SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 27, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Catterson, J.P., Richter, Abdus-Salaam, Manzanet-Daniels, Román, JJ.

5707 The People of the State of New York, Ind. 5248/08
Respondent,

-against-

Vincent Barone,
Defendant-Appellant.

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5708 The People of the State of New York, Ind. 5248/08
Respondent,

-against-

V. Reddy Kancharla,
Defendant-Appellant.

Lankler & Carragher, LLP, New York (Andrew M. Lankler of counsel), for Vincent Barone, appellant.

Stillman, Friedman & Shechtman, P.C., New York (Paul Shechtman of counsel), for V. Reddy Kancharla, appellant.

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

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered April 7, 2010, convicting defendant Vincent Barone, after a jury trial, of enterprise corruption,

attempted grand larceny in the third degree, two counts of scheme to defraud in the first degree and nine counts of offering a false instrument for filing in the first degree, and sentencing him to an aggregate term of 5 1/3 to 16 years, modified, on the law and the facts, to the extent of vacating the conviction for enterprise corruption and, as a matter of discretion in the interest of justice, to the extent of modifying the remaining sentences to run concurrently, thereby reducing the aggregate term to 16 months to 4 years, and otherwise affirmed. Judgment, same court and Justice, rendered May 26, 2010, convicting defendant V. Reddy Kancharla, after a jury trial, of enterprise corruption, two counts of scheme to defraud in the first degree, nine counts of offering a false instrument for filing in the first degree and three counts of falsifying business records in the first degree, and sentencing him to an aggregate term of 7 to 21 years, modified, on the law and the facts, to the extent of vacating the convictions for enterprise corruption and offering a false instrument for filing under counts 12 and 13 as originally numbered in the indictment, and, as a matter of discretion in the interest of justice, to the extent of modifying the remaining sentences to run concurrently, thereby reducing the aggregate term to 16 months to 4 years, and otherwise affirmed. The matter

is remitted to Supreme Court, New York County, for further proceedings pursuant to CPL 460.50(5).

We exercise our discretion in the interest of justice to modify defendants' sentences so that the sentences for the remaining counts run concurrently. Pursuant to CPL 470.15(6)(b), this Court has "broad, plenary power to modify a sentence that is unduly harsh or severe under the circumstances," even with respect to an otherwise legal sentence (*see People v Delgado*, 80 NY2d 780, 783 [1992]). This power may be exercised in the interest of justice and without deference to the sentencing court (*id.*) Where the court deems an otherwise legal sentence to be excessive, it may "substitute [its] own discretion even where a trial court has not abused its discretion" (*People v Edwards*, 37 AD3d 289, 290 [1st Dept 2007], *lv denied* 9 NY3d 843, 840 [2007], citing *People v Rosenthal*, 305 AD2d 327, 329 [1st Dept 2003]).

In this case, the trial court sentenced Barone to an aggregate term of 5 1/3 to 16 years, indicating that the sentences on four counts -- including offering a false instrument for filing, attempted grand larceny, and scheme to defraud -- should run consecutively, but concurrently with the sentences on the remaining counts, including the sentence of 5 1/3 to 16 years for enterprise corruption. Similarly, the trial court sentenced

Kancharla to an aggregate term of 7 to 21 years, indicating that the sentences on six counts -- including offering a false instrument for filing, falsifying a business record, and scheme to defraud -- should run consecutively to each other. Kancharla's 7-to-21-year sentence for enterprise corruption along with the sentences for the remaining counts, were to run concurrently.

Thus, the trial court meted out the sentences in a manner such that even if the enterprise corruption convictions were vacated, the defendants would still serve equivalent aggregate terms. As defendants point out, the trial court apparently felt that such sentences were warranted in order to "send a message" to "'the construction industry in New York City [which] over the decades has been rife with corruption.'"

In light of our decision to vacate the enterprise corruption convictions, we find that the imposition of consecutive sentences is unduly harsh. "[F]airness of the criminal justice system requires some measure of equality in the sentences meted out to defendants who commit the same or similar crimes" *see People v Schonfeld*, 68 AD3d 449, 450 [1st Dept 2009] [internal quotation marks omitted]; *People v Andrews*, 176 AD2d 530 [1st Dept 1991], *lv denied* 79 NY2d 918 [1992] [although defendant was could be

properly sentenced to greater term than those imposed upon codefendants who pled guilty, the concept of proportionality of punishment warranted a reduction of his sentence]; *People v Slobodan*, 67 AD2d 630, 630, 412 N.Y.S.2d 21, 22 (1st Dept. 1979)(sentence reduced where the difference between defendant's sentence and those of his codefendants who did not go to trial was "so great as to raise serious questions as to whether [defendant was] not being penalized for going to trial").

Here, in return for his cooperation with the prosecution, codefendant Thumma, who affixed his engineer's stamp to hundreds of mix design reports, received a misdemeanor conviction and a probationary sentence and will likely retain his engineering license. Similarly, codefendant Porter pleaded guilty to a single felony count and was sentenced to probation. The

defendants' consecutive sentences for the same or similar crimes, all non-violent class E felonies, are strikingly disproportionate and should be reduced in the interest of justice.

All concur except Catterson, J.P. and Richter, Abdus-Salaam and Román, JJ. who concur in Part I of a separate memorandum by Catterson, J.P.; Richter, Abdus-Salaam, Manzanet-Daniels and Román, JJ. who concur in Part I of a separate memorandum by Manzanet-Daniels, J.; Catterson, J.P. who dissents in part in Part II of his separate memorandum and Manzanet-Daniels, J. who dissents in part in Part II of her separate memorandum as follows:

CATTERSON, J.P. (concurring in part and dissenting in part)

Part I

In this case involving alleged falsified test and inspection reports for landmark projects in the New York City metropolitan area, we find that defendants' convictions for enterprise corruption were not supported by legally sufficient evidence and were against the weight of the evidence. Relying on pure conjecture bolstered by empty rhetoric, the People failed to produce any evidence that either defendant knew that test results and inspection reports were fabricated, much less that the defendants spearheaded a criminal enterprise.

The record reflects that in 1995, defendant V. Reddy Kancharla joined Testwell Craig, a construction material testing company, as its laboratory director. Kancharla acquired the company three years later, renaming it Testwell Laboratories, Inc. (hereinafter referred to as "Testwell"). Testwell was considered the preeminent material testing laboratory in the New York area. Both public and private builders relied on its test reports and certifications about the strength of concrete and the quality of steel in structures built in the city.

In October 2008, a New York County grand jury returned an indictment against Testwell, its owner and chief executive

officer Kancharla, its vice-president of engineering, defendant Vincent Barone, and several other employees, charging various crimes including enterprise corruption, scheme to defraud and offering a false instrument for filing. The crimes were based on five separate criminal schemes. At issue in this appeal are three schemes involving concrete and steel testing of major, high-profile projects including Yankee Stadium, the Freedom Tower, and Jet Blue facilities at JFK Airport.

Kancharla was charged in connection with the "mix design scheme," the "steel inspections scheme" and the "certified inspectors" scheme, but not in the "field tests scheme" or the "compressive/flexural strength alternations scheme." Barone was charged only in the "steel inspections scheme" and "compressive/flexural strength alternations scheme."

In the "mix design scheme" the People alleged that Testwell, rather than utilizing the "preliminary tests method," one of three methods authorized by the Building Code to calculate the strength of concrete needed for a project, created a formula believed to meet project specifications, and then used a computer program to generate expected compressive strength tests. Thus, the mix design reports were the product of a computer algorithm, not actual testing. The People contended that Kancharla stamped

and signed the improperly-prepared “mix design” reports and urged Testwell’s laboratory director, Dr. Kaspal Thumma, to do the same.

In the “compressive/flexural strength alterations scheme” the People alleged that compressive strength test results were altered by Testwell employees before the results were sent out for review, and that Barone authorized changes to certain test results related to one project through faxes sent from his assistant. The People’s theory was that the altered test results were designed to eliminate anomalous outcomes so that the projects’ engineers would not question the results. At trial, the prosecution relied on testimony from Ana Murthy, an employee in the concrete department, and on documents seized from Testwell’s offices to identify who altered test results.

The “steel inspections scheme” charges arose from steel inspections performed by two Testwell inspectors in 2007 for the Dormitory Authority of New York at a South Carolina steel fabrication plant. The People alleged that Testwell double-billed for the inspectors’ work.

Kancharla was convicted of all the mix design counts and one of the 22 “steel inspections scheme” charges, and was acquitted of the “certified inspectors scheme” charge. He was also

convicted of being the leader of the "Testwell Group," which was allegedly a criminal enterprise. Barone was convicted of five counts in the "compressive/flexural strength alterations scheme" and seven counts in connection with the "steel inspections scheme." He was also convicted of enterprise corruption.

In our view, the evidence necessary to establish the elements of enterprise corruption was wholly missing from the People's proof. Indeed, the entire theory of the People's case is made of conjecture, surmise and innuendo rather than proof beyond a reasonable doubt. A person is guilty of enterprise corruption when that individual is employed by or associated with a criminal enterprise and intentionally participates in the affairs of that enterprise by engaging in a pattern of criminal activity involving at least three criminal acts. Penal Law § 460.20(1), (2); see People v. Besser, 96 N.Y.2d 136, 726 N.Y.S.2d 48, 749 N.E.2d 727 (2001); People v. Western Express Intl., Inc., 85 A.D.3d 1, 923 N.Y.S.2d 34 (1st Dept. 2011), rev'd 19 N.Y.2d 652, ___ N.Y.S.2d ___, ___ N.E.2d ___ (2012).

In Besser, the Court of Appeals held that:

> "Penal Law § 460.20 was plainly intended to reach conduct that was not already subject to criminal prosecution (*see*, Bill Jacket, L 1985, ch 516). The emphasis of the legislation was not on the quantity or nature of the myriad, isolated criminal activities underlying the new offense --

> conduct adequately addressed elsewhere in the Penal Law. Instead, it '*focuse[d] upon criminal enterprises because their sophistication and organization make them more effective at their criminal purposes and because their structure and insulation protect their leadership from detection and prosecution*' (Penal Law § 460.00). Thus, *the purpose of creating the separate crime was to address the particular and cumulative harm posed by persons who band together in complex criminal organizations*." 96 N.Y.2d at 142, 749 N.E.2d at 729, 726 N.Y.S.2d at 50 (emphasis added).

A "criminal enterprise" has also been defined as "a group of persons sharing a common purpose of engaging in criminal conduct, associated in an ascertainable structure distinct from a pattern of criminal activity, and with a continuity of existence, structure and criminal purpose beyond the scope of individual criminal incidents." Penal Law § 460.10(3); see Western Express, 85 A.D.3d at 6-7, 923 N.Y.S.2d at 37-38; People v. Yarmy, 171 Misc.2d 13, 16-17, 651 N.Y.S.2d 840, 843 (Sup. Ct., NY County 1996). Thus, a criminal enterprise consists of three elements: (i) a common purpose; (ii) an ascertainable structure distinct from a pattern of criminal activity; and (iii) a continuity of existence, structure and criminal purpose. See Western Express, 85 A.D.3d at 7, 923 N.Y.S.2d at 38.

In Western Express, a majority of this Court upheld the enterprise corruption counts on the ground that the defendants "transform[ed] what had been [a] legitimate business into a hub

for criminal activity geared toward maximizing ... profits from the theft and use of stolen credit card information." 85 A.D.3d at 13, 923 N.Y.S.2d at 42. The Court of Appeals recently reversed, finding that "[t]here [was] no hint that ... [the participants] were somehow connected to the workings of a structured, purposeful criminal organization." Western Express, 19 N.Y.3d at 659.

The Western Express decision is particularly instructive in that it reiterates that the People must prove that there is a "common purpose" and an "ascertainable" hierarchical structure. The Court of Appeals, quoting the dissent at this Court, specifically noted that although there was a pattern of illegal activity, there was no "'evidence of any collective decision-making or coordination with respect to the purported enterprise's activities or of any overarching structure of authority or hierarchy in which defendants participated.'" Western Express, 19 N.Y.3d at 657, quoting 85 A.D.3d at 19, 923 N.Y.S.2d at 46 (Andrias, J., dissenting). The Court concluded that the enterprise corruption indictments should have been dismissed because there could be no reasonable inference of an "enduring structurally distinct symbiotically related criminal entity with which [defendants] were purposefully associated." 19

N.Y.3d at 660.

Other decisions on continuing criminal enterprise similarly rely on evidence of a defendant's purposeful participation in a distinct hierarchy. In People v. Forson, N.Y.L.J., May 12, 1994 at 29, col. 3 (Sup. Ct. N.Y. Co. 1994), the defendants formed a business, Oxford Capital Securities, that "stole vast sums" of money "through a variety of fraudulent [securities schemes]." The testimony showed that "Forson was at the top of the hierarchy and directed the entire criminal enterprise" -- that he set the goals, policies, and strategies" for Oxford -- and that other defendants formed an "inner circle" to "execute his directives and to relay them to those below in the enterprise." Id. In People v. D.H. Blair & Co., Inc., 2002 N.Y. Slip Op. 50152[U], *9 (Sup. Ct. N.Y. County 2002), the defendants operated a securities "boiler room" through a "hierarchical structure" with "the top of the structure planning the objectives of the enterprise and directing how the objectives would be achieved, and the middle and bottom levels engaging in activities to carry out the scheme." In People v. Pustilnik, 14 Misc.3d 1237(A), 2007 N.Y. Slip Op. 50407[U] (Sup. Ct. N.Y. County 2007), the indictment alleged a criminal enterprise bent on defrauding no-fault insurance carriers, with Pustilnik and his mother "at the top of

the structure ... establish[ing], plan[ning] and direct[ing] the accomplishments of its illegal goals" and others "carrying out [their] criminal plan." Id. at *6. Finally, in People v. Marquez, N.Y.L.J., July 22, 1996 at 25, col. 6 (Sup. Ct. N.Y. County 1976), Raymond Marquez "controlled and managed a sophisticated gambling syndicate," supervising approximately 100 employees. Marquez was "[a]t the top of the hierarchy;" his associates called him "Boss"; "[o]n a continuing basis he set the goals, policies and strategies of the organization"; and the operation of each gambling spot was "centralized under his direction."

Here, as in Western Express, there is "no proof of concerted activity from which a petit jury might reasonably have gathered that the appellants were knowing participants in the affairs of a 'criminal enterprise.'" Western Express, 19 N.Y.3d at 660. Defendant Kancharla asserts, and we concur, that the People failed to introduce any evidence that Kancharla knew that anyone at Testwell altered the results from the compressive tests or that the field test results from the Yankee Stadium Project were fabricated. Similarly, the People failed to introduce evidence that Kancharla knew that there was any problem with the inspection reports for the John Jay Project or that the

certifications submitted to the School Construction Authority were inaccurate. There is also no evidence that Kancharla discussed any alleged illegal activity with anyone at Testwell but for an extremely brief exchange sometime in 2004 with Thumma concerning the mix design reports. Absent this proof, the enterprise corruption counts cannot stand.

It appears that the People relied on two witnesses to make out the charge of enterprise corruption: Thumma and Karen Connelly. Connelly testified about Testwell's website and newsletters. This testimony was seemingly introduced to show Testwell's corporate hierarchy. Thumma effectively negated Connelly's testimony when he testified that the website was "totally out of date." Moreover, Thumma's testimony is far more important for what it did not say. While Thumma stated that there were regular meetings of Testwell's management, Thumma did not testify that at any meeting at Testwell there was any discussion related to any of the schemes described above.

The People offered no proof that Kancharla, Barone, or Testwell encouraged or expanded any criminal transactions. They adduced no proof that anyone encouraged "more and larger criminal transactions." Simply put, the People failed to introduce any evidence of a leadership structure, overall planning of the

criminal enterprise, or any communications between Kancharla, Barone, and any of the Testwell employees in furtherance of the criminal enterprise as required by the precedent cited above. Astoundingly, there was no testimony that any employee of Testwell ever spoke with Kancharla or Barone about the different crimes other than the one tangential conversation that Kancharla had with Thumma.

In the People's brief on appeal and at oral argument, the People offered a series of wholly unsupported arguments and significant misrepresentations of the record to sidestep the absence of proof on the criminal enterprise issue. The People contended that Testwell's "computer programming, the vagueness about [its] corporate titles and responsibilities, [and its] careful crafting of correspondence ... are signs of an enterprise that has banded together to ensure that [its] crimes [would be] undetected."

The People repeatedly pointed to Testwell's computer system, stating that Kancharla "personally installed [a] 'state of the art' computer system" that "was programmed to support and help hide the data-tampering fraud." The People failed to provide any record citation either in their brief on appeal or when pressed at oral argument for what defendant correctly characterizes as an

outlandish claim. While there was testimony that Testwell's computer system did not allow one to determine who had altered data, there was no evidence of any kind that the computer system was purposefully programmed to "hide" data tampering or that Kancharla had any role in the programming.

We agree with Kancharla that it is one thing to draw inferences from the facts and another thing for the People to simply invent facts in an attempt to satisfy the Western Express standard. The only testimony on Kancharla's involvement with Testwell's computer system is as follows:

> "Q: And were there other system upgrades to the computers while Mr. Kancharla owned the company?
>
> [Thumma]: I mean the computer system itself has grown from a simple recording of dispatch data and test data to making things more automatic in terms of generating reports, generating reports, sending them and sorting them and also ability to email them.
>
> Q: So all these developments happened under Mr. Kancharla's ownership?
>
> [Thumma]: Yes."

The People also assert that Testwell's corporate titles and responsibilities were kept vague to "camouflage [its] crimes and blur responsibility for them." The People contend that Edward Porter's title "was published on Testwell's website as assistant

laboratory manager despite the fact that he had *nothing* to do with the lab.” However, the People put forth no evidence that any engineer doing business with Testwell was deceived by Porter’s title or that anyone even considered the issue. In any event, the record does demonstrate that Porter worked with Testwell’s laboratory whenever he prepared trial mixes.

Finally, the People claim that

> “Testwell’s correspondence was larded with the Testwell ‘we’ -- a usage that allowed top-tier members like Kancharla and Barone to appear to be taking a personal hand at resolving a client’s ‘issues’ even while they laid the foundation for a later claim that they bore no responsibility for the falsehoods festooning their correspondence.”

Once again, the People offer no record citation for this claim.

All of these specious claims are made to bolster the People’s theory on appeal that the “‘common purpose’ behind many of [Testwell’s] crimes was to cover up the shoddy quality of Testwell’s understaffed ... and often unqualified field inspectors and thereby protect the millions of dollars Testwell brought in from these operations on even a single project.” That contention is simply unsupportable by any fair view of the evidence of record.

The only evidence that Testwell’s inspectors were “unqualified” was the fact that two of its employees worked for

the School Construction Authority without the proper certificates *for one day each*. Thus, the People's use of "often unqualified field inspectors" is a hyperbolic argument, once again, calculated to convey to this Court that the Western Express standard has been met by proof in this case. This empty rhetoric is further refuted by the scale of Testwell's legitimate business when compared with the alleged profits from the various schemes. Testwell's total revenue in 2008 was approximately $20 million. Even were we to accept everything the prosecution contends as true, the revenue from criminal conduct in 2008 did not exceed $100,000, or .5%.

John Klein of Silverstein Developers gave a fairer assessment of Testwell's work. When the prosecutor asked him how Testwell's concrete inspectors had performed on the River Place II project, he said this:

> "They did a very good job. I had inspectors there, I never had to call to ask for inspectors to show up. The inspectors were always there on time. I never had to wait for an inspector to pour cylinder. [Mr. Kancharla] did a great job."

The dissent on the finding that the defendants' convictions for enterprise corruption were not supported by legally sufficient evidence and were against the weight of evidence (hereinafter referred to as "dissent"), contends that "it is

frequently the case that legitimate corporations may 'both lend their corporate form, hierarchy and operations to criminal enterprises which [flourish] within their corporate structure.'" People v. Joseph Stevens & Co., Inc., 31 Misc.3d 1223(A), 2011 N.Y. Slip Op. 50808[U] (Sup. Ct., N.Y. County 2011). While that may be correct as a legal aphorism, it certainly is no substitute for proof beyond a reasonable doubt. As detailed above, there simply was no such proof in the People's case, unlike the facts of Joseph Stevens & Co. In that case, the People sought to prosecute a broker-dealer firm that was accused of bilking 800 clients out of over $6 million in unauthorized commissions through 5,000 trades. Unlike the paucity of proof in this case, in Joseph Stevens & Co., the People established that the company created a series of stocks, manipulated the trades, and sought solely to profit on the commissions at their own clients' expense. All of the traders were part of the company-wide scheme to manipulate the market and the trading to maximize the commissions to the company.

The dissent's recitation of the evidence against Kancharla is also insufficient. Other than Kancharla's single conversation with Thumma described above, no evidence was put forward that Kancharla instructed anyone at Testwell to: alter any compressive

test results, alter or fabricate field test results on the Yankee stadium project, fabricate or falsify steel inspection reports on the John Jay project, or indeed commit any crime whatsoever. Furthermore, the dissent provides no record citation to prove any of these supposed criminal acts perpetrated by Kancharla.

Similarly, there is no proof of record that Barone altered any test results. The People's own forensic investigation, relied upon by the dissent, established that Barone did not even have access privileges for the data at issue. Therefore, the dissent is left with relying on the testimony of Ms. Murthy about how she was instructed to alter test data. However, the Murthy testimony does not support the People's position.

Murthy testified that she altered data on the concrete tests at Caruso's behest and the People submitted numerous emails that corroborated that testimony. Murthy never spoke with Kancharla about the data alterations. The only testimony linking Barone to Caruso's extensive alteration was as follows:

"ADA: So when Mr. Caruso was gone, Mr. Barone would review and employ a similar procedure like you talked about with Mr. Caruso?

Murthy: Not too many times, but I don't remember, but that was the procedure that was followed.

ADA: Okay. So other than sort of having the *supervisor* check the low breaks and make a decision, did you

receive any instructions from *Mr. Barone* about changing numbers.

Murthy: I would receive fax from the Queens office." (Emphasis added).

The People's position with regard to Barone did not improve with additional questioning. Ms. Murthy later testified that she changed test results for Caruso but she only changed data for Barone after receiving faxes for the Jet Blue project:

"ADA: And why did you make these changes, why did you change test data?

Murthy: Because my manager instructed me to do that.

ADA: And why didn't you question him?

Murthy: Testwell is a reputable company, they're in the business for a long time and my managers were professional engineers and I trusted them.

ADA: And when you say your managers, who are you referring to?

Murthy: Mr. Caruso *and through the faxes Mr. Barone*" (emphasis added).

Despite the purported clarification, the People in summation paraphrased Murthy's ambiguous testimony and overstated its meaning: "Don't take my word for it, ask for Murthy's read back, she said it. She said Vincent Barone would check and authorize changes when Alfredo Caruso was not available."

It appears that the dissent has adopted the People's

argument in summation and on appeal. But rather than limiting the People's position to the Jet Blue counts in the indictment, the dissent implies that it is evidence of a continuing criminal enterprise. Even if we were to accept that a handful of faxes concerning the alteration of data is sufficient to sustain a charge against Barone, it is wholly deficient as proof against Kancharla or Testwell. We reiterate that no witness testified that Kancharla ever discussed these faxes with Barone or Caruso or that Kancharla even knew about the practice.

Part II

I must respectfully dissent from that part of the majority opinion that upholds the remaining convictions (Manzanet-Daniels, J., joined by Justices Richter, Abdus-Salaam, and Román). In my view, the trial court made significant errors in evidentiary rulings which tainted the entire proceeding before the jury. Because these rulings, along with the People's unsupported (and now vacated) enterprise corruption counts, deprived the defendants of a fair trial, I would remand for a new trial on the remaining counts in the indictment.[1]

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[1] Although in my opinion a new trial should be held, lacking a majority of the Court for that position, I am constrained to agree in the modification of the sentences.

It is important to recognize that the enterprise corruption counts allowed the People to join five separate criminal schemes into one prosecution. Kancharla was not charged in two of the schemes and venue in one of them was in New York County only as a pattern act. Similarly, Barone was not charged in all of the separate criminal schemes such as the mix design and field test schemes.

The prosecution relied heavily on Testwell being a criminal enterprise. The People told the jury that "fraud [was] thoroughly entrenched at Testwell"; that "fraud became the master plan"; that at Testwell "it was fraud as a deliberate business strategy"; that "every engineer abides by [the City Code] ... except the ones at Testwell"; that "at Testwell a PE's license was ... a license to steal"; and that "[t]hese crimes work together [and] ha[ve] a cadence ... and they all conform to a pattern of criminal activity."

This use of Testwell as a criminal enterprise allowed the People to link for the jury all of the individual defendants to crimes with which they were not charged. In summation, the People stated that:

> "The details of this scheme were delegated by Reddy Kancharla to his top lieutenants, Vincent Barone, and Alfredo Caruso who in turn enlisted others to help

> them. This scheme is part of the way they covered up the false mix design reports and the incompetent and skipped field testing in the first two catch points."
>
> Similarly,
>
> "[n]ot only a new crime in and of itself, but part of the cover up, a way of being responsive without being truthful, a way of wriggling out of difficulty instead of coming clean.
>
> *****
>
> "Look at all the engineers that stamp things that they knew were not true: Kaspal Thumma, Michael Sterlacci, Nancy Phillips, Vincent Barone, and Reddy Kancharla in two states and it's not as if these mix design reports were meaningless pieces of paper that were thrown into a file somewhere. It's not as if Reddy Kancharla didn't know where these reports would go or what they would be used for. Reddy Kancharla knew exactly where they went.
>
> "Remember, as I just mentioned, he held the concrete license, he was the face of Testwell, he dealt with clients like Jack Klein."

The Second Department's recent decision in People v. Colletti (73 A.D.3d 1203, 901 N.Y.S.2d 684 (2d Dept. 2010), lv. denied 15 N.Y.3d 772, 907 N.Y.S.2d 461, 933 N.E.2d 1054 (2010)) is instructive in this regard. In Colletti, the indictment charged the defendant with, inter alia, participating in the Genovese-Bonanno gambling organization. However, at trial the prosecution repeatedly referred to the Colletti gambling organization. The Second Department reversed and vacated the

conviction on the criminal enterprise counts, citing United States v. Weissman (899 F.2d 1111 (2d Cir. 1990)), for the proposition that the defendant was indicted for associating with one criminal enterprise but the proof at trial repeatedly and impermissibly referred to the defendant's association with a different criminal enterprise. However, the Court then reversed the conviction on the remaining counts as well:

> "[S]ince the various offenses of which the defendant was convicted are factually intertwined with each other, and the references to organized crime and to the activities of various crime families pervade the record, reversal and a new trial as to all of the counts is appropriate." 73 A.D.3d at 1207-1208, 901 N.Y.S.2d at 688.

In my opinion, any viable defenses that Kancharla and Barone had to the crimes that they were actually charged with were consumed by the vision conjured by the People of Testwell as a continuing criminal enterprise.

I would also find that the trial court made two evidentiary rulings that were in error and greatly prejudiced Kancharla's defense. To demonstrate that he had no intent to defraud in the mix design scheme counts, Kancharla sought to explain to the jury that it had become an industry practice to create mix designs that did not adhere to the Building Code's preliminary tests method.

To that end, prior to the start of trial, Kancharla moved to introduce proof that numerous other testing laboratories employed the same approach as Testwell in their preparation of mix design reports. Kancharla argued that evidence of his good faith lay in showing that Testwell was using the same approach as its competitors, namely they reported estimated "breaks" not actual ones. The motion set out to establish that at least eight companies followed such an approach.

However, the trial court excluded the evidence on the grounds that "on the issue of intent ... the fact that Kancharla knew the other companies were preparing [reports] in the same manner [is] irrelevant." On appeal, the People amplify this holding by arguing that this evidence showed only that the companies were "guilty of the same form of fraud." The trial court's ruling was, in my opinion, a grievous error that a majority of this Court does not even address.

It is well established that scienter is an element of a scheme to defraud. People v. Korsen, 167 A.D.2d 180, 561 N.Y.S.2d 572 (1st Dept. 1990), lv. denied 77 N.Y.2d 962, 570 N.Y.S.2d 496, 573 N.E.2d 584 (1991). Further, as Kancharla correctly asserts, relying on People v. Kisina, (14 N.Y.3d 153, 160, 897 N.Y.S.2d 684, 688, 924 N.E.2d 792, 796 (2010)), it is

well settled that a defendant should be permitted to offer any evidence which bears directly on his intention to defraud.

Indeed, numerous courts have permitted defendants to introduce evidence of industry practice to show a lack of criminal intent. See e.g., Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 135 F.3d 266, 273 (3d Cir. 1998), cert. denied 525 U.S. 811, 119 S.Ct. 44, 142 L.Ed.2d 34 (1998) (evidence of industry practice "could, of course, be regarded by a trier of fact as probative of the defendants' state of mind"); United States v. Seelig, 622 F.2d 207, 216 (6th Cir. 1980), cert. denied 449 U.S. 869, 101 S. Ct. 206, 66 L.Ed.2d 89 (1980) (evidence of routine procedures of pharmacists should have been admitted on issue of good faith); United States v. Riley, 550 F.2d 233, 236 (5th Cir. 1977) ("[w]hile a general practice is not an absolute defense to criminality we think the wiser ... approach is to let the jury consider the practice in determining whether [the defendant] intended to ... defraud").

In this case, the harm from the ruling was compounded by the testimony of Thumma, Testwell's laboratory director who was called by the prosecution as a cooperating witness. The jury specifically asked to hear the transcript of Kancharla's reply to Thumma about computer generated results being a standard industry

practice. Without any other evidence, the jury could have inferred that the reference to "industry practice" was a lie intended to induce Thumma to go along with the practice. Hence, a fact that Kancharla sought to establish as true became evidence for the prosecution, and defendant had no opportunity to counter that impression.

The trial court also excluded evidence showing that the concrete contractors who purchased the mix design reports were well aware that Testwell was not following the preliminary tests method. Kancharla sought to introduce evidence that concrete contractors regularly requested that Testwell produce mix design reports in a few days' time, thus acknowledging that the preliminary tests method was not being followed.

The People argue that because the contractors were a couple of steps removed from their victims, the contractors' knowledge of the fraudulent nature of the reports had no bearing on whether the victims were duped. The court excluded the evidence on the ground that the concrete contractors were "unindicted coconspirators." I agree with defendants that in so doing the court committed reversible error. Again, a majority of this Court ignores this issue.

The evidence was offered to show that Testwell was not

hiding the fact that the reported breaks were estimated rather than actual, thus showing open conduct rather than fraud and deceit. Rather than allow the jury to hear the evidence and give it appropriate weight, the trial court took judicial notice that a whole segment of the construction industry was an accessory to crime. In my view, this was an impermissible finding. See Barker and Alexander, Evidence in New York State and Federal Courts § 2.2 (2012 Thomson Reuters) ("[t]he doctrine of judicial notice ... is based on the principle that some matters of fact are so generally well established in the world outside the courtroom that the taking of evidence would be unnecessary and inefficient"). Consequently, I would reverse and remand for a new trial.

MANZANET-DANIELS, J. (concurring in part and dissenting in part)

<u>Part I</u>

Kancharla challenges the sufficiency of the evidence supporting his conviction of the counts pertaining to the falsified mix design reports. With respect to the first-degree scheme to defraud count, it is true that Testwell was paid by the concrete suppliers, who would have been aware that no testing was being performed. Testwell was not directly paid by the victims, who were the developers funding the projects. Nevertheless, the evidence supported the conclusion that the victims' money indirectly would be used by the concrete supplier to pay for the testing, since the cost of the testing would be built into the concrete supplier's contract, along with its other expenses. Thus, the evidence established that defendants obtained at least $1,000 from one or more of the victims of the scheme (*see* Penal Law § 190.65[1][b]).

