SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 30, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Catterson, Richter, Abdus-Salaam, Román, JJ.

4605 Gentry T. Beach, et al., Ind. 603611/08
Plaintiffs-Appellants,

-against-

Touradji Capital Management L.P.,
Defendant-Respondent,

Paul Touradji,
Defendant.

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Liddle & Robinson, LLP, New York (David I. Greenberger of counsel), for appellants.

Arkin Kaplan Rice LLP, New York (Sean R. O'Brien of counsel), for respondent.

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Order, Supreme Court, New York County (Richard B. Lowe, III, J.), entered September 21, 2009, which, to the extent appealed from, as limited by the briefs, granted defendants' motion to dismiss the second cause of action for violation of Article 6 of the New York Labor Law, the third cause of action for unjust enrichment, the fourth cause of action for quantum meruit and the sixth cause of action for imposition of a constructive trust, unanimously modified, on the law, to reinstate the second, third

and fourth causes of action, and otherwise affirmed, without costs.

"A 'quasi contract' only applies in the absence of an express agreement . . . in order to prevent a party's unjust enrichment" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). Plaintiffs should have been permitted to plead both contract and quasi-contract claims in the alternative (*see Winick Realty Group LLC v Austin & Assoc.*, 51 AD3d 408 [2008]).

The court erred in dismissing plaintiff's unjust enrichment claim since it was based on allegations that defendants were unjustly enriched by withholding plaintiffs' 2005 compensation and reinvesting it without their permission, and no contract governing those actions existed. The court also erred in concluding, at this pleading stage, that plaintiffs' compensation did not constitute "wages" under Labor Law § 190, because plaintiffs alleged that the compensation was not "entirely discretionary" and was based on plaintiffs' "own personal productivity," and not solely upon defendants' overall financial success (*see Truelove v Northeast Capital & Advisory*, 95 NY2d 220 [2000]).

The court's dismissal of plaintiffs' constructive trust claim was proper for failure to establish the existence of a confidential or fiduciary duty (*see Mirvish v Mott*, 75 AD3d 269,

275 n1 [2010], *lv granted* 16 NY3d 705 [2011]; *Wachovia Sec., LLC v Joseph*, 56 AD3d 269, 271 [2008]).

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

ENTERED: JUNE 30, 2011

CLERK

Gonzalez, P.J., Tom, Andrias, Moskowitz, Freedman, JJ.

5049 In re Lameka P.,

A Person Alleged to
be a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

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Tamara A. Steckler, The Legal Aid Society, New York (Selene D'Alessio of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about August 8, 2010, which adjudicated appellant a juvenile delinquent, upon her admission that she committed an act that, if committed by an adult, would constitute the crime of assault in the third degree, and placed her on probation for a period of 12 months, affirmed, without costs.

The petition alleged that appellant committed acts that if committed by an adult, would constitute the crimes of attempted robbery in the second and third degrees, attempted grand larceny in the fourth degree, menacing in the third degree, and assault in the third degree. The victim's supporting affidavit alleged that after exiting a bus, appellant and one Cartese B. followed her and a friend and said "they were going to jump us to get my

iTouch and cell phone." Appellant grabbed the victim's friend's hair and Cartese punched her face. Appellant then started to pull the victim's hair and punch her in the face and back with a closed fist. While appellant was doing this, Cartese tried to pull off her backpack and unzip it. Appellant also tried to pull off the victim's backpack. Appellant and Cartese ran away when a police car approached.

On April 23, 2010, appellant admitted to assault in the third degree, in full satisfaction of the petition, stating that, with the intent to cause physical injury to another person, she caused such injury to that person, in that she "hit [the person] in her face with my fist." The other charges were dismissed.

The Family Court, providently exercised its discretion in denying appellant's request for a conditional discharge, adjudicating her a juvenile delinquent and imposing a term of 12 months' probation as the least restrictive alternative consistent with appellant's needs and best interests and the need to protect the community (*see Matter of Akeem B.*, 81 AD3d 512 [2011]; *Matter of Florin R.*, 73 AD3d 533 [2010]; *Matter of Ashley P.*, 74 AD3d 1075 [2010]).

The charges stem from an attempted robbery. Appellant admitted punching the victim in the face and the probation officer's investigation and report concluded that she could

benefit from supervision services with the Department of Probation, including "anger management counseling/family and "close school monitoring," which may "help to deter further criminal behavior." This disposition is fully supported by the record which, as argued by the presentment agency at the dispositional hearing, shows that appellant: (1) "admitted to associating with negative peers"; (2) missed 34 days of school and was late 74 times; (3) was "not involved in any outside activities"; (4) admitted, as did her mother, that their relationship was "somewhat strained, based on [appellant's] poor attitude"; (5) did not express remorse and claimed it was a simple fight; and (6) admitted to cutting herself several years ago because "she felt alone and sad" (*see Matter of Monique R.*, 61 AD3d 412 [2009]).

Further, appellant's mother has a conviction for driving while intoxicated and a robbery arrest, as well as an arrest for fighting with her sister. Appellant's father has been incarcerated on a charge of attempted murder since appellant was born. Thus, appellant is unlikely to be properly supervised at home (*see Matter of Shaundale W.*, 82 AD3d 1254 [2011]). Nor was the court required to grant her request for a conditional discharge merely because this may have been her first arrest (*see Matter of Nikita P.*, 3 AD3d 499, 501 [2004]).

Appellant's claim that the disposition must be vacated because the court mistakenly relied on its belief that appellant drank socially is not preserved, and we decline to consider it in the interests of justice (see CPL 470.05[2]; *People v Gray*, 86 NY2d 10, 19 [1995]). Although the record demonstrates that it was appellant's mother who admitted to the drinking, in rendering its disposition the court expressly stated that "*[f]or the reasons indicated by* [*the presentment agency*], I do not believe that a conditional discharge is appropriate. I do adjudicate the respondent to be a juvenile delinquent. I do believe she's in need of the supportive services provided by Probation. The disposition of the Court is probation for 12 months, with anger management and counseling (emphasis added)." The reasons cited by the presentment agency did not include an allegation that appellant drank and, in and of themselves, more than amply establish that the disposition appellant received was the least restrictive alternative consistent with her needs and best interests and the need to protect the community.

All concur except Moskowitz and Freedman, JJ.
who dissent in a memorandum by Freedman, J.
as follows:

FREEDMAN, J. (dissenting)

I dissent from the order of disposition adjudicating appellant a juvenile delinquent and placing her on probation for a period of 12 months, and, in the exercise of discretion in the interest of justice, would remand the matter to Family Court with the direction to order a supervised adjournment in contemplation of dismissal pursuant to Family Court Act § 315.3.

Although the presentment agency did not allege that appellant drank alcohol, the record shows that the court gave considerable weight to its mistaken belief that the 15-year-old appellant was a habitual drinker. The Court specifically stated that "the I&R [probation department investigation and report] points out that respondent does use alcohol. She said she drinks socially. Nevertheless, she's 15 years old and she's consuming alcohol, at least on a social basis, if she's to be believed." In fact, it was appellant's mother, not appellant, who reported alcohol use on a social basis. There was absolutely no evidence that appellant used alcohol or drugs of any kind.

The majority emphasizes the negative findings concerning appellant in the I&R. However, the I&R also indicated that appellant obeys her mother and her curfews, gets along well with her siblings, is well liked by her teachers, has had no prior involvement with the law, and has maintained grade averages in

the mid-70s despite school absences. Some of the absences were also attributable to the time involved in the administrative hearing resulting from the incident at issue. The "somewhat strained" relations between mother and daughter, cited by the majority, are, if anything, typical of relations between 14- or 15-year-old girls and their mothers.

While the majority avers that the I&R indicated that appellant showed a lack of remorse, I disagree with that assessment. Appellant fully admitted to committing the act with which she was charged, and acknowledged her need to control her anger (*see Matter of Israel M.,* 57 AD3d 274 [2008]). Notably, her more culpable companion received a conditional discharge. I also believe that appellant's cutting herself several years earlier during a period of sadness should not be considered as a dispositional factor.

Although appellant is not blessed with parents who are able to provide optimal supervision, she is obedient and has no history of behavioral problems. A supervised ACD would serve the purpose of making sure that she attends school regularly and does not become involved in uncontrolled altercations without imposing

the stigma of a juvenile delinquency adjudication (*see e.g. Matter of Julian O.*, 80 AD3d 525 [2011]; *Matter of Jeffrey C.*, 47 AD3d 433 [2008], *lv denied* 10 NY3d 707 [2008]).

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

ENTERED: JUNE 30, 2011

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Abdus-Salaam, JJ.

4522N Alexandra Fiallos, etc., Index 350463/09
Plaintiff-Appellant,

-against-

New York University Hospital,
Defendant-Respondent.

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

Martin Clearwater & Bell LLP, New York (Barbara D. Goldberg of counsel), for respondent.

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about February 8, 2010, which granted defendant's motion for a change of venue, reversed, on the law and the facts, without costs, and the motion denied.

In making its motion, defendant assumed the burden of disproving plaintiff's Bronx County residence (*see e.g. Clarke v Ahern Prod. Servs.*, 181 AD2d 514 [1992]). Counsel's affidavit by which he cites unspecified "investigative efforts" that revealed that someone other than plaintiff occupied the apartment amounts to mere hearsay and is insufficient to carry defendant's initial burden (*see Hurley v Union Trust Co. of Rochester*, 244 App Div 590 [1935]). Even if accepted, defendant's proof would fall far short of establishing that plaintiff did not live anywhere in Bronx County when this action was commenced. Accordingly,

defendant's failure to meet its initial burden of making a prima facie showing of entitlement to relief makes it unnecessary to consider the sufficiency of plaintiff's opposition to the motion (*see e.g. Frees v Frank & Walter Eberhart L.P. No.1*, 71 AD3d 491, 492 [2010]).

All concur except Sweeny, J. who dissents in a memorandum as follows:

SWEENY, J. (dissenting)

I would affirm the granting of the motion to change venue.

The burden is on the defendant, as the movant, to establish that plaintiff improperly designated Bronx County as the venue for this action (*see Garced v Clinton Arms Assoc.*, 58 AD3d 506, 509 [2009]). This burden may, under appropriate circumstances, be satisfied by submitting counsel's sworn averment explaining why there are insufficient grounds for venue as laid (*see Torres v Larsen*, 195 AD2d 285, 286-287 [1993]). Although *Torres* concerned a CPLR 510(3) motion to change venue due to the inconvenience of witnesses, its reasoning extends to this CPLR 510(1) motion seeking to change venue due to the action having been brought in the wrong county.

