SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 20, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Friedman, Catterson, Renwick, Manzanet-Daniels, JJ.

3496 Joseph Torres, Index 20085/07
Plaintiff-Respondent,

-against-

The City of New York, New York,
Defendant-Appellant,

Netta Realty Corp.,
Defendant.

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Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for appellant.

David P. Kownacki, P.C., New York (Andrew D. Leftt of counsel), for respondent.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about June 12, 2009, which, insofar as appealed from as limited by the briefs, denied defendant City's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

The Big Apple map depicting the intersection of Westchester Avenue and Simpson Street in the Bronx, where the accident allegedly occurred, raises a triable issue as to whether

defendant City of New York had prior written notice of the cracked or broken curb on which plaintiff allegedly tripped and fell. Contrary to the argument in the City's briefs, plaintiff's deposition testimony that he fell as he was crossing Simpson Street was consistent with the allegations of his notice of claim, verified complaint and verified bill of particulars.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 20, 2011

CLERK

Tom, J.P., Saxe, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

3578 Schulte Roth & Zabel, LLP, Index 604605/02
Plaintiff-Respondent,

-against-

Philip J. Kassover,
Defendant-Appellant.

_____

Kaplan Landau LLP, New York (Mark Landau and Patrick Train-Gutiérrez of counsel), for appellant.

Kravet & Vogel, LLP, New York (Donald J. Kravet of counsel), for respondent.

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Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered November 20, 2009, awarding plaintiff the principal sum of $579,821.67, and bringing up for review an order, same court and Justice, entered November 17, 2009, which granted plaintiff's motion for summary judgment on its cause of action for an account stated and summary judgment dismissing defendant's affirmative defenses and counterclaims, and denied defendant's cross motion for summary judgment, unanimously affirmed, without costs. The Clerk is directed to unseal the record.

Defendant client's occasional oral objections to plaintiff law firm's bills were insufficient to raise an issue of fact as to the existence of an account stated (*see Duane Morris LLP v Astor Holdings Inc.*, 61 AD3d 418, 419 [2009]). At deposition, he

was unable to relate any objection to a specific amount or invoice and had an extensive history of partial payment, including writings acknowledging the debt.

Evidence that plaintiff failed to read an order entered on consent before its entry, allowed the time for an appeal from that order to lapse, and abandoned defendant on a stay application just days before a material event raised a triable issue as to whether plaintiff's conduct fell below the standard of the profession (*see Bernstein v Oppenheim & Co.*, 160 AD2d 428, 430-431 [1990]). However, because defendant was unable to show that, but for counsel's errors, he would have prevailed, his malpractice claims were correctly dismissed (*see Schwartz v Olshan Grundman Frome & Rosenzweig*, 302 AD2d 193, 198 [2003]).

Defendant's contention that plaintiff lacked "good cause" to withdraw from representation, as the engagement agreement required, is without merit. Defendant's contract claim is based on the same facts and circumstances as the malpractice claim and was properly dismissed as duplicative (*see Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo*, 290 AD2d 399, 400 [2002]). In any event, it is clear that defendant would not have won the stay he sought in District Court and that any legal fees incurred in pursuit of his ultimately unsuccessful attempts to enforce the shareholder agreement or to contest the bankruptcy court's

subject matter jurisdiction would have inured to plaintiff firm, rather than some other firm, had plaintiff not withdrawn. Defendant, therefore, sustained no damages as a result of the asserted breach.

Although this appeal was heard on a record sealed by Supreme Court, counsel advised this Court, at argument, that there is no reason for confidentiality. In keeping with the strong public interest in the openness of court proceedings, we direct that the record be unsealed (*see* 22 NYCRR 216.1[a]; *Danco Labs. v Chemical Works of Gedeon Richter*, 274 AD2d 1, 6 [2000]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 20, 2011

CLERK

Tom, J.P., Andrias, Sweeny, DeGrasse, Román, JJ.

3809-
3809A Arthur Kill Power, LLC, et al., Index 102943/08
Plaintiffs-Appellants-Respondents,

-against-

American Casualty Safety
Insurance Company, etc.,
Defendant-Respondent-Appellant.

_____

Rawle & Henderson LLP, New York (James R. Callan of counsel), for appellants-respondents.

Gartner & Bloom, P.C., New York (Susan P. Mahon of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered March 9, 2010, which, inter alia, denied that portion of plaintiffs' motion for summary judgment declaring that defendant had a duty to defend and indemnify plaintiff Arthur Kill Power, LLC (Arthur Kill) and that defendant's coverage was primary, and denied that portion of defendant's motion for summary judgment declaring that the "Employer's Liability Exclusion" in its general liability insurance policy excluded coverage to Arthur Kill, modified, on the law, to declare that the Employer's Liability Exclusion did exclude coverage to Arthur Kill, and, as so modified, affirmed, without costs. Appeal from order, same court and Justice, entered June 11, 2010, which, to the extent appealed from, granted plaintiffs' motion to reargue

the aforesaid order, and upon reargument, adhered to its prior decision, unanimously dismissed, without costs, as academic.

Arthur Kill is an additional insured under a commercial general liability policy issued by defendant to nonparty Wing Environmental, Inc. (Wing), an asbestos abatement contractor. This is an action for a judgment declaring that defendant has a duty to provide Arthur Kill with a defense and indemnification in a personal injury action brought by Jose Barros, Wing's employee. Barros, who allegedly slipped on grease on the floor of Arthur Kill's premises, asserts in the underlying action that Arthur Kill negligently maintained the premises. Defendant's policy provided that the coverage available thereunder was to have been primary with respect to additional insureds "with whom the Named Insured executes a written contract prior to the start of the project." As correctly found by the motion court, Arthur Kill's coverage under defendant's policy would not have been primary because the purported written contract between Arthur Kill and Wing was not executed until after Barros's accident.

The Employer's Liability Exclusion of defendant's policy excludes coverage for bodily injury to any employee of any insured arising from and in the course of employment by any insured. The exclusion, however, does not apply to liability assumed by an insured under an "insured contract." The policy

defines an insured contract as a written contract by which an insured assumes the tort liability of another because of bodily injury or property damage to a third person *caused by the insured's negligence*.

Under applicable Georgia law, "[a]n insurer's duty to defend is determined by comparing the allegations of the complaint with the provisions of the policy" (*Nationwide Mut. Fire Ins. Co. v City of Rome*, 268 Ga App 320, 601 SE2d 810 [2004]).[1] Here, the motion court concluded that the employer's liability exclusion did not apply to Arthur Kill's liability to Barros because such liability was assumed by Wing under an insured contract. This was error. The Barros complaint provides no basis for an inference that the presence of grease on Arthur Kill's floor would have been the result of negligence on Wing's part. Therefore, Barros's claim does not involve tort liability assumed by Wing because of injury caused by its own negligence. The dissent misplaces reliance on the fact that Barros was on Arthur Kill's premises "in furtherance of the work described by the parties' agreement." Absent an inference of negligence on Wing's part, the purpose of Barros's presence on the premises would be

[1]We therefore disagree with the dissent's view that the applicability of a policy exclusion is not determined by reference to the allegations made against the insured in the underlying action.

irrelevant. On the other hand, although Arthur Kill is an insured and was allegedly negligent, its liability to Barros, if any, would not have stemmed from any contract by which it assumed the tort liability of another. As such, the Employer's Liability Exclusion applies because Arthur Kill's liability to Barros, if any, did not arise out of an insured contract. We have considered the parties' remaining contentions and find them unavailing.

All concur except Tom, J.P. and Román, J. who dissent in part in a memorandum by Román, J. as follows:

ROMÁN, J. (dissenting in part)

To the extent the majority concludes that plaintiff Arthur Kill Power, LLC is not entitled to coverage under defendant's insurance policy because of the "Employee Injury Exclusion" contained within defendant's policy, I respectfully dissent.

Whether plaintiff is entitled to coverage under defendant's insurance policy, and indeed whether the abovementioned exclusion applies is, under Georgia law, "a matter of contract and the parties to the contract of insurance are bound by its plain and unambiguous terms" (*Blue Cross & Blue Shield of Georgia, Inc. v. Shirley*, 305 Ga App 434, 437 [2010]). Accordingly, when the policy is clear and unambiguous it must be enforced in accordance with its express terms (*id.*).

Here defendant's claim that coverage to plaintiff Arthur Kill Power, LLC is precluded by the "Employee Injury Exclusion" contained within its policy is unavailing, since such an assertion is belied when the policy's express and clear terms are read together with the purchase order between Arthur Kill Power, LLC and Wing Environmental Inc. While the policy excludes coverage for bodily injury claims to an employee of any insured when the same arise during the course of employment of any insured, the exception to the exclusion, which follows thereafter, clearly states that the exclusion does not apply when

the insured assumes liability pursuant to an "insured contract." The policy defines an insured contract as "that part of any written contract or agreement under which you assume the tort liability of another party to pay damages not otherwise excluded under the policy because of 'bodily injury or property damage' to a third party or organization and caused by your negligence." The indemnification portion of the purchase order between Wing Environmental Inc. and Arthur Kill Power, LLC, is clearly such an insured contract insofar as it states that "[t]he Supplier [Wing Environmental Inc.] shall defend, indemnify and hold harmless buyer [Arthur Kill Power, LLC] . . . against all claims suits or proceedings . . . arising out of or resulting from the Supplier's performance or failure to perform under this Purchase Order." Thus, the policy's exception to the exclusion applies because, the defendant's named insured, Wing Environmental Inc., assumed Arthur Kill, LLC's liability by virtue of an insured contract containing language compliant with the policy.