Kancharla raises issues regarding the geographical jurisdiction of New York County with respect to the offering a false instrument for filing counts. There was evidence that copies of the mix design reports were distributed to the developer, the architect, the construction manager and the engineer of record, and that the Port Authority, which had its

main office in New York County, acted as the regulatory agency for all projects on its property, and received all regulatory filings. This was sufficient to prove venue in New York County by a preponderance of the evidence (*see People v Ribowsky*, 77 NY2d 284, 291-292 [1991]). However, the evidence failed to establish, with respect to the fraudulent reports filed with the Metropolitan Transportation Authority pertaining to a bus depot project, that the reports had been filed in New York County. Accordingly, Kancharla is entitled to vacatur of his convictions on counts 12 and 13 as originally numbered in the indictment.

We reject Barone's challenges to the sufficiency and weight of the evidence supporting his convictions pertaining to the compression/flexural strength alteration scheme. Barone acknowledged that codefendant Caruso directed Testwell's personnel to flag failing test results, and that the data entry staff and codefendant Caruso routinely tampered with lab data to falsify test results so that concrete that failed to meet the requisite threshold would appear to satisfy the engineer's specifications. The testimony of one of Testwell's data entry employees, stating that Barone filled in when Caruso was absent and that the employees reported to him "the same way," was sufficient to establish Barone's participation in Caruso's

scheme.

In addition, faxes from Barone's Queens office with data alternations sent several times a week proved that Barone also altered the data. While Barone claims that those faxes never altered a failing result to a passing one, many of those changes either raised a result below the threshold to a number above it, or made alterations that brought the results much closer to a passing mark, although still technically failing. Thus, Barone's alterations to the data left enough anomalies to make the data realistic, since the complete absence of *any* problematic results would have been highly suspicious to a professional engineer.

We reject all of defendants' arguments relating to the fact that they were convicted of some counts and acquitted of others. There is nothing in any of the acquittals that would undermine the sufficiency or weight of the evidence supporting the convictions (*see People v Rayam*, 94 NY2d 557 [2000]).

The court properly exercised its discretion in excluding, as irrelevant, certain evidence offered by defendants (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]). The fact that concrete suppliers may have been aware that mix design reports had been generated without sufficient time having passed to do the requisite testing was not relevant with regard to the issue of

whether the victims, i.e., the builders, architects, engineers, and regulators, had been defrauded by Testwell's false reports.[1]

Similarly, the court properly excluded evidence that other materials testing laboratories used the same practice of providing estimated breaks in mix design reports. Evidence of an industry custom involving criminality cannot justify a criminal act (*see Smith v United States*, 188 F2d 969, 970 [9th Cir. 1951]). The evidence is any event irrelevant insofar as it tended to show that other testing companies cheated in the same manner as Testwell, but did not prove whether or not the victimized builders and regulators had been defrauded by the practice.

Defendants did not preserve their claims that the court's interjections deprived them of a fair trial (*see People v Charleston*, 56 NY2d 886, 888 [1982]), and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. While the court made a few isolated remarks that were inappropriate, they were not unduly prejudicial, and the court instructed the jury to disregard what

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[1]Notably, where such documents were relevant with respect to a particular witness's credibility or to show the victim's knowledge, the court permitted the defense to introduce such exhibits.

it had said.

The court properly directed Kancharla to pay reparations in the amount of $225,000 (*see* Penal Law § 60.27[1]). Kancharla's crimes at the mix design stage set in motion the chain of results that ultimately required the retesting, and it is not necessary that his conduct was not the sole cause, as long as his actions were a sufficiently direct cause of the ensuing harm (*see People v DaCosta*, 6 NY3d 181, 184 [2006]).

<u>Part II</u>

I believe that the evidence at trial more than sufficiently established the enterprise corruption counts as to defendants Kancharla and Barone. The evidence at trial showed a pervasive scheme involving systematic falsification of concrete data testing at many levels of the company, and defendants' participation in the manipulation of the data. I would therefore affirm their convictions on those counts.

Defendant Kancharla was the owner and chief executive officer of Testwell Laboratories, Inc. Defendant Barone was Testwell's vice president of engineering. These defendants, several other employees and Testwell itself were charged with a series of crimes based on several separate criminal schemes involving concrete and steel testing for major development

projects, including the Freedom Tower, Yankee Stadium and the Jet Blue facilities at JFK Airport.

The "mix design" scheme involved Testwell's mix design reports which purported to measure the respective strength of four proposed mixes of concrete at 7, 14 and 28 days applying compression strength tests. Instead, the mix design reports at issue were prepared using computer-generated numbers without any actual testing.

The "compressive/flexural strength alterations scheme" pertained to the requirement that the strength of the concrete actually used on a project be tested by a laboratory. Alfredo Caruso is a codefendant whose case was severed from that of these defendants. Caruso, the head of Testwell's concrete department, allegedly instructed employees to flag low test results for his review, after which Caruso directed employees to insert a different number to alter the results. Barone was charged with participating in Caruso's scheme.

The "steel inspections scheme" alleged that Testwell double-billed for the work of two Testwell steel inspectors who worked on projects for Tishman Construction and Silverstein Developers at the same time as the project for the Dormitory Authority of New York.

In my view, the evidence amply supported the enterprise corruption counts against defendants Barone and Kancharla. As relevant here, a person is guilty of enterprise corruption when he or she "is employed by or associated with a criminal enterprise and intentionally participates in the affairs of that enterprise by engaging in a pattern of criminal activity involving at least three criminal acts" (Penal Law § 460.20[1], [2]; *see People v Besser*, 96 NY2d 136, 142 [2001]). A "criminal enterprise" is defined as "a group of people sharing a common purpose of engaging in criminal conduct, associated in an ascertainable structure distinct from a pattern of criminal activity, and with a continuity of existence, structure and criminal purpose beyond the scope of individual criminal incidents" (Penal Law § 460.10[3]). Thus, "a criminal enterprise consists of three elements: (i) a common purpose, (ii) an ascertainable structure distinct from a pattern of criminal activity, and (iii) a continuity of existence, structure and criminal purpose" (*see People v Pustilnik*, 14 Misc 3d 1237[A], 2007 NY Slip Op 50407[U], *5 [Sup Ct, NY County 2007]). The first and third elements are easily satisfied in this case, since realizing an economic benefit was the common purpose, and there was extensive continuity.

With respect to the element of an ascertainable structure distinct from a pattern of criminal activity, the criminal enterprise must be more than, and distinct from, "any ad hoc association entered into for the purpose of carrying out one or more of the criminal incidents relied upon to establish its existence" (*People v Cantarella*, 160 Misc 2d 8, 14 [1993]).

The majority on this point asserts that the People failed to introduce any evidence of a leadership structure or overall planning of the criminal enterprise. Yet, as the People argued at trial, the structure of defendants' enterprise was largely based on the corporate structure of Testwell Laboratories, as is often true of defendants operating within the structure of a legitimate enterprise in order to conceal their crimes (*see e.g. People v Pustilnik* [enterprise assumed form of legitimate P.C.s used to perpetrate fraudulent insurance billing scheme]). The presence of a discernible organizational structure distinguishes this case from *People v Western Express Int'l, Inc.* (85 AD3d 1 [1st Dept 2011]), in which I was in the dissent in finding insufficient proof of enterprise liability, and which was recently reversed by the Court of Appeals (19 NY3d 652 [2012]), on those grounds. In *Western Express*, involving the traffic of stolen credit card data via Internet sites, there were various

individuals and organizations, each operating independently and with no overarching structure or system of authority. In this case, there is a discernible organizational structure, indeed a traditional hierarchical structure, in which persons at all levels of the corporation participated in the systematic falsification of concrete testing data.

The majority argues, in a related vein, that the scale of Testwell's legitimate business refutes the proof of enterprise corruption, noting that only a small percentage of Testwell's profits were ascribable to the alleged criminal activities. However, it is frequently the case that legitimate corporations may "both len[d] their corporate form, hierarchy and operations to criminal enterprises which [flourish] within their corporate structure" (*People v Joseph Stevens & Co., Inc.*, 31 Misc 3d 1223(A), 2011 NY Slip Op 50808[4],*40 [2011]).

The Governor's Memorandum approving the statute notes that relieving the People of the obligation to prove a distinction between the criminal enterprise and a legitimate one to which it may be connected

> "accomplishes two important results. First, it makes clear that groups that have both legitimate and illegitimate purposes – like a social club that 'fronts' for a criminal gang, or a pawn shop that is the center of a

> fencing operation - can constitute criminal enterprises. Second, it permits the hierarchy of and positions within a legitimate enterprise – for example a labor union, trade association or government agency - to contribute to the structure of a criminal group existing and operating within that legitimate enterprise." (Governor's Memorandum approving L 1986, ch 516, McKinney's Session Laws of NY, at 3177)

Given that persons at all levels of the company participated in a series of continuing frauds and falsifications of data, and the manner in which one type of fraudulent activity was necessary to cover up another set of frauds, it would be reasonable to conclude that there existed a structured criminal enterprise "that enabled its members to repeatedly commit the pattern of criminal activity alleged in the indictment" (*Pustilnik*, at *7). Kancharla's mix design scheme allowed the company to generate almost pure profit by charging $300 to $500 for a seemingly legitimate, but worthless, certification. Rather than testing the strength of the concrete at the required intervals, Testwell used computer algorithms to predict expected results, turning around reports in under a week.[2]

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[2]These reports were furnished to concrete suppliers, who in turn would deal with the project developers, the victims of the scheme to defraud. Thus, it cannot be assumed that the victims must have known about the falsification of results due to the quick turn around of the reports.

Barone hid flaws in the concrete and in Testwell's field inspection process by altering lab results to conform to expectations. The evidence showed that Caruso and his team routinely altered results when they fell below the engineer's requirements, ensuring that no one would question the authenticity of the reports.

Testwell's computer system was programmed to erase the identity of any user making changes to test data, and further, to alert the user when results had already been reported to the client, a safeguard against the generation of contradictory reports.[3]

This is not a case where disparate crimes have been "stitched together" simply because the perpetrators all worked

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[3]The People's computer forensic experts testified at length concerning how management at Testwell had manipulated testing data. Comparing data from subsequent back-ups to the bar code for a given project, they were able to ascertain that load and stress data had been altered on a regular basis. Reviewing emails on the company's hard drives, they found instructions to alter data such as "fix low breaks." They also reviewed hard copies of faxes with requests for changes, such as Barone's instructions on the Jet Blue project, and using the project bar codes found evidence that the data on those projects had been altered on the system. The People's expert further found evidence of attempts to cover up what was going on, such as emails from Caruso "not [t]o request in writing to fix low breaks." The People's expert's analysis found that data had been altered approximately 3,260 times on over 100 projects.

for the same company. It is evident from the pattern of criminal activity that all of Testwell's crimes were committed as part of a single enterprise, intent on increasing Testwell's profits.

The fact that defendants were not personally charged in connection with every one of Testwell's schemes or convicted of every count in which they were charged does not mean that they were in the dark about the criminal enterprise. There is no requirement that an enterprise member participate in, or be aware of, all of its crimes; provided the member is aware of the basic structure and purpose of the enterprise, and participates in the enterprise by committing the requisite number of criminal acts, he or she may be held criminally liable. Although, for example, Barone may not have been charged in the mix design scheme, the evidence showed that he knew about the scheme. Indeed, there would have been no reason for Barone to tamper with lab data to hide "low breaks" if the company had performed mix design testing as it should have. Similarly, although Kancharla may not have personally tampered with lab data, he relied on his staff to do so in order to cover up the mix design scheme.

Thumma, the director of laboratory testing, described the mix design scheme and the roles employees played in furtherance

of the scheme.[4] Thumma reported to Kancharla, who was in charge of all technical operations and was responsible for the accreditation program. Thumma testified concerning the mix design software, which would generate results based on computer algorithms, rather than actual testing at the required intervals. These mix design reports were initially signed and certified by Kancharla himself, and later by Sterlacci and Thumma. At the time Thumma assumed this responsibility, he had a conversation with Kancharla concerning the mechanics of generating the reports. Kancharla assured him that the manner in which Testwell generated the mix design reports was standard practice in the industry and "there couldn't be any problem using these reports and signing them." Thumma testified that Kancharla also signed and stamped blank mix design reports.

Murthy provided equivalent evidence regarding the roles Barone, Caruso, Shah, Promushkin and others played in the test-alteration scheme. Murthy, who was responsible for inputting data from field reports, and matching the field data with results subsequently generated by the laboratory, testified that she was instructed once or twice a week to alter inputs so as to achieve

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[4]Thumma also pleaded guilty to filing false mix design reports.

a target number. She testified that she would “play around with” the compressive strength number so as to achieve the result requested by Caruso, her direct supervisor. She testified that Caruso would “circle the number, and then give — put in a number, we would put in another number.” When Caruso was absent, Barone assumed his duties. In addition, Murthy’s office, which was responsible for data input, received faxes from Barone directing them to alter certain lab results. Murthy testified that when she input the requested data, the normal practice was to shred the faxes.

Forensic experts evaluating Testwell’s computer systems found evidence both of systematic alteration of test data and systematic efforts to cover up falsified results, including software that erased proof of the identity of the user who had altered any particular test result, and system warnings that would appear if staff attempted to change a result that had already been reported to the client. The evidence, in its totality, was more than sufficient to establish enterprise corruption (*see e.g. Western Express*, 85 AD3d at 9-10 [existence of internet crime scheme established through evidence, inter alia, that site selling stolen credit card numbers helped its customers evade detection by law enforcement]). I would

accordingly uphold defendants Kancharla and Barone’s convictions on the enterprise corruption counts.

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

ENTERED: DECEMBER 27, 2012

CLERK

Andrias, J.P., Sweeny, Catterson, Moskowitz, Manzanet-Daniels, JJ.

8181 Madeline D'Anthony Enterprises, Inc., Index 109605/10
Plaintiff,

ZCAM LLC,
Plaintiff-Appellant,

-against-

Robert (Robbie) Sokolowsky, et al.,
Defendants-Respondents.

Kossoff & Unger, New York (Joseph Goldsmith of counsel), for appellant.

Borah Goldstein Altschuler Nahins & Goidel PC, New York (Paul N. Gruber of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Judith J. Gische, J.), entered May 19, 2011, which to the extent appealed from as limited by the briefs, granted defendants' cross motion for summary judgment on their first counterclaim and declared that the subject building is an interim multiple dwelling (IMD) pursuant to Section 281(5) of Article 7-C of the Multiple Dwelling Law and that defendant Robert Sokolowsky is a protected occupant, unanimously modified, on the law, to declare that Sokolowsky's unit is an IMD unit covered by § 281(5), and that he is the protected occupant of the unit, and otherwise affirmed, without costs.

Defendant Sokolowsky occupies a unit on the 5th floor of the building. His lease, effective September 1, 2007, states that the premises were to be used as an office and that he resided elsewhere.

Effective June 21, 2010, the Loft Law was amended to add Multiple Dwelling Law § 281(5) (L. 2010, Ch. 147 § 1), which created a new qualifying window period under which residential units may qualify for coverage as IMDs. Section 281(5) defines an IMD as any building that: (1) at any time was occupied for manufacturing, commercial, or warehouse purposes; (2) lacks a certificate of compliance or occupancy (CO) pursuant to section 301 of the chapter; (3) is not owned by a municipality; and (4) was occupied "as the residence or home of any three or more families living independently from one another for a period of twelve consecutive months during the period commencing" January 1, 2008, and ending December 31, 2009, provided that the unit (i) is not located in a basement or cellar and has at least one entrance that does not require passage through another residential unit to obtain access to the unit, (ii) has at least one window opening onto a street or a lawful yard or court as defined in the zoning resolution for such municipality, and (iii) is at least 550 square feet in area.

In determining whether or not a structure is an IMD, the proponent for coverage bears the burden of proving that 3 units were residentially occupied as required by the statute during the window period (*see Laermer v New York City Loft Bd*, 184 AD2d 339 [1st Dept 1992], *lv denied* 81 NY2d 701 [1992]). In order for a unit to qualify as a covered residence, "it must possess sufficient indicia of independent living to demonstrate its use as a family residence" (*Anthony v New York City Loft Bd.*, 122 AD2d 725, 727 [1st Dept 1986]). This includes a showing that the premises have been converted, at least in part, into a dwelling (*id.*). Where only a small portion of the space is devoted to residential use, and residential amenities are lacking, the premises are not covered (*see Matter of Amann v New York City Loft Board*, 262 AD2d 234, 234-235 [1st Dept 1999]). For coverage purposes, a unit need not be the sole residence of the occupant during the window period (*see Matter of Vlachos v New York City Loft Bd.*, 70 NY2d 769, 770 [1987]); *Kaufman v American Electrofax Corp.*, 102 AD2d 140, 142 [1st Dept 1984]).

To obtain summary judgment, the movant "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320,

324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" *(Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562)

Here, notwithstanding the motion court's inaccurate recitation of certain of the tenants' periods of residency, the record establishes that the 2nd, 3rd and 5th floor units were occupied by three separate families for residential purposes for 12 consecutive months during the requisite window period of January 1, 2008 through December 31, 2009 in violation of the CO for those units (*see* Multiple Dwelling Law § 281[5]; *Laermer*, 184 AD2d at 340).

The CO provides for commercial use of the 1st floor as a theater, offices on the 2nd, 3rd and 5th floors, and a caretaker's apartment on the 4th floor. Sokolowsky swore from personal knowledge that from Fall 2006 to August 2009, Kimberly Burns lived in the 3rd floor unit; from Spring 2007 to August 2009, Joseph Kushner and Vanessa Brown lived in the 4th floor unit; and from 2004 until September 2009, Roman Milisic and M.J. Diehl lived in the 2nd floor unit. He also swore that the units "were

configured and utilized for residential purposes for all of 2008 and most of 2009 until the other tenants vacated after a long court battle."

Sokolowsky also submitted affidavits from the prior litigation in which (1) Burns stated that the 3rd floor unit was configured for residential use; that she resided there from November 1, 2006 through October 31, 2008; that the 1st floor contained a commercial unit; and that floors 2 through 5 contained one residential unit each; and (2) Kushner stated that he lived in the 4th floor unit with his wife and son from May 1, 2007 through April 30, 2008. Sokolowsky also submitted the stipulation of settlement from that litigation which required Kushner and Burns to vacate their units by August 31, 2009 and Milisic by September 30, 2009.

In addition to the affidavits and stipulation, Sokolowsky submitted (1) architectural drawings prepared on behalf of plaintiff dated February 25, 2008, which showed that there were residential units on the 2nd - 5th floors that contained bedrooms, living area, full kitchens and bathrooms; and (2) records showing that DHPD issued 49 violations on the building, and the ECB issued 20 violations, including several relating to unauthorized residential use. In 2009, violations were issued noting

unauthorized residential occupancy from the 2nd to 5th floors.

These submissions sustained defendants prima facie burden of establishing that in violation of the CO: (1) Sokolowsky has resided in the 5th floor from September 2007 to date; (2) Milisic resided in the 2nd floor unit as of September 2004 and was authorized by the stipulation to remain there until September 30, 2009; (3) Burns resided in the 3rd floor unit as of November 1, 2006 and was authorized by the stipulation to remain there until August 31, 2009; (4) Kushner resided in the 4th floor unit as of May 1, 2007 and was authorized by the stipulation to remain there until August 31, 2009; and (5) the units were configured for residential use. Thus, even if the 4th floor unit is not counted because the CO allowed its residential uses, albeit as an accessory apartment, the 2nd, 3rd, and 5th floors were occupied residentially from January 1, 2008 - August 31, 2009, a period of more than 12 consecutive months.

The former tenants' affidavits, which provided first hand accounts of their residential use were properly considered by the motion court (*see Rosado v Phipps Houses Servs., Inc.*, 93 AD3d 597, 597-598 [1st Dept 2012]; *Conforti v Goradia*, 234 AD2d 237 [1st Dept 1997]). While the stipulation settling that action contains a statement by the tenants that the building and units

at issue “are not covered by [MDL] Article 7-C, [and] that [tenants] . . . are not protected, regulated or stabilized tenants of their respective units,” that legal conclusion does not alter the factual statements made in their affidavits. Indeed, the stipulation was executed prior to the effective date of MDL § 281(5), at which time a different window for loft law coverage applied.

Plaintiff did not submit sufficient proof to raise an issue of fact as to whether these units were occupied for residential purposes for 12 consecutive months during the requisite window period, or as to whether the other requirements of Multiple Dwelling Law § 281(5) were met. “Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation” (*Smith v Johnson Prods. Co.*, 95 AD2d 675, 676 [1st Dept 1983]). “Facts appearing in the movant’s papers which the opposing party does not controvert, may be deemed to be admitted” *(Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]).

Nor is there merit to plaintiff’s reversion argument. In *Matter of Shenkman v Dole* (148 AD2d 116 [1st Dept 1989], *lv denied* 75 NY2d 704), this court held that in deciding whether a building qualifies as an IMD under the Loft Law, the sole

question is whether the building was occupied residentially by three or more families during the statutory window period. A subsequent reduction in the number of occupied residential units cannot effect the remaining residential tenants' rights to Loft Law protection (*id.*). Here, coverage for Sokolowsky’s 5th floor unit was established by showing that the 3 or more units were occupied for residential purposes for 12 consecutive months during the requisite window period (*id.; see also Matter of Moran*, OATH Index No. 2016/00 at 40-41 [Feb. 2, 2002], adopted Loft Bd. Order No. 2726 [Apr. 18, 2002] [“Clearly, a unit may be covered for legalization purposes, yet be deregulated for rent purposes . . . [A] sale of fixtures under Multiple Dwelling Law § 286(6), or a sale of rights pursuant to § 286(12) . . . can take a unit out of rent regulation status without eliminating it as a covered unit for legalization purposes”]).

In any event, while plaintiff averred that the units on the 2nd, 3rd and 4th floors have remained empty, it did not establish that they were converted back to commercial use (*see Acevedo v Piano Bldg. LLC*, 70 AD3d 124 [1st Dept 2009] [because the owner maintained the residential use of the unit and claimed exemption from regulation, rather than converting it to nonresidential under 29 RCNY 2-10(c), the unit remained subject to rent

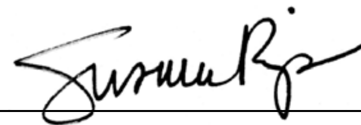
stabilization by virtue of ETPA]; *Walsh v Salva Realty Corp.*, 2009 NY Slip Op 31573[U] at *8 [Sup Ct, NY County 2009] ["Under the Loft Board Rules, where there is a sale of rights by a tenant in an IMD unit, and the unit remains residential, the owner remains subject to all requirements of the Loft Law and the Loft Board, 'except that the Unit is no longer subject to rent regulation where coverage under Article 7-C of (the Loft Law) was the sole basis for such rent regulation'"]).

The motion court's finding as to coverage should have been restricted to the 5th floor, the sole unit at issue.

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

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

ENTERED: DECEMBER 27, 2012



CLERK

Andrias, J.P., Sweeny, Catterson, Moskowitz, Manzanet-Daniels, JJ.

8182 StarVest Partners II, L.P., et al., Index 600489/09
Plaintiffs-Respondents,

-against-

Emportal, Inc.,
Defendant-Appellant.

Law Offices of Kirk B. Freeman, San Francisco, CA (Kirk B. Freeman of the bar of the State of California, admitted pro hac vice, of counsel), for appellant.

Ropes & Gray LLP, New York (John C. Ertman of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Ira Gammerman, J.H.O.), entered February 15, 2011, which, insofar as appealed from as limited by the briefs, granted plaintiffs' (Starvest) motion to dismiss defendant Emportal's first through third and seventh through ninth counterclaims and granted plaintiffs summary judgment declaring that they had no liability to defendant, unanimously affirmed, with costs.

This action arises from Emportal's solicitation of venture capital financing from New York-based StarVest in late 2008. Emportal, a California-based software company, discussed with StarVest the possibility of StarVest purchasing approximately $3.5 million worth of Emportal preferred stock. After conducting

some preliminary due diligence, StarVest decided to work alongside another venture capital firm named Leapfrog Ventures (Leapfrog). These firms discussed with Emportal the possibility of providing a total of $7 million in funding in exchange for a combined 40% equity interest in the company. In September 2008, Emportal ceased discussions with StarVest and Leapfrog after selecting another venture capital syndicate to provide funding. That syndicate decided in October 2008 not to proceed with the financing. That same month, StarVest and Leapfrog made it known to Emportal that they remained interested in providing a combined investment of $6.5 million for a total of 65% of shareholders' equity.

The parties ultimately executed a term sheet consisting of five pages, the last four of which contained a listing of terms and conditions for the investment in Emportal. Significantly, the first page of this document, which was signed by all parties on October 29, 2008, contained the following language:

> "Binding agreements will be entered into only upon the execution by all parties of the Stock Purchase Agreement and other related documents. This Term Sheet is for discussion purposes only and there is no obligation on the part of any party unless and until a definitive stock purchase agreement is signed by all parties."

The term sheet set November 11, 2008 as a closing date for the transaction, subject to an acceptable financial plan, outstanding obligations of no more than $600,000, and "other diligence as requested by StarVest or Leapfrog." After this date passed without the transaction closing, the parties continued, via email, to discuss various issues with a view toward finalizing an agreement.

On November 18, 2008, a StarVest representative notified Emportal representatives via email that StarVest had received approval from the partnership to proceed with the investment. Emportal's attorneys prepared a series of documents necessary to close the deal, including a Litigation Indemnity Agreement, and sent them to StarVest's counsel. Both law firms were located in California and the documents included choice of law provisions which indicated that California law was to govern.

On November 21, 2008, StarVest's counsel emailed Emportal's attorneys changes to the Indemnity Agreement. A specifically referenced problem concerned a lawsuit a former partner of Emportal's chairman, Kevin Grauman, filed, alleging that Grauman defrauded him and seeking that the company's "founders" indemnify new investors.

Three days later, StarVest contacted Emportal and said it

needed a “timeout” to continue to evaluate “certain dynamics” of the deal. On December 4, 2008, StarVest advised Grauman that it could not proceed with an investment in Emportal because of concerns about the lawsuit, “radical changes” in the economy and “other aspects of the background check due diligence.”

After a series of what StarVest characterized as “inflammatory” emails from Grauman, accusing it of, among other things, “lost good will and reputation,” StarVest commenced this declaratory relief action in New York, seeking a judgment declaring that Starvest had no obligation to provide funding to Emportal, and that its refusal to invest was not wrongful and caused no actionable harm or injury to Emportal. Starvest also sought a declaration that it was not liable for breach of contract, fraud or any other legal theory.

Emportal commenced an action for damages against StarVest in California, arguing extensively that California was the appropriate forum because it had a greater interest in the case than New York. After a hearing, the California court granted StarVest’s motion for a stay on the ground of inconvenient forum, noting that Emportal could file a cross complaint in the New York action. The court also explicitly rejected Emportal’s forum arguments, stating that “in weighing the public and private

factors, there is no clear indication that California is preferable over New York."

Thereafter, Emportal filed an amended answer in the New York action, asserting nine counterclaims for damages similar to those filed in California, including, inter alia, breach of oral contract, breach of implied covenant of good faith and fair dealing, promissory estoppel, and fraud and negligent misrepresentation. StarVest moved to dismiss the counterclaims, and the court granted that motion.

Dismissal of the breach of contract counterclaims is required where, as here, the parties have agreed that there would be no binding agreement until their execution of a written contract, but no such contract was ever executed (*see Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426-427 [1st Dept 2010], *lv denied* 15 NY3d 704 [2010]). Emportal's contention that the term sheet was no longer operable, as it expired as of the closing date, is unavailing. The closing date, as with all points made on the term sheet, was for "discussion purposes only." There was no "time is of the essence" clause or explicit language that if the transaction was not closed by that date, the deal would fail (*cf. Meyers Assoc., L.P. v Conolog Corp.*, 61 AD3d 547, 548 [1st Dept 2009]). "[T]he

concept of freedom of contract includes the '[f]reedom to *avoid* oral agreements,' a freedom that 'is especially important when business entrepreneurs and corporations engage in substantial and complex dealings' . . . We think it preferable to allow sophisticated parties operating in the business world to decide when and how they wish to enter into legally enforceable contracts" (*Jordan Panel Sys. Corp. v Turner Constr. Co.*, 45 AD3d 165, 173-174 [1st Dept 2007]). The result would be no different under California law because "[w]hen it is clear, both from a provision that the proposed written contract would become operative *only* when signed by the parties as well as from any other evidence presented by the parties that both parties contemplate[] that acceptance of the contract's terms would be signified by signing it, the failure to sign the agreement means no binding contract was created" (*Banner Entertainment, Inc. v Superior Ct.*, 62 Cal App 4th 348, 358, 72 Cal Rptr 2d 598, 603 [1998]).

Moreover, a claim for breach of the implied covenant of good faith and fair dealing "may not be used as a substitute for a nonviable claim of breach of contract" (*Sheth v New York Life Ins. Co.*, 273 AD2d 72, 73 [1st Dept 2000]; *see Starzynski v Capital Pub. Radio, Inc.*, 88 Cal App 4th 33, 39, 105 Cal Reptr 2d

525, 529 [2001]).

The court also properly dismissed Emportal's tort counterclaims for promissory estoppel, negligent misrepresentation and fraud. Where a term sheet or other preliminary agreement explicitly requires the execution of a further written agreement before any party is contractually bound, it is unreasonable as a matter of law for a party to rely upon the other party's promises to proceed with the transaction in the absence of that further written agreement (*see 511 9th LLC v Credit Suisse USA, Inc.*, 69 AD3d 497 [1st Dept 2010]; *Jordan Panel Sys. Corp.*, 45 AD3d at 179-180; *Prestige Foods v Whale Sec. Co.*, 243 AD2d 281 [1st Dept 1997] [dismissing promissory estoppel, fraud and negligent misrepresentation counts because plaintiffs' claim of reasonable reliance was "flatly contradicted" by the letter agreements stating that neither party had any legal obligations until both had executed an underwriting agreement] [internal quotation marks omitted). The result would not be different under California law (*see J.B. Enterprises. Intl., L.L.C. v Sid and Marty Krofft Pictures Corp.*, 2003 WL

21037837, *4, 2003 US Dist LEXIS 7668, *10 [CD Cal, March 3 2003 No. CV-02-7779 CBM CSHX]).

We have considered defendant's remaining contentions and find them to be without merit.

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

ENTERED: DECEMBER 27, 2012

CLERK

Andrias, J.P., Sweeny, Catterson, Moskowitz, Manzanet-Daniels, JJ.

8186 The People of the State of New York, Ind. 3996/08
Respondent,

-against-

William Walsh,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Allen J. Vickey of counsel), for respondent.

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered November 23, 2009, convicting defendant, upon his plea of guilty, of burglary in the third degree (three counts), and sentencing him, as a second felony offender, to two concurrent terms of 3 to 6 years, to run consecutively with another term of 3 to 6 years, modified, as a matter of discretion in the interest of justice, to the extent of directing that all of the sentences run concurrently with each other, and otherwise affirmed.

The Appellate Division has "broad, plenary power to modify a sentence that is unduly harsh or severe under the circumstances, even though the sentence may be within the permissible statutory range" (*People v Delgado*, 80 NY2d 780, 783 [1992]). "We may

substitute our own discretion even where a trial court has not abused its discretion" (*People v Edwards*, 37 AD3d 289, 290 [1st Dept 2007], *lv denied* 9 NY3d 843 [2007]) and may reduce a sentence in the interests of justice, taking into account factors such as a defendant's age, physical and mental health, and remorse (*see People v Ehrlich*, 176 AD2d 203, 204 [1st Dept 1991]).

Defendant is a 61-year-old Vietnam veteran, who once had a successful business and stable family life. His decline, marked by business failure, family dissolution and larceny, has been fueled by drug and alcohol abuse. Although his criminal record is extensive, his offenses have been nonviolent, with the instant charges stemming from commercial burglaries.

Considering the nonviolent nature of his criminal conduct, his age and poor health (Crohn's disease, epilepsy, and asthma), and his expressions of remorse, defendant's aggregate sentence of 6 to 12 years warrants modification to the extent of running the sentences imposed under all three counts concurrently with each other (*see People v Solomon*, 78 AD3d 521 [1st Dept 2010], *lv denied* 16 NY3d 863 [2011]; *People v Schonfeld*, 68 AD3d 449 [1st Dept 2009]; *People v Lakatosz*, 59 AD3d 813 [3d Dept 2009], *lv denied* 12 NY3d 917 [2009]; *People v Ostrow*, 165 AD2d 719 [1st

Dept 1990]; *People v Harrison*, 120 AD2d 358 [1986], *lv denied* 68 NY2d 668 [1st Dept 1986]). This will result in an aggregate sentence of 3 to 6 years.