Here, there is no question that defendants are located in New York County, the alleged malpractice occurred there and the medical records concerning plaintiff's treatment are also located there. These are facts that support defendants' motion for a change of venue (*see Castro v New York Hosp. Med. Ctr. of Queens*, 52 AD3d 251, 252 [2008]; *Goldberg v Bierman*, 35 AD3d 807, 808 [2006]). While the better practice would have been for defendants to elaborate on and provide documentary evidence of their claims that plaintiff did not reside at the Bronx addresses she gave in her opposition papers as well as the address listed

on the summons, the attorney's affirmation did set forth sufficient information to meet defendants' initial burden. For example, the affirmation in response to plaintiff's opposition papers affirmatively stated that the residents of the apartment plaintiff claimed as her address were listed as two other named persons, not plaintiff.

Plaintiff, in response, failed to objectively demonstrate that she resided in Bronx County at the time she filed the complaint. In opposition to defendant's motion, plaintiff submitted (1) her self-serving affidavit stating that she was a resident of Bronx County at the time the action was commenced, and (2) a phone bill in Bronx County dated *prior* to commencement of the action. Moreover, plaintiff's medical records showing a Bronx address submitted in opposition to defendants' motion, related to medical treatment prior to the commencement of this action.

Since plaintiff failed to demonstrate her residence in Bronx

County on the date of the commencement of the action, the motion court acted properly in changing venue to New York County.

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

ENTERED: JUNE 30, 2011

CLERK

Andrias, J.P., Saxe, Moskowitz, Richter, Manzanet-Daniels, JJ.

4843 Dennis Arroyo, Index 6379/07
Plaintiff-Appellant,

-against-

Horace Morris,
Defendant,

Juldeh Bah, et al.,
Defendants-Respondents.

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Law Office of Mark S. Gray, New York (William Ricigliano and Mark S. Gray of counsel), for appellant.

Baker McEvoy Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for respondents.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered March 19, 2010, which granted defendants Juldeh Bah and Nigeriya Car's 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 affirmed, without costs.

Defendants-appellants established prima facie that plaintiff did not sustain a serious injury by submitting a radiologist's affirmed reports stating that the MRI films of the lumbar spine revealed evidence of degenerative disc disease predating the accident and no evidence of recent traumatic or causally related injury, and that the MRI films of the left knee revealed evidence

of a preexisting chronic condition and no radiographic evidence of recent traumatic or causally related injury (*see Valentin v Pomilla*, 59 AD3d 184, 186 [2009]). In opposition, plaintiff failed to refute defendants' evidence of a preexisting degenerative condition of the lumbar spine or a preexisting chronic condition of the left knee, and therefore failed to raise an inference that injury to either the spine or the knee was caused by the accident (*see id.*; *see also Jimenez v Rojas*, 26 AD3d 256 [2006]; *Diaz v Anasco*, 38 AD3d 295 [2007]). Further, none of plaintiff's doctors made any reference to either the degenerative or the chronic condition; without an explanation for ruling out these conditions as the cause of plaintiff's injuries, the doctors' opinions that the injuries were caused by the accident are speculative (*see Valentin*, 59 AD3d at 186).

As there is no objective medical evidence that plaintiff's injuries were caused by the accident, plaintiff's statement that he was out of work for nine months is insufficient to establish his 90/180-day claim (*see Linton v Nawaz*, 62 AD3d 434, 443

[2009], *affd* 14 NY3d 821 [2010]; *see also Hutchinson v Beth Cab Corp.*, 207 AD2d 283 [1994]).

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

ENTERED: JUNE 30, 2011

CLERK

Friedman, J.P., Sweeny, DeGrasse, Abdus-Salaam, Román, JJ.

4860 Superior Officers Council Health & Welfare Fund, et al., Plaintiffs-Appellants,

-against-

Empire HealthChoice Assurance, Inc., etc., Defendant-Respondent.

Index 603676/09

Mirkin & Gordon, P.C., Great Neck (Joel Spivak of counsel), for appellants.

Gibson, Dunn & Crutcher LLP, New York (Randy M. Mastro of counsel), for respondent.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered June 8, 2010, which granted defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), affirmed, without costs.

Defendant provides prescription benefits management services to plaintiffs pursuant to an "Agreement for Administrative Pharmaceutical Services Only." Under their contract cause of action, plaintiffs seek to recover rebates from prescription drug manufacturers that defendant received but did not share with or pay over to plaintiffs. Plaintiff claims to be entitled to the rebates under Section 4.7 of the agreement, which is set forth in the complaint and provides:

> "In the event the Group [plaintiffs] adopts a drug formulary and provides notice to Empire [defendant] of

> its desire to participate in a pharmaceutical rebate arrangement, Empire shall provide the Group with any applicable rebates that Empire may obtain from any third party pharmaceutical vendor that such vendor has received from a pharmaceutical manufacturer. Such rebates would be obtained solely by Members' use of certain formulary drugs. Such rebates shall be remitted by Empire to the Group on a monthly basis along with a report of all rebates. In the event the Group is eligible to participate in the pharmaceutical rebate arrangement and provides notice to Empire of its desire not to participate, and further assigns its rights to the rebates to Empire, then in such event, it shall be entitled to a downward adjustment to its Administrative Fee as determined by Empire."

Plaintiffs concede in the complaint that they neither adopted a drug formulary nor provided defendant with the notice required by Section 4.7. Because plaintiffs have not met these prerequisites, the complaint fails to state a cause of action for the recovery of rebates under the agreement. As a matter of contract construction, we reject plaintiffs' argument that they were entitled to dispense with the prerequisites because defendant received rebates on the basis of prescription drug utilization by plaintiffs' members. "A fundamental tenet of contract law is that agreements are construed in accordance with the intent of the parties and the best evidence of the parties' intent is what they express in their written contract" (*Goldman v White Plains Ctr. for Nursing Care, LLC,* 11 NY3d 173, 176 [2008][citation omitted]).

The balance of the contract claim is based on Section 4.1.1

of the agreement which is also recited in the complaint. Section 4.4.1 required defendant to "[a]dvise and assist the Group in a consulting capacity regarding benefits design and other matters pertaining to administration of the Program." The only alleged breach of Section 4.1.1 is said to be defendant's purported failure to "'advise and assist' the Group in any manner whatsoever with respect to pharmaceutical rebate dollars payable when the SOC Funds' [plaintiffs'] members utilized prescription drugs on EBCBS' [defendant's] formulary, including the need to formally adopt a formulary to be eligible for rebates." A reading of Section 4.7, however, discloses that

- a pharmaceutical rebate program existed,
- plaintiffs were required to adopt a drug formulary and notify defendant in order to participate in the program,
- the program would have required defendant to remit to plaintiffs rebates from participating vendors,
- the rebates would have been remitted to plaintiff on a monthly basis, and
- upon notice to defendant, plaintiffs could have received an adjustment of their administrative fee in lieu of rebates for which they were eligible.

Absent fraud or other wrongful conduct, not alleged here, parties are presumed to know the contents of the agreements they have signed (*see Imero Fiorentino Assoc. v Green,* 85 AD2d 419, 420 [1982]). Hence, the agreement itself refutes the complaint's

assertion that information regarding the existence of a formulary, the availability of and plaintiffs' right to share in rebates "was solely within the knowledge of EBCBS and was deliberately and/or negligently not shared with the SOC Funds . . . "

Plaintiffs' breach of fiduciary duty claim was properly dismissed because it is not based upon the breach of any fiduciary duty independent of the parties' agreement itself (*see e.g. Morgenroth v Toll Bros, Inc.*, 60 AD3d 596, 597 [2009]). The negligence and conversion claims were also properly dismissed because "a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987] [citations omitted]). The unjust enrichment or quasi contract claim was similarly precluded by the existence of a valid agreement governing the subject matter of plaintiffs' claim (*id.* at 388). Plaintiffs also failed to state a claim under General Business Law § 349 because the conduct alleged in the complaint was not consumer-oriented (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995]). Finally, the claim based on the implied covenant of good faith and fair dealing was redundant since it is intrinsically tied to the

damages sought under the contract claim (*see Bostany v Trump Org. LLC*, 73 AD3d 479, 481 [2010]).

All concur except Sweeny and Abdus-Salaam, JJ. who dissent in a memorandum by Abdus-Salaam, J. as follows:

ABDUS-SALAAM, J. (dissenting)

I would modify, on the law, to reinstate the cause of action for breach of contract insofar as it alleges breach of section 4.1.1.

Taking the allegations of the complaint as true and giving plaintiffs the benefit of every possible inference (*see EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]), I conclude that plaintiffs adequately pleaded a breach of contract under section 4.1.1 based on defendant's failure to advise plaintiffs about the advantages of a drug formulary and to advise plaintiffs that defendant was managing a drug formulary and receiving rebates for drugs that were being used by plaintiffs' members. Section 4.1.1 required defendant to advise and assist plaintiffs. Defendant's assertion that it specifically discussed implementing the formulary plan with plaintiffs' administrator and that she flatly rejected the plan is not supported by any documentary evidence or testimony and is disputed by plaintiffs. Such an argument may be a defense to this action, but is not sufficient to demonstrate that plaintiffs do not have a cognizable claim.

The majority concludes that section 4.7 refutes the complaint's assertion that the information about the existence of a formulary and the availability of rebates was deliberately

and/or negligently not shared with plaintiffs. I disagree with this reading of section 4.7. That provision provides, in part, that "[i]n the event the Group adopts a drug formulary and provides notice to Empire of its desire to participate [in a rebate arrangement], Empire shall provide the Group with any applicable rebates." Section 4.7 provides the mechanism by which plaintiffs could adopt a formulary and obtain rebates from defendant. It has no bearing on the essence of the allegation that Empire did not advise or consult with plaintiffs regarding the benefits of adopting a drug formulary, or advise plaintiffs that Empire was in fact managing a formulary and receiving rebates that could have been passed on to plaintiffs.