Plainly, the exception to the exclusion is made applicable solely by virtue of the existence of an insured contract, which complies with the policy's definition of the same, rather than the actual allegations asserted against the insured in any subsequent action brought against it. Therefore, the allegations asserted against Arthur Kill Power, LLC in the underlying

personal injury action cannot, as the majority maintains, have a bearing on the applicability of the exception. Had the parties wished to exclude coverage based on allegations in any subsequent action asserted against a party whom defendant's insured is obligated to indemnify by virtue of an insured contract, as is urged here, then the policy should have so stated. Since the policy does not preclude coverage under these circumstances, the majority essentially seeks to exclude coverage on a basis not contained in the insurance policy and thus not agreed to by the parties. The majority's other conclusion, namely that Arthur Kill Power, LLC's liability in the underlying personal injury action did not arise from the insured contract mentioned in the Purchase Agreement, finds little support in the record. After all, insofar as the plaintiff in the underlying personal injury claim was employed by Wing Environmental Inc., he necessarily was at premises owned by Arthur Kill Power, LLC, solely in furtherance of the work described by the parties' agreement, the very agreement containing the insured contract.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 20, 2011

CLERK

Tom, J.P., Andrias, Saxe, Freedman, Manzanet-Daniels, JJ.

3894 Southern Wine & Spirits of America, Inc., et al., Plaintiffs-Appellants, Index 650489/08

-against-

Impact Environmental Engineering, PLLC, et al., Defendants-Respondents.

_____

Ganfer & Shore, LLP, New York (Ira Brad Matetsky of counsel), for appellants.

DL Rothberg & Associates, PC, New York (Debra L. Rothberg of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered November 6, 2009, which, inter alia, granted defendants' motion to dismiss the amended complaint, unanimously affirmed, with costs.

Dismissal of the action was appropriate since plaintiffs failed to comply with the express, bargained-for condition precedent to its right to bring an action against defendants (*see Yonkers Contr. Co. v Port Auth. Trans-Hudson Corp.*, 208 AD2d 63 [1995], *affd* 87 NY2d 927 [1996]; *see also Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690-692 [1995]). The agreements between the parties made the submission by plaintiffs of an expert certification to defendants a condition precedent to plaintiffs' right to bring any legal action against defendants.

Plaintiffs failed to submit such certification prior to commencing this action and their efforts to utilize the relation-back doctrine to cure the defective initial complaint are unavailing. Relation back applies to the amendment of claims and parties and is dependent upon the existence of a valid preexisting action (*see Carrick v Central Gen. Hosp.*, 51 NY2d 242, 248-249 [1980]). Here, however, the original complaint was brought by plaintiffs in violation of the condition precedent, and plaintiffs cannot rely upon CPLR 203(f) to cure such failure to comply (*see Goldberg v Camp Mikan-Recro*, 42 NY2d 1029 [1977]).

We have considered plaintiffs' remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 20, 2011

CLERK

Tom, J.P., Andrias, Saxe, Freedman, Manzanet-Daniels, JJ.

3895 Rogelio Quinones, Index 113437/07
Plaintiff-Appellant,

-against-

M. Ksieniewicz, et al.,
Defendants-Respondents.

_____

Leonard Zack & Associates, New York (Leonard Zack of counsel), for appellant.

Brand Glick & Brand, P.C., Garden City (Peter M. Khrinenko of counsel), for respondents.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered January 27, 2010, which granted defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to deny the motion as to plaintiff's 90/180-day claim, and otherwise affirmed, without costs.

The affirmed reports of defendants' orthopedic surgeon and neurologist concerning plaintiff's range of motion and lack of evidence of disability established prima facie that plaintiff suffered no "significant limitation" or "permanent consequential limitation of use" (Insurance Law 5102[d]), and shifted the

burden to plaintiff to raise an issue of fact (*see Franchini v Palmieri*, 1 NY3d 536 [2003]; *Smith v Brito*, 23 AD3d 273 [2005]). Likewise, defendants' radiologist's finding of a pre-existing degenerative condition had to be refuted by plaintiff (*see Pommells v Perez*, 4 NY3d 566, 580 [2005]; *Rodriguez v Abdallah*, 51 AD3d 590, 592 [2008]). Plaintiff failed to meet his burden because the unaffirmed and unsworn medical reports he submitted in opposition were in inadmissible form and therefore without probative value (*see Grasso v Angerami*, 79 NY2d 813 [1991]).

However, defendants failed to establish prima facie that plaintiff did not sustain a medically determined injury "of a non-permanent nature" that prevented him from performing substantially all of his customary and daily activities for 90 of the 180 days immediately following the accident (*see Toussaint v Claudio*, 23 AD3d 268 [2005]; *Feaster v Boulabat*, 77 AD3d 440, 441 [2010]). The reports of defendants' medical experts were based on examinations of plaintiff conducted nearly two years after the subject accident, and addressed plaintiff's condition as of the time of the examination, not during the six months immediately

after the accident. The MRI studies that the defense experts reviewed were performed 10 months after the accident.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 20, 2011

CLERK

Tom, J.P., Mazzarelli, Friedman, Renwick, DeGrasse, JJ.

4074 Concourse Rehabilitation & Nursing Center, Inc., Plaintiff-Appellant-Respondent, Index 20201/03

-against-

Antonia C. Novello, M.D., etc., et al., Defendants-Respondents-Appellants.

_____

Neiman & Mairanz P.C., New York (Marvin Neiman of counsel), for appellant-respondent.

Andrew M. Cuomo, Attorney General, New York (Marion R. Buchbinder of counsel), for respondents-appellants.

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Order, Supreme Court, Bronx County (George D. Salerno, J.), entered July 20, 2009, which denied defendants' motion for summary judgment dismissing the complaint and granted plaintiff's cross motion for summary judgment declaring that the penalties imposed against it are unconstitutional only to the extent of declaring that plaintiff is entitled to have 50% of the subject interest and penalties waived, unanimously modified, on the law, defendants' motion granted and the declaration sought by the cross motion vacated, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint.

Public Health Law § 2807-d requires hospitals and residential health care facilities such as plaintiff to pay to defendant Department of Health (DOH) assessments (taxes) on their

gross receipts from all patient care services and other operating income. Assessments on Medicaid receipts (but not non-Medicaid receipts) are reimbursable as a cost of care (*see Port Jefferson Health Care Facility v Wing*, 94 NY2d 284, 287-288 [1999], *cert denied* 530 US 1276 [2000]). If a facility fails to pay the full amount of the assessments, DOH "may collect the deficiency" by withholding funds, such as the Medicaid reimbursement, that are due to the facility from the State (Public Health Law § 2807-d[6]). In addition, the "deficiency" is subject to interest and penalties (*id.* § 2807-d[8]).

In December 1999, the Court of Appeals rejected a challenge to the statute on constitutional grounds (*see Port Jefferson Health Care Facility v Wing*, 94 NY2d 284 [1999], *supra*). During the pendency of that litigation, many facilities, including plaintiff, did not pay the assessments due under the statute, and, in February 2000, DOH began recouping these unpaid assessments, with statutory interest and penalties. Later that year, however, the Legislature enacted an amnesty provision to relieve the facilities from the statutory interest and penalties. It provided for a 100% waiver of interest and penalties if all outstanding assessments were paid by March 31, 2001 (*see* L 2000, ch 57, pt A, § 2). In 2004, a second amnesty provision was enacted, which reduced by 50% the interest and penalties

attributable to unpaid assessments due for any period before January 1, 2003, except for interest and penalties DOH had collected before the April 1, 2004 effective date (*see* L 2004, ch 58, part C, §§ 29; 36). A third amnesty provision, enacted in 2005, continued the 50% amnesty for interest and penalties due on unpaid assessments before January 1, 2003, after the second amnesty provision expired (*see* L 2005, ch 58, part C, § 24).

Plaintiff brought this action to challenge defendants' method of applying the funds they recouped for unpaid gross receipts toward assessment delinquencies. It contends that defendants wrongfully applied recouped funds to each delinquent month's principal, interest and penalties in chronological order, while they should have treated withheld funds owed to plaintiff as credits towards the assessments.

As a preliminary matter, the appropriate vehicle for plaintiff's challenge to defendants' determination is a CPLR article 78 proceeding (*see Solnick v Whalen*, 49 NY2d 224, 230-231 [1980]; *see also New York City Health & Hosps. Corp. v McBarnette*, 84 NY2d 194 [1994]). Thus, we review the determination according to the standard of review for an article 78 proceeding, i.e., whether the determination was rational, arbitrary and capricious, or an abuse of discretion (CPLR 7803;

Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222 [1974]).

As the motion court implicitly found, plaintiff was not entitled to the benefit of the first amnesty because it did not pay the outstanding assessments by the March 31, 2001 deadline. However, contrary to the court's finding, the record did not show that plaintiff was owed substantially more than the outstanding assessments by DOH as of March 31, 2001. Indeed, plaintiff essentially concedes that the various rate increases, reimbursements and other sums eventually paid to it were not owed before March 31, 2001. Rather, these rate increases and reimbursements resulted from payment rates that for various reasons were revised retroactively. Thus, plaintiff's claim that it was owed monies as of March 31, 2001 refers to retroactive rate increases that it anticipated but that had not yet been calculated by DOH or approved for payment. The fact that DOH eventually paid the various sums does not support plaintiff's argument that those sums were owed as of March 31, 2001. The only exception to the foregoing is the $767,319 that DOH admitted was owed to plaintiff as of March 31, 2001. However, that amount was insufficient to pay the more than $2 million in unpaid assessments that plaintiff owed for the period April 1997 through

December 1999, which is the period at issue here.

As to the second and third amnesty provisions, it is undisputed that DOH reduced by 50% the funds it attributed to interest and penalties that it had not recouped as of the April 1, 2004 effective date of the second amnesty provision. Thus, plaintiff was afforded the benefit of the second and third amnesty provisions. Its argument is that DOH should have applied the recouped funds first to principal. However, we find that DOH's determination to apply the funds to the earliest month's principal, interest, and penalties before proceeding to the next month was entirely rational. While "[a]s a general rule, the debtor has the right to specify to which debt he wishes a payment to be applied" (*Beyer Bros. of Long Is. Corp. v Kowalevich*, 89 AD2d 1005, 1005 [1982]), contrary to plaintiff's contention and the motion court's finding, there is no evidence that plaintiff so specified before DOH had allocated the funds. Thus, DOH was entitled to make the designation (*id.*). Further, "usually, the funds will be applied to the debts in the order of time in which they stand in the account" (*id.* at 1006).