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

SWEENY, J. (dissenting)

Since the sentence imposed was neither harsh, severe, nor one that should be reduced in the interests of justice, I must dissent.

The facts of this case are not in dispute. On five separate occasions between April 16 and July 8, 2007, the defendant burglarized three different commercial businesses and stole over $1,000 in electronic equipment. He was subsequently charged in a 15-count indictment with nine counts of burglary in the third degree, four counts of petit larceny, and one count each of possession of burglar’s tools and grand larceny in the fourth degree. Ultimately, defendant entered a guilty plea to three counts of burglary in the third degree in full satisfaction of the indictment, with a sentence commitment of two concurrent terms of 3 to 6 years, to run consecutive with one term of 3 to 6 years. Defendant, who was potentially a discretionary persistent felony offender, was promised to be sentenced as a second felony offender. Sentence was imposed as promised.

The sole basis for this appeal is defendant’s claim that his sentence was excessive. It is uncontroverted that this defendant entered into a negotiated plea and agreed-upon sentence. He did so with the advice of counsel and with the approval of an

experienced judge. He does not challenge the validity of those proceedings. He admitted to the second felony offender statement. There is no claim that the plea was anything other than voluntarily, knowingly and freely entered into. Nor is there any claim that defendant was anything but fully competent when he entered his plea. Moreover, defendant is no stranger to the criminal justice system. In fact, he was on parole for a 2006 conviction of burglary in the third degree when he committed these crimes. By defendant's own admission in his brief, he has seven felony convictions, including a conviction for the violent felony of attempted burglary in the second degree, as well as five misdemeanor convictions. The People aver, without contradiction, that he has a history of bench warrants and parole violations and appears to be a multi-state offender with a criminal record in Florida, California, New Mexico, Tennessee, Louisiana and the District of Columbia. Notably, this record begins in 1972, well in advance of the dissolution of his marriage in 1984 and subsequent loss of his business, both of which he blames for his present difficulties. He does not refute the People's allegation that he refused to speak with the probation department for his presentence interview. Nevertheless, he argues that his medical issues, prior history of

substance abuse and age are factors that warrant a reduction of his sentence in the interest of justice.

While I agree with the majority that we have "broad, plenary power to modify a sentence that is unduly harsh or severe under the circumstances" (*People v Delgado*, 80 NY2d 780, 783 [1992]), our discretion is not unfettered and must be sparingly applied. We have long held that a reviewing court should rarely reduce a sentence that is the result of a negotiated plea (*People v Lopez*, 190 AD2d 545 [1st Dept 1993]). "Having received the benefit of his bargain, [a] defendant should be bound by its terms" (*People v Cipullo*, 171 AD2d 432, 432 [1st Dept 1991], [internal quotations omitted], *lv denied* 77 NY2d 993 [1991]; *People v Vera*, 194 AD2d 404, 404 [1st Dept 1993]; *People v Watson*, 199 AD2d 184 [1st Dept 1993]; *lv denied*, 83 NY2d 859 [1994]). Furthermore, the sentencing judge is in the best position to determine the appropriate sentence and his or her action should not be disturbed unless there is a clear abuse of discretion (*People v Sheppard*, 273 AD2d 498, 500 [3d Dept 2000], *lv denied* 95 NY2d 908 [2000]).

Here, defendant concedes in his brief that "the aggregate sentence of six to 12 years . . . cannot properly be termed an 'abuse of discretion.'" Nor does he allege any infirmity with

respect to the proceedings in this case. He instead argues that his sentence should be reduced in the interests of justice.

An interest of justice determination is not a catch-all provision for second-guessing a sentencing court or a vehicle to be used as an outlet for misplaced sympathy. Rather, where a sentence is imposed in accordance with a plea bargain and is within the statutory guidelines (*Vera*, 194 AD2d at 404), for this Court to reduce a sentence in the interests of justice, there must exist “special circumstances deserving of recognition” (*People v Chambers*, 123 AD2d 270, 270 [1st Dept 1986]). The absence of “extraordinary circumstances” will normally not support a reduction of a sentence in the interests of justice (*id.; see also People v Fair*, 33 AD3d 558, 558 [1st Dept 2006], *lv denied* 8 NY3d 945 [2009]; *People v Higgins*, 19 AD3d 877, 877 [3d Dept 2005]; *lv denied* 5 NY3d 828 [2005]).

In this case, rather than being extraordinary, the circumstances relied on by the majority to support the reduction in sentence are, tragically, all too ordinary: an individual suffers personal and financial reverses, begins to abuse drugs and/or alcohol either before or after these reverses and ends up facing significant jail time as a result of his commission of various crimes. There is absolutely nothing presented to us that

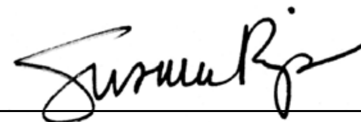
would even remotely warrant a reduction in the agreed upon sentence.

Significantly, every issue raised in this application was before the sentencing judge, who had the advantage of seeing and hearing the defendant. All the points the majority rely on to reduce the sentence, such as defendant’s medical condition, age, criminal record and the nature of the crimes charged, were all factors that appear on the record and were taken into consideration in the negotiations regarding the plea offer and sentence commitment.

Simply put, the majority is not engaging in the limited review prescribed by the case law cited herein but is instead giving defendant a sentence reduction based solely upon sympathy. This is not our role. There is no reason to disturb the trial court’s sentence, particularly since it was fairly negotiated and admittedly not an abuse of discretion.

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

ENTERED: DECEMBER 27, 2012



CLERK

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

8211 The People of the State of New York, Ind. 10589/97
Respondent,

-against-

Wilson Feliciano,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Martin J. Foncello of counsel), for respondent.

Judgment, Supreme Court, New York County (Brenda Soloff, J.), rendered September 5, 2006, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the fifth degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, affirmed.

The court properly concluded that defendant failed to meet the conditions of his plea agreement (*see generally People v Jenkins*, 11 NY3d 282 [2008]). Over a period of 8½ years, the court gave defendant many opportunities to earn a dismissal of the indictment under the Drug Treatment Alternative to Prison program. Instead, defendant violated the terms of his original plea agreement by relapsing into drug use, absconding from aftercare and having conflicts with the law that included a new

drug conviction. Defendant's obligations under the original agreement were clear (*see People v Cataldo*, 39 NY2d 578 [1976]). Defendant's brief successes in drug treatment, followed by relapses, did not satisfy the terms of the agreement.

Defendant did not preserve his contention that the second plea agreement he entered into was a nullity because it contained allegedly unconstitutional postplea conditions, and we decline to review it in the interest of justice. As an alternate holding, we reject this claim on the merits. By the time defendant entered into the second agreement, he had already violated the first one. While these violations made defendant eligible for a sentence of incarceration, the court provided him with another opportunity to avoid a prison term by complying with the terms of the new agreement. Defendant voluntarily agreed to the second agreement, and then violated its terms as well.

We perceive no basis for dismissing the indictment in the interest of justice.

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

CATTERSON, J. (dissenting)

I must respectfully dissent. The majority affirms the defendant's 2006 felony conviction on the ground that the defendant "violated the terms" of the plea agreement made in connection with his felony arrest in 1997. In my opinion, the facts of this case do not support the majority's conclusion.

As set forth more fully below, the record indicates that the first plea agreement required the defendant to successfully complete "at least" one year of a drug treatment program in order for his indictment to be dismissed. However, three years later, despite defendant's apparent completion of the drug treatment program, the People continued to impose new conditions such as obtaining a GED and securing employment which they explicitly concede were not part of the original plea agreement.

Settled case law prohibits such rewriting of a voluntarily entered-into plea agreement. I would therefore dismiss the indictment.

The defendant was indicted for criminal sale and possession of a controlled substance in the fifth degree after he sold Xanax to an undercover police officer on October 19, 1997. On March 25, 1998, the defendant pleaded guilty to criminal sale of a controlled substance in the fifth degree in full satisfaction of

the indictment, and entered into a Drug Treatment Alternative to Prison (DTAP) agreement as part of his plea agreement. The DTAP agreement required that the defendant participate in the H.E.L.P./Project Samaritan drug treatment program for *at least 12 months*, that he not "get into trouble," "violate the rules," or "commit any other crimes," and that he "cooperate with the DTAP program and the court," but it did not set a date for completion. The People agreed that they would dismiss the indictment if the defendant successfully completed the program, and whether "the defendant has successfully completed the [drug treatment] program is within the sole discretion of the prosecutor." The defendant signed the DTAP agreement incorporating the terms of the plea.

Pursuant to a report eight months later on November 4, 1998, the defendant was "compliant with the program rules and regulations." He continued "doing well" in the program as reported on January 13, 1999. At an appearance on June 2, 1999, the defendant told the court that he understood that the case was to have been dismissed in April 1999, which would have marked 12 months in the program. The court informed the defendant that the case would be dismissed when the defendant "completed" the program, but did not inform the defendant as to a date, approximate or otherwise, or any triggering event for completion.

The defendant continued doing well in treatment and tested negative for drugs through August 25, 1999.

When he appeared in court on September 22, 1999, after completing 18 months of residential treatment, defense counsel informed the court that the defendant had been discharged from the program for keeping a pocketknife in his locker to open parcels sent by his family, a violation of the facility's rules. However, defense counsel informed the court that the discharge coincided with his discharge from residential treatment for "complet[ing] everything."

The prosecutor, meanwhile, asserted that the defendant was further required to complete "after phase" treatment pursuant to the DTAP agreement. Although, at the time, defense counsel was "not sure" if the agreement with DTAP mandated aftercare, and indeed the record reflects that the agreement does not specify aftercare, he nevertheless informed the court that the defendant had been referred to an outpatient treatment program.

At the defendant's appearance on October 1999, the prosecutor, for the first time, suggested to the court that the defendant seek treatment at a methadone clinic. The defendant agreed, and on December 22, 1999, he began treatment at the methadone clinic in addition to treatment in another program.

At a court appearance on May 10, 2000, more than two years after the original plea agreement was signed, the prosecutor informed the Court that the "defendant [was] doing well" and was "compliant with the rules of the program." Defense counsel informed the court that appellant had been in treatment for about 2 ½ years and was "looking for some closure." Despite noting that the defendant "kept getting bounced around," the court adjourned the case again.

During a status report on September 28, 2000, defense counsel reported that the defendant was doing well at the methadone abstinence clinic. However, the prosecutor, *for the first time*, informed the court and the defendant that the defendant was required to obtain vocational training.

The record, at this point, is devoid of any indication that the defendant had suffered any lapses into substance abuse. Yet, despite the defendant's completion of nearly three years of "successful" residential treatment and aftercare, the court did not dismiss the defendant's case at his January 23, 2001 appearance. Instead, at this point, the prosecutor asked the court to advise the defendant that he was required to obtain a GED. Several months later, the prosecutor advised the defendant that the 1998 DTAP also required him to secure employment. The

People concede that these "conditions [...] were not explicit in the original [DTAP] agreement."

The Court of Appeals has emphasized that "certainty in plea negotiations [is] vital to the continued validity of that process." People v. Danny G., 61 N.Y.2d 169, 173, 473 N.Y.S.2d 131, 133, 461 N.E.2d 268, 270 (1984). Accordingly, "[j]ust as the defendant is bound to the terms of the plea agreement, so is the government, and it may not unilaterally rewrite the agreement to protect its interests." United States v. Alexander, 869 F.2d 91, 94 (2d Cir. 1989); see e.g. People v. Danny G., 61 N.Y.2d at 174, 473 N.Y.S.2d 131, 133. Moreover, any ambiguity in the plea agreement should be construed in favor of the defendant. Spence v. Superintendent, Great Meadow Corr. Facility, 219 F.3d 162, 167 (2d Cir. 2000); Innes v. Dalsheim, 864 F.2d 974, 979 (2d Cir. 1988), cert. denied 493 U.S. 809, 110 S.Ct. 50 (1989).

In People v. Spina, (186 A.D.2d 9, 586 N.Y.S.2d 800 (1st Dept. 1992)), this Court reversed the defendant's conviction after Supreme Court imposed a heightened sentence based upon the defendant's violation of conditions that the court imposed *after* the defendant entered the guilty plea. As we explained:

> "Although a court may impose a sentence greater than the one originally promised if that sentence is contingent upon compliance with certain conditions and the defendant

> does not discharge those requirements ... the court in the instant situation did not, at the time of the plea, prescribe any rules that defendant had to observe in order to receive probation. Only later did the court decide to make the sentence of probation subject to defendant's adherence to certain conditions ... [T]his is impermissible."

186 A.D.2d at 9-10, 586 N.Y.S.2d at 801, citing People v. Rodney E., 77 N.Y.2d 672, 569 N.Y.S.2d 920, 572 N.E.2d 603 (1991).

The United State Supreme Court has long made clear that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 499 (1971); accord People v. Selikoff, 35 N.Y.2d 227, 239, 360 N.Y.S.2d 623, 634, 318 N.E.2d 784, 792 (1974), cert. denied 419 U.S. 1122, 95 S.Ct. 806 (1975). It is axiomatic that "each party to the voluntarily entered-into plea agreement is entitled to the benefits emanating from the agreement which cannot be retroactively vitiated." People v. Evans, 58 N.Y.2d 14, 24, 457 N.Y.S.2d 757, 762, 444 N.E.2d 7, 12 (1982).

Accordingly, had the People adhered to the terms of the DTAP agreement, the defendant's indictment on the 1997 felony offense would have been quashed by March 2001 when the defendant was arrested a second time for selling Xanax to an undercover police

officer. After pleading guilty to a reduced misdemeanor charge, he subsequently signed a second DTAP agreement in February 2002 appertaining to his original plea on the 1997 felony offense. For the next five years, the defendant was alternately incarcerated awaiting program placement or in drug treatment while he attempted to comply with the terms of the second agreement.

The minutes of numerous court appearances and adjournments chronicle the defendant's futile efforts to satisfy the terms of the second agreement, which this time specified that he was required to successfully complete an 18-month drug treatment program, obtain his GED, attend vocational training, secure full-time employment, find suitable housing, and accumulate savings.

Finally, after 8 ½ years of being, as one judge observed, "enmesh[ed] ... [in] the bureaucracy," the defendant left the program and refused to go back. Instead, he returned to court, and on September 5, 2006, he was sentenced on the 1997 indictment for failing to meet the conditions of his plea agreement.

In my view, this was error. The court had no authority to impose additional conditions such as securing a GED, vocational training and employment more than two years *after* the original plea agreement was executed. The defendant was not informed at

the time of his plea that he would have to comply with these conditions, nor indeed what constituted "successful completion" of DTAP in order to have his indictment dismissed.

He was told only that he had to cooperate with and successfully complete the treatment program without getting into trouble, violating the rules, or committing new crimes. The written plea agreement he signed described successful completion as "regular attendance, compliance with the program rules and regulations, full participation in all activities designated by program staff and negative toxicology reports." There is no indication whatsoever that he did not fulfill these conditions.

On the contrary, as the defendant asserts, the record reflects that he essentially satisfied the requirements of his March 1998 plea agreement before his March 2001 arrest. The defendant had entered a drug treatment program where, for 18 months, he did "well" and tested negative for drugs. Furthermore, although there is no evidence that the DTAP required any additional treatment, the defendant entered an aftercare program and then a methadone abstinence program where he "did well" and complied with the rules for approximately 18 more months.

Although the People assert that the defendant broke one of

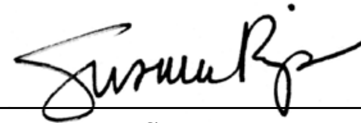
the inpatient program rules by bringing in a pocketknife, they do not dispute that the incident coincided with his completion of the drug treatment program. Indeed at the defendant's September 22, 1999 appearance, rather than requesting that the defendant be remanded for violating the DTAP agreement or return to residential treatment, the prosecutor recommended that the defendant proceed to the aftercare phase of treatment. The court permitted the defendant to leave the program and enroll in an aftercare program where he remained in treatment and again "did well." Subsequently, at the prosecution's recommendation, the defendant sought treatment at a methadone clinic. By June 2000, the "the only other thing" that the prosecutor sought was to have the defendant completely "off of" methadone, which the People do not dispute he accomplished "in early 2001."

Under these circumstances, I would find that the defendant is entitled to specific performance of his original plea

agreement and that the indictment should be dismissed. See People v. McConnell, 49 N.Y.2d 340, 348, 425 N.Y.S.2d 794, 798, 402 N.E.2d 133, 137 (1980); see also People v. Danny G., 61 N.Y.2d at 175, 473 N.Y.S.2d at 134.

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

ENTERED: DECEMBER 27, 2012



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Andrias, J.P., Saxe, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

8423 Anthony Valdez, Index 301239/10
Plaintiff-Appellant,

-against-

Norris D. Benjamin, et al.,
Defendants-Respondents.

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

Desena & Sweeney, LLP, Hauppauge (Shawn P. O'Shaughnessy of counsel), for respondents.

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered June 27, 2011, which granted defendants' motion for summary judgment dismissing the complaint alleging serious injuries under Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants met their burden of establishing the absence of a serious injury to plaintiff's right knee by submitting their neurologist's report finding full range of motion, negative test results, and resolved injuries, and their radiologist's report finding absence of tears, trauma, or other causally related injuries (*see Fuentes v Sanchez*, 91 AD3d 418 [1st Dept 2012]). In opposition, plaintiff failed to raise a triable issue of fact. His treating physician provided neither evidence of range of

motion limitations nor a qualitative assessment of the knee, and his finding of permanency relied on plaintiff's subjective complaints of pain (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]). While plaintiff's radiologist found a meniscal tear, the record contains no evidence of any limitations resulting from that tear (*see Dembele v Cambisaca*, 59 AD3d 352 [1st Dept 2009]).

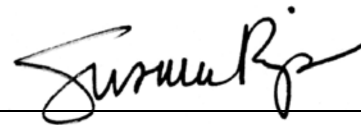
Plaintiff's contention that defendants failed to establish the absence of serious injury to his cervical and lumbar spine because of the inconsistencies or omissions in their experts' reports is unpreserved, and we decline to consider it (*see Alicea v Troy Trans*, Inc., 60 AD3d 521, 521–522 [1st Dept 2009]). In any event, plaintiff failed to rebut defendants' prima facie showing of lack of causation. Defendants' radiologist concluded that the claimed injuries in both parts of the spine were preexisting degenerative conditions, and found no evidence of trauma or causally related injuries (*see Graves v L & N Car Serv.*, 87 AD3d 878 [1st Dept 2011]). Plaintiff's radiologist did not opine as to the etiology of the injuries (*id.*). Plaintiff's treating physician opined as to causation, albeit conclusorily (*see Biascochea v Boves*, 93 AD3d 548, 548-549 [1st Dept 2012]). However, plaintiff failed to explain adequately the gap in

treatment from six months or a year after the February 2008 accident through February 2011 (*see Pommells v Perez*, 4 NY3d 566, 574 [2005]).

Plaintiff's admission at deposition that he returned to work two days after the accident established as a matter of law that he did not suffer a 90/180-day injury (*see Seck v Balla*, 92 AD3d 543 [1st Dept 2012]).

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

ENTERED: DECEMBER 27, 2012



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Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

8463 Altagracia Morales, Plaintiff-Respondent, Index 18017/06 85774/07

-against-

The City of New York, et al., Defendants,

CSC Holdings, Inc., et al., Defendants-Appellants-Respondents.

- - - - -

CSC Holdings, Inc., et al., Third-Party Plaintiffs-Appellants-Respondents,

-against-

CFG Cable Corporation, Third-Party Defendant-Respondent-Appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Steven B. Prystowsky of counsel), for appellants-respondents.

McGaw, Alventosa & Zajac, Jericho (Ross P. Masler of counsel), for respondent-appellant.

David M. Schwarz, Dix Hills, for respondent.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered February 18, 2011, which denied defendants CSC Holdings, Inc. and Cablevision Systems NYC Corporation's motion for summary judgment dismissing the complaint as against them and third-party defendant CFG Cable Corporation's motion for summary judgment

dismissing the complaint and all cross claims, unanimously reversed, on the law, without costs, and the motions granted. The Clerk is directed to enter judgment dismissing the complaint as against CSC Holdings, Inc., Cablevision Systems NYC Corporation and CFG Cable Corporation and dismissing the third party complaint.

The evidence submitted by CSC Holdings, Cablevision and CFG that they had not received any complaints regarding work performed in connection with the installation of a cable conduit in 1992 was uncontroverted. The inspection conducted by plaintiff's expert, approximately 14 years after the work was performed, did not constitute probative evidence of negligence by the movants, as his inferences as to the quality of the work performed by these defendants were speculative. Because plaintiff failed to raise a triable issue as to the liability of the movants, the motions for summary judgment should have been granted.

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

ENTERED: DECEMBER 27, 2012

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

8464 In re Juan L.,

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

Tamara A. Steckler, The Legal Aid Society, New York (Amy Hausknecht of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Kathy H. Chang of counsel), for presentment agency.

Order, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about March 1, 2012, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of possession of an imitation firearm, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court providently exercised its discretion in imposing a juvenile delinquency adjudication with probation.

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

ENTERED: DECEMBER 27, 2012

CLERK

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

8579 The People of the State of New York, Ind. 4903/09
Respondent,

-against-

Rosario Terrance,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Michael R. Sonberg, J. at suppression hearing; Thomas Farber, J. at jury trial and sentencing), rendered March 8, 2011, convicting defendant of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

The hearing court properly denied defendant's motion to suppress a gravity knife recovered from his person. Under the facts presented, a police officer was permitted to remove a knife from defendant's person during a common-law inquiry, even though the officer had no reason to believe it was an illegal knife until after he acquired it.

It is undisputed that the officer was entitled to make a

common-law inquiry based on his observations that defendant was carrying a type of bag associated with shoplifting and appeared to be casing a store. The officer also observed that defendant's back pocket contained an outline of what appeared to be a knife. The officer asked defendant, among other things, whether he had a knife, to which defendant responded that he did, and began to reach for his back pocket. The officer told defendant to stop, and then retrieved the knife.

Defendant's conduct, viewed in its entirety, gave the officer a reasonable basis to fear for his safety, even though the officer did not articulate any fear for his safety at the suppression hearing (*see People v Batista*, 88 NY2d 650, 654 [1996]). Accordingly, the officer's seizure of the knife from the location indicated by defendant was a reasonable protective measure (*see People v Miranda*, 19 NY3d 912 [2012]; *see also People v Hensen*, 21 AD3d 172 [1st Dept 2005], *lv denied* 5 NY3d 828 [2005]). Defendant's acknowledgment, in response to a lawful inquiry, that he was carrying a knife was equivalent to the knife becoming "plainly visible" as in *Miranda* (19 NY3d at 914).

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). The court charged the jury

that the People had the burden to prove, among other things, that defendant knew he possessed a gravity knife, which the court defined in accordance with Penal Law § 265.00(5). The People are generally not required to prove such specific knowledge of the nature of the knife (*see People v Berrier*, 223 AD2d 456 [1st Dept 1996], *lv denied* 88 NY2d 876 [1996]). However, in this case the People had to meet the added burden imposed by the court's charge, to which they did not object (*see People v Malagon*, 50 NY2d 954, 956 [1980]).

Any deficiency in the People's case with respect to the element of knowledge was cured by defendant's trial testimony (*see People v Kirkpatrick*, 32 NY2d 17, 21 [1973], *appeal dismissed* 414 US 948 [1973]). Defendant testified that he used the knife to cut linoleum tiles shortly before his arrest. This testimony permitted the jury to infer that he had opened the knife. In light of the officer's testimony that the knife was

opened by using the force of gravity and automatically locked into place, the jury could have reasonably inferred that defendant knew the knife had the characteristics of a gravity knife, as defined by Penal Law § 265.00(5).

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

ENTERED: DECEMBER 27, 2012

CLERK

Friedman J.P., Catterson, Renwick, DeGrasse, Román, JJ.

8582- Index 105551/06
8583 Anthony Tuccillo, Jr., et al.,
Plaintiffs-Appellants-Respondents,

-against-

Bovis Lend Lease, Inc., et al.,
Defendants,

ADT Security Services, Inc.,
Defendant-Respondent-Appellant.

[And A Third-Party Action]

Arye, Lustiv & Sassower, P.C., New York (Mitchell J. Sassower of counsel), for appellants-respondents.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Debra A. James, J.), entered October 25, 2011, which, upon plaintiffs' motion to renew and reargue their motion for partial summary judgment on the issue of liability on the Labor Law § 240(1) cause of action and that part of defendant ADT Security Systems' (ADT) cross motion for summary judgment dismissing the Labor Law § 240(1) and § 241(6) causes of action, denied renewal, granted reargument, and, upon reargument, denied ADT's cross motion as to the § 240(1) cause of action, unanimously modified, on the law, to grant renewal, and, upon renewal, to grant plaintiffs partial summary

judgment on the issue of liability on the § 240(1) claim and to deny ADT's cross motion as to the Labor Law § 241(6) claim, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered February 25, 2011, unanimously dismissed, without costs, as academic in light of the foregoing.

The genesis of this case stems from the January 31, 2006 accident in which plaintiff, Anthony Tuccillo, Jr., a journeyman electrician employed by third-party defendant, and non party to this appeal Petrocelli Electric Co. (Petrocelli), was installing cables for a security system at the United States Post Office at Cadman Plaza, Brooklyn. Tuccillo was on the building's third floor, standing on an A-frame ladder, pulling cables down from the fourth floor, when the ladder wobbled and sent him crashing to the floor, causing injury, including a fractured skull and ribs.

Defendant ADT had been hired by the federal government, namely, the United States Marshals Service, to install closed circuit televisions, access controls, an intercom system and a burglar alarm system at Cadman Plaza. ADT then subcontracted the wiring aspect of this job to Petrocelli.

Shortly after the incident, by summons and complaint dated April 20, 2006, Tuccillo and his wife commenced this action

against defendant ADT, among others, alleging common-law negligence and violations of Labor Law § 200, § 240(1) and § 241(6). By notice of motion dated December 28, 2009, plaintiffs sought partial summary judgment on liability on their Labor Law § 240(1) cause of action. Plaintiffs argue that the fall from the ladder was prima facie proof of a Labor Law § 240(1) violation, as was ADT's failure to provide a safety device to prevent Tuccillo's fall. Besides opposing the motion, ADT cross-moved for summary judgment dismissing all claims. With regard to the Labor Law § 240(1) and § 241(6) causes of action, ADT argued that they must be dismissed because there was no evidence that ADT had any authority to supervise, direct or control Tuccillo's work.

In an order entered February 25, 2011, the IAS court denied plaintiffs' motion for summary judgment, and granted ADT's cross motion in its entirety, dismissing the causes of action for common-law negligence and Labor Law § 200, § 240(1) and § 241(6). With regard to the Labor Law § 240(1) and § 241(6) causes of action, the IAS court found that there was no evidence that ADT was delegated supervisory authority over Tuccillo's work.

By notice dated March 30, 2011, plaintiffs moved to reargue and renew that part of the court's order dismissing the Labor Law § 240(1) and § 241(6) causes of action. Plaintiffs contended

that there was no dispute that ADT had entered into a contract with the U.S. Marshals Service to install a security system at Cadman Plaza, and that it had subcontracted a portion of the work to Petrocelli. Plaintiffs submitted a copy of ADT's contract with the U.S. Marshals Service for the court's consideration. Plaintiffs argued that once ADT entered into its contract for the installation of the security system, it became responsible under the law for safety compliance with respect to that portion of the Cadman Plaza renovation project.

In an order entered October 25, 2011, the court denied plaintiffs' motion to renew the February 25, 2011 order, but granted their motion to reargue, and upon reargument, modified the previous order to deny ADT's motion for summary judgment dismissing the Labor Law § 240(1) cause of action. The court denied the motion to renew because plaintiffs had been in possession of the contract between ADT and the U.S. Marshals Service, but had not proffered it on the prior motion. Instead, the court granted the motion to reargue upon a reevaluation of the subcontract between ADT and Petrocelli. The court found that the contract, which, in relevant part, delegated to Petrocelli the authority to supervise and control the wiring installation, provided some, but not conclusive, evidence that ADT may have

been the statutory agent for the owner. On the issue of § 241(6) liability, the court found that plaintiffs had not submitted sufficient evidence to warrant a change in its previous holding.

Plaintiffs' motion to renew should have also been granted to the extent it was based on evidence not presented on the prior motion, i.e., a copy of ADT's contract with the U.S. Marshals Service for the installation of the security system at Cadman Plaza. "Although renewal motions generally should be based on newly discovered facts that could not be offered on the prior motion (*see* CPLR 2221[e]), courts have discretion to relax this requirement and to grant such a motion in the interest of justice" (*see e.g. Spinac v Carlton Group, LTD.*, 99 AD3d 603 [1st Dept. 2012]; *Mejia v Nanni*, 307 AD2d 870 [1st Dept. 2003]; *Daniels v City of New York*, 291 AD2d 260 [1st Dept. 2002]; *Strong v Brookhaven Mem. Hosp. Med. Ctr.*, 240 AD2d 726 [2nd Dept. 1997]). On this record, in which ADT's contract with U.S. Marshals Service for the installation of the security system at Cadman Plaza is unchallenged, we deem it appropriate to grant renewal and, upon renewal, grant plaintiffs' motion for partial summary judgment on liability on their Labor Law §240(1) cause of action against ADT.

The record shows that ADT was a statutory agent of the U.S.

Marshals Service, which had hired ADT for the installation of the security system at Cadman Plaza *(see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]). ADT had the authority to supervise and control the work being done by Tuccillo pursuant to the terms of its subcontract with the federal government *(see e.g. McGurk v Turner Constr. Co.*, 127 AD2d 526, 529 [1st Dept. 1987]). Moreover, ADT demonstrated this authority by subcontracting a portion of the installation of the security system to Tuccillo's employer, Petrocelli (*see Williams v Dover Home Improvement*, 276 AD2d 626 [2nd Dept. 2000]). The fact that Petrocelli possessed concomitant or overlapping authority to supervise the wire installation does not negate ADT's authority to supervise and control the installation of the wires *(Nephew v Klewin Bldg. Co., Inc.*, 21 AD3d 1419, 1420-1421 [4th Dept. 2005]). Whether ADT actually supervised Tuccillo is irrelevant (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]*; Rizzo v Hellman Elec. Corp.*, 281 AD2d 258 [1st Dept. 2001]).

The motion court dismissed plaintiffs' causes of action under Labor Law § 241(6), presumably under the reasoning that ADT had not exercised any supervision or control over Tuccillo's work. Since the analysis of statutory agency for purposes of

Labor Law § 240(1) applies equally to Labor Law § 241(6) *(see Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 192-193 [1st Dept 2011]), ADT's motion for summary judgment to dismiss the Labor Law § 241(6) cause of action should have been denied.

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

ENTERED: DECEMBER 27, 2012

CLERK

Friedman, J.P., Catterson, Renwick, DeGrasse, Román, JJ.

8584 Colin Fraser, et al., Index 113586/02
Plaintiffs-Respondents,

-against-

301-52 Townhouse Corp., et al.,
Defendants-Appellants.

Schechter & Brucker P.C., New York (Thomas V. Juneau, Jr., of counsel), for appellants.

Jaroslawicz & Jaros LLC, New York (David Tolchin of counsel), for respondents.

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered March 23, 2011, which, to the extent appealed from, denied defendants' motion to dismiss the claims for lost earnings or to preclude evidence in support thereof at trial, to preclude evidence in support of the claims of loss of personal property, to dismiss the claim for damages for the alleged diminished value of the apartment or preclude evidence in support thereof, and to preclude expert testimony as to the rules of law applicable to this case, unanimously modified, on the law, to grant the motion to dismiss the claims for lost earnings and to preclude evidence of loss of personal property, and otherwise affirmed, without costs.