Such advice and consultation services are at the crux of the agreement to "[a]dvise and assist the Group in a consulting capacity regarding benefits design" (section 4.1.1). This is illustrated by defendant's argument, made in support of its motion to dismiss the complaint, that Empire specifically discussed implementing the formulary plan with plaintiffs' administrator and that she rejected the plan. Defendant's argument also highlights why the majority is incorrect in concluding that the language of section 4.7 (which only sets

forth *the procedure* for adopting a formulary and obtaining rebates) negates and refutes plaintiffs' assertion that defendant failed to provide the advice and consultation required by the agreement.

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

ENTERED: JUNE 30, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, Renwick, Richter, JJ.

5244-
5244A Joshua Guberman, Index 105002/10
Plaintiff-Appellant,

-against-

Paul E. Rudder, as Receiver,
Defendant-Respondent.

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Danzig Fishman & Decea, White Plains (Thomas B. Decea of counsel), for appellant.

Peter F. Edelman, New York, for respondent.

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Judgment, Supreme Court, New York County (Laura E. Drager, J.), entered December 2, 2010, dismissing the complaint with prejudice and awarding defendants $10,000 as sanctions imposed against plaintiff, unanimously modified, on the law, to reduce the sanctions to $2500, and remand for further proceedings, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered May 12, 2010, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff, a prospective purchaser of real property, failed to obtain leave of court to sue defendant, the receiver of the property in the underlying action, to which plaintiff was not a party, for defendant's conduct in facilitating the sale of the property. Nonetheless, the rule requiring leave to sue a receiver is not statutory and does not affect the court's

jurisdiction (*see Copeland v Salomon*, 56 NY2d 222, 230 [1982]).

However, dismissal of the complaint was warranted for lack of legal capacity under CPLR 3211(a)(3), since a legal action filed against a receiver without leave of court cannot be maintained (*see Chang v Zapson*, 67 AD3d 435 [2009]) unless the court permits the action to be filed nunc pro tunc (*see Copeland* at 230), which was not the case here.

In any event, the complaint failed to state a cause of action. The breach of fiduciary duty claim fails since plaintiff did not allege the existence of a fiduciary relationship (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 561-562 [2009]). His fraudulent misrepresentation claim fails since he did not allege that the misrepresentations were made with the intent to deceive him (*see Friedman v Anderson*, 23 AD3d 163, 167 [2005]). There was also nothing in the complaint asserting defendant either participated in or had knowledge of any alleged fraud (*see Handel v Bruder*, 209 AD2d 282, 282-283 [1994]).

The record supports the court's discretionary cancellation of the notice of pendency pursuant to CPLR 6514(b), since the notice of pendency could not be maintained in the absence of a valid claim (*see Jericho Group Ltd. v Midtown Dev., L.P.*, 67 AD3d 431, 432 [2009], *lv denied* 14 NY3d 712 [2010]; *Sorenson v 257/117 Realty, LLC*, 62 AD3d 618, 619 [2009], *lv dismissed* 13 NY3d 935

[2010]).

We agree with the court that the commencement of the action, without the permission of the court, was frivolous and that sanctions were warranted (*see Matter of Rachel's Trousseau [Warshaw Woolen Assoc.]*, 249 AD2d 148 [1998], *lv denied* 92 NY2d 810 [1998]; 22 NYCRR 130-1.1.a). The court sufficiently articulated the basis for its actions, and gave counsel and the plaintiff an opportunity, on the record, to explain their actions. We reduce the amount of the sanctions to $2500 and remand for further proceedings in accordance with this opinion.

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

ENTERED: JUNE 30, 2011

CLERK

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

5408 Howard Jackson, as Administrator of the Estate of Benita M. Williams Smith, etc., et al., Plaintiff-Respondent, Index 13313/96

-against-

City of New York, et al., Defendants,

New York City Transit Authority, et al., Defendants-Appellants.

_____

Wallace D. Gossett, Brooklyn (Lawrence Heisler of counsel), for appellants.

Gainey & McKenna, New York (Barry J. Gainey of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered March 24, 2010, upon a jury verdict apportioning liability between defendant-appellant New York City Transit Authority and the non-party tortfeasor, awarding damages to plaintiff, as administrator of the decedent's estate, individually, and as guardian of the decedent's children, unanimously reversed, on the law, without costs, the judgment vacated, and the complaint dismissed. The Clerk is directed to enter judgment in favor of defendant Transit Authority dismissing the complaint.

The decedent, a Transit Authority worker, was shot and

killed by her estranged husband while she was in a restricted employee-only locker room located in a subway station. Plaintiff alleges that Transit Authority employees' negligence in directing the husband, a non-employee, to the employees-only area without ascertaining his identity, violated a work policy prohibiting employees from giving out such information. Plaintiff also asserts that the Transit Authority's failure to adequately secure the locker room proximately caused the decedent's death.

The Transit Authority's provision of security measures involves a governmental function, and therefore it is immune from liability for the husband's attack, absent facts establishing a special relationship between the Authority and the decedent (*see Clinger v New York City Tr. Auth.*, 85 NY2d 957 [1995]; *Bonner v City of New York*, 73 NY2d 930, 932 [1989]; *Genovese v New York City Tr. Auth.*, 204 AD2d 116 [1994]; *Calero v New York City Tr. Auth.*, 168 AD2d 659 [1990], *lv denied* 78 NY2d 864 [1991]). The Transit Authority's adoption of a policy against divulging information regarding employees to outsiders is insufficient to establish a special relationship (*see Vitale v City of New York*, 60 NY2d 861 [1983]; *Pascarella v City of New York*, 146 AD2d 61, 70 [1989], *lv denied* 74 NY2d 610 [1989]).

Moreover, nothing indicates that the decedent justifiably relied on the policy to her detriment (*see Cuffy v City of New York*, 69 NY2d 255, 260 [1987]).

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

ENTERED: JUNE 30, 2011

CLERK

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

5479-
5480 The People of the State of New York, Respondent, Ind. 2230/99

-against-

Jose Alfaro,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Anastasia Heeger of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes of counsel), for respondent.

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Judgment, Supreme Court, New York County (Edwin Torres, J.), rendered February 29, 2000, convicting defendant, after a jury trial, of robbery in the first and second degrees, assault in the first degree, and gang assault in the second degree, and sentencing him to an aggregate term of 15 years, and judgment of resentence, same court (Laura A. Ward, J.), rendered April 2, 2008, resentencing defendant to an aggregate term of 15 years, with 2½ years' postrelease supervision, unanimously affirmed.

The verdict was based on legally sufficient evidence. The evidence supports reasonable inferences that defendant and his companions took property from the victim, and did so with intent to deprive the victim of the property (*see e.g. People v Kirnon*, 39 AD2d 666, 667 [1972], *affd* 31 NY2d 877 [1972]).

The court properly admitted into evidence an imitation

pistol, handcuffs and handcuff keys found in defendant's possession or vicinity immediately after the crime was committed. Although defendant was not charged with unlawful possession of an imitation pistol, his possession of those items provided circumstantial evidence of his intent to commit the crimes charged (*see People v Medina*, 37 AD3d 240, 242 [2007], *lv denied* 9 NY3d 847 [2007]; *People v Cooper*, 238 AD2d 194 [1997], *lv denied* 90 NY2d 939 [1997]). Furthermore, the probative value of this evidence outweighed its prejudicial effect. The lack of a limiting instruction does not warrant reversal under the circumstances.

The court properly exercised its discretion when it denied defendant's request, made at the close of the defense case, to recall a prosecution witness for further cross-examination (*see generally People v Olsen*, 34 NY2d 349, 353-354 [1974]). The court did not deprive defendant of his right to confront this witness.

Defendant did not preserve any of his other challenges to the court's conduct of the trial, including his constitutional claims, and we decline to review them in the interest of justice. As an alternative holding, we find that defendant was not deprived of his right to a fair trial and to confront witnesses. The court placed reasonable restrictions on defendant's cross-

examination, and its own participation in the questioning of witnesses was within permissible limits (*see People v Moulton*, 43 NY2d 944, 945 [1978]).

Defendant did not preserve his claim that certain counts of the indictment are multiplicitous, or any of his arguments concerning the defense and prosecution summations, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: JUNE 30, 2011

CLERK

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

5481 Bruce Gutkin, Index 600071/10
Plaintiff-Appellant,

-against-

Richard D. Siegal, et al.,
Defendants-Respondents,

Schain Leifer Guralnick, et al.,
Defendants.

_____

Richardson & Patel, LLP, New York (David B. Gordon of counsel), for appellant.

Rosenfeld & Kaplan, LLP, New York (Steven M. Kaplan of counsel), for respondents.

_____

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered September 30, 2010, as amended by order, same court and Justice, entered October 4, 2010, which, to the extent appealed from as limited by the briefs, granted the motion of defendants Richard D. Siegal and Palace Exploration Company to dismiss the first cause of action, unanimously affirmed, with costs.

In his first cause of action, for fraud, plaintiff alleges that defendants Siegal and Palace failed to disclose to him that the oil and gas drilling partnerships in which he invested between 1999 and 2002 would receive only a small portion of the generated revenue. Plaintiff alleges that he understood language

in the prospect agreements to mean that the partnerships would receive 60% of the net drilling revenue. Plaintiff further alleges that he could not have discovered the fraud until he received deficiency notices in January 2008 concerning tax deductions he took as a result of the investments. In this regard, plaintiff asserts that in 2005, when he inquired as to why revenues were not what he expected, he was informed that drilling had not been very successful and that Siegal was perhaps not as adept in the oil and gas business as anticipated. Plaintiff commenced this action in January 2010.

An action based upon fraud must be commenced within the greater of 6 years from the date the cause of action accrued or 2 years from the time plaintiff discovered or, with reasonable diligence, could have discovered the fraud (CPLR 213[8]). Here, plaintiff's claim was more than six years old at the time it was filed, and therefore time-barred, unless he did not discover or, with reasonable diligence, could not have discovered it before January 2008.

"The test as to when fraud should with reasonable diligence have been discovered is an objective one" (*Armstrong v McAlpin* 699 F2d 79, 88 [2d Cir 1983]). "'[W]here the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises,

and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him'" (*id.*, quoting *Higgins v Crouse,* 147 NY 411, 416 [1895]).

The motion court correctly determined that plaintiff could have, with reasonable diligence, discovered the alleged fraud before January 2008. Indeed, accepting plaintiff's allegations as true, as one must on a motion to dismiss, plaintiff had constructive knowledge of the alleged fraud in 2005, when he recognized that his investment returns were significantly less than expected. At that point, a reasonable investor who had lost millions of dollars would have investigated further, rather than accept the cursory explanation plaintiff allegedly received.