Plaintiff's claimed entitlement to amnesty for penalties and interest attributable to assessments that were due between January 2000 and June 2004 is not properly before us, since it was not alleged in the complaint and there is no evidence in the

record as to whether plaintiff failed to pay assessments due in that period or whether DOH imposed any interest and penalties for such assessments.

There is no merit to plaintiff's contention that the penalties imposed against it are unconstitutional because the statute constitutes an unconstitutional bill of attainder. There is no evidence that the statute was enacted for the specific purpose of punishing plaintiff or any specific facilities (*see Lanza v Wagner*, 11 NY2d 317, 324 [1962], *cert denied* 371 US 901 [1962]).

Nor is there any merit to plaintiff's argument that the three-year statute of limitations applicable to actions pursuant to a statute (see CPLR 214[2]) applies here. The CPLR does not govern proceedings before administrative agencies (*Hicks v NYSDHCR*, 75 AD2d 127). Further, it was reasonable for DOH to wait for the Court of Appeals' decision in *Port Jefferson* to begin to recoup funds that facilities had withheld during that litigation, and it was reasonable for DOH to stop recoupment when the Legislature enacted the first amnesty giving the facilities until March 31, 2001 to pay their delinquent assessments.

Summary judgment dismissing plaintiff's remaining claims, which were not addressed by the motion court, is also warranted. As to the first claim for relief, the statute entitles a facility

to a hearing on assessments only where the assessments are based on estimates, not the case here (*see* Public Health Law § 2807-d[6][e]). Plaintiff's interpretation of Public Health Law § 2807-d(8)(a) and (b), which underpins its fourth claim for relief, would lead to an absurd result (*see* McKinney's Cons Laws of NY, Book 1, Statutes § 145). As to its fifth claim, plaintiff concedes that DOH has the discretion to use the 12% rate provided by the statute (Public Health Law § 2807-d[8][a]). The sixth claim is without merit since plaintiff is not a facility excluded from the provisions of the statute (*see* Public Health Law § 2807-d[1][b]). As to plaintiff's seventh claim, DOH reasonably did not consider its assessment payments "actual" until it had completed its recoupment of plaintiff's unpaid assessments, interest, and penalties, at which time DOH in fact reconciled the assessments paid and revised plaintiff's Medicaid rates. As to the eighth claim, plaintiff acknowledges the removal of the cap for the applicable time period, to wit, 1997 to 1999. Plaintiff's tenth claim is based on the fact that certain facilities that were delinquent or late were not charged with interest or penalties. However, as DOH explained, those facilities made payments on or before the first amnesty end date, i.e., March 31, 2001 and thus were not "similarly-situated" to plaintiff (*see generally Matter of Walton v New York State Dept.*

of Correctional Servs., 13 NY3d 475, 492 [2009]). Finally, as to plaintiff's twelfth claim, Public Health Law § 2807-d does not condition the imposition of assessments on the existence of a Medicaid contract between the facility to be assessed and a local social services district.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 20, 2011

CLERK

Tom, J.P., Mazzarelli, Friedman, Renwick, DeGrasse, JJ.

4077 GS Plasticos Limitada, Index 650242/09
Plaintiff-Respondent,

-against-

Bureau Veritas,
Defendant-Appellant,

Bureau Veritas Consumer Products Services, Inc.,
Defendant.

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Hughes Hubbard & Reed LLP, New York (Daniel H. Weiner of counsel), for appellant.

Abduljaami, PLLC, New York (Saboor H. Abduljaami of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered on or about April 16, 2010, which denied defendant Bureau Veritas's motion to dismiss the complaint as against it for lack of personal jurisdiction and for lack of jurisdiction pusuant to Business Corporation Law section 1314(b), unanimously reversed, on the law, with costs, and the motion granted for lack of jurisdiction pursuant to Business Corporation Law section 1314(b). The Clerk is directed to enter judgment dismissing the complaint as against Bureau Veritas.

In this action for tortious interference with contractual relations, plaintiff, a Brazilian company authorized to do business in New York, alleges that it lost a contract with a

third party due to the issuance by defendant Bureau Veritas Consumer Products Services (BVCPS) of reports falsely concluding that plaintiff's products contained excessive amounts of arsenic. BVCPS, an indirect subsidiary of defendant Bureau Veritas (BV), provides testing and inspection services for consumer products, with testing facilities located in Buffalo, New York. BV is a French company that relinquished its authority to do business in New York before the commencement of this action.

As the motion court found, BV's surrender of its authority to do business in New York does not insulate it from the court's assertion of personal jurisdiction over it, because the liability in this case was "incurred by [BV] within this state before the filing of the certificate of surrender" (Business Corporation Law [BCL] § 1310[a][5]; *see Antonana v Ore S.S. Corp.*, 144 F Supp 486, 491 [SD NY 1956]; *Munn v Security Controls*, 23 AD2d 813 [1965]). Contrary to BV's argument, neither the language of the statute nor the case law limits relief to New York residents (*see Carlton Props. v 328 Props.*, 208 Misc 776, 778-779 [1955]; *Antonana*, 144 F Supp at 491; *Green v Clark*, 173 F Supp 233, 236-237 [SD NY 1959]).

However, the court erred in finding that it had jurisdiction pursuant to BCL § 1314(b)(3), based on the tortious conduct's having arisen out of the testing services performed in

New York. For purposes of BCL § 1314(b)(3), the inquiry is not where the tortious conduct occurred but "[w]here the cause of action arose" (*see id.; see also Gonzalez v Industrial Bank [of Cuba]*, 12 NY2d 33 [1962]; *Hibernia Natl. Bank v Lacombe*, 84 NY 367, 384 [1881]). Plaintiff's claim is one for interference with contractual relations. Although the faulty testing that led to the loss of the contract occurred in New York, plaintiff had no cause of action until the contract was actually lost, i.e., until it was cancelled, and that cancellation occurred in Brazil.

Nor can plaintiff establish jurisdiction pursuant to BCL § 1314(b)(3) or (b)(4), predicating jurisdiction under either of these subdivisions on BVCPS's activities as an agent or mere department of BV. The record does not support a finding that BVCPS's activities are "so complete that [it] is, in fact, merely a department of [BV]," i.e., it was "performing the same activities (i.e., 'doing all the business') that [BV] would have performed had it been doing or transacting business in New York" (*see Porter v LSB Indus.*, 192 AD2d 205, 213, 214 [1993]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 20, 2011

CLERK

Tom, J.P., Mazzarelli, Friedman, Renwick, DeGrasse, JJ.

4079-
4080
4081 Jodd Readick, Index 350161/04
Plaintiff-Respondent,

-against-

Jeannette Readick,
Defendant-Appellant.

_____

Mulhern & Klein, New York (Jeff Klein of counsel), for appellant.

Phillips Nizer LLP, New York (Elliot Wiener of counsel), for respondent.

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Order, Supreme Court, New York County (Harold B. Beeler, J.), entered December 8, 2008, which granted plaintiff's motion for a money judgment in the amount of $7,824 in child support arrears through February 24, 2008 and attorneys' fees, and ordered the Clerk to enter judgment in plaintiff's favor in the principal sum of $17,709, consisting of the aforesaid $7,824 plus $9,885 for defendant's share of the reasonable expenses incurred by plaintiff on the child's behalf subsequent to filing the motion, unanimously modified, on the law, to reduce the award from $17,709 to $7,824, and the matter remanded for a hearing to determine the issues of constructive emancipation and the reasonableness of plaintiff's incurred expenses, and otherwise affirmed, without costs. Appeal from order, same court and

Justice, entered May 6, 2009, which, to the extent appealable, denied defendant's motion for renewal, unanimously dismissed, without costs, as academic in view of the foregoing. Order, same court (Matthew F. Cooper, J.), entered on or about February 8, 2010, which granted plaintiff's motion for a money judgment in the amount of defendant's share of the reasonable expenses plaintiff incurred from October 27, 2008 through February 27, 2009 and attorneys' fees and to direct defendant to post security, unanimously modified, on the law, to delete the sum of $17,811.75, and the matter remanded for a hearing on the reasonableness of plaintiff's incurred expenses, and otherwise affirmed, without costs.

There is no merit to defendant's argument that the child support order is void under the Child Support Standards Act (CSSA) (Domestic Relations Law § 240[1-b]). While a court may, in its discretion, apply the CSSA standards and guidelines in determining the appropriate amount of temporary child support, it is not required to do so (*Rizzo v Rizzo*, 163 AD2d 15 [1990]). Defendant concedes on appeal that the order is an interim support order.

Nor is there any merit to defendant's argument that the support order merged with the parties' judgment of divorce, rendering erroneous the court's award of post-judgment child

support and attorneys' fees. The parties agreed to address the issue of child support separately from the other issues in the divorce (*see Catalano v Catalano*, 158 AD2d 570, 572 [1990]). Furthermore, the support order was signed at the hearing at which the court granted the parties' divorce and surely was not meant to terminate on the very same day.

However, the court erred in failing to conduct a hearing to determine whether the parties' child was constructively emancipated after February 28, 2004 and whether the expenses incurred by plaintiff after that date were reasonable. Indeed, in granting the parties' divorce, the court indicated that it would address both of these issues at a future date. The record presents issues of fact whether the child's behavior demonstrated that he is emancipated so as to warrant relieving defendant from her support obligation (*see Matter of Roe v Doe*, 29 NY2d 188 [1971]; *Clifton Springs Sanitarium Co. v Watkins*, 130 AD2d 944 [1987]; *O'Neill v O'Neill*, 109 AD2d 829 [1985]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 20, 2011

CLERK

Tom, J.P., Mazzarelli, Friedman, Renwick, DeGrasse, JJ.