Plaintiffs' premises liability claims are based on an

alleged toxic mold condition in their former cooperative apartment. In his deposition, plaintiff Colin Fraser attributed the claimed lost earnings to lethargy which, according to plaintiffs Colin Fraser and Pamela Fraser's supplemental bill of particulars, was a consequence of plaintiffs' exposure to the mold contamination. Damages for the resultant lost earnings are therefore not recoverable in light of the motion court's previous dismissal of plaintiffs' personal injury claims (*see* 57 AD3d 416 [2008], *appeal dismissed* 12 NY3d 847 [2009]). Moreover, it does not avail plaintiffs to argue that they have not been able to make commercial use of the apartment since 2002, which happens to be the year they moved out of the premises.

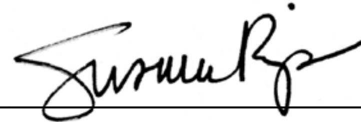
Plaintiffs should be precluded from offering evidence at trial as to loss of personal property because they disposed of the items they claim were damaged, thereby preventing defendants from challenging the validity and extent of those claims (*see* *Squitieri v City of New York*, 248 AD2d 201 [1st Dept 1998]).

Notwithstanding defendants' argument, the closed violation summary report issued by the New York City Department of Housing Preservation and Development does not dispose of plaintiffs' claim of a diminution in the value of the apartment. The report does not resolve the operative question of whether and to what

extent the alleged contamination affected the value of plaintiffs' cooperative shares (*see e.g. Matter of Commerce Holding Corp. v Board of Assessors of Town of Babylon,* 88 NY2d 724, 730 [1996]). Moreover, as the motion court ruled, limitations on the testimony of plaintiffs' expert witnesses are appropriately left to the discretion of the trial court.

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

ENTERED: DECEMBER 27, 2012



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Andrias, J.P., Saxe, Moskowitz, Freedman, Abdus-Salaam, JJ.

8858N IDT Corporation, Index 603710/04
Plaintiff-Appellant,

-against-

Morgan Stanley Dean
Witter & Co., et al.,
Defendants-Respondents.

Boies, Schiller & Flexner LLP, Armonk (Edward Normand of counsel), for appellant.

David Polk & Wardwell LLP, New York (Guy Miller Struve of counsel), for respondents.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered April 4, 2012, which denied plaintiff's motion to amend the complaint, unanimously affirmed, with costs.

Plaintiff is unable to allege that it reasonably relied on defendants' misrepresentation that they would stop disparaging it in discussions with Telefonica. In a prior appeal, the Court of Appeals rejected plaintiff's argument that defendants' statute of limitations affirmative defenses should be barred by equitable estoppel, because after learning of defendants' disparagement of it, plaintiff was on inquiry notice that it might have legal claims against them and therefore "should have made further inquiry before the statute of limitations expired" (*see* 12 NY3d

132, 141 [2009]). Contrary to plaintiff's interpretation of the Court's statement, the point is that had it made further inquiry, it would have learned that defendants' alleged promise to stop disparaging it was illusory. The proposed amended complaint does not allege that plaintiff made further inquiry. It alleges that defendants continued to disparage plaintiff even after they promised to stop doing so. These allegations do not cure the pleading defect concerning justifiable reliance (*see Rosenblum v Glogoff*, 96 AD3d 514 [1st Dept 2012]). Moreover plaintiff's lost opportunity claim is not viable as damages are limited by the out-of-pocket rule (*Lama Holding v Smith Barney*, 88 NY2d 413).

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

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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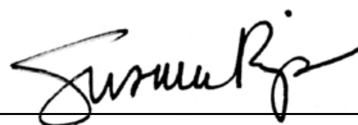

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Friedman, J.P., Acosta, Renwick, Richter, Román, JJ.

8881 The People of the State of New York, Ind. 708/79
Respondent,

-against-

David Rodriguez,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

Order, Supreme Court, New York County (Daniel McCullough, J.), entered on or about April 25, 2012, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion in declining to grant defendant a downward departure (*see People v Pettigrew*, 14 NY3d 406, 409 [2010]). The mitigating factors he cites were outweighed by the seriousness of the underlying sex crime, which

resulted in the death of the victim, as well as by defendant’s criminal history and his prison disciplinary infractions. Defendant has not established that his medical condition eliminates any significant risk of reoffense.

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

ENTERED: DECEMBER 27, 2012

CLERK

Friedman, J.P., Acosta, Renwick, Richter, Román, JJ.

8882 Yolando Corrado, Index 118274/09
Plaintiff,

-against-

80 Broad LLC,
Defendant-Respondent,

First Republic Bank,
Defendant-Appellant.

Devitt Spellman Barrett, LLP, Smithtown (John M. Denby of counsel), for appellant.

Gannon, Rosenfarb, Balletti & Drossman, New York (Lisa L. Gokhulsingh of counsel), for respondent.

Order, Supreme Court, New York County (Anil C. Singh, J.), entered October 11, 2011, which to the extent appealed from as limited by the briefs, denied that portion of defendant tenant Bank's motion for summary judgment seeking dismissal of defendant landlord 80 Broad, LLC's cross claims against it and granted defendant landlord's cross motion for summary judgment on its indemnification claim, unanimously modified, on the law, to the extent of denying landlord's cross motion, and otherwise affirmed, without costs.

This is an action for personal injuries suffered by plaintiff, who is not a party to this appeal, when she tripped

and fell on a defect in the public sidewalk in front of the defendant tenant bank's branch office, located in premises leased from defendant landlord's building. Pursuant to the lease, defendant landlord is responsible for maintaining the sidewalk and defendant tenant's use of the sidewalk is limited to a three foot "control zone" outside the premises for ingress, egress and deliveries where landlord retains control of the lighting, signage, presentation and design of the premises. In addition, the lease contains an indemnification provision providing that tenant is to indemnify landlord for any accident that occurs "in or about the premises."

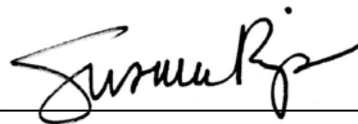
Although the phrase "in or about," may, in appropriate circumstances, refer to a general area "expressing the idea of physical proximity" sufficient to include the sidewalk outside a demised premises (*see Hogeland v Silbey Lindsay & Curr Co.*, 42 NY2d 153, 159 [1977]), construing the indemnification clause in this manner would improperly place the clause in direct conflict with other provisions of the lease (*National Conversion Corp. v Cedar Bldg. Corp.*, 23 NY2d 621, 625 [1969]; *HSBC Bank USA v National Equity Corp.*, 279 AD2d 251, 253 [1st Dept 2001]). Tenant is precluded from having any beneficial use of or responsibility for maintenance of the sidewalk and the public

sidewalk was not part of the leased premises. Accordingly, the indemnification provision cannot be construed as an agreement to indemnify landlord for accidents on the public sidewalk (*see e.g. Lopez v Guei Shun Shiau*, 29 Misc3d 1215(A), *affd* 88 AD3d 598 [1st Dept 2011]).

The tenant also seeks summary judgment against the landlord on the tenant's common-law indemnification claims to the extent the tenant is liable to plaintiff. Such relief, which the tenant requested in the alternative, is unnecessary since the order appealed from also dismissed the complaint as against the tenant.

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

ENTERED: DECEMBER 27, 2012



CLERK

Friedman, J.P., Acosta, Renwick, Richter, Román, JJ.

8883 In re Fidan G.,

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

Andrew J. Baer, New York, for appellant.

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

Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about January 19, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of assault in the third degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis to disturb the court's determinations concerning credibility and identification. The victim's testimony established that appellant, acting in concert with several other

youths, intentionally and repeatedly punched and kicked him (*see Matter of Kaseem W.*, 50 AD3d 521 [1st Dept 2008]). Physical injury was established by the victim's testimony that the attacks resulted in, among other things, swelling to his jaw, abrasions on his arms, and back pain that required him to take prescribed medication for three months (*see People v Haith*, 44 AD3d 369 [1st Dept 2007], *lv denied* 9 NY3d 1034 [2008]; *Matter of Veronica R.*, 268 AD2d 287 [1st Dept 2000]).

Appellant failed to request an adjournment in contemplation of dismissal as the least restrictive alternative, and the court properly exercised its discretion in denying his request to dismiss the petition (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). The aggravating circumstances of this serious offense, appellant's failure to take responsibility for his actions, and his poor academic performance and school attendance record

warranted the 12-month period of supervision (*see e.g. Matter of Zion F.*, 92 AD3d 589 [1st Dept 2012]; *Matter of Ahmed I.*, 49 AD3d 319 [1st Dept 2008]).

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

ENTERED: DECEMBER 27, 2012

CLERK

Friedman, J.P., Acosta, Renwick, Richter, Román, JJ.

8884 In re 7th Avenue Restaurant Group LLC, Petitioner-Appellant, Index 113490/11

-against-

New York State Liquor Authority,
Respondent-Respondent.

Mehler & Buscemi, New York (Martin P. Mehler of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Won S. Shin of counsel), for respondent.

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered February 10, 2012, denying the petition to annul the determination of respondent New York State Liquor Authority, dated November 16, 2011, which denied petitioner's application to renew its on-premises liquor license, and dismissing this proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The State Liquor Authority's determination to deny petitioner's application to renew its on-premises liquor license has a rational basis (*see Matter of Farina v State Liq. Auth.*, 20 NY2d 484, 491 [1967]; *see also Cromwell, Inc. v Hoffman*, 283 AD2d 333, 334 [1st Dept 2001]). The record reflects that after a

change of ownership in 2009, petitioner adopted a new trade name, renovated the premises, extended its hours from 2:00 a.m. to 4:00 a.m. and began playing loud music, causing its neighbors to register dozens of noise complaints. The State Liquor Authority received complaints from petitioner's landlord, the local community board and numerous concerned citizens and reviewed notices of violation issued by the New York City Buildings, Police and Fire Departments to petitioner for, among other things, operating an “illegal cabaret” without a license. Since petitioner was only licensed to serve liquor under a “restaurant” license (*see* Alcoholic Beverage Control Law § 64), respondent’s determination to deny its renewal application was “not arbitrary and capricious” (*see Rose Group Park Ave. LLC v New York State Liq. Auth.*, 93 AD3d 1, 3 [1st Dept 2012], *lv denied* 18 NY3d 953 [2012]).

The agency did not exceed its statutory authority in adopting 9 NYCRR § 48.8(a), as the rule is not “out of harmony with the [licensing] statute[s]” (*see Matter of Metro. Movers*

Assn., Inc. v Liu, 95 AD3d 596, 600 [1st Dept 2012], quoting *Matter of Jones v Berman*, 37 NY2d 42, 53 [1975]).

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

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: DECEMBER 27, 2012

CLERK

Friedman, J.P., Acosta, Renwick, Richter, Román, JJ.

8885 In re Abram Bauman, et al., Petitioners, Index 401808/10

-against-

New York State Division of Housing and Community Renewal, Respondent.

Abram Bauman, petitioner pro se.

Lyudmila Bauman, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Valerie Figueredo of counsel), for respondent.

Determination of respondent New York State Division of Housing and Community Renewal (DHCR), dated April 22, 2010, which terminated petitioners' Section 8 subsidy on the ground that the assisted unit was not their only residence (24 CFR 982.551[h][1]), unanimously modified, on the law, to delete the finding that petitioner Abram Bauman is indebted to the agency for the overpayment of assistance for the period after he vacated the unit, and to vacate the penalty of termination, the matter is remanded for the imposition of a lesser penalty, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Joan B. Lobis, J.], entered October 29, 2010), is otherwise disposed of

by confirming the remainder of the determination, without costs.

Substantial evidence supports the determination that petitioners, an elderly married couple, violated DHCR's policy requiring truthful and complete reporting of family composition on its recertification forms. However, the finding that Mr. Bauman is indebted to DHCR for the total amount of subsidy paid since October 1, 2007, when he vacated the unit pursuant to the couple's separation, is not supported by substantial evidence. The evidence shows that from the time it was first awarded, the subsidy was provided to assist both petitioners to live in the unit. The hearing officer found that Mrs. Bauman continued to reside in the unit at all times, and it is undisputed that she fulfilled all of her other obligations with respect to the unit and that there were no other problems with her tenancy. In addition, DHCR's witnesses testified that Mrs. Bauman had the right to remain in the unit alone, and that since she remained individually eligible for the subsidy, if she and her husband had complied with the rules and reported that she was the sole occupant of the unit, she would have received a higher subsidy, based on her income alone. Hence, the evidence establishes that DHCR did not suffer the claimed financial loss in the amount of the full value of the subsidy.

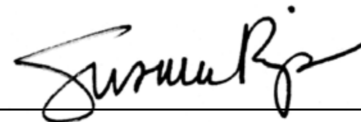
When DHCR staff discovered the discrepancy and explained the seriousness of the problem to petitioners with the aid of a Russian-speaking case manager, petitioners immediately admitted their mistake in continuing to fill out the recertification forms after they separated in the same manner as before. They maintain that they did not mean to defraud the agency, but they did not understand the rules, in part because of language and cultural barriers. A DHCR caseworker testified that she understood that they required help to fill out the forms and that they signed the paperwork after it was prepared by others. We note that in confirming the determination, the hearing officer, who heard testimony from both petitioners via translators, did not make any credibility determinations, but found instead that the inaccurate recertifications alone violated the agency's rules. We further note that both petitioners are elderly and disabled, that their only source of income is disability, and that undisputed medical evidence establishes that they suffer from serious, chronic, and deteriorating physical and mental health conditions, which have compromised Mr. Bauman's vision and Mrs. Bauman's mental faculties, and that the latter two conditions may have contributed to the recertification violations.

Under these circumstances, we find that the penalty of

termination, which would likely render petitioners homeless, is excessive and shockingly disproportionate to what the evidence shows was essentially a technical offense. Hence, we remand for imposition of a lesser penalty (*see e.g. Matter of Paul v New City Hous. Auth.*, 89 AD3d 520 [1st Dept 2011], *lv denied* 18 NY3d 808 [2012]; *Matter of Wise v Morales*, 85 AD3d 571 [1st Dept 2011], *lv denied* 18 NY3d 808 [2012]; *Matter of Williams v Donovan*, 60 AD3d 594 [1st Dept 2009]; *Matter of Gray v Donovan*, 58 AD3d 488 [1st Dept 2009]).

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

ENTERED: DECEMBER 27, 2012



CLERK

Friedman, J.P., Acosta, Renwick, Richter, Román, JJ.

8886 In re Tyjaia Simone-Kiesha Mc., and Another,

Dependent Children Under Eighteen Years of Age, etc.,

Crystal Mc.,
Respondent-Appellant,

Edwin Gould Services for Children and Families,
Petitioner-Respondent,

Commissioner of the Administration for Children's Services of the City of New York,
Petitioner.

Daniel R. Katz, New York, for appellant.

John R. Eyerman, New York, for respondent.

Michael S. Bromberg, Sag Harbor, attorney for the children.

Order of disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about September 8, 2011, which, upon a fact-finding of permanent neglect, terminated respondent mother's parental rights to the subject children and committed custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and

convincing evidence that despite the agency’s diligent efforts, respondent failed to plan for the children’s future (*see* Social Services Law § 384-b[7][a]). Although respondent was required to complete a drug treatment program and the agency provided referrals and sought to follow up, respondent failed to complete a program (*see Matter of Jada Dorithah Solay McC. [Crystal Delores McC.]*, 95 AD3d 615 [1st Dept 2012]; *Matter of Alfonso D.*, 12 AD3d 258, 259 [1st Dept 2004]).

A preponderance of the evidence supports the determination that the children’s best interests would be served by terminating respondent’s parental rights and freeing the children for adoption (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). Respondent still had not completed a drug treatment program by the time of disposition. Meanwhile, the children have lived in the same preadoptive foster home with their other

siblings for over four years. In addition, the foster parents, who wish to adopt the children, have been tending to the children's special needs, and the children have been thriving in their care.

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

ENTERED: DECEMBER 27, 2012

CLERK

Friedman, J.P., Acosta, Renwick, Richter, Román, JJ.

8887 The People of the State of New York, Ind. 365/11
Respondent,

-against-

Andres Zapata,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Renee A. White, J.), rendered on or about April 26, 2011,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

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

ENTERED: DECEMBER 27, 2012

CLERK

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

Friedman, J.P., Acosta, Renwick, Richter, Román, JJ.

8891 Rayford Wayne Chappill, Index 109041/05
Plaintiff-Appellant,

-against-

Bally Total Fitness Corporation,
Defendant-Respondent.

Joshua Annenberg, New York, for appellant.

Morrison Mahoney, LLP, New York (Demi Sophocleous of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Louis B. York, J.), entered January 26, 2011, which, upon reargument, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff, a member of defendant's health club, suffered a heart attack at the club and was found lying on the floor near a weight training machine. In support of its motion for summary judgment, defendant submitted evidence that club employees immediately called 911, and two employees rushed to plaintiff's side, and checked for a pulse and to see whether or not he was breathing. Those employees, both trained in cardiopulmonary resuscitation (CPR) testified that they did not perform CPR because plaintiff was breathing and therefore it was not

appropriate.

The incident occurred prior to enactment of General Business Law § 627-a (1), which requires health clubs to have an automated external defibrillator device (AED) on site, and at least one individual who holds a valid certification of completion of a course in operation of AEDs and in CPR. Nor was defendant vicariously liable for breaching a common-law duty of care that the employees had assumed by coming to plaintiff's aid as "Good Samaritans." Since the employees were providing emergency medical treatment to plaintiff, they could only have been liable for gross negligence (*see* Public Health Law § 3000-a [1]), conduct not displayed here (*see Digiulio v Gran, Inc.*, 74 AD3d 450 [1st Dept 2010], *affd* 17 NY3d 765 [2011]; *Colnaghi, U.S.A. v. Jewelers Protection Servs.*, 81 NY2d 821, 823-824 [1993]).

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

ENTERED: DECEMBER 27, 2012

CLERK

Friedman, J.P., Acosta, Renwick, Richter, Román, JJ.

8892 Georgina Ortiz, as Administratrix of the Goods, Chattels and Credits which were of Laioner Gil, deceased, et al.,
Plaintiffs-Appellants, Index 17064/07

-against-

Vithal Vernenkar, M.D., et al.,
Defendants-Respondents,

"John" Gandhi, M.D., etc., et al.,
Defendants.

The Jacob D. Fuchsberg Law Firm, New York (Christina J. Kazepis of counsel), for appellants.

O'Connor, McGuinness, Conte, Doyle, Oleson, Watson & Loftus, LLP, White Plains (Montgomery L. Effinger of counsel), for Vithal Vernenkar, M.D., respondent.

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for St. Barnabas Hospital, respondent.

Appeal from order, Supreme Court, Bronx County (Stanley Green, J.), entered October 3, 2011, which granted defendants Vithal Vernenkar's and St. Barnabas Hospital's motions for summary judgment dismissing the complaint as against them, deemed appeal from judgment, entered October 6, 2011, dismissing the complaint as against said defendants, and, so considered, the judgment is unanimously affirmed, without costs.

In the interests of justice, we deem plaintiff's notice of

appeal from the order a valid notice of appeal from the judgment (*see* CPLR 5520[c]; *Robertson v Greenstein*, 308 AD2d 381 [1st Dept 2003], *lv dismissed* 2 NY3d 759 [2004]).

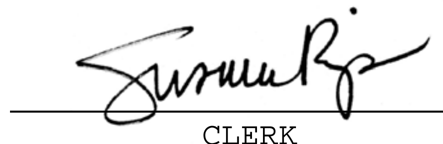
Defendants established prima facie, by submitting the hospital records and an expert affirmation, that Dr. Vernenkar's limited emergency treatment of the decedent, which concluded with the decedent's transfer to the intensive care unit in stable condition, did not depart from accepted medical practices and was not the proximate cause of the injuries claimed in this case. In opposition, plaintiffs failed to raise an issue of fact. Their expert's opinion that Dr. Vernenkar departed from accepted standards of medical care was conclusory and speculative; it failed to address, inter alia, the nature of Dr. Vernenkar's role and duties as a trauma surgeon. In the absence of any malpractice by Dr. Vernenkar, the hospital cannot be held vicariously liable for injuries claimed herein.

The claim of medical malpractice based on a lack of informed consent fails because such a claim is limited "to those cases

involving either (a) non-emergency treatment, procedure or surgery, or (b) a diagnostic procedure which involved invasion or disruption of the integrity of the body” (Public Health Law § 2805-d[2]).

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

ENTERED: DECEMBER 27, 2012



CLERK

Friedman, J.P., Acosta, Renwick, Richter, Román, JJ.

8893 Wells Fargo Bank, N.A., etc., Index 382738/09
Plaintiff-Respondent,

-against-

June Joan Van Dyke, et al.,
Defendants-Appellants,

New York City Environmental
Control Board, et al.,
Defendants.
- - - - -
Legal Services NYC, South Brooklyn
Legal Services, Legal Services NYC-
Bronx, MFY Legal Services, Inc.,
Staten Island Legal Services, Queens
Legal Services, Bedford-Stuyvesant
Community Legal Services, JASA/Legal
Services for the Elderly in Queens,
Empire Justice Center, and Neighborhood
Economic Development Project (NEDAP),
Amici Curiae.

Thomas M. Curtis, New York, for appellants.

Hogan Lovells US LLP, New York (David Dunn of counsel), for respondent.

Jacob Inwald, New York, for Legal Services NYC, amicus curiae.

Shira Galinsky, Meghan Faux and Pavita Krishnaswamy, Brooklyn, for South Brooklyn Legal Services, amicus curiae.

James Jantarasami, Bronx, for Legal Services NYC-Bronx, amicus curiae.

Jeanette Zelhof, New York (Renee Cadmus and Linda Jun of counsel), for MFY Legal Services, Inc., amicus curiae.

Margaret Becker, Staten Island, for Staten Island Legal Services, amicus curiae.

Franklin Romeo, Jamaica, for Queens Legal Services, amicus curiae.

Hon. Betty Staton, Brooklyn (Catherine P. Isobe of counsel), for Bedford-Stuyvesant Community Legal Services, amicus curiae.

Donna Dougherty, Rego Park, for JASA/Legal Services for the Elderly in Queens, amicus curiae.

Rebecca Case-Grammatico, Rochester, for Empire Justice Center, amicus curiae.

Josh Zinner, New York, for Neighborhood Economic Development Project (NEDAP), amicus curiae.

Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered August 25, 2011, which denied the Van Dyke defendants' motion to dismiss the complaint as against them, unanimously affirmed, without costs.

Defendants failed to demonstrate that plaintiff's representative was not fully authorized to negotiate a settlement of this residential foreclosure action on plaintiff's behalf or that the negotiations that were had were a sham (*see* CPLR 3408). Contrary to defendants' apparent belief, plaintiff was not required by CPLR 3408 to offer them a settlement. While the aspirational goal of CPLR 3408 negotiations is that the parties "reach a mutually agreeable resolution to help the defendant

avoid losing his or her home" (CPLR 3408[a]), the statute requires only that the parties enter into and conduct negotiations in good faith (*see* subd [f]). As the motion court found, there are situations in which the statutory goal is simply not financially feasible for either party. Defendant June Van Dyke, while asserting that nearly two thirds of her income was rental property, produced no lease, no affidavits by tenants, and no bank statements showing funds traceable to the rents she alleges she has been collecting for a number of years. The bank statements she submitted covered a mere three months. Under the circumstances, it was not unreasonable for plaintiff to resist using her purported rental income in its loan modification calculations. In any event, even if the rental income were used, plaintiff would be ineligible for available modifications. Contrary to defendants' apparent contention, the mere fact that plaintiff refused to consider a reduction in principal or interest rate does not establish that it was not negotiating in good faith. Nothing in CPLR 3408 requires plaintiff to make the exact offer desired by defendants, and plaintiff's failure to make that offer cannot be interpreted as a lack of good faith.

While it does not affect the result in this case, we reject plaintiff's contention that compliance with the good faith

requirement of CPLR 3408 is established merely by proving the absence of fraud or malice on the part of the lender. Any determination of good faith must be based on the totality of the circumstances. In this regard we note that CPLR 3408 is a remedial statute.

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

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

ENTERED: DECEMBER 27, 2012

CLERK

Friedman, J.P., Acosta, Renwick, Richter, Román, JJ.

8894 Alexander Komolov, et al., Index 651626/11
Plaintiffs-Appellants,

-against-

David Segal, et al.,
Defendants-Respondents.

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for appellants.

Kathryn Bedke Law, New York (Kathryn L. Bedke of counsel), for respondents.

Appeal from order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered March 7, 2012, upon reargument, insofar as said order dismissed the conversion claims for failure to state a cause of action, deemed an appeal from judgment, same court and Justice, entered May 29, 2012, dismissing the conversion causes of action (CPLR 5501[c]), and so considered, said judgment unanimously reversed, on the law, without costs, and the judgment vacated.

Contrary to plaintiffs' claim, we did not decide in the prior appeal (96 AD3d 513 [1st Dept 2012]) whether the complaint stated a cause of action for conversion; hence, law of the case does not require reversal of the judgment currently under appeal.

The motion court did not impermissibly act sua sponte in

changing the grounds for dismissal of the conversion claims; rather, it was reacting to the arguments made by plaintiffs in opposition to defendants' motion to reargue (*see Marx v Marx*, 258 AD2d 366, 367 [1st Dept 1999]; *Goldstein Affiliates v Len Art Knitting Corp.*, 75 AD2d 551 [1st Dept 1980]). In any event, the court had discretion to reconsider its own prior interlocutory order (*see e.g. Kleinser v Astarita*, 61 AD3d 597 [1st Dept 2009]).

Accepting the complaint and the materials submitted on the various motions as true, as we must on a CPLR 3211(a)(7) motion to dismiss, we find that they show that plaintiffs have a claim for conversion of the Picasso and Vlaminck paintings but not for the jewelry (*see e.g. Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). The complaint and the affidavits show that on February 4, 2008, defendant Mohamed Serry purchased a Picasso glasswork at the Original Miami Antique Show and had it shipped to his office/gallery; in or about June 2008, plaintiff Komolov purchased from defendants a Picasso painting on glass known as "*Portrait de famille*" and depicted in the record on appeal; that Komolov's office was located next to defendants'; in March 2010, while Komolov was away on a business trip, defendants Serry and Segal told nonparty Selvin Paz to remove "*Portrait de*

famille" from Komolov's office, place it within defendants' company's control, and not to return it to Komolov; and on or about March 16, 2010, Komolov tried to pick up "*Portrait de famille,"* but Serry told nonparty Raul Giansante not to release it to Komolov.

The complaint and the affidavits also show that in May or July 2008, Komolov bought from defendants a Vlaminck painting known as "Night View" and depicted in the record on appeal; at the beginning of March 2010, Serry told Giansante and Paz to remove the Vlaminck painting from Komolov's office, which they did; and on or about March 16, 2010, Serry told Giansante not to release to Komolov anything that Komolov wanted to retrieve.

However, with respect to the jewelry, plaintiffs failed to satisfy the element of "[defendants'] dominion over the property or interference with it, in derogation of [plaintiffs'] rights" (*see Dobroshi v Bank of Am., N.A.*, 65 AD3d 882, 885 [1st Dept 2009], *lv dismissed* 14 NY3d 785 [2010]). Neither Giansante nor Paz said he removed any jewelry from Komolov's office. While Komolov said the jewelry was taken from his office while he was away, he did not say by whom, and he could not have had direct knowledge because he was not present when the jewelry was removed.

In addition, with respect to the sapphire ring, plaintiffs failed to show "legal ownership or an immediate superior right of possession to a specific identifiable thing" (*Messiah's Covenant Community Church v Weinbaum*, 74 AD3d 916, 919 [2d Dept 2010]). The complaint alleges that defendants converted a sapphire *ring*, but the photograph attached to the complaint shows merely a *sapphire* (i.e., a gemstone). The affidavits give no further details about the ring.

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

ENTERED: DECEMBER 27, 2012

CLERK

Friedman, J.P., Acosta, Renwick, Richter, Román, JJ.

8895 & M-5519 Index 650435/11 650678/11

Viking Global Equities, LP, et al.,
Plaintiffs-Respondents,

-against-

Porsche Automobil Holding SE,
formerly known as Dr. Ing.
H.C. F. Porsche AG,
Defendant-Appellant.

\- - - - -

Glenhill Capital LP, et al.,
Plaintiffs-Respondents,

-against-

Porsche Automobil Holding SE,
formerly known as Dr. Ing.
H.C. F. Porsche AG,
Defendant-Appellant.

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The Federation of German Industries,
German Issuers, The Association of
German Banks, The Swiss Bankers
Association, The European Banking
Federation, Economiesuisse,
Mouvement Des Entreprises De France,
and German and American Law Professors,
Amici Curiae.

Sullivan & Cromwell LLP, New York (Robert J. Giuffra, Jr. of counsel), for appellant.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Marc L. Greenwald of counsel), and Dowd Bennett LLP, St. Louis, MO (James F. Bennett of the bar of the State of Missouri, admitted pro hac vice, of counsel), for Viking Global Equities, LP, Viking Global Equities II LP, and VGE III Portfolio LTD., respondents.

Kleinberg, Kaplan, Wolff & Cohen, P.C., New York (David Parker of

counsel), and Bartlit Beck Herman Plaenchar & Scott LLP, Chicago, IL (James B. Heaton, III of the bar of the State of Illinois, admitted pro hac vice, of counsel), for Glenhill Capital LP; Glenhill Capital Overseas Masters Fund LP; Glenhill Concentrated Fund LP; Glenview Capital Partners, L.P.; Glenview Institutional Partners, L.P.; Glenview Capital Master Fund, Ltd.; GCM Little Arbor Partners, L.P.; GCM Little Arbor Institutional Partners, L.P.; GCM Little Arbor Master Fund, Ltd.; GCM Opportunity Fund, L.P.; Glenview Capital Opportunity Fund, L.P.; Glenview Offshore Opportunity Master Fund, Ltd.; Greenlight Capital, L.P.; Greenlight Capital Qualified, L.P.; Greenlight Capital Offshore Partners; Greenlight Reinsurance, Ltd.; Royal Capital Value Fund, LP; Royal Capital Value Fund (QP), LP; RoyalCap Value Fund, Ltd.; RoyalCap Value Fund II, Ltd.; Tiger Global, L.P.; Tiger Global II, L.P.; and Tiger Global, Ltd., respondents.

Mayer Brown LLP, New York (Andrew J. Pincus of counsel), The Federation of German Industries, German Issuers, The Association of German Banks, The Swiss Bankers Association and The European Banking Federation, Economiesuisse, Mouvement Des Entreprises De France, for amici curiae.

Snell & Wilmer L.L.P., Costa Mesa, CA (Mary-Christine Sungaila of the bar of the State of California, admitted pro hac vice, of counsel), for German and American Law Professors, amici curiae.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered August 8, 2012, which to the extent appealed from as limited by the briefs, denied defendant’s motion to dismiss the complaint on the ground of forum non conveniens, and denied its motions for summary judgment and to dismiss causes of action for failure to state a claim, unanimously reversed, on the law and the facts, with costs, the motion to dismiss on the ground of forum non conveniens granted. The Clerk is directed to enter

judgment dismissing the complaint.

In these consolidated actions for fraud and unjust enrichment, plaintiff hedge funds allege that they sustained losses as a result of misrepresentations made by defendant relating to its intention to acquire shares in nonparty Volkswagen AG. Plaintiffs allege that they were fraudulently induced into making short sales in VW stock in reliance on defendant's public and private assurances that it had no present intention to acquire a 75% stake in VW, and that when defendant unveiled its takeover plan, it triggered a "short squeeze" that spiked prices and forced plaintiffs to cover their positions at losses of more than a billion dollars.