Moreover, beginning in the first year after his investment, plaintiff received quarterly drilling reports which reflected the exact percentage of net drilling revenue each partnership received from each well. Thus, if plaintiff believed that each partnership was entitled to receive 60% of the net revenue, the quarterly reports put him on notice that he was either in error or had been defrauded. By his own account, plaintiff never sought clarification of the quarterly reports. The language in the prospect agreements, which plaintiff contends contradicted the quarterly reports, is ambiguous, and plaintiff does not claim

to have sought clarification prior to or after investing in the partnerships. He also does not deny that he signed subscription agreements in which he acknowledged that he had received all information he desired prior to making his investments. Accordingly, the motion court properly dismissed the first cause of action as time-barred (*see Sheth v New York Life Ins. Co.*, 308 AD2d 387, 387 [2003], *lv denied* 1 NY3d 505 [2003]).

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

ENTERED: JUNE 30, 2011

CLERK

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

5482 Lisa J. Weksler, etc., Index 603288/07
Plaintiff-Appellant,

-against-

Joseph Weksler, etc., et al.,
Defendants-Respondents,

Mitchell D. Hollander, Esq., et al.,
Defendants.

_____

Jonathan P. Harvey Law Firm, PLLC, Albany (Jonathan P. Harvey of counsel), for appellant.

Putney, Twonbly, Hall & Hirson LLP, New York (Thomas A. Martin of counsel), for respondents.

_____

Order, Supreme Court, New York County (Richard B. Lowe, III, J.), entered January 22, 2010, which, in an action alleging minority shareholder oppression, denied plaintiff's motion pursuant to Business Corporation Law (BCL) § 1107, for leave to amend and replead, nunc pro tunc, the eleventh cause of action into a proceeding under the BCL to comply with sections 1104-a, 1105, and 1106, and to sever that proceeding as amended and repled, unanimously affirmed, with costs.

Supreme Court's denial of the motion and its directive that plaintiff may, if she chooses, commence a separate proceeding under BCL 1104-a in compliance with the applicable statutory requirements, was a provident exercise of discretion (*see Matter*

of WTB Props., 291 AD2d 566, 567 [2002]). Defendants' rights under the statutorily mandated timetable would have been unfairly prejudiced if the proposed amendment were permitted (BCL 1118). Contrary to plaintiff's argument, the motion court was not required to convert the eleventh cause of action into a separate proceeding under CPLR 103(c) (*cf. Matter of Nelkin v H.J.R. Realty Corp.*, 25 NY2d 543, 547 n 2 [1969]).

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

ENTERED: JUNE 30, 2011

CLERK

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

5484-	The People of the State of New York,	Ind. 2365/01
5484A-	Respondent,	2490/01
5484B-		2491/01
5484C	-against-	40/02

Kareem Willis,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Megan R. Roberts of counsel), for respondent.

_____

Judgments, Supreme Court, Bronx County (Troy K. Webber, J.), rendered February 18, 2003, convicting defendant upon his pleas of guilty, of murder in the second degree, robbery in the first degree (two counts) and promoting prison contraband in the first degree and sentencing him to an aggregate term of 16 years to life, unanimously modified, on the law, to the extent of vacating the sentence on the conviction of promoting prison contraband in the first degree, and substituting a term of 2½ years to 5 years, and otherwise affirmed.

The People concede that defendant's determinate five-year sentence on his prison contraband conviction was improper. The statute required an indeterminate term (*see* Penal Law § 70.06[2]).

Application by appellant's counsel to withdraw as counsel as

to the judgments rendered on the indictments other than indictment 40/02 is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed the record and agree with appellant's assigned counsel that there are no nonfrivolous points which could be raised on this appeal as to those indictments.

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: JUNE 30, 2011

CLERK

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

5485 The People of the State of New York, Ind. 206/03
Respondent,

-against-

Julio Fuentes,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Brian J. Reimels of counsel), for respondent.

_____

Appeal from order, Supreme Court, Bronx County (John P. Collins, J.), entered February 11, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously dismissed as moot.

Defendant was released on parole during the pendency of this appeal and is not currently in custody. Therefore, he lost his eligibility for resentencing (*see* CPL 440.46[1]). Accordingly,

his appeal is moot (*see People v Orta*, 73 AD3d 452, *lv denied*, 15 NY3d 755 [2010]).

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

ENTERED: JUNE 30, 2011

CLERK

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

5492-
5493 The People of the State of New York, Respondent,

Ind. 5221/00

-against-

Tobie Coleman,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Arthur H. Hopkirk of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Beth Fisch Cohen of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ronald Zweibel, J.), entered on or about April 27, 2009, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The record supports a point score of 110, qualifying defendant as a level three offender. We have considered and rejected defendant's challenges to the court's point assessments for the risk factors of sexual contact with victim and number of victims.

Regardless of whether defendant's correct point score qualifies him as a presumptive risk level three offender, the record supports the court's discretionary upward departure (*see e.g. People v Schlau*, 60 AD3d 529 [2009], *lv denied* 12 NY3d 712

[2009]). In separate incidents over a period of three weeks, defendant followed three women into their apartment buildings and brutally attacked each of them. Defendant sexually assaulted two of them, and, as the court observed, it is a reasonable inference that he intended to sexually assault the third. The risk assessment instrument did not adequately account for this dangerous, predatory pattern of conduct.

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

ENTERED: JUNE 30, 2011

CLERK

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

5494 In re Urban Justice Center, Index 108317/10
Petitioner,

-against-

New York City Clerk,
Respondent.

_____

Jeremy A. Berman, New York, for petitioner.

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

_____

Determination of respondent, New York City Clerk, dated February 25, 2010, which imposed a $2,700 fine on petitioner for failing to timely file a 2008 client annual report, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Michael D. Stallman, J.], entered December 16, 2010), dismissed, without costs.

Respondent's determination was supported by substantial evidence (CPLR 7803[4]; 7804[g]). That evidence, the accuracy of which petitioner does not dispute, demonstrates that petitioner was not a first-time filer, and that it filed its 2008 client annual report 108 days after the February 17, 2009 deadline. Accordingly, petitioner violated New York City Lobbying Law (Administrative Code of City of NY) § 3-217(c), and was subject

to a fine of $25 per day for each day the required filing was late (51 RCNY 1-03[b][1][iv][B]).

We are unpersuaded by petitioner's focus on its purported good faith efforts to comply with the Lobbying Law, given that the statute does not provide for consideration of such criteria. We also reject petitioner's contention that it was deprived of due process. Petitioner was afforded an opportunity to "present relevant and material evidence" before an administrative law judge, in accordance with 51 RCNY 1-03(c)(6).

We have considered petitioner's remaining contentions and find them

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

ENTERED: JUNE 30, 2011

CLERK

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

5495 The People of the State of New York, Ind. 1749/09
Respondent,

-against-

Jose Morales,
Defendant-Appellant.

_____

Center for Appellate Litigation, New York (Robert S. Dean of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered May 6, 2010, convicting defendant, after a jury trial, of assault in the second degree and public lewdness, and sentencing him to an aggregate term of 3 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant challenges the evidence supporting the element of physical injury, asserting that the injured police officer exaggerated her

injuries. However, we find no basis for disturbing the jury's credibility determinations.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 30, 2011

CLERK

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

5497-
5497A Matthew H. Maschler,
Plaintiff-Respondent,

Index 108076/08

-against-

Stuart Brenker, et al.,
Defendants-Appellants.

_____

Dillon Horowitz & Goldstein LLP, New York (Michael M. Horowitz of counsel), for appellants.

Jamie Andrew Schreck, P.C., New York (Jamie Andrew Schreck of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Louis B. York, J.), entered July 12, 2010, in favor of plaintiff, and bringing up for review an order, same court and Justice, entered May 7, 2010, which denied defendants' motion for summary judgment dismissing the complaint, and granted plaintiff's motion for summary judgment in his favor, unanimously reversed, on the law, with costs, the judgment vacated, defendants' motion granted and plaintiff's denied, and the matter remanded for a determination of attorneys' fees to be awarded to defendants. Appeal from the order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff received his shares in defendant 5 County Alarm Systems, Inc., a closely held subchapter S corporation, from his mother, pursuant to a stock purchase agreement entered into in

September 2005. The transfer violated a right of first refusal provision in a prior agreement between plaintiff's mother and the other shareholders. However, defendants Stuart Brenker and Joel Brenker validated the transfer when they entered into an agreement to purchase the shares from plaintiff on August 15, 2007 (*see Ray v Ray*, 61 AD3d 442, 447 [2009]).

Plaintiff claims that the company improperly issued an IRS Schedule K-1 (reporting shareholder's share of income, deductions, credits, etc.) to his mother, declaring ordinary business income of $20,156 during a period in which she was the shareholder of record, without distributing any portion of the income. This claim is barred by the terms of the settlement and general release executed at the time plaintiff's shares were transferred (*see Littman v Magee*, 54 AD3d 14, 17 [2008]). Alternatively, plaintiff claims, for the first time on appeal, that he should be held harmless for any tax liability resulting from the reported income. Nothing in the release suggests that defendants intended to hold plaintiff harmless from any tax consequences.

For these reasons, and because plaintiff was fully compensated for his release of claims, the complaint, which alleges breach of contract and unjust enrichment, must be dismissed (*see Dragon Inv. Co. II LLC v Shanahan*, 49 AD3d 403,

405 [2008]; *Khalid v Scagnelli*, 290 AD2d 352, 354 [2002]; *Fruchthandler v Green*, 233 AD2d 214, 215 [1996]). In any event, plaintiff did not establish damages. He failed to demonstrate that the fact that the shareholder of record incurred a tax liability without receiving an equivalent amount of cash was improper. Nor did he submit any evidence that the disputed taxes were paid.

In accordance with the foregoing, defendants are entitled to attorneys' fees, pursuant to the terms of the settlement and general release.

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

ENTERED: JUNE 30, 2011

CLERK

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

5498 The People of the State of New York, Respondent, Ind. 2029/09

-against-

Daniel McNair, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (David J. Klem of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Shelia O'Shea of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J. at suppression hearing; Patricia M. Nunez, J. at plea and sentencing), rendered January 7, 2010, convicting defendant of criminal possession of a controlled substance in the first degree, and sentencing him, as a second felony drug offender, to a term of 13 years, unanimously affirmed.