4082 The People of the State of New York, Ind. 2431/08
Respondent,

-against-

Tracy Foster,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Bonnie Wittner, J.), rendered on or about October 28, 2008, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 20, 2011

CLERK

Tom, J.P., Mazzarelli, Friedman, Renwick, DeGrasse, JJ.

4083 The People of the State of New York, Ind. 5795/08
Respondent,

-against-

George Diaz,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Jalina J. Hudson of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Marc Weber of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered July 21, 2009, convicting defendant, upon his plea of guilty, of attempted robbery in the second degree, and sentencing him, as a second violent felony offender, to a term of 5 years, unanimously affirmed.

Defendant did not move to withdraw his guilty plea, or make any statements at sentencing that could be construed as such a motion. Since this case does not come within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662 [1988]), his challenge to the plea is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The record establishes that after weighing the evidence against him and the risks of going to trial, defendant entered a knowing, intelligent

and voluntary plea, and there was nothing in his ultimate plea allocution that cast significant doubt on his guilt (*see People v Toxey*, 86 NY2d 725 [1995]). While defendant asserted his innocence earlier in the plea proceeding and at other stages of the case, the record is clear that during the actual plea allocution the court carefully elicited defendant's unequivocal admission that he punched the victim and stole his money (*see People v McNair*, 13 NY3d 821 [2009]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 20, 2011

CLERK

Tom, J.P., Mazzarelli, Friedman, Renwick, DeGrasse, JJ.

4084-
4084A Priscilla Quinones, Index 15969/07
Plaintiff-Appellant,

-against-

New England Motor Freight Inc., et al,
Defendants-Respondents.

_____

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for appellant.

Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formato & Einiger, LLP, Lake Success (Todd C. Rubenstein of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered March 10, 2010, which granted defendants Pease and New England Motor Freight Inc.'s motion for summary judgment dismissing the complaint as to them, and order, same court and Justice, entered on or about March 25, 2010, which granted plaintiff's motion for reargument, and upon reargument, adhered to its original determination, unanimously affirmed, without costs.

Plaintiff alleged she sustained personal injuries when her car struck a disabled vehicle after she was abruptly cut off by defendants' tractor trailer on the highway.

Defendants met their burden of establishing prima facie entitlement to summary judgment by presenting evidence that

defendants Pease and New England Motor Freight did not cause the accident. The burden then shifted to plaintiff, who failed to raise a triable issue of fact to defeat summary judgment (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 231 [2003]) with her submission of a police accident report. The court properly disregarded the accident report, made by a police officer who was not an eyewitness, that contained several obvious inaccuracies and the hearsay statements of a defendant regarding the ultimate issues of fact (*Figueroa v Luna*, 281 AD2d 204, 205 [2001]).

We have considered plaintiff's remaining contentions and find them without merit.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 20, 2011

CLERK

Tom, J.P., Mazzarelli, Friedman, Renwick, DeGrasse, JJ.

4085 Danielle Ezzard, Index 114803/08
Plaintiff

-against-

One East River Place Realty
Company, LLC, et al.,
Defendants-Appellants,

New York Elevator & Electrical Corp.,
Defendant-Respondent.

_____

Hitchcock & Cummings, LLP, New York (Christopher B. Hitchcock of counsel), for appellants.

Geringer & Dolan LLP, New York (John T. McNamara of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered April 16, 2010, which, insofar as appealed from as limited by the briefs, denied that part of the motion of defendants-appellants for an order directing defendant New York Elevator & Electrical Corp. (NYE) to assume their defense against the claims brought by plaintiff, unanimously affirmed, with costs.

The motion was properly denied in this action where plaintiff was allegedly injured when she tripped and fell while exiting an elevator car. Because there has been no showing that NYE was negligent or that appellants were not negligent, any

order requiring NYE to defend is premature (*see Inner City Redevelopment Corp. v Thyssenkrupp El. Corp.*, __ AD3d __ , 2010 NY Slip Op 8798 [1st Dept 2010]; *see also Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 809 [2009]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 20, 2011

CLERK

Tom, J.P., Mazzarelli, Friedman, Renwick, DeGrasse, JJ.

4086 The People of the State of New York, Ind. 449/09
Respondent,

-against-

Carlos Ortiz,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Brian E. Rodkey of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Rena K. Uviller, J.), rendered on or about July 29, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: JANUARY 20, 2011

CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Tom, J.P., Mazzarelli, Friedman, Renwick, DeGrasse, JJ.

4087 Lucille Jones, Index 8009/05
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant.

_____

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for appellant.

Kramer & Dunleavy, LLP, New York (Denise M. Dunleavy of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), entered October 30, 2009, upon a jury verdict awarding plaintiff the principal amount of $800,000 for past emotional pain and suffering arising from a loss of sepulcher, unanimously modified, on the facts, to vacate the award and order a new trial as to damages, unless plaintiff, within 30 days of service of a copy of this order with notice of entry, stipulates to accept a reduced award in the amount of $400,000 and to entry of an amended judgment in accordance therewith, and otherwise affirmed, without costs.

The evidence adduced at this trial on the issue of damages established that after informing plaintiff that her 51-year-old son had died and after two of plaintiff's other children identified the decedent's body at the office of the medical

examiner, defendant improperly released the body of the decedent to a funeral home in Pennsylvania, where he was ultimately buried. Several days later, the decedent's body was exhumed and returned to New York, where, because of the passage of time, cremation of the body was required. Under these circumstances, the award of $800,000 deviates materially from what is reasonable compensation to the extent indicated (*see Duffy v New York*, 178 AD2d 370 [1991], *lv denied* 81 NY2d 702 [1993]; *see also Emeagwali v Brooklyn Hosp. Ctr.*, 60 AD3d 891 [2009]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 20, 2011

CLERK

Tom, J.P., Mazzarelli, Friedman, Renwick, DeGrasse, JJ.

4088 Lynsi Smigo, Index 108756/08
Plaintiff-Appellant,

-against-

NYP Holdings, Inc., et al.,
Defendants,

Collins Communications, Inc., etc., et al.,
Defendants-Respondents.

_____

Ginsberg & Burgos PLLC, New York (Peter R. Ginsberg of counsel), for appellant.

Darnay Hoffman, New York, for respondents.

_____

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered March 17, 2010, which granted the motion of defendants Collins Communications Inc. and Steven P. Dowsett a/k/a Chaunce Hayden (Hayden) for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

The motion court properly dismissed the causes of action alleging slander per se and a violation of Civil Rights Law § 77. Plaintiff maintained that defendant Hayden committed slander per se by telling someone at the New York Post that he had viewed a video showing plaintiff having sex with a public figure. However, once defendants moved for summary judgment and submitted Hayden's affidavit in which he stated that he had told an employee of the paper that he had not seen the alleged tape of

plaintiff, the burden then shifted to plaintiff to establish that he had indeed uttered the words quoted in a Post article to a third party by competent evidence, which plaintiff failed to do (*see Rowe v Washburne*, 62 App Div 131, 132 [1901]).

Since the article published in Steppin' Out Magazine and authored by Hayden does not contain any material that could be considered defamatory as to plaintiff, it cannot be shown that defendants Collins Communications and Hayden were negligent in publishing the story (*cf. Krauss v Globe Intl.*, 251 AD2d 191 [1998]). Thus, the dismissal of the remaining causes of action was appropriate.

We have considered plaintiff's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 20, 2011

CLERK

Tom, J.P., Mazzarelli, Friedman, Renwick, DeGrasse, JJ.

4089 The People of the State of New York, Respondent, Ind. 1512/03

-against-

Anthony Roosevelt, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Nancy E. Little of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Craig A. Ascher of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lewis Bart Stone, J.), entered on or about April 13, 2007, which denied defendant's motion for resentencing under the Drug Law Reform Act of 2005 (L 2005, ch 643), unanimously affirmed.

Defendant incurred serious disciplinary infractions while incarcerated and was therefore ineligible to earn merit time under Correction Law § 803(1)(d). Accordingly, he is not eligible for resentencing under the DLRA (*see People v Paniagua*, 45 AD3d 98 [2007], *lv denied* 9 NY3d 992 [2007]). In any event,

the record supports the court's conclusion that substantial justice would dictate the denial of the application.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 20, 2011

CLERK

Mazzarelli, J.P., Friedman, Renwick, DeGrasse, JJ.

4090 In re Mark Eric R., and Others,

The Children's Aid Society,
Petitioner-Respondent,

-against-

Juelle Virginia G.,
Respondent-Appellant.

_____

Elisa Barnes, New York, for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

Frederic P. Schneider, New York, attorney for the children.

_____

Orders of disposition, Family Court, New York County (Jody Adams, J.), entered on or about June 30, 2009, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject children and committed the custody and guardianship of the children to petitioner agency and the Commissioner of the Administration for Children's Services for the purposes of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence of respondent's failure to learn to control her anger, to cooperate with the agency in providing home visits and proof of income, and to attend most of the children's educational and medical appointments, and her refusal to accept

guidance on proper parenting, the diligent efforts of petitioner and the previous agency notwithstanding (*see Matter of Antwone Lee S.*, 49 AD3d 276 [2008]). Any error in excluding the testimony of a social worker who observed a few of respondent's visits with the children was harmless.

The determination that termination of respondent's parental rights is in the best interests of the children is supported by a preponderance of the evidence showing that the children have bonded and are thriving with their foster parents, who wish to adopt them, and that respondent continues to have problems controlling her anger and has failed to find suitable housing (*see Matter of Shaka Efion C.*, 207 AD2d 740 [1994]). Respondent's claim that she was prejudiced by the suspension of visitation with the children during the dispositional phase of the proceedings is unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 20, 2011

CLERK

Tom, J.P., Mazzarelli, Freedman, Renwick, DeGrasse, JJ.

4091 Neal Ostberg, Index 111647/09
Plaintiff-Respondent,

-against-

Dragan Litric, etc.,
Defendant-Appellant.

_____

Weiss & Hiller, PC, New York (Arnold M. Weiss of counsel), for appellant.