With respect to the motion to dismiss the action on the ground of forum non conveniens, the only alleged connections between the action and New York are the phone calls between plaintiffs in New York and a representative of defendant in Germany, and the emails sent to plaintiffs in New York but generally disseminated to parties elsewhere, which allegedly contained misrepresentations of defendant's intent to acquire a 75% stake in VW. We find that these connections failed to create a substantial nexus with New York, given that the events of the underlying transaction otherwise occurred entirely in a foreign

jurisdiction (*see Finance & Trading Ltd. v Rhodia S.A.*, 28 AD3d 346 [1st Dept 2006], *lv denied* 7 NY3d 706 [2006]). In light of this inadequate connection between the events of the transaction and New York, as well as the facts that defendant and most plaintiffs are not New York residents, the VW stock is traded only on foreign exchanges, many of the witnesses and documents are located in Germany, which has stated its interest in the underlying events and provides an adequate alternative forum, Porsche met its heavy burden to establish that New York was an inconvenient forum (*see Kuwaiti Eng'g Group v Consortium of Intl. Consultants, LLC*, 50 AD3d 599, 599-600 [1st Dept 2008]).

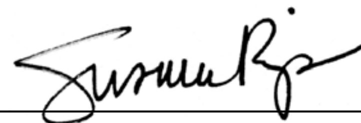
In light of the foregoing, we need not address Porsche’s alternative arguments.

M-5519 - *Viking Global Equities, LP, et al. v Porsche Automobil Holding SE, etc.*

Motion to file amici curiae brief granted.

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

ENTERED: DECEMBER 27, 2012



CLERK

Friedman, J.P., Acosta, Renwick, Richter, Román, JJ.

8896 The People of the State of New York, Ind. 5520/09
Respondent,

-against-

Victor Peterson,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered September 28, 2010, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of three years, unanimously affirmed.

The record, taken as a whole (*see People v Providence*, 2 NY3d 579, 583 [2004]), demonstrates that defendant made a knowing and intelligent waiver of his right to counsel. The court conducted a thorough inquiry, in which it fully warned defendant of the risks of self-representation (*see e.g. People v Peterson*, 273 AD2d 88, 89 [2000] [same defendant]). Defendant's lack of legal knowledge and difficulties in representing himself were not grounds for denying or revoking pro se status (*see People v Ryan*,

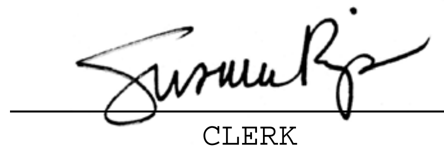
82 NY2d 497, 507 [1993]). "Ineptitude, inherent in almost any case of self-representation, is a constitutionally protected prerogative" (*People v Schoolfield*, 196 AD2d 111, 117 [1994], *lv dismissed* 83 NY2d 858 [1994], *lv denied* 83 NY2d 915 [1994]). Even though defendant had no right to hybrid representation (*see People v Rodriguez*, 95 NY2d 497, 501 [2000]), the court acceded to his request for an arrangement whereby he could switch back and forth between self-representation and representation by his legal advisor. Any disadvantages caused by that arrangement were of defendant's own making.

The evidence at the *Hinton* hearing established an overriding interest that warranted closure of the courtroom during an undercover officer's testimony (*see Waller v Georgia,* 467 US 39 [1984]; *People v Ramos*, 90 NY2d 490, 497 [1997], *cert denied sub nom. Ayala v New York*, 522 US 1002 [1997]), as well as a need for

the officer to testify under her shield number (*see People v Waver*, 3 NY3d 748 [2004]). We have considered and rejected defendant's arguments on these issues.

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

ENTERED: DECEMBER 27, 2012



CLERK

Friedman, J.P., Acosta, Renwick, Richter, Román, JJ.

8897 Michael Thompson, Index 300039/10
Plaintiff-Appellant,

-against-

793-97 Garden Street Housing
Development Fund Corporation,
Defendant-Respondent.

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

Hannum Feretic Prendergast & Merlino, LLC, New York (Barbara Apostol Hayes of counsel), for respondent.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered October 11, 2011, which granted defendant's motion for summary judgment dismissing the complaint, and denied plaintiff's cross motion for leave to amend his bill of particulars, unanimously affirmed, without costs.

The record demonstrates conclusively that defendant did not own the property that abutted the sidewalk on which plaintiff tripped and fell, and was therefore not responsible for maintaining it in a reasonably safe condition (*see* Administrative Code of City of NY § 7-210; *Montalbano v 136 W. 80 St. CP*, 84 AD3d 600, 602-603 [1st Dept 2011]).

Plaintiff's proposed amendment of his bill of particulars to

allege that defendant made special use of the sidewalk is unsupported by evidence that the sidewalk was subject to defendant’s control (*see Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 298 [1st Dept 1988], *lv dismissed in part, denied in part* 73 NY2d 783 [1988]). Plaintiff’s evidence shows merely that many people, including some of defendant’s tenants, use the sidewalk to exit a de facto parking lot on a nearby abandoned dirt road.

We have considered plaintiff’s remaining contentions and find them unavailing.

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

ENTERED: DECEMBER 27, 2012

CLERK

Friedman, J.P., Acosta, Renwick, Richter, Román, JJ.

8898 Jamiluden Haniff, Index 310297/10
Plaintiff-Respondent,

-against-

Adil Khan, et al.,
Defendants-Appellants.

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

Burns & Harris, New York (Blake G. Goldfarb of counsel), for respondent.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered September 19, 2011, which, to the extent appealed from, denied defendants' motion for summary judgment dismissing the complaint alleging serious injuries under Insurance Law § 5102(d), unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Plaintiff's car was rear-ended by a cab driven and owned by defendants on September 24, 2009, and he subsequently commenced this action alleging serious injuries to his lower back and left shoulder under the "significant limitation," "permanent consequential limitation," and 90/180-day injury categories of Insurance Law § 5102(d).

Defendants established prima facie absence of a serious injury in the lumbar spine and shoulder by submitting the affirmed report of an orthopedist who examined plaintiff in October 2010 and found full range of motion, negative clinical test results, and resolved sprains (*see Castillo v Cinquina*, 85 AD3d 660 [1st Dept 2011]; *Christian v Waite*, 61 AD3d 581, 582 [1st Dept 2009]).

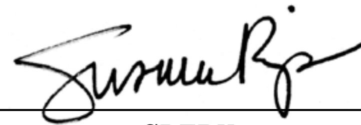
Plaintiff failed to raise a triable issue of fact. He did not submit any recent evidence of limitations in his lumbar spine, and his expert reported the lumbar spine was asymptomatic. As to the shoulder, plaintiff's orthopedist found only minor limitations in range of motion which are insufficient to establish existence of a "significant" or "consequential" limitation (*see Style v Joseph*, 32 AD3d 212, 214 n [1st Dept 2006]; *Arrowood v Lowinger*, 294 AD2d 315, 316 [1st Dept 2002]; *Bandoian v Bernstein*, 254 AD2d 205 [1st Dept 1998]). Further, plaintiff returned to work without limitation after two days and his orthopedist noted that he stopped treatment at his office after two months, at which time he exhibited only mild limitations, which are not a serious injury (*see Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]).

Defendants established entitlement to dismissal of the

90/180-day injury claim by submitting plaintiff's verified bill of particulars alleging that he was confined to bed and home and was substantially disabled for only two days (*see Rosa v Mejia*, 95 AD3d 402, 405 [1st Dept 2012]; *Onishi v N&B Taxi, Inc.*, 51 AD3d 594, 595 [1st Dept 2008]). Plaintiff did not submit any evidence to raise a triable issue of fact. Rather, the deposition testimony, which he submitted, confirmed that he missed two days of work.

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

ENTERED: DECEMBER 27, 2012



CLERK

Friedman, J.P., Acosta, Renwick, Richter, Román, JJ.

8899 The People of the State of New York, Ind. 1088/01
Respondent,

-against-

Daniel Sparber,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered on or about September 16, 2008, unanimously affirmed.

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

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

service of a copy of this order.

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

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

ENTERED: DECEMBER 27, 2012

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Clark, JJ.

8901 The People of the State of New York, Respondent, Ind. 3696/08

-against-

Solomon Wright,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and White & Case LLP, New York (Benjamin Rose and Alan Schindler of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered June 23, 2009, convicting defendant, after a jury trial, of assault in the first degree (two counts) and criminal possession of a weapon in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of 12 years, unanimously affirmed.

The verdict finding defendant guilty of two counts of assault in the first degree was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]; Penal Law § 120.10[1], [2]). The evidence demonstrated that the wound the victim sustained constituted "serious disfigurement" (*People v*

McKinnon, 15 NY3d 311, 315-316 [2010]).

While defendant raises a founded argument that certain comments in the prosecutor's voir dire and opening and closing statements were improper in that they tended to shift the burden of proof, it is unpreserved (*see People v Gray*, 86 NY2d 10, 19-20 [1995]). We decline to review it in the interest of justice. As an alternative holding, we find that any improprieties in the statements of the prosecutor constituted harmless error in light of the evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: DECEMBER 27, 2012

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Clark, JJ.

8902 Nicholas Cassizzi, et al., Index 300521/09
Plaintiffs-Appellants,

-against-

Fordham University,
Defendant-Respondent.

Michael A. Russo, White Plains (Christopher Riley of counsel), for appellants.

Harrington, Ocko & Monk, LLP, White Plains (Dawn M. Foster of counsel), for respondent.

Order, Supreme Court, Bronx County (Lizbeth González, J.), entered April 10, 2012, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Dismissal of the complaint was warranted in this action for personal injuries sustained by plaintiff Nicholas Cassizzi when, while descending stairs within a building on defendant's campus, he fell down the stairs. Although any alleged inconsistency in plaintiff's deposition testimony as to how the accident occurred, and whether his foot touched the stair before he fell, raised issues of credibility that are for a trier of fact (*see Cuevas v City of New York*, 32 AD3d 372, 373 [1st Dept 2006]; *Francis v New York City Tr. Auth.*, 295 AD2d 164 [1st Dept 2002]), the

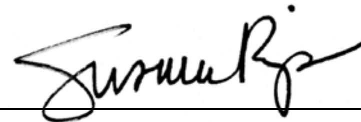
photographs of the subject stair and the affidavit of plaintiff's expert demonstrate that the defect in the stair was trivial.

Further, plaintiff failed to present evidence indicating that the "defect presented a significant hazard, notwithstanding its minimal dimension, by reason of location, adverse weather or lighting conditions, or other circumstances giving it the characteristics of a trap or snare" (*Gaud v Markham*, 307 AD2d 845 [1st Dept 2003]; *see Cintron v New York City Tr. Auth.*, 77 AD3d 410, 411 [1st Dept 2010]).

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

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

ENTERED: DECEMBER 27, 2012



CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Clark, JJ.

8903 In re Marlyn J'ace A.,

A Dependent Child Under
Eighteen Years of Age, etc.,

Lynora A.,
Respondent-Appellant,

Edwin Gould Services for
Children and Families,
Petitioner-Respondent.

Israel P. Inyama, New York, for appellant.

John R. Eyerman, New York, for respondent.

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

Order of disposition, Family Court, Bronx County (Jeanette Ruiz, J.), entered on or about August 4, 2011, which, upon a fact-finding determination that respondent mother suffers from a mental illness, terminated her parental rights to the subject child and committed custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

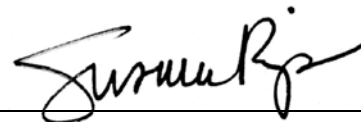
Clear and convincing evidence supports the determination that respondent, by reason of mental illness, is presently and

for the foreseeable future unable to provide proper and adequate care for her child (*see* Social Services Law § 384-b[4][c]; [6][a]). The court-appointed expert testified that respondent suffers from schizophrenia, non-differentiated type with paranoid features, and that this condition, which was manifest during the expert's interview with respondent, prevents her from adequately caring for the child presently and for the foreseeable future. The expert also testified that respondent refuses treatment and is noncompliant with medication (*see Matter of Timothy Reynaldo L.M.* [*Frances M.*], 89 AD3d 542 [1st Dept 2011], *lv denied* 18 NY3d 806 [2012]). Respondent did not present any evidence to rebut the expert's testimony (*see Matter of Isis S.C. [Doreen S.]*, 98 AD3d 905, 906 [1st Dept 2012]).

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

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

ENTERED: DECEMBER 27, 2012



CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Clark, JJ.

8904 Gualbert Alvarez, Index 7124/05
Plaintiff-Respondent,

-against-

Beth Abraham Health Services, et al.,
Defendants-Appellants.

Mauro Lilling Naparty LLP, Woodbury (Katherine Herr Solomon of counsel), for appellants.

Pollack, Pollack, Isaac & De Cicco, New York (Michael H. Zhu of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered September 28, 2011, upon a jury verdict, awarding plaintiff damages in the amount of $500,000 for past pain and suffering and $250,000 for future pain and suffering over 42 years, unanimously affirmed, without costs.

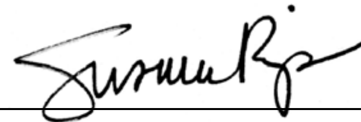
Defendants failed to preserve their argument that the jury's verdict was inconsistent as to liability and culpable conduct, as they failed to raise the argument before the jury was discharged (*see Barry v Manglass*, 55 NY2d 803, 806 [1981]; *Arrieta v Shams Waterproofing, Inc.*, 76 AD3d 495, 496 [1st Dept 2010]). In any event, the jury's verdict was consistent and can be reconciled with a reasonable view of the evidence (*see Martinez v New York City Tr. Auth.*, 41 AD3d 174, 175 [1st Dept 2007]). Further, the

court’s interrogatory regarding “the skin care provided to the plaintiff” was unambiguous and consistent with the charge, evidence and applicable law (*compare Plunkett v Emergency Med. Serv. of N.Y. City*, 234 AD2d 162, 163 [1st Dept 1996], *with Rodriguez v Budget Rent-A-Car Sys., Inc.*, 44 AD3d 216, 223 [1st Dept 2007]).

We find the jury’s award for past pain and suffering appropriate. Given plaintiff’s relatively young age, and in light of the evidence that his ulcer may reopen in the future, we decline to disturb the jury’s award for future pain and suffering.

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

ENTERED: DECEMBER 27, 2012



CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Clark, JJ.

8905 In re 315 East 72nd, Street Owners, Inc., Petitioner-Appellant, Index 109077/11

-against-

New York State Division of Housing and Community Renewal, et al., Respondents-Respondents.

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York (Paul N. Gruber of counsel), for appellant.

Gary R. Connor, New York (Eu Ting-Zambuto of counsel), for New York State Division of Housing and Community Renewal, respondent.

Himmelstein McConnell Gribben Donoghue & Joseph, New York (David Hershey-Webb of counsel), for Morton Drosnes, respondent.

Order and judgment (one paper), Supreme Court, New York County (Joan B. Lobis, J.), entered January 19, 2012, which denied the petition seeking to annul the determination of respondent State of New York Division of Housing and Community Renewal (DHCR), dated June 6, 2011, denying petitioner's application to deregulate a rent-stabilized apartment, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Supreme Court properly dismissed the petition seeking to annul DHCR's denial of petitioner's application for high-income

rent deregulation. Contrary to petitioner’s contention, DHCR was not required to conduct any further investigation prior to reaching its determination (*see e.g. Matter of Classic Realty v New York State Div. of Hous. & Community Renewal*, 298 AD2d 201 [1st Dept 2002]). The record before DHCR permitted it to rationally and reasonably find that respondent Morton Drosnes’ daughter, Carrie, had been an occupant of the apartment on a temporary basis only in the two years preceding service of the income certification form (ICF), and had vacated the unit in April 2008, approximately one year prior to the March 3, 2009 service of the ICF. The operative date for determining occupancy is the date when the ICF is served (*see Matter of 103 E. 86th St. Realty Corp. v New York State Div. of Hous. & Community Renewal*, 12 AD3d 289, 290 [1st Dept 2004]; *Matter of A.J. Clarke Real Estate Corp v New York State Div of Hous. & Community Renewal* (307 AD2d 841 [1st Dept 2003]). DHCR properly denied the petition for high income deregulation as Carrie’s income should not have been considered in the calculation of Drosnes’ total household income (*see Matter of Chatsworth Realty Corp. v New York State Div. of Hous. & Community Renewal*, 56 AD3d 371 [1st Dept 2008]).

Petitioner’s contention that DHCR improperly accepted

Drosnes' unsworn statement regarding his daughter's occupancy lacks merit, as State Administrative Procedure Act § 306(1) provides, in part, that "[u]nless otherwise provided by any statute, agencies need not observe the rules of evidence observed by courts, but shall give effect to the rules of privilege recognized by law." Pursuant to State Administrative Procedure Act § 306(1), the burden of proof was on petitioner - as the party who initiated the proceeding – to establish that Drosnes' daughter did not reside in the apartment on a temporary basis.

Drosnes' supplemental response, made one day after the 60-day period, was the result of DHCR's request for clarification of his initial submission. Any delay may be properly excused (*see Matter of Elkin v Roldan*, 260 AD2d 197 [1st Dept 1999]), as New York City Administrative Code § 26–504.3(c)(1) does not divest DHCR of "authority to forgive a late filing or excusable

default in the sound exercise of its discretion" (*Matter of Dworman v New York State Div. of Hous. & Community Renewal*, 94 NY2d 359, 371-372 [1999]).

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

ENTERED: DECEMBER 27, 2012

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Clark, JJ.

8906 William Dugan, et al., Index 603468/09
Plaintiffs-Respondents,

-against-

London Terrace Gardens, L.P.,
Defendant-Appellant.
- - - - -
8907 James Doerr, etc., Index603696/09
Plaintiff-Respondent,

-against-

London Terrace Gardens, L.P.,
Defendant-Appellant.

Borah, Godlstein, Altschuler, Nahins & Goidel, P.C., New York (Robert D. Goldstein of counsel), for appellant.

Emery Celli Brinckerhoff & Abady LLP, New York (Adam R. Pulver of counsel), for William Dugan, Masha D'Yans, Georgette Gagnon, Lowell D. Kern, Michael McCurdy, Jose Pelaez, Tracy Synder, Michael J. Walsh, Leslie M. Mack, and Anita Zitis, respondents.

Bernstein Liebhard LLP, New York (Gabriel G. Galletti of counsel), for James Doerr, respondent.

Order, Supreme Court, New York County (Lucy Billings, J.), entered June 21, 2011, which denied defendant's motion to dismiss these actions on the ground of primary jurisdiction or stay them pending resolution by the New York State Division of Housing and Community Renewal (DHCR), unanimously affirmed, with costs.

Supreme Court properly declined to cede primary jurisdiction

of these actions to DHCR, since the actions raise legal issues, including class certification and applicable limitations periods, that should be addressed in the first instance by the courts (*Gerard v Claremont York Assocs., LLC*, 81 AD3d 497 [1st Dept 2011]; *see Staatsburg Water Co. v Staatsburg Fire Dist.*, 72 NY2d 147, 156 [1988]; *Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270, 287 [2009]).

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

ENTERED: DECEMBER 27, 2012

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Clark, JJ.

8908 The People of the State of New York, Ind. 2594/08
Respondent,

-against-

Marlon Sullivan,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bruce Allen, J.), rendered on or about December 18, 2009,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

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

ENTERED: DECEMBER 27, 2012

CLERK

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

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Clark, JJ.

8909 In re Fontaine O.,

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

Tamara A. Steckler, The Legal Aid Society, New York (Susan Clement of counsel), for appellant.

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

Order, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about August 22, 2011, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of menacing in the second degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

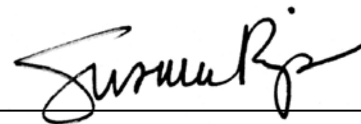
Appellant’s admission was knowingly, intelligently and voluntarily made. That the factual inquiry preceded the advisement of rights does not require reversal. The court fully advised appellant and his adult sister of the rights appellant was waiving before the court accepted and entered the admission, at which point it became final (*see Matter of Sean B.*, 99 AD3d 433 [1st Dept 2012]). As in *Matter of Leon T*. (23 AD3d 256 [1st

Dept 2005]), “[a]ppellant’s assertion that he was forced to ‘incriminate’ himself prior to receiving any warnings is meritless; the admission had no ‘incriminating’ effect until it was finally accepted by the court.”

Appellant’s other challenges to his admission are likewise unavailing. The court sufficiently explained the rights that appellant was waiving (*see generally Boykin v Alabama*, 395 US 238 [1969]), and the adult sibling’s allocution sufficiently incorporated appellant’s allocution by reference (*see Matter of Humberto R.*, 81 AD3d 471 [1st Dept 2011]).

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

ENTERED: DECEMBER 27, 2012



CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Clark, JJ.

8910 Liberty Insurance Underwriters, Inc., Plaintiff-Appellant, Index 113946/06 590955/07

-against-

Perkins Eastman Architects, P.C.,
Defendant-Respondent.

\- - - - -

Perkins Eastman Architects, P.C.,
Third-Party Plaintiff-Appellant,

-against-

ACE American Insurance Company,
Third-Party Defendant-Respondent.

Kissel Hirsch & Wilmer LLP, Tarrytown (Frederick J. Wilmer of counsel), for Liberty Insurance Underwriters, Inc., appellant.

CLifton Budd & DeMaria, LLP, New York (Robert J. Tracy of counsel), for Perkins Eastman Architects, P.C., respondent/appellant .

Kramer Levin Naftalis & Frankel LLP, New York (Philip S. Kaufman of counsel), for Ace American Insurance Company, respondent.

Judgment, Supreme Court, New York County (Bernard J. Fried, J.), entered September 7, 2011, to the extent appealed from, declaring that plaintiff is obligated to defend and indemnify defendant in the underlying federal action, and dismissing the third-party complaint, unanimously modified, on the law, to vacate the dismissal of the third-party complaint and declare

that third-party defendant is not obligated to defend or indemnify defendant in the underlying action, and otherwise affirmed, without costs.

In compliance with the “claims made” policy issued to it by plaintiff, defendant timely advised plaintiff of a “Circumstance that may reasonably be expected to give rise to a Claim against [it]” and of the particulars of the potential claim. “Circumstance” is defined as “an event reported during the Policy Year from which you reasonably expect a Claim may be made.” In correspondence with plaintiff from 2004 to 2005, defendant identified specific problem areas, as well as delays and coordination issues, in the course of the subject nursing home construction project. It identified the owner, contractor, and contractor’s surety as potential claimants for millions of dollars. It noted that the owner was litigious, that the contractor was looking to deflect blame, and that negotiations with the surety over honoring its performance bond were proceeding slowly. Nowhere in any of the notices and letters to plaintiff did defendant limit the potential claim to design errors.

As to third-party defendant ACE’s “claims made and reported” policies, coverage for the federal action is barred by the

exclusion for claims arising from circumstances required to be, but not, disclosed in defendant's applications for insurance. Moreover, the federal action was a claim first made on November 3, 2005, during the second ACE policy period (February 16, 2005-February 16, 2006), but not reported to ACE before the end of that policy period. Although plaintiff disclaimed coverage on February 20, 2006, ACE did not receive notice of the federal action until March 31, 2006.

The "New York Amendatory" endorsement to the second ACE policy giving defendant an additional 60 days after February 16, 2006 to give notice of the claim does not avail defendant since, by its terms, it applies only if the policy terminates or is not renewed, neither of which occurred here. Nor did defendant establish detrimental reliance on any communications from ACE so as to estop ACE from denying coverage.

We modify solely to declare in ACE's favor (*see Lanza v Wagner*, 11 NY2d 317, 334 [1962], *cert denied* 371 US 901 [1962]).

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

ENTERED: DECEMBER 27, 2012

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Clark, JJ.

8911 Global Business Institute, Index 104918/06
Plaintiff-Respondent,

-against-

Rivkin Radler LLP,
Defendant-Appellant.

Rivkin Radler LLP, Uniondale (Evan H. Krinick of counsel), for appellant.

Heller, Horowitz & Feit, P.C., New York (Martin Stein of counsel), for respondent.

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered April 19, 2012, which denied defendant's motion for partial summary judgment dismissing plaintiff's claims for tax escalation damages and substantial completion/lost profits damages, unanimously reversed, on the law, without costs, and the motion granted.

"An action for legal malpractice requires proof of three elements: (1) that the attorney was negligent; (2) that such negligence was a proximate cause of plaintiff's losses; and (3) proof of actual damages" (*Brooks v Lewin*, 21 AD3d 731, 734 [1st Dept 2005], *lv denied* 6 NY3d 713 [2006]). "[T]he failure to show proximate cause mandates dismissal of a legal malpractice action regardless of whether the attorney was negligent" (*Wo Yee*

Hing Realty Corp. v Stern, 99 AD3d 58, 63 [1st Dept 2012] [internal quotation marks omitted]).

In this action for legal malpractice, defendant met its burden on summary judgment of "showing an absence of proximate cause" between the alleged negligence and plaintiff's losses (*Levine v Lacher & Lovell-Taylor*, 256 AD2d 147, 151 [1st Dept 1998]). The documentary evidence establishes that plaintiff, and defendant, the firm that represented plaintiff in the negotiation and drafting of the lease, requested that the landlord agree to utilizing a later base year than 2004/05 for real estate tax escalation and the landlord refused. The documentary evidence also establishes that plaintiff knowingly accepted the landlord's terms on this issue. In addition, defendant demonstrated that the landlord would not have agreed to an additional penalty beyond deferment of rent for late completion of the construction required for plaintiff to use the premises for its business.

Plaintiff failed "to demonstrate a material issue of fact on the question of proximate cause" (*Levine*, 256 AD2d at 151). Notably, neither of plaintiff's experts contradicted defendant's expert's testimony that, at the time the subject lease was being negotiated, the real estate market strongly favored landlords.

Plaintiff's claim that it would have pursued alternative space is speculative and therefore insufficient to establish that defendant's malpractice, if any, was a proximate cause of plaintiff's loss (*see Brooks*, 21 AD3d at 734-735).

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

ENTERED: DECEMBER 27, 2012

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Clark, JJ.

8912 The People of the State of New York, Respondent, — Ind. 4514/09, 4515/09

-against-

Samuel Johnson,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Lauren Stephens-Davidowitz of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Catherine M. Reno of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Ann M. Donnelly, J.), rendered on or about February 18, 2011,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

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

ENTERED: DECEMBER 27, 2012

CLERK

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

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Clark, JJ.

8913 Robert Katz, et al., Index 11062/11
Plaintiffs-Appellants,

-against-

Third Colony Corporation,
Defendant-Respondent.

Zuckerman Spaeder LLP, New York (C. Evan Stewart of counsel), for appellants.

Braverman & Associates, P.C., New York (Tracy M. Peterson of counsel), for respondent.

Order, Supreme Court, New York County (Anil C. Singh, J.), entered April 19, 2012, which granted defendant's motion for summary judgment dismissing the complaint with prejudice, and denied plaintiffs' cross motion for partial summary judgment as moot, unanimously affirmed, with costs.

Defendant is a cooperative corporation that owns a building at 180 East 79th Street, New York County, and plaintiffs formerly owned the shares to apartments 14B and 14C. In August 2011, plaintiffs sold their interest in the two apartments and, under protest, paid a "flip tax" to defendant. Within weeks, plaintiffs commenced this action alleging one cause of action the characterization of which is in dispute. That portion of plaintiffs' complaint that specified the sole cause of action

explicitly and repeatedly alleges that defendant acted “ultra vires,” which plaintiffs argued below. Now, however, in an attempt to make their claim appear viable, plaintiffs avoid characterizing their claim as seeking to prohibit defendants’ ultra vires acts, and instead, they repeatedly characterize their claim as one “for money damages” or an “extraction of money” that was “wrongful,” seeking a money judgment in the amount of the flip tax.

Supreme Court properly granted defendant’s motion because plaintiffs’ claim, despite their current characterization, is barred by the statute of limitations. Defendant’s allegedly ultra vires acts occurred in 1997 and in 2008 when the by-laws and proprietary leases were amended to, respectively, allow a majority of the directors to alter the by-laws, and to allow two-thirds of shareholders to approve amendments to the proprietary leases, and to institute a 2% flip tax on the gross sale price of any apartment. Plaintiffs are now prohibited from challenging the propriety of those amendments because they are required to have done so via a proceeding pursuant to CPLR article 78 within four months thereof (CPLR 217[1], 7802[a], 7803[2]; *see Buttita v Greenwich House Coop. Apts., Inc.*, 11 AD3d 250, 251 [2004];

Schulz v Town Bd. of Town of Queensbury, 253 AD2d 956 [3d Dept 1998], *lv denied* 93 NY2d 808 [1999]).

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

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

ENTERED: DECEMBER 27, 2012

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Clark, JJ.

8915 Landauer Limited, Index 260550/10
Plaintiff-Appellant,

-against-

Joe Monani Fish Co., Inc.,
Defendant-Respondent.

Clyde & Co US LLP, New York (Diane Westwood Wilson of counsel), for appellant.

Phillips Nizer LLP, New York (Chryssa V. Valletta of counsel), for respondent.

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered December 21, 2011, which, in an action to enforce a foreign money judgment entered against defendant on default (the English action), after a traverse hearing, denied plaintiff's motion for summary judgment in lieu of complaint and dismissed the action, without prejudice, for lack of personal jurisdiction, unanimously affirmed, without costs.

Plaintiff failed to carry its burden of demonstrating, by a preponderance of the evidence, that service of papers in the English action was properly made upon defendant, a New York corporation, in accordance with CPLR 311(a)(1) (*see Forrester v Luisa*, 52 AD3d 324, 324 [1st Dept 2008]). Plaintiff's process servers testified that upon arriving at the building referred to

in the affidavits of service and not locating defendant's name in the directory, they were directed by an individual who was mopping the floor to a particular office said to belong to defendant. Although the door to that office did not bear defendant's name, the process servers nonetheless delivered a copy of the papers to the only individual present in the office, without specifically asking that person if he was employed by defendant or authorized to receive service on defendant's behalf (*see* CPLR 311[a][1]; *see also Fashion Page v Zurich Ins. Co.*, 50 NY2d 265, 273 [1980]). Under the circumstances, plaintiff's process servers did not have a reasonable basis for believing that the individuals served were authorized to accept service of process on defendant's behalf (*see Arvanitis v Bankers Trust Co.*, 286 AD2d 273, 273 [1st Dept 2001]; *Martinez v Church of St. Gregory*, 261 AD2d 179, 180 [1st Dept 1999]).

The court indicated that it had considered all the testimony, exhibits and affidavits of service. In any event, even if the court did not consider certain exhibits submitted by plaintiff, there was no error, as the exhibits were submitted for

the first time in plaintiff's reply (*see Schultz v Gershman*, 68 AD3d 426, 426 [1st Dept 2009]). Moreover, the evidence does not establish proper service pursuant to New York law.

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

ENTERED: DECEMBER 27, 2012

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Clark, JJ.

8917-
8918 Tony Shafrazi Gallery, Inc., Plaintiff,

Index 112192/07

Guido Orsi,
Plaintiff-Appellant-Respondent,

-against-

Christie's Inc., formerly known as Christie, Manson & Woods International, Inc.,
Defendant-Respondent-Appellant,

John Doe 1, et al.,
Defendants.

Aaron Richard Golub, P.C., New York (Nehemia S. Glanc of counsel), for appellant-respondent.

Andrews Kurth LLP, New York (Joseph A. Patella of counsel), for respondent-appellant.

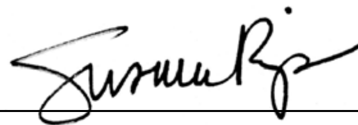
Order, Supreme Court, New York County (Herman Cahn, J.), entered November 17, 2008, which, insofar as appealed from as limited by the briefs, granted defendant Christie's motion for summary judgment dismissing the breach of contract and breach of warranty causes of action, and order, same court (Shirley Werner Kornreich, J.), entered November 23, 2011, which granted defendant's motion for summary judgment dismissing the remaining fraud claims, unanimously affirmed, without costs.

As to the fraud claims, the record contains no evidence sufficient to raise an issue of fact whether defendant acted with the requisite intent (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Nor does the record support plaintiff Orsi’s contention that defendant acted recklessly in accepting the painting for consignment (*see State Street Trust Company v Ernst* 278 NY 104 [1938]).

Orsi is not aggrieved by the dismissal of the breach of contract cause of action. In dismissing the breach of warranty cause of action on statute of limitations grounds, the motion court correctly relied on *Hanover Square Antiques Limited v Insalaco* (6 AD3d 258 [2005] *lv. denied* 5 NY3d 710 [2005]).

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

ENTERED: DECEMBER 27, 2012



CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Clark, JJ.