The court properly denied defendant's suppression motion. Defendant failed to preserve his claim that police lacked reasonable suspicion to stop a car in which he was a passenger (*see People v Davis*, 233 AD2d 148 [1996], *lv denied* 89 NY2d 941 [1997]; *see also People v Colon*, 46 AD3d 260, 263 [2007]). Defendant likewise failed to preserve his claim that the procedure by which People obtained a search warrant to retrieve information from his cell phone was unconstitutional (*see People*

v Iannelli, 69 NY2d 684 [1986], *cert denied* 482 US 914 [1987]). We decline to review either of these claims in the interest of justice. As an alternate holding, we reject both claims on the merits.

When the police stopped the car in which defendant was riding, they clearly had reasonable suspicion that defendant, along with the driver and other persons, had just taken part in a large drug transaction. This was based on a long-term investigation, including surveillance and eavesdropping, that led to a chain of circumstantial evidence justifying the stop of the car.

The police took custody of a cell phone that defendant was carrying at the time of his arrest. While this case was pending in Supreme Court, the police obtained a search warrant to retrieve information from the phone. The ex parte procedure was lawful, since the target of a search warrant has no right to notice or an opportunity to be heard on the application (*see* CPL art 690; *Matter of Albany County Dept. of Social Servs. v Rossi*, 62 AD3d 1049, 1050 [2009]). We reject defendant's argument that

a different procedure was constitutionally required under the circumstances of this case.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 30, 2011

CLERK

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

5499N Heithem Anoun, Index 114837/08
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Rimland & Associates, New York (Anthony M. Grisanti of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Julie Steiner of counsel), for respondent.

_____

Order, Supreme Court, New York County (Karen S. Smith, J.), entered October 19, 2009, which granted defendant's motion to amend its answer to change an admission of ownership of the alleged accident location to a denial, unanimously affirmed, without costs.

Plaintiff alleges that on July 1, 2008, he tripped and fell over a depressed metal grating located in the ground at Chelsea Waterside Park. Plaintiff served a timely notice of claim upon defendant and, on November 5, 2008, commenced this action. In January 2009, defendant answered and admitted ownership and control over the area where the accident occurred.

Defendant subsequently moved for, inter alia, summary judgment, arguing that it did not own the subject park. Defendant provided evidence that the property was owned by the

State. When defendant realized that it had previously admitted ownership, defendant moved for leave to serve an amended answer and to stay a determination of the summary judgment motion.

It is well established that leave to amend a pleading is freely given "absent prejudice or surprise resulting directly from the delay" (*Fahey v County of Ontario*, 44 NY2d 934, 935 [1978]; *see* CPLR 3025[b]). "Prejudice arises when a party incurs a change in position, or is hindered in the preparation of its case, or has been prevented from taking some measure in support of its position" (*Valdes v Marbrose Realty*, 289 AD2d 28, 29 [2001]). Here, the 90-day period within which plaintiff could serve the State with a notice of claim terminated on September 29, 2008, more than three months prior to defendant's admission of ownership. Thus, the admission could not have caused plaintiff any prejudice. For the same reasons, plaintiff's claims of estoppel are unfounded (*see Baje Realty Corp. v Cutler*, 32 AD3d 307, 310 [2006]).

Although it may ultimately be found that defendant participates in the park's operation or retains some control over it, that does not warrant denial of the motion to amend. On such a motion, the court considers "the sufficiency of the merits of the proposed amendment" (*Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 25 [2003] [internal quotation marks and citation

omitted]). Here, defendant's submissions, which included an affidavit of the title examiner and appropriation maps showing that the property was the subject of a taking by the State, were sufficient to support the proposed amendment (*see e.g. MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [2010]).

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

ENTERED: JUNE 30, 2011

CLERK

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

5500N Grand Manor Health Related Facility, Inc., Plaintiff-Respondent, Index 303440/10

-against-

Hamilton Equities, Inc., et al., Defendants-Appellants.

_____

Macron & Cowhey, P.C., New York (John J. Macron of counsel), for appellants.

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

_____

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered October 27, 2010, which, inter alia, granted plaintiff's motion for a preliminary injunction enjoining defendants from taking any action against it with respect to the subject lease, unanimously affirmed, without costs.

The law of the case doctrine is inapplicable here, since there is no evidence that the motion court purported to overrule or modify any of this Court's prior orders concerning the parties (*see Kenney v City of New York*, 74 AD3d 630, 631 [2010]). The sole issue determined by the motion court was plaintiff's entitlement to a preliminary injunction; the court did not address any previously litigated issue regarding the parties' stipulated *Yellowstone* injunction.

We find that plaintiff demonstrated a likelihood of success on the merits. Plaintiff also established a danger of irreparable harm in the absence of the requested relief and a balance of the equities in its favor (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839 [2005]). Without the injunction, plaintiff, which operates a residential health care facility, would be at risk of losing its valuable leasehold and incurring significant permanent damage to more than 30 years of hard-earned goodwill (*see Concourse Rehabilitation & Nursing Ctr., Inc. v Gracon Assoc.*, 64 AD3d 405 [2009]; *GFI Sec., LLC v Tradition Asiel Sec., Inc.*, 61 AD3d 586 [2009]).

We have considered defendants' remaining contention and find it without merit.

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

ENTERED: JUNE 30, 2011

CLERK

Mazzarelli, J.P., Saxe, Renwick, DeGrasse, Richter, JJ.

4636-
4636A MBIA Insurance Corporation, Index 602825/08
Plaintiff-Respondent-Appellant,

-against-

Countrywide Home Loans, Inc., et al.,
Defendants-Appellants-Respondents,

Bank of America Corp.,
Defendant.

_____

Goodwin Procter LLP, New York (Mark Holland of counsel), for appellants-respondents.

Quinn Emanuel Urquhart & Sullivan LLP, New York (Philippe Z. Selendy of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered April 29, 2010, modified, on the law, to dismiss the implied duty claim in its entirety, and otherwise affirmed, without costs. Appeal and cross-appeal from order, same court and Justice, entered July 13, 2009, dismissed, without costs, as moot.

Opinion by Richter, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
David B. Saxe
Dianne T. Renwick
Leland G. DeGrasse
Rosalyn H. Richter, JJ.

4636-
4636A
Index 602825/08

_____x

MBIA Insurance Corporation,
Plaintiff-Respondent-Appellant,

-against-

Countrywide Home Loans, Inc., et al.,
Defendants-Appellants-Respondents,

Bank of America Corp.,
Defendant.

_____x

Cross appeals from the order of the Supreme Court, New York County (Eileen Bransten, J.), entered April 29, 2010, which, to the extent appealed from as limited by the briefs, granted the Countrywide defendants' CPLR 3211 motion to dismiss the amended complaint to the extent of dismissing the negligent misrepresentation claim and narrowing the claim for breach of the implied duty of good faith and fair dealing, and denied said defendants' motion to dismiss the fraud claim, and from the order, same court and Justice, entered July 13, 2009, which granted in part and denied in part the Countrywide defendants' motion to dismiss the original complaint.

Goodwin Procter LLP, New York (Mark Holland, Christopher J. Garvey, Abigail K. Hemani, Ashley H. Gray, Paul F. Ware, Jr., and Sarah Heaton Concannon of counsel), for appellants-respondents.

Quinn Emanuel Urquhart & Sullivan LLP, New York (Philippe Z. Selendy, Peter E. Calamari, Sanford I. Weisburst, Manisha M. Sheth and Eve S. Moskowitz of counsel), for respondent-appellant.

RICHTER, J.

Plaintiff MBIA Insurance Corporation (MBIA) is in the business of providing financial guarantee insurance and other forms of credit protection on financial obligations. Defendant Countrywide Financial Corporation (Countrywide Financial), itself or through its subsidiaries, is engaged in mortgage lending and other real estate finance related businesses, including mortgage banking, securities dealing and insurance underwriting. Defendant Countrywide Home Loans, Inc. (Countrywide Home) originates residential home mortgage loans and, together with defendant Countrywide Home Loans Servicing LP (Countrywide Servicing), services those loans. Defendant Countrywide Securities Corporation (Countrywide Securities), a registered broker-dealer, underwrites offerings of mortgage-backed securities.[1]

In this action, MBIA alleges that the Countrywide defendants (collectively Countrywide) committed fraud and breached certain contracts in connection with the securitization of pools of

[1] Countrywide Home, Countrywide Servicing and Countrywide Securities are all wholly-owned subsidiaries of Countrywide Financial. After the events set forth in the amended complaint, defendant Bank of America merged with Countrywide Financial and acquired these subsidiaries. Bank of America is not a party to this appeal.

residential mortgages.[2] Securitization involves packaging numerous mortgage loans into a trust, issuing debt securities in the trust and selling those notes, known as residential mortgage-backed securities, to investors. The securities are backed by the mortgages, and the borrowers' payments of principal and interest on their mortgage loans are used to pay the investors who purchased the securities.

According to the amended complaint, Countrywide Home originated or acquired residential mortgages, selected certain of those loans for securitization and transferred them into Countrywide-created trusts that issued the notes. Either Countrywide Home or Countrywide Servicing acted as the servicer for the mortgage loans. Countrywide Securities underwrote the securitizations and sold the securities to investors.

In order to make the securities more marketable, Countrywide engaged MBIA to provide financial guarantee insurance. Between 2002 and 2007, MBIA entered into 17 insurance contracts with Countrywide Home and Countrywide Servicing relating to 17 of Countrywide's securitizations; 15 of these, spanning from 2004 through 2007, are at issue in this action. Each securitization

[2] The facts set forth here are from the amended complaint which, unless contradicted by documentary evidence, must be accepted as true for purposes of this CPLR 3211 motion.

generally comprised one or two pools of mortgage loans consisting of between approximately 8,000 and 48,000 loans. All of the loans in the securitizations were either home equity lines of credit (HELOCs) or closed-end second mortgages (CESs).[3]

Pursuant to the insurance contracts, MBIA guaranteed the payments of interest and principal to the investors. Because the trusts' obligations were backed by MBIA, in its capacity as insurer, any shortfalls in trust payments to the investors would be covered by MBIA. According to the amended complaint, MBIA's guarantee allowed Countrywide to market the securities based on a AAA credit rating, rather than the lower credit rating the notes would otherwise have obtained.