Mazur Carp Rubin & Schulman P.C., New York (Sayward Mazur of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered May 27, 2010, which denied defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), unanimously affirmed, with costs.

The complaint properly states a cause of action for confirmation of the architect's decision, and defendant failed to demonstrate that the contract documents conclusively establish a defense to that cause of action. Contrary to defendant's contention, the Court of Appeals' decisions in *Matter of County of Rockland (Primiano Constr. Co.)* (51 NY2d 1 [1980]), and *Matter of Liebhafsky (Comstruct Assoc.)* (62 NY2d 439 [1984]), do not hold as a matter of law that an architect is automatically divested of authority to render a decision on a claim submitted to him or her after the construction is substantially completed

or the contract is terminated due to either party's default. Rather, the holdings in those cases were dependent on the language of the particular dispute resolution procedures contained in the contracts at issue therein.

Here, the dispute resolution procedures broadly require that all "disputes and matters in question between the Owner and the Contractor arising out of or relating to the Contract" be submitted to the architect for decision as a condition precedent to mediation, arbitration, or litigation, and do not place any time limits on the architect's authority to render such decisions. Thus, the architect's decision was not invalidly rendered merely by virtue of the fact that plaintiff submitted his claim to the architect after the contract was terminated (*see e.g. BAE Automated Sys., Inc. v Morse Diesel Intl., Inc.*, 2001 WL 547133, at *5 [SD NY 2001]). If defendant disputed the authority of the architect to render a decision on plaintiff's claim, it was incumbent on him to assert his challenge at the time the claim was submitted, not remain silent and seek to challenge the architect's authority after an adverse decision had been rendered against him.

The motion court also correctly held that defendant's remaining grounds for dismissal were not properly before the court. Defendant's claim that plaintiff and the architect

committed procedural errors in connection with the dispute resolution provisions is unavailing. The requirements that a party submit a claim to the architect within twenty-one days of its occurrence, that a party respond to any requests by the architect for a response or additional information within ten days of such request, and that the architect render a decision on the claim within thirty days of its submission are conditions *in* arbitration, which are beyond the scope of a court's authority to address (*see Primiano*, 51 NY2d at 7-9), even though arbitration of this matter was not demanded by either party. Since defendant chose not to participate in the dispute resolution procedures at all, this is not the proper forum for him to complain that the procedures were not followed.

We have considered defendant's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 20, 2011

CLERK

Tom, J.P., Mazzarelli, Friedman, Renwick, DeGrasse, JJ.

4093 The People of the State of New York, Respondent, Ind. 2510/03

-against-

Calvin Summers, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Brian E. Rodkey of counsel), for respondent.

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Judgment, Supreme Court, New York County (Brenda G. Soloff, J. at plea; Michael R. Ambrecht, J. at dismissal motion and sentence), rendered August 5, 2008, convicting defendant of criminal possession of a controlled substance in the fourth degree, and sentencing him to a term of 1 year, unanimously affirmed.

The court properly denied defendant's motion to dismiss the indictment, made on the ground of delay in sentencing (see CPL 380.30 [1]), since the delay was not excessive and was occasioned by "plausible reasons" that should not trigger a loss of jurisdiction (*see People v Drake*, 61 NY2d 359, 366 [1984]). The only delay that defendant seeks to attribute to the People is a nine-month period where he was incarcerated in another state and the People sought to extradite him. Although the People made

reasonable efforts to secure defendant's prompt attendance for sentencing, those efforts were frustrated by actions of authorities in the other state.

Defendant's excessive sentence claim is moot because he has completed his sentence (*see e.g. People v Barnes*, 72 AD3d 516 [2010], *lv denied* 15 AD3d 747 [2010]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 20, 2011

CLERK

Tom, J.P., Friedman, Renwick, DeGrasse, JJ.

4094N Robert J.A. Zito, Index 602308/04
Plaintiff,

-against-

Fischbein Badillo Wagner Harding, et al.,
Defendants.
- - - - - -
Robert J.A. Zito,
Plaintiff-Respondent,

-against-

Nimkoff Rosenfeld & Schechter, LLP,
Defendant-Appellant,

Ronald Nimkoff,
Defendant.

_____

L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City (Kimberly Johnson Glenn of counsel), for appellant.

Robert J.A. Zito, New York, respondent pro se.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered November 23, 2009, which, insofar as appealed from as limited by the briefs, denied defendant Nimkoff Rosenfeld & Schechter, LLP's motion to dismiss the second, third, and fifth causes of action, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint as against Nimkoff Rosenfeld & Schechter.

Plaintiff is collaterally estopped from seeking a

declaration that he had cause to terminate his attorney-client relationship with defendant Nimkoff Rosenfeld & Schechter (the third cause of action) by this Court's order on a prior appeal, which implicitly determined that defendant was not discharged for cause, because in fact it was not discharged at all but voluntarily withdrew (*see* 58 AD3d 532 [2009]). Any other construction of the order would be contrary to law, since an attorney discharged for cause "has no right to compensation or to a retaining lien" (*Teichner v W & J Holsteins*, 64 NY2d 977, 979 [1985]). The issue of discharge that plaintiff raised in his legal malpractice action is identical to the issue addressed by this Court in the prior appeal of the original action. Indeed, during the prior appeal, plaintiff asked this Court to take judicial notice of the malpractice action he commenced in Nassau County, and fully briefed his malpractice claims.

The second cause of action, alleging legal malpractice, is barred under the doctrine of res judicata by the court's imprimatur of a retaining lien (*see Kinberg v Garr*, 28 AD3d 245 [2006]; *Molinaro v Bedke*, 281 AD2d 242 [2001]; *Summit Solomon & Feldesman v Matalon*, 216 AD2d 91 [1995], *lv denied* 86 NY2d 711 [1995]; *see generally Blair v Bartlett*, 75 NY 150, 154 [1878]).

The fifth cause of action, alleging a violation of Judiciary Law § 487, is also barred by res judicata since it is predicated

upon the same conduct as underlies the legal malpractice claim, namely, defendant's "prior representation of" plaintiff (*see Izko Sportswear Co., Inc. v Flaum*, 63 AD3d 687, 688 [2009], *lv denied* 13 NY3d 708 [2009]; *Jericho Group Ltd. v Midtown Dev., L.P.*, 67 AD3d 431, 432 [2009], *lv denied* 14 NY3d 712 [2010]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 20, 2011

CLERK

Tom, J.P., Andrias, Catterson, Moskowitz, Acosta, JJ.

3008 The People of the State of New York, Ind. 3299/08
Respondent,

-against-

Saleem Khan,
Defendant-Appellant.

_____

Roger J. Bernstein, New York, for appellant.

Cyrus R. Vance, Jr., New York (Timothy C. Stone of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (James A. Yates, J. at speedy trial motion; Marcy L. Kahn, J. at jury trial and sentence), rendered July 17, 2009, affirmed.

Opinion by Acosta, J. All concur except Catterson, J. who dissents in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Richard T. Andrias
James M. Catterson
Karla Moskowitz
Rolando T. Acosta, JJ.

3008
Ind. 3299/08

_____x

The People of the State of New York,
Respondent,

-against-

Saleem Khan,
Defendant-Appellant.

_____x

Defendant appeals from a judgment of the Supreme Court, New York County (James A. Yates, J. at speedy trial motion; Marcy L. Kahn, J. at jury trial and sentence), rendered July 17, 2009, convicting him, of grand larceny in the third degree and health care fraud in the fourth degree, and imposing sentence.

Roger J. Bernstein, New York (Roger J. Bernstein and Eugene A. Gaer of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Timothy C. Stone and Grace Vee of counsel), for respondent.

ACOSTA, J.

This case stems from a joint investigation by the New York City Police Department and the Human Resources Administration (HRA) of a pharmacy in Manhattan based on a tip that drugs were being sold out of that location without prescriptions. The investigation resulted in the prosecution of defendant for, among other crimes, health care fraud pursuant to Penal Law Article 177, which was enacted in 2006 to deal specifically with fraud by health care providers.[1] This is the first case on appeal under that statute and we therefore write to address the nature of proof required for a conviction.

Background

On November 15, 2007, undercover officer Pedro Gomez entered

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[1]Although article 177 applies to conduct which was already covered by other Penal Law sections, such as larceny (Penal Law article 155) and insurance fraud (Penal Law article 176), the Legislature's "stated rationale" for the health care fraud statutes was to

> "get at the specific conduct by health care providers who defraud the system; make it easier to aggregate claims for fraud against a single health plan; and send a clear message to health care providers that the state remains vigilant and will punish fraud against the health care system. Legislative Memorandum."

(Donnino, Practice Commentary, McKinney's Cons Laws of NY, Book 39, Penal Law § 177.00, at 481-482).

the NYC Pharmacy and asked the clerk, Marvin Portillo, for 40 pills each of the prescription medications Amitriptyline (an antidepressant) and Clonidine (use for treating high blood pressure and for detoxing from, among other things, alcohol and methadone).[2] Portillo said that was too many pills to dispense without a prescription, and he would have to ask his "boss." Portillo went to the back of the pharmacy and spoke to defendant. Although defendant told Gomez that it was a federal crime to sell those pills without a prescription, and that he could lose his job if he did so, he eventually agreed to sell Gomez the Amitriptyline and Clonidine. Portillo gave the detective two orange bottles containing pills from the back of the pharmacy, and the detective gave him two $20 bills. At the precinct, Gomez vouchered the pills: one bottle contained 40 pink pills stamped "2105V," and the other contained 41 pills stamped "129." Gomez had no relevant experience with any pharmaceutical terms and was therefore unqualified to offer an opinion identifying the pills. The pills were not subjected to laboratory analysis to determine their chemical composition.

On November 21, 2007, Detective Gomez returned to NYC

[2]Although we state what the medications are primarily used for, this information was not elicited at trial other than when Gomez testified that Advair is an asthma medication.