8921 In re Michael Savallo, Index 107987/10
Petitioner-Appellant,

-against-

Raymond Kelly, etc., et al.,
Respondents-Respondents.

Jeffrey L. Goldberg, Port Washington, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Keith M Snow of counsel), for respondents.

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered February 15, 2011, denying the petition to annul respondents' denial of accidental disability retirement (ADR) benefits, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The Board of Trustees denied petitioner's application for ADR benefits based on a tie vote, upon a court-ordered remand in a prior proceeding. Petitioner fails to establish, as a matter of law, that his disability was the natural and proximate result of a service-related accident" (*Matter of Canfora v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II*, 60 NY2d 347, 352 [1983]). The evidence shows that petitioner's back injury was caused by an incident in 2003, in

which he was moving a table to prepare for a police training course. Such injury caused by exertion in lifting a heavy object was a risk of the work performed, and did not result from a sudden, unexpected event (*see Matter of Lichtenstein v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II*, 57 NY2d 1010, 1012 [1982]; *Matter of Valentin v Board of Trustees of N.Y. City Employees' Retirement Sys.*, 91 AD2d 916 [1st Dept 1983], *affd* 59 NY2d 702 [1983]).

Contrary to petitioner's contention, the Board of Trustees did not fail to comply with the aforementioned remand. The prior order remanding the matter directed the Medical Board to determine whether petitioner's disability was caused by a prior incident in 1996, and further directed that if the Medical Board answered that question in the affirmative, the Board of Trustees was required to determine whether the 1996 incident was a

service-related accident causing the disability. However, the Medical Board answered the question in the negative, and thus, the Board of Trustees was not required to consider the 1996 incident upon remand.

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

ENTERED: DECEMBER 27, 2012

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Clark, JJ.

8922 Ann Chisom, Index 307442/09
Plaintiff-Appellant,

-against-

Columbia Mutual Life Insurance Co.,
Defendant-Respondent.

Sandra D. Frelix, New York, for appellant.

Gold Benes LLP, Bellmore (Jeffrey B. Gold of counsel), for respondent.

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered January 20, 2011, which, inter alia, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant demonstrated that it paid plaintiff the full benefit of her late husband's life insurance policy and that therefore there was no breach of contract. We reject plaintiff's attempt to assert a cause of action for tortious conduct based on defendant's initial conclusion that the policy had lapsed and its

ensuing, very brief, investigation, which resulted in the issuance of a check to plaintiff (*see Royal Indem. Co. v Salomon Smith Barney*, 308 AD2d 349 [1st Dept 2003]).

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

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

ENTERED: DECEMBER 27, 2012

CLERK

Mazzarelli, J.P., DeGrasse, Manzanet-Daniels, Clark, JJ.

8923N Captain Lori Albunio, et al., Index 113037/03
Plaintiffs-Appellants-Respondents,

-against-

The City of New York, et al.,
Defendants,

Mary D. Dorman,
Nonparty Respondent-Appellant.

Leon Friedman, New York, for appellants-respondents.

Paul O'Dwyer, New York, for appellant.

Order, Supreme Court, New York County (Martin Shulman, J.), entered May 1, 2012, which granted nonparty respondent's motion to determine her fees to the extent of including her statutory attorneys' fee award for trial level work in the total recovery for purposes of calculating her contingency fee and excluding from consideration of her fees for trial level work the statutory attorneys' fee awards for appellate level work, and denied the motion to the extent of requiring nonparty respondent to credit nonrefundable retainers totaling $15,000 against her contingency fee, unanimously affirmed, without costs.

The broad terms of the contingency fee agreement providing for a fee of 33 1/3 percent of "the sum recovered, whether

recovered by suit, settlement or otherwise," unambiguously require that the award of attorneys' fees be included in "the sum recovered." The cases cited by plaintiffs involve retainer agreements with narrower provisions *(see e.g. Bates v Kuguenko*, 100 F3d 961, 1996 WL 654449, *1, 1996 US App LEXIS 29385, *2 [9th Cir 1996] [contingency fee to be computed as percentage of "damages recovered"]). Nor does this State follow the rule found in certain federal statutes that contingency counsel must take the larger of the contingency fee or the statutory fee (*see e.g. id.*, 1996 WL 654449, *1, 1996 US App LEXIS 29385, *3).

The parties' wholly separate retainer agreements for the appeals to this Court and the Court of Appeals expressly set the statutory fees for the appeals apart from the statutory and contingency fees for the trial level work.

As the retainer letters are ambiguous as to the treatment of

the retainer fees, they must be construed in favor of plaintiffs (*see Jacobson v Sassower*, 66 NY2d 991, 993 [1985]).

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

ENTERED: DECEMBER 27, 2012

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

6426 In re Edwin Lopez, Index 251269/10
Petitioner-Appellant,

-against-

Andrea Evans, etc.,
Respondent-Respondent.

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

Eric T. Schneiderman, Attorney General, New York (Simon Heller of counsel), for respondent.

Order, Supreme Court, Bronx County (Mark S. Friedlander, J.), entered February 4, 2011, reversed, on the law, without costs, the petition granted, respondent's determination annulled, petitioner reinstated to parole, and the cross motion denied.

Opinion by Friedman, J. All concur except Catterson J. who concurs in a separate Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
David Friedman
James M. Catterson
Dianne T. Renwick
Helen E. Freedman, JJ.

6426
Index 251269/10

In re Edwin Lopez,
Petitioner-Appellant,

-against-

Andrea Evans, etc.,
Respondent-Respondent.

Petitioner appeals from an order of the Supreme Court, Bronx County (Mark S. Friedlander, J.), entered February 4, 2011, which denied the CPLR article 78 petition to annul respondent's determination finding that petitioner violated the conditions of his parole, revoking his parole and imposing on him an assessment of additional imprisonment, and granted respondent's cross motion to dismiss the petition.

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

Eric T. Schneiderman, Attorney General, New York (Simon Heller and Alison J. Nathan of counsel), for respondent.

FRIEDMAN, J.

This appeal requires us to determine whether a parole revocation proceeding may go forward against a parolee who has been found mentally incompetent to stand trial in a criminal prosecution based on the same charges that are at issue in the revocation proceeding. We hold that, under the circumstances of this case, the revocation proceeding may not go forward.

Petitioner Edwin Lopez was sentenced to 15 years to life on a second-degree murder conviction in the 1970s, and was released from prison to lifetime parole supervision on July 20, 1994. On or about August 11, 2008, while he was a resident of a mental health facility, petitioner allegedly assaulted another patient, for which he was arrested and charged with third-degree assault and two lesser charges. The court ordered a psychiatric examination to determine petitioner's fitness to stand trial (*see* CPL article 730), and the two examining psychologists submitted reports, dated August 25, 2008, finding that he suffered from dementia, probably secondary to head trauma, and was unfit to stand trial.[1] Thereafter, a final order of observation was filed

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[1]One of the psychologists wrote in his report:

> "Understanding, Reasoning and Appreciation of Charges: At this time, he is not able to demonstrate either a rational or a [factual] understanding of the proceedings against him. When asked about his own

committing petitioner to the custody of the Office of Mental Health (*see* CLP 730.40[1]), and the criminal charges against him were dismissed (*see* CPL 730.40[2]).

On August 27, 2008, two days after the date of the reports finding petitioner unfit to stand trial, a parole revocation proceeding was commenced against him. It was alleged that petitioner's conduct in the incident of August 11, 2008 — the same incident underlying the aborted criminal prosecution — constituted a violation of the conditions of his parole. Before

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> understanding of the current charges against him, Mr. Lopez says, 'Nothing happened.' He is unable to coherently relate the incidents of the day in question. When asked his plans to resolve the charges against him, he replied 'the whole case shall be dismissed.' He did not demonstrate he has an adequate understanding of the roles of his attorney, the DA or ADA, and the Judge."

The psychologist continued:

> "Mr. Lopez was unable to enter into a rational and meaningful discussion of his legal defense options. Although he had some awareness of the nature of legal charges against him, his thinking was unfocused and rambling. He was not able to effectively assist counsel.
>
> "It is my opinion that his cognitive disorder and possible Dementia would prevent Mr. Lopez from constructing a rational defense and collaboratively working with his attorney. He is not able to adequately convey by his own statements, that he shows a reasonable understanding of the allegations against him and his legal options. He is not able to actively assist in his own defense."

witnesses were called at the final hearing on November 13, 2008, petitioner's counsel objected to going forward on the ground, among others, that, by reason of his mental disability, as determined in the criminal case, he was unable either to understand the nature of the proceeding or to assist in his own defense. This objection was overruled and, after the hearing was completed on December 12, 2008, the Administrative Law Judge found that petitioner had violated his parole and recommended an assessment of 24 months of additional imprisonment, which the Parole Board accepted. On his administrative appeal, petitioner argued that the finding that he was unfit for a criminal trial meant that he was likewise unfit to defend himself in the parole revocation proceeding. In denying the appeal, the administrative panel stated that "mental illness is not an excuse for a parole violation."

Petitioner subsequently commenced this article 78 proceeding challenging the revocation of his parole. The petition contends that the parole revocation hearing should not have gone forward in light of the finding, rendered just two days before the institution of the parole revocation proceeding, that petitioner was unfit to stand trial on criminal charges based on the same conduct that was alleged to have constituted the parole violation. Petitioner now appeals from the judgment of Supreme

Court denying his petition and granting respondent's cross motion to dismiss the proceeding. We reverse.[2]

We agree with petitioner that the basic requirements of due process applicable to a parole revocation proceeding (*see Morrissey v Brewer*, 408 US 471 [1972]) should now be construed to preclude going forward with such a proceeding in the event it is determined that the parolee is not mentally competent to participate in the hearing or to assist his counsel in doing so. As an Indiana appellate court recently observed in considering this issue: "Without competency, the minimal due process rights guaranteed to probationers at probation revocation hearings would be rendered useless" (*Donald v State*, 930 NE2d 76, 80 [Ind App 2010]; *see also State v Qualls*, 50 Ohio App 3d 56, 58, 552 NE2d 957, 960 [Ohio App 1988] ["the effectiveness of the minimal (due process) standards enumerated in *Morrissey* . . . may be rendered null if the defendant is not competent to understand and to participate in or to assist counsel in participating in the proceedings"]). We respectfully decline to follow the contrary holdings on this issue of certain older decisions of other

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[2]Although we have been advised that, since this appeal was argued, petitioner has once again been granted parole, this appeal comes within the exception to the mootness doctrine for orders raising novel and substantial issues that are likely to recur but to evade appellate review (*see Mental Hygiene Legal Servs. v Ford*, 92 NY2d 500, 505-506 [1998]).

departments of the Appellate Division (*see Matter of Newcomb v New York State Bd. of Parole*, 88 AD2d 1098 [3d Dept 1982], *lv denied* 57 NY2d 605 [1982], *cert denied* 459 US 1176 [1983]; *People ex rel. Porter v Smith*, 71 AD2d 1056 [4th Dept 1979]; *People ex rel. Newcomb v Metz*, 64 AD2d 219 [3d Dept 1978]).

In this case, there is no question that petitioner was incompetent at the time of his parole revocation hearing. On August 25, 2008, only two days before the parole revocation proceeding was instituted and less than three months before the commencement of the hearing thereon the following November, he was found incompetent to stand trial on criminal charges based on the same conduct alleged to constitute the violation of his parole.[3] Since a determination of incompetency was here made independent of the parole revocation proceeding, the instant appeal does not present us with the questions of (1) whether the parole board has authority to determine a parolee's competence to undergo a revocation hearing and, (2) if not, what should be done when it appears that a parolee charged with a violation may be incompetent. Nevertheless, the concurrence would have us address these unposed questions in a manner sure to cause significant

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[3]There is nothing in the record to indicate that any change in petitioner's mental condition occurred between the finding of incompetence in the criminal case and his parole revocation hearing.

disruption to the parole system of this state. The concurrence apparently would hold that, until the Legislature enacts statutory provisions specifying the procedures to be followed in determining the competency of an alleged parole violator, the parole board may not make such a determination. Given the holding that an incompetent parolee may not be subjected to a parole revocation hearing, the effect of adopting the concurrence's position would be to bring to a halt any parole revocation proceeding against a person willing to place his or her own competence in question. In essence, this would excuse such a parolee from complying with the conditions of his or her parole until the Legislature acts.

Even if this appeal did present the question of the authority of the parole board to determine the competence of an alleged parole violator, we would see no reason to hold that the board may not render such a determination (in a case where it appears that the parolee's competence may reasonably be questioned) until the Legislature has enacted procedures to govern the making of such a determination. After all, even *Newcomb* held that the board of parole should, in an appropriate case, "consider[] . . . a person's mental competency during the parole revocation process" (64 AD2d at 222), albeit only as a "possibly mitigating or excusing" factor rather than as a

prerequisite to going forward with a revocation hearing (88 AD2d at 1098, citing 64 AD2d at 223). To be sure, it would be beneficial for the Legislature to enact procedures and schedules to govern competency issues in parole revocation proceedings. However, contrary to the concurrence's assertion that we "agree[] that the Legislature *must* act" (emphasis added), until the Legislature chooses to take action, we are not aware of any impediment, either in constitutional principle or in article 12-B of the Executive Law (governing the jurisdiction and operation of the board of parole), to the board, upon ascertaining that the parolee's competence is in question, receiving evidence on the parolee's mental condition and ruling on his or her competence at the outset of a revocation hearing. Of course, a finding of competence will be subject to judicial review in an article 78 proceeding brought to challenge an ultimate revocation of parole.

The concurrence professes to believe that the absence of a statute expressly authorizing the board to determine the competence of an alleged parole violator means that, until the statutory scheme is amended, a revocation proceeding must come to a halt whenever it reasonably appears that the alleged violator may be incompetent. We disagree. "It is well settled that an agency's powers include not only those expressly conferred, but also those '*required by necessary implication*'" (*Matter of Mercy*

Hosp. of Watertown v New York State Dept. of Social Servs., 79 NY2d 197, 203 [1992], quoting *Matter of City of New York v State of N.Y. Commn. on Cable Tel.*, 47 NY2d 89, 92 [1979] [emphasis added]; *see also* 2 NY Jur 2d, Administrative Law § 26). For example, in *Mercy Hospital*, the Court of Appeals held that the Department of Social Services' use of random sample audits (rather than individual review of all cases within the audit period) to determine whether the petitioner had received Medicaid overpayments was, by necessary implication, within the agency's statutory authority to administer the Medicaid program.

From our holding that an alleged parole violation cannot be adjudicated while the parolee is incompetent, it follows that a determination of the parolee's competence (where it is in question) is a necessary prerequisite to the board's determining whether to exercise its statutory "power to revoke the community supervision status" of the parolee (Executive Law § 259-c[6]).[4] The situation is analogous to circumstances giving rise to a question of administrative jurisdiction, where it is recognized

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[4]At the time of the relevant events, Executive Law § 259-c(6) provided in pertinent part that the board had "the power to revoke the presumptive release, parole, conditional release or post-release supervision status of any person." The amendment of the statutory language (by L 2011, ch 62, pt C, subpt A, § 38-b) does not appear to have been intended to effect any substantive change in the law.

that, "[l]ike a judicial tribunal, an administrative tribunal has jurisdiction to determine its own jurisdiction" (*Pesta v Department of Corr.*, 63 So3d 788, 791 [Fla App 2011]; *see also City of Whitehall v Ohio Civil Rights Commn.*, 74 Ohio St 3d 120, 123-124, 656 NE2d 684, 688 [1995] ["a(n) (administrative) tribunal having general subject matter jurisdiction of a case possesses authority to determine its own jurisdiction"]; 2 Am Jur 2d, Administrative Law § 284). As the Connecticut Supreme Court has explained:

> "Where there is in place a mechanism for adequate judicial review . . . , it is the general rule that an administrative agency may and must determine whether it has jurisdiction in a particular situation. When a particular statute authorizes an administrative agency to act in a particular situation it necessarily confers upon such agency authority to determine whether the situation is such as to authorize the agency to act" (*Greater Bridgeport Trans. Dist. v Local Union 1336, Amalgamated Trans. Union*, 211 Conn 436, 439, 559 A2d 1113, 1115 [1989] [internal quotation marks and brackets omitted]).

Similarly, here, the statute authorizing the parole board to determine whether a parolee has violated parole necessarily confers upon the board authority to determine whether the parolee possesses the mental competence required for such a determination to be rendered in accordance with due process.[5]

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[5]In support of his view that a parole board has no authority to determine a parolee's mental competence to assist in the defense of a parole revocation hearing, our concurring colleague

While the concurrence takes us to task for stating that the parole board should conduct a competency inquiry when it reasonably appears that the alleged violator may be incompetent, our concurring colleague overlooks the fact that, under his analysis, so too will the board have to determine whether the parolee's competence has been placed in question. Moreover, we see no basis for the concurrence's implication that something like chaos will ensue if the board makes competency determinations — determinations which, to reiterate, will be subject to judicial review — before the Legislature acts. To the contrary, in view of our holding that a parole revocation hearing cannot go forward against a mentally incompetent parolee, it

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cites *People ex rel. Marshall v Webster* (266 App Div 637 [3d Dept 1943]). *Marshall* provides no support for the concurrence's position. In *Marshall,* the Third Department disapproved the parole board's denial of parole to an inmate otherwise eligible therefor based solely on "the finding of insanity by a prison physician, unsupported and untested, and adopted by the Parole Board without proof" (*id.* at 639). Based on its finding that the board had, in effect, civilly committed the inmate without a trial on the issue of his sanity (*id.*), the Third Department reinstated the inmate's petition for a writ of habeas corpus and remitted the matter to Special Term "for a trial as to the prisoner's mental condition" (*id.*). In *Marshall*, the board's finding of insanity, besides having been rendered without due process, was not necessary to any exercise of the board's lawful powers. Rather, the Third Department found that, in light of the fact that the inmate appeared to be entitled to parole under the law of the time, the board's purported finding that he was mentally ill and ensuing denial of parole was an unauthorized substitute for a civil commitment proceeding.

would be far more disruptive to prohibit a parole board to determine the competency of a parolee charged with a parole violation. In any event, as previously noted, the question need not be reached in this case, given that petitioner was adjudged incompetent to stand trial in the criminal prosecution arising from the same conduct at issue in his parole revocation proceeding.

Accordingly, the order of the Supreme Court, Bronx County (Mark S. Friedlander, J.), entered February 4, 2011, which denied the CPLR article 78 petition to annul respondent's determination finding that petitioner violated the conditions of his parole, revoking his parole and imposing on him an assessment of 24 months of additional imprisonment, and granted respondent's cross motion to dismiss the petition, should be reversed, on the law, without costs, the petition granted, respondent's determination annulled, petitioner reinstated to parole, and the cross motion denied.

All concur except Catterson, J. who concurs in a separate Opinion.

CATTERSON, J. (concurring)

In this article 78 proceeding, I concur with the determination that a finding of mental incompetency to stand trial on misdemeanor charges bars not only criminal prosecution but also a subsequent parole revocation hearing where the alleged parole violation is based on the same conduct that gave rise to the misdemeanor charges. However, I write separately to emphasize that the specific circumstances of this case allow the Court to find in favor of the petitioner without considering the concomitant concerns that have plagued other jurisdictions, namely that the parolee "will remain free as a danger to society because of his unfitness." People v. Davis, 127 Ill. App. 3d 49, 61, 468 N.E.2d 172, 181 (1984).

Thus, our decision today also serves to highlight the deficiencies of the statutory scheme. While asserting that this appeal does not require this Court to consider those deficiencies, the majority, in response to this concurrence, posits that the Parole Board may "rul[e] on [a parolee's] competence" until such time as the Legislature amends the statutory scheme. For the reasons set forth more fully below, in my opinion the Parole Board is not authorized to make such determinations.

The record reflects the following: More than 25 years ago

the petitioner was convicted of murder in the second degree and sentenced to a prison term of 15 years to life. He was paroled on July 20, 1994. In 2004, he was admitted to an Office of Mental Health (hereinafter referred to as "OMH") psychiatric facility. On August 11, 2008, while on lifetime parole supervision and a resident of the OMH facility, the petitioner allegedly grabbed another patient by the neck and scratched him in the course of a dispute over which television station to watch. He was arrested and charged with assault in the third degree, attempted assault in the third degree, and harassment.

The petitioner underwent a psychiatric examination pursuant to Criminal Procedure Law (hereinafter referred to as "CPL") 730, and on August 25, 2008, two examining psychologists found him incompetent to stand trial on the criminal charges arising from the incident. The psychologists diagnosed the 52-year-old petitioner with dementia, secondary to head trauma. Petitioner was also diagnosed with cognitive disorder and borderline intellectual functioning, along with a history of heroin abuse, which petitioner reported began at age 14 or 15.

One of two psychologists found that petitioner's

> "cognitive disorder and possible [d]ementia would prevent [him] from constructing a rational defense and collaboratively working with his attorney. He is not able to adequately convey by his own statements that he shows a reasonable understanding of the allegations against him and

> his legal options. He is not able to actively assist in his own defense."

The second psychologist concurred in this assessment, finding that

> "the [petitioner] is unable to talk about his case in any intelligent fashion. He is not oriented to date or place. He cannot remember three objects after five minutes. He is unable to consider his case in any reasonable fashion, stating that the charges should be dismissed because 'I think I carried myself too fast.'"

The psychologists found that the petitioner did not understand the allegations against him, nor could he recall that the incident occurred at the psychiatric facility where he had been living for years. It was noted, in an understatement, that the petitioner is "an unreliable historian," as he cannot accurately recall events in his life. The petitioner told the psychologists that he sustained a head injury in either an assault or a motor vehicle accident, but could not remember which.

One of the psychologists further observed that the petitioner's "continuity of thought is often unfocused and rambling," and he is "confused, and disoriented to date [...] At this time, he is not able to demonstrate either a rational or a factual understanding of the proceedings against him. When asked about his understanding of the current charges against him, [the petitioner answered] 'Nothing happened.'"

A final order of observation was entered in the criminal

court committing petitioner to the custody of OMH and dismissing the misdemeanor charges against him pursuant to CPL 730.40(2). On August 27, 2008, while petitioner was in the custody of OMH, respondent Division of Parole commenced a parole violation proceeding against the petitioner based on the alleged assault. A preliminary hearing was held on September 5, 2008. The Administrative Law Judge (hereinafter referred to as the "ALJ") found that there was probable cause to believe that the petitioner violated the New York State Department of Corrections and Community Supervision conditions of release when "he did chase, grab[] and attempt[] to choke another patient ... by grabbing him by the neck." Rule 8 of the conditions of release require that a parolee "will not behave in such manner as to ... threaten the safety or well-being of himself or others." 9 NYCRR 8003.2(h).

At the final hearing held on November 13, the petitioner's counsel raised several objections, including that the petitioner was unable to assist in his own defense. His objections were overruled. When the final hearing was continued on December 12, 2008, a social worker for the Legal Aid Society's Parole Revocation Defense Unit testified that the petitioner was unable to assist counsel in obtaining information regarding his defense. Counsel requested that the parole warrant be vacated and that the

petitioner be returned to the custody of OMH, the agency that he believed was best equipped to address the petitioner's medical and psychiatric needs.

On December 12, 2008, the ALJ sustained the charge against the petitioner as a parole violation. Wholly inexplicably, the ALJ recommended that the petitioner be returned to the custody of the New York State Department of Correctional Services (hereinafter referred to as "DOCS") and incarcerated for a period of 24 months.[1] The ALJ, without explanation, stated that the violation was "especially serious," and that the alternatives to incarceration were considered but not appropriate.

On April 29, 2009, the petitioner filed an administrative appeal, arguing that his due process rights had been violated when the respondent proceeded against him for the parole violation despite the finding that he was not competent to defend himself in the related criminal case. The appeals panel denied the appeal, noting that "mental illness is not an excuse for a parole violation"; - which, of course, misses the point and misstates the question presented by the appeal.

On August 23, 2010, the petitioner commenced the instant article 78 proceeding, contending that the appeal was improperly

[1] The petitioner was denied re-release at the conclusion of the 24 months and ordered to be held for an additional 24 months.

denied. The respondent cross-moved to dismiss the action on September 9, 2010, on the ground that the petitioner had been accorded his full due process rights.

In a January 2011 decision, Supreme Court denied the petition. The court held that in the absence of controlling precedent from this Court, it was bound by People ex rel. Newcomb v. Metz (64 A.D.2d 219, 409 N.Y.S.2d 554 (3d Dept. 1978)) and Matter of Newcomb v. New York State Bd. of Parole, (88 A.D.2d 1098, 452 N.Y.S.2d 912 (3d Dept. 1982), lv. denied 57 N.Y.2d 605 (1982), cert. denied 459 U.S. 1176, 103 S.Ct. 828 (1983)), which held that a finding of competency was not a prerequisite to conducting a parole revocation hearing. This finding was also adopted by the Fourth Department in People ex rel. Porter v. Smith, 71 A.D.2d 1056, 420 N.Y.S.2d 817 (4th Dept. 1979).

I agree with the majority's position declining to follow the holdings of Newcomb and Porter, but only to the extent that lack of a statutory provision to determine competency in those cases is irrelevant in this case, given that, unlike in Newcomb, the petitioner in this case was adjudged incompetent to stand trial pursuant to CPL 730.40. Thus, the principal issue before the Court is whether that finding also serves to bar a parole revocation hearing.

It has long been established that the conviction of a

legally incompetent person is a violation of due process. Medina v. California, 505 U.S. 437, 112 S. Ct. 2572 (1992); Pate v. Robinson, 383 U.S. 375, 86 S. Ct. 836 (1966). This prohibition, which has its roots in the common law, is a corollary of the ban against trials in absentia, on the theory that a mentally incompetent defendant, even if physically present in the courtroom, is unable to aid in his own defense. Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896 (1975); see People v. Gensler, 72 N.Y.2d 239, 532 N.Y.S.2d 1209, 527 N.E.2d 1209 (1988), cert. denied 488 U.S. 932, 109 S.Ct. 323 (1988); People v. Pena, 251 A.D.2d 26, 675 N.Y.S.2d 330 (1st Dept. 1998), lv. denied 92 N.Y.2d 929, 680 N.Y.S.2d 470. 703 N.E.2d 282 (1998). As eighteenth century jurist Sir William Blackstone explained:

> "[I]f a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defense?"

4 William Blackstone, Commentaries on the Laws of England *24.

An accused who lacks the "present ability to consult with his lawyer with a reasonable degree of rational understanding," and "a rational and factual understanding of the proceedings against him" may not be subjected to a trial. People v. Pena, 251 A.D.2d at 30, 675 N.Y.S.2d at 333-334. Accordingly, a trial

court has an obligation to order an examination at any time after a defendant's arraignment "when it is of the opinion that the defendant may be an incapacitated person." CPL 730.30(1). Should the defendant be found incompetent, the court must adjudicate him or her an incapacitated person, and the criminal charges will be dismissed or stayed until the defendant regains his capacity. CPL 730.40(1).

In People ex rel. Menechino v. Warden, Green Haven State Prison, (27 N.Y.2d 376, 318 N.Y.S.2d 449, 267 N.E.2d 238 (1971)), the Court of Appeals observed that "[w]hen all the legal niceties are laid aside, a proceeding to revoke parole involves the right of an individual to continue at liberty or to be imprisoned [... and therefore] involves a deprivation of liberty just as much as did the original criminal action and [...] falls within the due process provision of section 6 of Article I of our State Constitution." 27 N.Y.2d at 382, 318 N.Y.S.2d at 453 (internal quotation marks omitted).

The following year, in Morrissey v. Brewster, (408 U.S. 471, 92 S.Ct. 2593 (1972)), the United States Supreme Court set forth guidelines for the level of due process required in order for a state to deprive a parolee of his liberty interests. The Morrissey petitioners filed habeas corpus petitions alleging that they had been denied due process because their paroles had been

revoked without a hearing. The Court examined the function of the parole system and determined that the "essence of parole is release from prison," and that revocation of parole "deprives an individual [...] of the conditional liberty properly dependent on observance of special parole restrictions." 408 U.S. at 477, 480, 92 S.Ct. at 2598, 2600. The Court stated that

> "[t]he liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. The parolee has been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person. Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison."

408 U.S. at 482, 92 S.Ct. at 2600-2601.

The Court noted that the freedom of a parolee "includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee." 408 U.S. at 482, 92 S.Ct. at 2601. "[T]he liberty is valuable and must be seen as within the protection of the Fourteenth Amendment, [and i]ts termination calls for some orderly process, however informal." Id.

Thus, the Morrissey Court found that a parolee must be provided with: 1) written notice of the claimed parole

violations; 2) disclosure of the evidence against the parolee; 3) an opportunity to be heard and present witnesses and documentary evidence; 4) an opportunity to confront and cross-examine adverse witnesses; 5) review of the evidence by a "neutral and detached hearing body"; and 6) a written statement of reasons for revocation and the evidence relied upon. 408 U.S. at 489, 92 S.Ct. at 2604. In Gagnon v. Scarpelli, (411 U.S. 778, 93 S.Ct. 1756 (1973)), the Supreme Court confirmed that in order to meet due process requirements, a parolee (and a probationer) must be provided with a preliminary and a final revocation hearing.

New York has codified these rights in Executive Law § 259-i, pursuant to which, a parolee is entitled to be given a preliminary hearing within 15 days after the warrant for retaking and temporary detention has been executed, unless he has been convicted of a new crime. Executive Law § 259-i(3)(c)(i). The standard of proof at the preliminary hearing is probable cause to believe that the parolee has violated one or more conditions of parole "in an important respect." Executive Law § 259-i(3)(c)(iv).

At a preliminary hearing, "the hearing officer shall review the violation charges with the alleged violator, direct the presentation of evidence concerning the alleged violation, receive the statements of witnesses and documentary evidence on

behalf of the prisoner, and allow cross examination of those witnesses in attendance." Executive Law § 259-i(3)(c)(v). The Parole Board decides on a case-by-case basis whether, in its discretion, due process requires the assistance of counsel at a preliminary hearing. People ex rel. Calloway v. Skinner, 33 N.Y.2d 23, 347 N.Y.S.2d 178, 300 N.E.2d 716 (1973). At the preliminary hearing, a parolee has the right to "appear and speak in his or her own behalf [...]introduce letters and documents [...] present witnesses who can give relevant information to the hearing officer [...] and confront the witnesses against him or her." Executive Law § 259-i(3)(c)(iii).

A final revocation hearing must be scheduled to be held within 90 days of the probable cause determination. Executive Law § 259-i(3)(f)(i). A parolee is entitled to written notice of his or her rights, including his or her right to counsel at that hearing and his or her right to present mitigating evidence relevant to restoration of parole. § 259-i(3)(f)(iv). At this hearing, the charges are read and an alleged violator may plead not guilty, guilty, guilty with an explanation or stand mute. § 259-i(3)(f)(vi). The standard of proof at a final revocation hearing is a preponderance of evidence. § 259-i(3)(f)(viii). As in the preliminary hearing, the parolee has the right to confront and cross-examine adverse witnesses, present witnesses and

documentary evidence in defense of the charges, and present witnesses and documentary evidence relevant to the question of whether reincarceration is appropriate. § 259-i(3)(f)(v) & (vi).

Thus, although a parolee does not, as respondent points out, enjoy the "full panoply of rights" accorded a criminal defendant, such as the application of formal rules of evidence and certain procedural rights accorded at trial, he or she is nonetheless entitled to certain basic due process protections. It is axiomatic that in order to meaningfully exercise these rights, a parolee must, as in the case of a criminal defendant, have "a rational and factual understanding of the proceedings against him" and be able to "consult with his lawyer with a reasonable degree of rational understanding." See People v. Pena, 251 A.D.2d at 30, 675 N.Y.S.2d at 333-334. As the Morrissey Court explained, the purpose of a hearing is to "assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior." 408 U.S. at 484, 92 S.Ct. at 2602. When a parolee is incompetent, there is a "'possibility that [he] might possess information which would prove him innocent but which he is unable to communicate to his attorney.'" See People v. Davis, 127 Ill. App.3d at 61, 468 N.E.2d at 180-181 (1984), supra, quoting Pierce v. State Dept. of Social & Health

Servs., 97 Wash.2d 552, 559, 646 P.2d 1382, 1386 (1982).