In the late fall of 2007, there was a material increase in delinquencies, defaults and subsequent charge-offs of the loans underlying the securitizations. As a result, the trusts were unable to meet their payment obligations to the investors who held the securities and MBIA was forced to pay out on its

[3] With a HELOC, the equity in the property collateralizes a specified line of credit that may be drawn down by the borrower. A CES is also collateralized by the borrower's equity, but the loan is of a fixed amount. Both HELOCs and CESs are second liens on residential property and are junior in priority to the first lien mortgage. Thus, if the property is foreclosed, the proceeds must be used to fully satisfy the first lien before the second lien is paid. Accordingly, both HELOCs and CESs present more risk than a first-lien mortgage.

insurance policies. As of August 29, 2009, MBIA had paid $1.4 billion on its guarantees and faces future claims in excess of hundreds of millions of dollars more.

MBIA commenced this action alleging that the various Countrywide entities made material misrepresentations and breached warranties concerning the origination and quality of the mortgage loans underlying the securitizations. MBIA alleges that Countrywide falsely represented that the loans were made in strict compliance with its underwriting standards and guidelines, as well as industry standards. In fact, MBIA claims, Countrywide abandoned those guidelines by knowingly lending to borrowers who could not afford to repay the loans, or who committed fraud in loan applications or whose applications could not satisfy basic criteria for responsible lending.

For each securitization, Countrywide Home solicited bids from MBIA and provided it with "loan tapes" - key statistics about each underlying loan in the pool - that purportedly contained materially false information indicating that the borrowers were more creditworthy than they actually were.[4] In addition, Countrywide is alleged to have falsely represented

[4] The loan tapes generally included information such as the loan-to-value ratio for each loan, the debt-to-income ratio for each borrower, and the borrower's FICO score, which measured the borrower's creditworthiness.

that appraisals of residential properties were conducted by independent third-party appraisers. In fact, MBIA alleges, the appraisers were not independent but rather were affiliated with Countrywide, which led to a conflict of interest and increased the risk of inflated appraisals. In addition, Countrywide Securities gave MBIA prospectuses for the securities MBIA was going to insure. MBIA alleges that these documents too contained false representations.

Countrywide also provided MBIA with "shadow ratings" on the proposed pools of mortgage loans selected for the securitizations. A shadow rating, issued by a credit rating agency based on information provided by Countrywide as to the credit quality of the mortgage loans, represents the rating the securitization would have had without MBIA's financial guarantee. All of the securitizations had shadow ratings of at least BBB- or the equivalent. MBIA contends that in the absence of credit quality reflected by a shadow rating of at least BBB-, it would not have agreed to provide the financial guarantees. MBIA alleges that the shadow ratings were false, misleading or inflated.

According to the amended complaint, as a result of Countrywide's alleged misconduct and fraudulent misrepresentations concerning the quality of the loans underlying

the securitizations, thousands of mortgage loans went into default and MBIA was forced to pay out on its guarantees. MBIA contends that if it had known that Countrywide's representations about the loans were false, MBIA would never have guaranteed the notes and suffered the losses alleged.

In its amended complaint, MBIA asserts causes of action against the various Countrywide entities for, inter alia, fraud, negligent misrepresentation and breach of the implied duty of good faith and fair dealing.[5] Countrywide moved to dismiss these claims pursuant to CPLR 3211(a)(1) and (7), and in a decision entered April 29, 2010, the motion court dismissed the negligent misrepresentation cause of action, but declined to dismiss the fraud cause of action. With respect to the breach of the implied duty of good faith and fair dealing cause of action, the court dismissed the claim except for MBIA's allegation that Countrywide deliberately refused to take corrective action on defaulting loans so that it could collect more fees. Both plaintiff and Countrywide now appeal.

The motion court properly concluded that the fraud cause of action is not duplicative of the contract claim alleging breaches

[5] Since MBIA's original complaint was superseded by the amended complaint, we dismiss as moot the appeal and cross-appeal from the motion court's July 13, 2009 order addressed to the original complaint.

of certain representations and warranties. In order to establish fraud, a plaintiff must show a material misrepresentation of an existing fact, made with knowledge of its falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). General allegations that a defendant entered into a contract with the intent not to perform are insufficient to support a fraud claim (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]; *Univec, Inc. v American Home Prods. Corp.*, 265 AD2d 403, 403 [1999]).

A fraud claim will be upheld when a plaintiff alleges that it was induced to enter into a transaction because a defendant misrepresented material facts, even though the same circumstances also give rise to the plaintiff's breach of contract claim (*First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 291-292 [1999]). "Unlike a misrepresentation of future intent to perform, a misrepresentation of present facts is collateral to the contract . . . and therefore involves a separate breach of duty" (*id.* at 292; *see also Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986]; *GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [2010]; *Selinger Enters., Inc. v Cassuto*, 50 AD3d 766, 768 [2008]; *WIT Holding Corp. v Klein*, 282 AD2d 527, 528 [2001]).

We find that MBIA has sufficiently pleaded a fraud

independent of the contract claim. The amended complaint alleges that: (i) for each securitization, Countrywide Home provided MBIA with loan documentation, including requests for bids, loan tapes and underlying transaction documents; (ii) representations made in this documentation, such as the loan-to-value ratio, the debt-to-income ratio and the borrower's FICO score, were false and misleading; (iii) for each securitization, Countrywide Securities provided MBIA with prospectuses; (iv) these prospectuses contained false representations about Countrywide's compliance with its underwriting guidelines, the independence of the third-party appraisers, and Countrywide's knowledge of facts that would have caused a reasonable originator to conclude that a borrower would not be able to repay the loan; (v) Countrywide provided MBIA with false, misleading or inflated "shadow ratings" for the loans selected for securitization; (vi) Countrywide made regular presentations to MBIA falsely representing its risk-management systems and loan origination practices; and (vii) all of these representations were made with knowledge of their falsity and to induce MBIA to enter into the insurance agreements. MBIA further alleges that Countrywide Financial directed the activities of Countrywide Home and Countrywide Securities.

Because MBIA alleges misrepresentations of present facts, and not future intent, made with the intent to induce MBIA to

insure the securitizations, the fraud claim survives (*see First Bank*, 257 AD2d at 292 ["defendants intentionally misrepresented material facts about various individual loans so that they would appear to satisfy [the] warranties" in the parties' agreements]). It is of no consequence that some of the allegedly false representations are also contained in the agreements as warranties and form a basis of the breach of contract claim (*see id.* ["a fraud claim can be based on a breach of contractual warranties notwithstanding the existence of a breach of contract claim"]; *Jo Ann Homes at Bellmore v Dworetz*, 25 NY2d 112, 119-121 [1969] [allowing fraud claim to proceed in tandem with a contract claim, where the seller misrepresented facts as to the present condition of his property, even though these facts were warranted in the parties' contract]). "It simply cannot be the case that any statement, no matter how false or fraudulent or pivotal, may be absolved of its tortious impact simply by incorporating it verbatim into the language of a contract" (*In re CINAR Corp. Secs. Litig.*, 186 F Supp 2d 279, 303 [ED NY 2002]).

There is no merit to Countrywide's claim that the fraud cause of action fails to satisfy the particularity pleading requirements of CPLR 3016(b). Although CPLR 3016(b) requires a plaintiff to detail the allegedly fraudulent conduct, "that

requirement should not be confused with unassailable proof of fraud" (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]). The amended complaint sufficiently identifies Countrywide's misrepresentations and describes when and how they were made to MBIA, including through false and misleading loan tapes and prospectuses. The fraud claim also lists 4,689 loans that allegedly failed to comply with Countrywide's underwriting guidelines, specifies that the defective loans had debt-to-income ratios or combined loan-to-value ratios exceeding maximum guideline levels and alleges that the loans were approved on the basis of unverified borrower-stated income that was patently unreasonable. These allegations are "sufficient to permit a reasonable inference of the alleged conduct" (*id.* at 492). Furthermore, the amended complaint sufficiently identifies Countrywide Securities and Countrywide Financial's roles in the alleged fraud.

We reject Countrywide's contention that the fraud claim should have been dismissed for failure to plead a causal link between Countrywide's alleged conduct and MBIA's damages. To demonstrate fraud, a plaintiff must show, inter alia, that a defendant's misrepresentations were the direct and proximate cause of the claimed losses (*Laub v Faessel*, 297 AD2d 28, 30 [2002]). "A fraudulent misrepresentation is a legal cause of a

pecuniary loss resulting from action or inaction in reliance upon it if, but only if, the loss might reasonably be expected to result from the reliance" (*Stutman v Chemical Bank*, 95 NY2d 24, 30 [2000], quoting Restatement [Second] of Torts § 548A).

The amended complaint alleges that (i) Countrywide knowingly lent to borrowers who could not afford to repay their loans, who committed fraud in loan applications, or who otherwise did not satisfy the basic risk criteria for prudent and responsible lending that Countrywide claimed to use; (ii) Countrywide falsely represented to MBIA that the loans were made in strict compliance with its underwriting standards and guidelines, and made numerous other misrepresentations about the quality of the loans; (iii) the number of delinquencies and defaults was extremely high because the loans materially failed to comply with Countrywide's underwriting guidelines; (iv) a review conducted by MBIA revealed that 91% of the defaulted or delinquent loans showed material discrepancies from underwriting guidelines; and (v) as a result of the defaults, MBIA has been forced to make billions of dollars in claims payments on the insurance agreements.

These allegations are sufficient to show loss causation since it was foreseeable that MBIA would suffer losses as a result of relying on Countrywide's alleged misrepresentations

about the mortgage loans (*see Silver Oak Capital L.L.C. v UBS AG*, 82 AD3d 666, 667 [2011] [loss causation sufficiently alleged "since it was foreseeable that (the plaintiffs) would sustain a pecuniary loss as a result of relying on (the defendant's) alleged misrepresentations"]; *Teamsters Local 445 Frgt. Div. Pension Fund v Bombardier, Inc.*, 2005 US Dist LEXIS 19506, *57-58 [SD NY 2005]; *see also Hotaling v Leach & Co.*, 247 NY 84, 93 [1928] ["The loss sustained is directly traceable to the original misrepresentation of the character of the investment the plaintiff was induced to make"]). It cannot be said, on this pre-answer motion to dismiss, that MBIA's losses were caused, as a matter of law, by the 2007 housing and credit crisis (*see In re Countrywide Fin. Corp. Sec. Litig.*, 588 F Supp 2d 1132, 1174 [CD Cal 2008] [it is the job of the fact-finder to determine which losses were proximately caused by misrepresentations and which are due to extrinsic forces]).