Pharmacy, and asked Portillo for 20 more pills each of Amitriptyline and Clonidine. Defendant gave Gomez two small yellow envelopes, and Gomez paid with two $20 bills. Gomez vouchered 25 pink pills stamped "2105V" and 25 orange pills stamped "129," which the People assert matched the known colors and imprints for Amitriptyline and Clonidine respectively, although they concede on appeal that no evidence was introduced at trial on this issue.

Detective Gomez made his next purchase on February 1, 2008, when he again asked Portillo for 20 pills each of Amitriptyline and Clonidine. Initially, Portillo refused to sell the medications without a prescription, explaining that the police had recently questioned him and his boss (meaning defendant). Portillo spoke to defendant, who then asked Gomez some questions, commenting, "You could be a cop. There's a lot of cops out there." Gomez gave defendant two $20 bills; defendant went to the back of the pharmacy, and a few minutes later gave Gomez a small orange bottle of pills. These pills were not introduced into evidence.

In the second phase of their investigation, Gomez presented prescriptions to defendant and asked for medications not specified in the prescriptions. To pay for the medications, Gomez used a New York State Benefit card (prepared by HRA to be

used in this investigation) in the name of Ivonne Arroyo, a fictitious woman, whom Gomez said was his wife. According to Gomez, when a Medicaid recipient presents a prescription to a participating pharmacy, the pharmacy dispenses the medication and then bills Medicaid for reimbursement.

On February 28, 2008, Gomez presented defendant with a Zyprexa prescription (an antipsychotic drug), stating that it was for his girlfriend/wife.[3] He also told defendant that "[t]hey gave [his wife] this because she's crazy," adding, "I don't want that, my wife is not crazy." Rather, he wanted Amitriptyline and Clonidine like he had gotten in the past. He told Portillo earlier that he wanted the pills so that he could make money.

Defendant took the prescription to the back of the pharmacy, then returned and had Gomez sign a book on the counter and the back of the Zyprexa prescription. Gomez signed the name "Ivonne Arroyo." Defendant told Gomez that he could give him 30 pills, but Gomez asked for 40 pills of Amitriptyline and Clonidine, urging, "Come on I need to make a little money." After more negotiation, defendant agreed to give Gomez 40 pills. Defendant told Gomez to "go to no one else in the future with this kind of

[3]There was some confusion as to whether the name on the prescription was Gomez's girl friend or wife, and Gomez cleared up the situation by stating "[n]o; no; no; she's not really my wife; okay. You know the deal."

thing," instructing Gomez to come directly to him. Gomez asked defendant for his Medicaid card before he left. Afterward, at the precinct, Gomez vouchered 40 orange pills stamped "129." Although the pills were entered into evidence, they too were not subjected to laboratory analysis.

On March 6, 2008, Gomez went directly to defendant, bypassing Portillo, and presented a prescription for 30 pills of 600-milligram Sustiva (an antiviral medication used for treating HIV). Gomez told defendant that he did not want the medication on the prescription, but wanted the usual pills he had previously gotten from defendant. Defendant took the prescription in the back and returned with an orange bottle labeled "Sustiva - 600 milligrams." Despite the label, according to Gomez, the bottle contained "40 orange pills stamped as GG 461, which is the Amitriptyline that I was getting in the past." According to the People, however, the orange pills he had received previously were stamped "129" not "GG 461." These pills were not introduced into evidence nor subjected to laboratory analysis.

On April 2, 2008, Gomez returned to the pharmacy and gave defendant prescriptions for three medications: Epzicom, Prezista (both of which are antiviral medications) and Advair, which he said he had gotten from his "girl." Gomez also asked for Percocet, a painkiller, for his cousin, who had been hurt in a

motorcycle accident. Defendant replied that he could not give Gomez anything with codeine or any other controlled substance, but could dispense anything else, including "very very strong" painkillers worth $5 to $10 per pill.

In response to defendant's request for photo identification, Gomez said he did not have any on him, and complained about being hassled despite their past dealings. Defendant explained that detectives might ask about who provided the prescriptions. Defendant asked Gomez what he wanted, and he requested 40 of "my pills" plus two kinds of painkillers. Gomez signed the prescriptions, reassuring defendant that he was familiar with Arroyo's signature and would sign the way he had before. Defendant went to the back of the pharmacy, but returned and explained that he could not dispense the painkillers because they were not registered in the computer. Defendant reminded Gomez to bring identification the next time, said he would gave him the 40 pills, and told him to return on Saturday for the painkillers. Gomez asked for his Medicaid card and defendant replied, "Alright," and returned a few seconds later with the card. At the precinct, Gomez vouchered the 40 round pink pills stamped "2105V." These pills were entered into evidence, but like the others, were never subjected to laboratory analysis.

On May 21, 2008, Detective Gomez made his final purchase

from defendant. Gomez asked for Amitriptyline, Clonidine and Percocet. Defendant went to the back of the pharmacy, but came back and advised Gomez that the prescriptions were "not properly registered in the computer" and that the prescription had to be "in the computer by the doctor in order to be dispensed," otherwise he could not bill Medicaid for the prescriptions. Gomez reminded defendant that he had promised Gomez strong painkillers, and asked for Amitriptyline and Clonidine instead. After some "back and forth," defendant agreed, and also asked Gomez if he wanted to purchase additional Clonidine. Gomez said yes, and defendant sold him a total of 60 pills for $20. At the precinct, he vouchered 60 round pink pills stamped "2105V."

Two months later, on July 21, 2008, the police arrested defendant and Portillo inside the pharmacy. The police recovered five prescriptions for Ivonne Arroyo that defendant had accepted from Gomez in exchange for the pink and orange pills at the pharmacy. Records showed that four of the five billings transpired almost simultaneously with defendant's receipt of the corresponding prescriptions. No such record exists for the March 6, 2008 purchase. The police also recovered a check from Medicaid made out to NYC Pharmacy in the amount of $32,297.60. It was dated April 7, 2008 — five days after the April 2 exchange in which defendant received three prescriptions. Significantly,

the remittance number on the check matched the remittance number in Medicaid's database for the three corresponding claims made on April 2.

Levon Aharonyan, supervising investigator at the New York Office of the Inspector General, testified, based on a document with information on Medicaid's electronic database (EMED) that on February 28, 2008 at 6:42 p.m., Medicaid was billed $706.55 for 20-milligram tablets of Zyprexa, on behalf of NYC Pharmacy for medicine dispensed to Ivonne Arroyo. On March 6, 2008, Medicaid was billed $519.04 on behalf of NYC Pharmacy for 600-milligram tablets of Sustiva dispensed to Ivonne Arroyo. Finally, on April 2, 2008, three times between 5:29 p.m. and 5:34 p.m., Medicaid was billed on behalf of NYC Pharmacy for medications dispensed to Ivonne Arroyo: $884.28 for 300-milligram tablets of Prezista; $812.89 for Epzicom Tablets; and $150.71 for an Advair discus. All five claims were marked paid in EMED, meaning that the claims had been submitted for payment and approved, and payment made. Aharonyan, however, acknowledged that a claim could be marked as paid but payment could be withheld.

Defendant was charged with, among other offenses, grand larceny in the third degree (Penal Law §155.35), criminal diversion of prescription medications in the second degree(Penal Law §178.20), and health care fraud in the fourth degree (Penal

Law §177.10), encompassing the transactions that occurred on February 28, March 6 and April 2, 2008. He was also charged with four counts of criminal diversion of prescription medications in the fourth degree (Penal Law §178.10)(for transactions that occurred on November 15, 2007, November 21, 2007, February 1, 2008, and May 21, 2008), as well as various lesser included offenses. He was convicted of grand larceny in the third degree (count one), criminal diversion of prescription medications in the fourth degree (a lesser included offense of count two), health care fraud in the fourth degree (count three), and the four counts of criminal diversion of prescription medications in the fourth degree (counts four to seven).

On defendant's CPL 290.10 motion, the court dismissed the five counts of fourth-degree criminal diversion of prescription medications, and otherwise denied the motion. For the reasons that follow, we affirm the judgment.

Health Care Fraud in the Fourth Degree

Health care fraud in the fourth degree is committed when, with intent to defraud a health care plan, a person[4] knowingly

[4]Penal Law 177.00(2) defines "person" as "any individual or entity, other than a recipient of a health care item or service under a health plan unless such recipient acts as an accessory to such an individual or entity."

and willfully provides materially false information or omits material information for the purpose of requesting payment from the health plan for a health care item, and as a result of such information, the person or another receives payment in an amount to which the person or another is not entitled, and the payment wrongfully received from a single health plan in the period of a year exceeds $3,000 (Penal Law §177.05, §177.10).[5]

Here, the evidence supported a conviction of health care fraud in the fourth degree on the theory that the Medicaid claims misidentified the recipient of the medications. Although I agree with the dissent that the evidence presented by the prosecution for the March 6 transaction was carelessly weak, when combined with the evidence presented for the February 28th and April 2nd transactions, the evidence as a whole was sufficient *(cf. People v Ramirez*, 33 AD3d 460, 460 [2006], *lv denied* 7 NY3d 928 [2006]

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[5]Count 3 of the indictment charged:

"The defendant, in the County of New York, from on or about February 28, 2008 to on or about April 2, 2008, with intent to defraud a health care plan, knowingly and willfully provided false information and omitted material information for the purpose of requesting payment from a health plan for a health care item and service and, as a result of such information and omission, he or another person received payment in an amount that he or such other person were not entitled to under the circumstances, and the payment wrongfully received, from a single health plan, in a period of not more than one year, exceeded three thousand dollars in the aggregate."