I therefore agree, as does the majority, with numerous other jurisdictions that a parole revocation proceeding violates due process protections when the parolee is incompetent to assist in his or her own defense. See e.g. Donald v. State, 930 N.E.2d 76, 80 (Ind. App. 2010)("[w]ithout competency, the minimal due process rights guaranteed to probationers at probation revocation hearings would be rendered useless"); State v. Stanley, 2008 WL 427289, *4, 2008 Tenn. Crim. App. LEXIS 88, *12 (Tenn. 2008) ("fundamental rights ... 'would be meaningless to an incompetent probationer'"), quoting Harrison v. State, 905 So.2d 858, 860 (Ala. Crim. App. 2005); State ex rel Vanderbeke v. Endicott, 210 Wis.2d 502, 515, 563 N.W.2d 883, 887 (1997)("[n]otice and hearing are meaningless guaranties to a probationer who is incompetent"); State ex rel Juergens v. Cundiff, 939 S.W.2d 381, 382 (Mo. 1997)(having been granted the right to "notice and the opportunity to be heard on the issues of whether he violated a condition of probation," " it can hardly be imagined that the general assembly did not intend for probationers to proceed to hearing without having capacity to exercise them")(internal quotation marks omitted); State v. Singleton, 322 S.C. 480, 472 S.E.2d 640 (1996); State v. Qualls, 50 Ohio App.3d 56, 58, 552 N.E.2d 957, 960 (1988)("the effectiveness of the minimal

standards enumerated in <u>Morrissey</u> ... may be rendered null if the defendant is not competent to understand and to participate in or to assist counsel in participating in the proceedings”); <u>People v. Davis</u>, 127 Ill. App. at 61, 468 N.E.2d at 180 (“[t]he intelligent exercise of [due process] rights is prevented if a [conditional release] defendant is unfit”); <u>Thompson v. State</u>, 654 S.W.2d 26, 28 (Tex. 1983)(“due process requires that no person may suffer revocation of his probation while incompetent”); <u>Commonwealth v. Megella</u>, 268 Pa. Super. 316, 321, 408 A.2d 483, 486 (1979)(“the revocation of probation and subsequent re-sentencing of a defendant who is mentally incapable of participating in the proceeding is a violation of due process”); <u>Hayes v. State</u>, 343 So.2d 672, 673 (Fla. App. 1977)(a probationer facing revocation must be “mentally capable of assisting in the conduct of that defense”); <u>People v. Martin</u>, 61 Mich. App. 102, 107-108, 232 N.W.2d 191, 194 (1975) (“[i]t would be fundamentally unfair to require a revocation hearing and then not ensure the safeguard that defendant understands the nature and object of the proceedings against him and that he is able to assist in his defense in a rational way”); <u>see</u> <u>also</u> 28 C.F.R. § 2.8(c)(2)(“[i]n the case of a parolee in a revocation proceeding, the Regional Commissioner shall postpone the revocation hearing and order that the parolee be given a mental health

examination"); United States v. McCarty, 747 F.Supp. 311 (E.D.N.C. 1990)(where the parole revocation hearing was suspended because the parolee was unfit to proceed, a separate motion to determine present mental condition should be treated similar to a request for a determination of the parolee's competence to stand trial); United States v. Avery, 328 F.Supp.2d 1269 (M.D. Ala. 2004)(where there was reasonable cause to believe parolee was not sufficiently competent to go forward with supervised released modification hearing, the court applied pretrial-detainee competency procedures outlined in federal statutes).

Clearly, therefore, Newcomb's compromise solution, of merely "taking into account" a parolee's mental incompetency in the disposition stage of a parole revocation hearing is unsatisfactory since, as the petitioner persuasively asserts, it assumes that the actual parole violations have been proven.

In this case, the record reflects that a nurse at the OMH psychiatric facility "credibl[y] testified" that:

> "[p]arolee was in the ward day room watching television when another resident came to the staff area and asked about watching a movie on television in the day room. Parolee began to stare at the other resident []. The nurse fearing a confrontation, when parolee began to walk towards [the other resident], said "Stop, stop!" [The other patient] ran away. Parolee chased him and grabbed him by the neck from behind. Staff members had to disengage them.

The petitioner was entitled to have an opportunity to rebut

this account by showing, "that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation." Morrissey, 408 U.S. at 488, 92 S.Ct. at 2603.

There is no indication that the petitioner in this case could remember or articulate the facts surrounding the incident much less "explain away the accusation of a parole violation." Morrissey, 408 U.S. at 484 n. 12, 92 S.Ct. at 2602 (internal quotation marks omitted). As the petitioner asserts, if he cannot understand the allegations and criminal charges against him at a trial, then a review of the violation charges against him at a preliminary parole revocation hearing is meaningless. If he cannot recall or relate the facts surrounding the alleged assault for the purposes of formulating a defense at a criminal trial, then he cannot "speak in his or her own behalf" or cross-examine witnesses at the preliminary hearing. Furthermore, a parolee who cannot communicate effectively with his attorney at trial because he "has difficulty finding the right words to express himself," "his use of language is quite peculiar," and he is unable to "coherently relate the incidents of the day in question," is equally unable to communicate effectively with his attorney during the parole revocation process.

The respondent's argument that the nature of a parole

revocation proceeding is substantially different from that of a criminal conviction where the defendant is cloaked in the presumption of innocence is without merit. A parole revocation hearing is a two-step process in which it first must be established that the parolee committed a violation. While the standard of proof is lower, nevertheless, there is no presumption that the parolee committed the violation until it is proved by a preponderance of the evidence.

Further, the respondent's argument that a parolee who is incompetent to assist in his defense at a criminal prosecution may nonetheless be capable of participating in parole revocation because it is a less formal process is also without merit. The respondent has put forth no evidence that a parolee such as the petitioner in this case, who was found by a psychologist to lack "an adequate understanding of the roles of his attorney, the DA or ADA, and the Judge" at a trial, is more likely to understand the roles of their analogs at a revocation hearing (i.e., his attorney, the Parole Revocation Specialist representing the Division of Parole, and the Hearing Officer). There is also no support for the respondent's contention that the more lenient evidentiary standards in a parole revocation proceeding would be more comprehensible to petitioner than the evidentiary standards in a criminal prosecution.

Moreover, as petitioner posits, the lesser standards of proof at parole revocation hearings arguably make it *more* imperative that a parolee be mentally competent to assist in his or her own defense. A criminal defendant, who is presumed innocent, need not present a defense or challenge the state's evidence in any way, yet still be entitled to an acquittal unless the prosecution proves its case beyond a reasonable doubt. At a parole revocation hearing, the Division need only show probable cause at the preliminary hearing and prove a charged violation by a preponderance of the evidence at the final hearing. Thus, as the petitioner points out, the failure of a parolee to present a factual defense to the charge or confront the witnesses against him is likely to result in the revocation of parole.

However, the determination that a finding of mental incompetency bars a revocation hearing into alleged parole violations cannot end the inquiry. While the statutory scheme provides for the retention of an incompetent parolee for psychiatric observation, retention of a parolee who has committed a misdemeanor or violation is not designed to extend until such time that the parolee regains competency, or even until it is determined whether parolee will or will not regain it.[2] Under

[2] The statutory provisions differ for a parolee who has committed a felony and been found incompetent. Section 730

CPL 730.40, if a parolee commits a misdemeanor and is then found incompetent to stand trial, the court will dismiss the criminal charges and the parolee is committed to the custody of the state commissioner and placed in an OMH facility under a final order of observation. CPL 730.40(1), (2) and 730.60(1). Within 72 hours of receiving an incompetent parolee who "has a pending parole revocation hearing," the facility will conduct an evaluation to determine

> "(A) if the person has a mental illness for which care and treatment as a patient in a hospital is essential to such person's welfare; and
>
> (B) if the person's judgment is so impaired that he is unable to understand the need for such care and treatment; and
>
> (C) if, as a result of mental illness, the person poses a risk of harm to self or others."

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authorizes commitment and multiple orders of retention where an incompetent felony defendant is not eligible for civil commitment, but the court feels that further retention is needed due to his incapacity to stand trial. People v. Lewis, 95 N.Y.2d 539, 720 N.Y.S.2d 87, 742 N.E.2d 601 (2000), cert. denied 534 U.S. 833, 122 S.Ct. 80 (2001). An incompetent parolee who has committed a felony may be in a psychiatric facility in the custody of the commissioner in this manner for up to two-thirds of the maximum prison sentence for the highest level felony for which he was indicted (CPL 730.50(3)) or a "reasonable period of time necessary to determine whether there is a substantial chance of his attaining th[at] capacity in the foreseeable future" (Jackson v. Indiana, 406 U.S. 715, 733, 92 S.Ct. 1845, 1855 (1972)). During this time, the criminal action is suspended -- the charges are not dismissed until after the orders of commitment or retention have expired. CPL 730.60(2).

14 NYCRR 540.6(a)(2)(ii).

If an incompetent parolee meets all of these criteria, he becomes a "civil patient," and is retained in the facility as long as he continues to meet the above criteria. 14 NYCRR 540.6(a)(2) and (7). Such custody may, upon review by the facility's forensic committee, convert to involuntary civil commitment. 14 NYCRR 540.9(g).

An incompetent parolee who does not meet the above criteria may be freed within days because, although incompetent, he does not pose a danger to himself or others. CPL 730.60(3); 14 NYCRR 540.6 et seq. However, as other jurisdictions have found in similar circumstances, continued parole on the same conditions on which parole was initially granted is problematic. See e.g. Pierce, 97 Wash.2d at 560-561, 646 P.2d at 1387 (continued parole on same conditions not in the best interests of the parolee or society).

Those jurisdictions have grappled with the problem by fashioning judicial remedies such as modifying the conditions of parole by requiring an incompetent parolee to "utilize the voluntary commitment procedures." 97 Wash.2d at 561, 646 P.2d at 1387. In this jurisdiction, however, there exists no statutory provision for modifying parole in any fashion unless the parolee

is found guilty of a violation.[3] See Executive Law § 259-i(3)(f)(x). This result is inimical to the state's interest in protecting the public and ensuring a parolee's successful reintegration into society, and again this statutory deficiency must be remedied by the Legislature rather than by this Court.

The majority agrees that the Legislature must act, but would find that, in the interim, the Parole Board has the authority to "receiv[e] evidence on the parolee's mental condition and rul[e] on his or her competence at the outset of a revocation hearing." Here I must respectfully part company with the majority since in my opinion, the holdings of Newcomb are still good law as to the lack of the Parole Board's statutory authority to determine mental competency.

In Newcomb, the parolee sought a competency evaluation during his parole revocation hearing. People ex rel Newcomb v.

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[3] The Newcomb Court observed that the conditions of parole could have been modified to "direct that the parole violator be restored to supervision and to make psychiatric treatment or admission to a hospital ... for the mentally ill in the Department of Mental Hygiene a condition of parole." 88 A.D.2d at 1099, 452 N.Y.S.2d at 915. However, the Court considered this solution in the context of a revocation proceeding in which the parolee was found to have violated his parole. People v. Ainsworth, (32 A.D.2d 839, 302 N.Y.S.2d 308 (1969)), also relied upon in Newcomb, merely stands for the proposition that upon initial release to parole supervision, the Parole Board may require psychiatric care as a condition of parole. It does not address the issue of modification of parole conditions.

Metz, 64 A.D.2d 219, 409 N.Y.S.2d 554 (3rd Dept. 1978), supra. The respondent Parole Board argued that it had "no statutory authority to make a determination of mental competency" in the context of a parole revocation proceeding. 64 A.D.2d at 220, 409 N.Y.S.2d at 555. Subsequently, the Court correctly found that there is no statutory provision in the Executive Law for such a mental competency evaluation by prison administrators or the Division of Parole. 64 A.D.2d at 222-223, 409 N.Y.S.2d at 556-557 (3rd Dept. 1978).

The majority reasons that there is no "impediment, either in constitutional principle or in article 23-B [sic] of the Executive Law." However, it is undisputed that there is no statute authorizing the Parole Board to make such determinations, nor is there anything in article 12-B suggesting that the Legislature intended to confer such powers on the Parole Board. To the contrary, the fact that the powers and duties of the Parole Board are specifically enumerated in Executive Law § 259-c indicates that the Board may not exercise powers beyond those specifically granted. "An enumerated list warrants an irrefutable inference that omitted items were intentionally excluded." Matter of Mayfield v. Evans, 93 A.D.3d 98, 106, 938 N.Y.S.2d 290, 297 (1st Dept. 2012), citing McKinney's Cons. Laws of NY, Book 1, Statutes § 240 (mandating the application of the

maxim expressio unius est exclusio alterius to the construction of statutes). Moreover, precedent indicates that the Legislature did not intend for the Parole Board to make competency determinations. See e.g. People ex rel. Marshall v. Webster, 266 App. Div. 637, 44 N.Y.S.2d 902 (3d Dept. 1943)(Parole Board is not authorized to determine whether a prisoner is insane).

In drafting article 730, which is the "exclusive remedy" for incapacitated defendants, the Legislature "balanc[ed] the sensitive policy issues at stake, including the welfare of the mentally ill accused and concerns about public safety," and crafted a "careful, comprehensive scheme." People v. Schaffer, (86 N.Y.2d 460, 464, 634 N.Y.S.2d 22, 25, 657 N.E.2d 1305, 1308 (1995). To hold that the Parole Board should make competency determinations without the benefit of "meticulously detailed procedure[s] governing this complex area of law and medicine" (People v. Gensler, 72 N.Y.2d at 243, 532 N.Y.S.2d at 75) similar to those in article 730, even in the interim, indeed can only contribute to the "disruption" that the majority seeks to avoid. The "reasonableness" standard suggested by the majority -- that the Parole Board should render a competency determination "when it reasonably appears that the alleged violator may be incompetent" -- is too vague to be workable, even as an interim solution.

In this case, fortunately, this Court is not hampered by the lack of a statutory remedy, and need not craft a judicial one since the petitioner was already civilly committed to an OMH facility four years prior to the incident, and he was returned to that same facility under the final observation order after the misdemeanor charges were dismissed. Indeed, the OMH detainer directed that "[i]n the event that the [petitioner] is released from the custody of the New York State Parol Department and/or Department of Corrections, *you are required to return this individual to the custody of OMH at [the OMH psychiatric facility]*" (emphasis added). As petitioner points out, he presented little danger to society and would have received continued care and treatment in the OMH facility.[4]

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

ENTERED: DECEMBER 27, 2012

CLERK

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[4] After being incarcerated for almost four years, the petitioner was scheduled for release from prison on or about November 5, 2012.

Gonzalez, P.J., Tom, Catterson, Renwick, Richter, JJ.

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7279A

Index 109565/03
600448/06

CDR Créances S.A., as Successor
to Societe de Banque Occidentale,
Plaintiff-Respondent,

-against-

Maurice Cohen,
Defendant-Appellant,

Summerson International Establishment, et al.,
Defendants.

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CDR Créances, S.A., as Successor
to Societe de Banque Occidentale,
Plaintiff-Respondent,

-against-

Leon Cohen, etc., et al.
Defendants-Appellants,

Iderval Holdings, Ltd., et al.,
Defendants.

Dewey Pegno & Kramarsky LLP, New York (David S. Pegno of counsel), for appellants.

Kellner Herlihy Getty & Friedman LLP, New York (Douglas A. Kellner of course), for respondent.

Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered September 16, 2011, affirmed, with costs, and order, same court (James A. Yates, J.), entered January 25, 2011, and from the resettled order, same court (O. Peter Sherwood, J.), entered September 15, 2011, dismissed, without costs, as subsumed

in the appeal from the judgment. Order, same court and Justice, entered February 24, 2011, dismissed, without costs, as abandoned.

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

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
Peter Tom
James M. Catterson
Dianne T. Renwick
Rosalyn H. Richter, JJ.

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7279-7279A
Index 109565/03E
600448/06E

CDR Créances S.A., as Successor
to Societe de Banque Occidentale,
Plaintiff-Respondent,

-against-

Maurice Cohen,
Defendant-Appellant,

Summerson International
Establishment, et al.,
Defendants.

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CDR Créances, S.A., as Successor
to Societe de Banque Occidentale,
Plaintiff-Respondent,

-against-

Leon Cohen, etc., et al.
Defendants-Appellants,

Iderval Holdings, Ltd., et al.,
Defendants.

Maurice Cohen, Leon Cohen, Sonia Cohen, Robert Maraboeuf and Allegria Aich appeal from the judgment of the Supreme Court, New York County (O. Peter Sherwood, J.), entered September 16, 2011, awarding plaintiff the principal sum together with in prejudgment interest from July 12, 2007. Appeals from the order, same court (James A. Yates, J.), entered January 25, 2011, which, after a hearing, granted plaintiff's motion to strike the answers of defendants Maurice Cohen, Leon Cohen, Sonia Cohen, Robert Maraboeuf and Allegria Aich and enter a default judgment against them, and from the resettled order of the same court (O. Peter Sherwood, J.), entered September 15, 2011, and from the order, same court and Justice, entered February 24, 2011.

Dewey Pegno & Kramarsky LLP, New York (David S. Pegno of counsel), for appellants.

Kellner Herlihy Getty & Friedman LLP, New York (Douglas A. Kellner of course), for respondent.

TOM, J.

This matter arises out of the diversion of the proceeds of a loan made by plaintiff's predecessor in interest to finance the renovation of a Manhattan property as a hotel. The conversion of the funds was accomplished by capital transfers to shell entities controlled by defendants Maurice Cohen and his son, Leon (collectively, the Cohens).[1] They were assisted in this enterprise by Sonia Cohen, wife of Maurice Cohen, and two family employees, Robert Maraboeuf and Allegria Achour Aich (collectively, appellants). We agree with Supreme Court's overall conclusion that these defendants have exhibited no less dishonesty before the courts as in their dealings with business associates and the federal taxing authorities. Thus, in view of their well-documented acts of deceit and fraud committed to suborn the judicial process, this Court concludes that the sanction of striking their pleadings and entering judgment on default in the principal sum of $135,359,331.30 with prejudgment interest, was entirely appropriate.

Plaintiff is the successor in interest to Societe de Bank Occidentale (SDBO), a wholly owned subsidiary of French bank

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[1] Maurice and Leon Cohen are presently serving respective 10-year sentences following conviction, after a jury trial, in connection with their failure to pay federal income taxes on the proceeds.

Credit Lyonnais. SDBO and SNC Coenson International et Cie (SNC) formed a partnership to develop the Flatotel hotel in Paris, part of a worldwide franchise of hotels. In 1990, SDBO and SNC became shareholders of Euro-American Lodging Corporation (EALC), whose purpose was to convert a Manhattan building into a Flatotel hotel. SDBO was to provide financing and SNC to provide expertise in the hotel industry. SNC nominally purchased SDBO's share in EALC for $50,000 because SDBO, as a foreign bank operating in the United States, could not own shares in a nonbanking business. SDBO's financing, pursuant to a pledge agreement, was secured by a mortgage and security interest in all of EALC's outstanding stock. In 1991, the parties entered into a new loan agreement, governed by French law, under which SDBO was to provide financing of $82,704,990 to the Manhattan Flatotel venture, to be disbursed as construction progressed, and EALC, among other things, was to pay taxes on the Manhattan property.

The relationship between the venture's participants began to deteriorate in 1992, when SDBO accused EALC, controlled by Maurice Cohen, of diverting funds, and as a result refused to provide further financing for the construction. A decade of litigation before the French courts began with EALC's filing an action to compel SDBO to distribute funds under the loan agreement and SDBO's counterclaim seeking to accelerate payment

of the loan debt on account of EALC's default. In 2003, EALC was directed by the French court to repay the loan and $13,923,311 in taxes it was to have paid to the City of New York. The French judgment was recognized in this jurisdiction and, in 2005, plaintiff was granted judgment in the principal sum of $95,837,522 plus interest of $112,159,088.41, which this Court affirmed (*CDR Créances S.A. v Euro-American Lodging Corp.*, 40 AD3d 421 [1st Dept 2007]). Plaintiff also instituted a mortgage foreclosure action predicated on EALC's default on the same loan agreement (*CDR Creances S.A. v Euro-American Lodging Corp.*, 43 AD3d 45 [1st Dept 2007]).

Also in 2003, plaintiff instituted a tort action asserting six causes of action and, in 2006, a second tort action asserting 38 causes of action – including fraud, fraudulent conveyance and conversion – against the Cohens, Sonia Cohen, various entities alleged to be controlled by them and certain of their employees. These actions were consolidated, and the first discovery conference was held in early March 2008. By way of an order entered August 13, 2008, Supreme Court struck the answers of the Cohen defendants and others for failure to comply with discovery demands, and judgment was entered against them later that month. This Court reversed the judgment, stating that due to the brief period that had elapsed from the initial discovery order and the

granting of judgment by default, “reasonable latitude should have been afforded before imposing the ultimate sanction” (62 AD3d 576, 577 [1st Dept 2009]). Thereafter, defendants continued to resist discovery orders that this Court found to be generally within the exercise of Supreme Court’s discretion (77 AD3d 489, 491 [1st Dept 2010] [upholding all directives except production of Maurice Cohen’s personal tax returns]).

In April 2010, Maurice Cohen (a.k.a. Mauricio Cohen Assor) and Leon Cohen (a.k.a. Leon Cohen Levy) were arrested by federal authorities for conspiracy to defraud the United States government and subscription to false income tax returns. Joelle Habib and Patricia Habib Petetin Benharbon (Petetin), two sisters who had been in the employ of the Cohen family, entered into agreements with the Justice Department's tax division to provide information, respond to questions and testify before the grand jury and at trial in exchange for the government's promise not to prosecute them for activities in connection with their involvement with Maurice and Leon Cohen. The criminal case was heard in the United States District Court for the Southern District of Florida, and the jury returned a guilty verdict in early October 2010. The testimony given by the Habib sisters at trial revealed a coordinated pattern of deceit calculated to conceal the defendants’ ownership of the New York property and

the shell corporations to which the proceeds of its sale were transferred. It emerged that, in violation of the loan agreement with SDBO, the defendants had caused the New York property to be sold for some $33 million and, using entities they controlled (both Panamanian), converted the proceeds to their own use and avoided paying taxes on the income derived from the sale by transferring the money first to the Swiss bank account of Blue Ocean Finance and then to the account of Carribean Business Fund, maintained at the same bank.[2]

At sentencing, the District Court found that the Cohens had engaged in criminal activity that "SPANNED THE BETTER PART OF A DECADE OR MORE, INVOLVED NUMEROUS FICTITIOUS ENTITIES, AN ELABORATE WEB OF SHELL CORPORATIONS, AND HEAVY HANDED [treatment] OF A NUMBER [of] LESS SOPHISTICATED FINANCIALLY DEPENDENT EMPLOYEES IN THE SCHEME." The court further found "THAT THE DEFENDANTS MAURICIO COHEN ASSOR AND LEON COHEN LEVY COMMITTED PERJURY." The court noted that they gave false testimony concerning such matters as the ownership of the New York property, the events that transpired at the closing of its sale, the ownership of the shell corporations they controlled, the

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[2] A more detailed account of the transaction may be found in this Court's decision in *World Bus. Ctr. v Euro-American Lodging Corp.* (309 AD2d 166, 167-168 [1st Dept 2003]).

involvement of various relatives in the operation of those entities and "THE FORGING OF SIGNATURES ON A HOST OF DOCUMENTS."

After the extent of the defendants' misconduct before the courts became apparent as a result of the federal investigation, plaintiff brought the instant motion to strike appellants' pleadings in August 2010. Supreme Court held a full evidentiary hearing to assess whether appellants had perpetrated a fraud upon the court. Appellants elected not to testify, and Maurice and Leon Cohen chose to rely solely on the testimony they had given at their federal trial. Testimony was received from the Habib sisters, who described a coordinated effort to deceive the courts. After hearing the testimony and reviewing the documentary evidence, Supreme Court issued a 17-page, single-spaced decision, in which it concluded, on the basis of clear and convincing evidence, that appellants had committed a fraud on the court. In the first order appealed from, the court granted plaintiff's motion, struck appellants' answers and directed that judgment be entered on default. Following resettlement, the second order appealed from, judgment was entered against appellants in the amount of $135,359,331.30 with prejudgment interest from which appellants also appeal.

Appellants challenge the disposition on the grounds that the court applied the wrong standard of proof in holding that they

committed a fraud directed at the court warranting the striking of their pleadings and, thus, abused its discretion in imposing the sanction of judgment by default. They further contend that the court erred in directing entry of judgment without conducting an inquest. The short answer to these assertions is that the proof elicited is more than sufficient to establish that appellants engaged in an extensive scheme to suborn perjury and subvert the judicial process; and calculation of the judgment, which is predicated on a foreign judgment recognized in this jurisdiction and affirmed by this Court, is a ministerial matter requiring only computation by the Clerk of the Court (CPLR 3215[a]).

Appellants portray the primary issue on appeal as the evidentiary standard to be applied in deciding if a fraud on the court has been committed. The parties contest whether such misconduct must be "conclusively demonstrated," as appellants contend (citing *Melcher v Apollo Med. Fund Mgt. L.L.C.*, 52 AD3d 244 [1st Dept 2008]).

Appellants' discussion of *Melcher* places great weight on the statement that "[d]eceit warranting the striking of the answer was not conclusively demonstrated" (52 AD3d at 245). However, a cursory examination of the context in which the statement was issued reveals that it does not purport to pronounce an

evidentiary standard. Rather, the purpose was to distinguish the circumstances of the matter before us from the authority cited, *317 W. 87 Assoc. v Dannenberg* (159 AD2d 245, 245 [1st Dept 1990]), in which we concluded that sanctions were supported by "'undisputed untruthfulness' on the record" (quoting *Smith v Malarczyk*, 118 AD2d 934, 935 [3d Dept 1986] ["undisputed untruthfulness of defendant's testimony at his examination before trial"]). The words "conclusively demonstrated" in *Melcher* refer to this Court's finding in *Dannenberg* concerning the proof of the defendant's misconduct and is not an evidentiary standard as urged by appellants. The holding of the case, insofar as pertinent to the issue before us, is contained in the sentence immediately following: "Whether the destruction of evidence was intentional or merely negligent presents an issue for the trier of fact" (*Melcher* at 245). The obvious implication is that the issue is appropriate for submission to a trier of fact, which should determine the question as a trier of fact decides most civil questions, by a preponderance of the evidence. Thus, to the extent that *Melcher* involves an issue to be decided in connection with striking the pleadings of a party responsible for destruction of evidence or withholding evidence, it indicates that the determination rests not on conclusive evidence but on a mere preponderance thereof.

As Supreme Court noted in its decision, “Actions for fraud upon the court are rare” – so rare that the court cited only a single New York case dealing with the subject, in which we stated, “The paramount concern of this Court is the preservation of the integrity of the judicial process” (*Koschak v Gates Constr. Corp.*, 225 AD2d 315, 316 [1st Dept 1996] [venue “designated as a result of duplicity . . . amounts to a fraud upon the court and will not be permitted to stand”]). In this jurisdiction, “fraud upon the court” is a term used to describe the perversion of the judicial process as a result of misconduct by a party or counsel (*see Baba-Ali v State of New York*, 19 NY3d 627, 634 [2012], citing Black’s Law Dictionary 686 [8th ed 2004]). With respect to the imposition of sanctions for failure to comply with discovery orders, the parties have cited no New York case that recognizes any such cause of action or, more precisely, requires that fraud on the court be established before pleadings may be stricken. Furthermore, appellants neither identify any basis for distinguishing the nature of the penalty assessed against them from one authorized under CPLR 3126 nor set forth any reason why a greater quantum of proof should be required to support imposition of the penalty.

Based on the extensive evidence adduced in this matter, Supreme Court did not abuse its discretion in striking the answer

(*Arts4All, Ltd. v Hancock*, 54 AD3d 286 [1st Dept 2008], *affd* 12 NY3d 846 [2009], *cert denied* __ US __, 130 S Ct 1301 [2010]). The ample record is more than sufficient to demonstrate appellants' utter disregard for the judicial process, and while no finding of fraud on the court is necessary to warrant striking the pleadings, appellants' conduct is appropriately characterized as such.

As a result of the federal prosecution of the Cohens, it was learned that they had arranged for false testimony to be given by various deposition witnesses. The Habib sisters testified that the Cohens had suborned perjury by holding planning sessions on various dates, at which they provided the sisters, Robert Maraboeuf and Allegria Achour Aich with written scripts to follow in giving deposition testimony. The scripts specified false answers that were to be provided denying the Cohens' control of the various defendant shell entities, as well as fictitious names of persons who were purported to be in control of those entities ("Francois Lavalle," "Jim Cox," "Javier Schrimpf" and others) and the name of a person asserted to have paid the witnesses' legal fees (one "Dahan"). Although they were instructed to destroy the scripts, Joelle Habib retained her copy and furnished it to the court. She further testified that her 2008 affidavit in support of the motion to vacate the judgment against her on default (to

which this Court alluded in vacating judgment) was false because Maurice Cohen had told her what to say. Furthermore, contrary to deposition testimony that the individual defendants were all paying their own lawyer, she stated that it was Maurice Cohen who paid the fees.

Testimony was also heard that appellants had submitted a forged document in opposition to a motion by plaintiff. Habib Levy Sibony (Levy), Maurice Cohen's brother-in-law, testified at both the criminal trial and a Florida civil action, in which plaintiff sought to encumber Florida real estate purchased with the proceeds of the sale of the New York property. Levy stated that an HSBC Bank letter portraying him as beneficial owner of Whitebury Shipping Ltd., an offshore bearer share entity used to conceal the proceeds of the original loan, had been forged.[3] He explained that, although his purported signature appeared on the document, he had never been asked whether his name could be used, he never gave Maurice Cohen or anyone else permission to use it, and he was never contacted by HSBC to verify his signature. Levy's disavowal of the signature was corroborated by recordings made in 2007 of his conversations with a bank officer, in which the officer was heard to state that the signature did not appear

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[3] The shares of a bearer share corporation are not registered, making its ownership particularly difficult to trace.

to be Levy's. Nor did Levy's passport signature match the one on the letter.

The motion to strike appellants' answer and enter judgment by default was originally supported by evidence garnered from the federal criminal trial and the Florida civil trial: the Habib sisters' testimony regarding the subornation of perjured deposition testimony; false 2008 affidavits submitted in connection with the motion to vacate the default judgment against the Habib sisters, Aich and Maraboeuf (which, as noted, this Court had mentioned in reversing Supreme Court's 2008 default order); Levy's testimony concerning his forged signature; and invoices sent to Maurice Cohen for legal representation provided to appellants, thereby contradicting Aich's deposition testimony regarding the source of payment. This evidence was augmented as a result of the hearing conducted by the motion court. The Habib sisters gave testimony consistent with that given during the Florida federal criminal and civil proceedings. Plaintiff placed in evidence the Joelle Habib deposition script, the transcript of Levy's testimony, affidavits from the attorney who handled the closing of the New York property, as well as deposition transcripts, bank records and portions of the record in the Florida civil action. Maurice and Leon Cohen, who were incarcerated, relied on their testimony at their criminal trial,

generally denying their ownership and control of the shell entities involved in the transfer of the funds from the sale of the New York property and alleging the intervention of persons purported to be in control of those entities.

The evidence is more than sufficient to support the dismissal of appellants' answer under criteria normally employed in this state (*see e.g. Zletz v Wetanson*, 67 NY2d 711, 713 [1986] ["conduct designed to yield one-sided disclosure"]; *Kirkland v New York City Hous. Auth.*, 236 AD2d 170 [1st Dept 1997] [spoliation]). While the proof may not quite amount to "undisputed untruthfulness on the record" (*Smith*, 118 AD2d at 935), it is sufficient to constitute incontrovertible untruthfulness on the record.