The motion court properly dismissed the negligent misrepresentation cause of action. A claim for negligent misrepresentation requires a showing of a special relationship of trust or confidence between the parties which creates a duty for one party to impart correct information to another (*OP Solutions, Inc. v Crowell & Moring, LLP*, 72 AD3d 622, 622 [2010]; *Hudson*

Riv. Club v Consolidated Edison Co. Of N.Y., 275 AD2d 218, 220 [2000]). Generally, a special relationship does not arise out of an ordinary arm's length business transaction between two parties (*Aerolineas Galapagos, S.A. v Sundowner Alexandria, LLC*, 74 AD3d 652, 653 [2010]; *ESE Funding SPC Ltd. v Morgan Stanley*, 68 AD3d 676, 677 [2009]).

The allegations in the amended complaint are insufficient to show that MBIA and Countrywide shared the type of business relationship that would give rise to a duty on the part of Countrywide to impart correct information. The transactions in question were conducted by two sophisticated commercial entities: MBIA, a long-established insurance company experienced in writing financial guarantee policies, and Countrywide, then an industry leader in the residential mortgage industry. MBIA's claim of a long-standing relationship between the parties is belied by the allegations in the amended complaint that MBIA insured only two Countrywide securitizations in a short period prior to the transactions in question. MBIA and Countrywide's limited prior dealings do not elevate this arm's length transaction into a relationship of trust or confidence.

The claim that Countrywide had superior knowledge of the particulars of its own business practices is insufficient to

sustain the cause of action (*see Sebastian Holdings, Inc. v Deutsche Bank AG*, 78 AD3d 446, 447 [2010] ["Plaintiff's alleged reliance on defendant's superior knowledge and expertise in connection with its foreign exchange trading account ignores the reality that the parties engaged in arm's-length transactions pursuant to contracts between sophisticated business entities that do not give rise to fiduciary duties"]). Because MBIA has failed to allege facts showing that these sophisticated commercial entities engaged in anything more than an arm's length business transaction, the negligent misrepresentation claim was properly dismissed.

The motion court should have dismissed in its entirety the cause of action for breach of the implied duty of good faith and fair dealing. Both the claim as pleaded in the amended complaint and the claim as upheld by the motion court are duplicative of the breach of contract claims because they arise from the same facts (*see Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [2009]). MBIA's newly-crafted claim on appeal fares no better. The allegation that Countrywide exercised its discretion in bad faith merely restates the contract-based claims that Countrywide failed to abide by industry standards.

Accordingly, the order of the Supreme Court, New York County

(Eileen Bransten, J.), entered April 29, 2010, which, to the extent appealed from, as limited by the briefs, granted the Countrywide defendants' CPLR 3211 motion to dismiss the amended complaint to the extent of dismissing the negligent misrepresentation claim and narrowing the claim for breach of the implied duty of good faith and fair dealing, and denied said defendants' motion to dismiss the fraud claim, should be modified, on the law, to dismiss the implied duty claim in its entirety, and otherwise affirmed, without costs. The appeals from the order, same court and Justice, entered July 13, 2009, which granted in part and denied in part the Countrywide defendants' motion to dismiss the original complaint, should be dismissed, without costs, as moot.

All concur.

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

ENTERED: JUNE 30, 2011

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
John W. Sweeny, Jr.
James M. Catterson
Rolando T. Acosta
Sallie Manzanet-Daniels, JJ.

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Janith King, as the Administrator of
the Estate of Thorrie Murray, deceased,
Plaintiff-Appellant,

-against-

St. Barnabas Hospital, et al.,
Defendants-Respondents.

_____x

Plaintiff appeals from an order of the Supreme Court, Bronx County (Douglas E. McKeon, J.), entered August 4, 2009, which granted defendants' motion for summary judgment dismissing the complaint.

Ephrem J. Wertenteil, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Fay Ng and Pamela Seider Dolgow of counsel), for respondents.

MANZANET-DANIELS, J.

In this case, involving allegedly negligent resuscitation efforts by a team of first responders, we revisit the vexing question of the degree of certainty necessary to establish legal or proximate cause in a medical malpractice action.

By definition, victims requiring resuscitation are found in grave condition from which the likelihood of recovery may be negligible. These circumstances, however, cannot excuse first responders from all responsibility when they fail to abide by professional standards. Negligent resuscitation attempts – while not a but-for cause of the victim's distress – may nonetheless contribute to a death so as to make the imposition of liability appropriate.

On February 3, 1999, 38-year old Thorrie Murray, a correction officer at Rikers Island, was off-duty and playing a basketball game at the correctional facility's gym when he suffered cardiac arrest and collapsed during the game. Medical assistance was summoned at approximately 6:25 A.M.

Medical personnel from the Rikers Medical Clinic arrived on the scene at 6:32 P.M. The clinic's medical staff consisted of employees from defendant St. Barnabas Hospital, which was under contract with defendant New York City Health and Hospitals Corporation (HHC) to provide medical services to Rikers Island.

Defendant City of New York operated and controlled the Rikers Island correctional facility, and oversaw (along with HHC) the performance of Rikers Medical Clinic.

Daniel Ashitey, a licensed physician's assistant,[1] and Kevin Lewis, a registered nurse, were the first responders. Ashitey testified that when they arrived on the scene, at 6:32 P.M., Murray was nonresponsive, not breathing, and unconscious with dilated pupils. Lewis and Ashitey immediately commenced cardiopulminary resuscitation. Ashitey used the "quick look" function on the defibrillator to ascertain whether there was any electrical activity in the heart. At deposition, Ashitey testified that he saw some activity on the cardiac monitor that "looked like a mixture of asystole and some V-fib [ventricular fibrillation]." However, the contemporaneous reports of Ashitey and Lewis stated that the quick paddle check showed Murray to be in an asystolic condition, that is, a "flat line" indicative of no electrical activity. The record evidence showed that defibrillation is not indicated for a patient in an asystolic state and that shocking a patient in asystole could in fact be detrimental to the heart muscle.

[1]As a physician's assistant, Ashitey was qualified to start an IV, administer medications, defibrillate and intubate, if necessary.

Ashitey shocked Murray with the defibrillator paddles at 200 joules in an attempt to restore Murray's heartbeat. Ashitey testified that he checked Murray's heart rhythm again, "confirm[ed]" that he was in an asystolic condition, and accordingly, discontinued defibrillation.

When asked whether starting an IV was an appropriate measure for a person in cardiac arrest, Ashitey responded, "Generally yes." However, no IV was started at that time. Ashitey also agreed that intubation is generally indicated for patients in cardiac arrest.

In a statement Ashitey made on the date of the occurrence, he wrote that after starting CPR, he did "[a] quick paddle check . . . with the defibrillator. Patient was found to be in asystole. Patient defibrillated at 200 joules, no response." Ashitey acknowledged that defibrillation would not be indicated for a patient in asystole.

Kevin Lewis described Murray as gray, "ashen," not breathing, with no pulse. Lewis testified that he initiated CPR and administered oxygen via Ambu-bag. The first responders carried a bag containing IV start equipment, medications including epinephrine and atropine, and intubation equipment such as a laryngoscope and guide wires. Lewis recalled that Murray was debrillated once, without success, during the emergency

response. Lewis testified that as a nurse trained in basic life support he lacked the authority to decide when a defibrillator would be used.[2] Lewis agreed that IV access was generally indicated for a patient in cardiac arrest, and agreed that intubation was the "optimal method" for securing airway access in the patient.

CPR was continued until the arrival at approximately 6:38 P.M. of Dr. Jean-Louis and two nurses from the Rikers Medical Clinic. The defibrillator monitor indicated that Murray was in an asystolic state. Dr. Jean-Louis was not advised by Ashitey or Lewis that there had been an attempt to defibrillate Murray.

Dr. Jean-Louis and the nurses set up an IV and administered three doses of epinephrine. Dr. Jean-Louis testified that he did not know why Ashitey and Lewis had not earlier established IV access. Dr. Jean-Louis attempted, but was unable to intubate Murray. Dr. Jean-Louis acknowledged that it was generally acceptable practice to intubate a patient in an asystolic state. He estimated that only 30-35% of oxygen reaches the patient's lungs via Ambu-bag, whereas 100% of oxygen reaches the lungs of a patient who is intubated. CPR continued.

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[2]Lewis testified, however, that he had received a certification in advanced life support. He also had experience working as an emergency room nurse. As a registered nurse, he was trained to start an IV.

Upon the arrival of EMS, at 6:50 P.M., Murray was successfully intubated. Atropine was administered at regular intervals, with no response. EMS did a "quick look" with the defibrillator paddles and noted an asystolic condition. Dr. Jean-Louis, in his written statement, recorded that EMS thereafter attempted to defibrillate Murray three times without success. Dr. Jean-Louis, like Ashitey, acknowledged that defibrillation was not indicated for a patient in an asystolic state and could in fact be detrimental to the heart muscle, eliminating the possibility of the patient recovering a heart rhythm. Murray remained unresponsive and was pronounced dead at 7:16 P.M.

In February 2001, Murray's estate commenced this action for medical malpractice and wrongful death against St. Barnabas Hospital, HHC and the City. The estate alleged that the defendants deviated from accepted medical practice in failing to properly assess decendent's heart function (i.e., defibrillating Murray although he was in asystole), and in failing to properly and timely institute advanced cardiac life support procedures including the administration of epinephrine and atropine.

In February 2009, defendants moved for summary judgment dismissing the complaint, arguing that the opinion of their medical expert established that the emergency medical treatment

rendered to Murray was within accepted medical standards, and, in any event, had not contributed to his death.

Defendants relied on the expert affirmation of Dr. Mark Henry, a board-certified emergency physician and the Chairman of the Emergency Medicine Department at Stony Brook Medical Center. Dr. Henry opined, with a reasonable degree of medical certainty, that the emergency medical treatment rendered to Murray by defendants did not depart from accepted practice, and did not contribute to Murray's death. Dr. Henry noted that when the first responders arrived on the scene, they found Murray to be in an asystolic state. He noted that "asystole is an ominous finding in victims of cardiac arrest in which the heart stops beating and is characterized by the absence of electrical and mechanical activity in the heart," and opined that the possibility of survival from such a state "is extremely rare, especially in the absence of immediate bystander CPR."