["[w]hile each link in the chain of circumstances might have an innocent explanation when viewed in isolation, the evidence, viewed as a whole, supported the conclusion that defendant was a participant in the drug conspiracy"]; *People v Coscia*, 279 AD2d 352, 352 [2001] ["[d]efendant's pattern of conduct, viewed as a whole, had no reasonable explanation other than guilt"]). Indeed, it would take a very narrow view of the evidence for a jury not to figure out that the "usual pills" were not for Arroyo, but for Gomez. For instance, on February 28, when defendant told Gomez that he could give him 30 pills, Gomez asked for 40, stating that he needed to make money. Defendant also instructed Gomez to go to no one else in the future "with this kind of thing," implying that he knew what Gomez was doing. On March 6, Gomez told defendant that he did not want what was prescribed for Arroyo, but what he had gotten in the past. Significantly, on April 2, when Gomez asked for "40 of my pills" and painkillers, defendant told Gomez that he could give him "very very strong" painkillers worth $5 to $10 each. And, during the negotiations, when Gomez was trying to convince defendant to give him painkillers with codine, he told defendant "that's why I got my girl to get me this, hook me up with this." Gomez then stated, "Listen I've been here before, so many times already. You know [inaudible] [s]he's got the hook up you know what I am

saying" to which defendant responded "[w]hatever you do, if you do it with the head on, it's ok."

Viewing the evidence in the light most favorable to the People, and giving them the benefit of every reasonable inference (*People v Robinson*, 225 AD2d 399, 400 [1996], *lv denied* 88 NY2d 884 [1996]), a rational jury could have found that defendant knew that Ivonne Arroyo was not the recipient of the medications, but rather Gomez, who wanted the drugs to sell for a profit.

Defendant posits that under this theory, a customer who goes to a pharmacy to obtain medication for a spouse would be guilty of health care fraud merely because the insurance claim or Medicaid claim is made in the spouse's name. We disagree. The definition of "person" for purposes of prosecution under this statute excludes a recipient of a health care item or service unless such person was an accessory to the fraud (Penal Law §177.00[2]). Thus, absent evidence that a spouse under defendant's hypothetical is involved in a scheme to defraud a health care plan, there would be no prosecution for health care fraud. Nor would a pharmacist who dispenses medications to someone other than the one for whom medications are prescribed commit fraud in the absence of evidence that the person picking up the medications is involved in an illegal scheme and the pharmacist is also aware of what is going on.

An additional element of a health care fraud prosecution is evidence that the defendant "provided" the materially false information. Although the statute does not expressly specify to whom the information is provided, nor does it limit the method by which the information is provided, it must be for the purpose of requesting payment from a health plan for a health care item or service (*see* Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law § 177.00, at 482-483). According to defendant, there is no evidence that defendant was the person who actually misled Medicaid. The statute, however, does not require that the People establish that defendant personally provided the false information to Medicaid. It is enough that he relayed that information to someone for the purpose of requesting payment from a health care plan. Whether the bookkeeper or a secretary actually entered the information via computer is irrelevant in prosecuting defendant.[6]

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[6]It should be noted in this regard that pursuant to Penal Law §177.30,

> "[i]n any prosecution under this article, it shall be an affirmative defense that the defendant was a clerk, bookkeeper or other employee, other than an employee charged with the active management and control, in an executive capacity, of the affairs of the corporation, who, without personal benefit, merely executed the orders of his or her employer or of a superior employee generally

Moreover, there is strong circumstantial evidence that defendant provided false information. Indeed, the pharmacy billed Medicaid for the five prescriptions used in the February 28, March 6, and April 2, 2008 transactions. The information compiled in Medicaid's electronic database proved that, on February 28, March 6, and April 2, 2008, New York State was billed on behalf of NYC Pharmacy for five prescription medications: 20-milligram tablets of Zyprexa, 600-milligram tablets of Sustiva, an Advair 100-50 Diskus, Epzicom tablets, and 300-milligram tablets of Prezista. These five medications were certified as being dispensed by NYC Pharmacy to "Ivonne Arroyo."

Significantly, the time line of the February 28 and April 2 billings, when compared with the corresponding time line of the undercover operation, support the conclusion that defendant conducted the billings. For example, on February 28, 2008, the undercover detective entered NYC Pharmacy at approximately 6:30 P.M., and spent the next 17 minutes negotiating with defendant over the Zyprexa prescription. The billing of Medicaid for the Zyprexa occurred on that day at 6:42 P.M. Similarly, on April 2, 2008, the undercover operation transpired at approximately 5:35 P.M. and the billing of Medicaid for the Prezista, Epzicom, and

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authorized to direct his or her activities."

Advair occurred that day at three separate times between 5:20 P.M. and 5:34 P.M.

In addition to the dovetailing time lines, other evidence was introduced that defendant provided the false information to Medicaid. For instance, on two different occasions, defendant explicitly told Detective Gomez that he could not dispense and accept certain medications because they were "not properly registered on the computer." Moreover, defendant himself stamped the prescriptions, had the detective sign the back of the prescriptions and the book on the pharmacy counter and directed Gomez, during the second phase of the investigation, to "go to no one else in the future with this kind of thing."

The offense of health care fraud in the fourth degree also requires proof of receipt of payment in an amount exceeding $3,000, whether by defendant or another. Here, the evidence established that Medicaid reimbursed NYC Pharmacy for the fraudulent claims submitted by defendant, and that the total payment exceeded $3,000 in less than one year. The five claims marked as paid in EMED – $706.55, $519.04, $150.71, $812.89 and $884.28 – totaled $3,073.47, paid to the NYC Pharmacy, which is a "person" under the health care fraud statute (*see* Penal Law § 177.00[2]).

The fact that none of the drugs were subjected to laboratory

analysis is of no moment with respect to this count. The relevant inquiry is whether defendant provided false information for the purpose of receiving payment and a person received a payment in excess of $3,000, not the identity of the drugs that were dispensed. Had the indictment limited defendant's act of providing material false information to misinforming Medicaid as to the drugs that were actually dispensed, the evidence would have been insufficient.[7] But the indictment was not so limited, and, as noted above, a rational jury could have found that the material false information consisted of misinforming Medicaid

[7]Given the absence of laboratory analysis and expert testimony as to what medications were dispensed, in particular on March 6, the evidence could not sustain a fourth-degree health care fraud conviction based on a theory that defendant falsely identified the medications dispensed. To be sure, unlike the criminal diversion charges, which required proof that a prescription medication was involved (*see* Penal Law § 178.00), the exact identity of the pills may be immaterial with respect to health care fraud. Rather, in this case, it was only necessary to prove that the pink and orange pills were not the prescribed medications. Arguably, the People's proof was adequate in that regard with respect to the February 28th and April 2nd transactions. That is, based on Gomez's testimony that he had received the same pink and orange pills on three prior occasions when he asked to purchase Amitriptyline and Clonidine, it could reasonably be inferred that the pills were not the medications Zyprexa, Epzicom or Prezista, and even more obviously, the pills were not the asthma inhalant Advair. On March 6, however, Gomez received orange pills marked "GG 461," and not "129." There is no evidence, however, that orange pills marked "GG 461" were not 600-milligram Sustiva pills. Without the March 6 transaction, the aggregate amount of money defrauded from Medicaid would not have exceeded $3000.

that Ivonne Arroyo was the recipient.

Grand Larceny in the Third Degree

The evidence was also legally sufficient to establish defendant's guilt of third-degree grand larceny, which required the People to prove that from February 28 to April 7, 2008, defendant wrongfully took, obtained or withheld money from New York State through its Medicaid program; that defendant intended to appropriate the money to himself or a third person; and that the money exceeded an aggregate of $3,000 (*see* Penal Law §155.35, §155.05[1]). Here, defendant wrongfully took, obtained or withheld money from New York State, by misleading Medicaid as to the actual recipient of what ever drugs were dispensed, billing Medicaid for $3,073.47, and causing New York State to reimburse the Pharmacy in that amount. As a result of defendant's fraudulent claims, the Pharmacy exercised "dominion and control" over money to which it was not entitled, and defendant's negotiations with the undercover detective indicated his intent to appropriate the money to the pharmacy which employed him.

Other Issues

The court correctly declined to submit attempted third-degree grand larceny as a lesser included offense, as there was no reasonable view of the evidence, viewed most favorably to defendant, that he only attempted to commit grand larceny but did

not complete the crime (*see People v Scarborough*, 49 NY2d 364, 371-374 [1980]).

The court properly denied defendant's speedy trial motion. The delay during the period in question was properly excluded, since it was attributable to motion practice, including a reasonable period after a decision regarding a motion, or was made at defense counsel's request (*see People v Jones*, 235 AD2d 297 [1997], *lv denied* 89 NY2d 1095 [1997]).

Defendant's claim that the verdict was repugnant and otherwise defective is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

Accordingly, the judgment of the Supreme Court, New York County (James A. Yates, J. at speedy trial motion; Marcy L. Kahn, J. at jury trial and sentence), rendered July 17, 2009, convicting defendant, of grand larceny in the third degree and health care fraud in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of 2¼ to 4½ years, should be affirmed.

All concur except Catterson, J. who dissents in an Opinion.

CATTERSON, J. (dissenting)

I must respectfully dissent. In my opinion, the evidence presented as to the March 6, 2008 undercover incident is insufficient to establish that the defendant provided materially false information either as to the medication dispensed or as to the identity of the recipient of the medication. Hence, I believe the People failed to prove beyond reasonable doubt that the defendant committed fourth-degree health care fraud. For the reasons set forth below, that conviction should be reduced to health care fraud in the fifth degree, and the case remanded for resentencing.

Following a seven-month undercover investigation of the defendant Saleem Khan and his employer, the NYC Pharmacy, the defendant was arrested. Subsequently, a grand jury indicted him on charges of third-degree grand larceny, fourth-degree health care fraud and second-degree criminal diversion of prescription medication, as well as four counts of fourth-degree criminal diversion of prescription medications.

At trial, testimony and evidence adduced the following relevant facts: that on three occasions during phase 1 of the investigation in November 2007 and April 2008, an undercover detective known only as Gomez requested the prescription drugs, Amitriptyline and Clonidine from the defendant at the pharmacy.

Gomez requested varying amounts of the drugs in exchange for cash, but without providing a prescription on any of the three occasions.

On two occasions, in return for cash, Gomez was given two types of pills in varying amounts: pink pills stamped "2105V" and orange pills stamped "129." On the third occasion, Gomez testified to receiving a "small orange bottle of pills." On each occasion, Gomez counted and vouchered the pills.

For phase 2 of the investigation, Gomez was provided with a Medicaid benefits card in the name of a fictitious woman, Ivonne Arroyo; and supplied with prescriptions for Arroyo signed by a doctor. On the next four visits to the pharmacy, Gomez handed the defendant the prescriptions and the Medicaid card, but asked instead to be given the same two drugs he had requested during phase 1 of the investigation.

On February 28, 2008, he presented a prescription for 30 20-milligram tablets of Zyprexa (an antipsychotic drug)for Arroyo. He told the defendant that Arroyo was his wife, that his wife was prescribed Zyprexa because "she's crazy [...] they gave it to my wife and she's not crazy." Instead, Gomez asked for 40 pills each of the two drugs he had requested on his initial visits to the pharmacy. He told the defendant he had his wife's Medicaid card, and defendant asked Gomez to sign a book on the counter and

the back of the prescription. Gomez signed with Arroyo's name. He was handed pills which he counted at the precinct. He testified that the 40 pills he was given looked like the orange pills stamped "129" that he had received on an earlier visit.

On March 6, 2008, Gomez returned to the pharmacy and handed the defendant a prescription for Arroyo for 30 tablets of 600-milligram Sustiva (a retroviral medication for HIV). Again, he told the defendant he wanted "the usual pills." The defendant handed Gomez a brown paper bag with an orange bottle labelled Sustiva 600-milligrams. The bottle contained 40 orange pills stamped "GG461."

On April 2, 2008, Gomez brought three prescriptions for Arroyo into the pharmacy for 30 tablets of Epzicom, 120 300-milligram Prezista and a 60-day supply of Advair. He asked the defendant for "40 of my pills." He also asked the defendant for some Percocet painkillers for his cousin who had been in a motorcycle accident. The defendant told him he could not dispense Percocet because it was "not registered in the computer." Gomez signed Arroyo's name in the book on the counter and on the back of the prescriptions. The defendant handed him a bottle which contained 40 pink pills with "2105V" stamped on them.

On May 21, 2008, Gomez returned with two prescriptions. At

trial, he could not recall what was ordered in the prescriptions, but he asked for the two usual drugs. The defendant told him that the prescriptions were "not properly registered in the computer" and that "the prescription has to be in the computer by the doctor in order to be dispensed" otherwise he "could not bill Medicaid for the prescriptions." However, the defendant sold him 60 pills for cash. Gomez testified that although he counted and vouchered all the pills he received on each visit to the pharmacy, he did not send any of them for laboratory analysis.

A second prosecution witness, a supervising investigator from the New York Office of the Inspector General, testified about a document from Medicaid's electronic database which showed that, on the relevant dates, the pharmacy had billed Medicaid for five Arroyo prescriptions. Medicaid had approved and made payment in a total amount of $3,073.47: that is, $706.55 for Zyprexa; $519.04 for the 600-milligram tablets of Sustiva; and for three prescriptions on April 2, 2008, the amounts of $884.28 (Prezista), $812.89 (Epzicom) and $150.71 (Advair).

At the close of trial, defendant moved for a trial order of dismissal pursuant to CPL 290.10 on the grounds that the evidence was legally insufficient as to the charges of health care fraud and grand larceny; and that the prosecution had failed to prove the nature of the pills Gomez had received. The court reserved

decision until after the jury verdict. The jury convicted the defendant of third-degree grand larceny, fourth-degree health care fraud, and five counts of fourth-degree criminal diversion of prescription medication.

Subsequently, the court dismissed all five counts of fourth-degree criminal diversion of prescription medications, holding that the evidence "falls short" of proving that the pills received by Gomez were prescription medications. The court denied the defendant's motion for dismissal of the counts relating to fourth-degree health care fraud and third-degree grand larceny. The court reasoned that "the entire amount of this reimbursement was wrongfully and fraudulently obtained since no medications were ever given to the 37-year old woman named in the five prescriptions."

On appeal, the defendant asserts that the court erred because the evidence was legally insufficient to establish grand larceny or the multiple elements that are required to be proven for a conviction for health care fraud in the fourth degree pursuant to Penal Law § 177.10. Specifically, the defendant asserts that the evidence was insufficient to prove, inter alia, that he made material false statements either as to the medications dispensed, or as to the recipient of the medications.

For the reasons set forth below, I agree with the defendant

to the extent that the evidence was insufficient as to the incident of March 6, 2008. Consequently, the People failed to establish the $3,000 value element of fourth-degree health care fraud charge, and consequently the value element of third-degree grand larceny.

It is well established that in determining whether a jury verdict is supported by legally sufficient evidence, this Court must decide

> "whether there is any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial ... and as a matter of law satisfy the proof and burden requirements for every element of the crime charged." People v. Bleakley, 69 N.Y.2d 490, 495, 515 N.Y.S.2d 761, 763, 508 N.E.2d 672, 674-675 (1987) (internal citations omitted).

To establish fourth-degree health care fraud, the People must prove that the defendant,

> "with intent to defraud a health care plan ... knowingly and willfully provide[d] materially false information ... for the purpose of requesting payment from a health plan for a health care item or service and, as a result of such information, the [defendant] or another person receive[d] payment in an amount [to which the defendant or another] [was] not entitled," and "the payment wrongfully received ... from a single health plan in a period of not more than a year exceed[ed] [$3,000] in the aggregate." Penal Law § 177.05, § 177.10.

As a threshold matter, it is undisputed that none of the pills were sent for laboratory analysis at any time before or during trial. Further, that error was compounded by an inept prosecution. As the trial court pointed out, even though some of the pills were introduced into evidence, the People did not proffer any expert testimony that the pills were prescription medications. Moreover, although the lead investigator testified he was familiar with the two prescription medications requested by Gomez, he was never asked to identify the pills Gomez received; Gomez was not able to identify the pills and testified to nothing more than that all the pills he received looked alike even though he described one batch of pills as stamped with different lettering than that on the pills he received on any other occasion.

The People nevertheless argue that identifying the pills given to Gomez in the second phase of the investigation is not necessary. The People argue that since the pills were plainly not the prescribed medications, the element of material misinformation as to the medications dispensed is established.

I am persuaded by the argument to the extent that the pills supplied to Gomez on April 2, 2008, where the prescription called for an asthma inhaler, were plainly not the prescribed medication. Viewing the evidence in the light most favorable to

the People, I am also inclined to agree that the People presented sufficient evidence for a jury to conclude that the orange and pink pills stamped 2105V and 129 dispensed on February 28, 2008 and April 2, 2008 were pills of the same type that Gomez bought for cash when he first requested Amitriptyline and Clonidine. Not being able to identify them precisely does not preclude the permissible inference that, nevertheless, they were the "usual pills that [he] was getting in the past" and not the drugs ordered on the prescriptions that Gomez presented to the defendant on February 28, 2008 and April 2, 2008.

Therefore, I believe the People presented ample proof that the defendant complied with Gomez's request for different medications than those set forth in the prescriptions the officer presented. Hence, there is sufficient evidence for finding that the defendant provided material false information as to the dispensed medications on February 28, and April 2.

However, in my opinion, there is insufficient evidence for concluding that, on March 6, 2008, the defendant dispensed something other than Sustiva, the prescribed medication, or that he dispensed it knowing that Arroyo was not going to be the recipient. This was the second prescription handed to the defendant by Gomez. The first prescription was for an antipsychotic drug, and Gomez played out a scene, describing

Arroyo as his wife and that she did not need the medication because she wasn't crazy. So, Gomez had argued, the defendant could substitute his "usual pills that [he] was getting in the past."

On March 6, 2008, when Gomez came into the pharmacy, he had a prescription for a retroviral medication prescribed for HIV patients. This time when Gomez again asked for "the usual pills," the defendant handed him pills stamped "GG461." Even though at trial Gomez characterized the pills as "the Amitriptyline that I was getting in the past" the pills were clearly neither those stamped "2105V" nor "129."

Thus, there is no basis for concluding that the medication handed to Gomez was not Sustiva. Indeed, the majority agrees. It states, albeit in a footnote, "There is no evidence, however, that orange pills marked 'GG 461' were not 600-milligram Sustiva pills." In my opinion, the rational inference arising from the possibility that the pills *could have been* the prescribed Sustiva is that the defendant filled the prescription for the person for whom the Sustiva was prescribed, that is, Arroyo.

Moreover, there is no evidence that the defendant suspected or knew that Arroyo did not exist. Only Gomez and the investigators knew that Arroyo was a fictitious individual. Further, based on the explanations the defendant made to Gomez as

to why he could not dispense Percocet, it is evident that the pharmacy used a system where legitimate prescriptions are entered by doctors into a computer database in order that they can be billed to Medicaid. Since Arroyo's prescriptions evidently were entered in the computer, there was no basis for the defendant to believe that Arroyo was not a real patient; or that Gomez, who had never identified himself by name, or shown the defendant any identification, was not indeed her husband or boyfriend.

Consequently, the majority's position that the defendant knowingly misidentified the recipient because "[he] knew that Ivonne Arroyo was not the recipient of the medications, but rather Gomez, who wanted the drugs to sell for a profit" is not supported by the evidence as to the March 6, 2008 incident. Such conclusion requires evidence that, on March 6, 2008 the defendant gave Gomez the pills he asked for instead of dispensing the prescribed medication. This however, as the majority clearly holds, is precisely the evidence that was not proferred. Hence, the element of "knowingly and willfully provid[ing] materially false information" was not proved beyond a reasonable doubt.

Finally, in my opinion, the failure of the People to prove beyond a reasonable doubt that the defendant materially misinformed Medicaid either as to the drugs dispensed or as to the recipient of the medication on March 6, 2008 impacts the

value elements of fourth-degree health care fraud and third-degree grand larceny. I would therefore vacate the larceny conviction, reduce the health care fraud conviction to fifth degree, and remand for resentencing.[1]

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 20, 2011

CLERK

[1]The defendant was acquitted by a jury of the lesser included offense of grand larceny in the fourth degree.