Dr. Henry opined that the decision by Ashitey to defibrillate was appropriate under the circumstances since "it was determined that the cardiac rhythm suggested possible ventricular fibrillation." He opined that shocking the patient was appropriate under these circumstances and had no detrimental effect on Murray's outcome.

Dr. Henry concluded:

> "It is my further opinion, to a reasonable degree of medical certainty, that the decedent suffered a sudden cardiac death and nothing more could have been done after the medical staff arrived at the gym to resuscitate decedent. As such, nothing that the Rikers Island medical staff did or did not do contributed to the death of this patient."

The estate opposed the motion, arguing that defendants had not established prima facie entitlement to summary judgment and, assuming they had, that the opinion of the estate's medical expert established the existence of triable issues of fact as to whether defendants departed from accepted medical practice and whether those departures were substantial factors in bringing about Murray's death.

Plaintiff's expert, a board certified emergency physician, opined, to a reasonable degree of medical certainty, that defendants departed from accepted practice by failing to timely administer advanced life support medications and by the inappropriate administration of electrical defibrillation to an asystolic rhythm.

Plaintiff's expert explained that CPR and emergency critical care proceed from the presumption that the brain may still be viable even after the heart has stopped, and thus, "the accepted

medical standards assumes that when the possibility exists that the brain is viable, absent some compelling medical or legal reason to act otherwise, resuscitation should be initiated."

Plaintiff's expert opined that defibrillating a patient in an asystolic state must be avoided "because doing so removes any chance the patient has of obtaining normal rhythm." He explained that obtaining intravenous access is essential because pharmacological therapy is rapidly needed, and that securing the patient's airway and administering oxygen is "vital" to avoid hypoxemia.

Plaintiff's expert opined that accepted practice, as reflected in guidelines such as those promulgated by the American Heart Association, required that emergency responders presented with an asystolic patient must confirm the absence of a heart rhythm in at least two lead configurations. If confirmed, CPR should be continued and supplemental oxygen administered. The patient should be intubated, and a large-bore peripheral IV inserted to permit the administration of epinephrine, with an initial dose of 1 mg and repeated at least every 3 to 5 minutes, as well as the administration of atropine, beginning at a 1 mg dose, at least every 3 to 5 minutes until maximum dose is achieved.

Plaintiff's expert opined that the failure to obtain IV

access and to administer epinephrine for 6 to 10 minutes after Lewis and Ashitey arrived, and the failure to administer atropine until after EMS arrived, a delay of 15 to 18 minutes, constituted departures from accepted medical practice. Plaintiff's expert noted that as a registered nurse and physician's assistant, both Lewis and Ashitey were qualified to start intravenous lines and to administer medication.

Plaintiff's expert opined that electrical defibrillation is not indicated for a patient in asystole, and that defibrillating a patient in an asystolic state can significantly harm the heart muscle and "eliminate any chance of recovery for the patient." Plaintiff's expert opined that assuming Murray was asystole, as described by defendants' witnesses in their testimony and statements, defibrillating Murray constituted a deviation from accepted medical practice.

Plaintiff's expert opined that these departures were substantial factors in bringing about Murray's death. Plaintiff's expert noted that epinephrine, an endogenous catecholamine with both alpha- and beta-adrenergic activity, produces a "favorable redistribution of blood flow during CPR and improves coronary and cerebral perfusion pressure," and that atropine, a parasympathologic drug that enhances both sinus node automaticity and atrioventricular conduction "acts to restore

normal AV nodal conduction and initiate electrical activity." Plaintiff's expert opined that the delay in administering epinephrine and atropine contributed to Murray's failed resuscitation and death and diminished his chances of survival.

Plaintiff's expert opined that defibrillating a patient in asystole will result in further ischemic damage and decrease the chances of a successful resuscitation.

The court granted defendants' motion for summary judgment dismissing the complaint.[3]

The court found that defendants' proof established, prima facie, that the first responders did not depart from accepted practice in their treatment of Murray. The court noted that upon their "timely" arrival on the scene, Murray was "already unresponsive," and that

> "[a]ll appropriate life saving measures were undertaken in an effort to revive [Murray] including the initiation of CPR. Appropriate and indicated medications were administered in a timely fashion and repeated without any apparent response. The decedent was found in asystole and although there was evidence to

[3]The court rejected defendants' argument that the emergency medical responders should be afforded the protections of the "Good Samaritan" statute, reasoning that it could not be said that the first responders, who worked for the Rikers Island medical clinic, voluntarily and without expectation of compensation had rendered first aid to decedent. The parties do not take issue with this aspect of the motion court's ruling and we accordingly do not address it on the appeal.

> suggest possible ventricular fibrillation on the cardiac monitor, defibrillating the patient had no detrimental effect on the outcome."

The court "rejected" the opinion of the estate's expert, noting that even under "the best circumstances, plaintiff's expert cannot predict whether Officer Murray could have been saved or if cardiac function could have been restored." The court noted that the expert had failed to offer any statistics or studies concerning the survival rates of patients in an aystolic state, or whether the administration of epinephrine or atropine during cardiac arrest increases the patient's chances of survival.

We disagree with the result reached by the motion court, and now reverse. On a motion for summary judgment in a medical malpractice action, the defendant doctor has the initial burden of establishing the absence of any deviation or departure from accepted medical practice, or that any such departure was not a proximate cause of the injury or damage alleged. Proximate cause is established where the defendant's conduct was a "substantial factor" in bringing about the injury (*Stewart v New York City Health & Hosps. Corp.*, 207 AD2d 703, 704 [1994], *lv denied* 85 NY2d 809 [1995]).

The motion court, in granting defendants' motion for summary

judgment, misapprehended the standard for establishing proximate cause. The motion court found that plaintiff failed to raise a triable issue of fact as to whether defendants' departures caused the decedent's death, noting that plaintiff's expert had failed to offer statistics concerning the survival rates of patients in an asystolic state, and could not predict whether Murray would have been saved. This Court, however, has cautioned that "proximate cause is a legal concept which cannot be dissected and measured in terms of percentages," and that it "has proven to be an elusive [concept], incapable of being precisely defined to cover all situations" (*Mortensen v Memorial Hosp.*, 105 AD2d 151, 157 [1984] [internal quotation marks and citation omitted]; *see Goldberg v Horowitz*, 73 AD3d 691, 694 [2d Dep't 2010] ["proximate cause may be found legally sufficient even if (the plaintiff's) expert is unable to quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased the injury"]).

The evidence in this case supports the inference that by shocking decedent when he was in an asystolic condition and by failing to timely administer the appropriate cardiac medications, defendants diminished decedent's chances of recovery and may have further damaged decedent's heart. "If the proof is ambivalent as to whether the deceased would have died regardless of the

malpractice, a pure factual issue is raised . . . and such an issue can only be resolved by a jury determination of whether the malpractice proximately deprived the deceased of that substantial possibility" (*Mortensen*, 105 AD2d at 157).

The motion court was of the view that decedent, found in a life-threatening, nonresponsive state, was in some sense destined to die, and therefore, that any departures from the resuscitation protocols by the first responders were of no import. However, we cannot endorse a rule that would essentially absolve first responders of liability where they deviate from life support protocols. The very fact that advanced life support protocols exist for patients in an asystolic state means that adherence to the protocols afford a chance of reviving the patient, notwithstanding the grave nature of the condition. It necessarily follows that failure to follow the protocols reduces the chances for reviving the patient.

New York courts have implicitly recognized liability premised on negligent resuscitation efforts (*see e.g. Lazzaro v County of Nassau*, 245 AD2d 342 [1997]), and the theory is recognized in other states (*see e.g. IHS Acquisition No. 131, Inc. v Crowson*, 2010 WL 636964, 2010 Tex. App. LEXIS 1274 [Ct App 2010]; *Wax v Tenet Health Sys. Hosp., Inc.*, 955 So2d 1 [Fla 2007]), an acknowledgment that under certain circumstances the

negligent actions of medical personnel called upon to render life support may depart from the protocols to such a degree that those actions may be said to have contributed to a decedent's death by the elimination or deprivation of any possibility of survival.[4]

In this case, defendants failed to meet their prima facie burden of establishing either the absence of a departure or lack of causation. Dr. Henry's opinion that Lewis and Ashitey did not deviate from acceptable medical practice was based on an assumption that the decedent was in ventricular fibrillation when he was shocked by Ashitey. However, the documentary evidence on the motion, including Lewis's and Ashitey's contemporaneous reports of the incident and Lewis's deposition testimony, showed that decedent was in an asystolic condition. The only "evidence" that decedent was other than asystolic was Ashitey's testimony, eight years after the incident – and contrary to his initial report – that he observed a "mixture of asystole and some V-fib." It remains undisputed that defibrillation is contraindicated, and in fact detrimental, for a patient in an asystolic condition – a proposition Dr. Henry did not even purport to refute.

Moreover, defendants' expert failed to even address the

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[4]These actions bear some similarity to the "wrongful suicide" cases, in which we have found that imposition of liability upon psychiatric personnel may be appropriate under certain circumstances for failing to prevent a suicide.

other departures alleged, namely, that defendants deviated from accepted medical practice in not administering epinephrine for as long as 10 minutes and atropine for 18 minutes.

We find, in any event, that plaintiff's expert has adequately raised a triable issue of fact as to whether defendants departed from accepted practice in their resuscitation attempts. Both plaintiff's expert and Dr. Jean-Louis testified that defibrillating a patient in an aystolic condition damages the heart muscle, thereby diminishing the chances of survival. The failure to promptly set up an IV and to administer epinephrine and atropine, as per resuscitation protocols, also diminished the chance of survival. Plaintiff established a delay on the order of 6 to 10 minutes in administering epinephrine and 18 minutes in administering atropine, which defendants do not dispute.

Accordingly, the order of the Supreme Court, Bronx County (Douglas E. McKeon, J.), entered August 4, 2009, which granted defendants' motion for summary judgment dismissing the complaint,

should be reversed, on the law, without costs, and the motion denied.

All concur.

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

ENTERED: JUNE 30, 2011

CLERK