Dismissal of the answer is supported by conduct that can fairly be described as "dilatory, evasive, obstructive and ultimately contumacious" (*Henry Rosenfeld, Inc. v Bower & Gardner*, 161 AD2d 374, 374 [1990]), designed to frustrate the motion court's discovery orders and directives (CPLR 3124). The striking of pleadings is warranted where, as here, the conduct of the offending party "frustrates the disclosure scheme provided by the CPLR" (*Henry Rosenfeld, Inc.* at 375; *see also Pimental v City of New York*, 246 AD2d 467, 468 [1st Dept 1998], citing *Herrerra v City of New York*, 238 AD2d 475, 476 [2d Dept 1997]). As a

general principle, Supreme Court is "accorded wide latitude in determining appropriate sanctions for dilatory conduct" (*Rafael Diamond Jewelry Import v Underwriters at Lloyds of London, England*, 189 AD2d 613, 613 [1st Dept 1993], citing *Sawh v Bridges*, 120 AD2d 74, 78, [2nd Dept 1986] *appeal dismissed* 69 NY2d 852 [1987]). Dismissal of a pleading is within the exercise of discretion (CPLR 3126 [3]) and subject to reversal only for abuse thereof (*Zletz*, 67 NY2d at 713).

After this Court vacated the default judgment entered against appellants, Supreme Court issued an order, directing that appellants, inter alia, comply with all scheduled discovery, including the completion of depositions, and conditionally precluded all of the individual defendants unless they complied with plaintiff's document demands and interrogatories, directives that this Court held to have been proper with the exception of the production of Maurice Cohen's personal tax return (77 AD3d 489, 491). For the purpose of imposing a sanction for discovery violations in this matter (CPLR 3126), it need only be observed that conspiring to provide false testimony and to mislead the court did not comply with Supreme Court's directives, as affirmed by this Court. Thus, it is sufficient that appellant's misconduct constitutes a gross deviation from the orderly completion of discovery as directed by Supreme Court and

envisioned by CPLR article 31 (*see 317 W. 87 Assoc. v Dannenberg*, 159 AD2d 245 [1st Dept 1990], *supra* [submission of back-dated document and false deposition testimony as to its validity]). Because a lesser sanction has proved to be ineffectual in deterring appellants from their obdurate obstruction of the judicial process, we deem striking the answer and entry of judgment by default to be both appropriate and necessary in order to promote respect for the judicial system and to preserve the integrity of its offices. Moreover, a lesser sanction would not ameliorate the substantial harm inflicted on plaintiff by appellants' pervasive misconduct.

Contrary to the dissent's position, the determination of credibility of the witnesses was within the province of the hearing court. Where, as here, an evidentiary hearing is conducted by the court, "the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses" (*Claridge Gardens v Menotti*, 160 AD2d 544, 544-545 [1st Dept 1990]; *see also Kronish v Koffman*, 199 AD2d 136, 138 [1st Dept 1993]). Since it cannot be said that Supreme Court's evaluation of the evidence before it was unfair

(*see Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]; *Hardwick v State of New York*, 90 AD3d 540 [1st Dept 2011]), there is no basis to depart from its findings. While appellants contend that the cooperation agreements with the federal prosecutor afforded the Habib sisters motive to give testimony favorable to the federal authorities, the hearing court fully credited their testimony.

In contrast to the evidence amassed by plaintiff, appellants' opposition by way of affidavit was relatively sparse. Their contention, both on the motion and on appeal, is that their commission of fraud on the court has not been demonstrated by sufficient evidence. While there is no requirement that appellants' conduct in withholding or misrepresenting evidence amount to fraud on the court, we note that, unlike the circumstance of *Passlogix, Inc. v 2FA Tech., LLC* (708 F Supp 2d 378, 406 [SD NY 2010]), on which appellants rely, the testimony received from the Habib sisters and Habib Levy Sibony was corroborated. In addition, while the extensive record does not warrant resort to the doctrine of collateral estoppel, Maurice and Leon Cohen were found, for the purpose of federal sentencing guidelines, to have committed perjury during the course of criminal proceedings in relation to the same transactions at issue in this action. Thus, appellants have certainly not

demonstrated the existence of any contradiction in the findings reached in the respective tribunals.

Much of appellants' brief is devoted to disputing the trial court's factual findings. Their discourse arrives at the conclusion that a finding of default was particularly inappropriate in view of appellants' asserted meritorious defenses and lack of meaningful discovery. This argument in favor of reversal is remarkable because, as evinced by the record and appellate history, this litigation is notable for appellants' failure to comply with discovery orders which Supreme Court, in its 2008 order striking the answer, found to be willful and contumacious. In reversing, this Court did not dispute the motion court's assessment of appellants' misconduct, reasoning only that the sanction imposed was premature. We specifically noted that our vacatur of the default judgment entered against appellants was without prejudice to any other sanctions Supreme Court deemed appropriate (62 AD3d at 577). Furthermore, in light of the evidentiary hearing conducted by Supreme Court prior to granting the instant judgment, appellants will not be heard to complain that there is an insufficient factual basis for imposing the sanction. Finally, they are hardly in a position to argue that their own failure to cooperate with Supreme Court's attempts to regulate disclosure has resulted in the absence of meaningful

discovery.

It is further contended that the default judgment entered against Maurice Cohen's wife, Sonia, should have been vacated for lack of evidence. There was no direct evidence to show that Sonia participated in the meetings regarding the false deposition testimony. However, contrary to Sonia's denial of knowledge of her husband's businesses, Petetin testified that Sonia took an active role in managing the Cohens' perfume store and that she lied about signing documents related to Maurice's business, about the ownership of family assets and about knowing Maraboeuf, who had managed her store. Sonia committed perjury and took part in hiding the transfer of family assets. Thus, the proof supports a finding that she participated in the effort to withhold from plaintiff evidence necessary to the prosecution of its case, thereby warranting the sanction against her.

Appellants' arguments regarding liability were properly found to be foreclosed by their default (*see Rokina Opt. Co. v Camera King*, 63 NY2d 728, 730 [1984]). Supreme Court correctly awarded damages without conducting a hearing, correctly found plaintiff's claims against the individual defendants viable, and correctly excluded the offsets appellants sought. The court directed entry of judgment in the amount of $135,359,331.39, together with interest from July 12, 2007 at the statutory rate,

as computed by the Clerk.

The amount of damages was determinable by resorting to the judgments of the French court, as recognized in New York and as calculated first by Special Referee Marion Lewis and then by Special Referee Marilyn Dershowitz with respect to interest that accrued after April 2005 and October 2005.

The amount of tort damages against the individual defendants was properly based on the amount of the unpaid loan; notably, numerous causes of action against the individual defendants concerned the fraudulent conveyance of the loan proceeds. These claims were preserved in the 2007 settlement by a specific carve-out for tort claims against the Cohens and entities under their control; the court correctly agreed with plaintiff's argument distinguishing *Bailon v Guane Coach Corp.* (78 AD3d 608 [1st Dept 2010]), upon which appellants relied, as lacking a carve-out provision for liability against individuals who had settled with a corporation.

The court properly denied a setoff for the value of the Florida properties, which were held in receivership rather than transferred outright to plaintiff. Thus, the Florida judgment remains unsatisfied.

Finally, the court properly awarded prejudgment interest since the fraud and fraudulent conveyance causes of action are

based on allegations that appellants attempted to impair plaintiff's right to recover on a loan (*see Eighteen Holding Corp. v Drizin*, 268 AD2d 371, 372 [1st Dept 2000]).

Accordingly, the judgment of the Supreme Court, New York County (O. Peter Sherwood, J.), entered September 16, 2011, awarding plaintiff the principal sum of $135,359,331.59, together with $50,965,529.62 in prejudgment interest from July 12, 2007, should be affirmed, with costs. The appeals from the order of the same court (James A. Yates, J.), entered January 25, 2011, which, after a hearing, granted plaintiff's motion to strike the answers of defendants Maurice Cohen, Leon Cohen, Sonia Cohen, Robert Maraboeuf and Allegria Aich and enter a default judgment against them, and from the resettled order of the same court (O. Peter Sherwood, J.), entered September 15, 2011, should be dismissed, without costs, as subsumed in the appeal from the judgment. The appeal from the order of the same court and Justice, entered February 24, 2011, should be dismissed, without costs, as abandoned.

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

CATTERSON, J. (dissenting)

I must respectfully dissent. In my opinion, the motion court abused its discretion in granting the plaintiff's motion for a default judgment based on its finding that the defendants committed a fraud on the court. It is incomprehensible that the motion court was able to find fraud on the court simply by crediting only the testimony of two witnesses who essentially admitted that they had lied at every stage of this action. Moreover, because the defendants sharply dispute the testimony of those two witnesses and thereby raise material questions of fact, precedent mandates that the issue could only be resolved by a jury.

This case is but another chapter in the long-running saga of litigation arising out of a commercial real estate loan dating back to 1990. At that time, Societe de Bank Occidentale (hereinafter referred to as "SDBO"), plaintiff CDR's predecessor, became a shareholder of Euro-American Lodging Corporation (hereinafter referred to as "EALC"), whose purpose was to convert a Manhattan building into a Flatotel hotel, part of an international franchise. CDR Créances S.A. v. Euro-American Lodging Corp., 43 A.D.3d 45, 837 N.Y.S.2d 33 (1st Dept. 2007). SDBO provided the financing pursuant to a 1991 loan agreement.

The relationship between SDBO and EALC soured in 1992, and

SDBO refused to provide further financing for construction based on its claim that EALC was diverting funds. EALC sued in France to compel SDBO to perform, and SDBO counterclaimed to default EALC and accelerate the loan debt. In 2003, a French appeals court ordered EALC to repay the loan in the amount of $82,704,980, with interest.

In May 2003, the plaintiff commenced the first of these two New York actions against EALC, Maurice Cohen and others, claiming breach of contract, fraud and other torts based on allegations that Cohen controlled EALC and effected a series of transfers to other entities controlled by him or by his nominees in order to conceal the proceeds of the loan and avoid repaying it.

In May 2006, the plaintiff commenced the second action, naming, inter alia, the other defendants herein, including Leon Cohen (Maurice's son), Sonia Cohen (Maurice's wife), Robert Maraboeuf (former CEO of SNC) and Allegria Aich (signatory on several of the challenged asset transfers), as well as Joelle Habib (Maurice Cohen's longtime secretary) and Patricia Habib Petetin (Ms. Habib's sister).

In January 2008, a default was entered against Maraboeuf, Aich, Habib and Petetin, and in August 2008 judgment was entered against them for approximately $264 million plus interest. On May 28, 2008, the plaintiff moved for a default judgment against

Maurice Cohen based on his alleged failure to provide discovery. Maurice Cohen cross-moved for, inter alia, a protective order. On August 7, 2008, the motion court granted the plaintiff's motion for a default against both Cohens and struck the Cohens' answers, finding their noncompliance with discovery orders willful and contumacious.

On May 21, 2009, this Court reversed, and vacated the defaults, finding that the motion court had "improvidently exercised its discretion." CDR Créances S.A.S. v. Cohen, 62 A.D.3d 576, 577, 880 N.Y.S.2d 251, 252 (1st Dept. 2009). Discovery resumed, and in July 2009, the Cohens were deposed for seven days creating a record of 1,031 pages. Leon Cohen denied that he or any member of his family had any direct or indirect ownership interest in any of the entities that plaintiff alleged were controlled by the Cohens. Maurice Cohen denied involvement in the negotiations and sale of the Flatotel, and denied ownership of any of the defendant entities.

Maurice Cohen provided additional deposition testimony that concluded on April 14, 2010. Leon Cohen's deposition did not recommence because on April 15, 2010, Maurice and Leon Cohen were arrested in Florida. The federal indictment charged them with conspiracy to evade taxes on income from various corporate entities and alleged that, as part of the conspiracy, they had

committed fraud on the New York court by forging documents and suborning perjury.

Habib and Petetin, who were also in the United States for depositions, entered into agreements with the Justice Department's tax division to testify against the Cohens in exchange for the government's promise not to prosecute them for activities in connection with their involvement with the Cohens. Habib and Petetin appeared at their depositions in New York on April 22 and 23, 2010, and asserted their Fifth Amendment rights. They also entered into a settlement agreement with the plaintiff in this case.

The tax case in Florida went to trial on September 16, 2010. Habib and Petetin testified for the government, and the Cohens were convicted of tax evasion on October 6, 2010. Habib and Petetin also testified against the Cohens in a Florida civil action where the court found that the Cohens' subornation of perjury and submission of a forged document in the New York actions was a fraud on the court.

On October 20, 2010, the plaintiff moved to strike the defendants' answer in the New York actions and for a default judgment pursuant to CPLR 3124 and 3126 on the grounds that the defendants defaulted on their discovery obligations and committed a fraud on the court. The motion court ordered an

evidentiary hearing over the objection of the defendants who argued that, because there was a factual dispute regarding the plaintiff's allegations, the drastic relief that the plaintiff sought was improper.

The evidentiary hearing was held November 29 through December 3, 2010. Habib and Petetin testified that after this Court vacated the defaults in 2009, they met with the Cohens, Aich and Maraboeuf, and were provided with written "questionnaires" to memorize in preparation for their depositions in the New York actions. They testified that the questionnaires contained false information. They further testified that they were instructed to state at their depositions that they did not work for the Cohens, and that the Cohens did not own Flatotels. They said that they were instructed not to tell their lawyers of the plan to give inaccurate testimony.

Habib testified that she was told to deny that the Cohens were behind any of the corporate entities involved in the alleged transfer of collateral, and instead to identify fictional representatives of the entities. Petetin testified that she was instructed to deny any relationship to the Cohens. Of course, ultimately the Habib sisters did not testify to any of these purported falsehoods at deposition because, as already noted they both asserted their Fifth Amendment rights.

Habib and Petetin were impeached on cross-examination. They admitted that they had lied numerous times throughout this action including to their lawyers in France. Habib also admitted to making false statements to a French court, and failing to report a $100,000 severance payment to French tax authorities that she testified she received from Maurice Cohen. Habib and Petetin testified that they lied in affidavits because the Cohens were paying their legal fees.

Habib and Petetin further acknowledged that, during the tax trial in Florida, they had settled with the plaintiff which agreed not to pursue its claims against them so long as they testified against the defendants. Habib and Petetin also admitted that the plaintiff had agreed to pay their legal fees and expenses.

The defendants submitted the sworn statements of Maurice and Leon Cohen, Aich, and Maraboeuf in which they expressly and emphatically denied that they were part of any agreement to testify falsely. The Cohens also submitted affidavits and the defendants' testimony from the Florida criminal trial wherein they denied the allegations against them.

The motion court credited Habib's and Petetin's entire testimony and concluded that Aich and Maraboeuf "followed the perjurious scripts and repeated the Cohens' false directives in

their depositions." The court was "convinced that [the representatives of the entities] were conscious fabrications, created by the Cohens to meet the exigencies of the situation and to obstruct the Court's truthfinding process."

The court concluded that "striking defendants' pleadings and dismissing the action is the appropriate sanction for the Cohens' bad faith and deliberate intent to deceive the Court."

In my opinion, for the reasons set forth below, this was plain error. The motion court abused its discretion in granting the plaintiffs' motion for a default judgment. As a threshold matter, it should be noted that the court referred to the evidentiary hearing as a Melcher hearing, citing to Melcher v. Apollo Med. Fund Mgt. L.L.C.,(52 A.D.3d 244, 859 N.Y.S.2d 160 (1st Dept. 2008)). However, the motion court then proceeded to ignore the standard set by this Court in that case, namely that "deceit warranting the striking of the answer" must be "*conclusively* demonstrated." 52 A.d.3d at 245, 859 N.Y.S.2d at 162 (emphasis added). Instead, the motion court adopted the "clear and convincing" standard set by some federal courts to find that the defendants perpetrated a fraud on the court. Melcher's requirement of a "conclusive" demonstration of deceit is mandated by precedent. See 317 W. 87 v. Dannenberg, 159 A.D.2d 245, 552 N.Y.S.2d 236 (1st Dept. 1990); see also Smith v.

Malarczyk, 118 A.D.2d 934, 499 N.Y.S.2d 501 (3d Dept. 1986). In these cases, fraud and deceit on the court is established only because it is "undisputed" or "admitted." See Smith, at 935, 499 N.Y.S.2d at 503 ("[g]iven the *undisputed* untruthfulness of defendant's testimony at his examination before trial that there were no witnesses [to the accident] ... the trial court's refusal to impose sanctions [...] constituted reversible error")(emphasis added). In Dannenberg, the "*undisputed* untruthfulness" involved offering a fraudulent document to the court under an affidavit, which fraudulence was subsequently "admitted" by the defendant. 159 A.D.2d at 245, 552 N.Y.S.2d at 237. Thus, Melcher's requirement of a "conclusive" demonstration of alleged deceit comports with a heightened standard of proof where, as the defendants assert, "conclusive" ordinarily means "putting an end to debate or question especially by reason of irrefutability."

More recently, in Kasoff v. KVL Audio Visual Servs., Inc., (87 A.D.3d 944, 930 N.Y.S.2d 5 (1st Dept. 2011), this Court determined that plaintiff's motion to strike should have been granted on the grounds that "[t]he record *establishes* that defendants' counsel actively interfered with discovery [and] [d]efendants also *admittedly* altered a commission report." 87 A.D.3d at 945; 930 N.Y.S.2d at 7. Hence, Kasoff also stands for the proposition that deceit must be admitted or undisputed when a

plaintiff has moved to strike an answer rather than just for the proposition the majority propounds, namely, that it is appropriate sanction when the fraudulent scheme is "extensive." In any event, the plaintiff here does not cite to any legal authority that supports the proposition that a motion to strike an answer or a motion for a default may be granted in a situation where the allegations of fraud and deceit on the court are the subject of a bona fide dispute.

Indeed, the facts of Melcher are instructive: In that case, the plaintiff moved to strike the defendants' answer for "spoliation of evidence and deceit related to such." At issue was "key evidence" of a document that plaintiff alleged was destroyed intentionally by one of the defendants to prevent forensic ink testing which would have shown the document to be fraudulent. The defendant disputed the allegation and asserted that the document was legitimate but "burned by accident, in his kitchen." Melcher v. Apollo Medical Fund Management LLC, 2007 N.Y. Slip Op. 33803[U], *3-4 (Sup. Ct., N.Y. County 2007).

The motion court denied the plaintiff's motion, and this Court affirmed holding that "[d]eceit warranting the striking of the answer was not conclusively demonstrated." Melcher, 52 A.D.3d at 245, 859 N.Y.S.2d at 162. Similarly, in this case, in my opinion, "deceit warranting the striking of the answer" or a

default judgment was not conclusively demonstrated. The fraud on the court allegedly perpetrated by defendants did not go undisputed, and was certainly not admitted. On the contrary, the defendants strenuously denied the allegations of deceit and fraud in their entirety. They challenged the witnesses' motives for testifying against them; they asserted that the "scripts" about which Habib and Petetin testified could have served other purposes such as aiding in the preparation of depositions; they argued that Habib and Petetin had an incentive to offer false adverse testimony against the defendants.

Indeed, the record supports the defendants' contentions to the extent that Habib and Petetin acknowledged at the evidentiary hearing that they testified against the defendants in return for the federal prosecutors dropping charges against the sisters. In my opinion, this was sufficient to preclude a finding of fraud on the court as a matter of law.

As in Melcher, the defendants raised a question of material fact as to the fraudulent conduct alleged, and the issue should have been presented to a jury. Melcher, 52 A.D.3d at 245, 859 N.Y.S.2d at 162 (whether defendant perpetrated a fraud on the court by destroying evidence and lying about it or "[w]hether the destruction of evidence was [...] merely negligent presents an issue for the trier of fact").

Despite this clear precedent, the motion court emphasized that it had arrived at its finding of fraudulent conduct by crediting the testimony of the same two witnesses who admitted they had lied in this action before a French court; admitted they had lied to their lawyers; admitted to lying on affidavits for the court; acknowledged asserting their Fifth Amendment rights at depositions ordered by the motion court, and conceded they had testified against the defendants in Florida in return for a deal with the government.

In my view, therefore, the motion court clearly abused its discretion when it allowed the plaintiffs to prevail on a motion for default under circumstances that would be insufficient to support a motion for summary judgment. Courts in other jurisdictions, in similar circumstances, have declined to grant a motion for default. See e.g. Gilbert v. Eckerd Corp. of Fla., Inc., 34 So.3d 773, 776 (Fla. App. 2010) ("if the motion to dismiss for fraud would not likewise survive a motion for summary judgment, the trial court should presume the matter not subject to dismissal"); Rockdale Mgt. Co., Inc. v. Shawmut Bank, N.A., 418 Mass 596, 601, 638 N.E.2d 29, 33 (1994) (O'Connor, J. concurring) ("[t]he precious right of trial by jury is jeopardized [if a court can strike pleadings] after measuring a party's credibility and without the benefit of an admission").

In light of the magnitude of the damages at issue in this case, and because I believe that the defendants succeeded in raising an issue of fact that must be resolved by a jury, I would reverse the January 25, 2011 order striking defendants' answers and granting a default judgment on liability, and remand for further proceedings.

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

ENTERED: DECEMBER 27, 2012

CLERK

Tom, J.P., Friedman, Catterson, Acosta, Freedman, JJ.

7481 IDT Corp., et al., Index 652097/10
Plaintiffs-Appellants,

-against-

Tyco Group, S.A.R.L., et al.,
Defendants-Respondents.

Robins, Kaplan, Miller & Ciresi L.L.P., New York (Hillel I. Parness of counsel), for appellants.

Dewey Pegno & Kramarsky LLP, New York (Thomas E.L. Dewey of counsel), for respondents.

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered June 20, 2011, reversed, on the law, with costs, and the motion denied.

Opinion by Catterson, J. All concur except Friedman and Freedman, JJ. who concur in a separate Opinion by Friedman, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David Friedman
James M. Catterson
Rolando T. Acosta
Helen E. Freedman, JJ.

7481
Index 652097/10

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IDT Corp., et al.,
Plaintiffs-Appellants,

-against-

Tyco Group, S.A.R.L., et al.,
Defendants-Respondents.

____x

Plaintiffs appeal from the order of the Supreme Court, New York County (Melvin L. Schweitzer, J.), entered June 20, 2011, which granted defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(7).

Robins, Kaplan, Miller & Ciresi L.L.P., New York (Hillel I. Parness, Richard A. Mescon and Oren D. Langer of counsel), for appellants.

Dewey Pegno & Kramarsky LLP, New York (Thomas E.L. Dewey of counsel), for respondents.

CATTERSON, J.

The parties in this breach of contract action have been engaged in a highly contentious business relationship since they agreed to form a joint venture to build a multi-billion dollar undersea fiber optic telecommunications network almost 15 years ago. Between periods of litigation, the parties have spent the last 12 years unhappily and unsuccessfully negotiating the details of the plaintiffs' usage of such a network. We now find that the prior decisions of this Court and the Court of Appeals in favor of the defendants did not extinguish the defendants' obligation to continue negotiations with the plaintiffs in good faith.

The record reflects the following: In November 1999, IDT Corp. and IDT Europe, B.V.B.A.'s (collectively "plaintiffs") and Tyco Group, S.A.R.L., Tycom (US), Inc., Tyco International, Ltd., Tyco International (US) Inc., and Tycom Ltd. (collectively "defendants") agreed to form a joint venture to construct a global fiber optic telecommunications network spanning more than 70,000 undersea kilometers and connecting more than 25 cities in Europe, North America, and Asia. The efforts to form the joint venture failed, and the parties spent the next year bringing various federal and state actions against one another. In October 2000, the parties entered into a settlement agreement in

which the plaintiffs agreed to release the defendants from all of their pending claims in exchange for the right to use a different undersea fiberoptic network for 15 years.

The defendants agreed to provide the plaintiffs, for their exclusive use, an "indefeasible right to use" (hereinafter referred to as an "IRU") two wavelengths, free of charge, for 15 years, beginning in 2002 for one wavelength and 2003 for the second. The defendants also agreed to provide operations, administration and management (hereinafter referred to as "OAM") for the wavelengths used by the plaintiffs for the same periods.

The settlement agreement further stated that the plaintiffs' IRU "shall be documented pursuant to definitive agreements *to be mutually agreed upon* and, in any event, contain [] terms and conditions consistent with those described" in the settlement agreement (emphasis added). The future agreements were to include terms governing, among other things, resale of capacity; provisioning, installation and commissioning of wavelengths; portability of capacity; and collocation services. Those agreements, including the IRU, were to be in writing and consistent with the defendants' standard agreements (which did not yet exist) with similarly situated customers or market rates, subject to any future negotiations between the parties.

After several years of unsuccessful negotiations, on May 4,

2004, the plaintiffs commenced a breach of contract action in Supreme Court. The plaintiffs alleged that the settlement agreement was a valid contract that obligated the defendants to provide IRU and OAM, and that the defendants had failed to supply the IRU and OAM in accordance with the terms of the agreement. The plaintiffs moved for partial summary judgment on the issue of liability, and the defendants cross-moved for summary judgment dismissing the complaint.

The motion court granted the plaintiffs' motion for partial summary judgment on the issue of liability and denied that portion of the defendants' cross motion seeking dismissal of the complaint. The defendants appealed, and this Court reversed. IDT Corp. v. Tyco Group, S.A.R.L., 54 A.D.3d 273, 863 N.Y.S.2d 30 (1st Dept. 2008). We reasoned that the settlement agreement was a preliminary agreement that although "incomplete" nonetheless bound the parties to "their ultimate contractual objective upon the subsequent occurrence of a contingency" – namely, "either the insistence of one party on the terms of the standard agreements after they come into existence or a resolution of the remaining terms through further negotiation" (54 A.D.3d at 275, 863 N.Y.S.2d at 33 (internal quotation marks omitted)). We further found that under this agreement the parties were obligated to negotiate the open issues in good faith "unless and until one

party were to insist on the terms of the standard agreements." Id. We concluded that the plaintiffs had erroneously asserted a breach of the agreement on the ground that the defendants' proposals for an IRU were inconsistent with those contemplated by the settlement agreement. Instead, we held that because the defendants' proposals were "hardly the sort of definite and final communication of an intent to forgo their obligations that is necessary to justify a claim of anticipatory breach," the defendants did not, as a matter of law, breach the settlement agreement. 54 A.D.3d at 275, 863 N.Y.S.2d at 33 (internal quotation marks omitted).

The plaintiffs appealed and on October 22, 2009, the Court of Appeals affirmed. IDT Corp. v. Tyco Group, S.A.R.L., 13 N.Y.3d 209, 890 N.Y.S.2d 401, 918 N.E.2d 913 (2009). The Court held that the record did not support a finding that the defendants breached any of their obligations but that "under the settlement agreement, the parties were required to negotiate the terms of the IRU and other agreements in good faith." 13 N.Y.3d at 214, 890 N.Y.S.2d at 405. The Court found that the settlement agreement was valid, but that it "contemplated the negotiation and execution of four additional agreements, most importantly the IRU." 13 N.Y.3d at 214, 890 N.Y.S.2d at 404. The Court reasoned that although there was a valid contract, the defendants

"obligation to furnish capacity never became enforceable because agreed-upon conditions were not met." Thus, the Court concluded that the defendants did not "breach[] the settlement agreement by merely proposing an IRU which allegedly contained [three] terms inconsistent with settlement." 13 N.Y.3d at 214, 890 N.Y.S.2d at 404, 405.

Subsequently, the parties resumed negotiations, but on November 15, 2010, the plaintiffs commenced this action in Supreme Court alleging that the defendants had breached the settlement agreement and their duty to negotiate in good faith. The defendants moved to dismiss the complaint pursuant to CPLR 3211(a)(7)(failure to state a cause of action), CPLR 3211(a)(1) (documentary evidence), and 3211(a)(5)(collateral estoppel/res judicata). The defendants argued that their obligations under the settlement agreement were extinguished by the Court of Appeals decision. The motion court agreed and granted the defendants' motion.

On appeal, the plaintiffs contend that the motion court erred, and should not have dismissed their complaint. For the reasons set forth below, we agree.

The motion court misconstrued the Court of Appeals decision in favor of the defendants. Specifically, the motion court, focussed on the conclusion that, "[a]lthough there was a valid

settlement agreement in this case, [the defendants'] obligation to furnish capacity *never became enforceable* because agreed-upon conditions were not met." IDT Corp., 13 N.Y.3d at 214, 890 N.Y.S.2d at 404 (emphasis added). It interpreted the highlighted phrase to mean that the defendants had "no further obligations under the [s]ettlement [a]greement." This was error.

The Court was simply observing that the allegations specified in the plaintiffs' first complaint did not articulate a breach at the time the action was commenced given the non-occurrence of a condition precedent: namely, the parties had not *yet* entered into final agreements, and the defendants had not otherwise breached their duty to negotiate.

More significantly, the cases relied upon by the motion court in which the failure to satisfy a condition precedent results in the discharge of further obligations under an agreement, are distinguishable in that they involve incidents where performance of a condition precedent was required by a date certain. See MHR Capital Partners LP v Presstek, Inc., 12 N.Y.3d 640, 884 N.Y.S.2d 211, 912 N.E.2d 43 (2009)(plaintiff's failure to obtain a consent by close of business on June 22, 2004 relieved defendant of its obligation to perform under a stock purchase agreement); Teachers Ins. & Annuity Assoc. of Am. v Tribune Co., 670 F. Supp. 491 (S.D.N.Y. 1987)(because plaintiff

failed to sell a building by the end of the calendar year 1982, defendant borrower was excused from its loan commitment). Obviously, in those cases, the defendants had no further duty to perform under the contract because, having passed the date certain, the condition precedent could never be satisfied.

On appeal, the defendants additionally argue that "a contractual obligation must be performed within a reasonable time" and that, in this case, such time has passed. They further suggest that the plaintiffs are responsible for this protracted litigation, and through the defendants' disingenuous use of block quoting,[1] imply that the Court of Appeals agreed and found that "enough was enough." There simply is no support for this

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[1]The following is an excerpt from the the defendants' brief:

> "After three years of negotiations and five years of litigation, the Court of Appeals thoroughly - and definitively - rejected all [the plaintiffs'] claims. Specifically, the Court ruled that:
>
> > "a. the handover of capacity was subject to the 'condition precedent' of 'negotiation and execution of four additional agreements, most importantly, the IRU';
> >
> > "b. 'the parties negotiated various open terms on and off for almost three years' but 'the IRU was never executed,' *through no fault of [the defendants]*; and thus
> >
> > "c. '[The defendants'] obligation to furnish capacity never became enforceable.' (Emphasis added).

proposition. The defendants' obligations in this case did not have an expiration date, nor, as the defendants urge, did one arise through the mere passage of time.

Moreover, this Court's decision, which the Court of Appeals affirmed, clarifies that the parties were obligated to continue to negotiate until either side insisted that the open terms be as set forth in the defendants' standard agreements. 54 A.D.3d at 275, 863 N.Y.S.2d at 33. Since there was no evidence that either party insisted on this provision, the parties remained obligated to continue negotiations subsequent to the Court of Appeals decision.

Hence, accepting the allegations in the complaint as true, and according the plaintiffs the benefit of every possible favorable inference, as we must on a motion to dismiss, (Leon v. Martinez, 84 N.Y.2d 83, 638 N.E.2d 511, 614 N.Y.S.2d 972 (1994), the plaintiffs here state a cause of action for breach of the agreement and breach of the duty to negotiate in good faith.

In this case, the plaintiffs allege that the defendants breached the agreement by frustrating the occurrence of the condition precedent in disavowing their obligation to negotiate. Specifically, the plaintiffs allege that on December 8, 2009, the defendants replied to the plaintiffs' communication and stated that, in light of the decisions of the Appellate Division and

Court of Appeals, they no longer had any obligations under the settlement agreement.

The plaintiffs further allege that the defendants continued to disavow their obligations, while nevertheless appearing to consider the plaintiffs' proposals for the IRU, and while making their own proposals throughout 2009 and 2010.

Hence, even though the parties apparently continued to negotiate, the defendants' statements that they had no further obligations to negotiate would constitute "a definite and final communication of an intent to forgo [the defendants'] obligations," which as we previously held, is an anticipatory breach of the contract. 54 A.D.3d at 276, 863 N.Y.S.2d at 33 (internal quotation marks omitted). Moreover, it is well settled that "[w]here there has been an anticipatory breach of a contract by one party, the other party may treat the entire contract as broken and may sue immediately for the breach." Rachmani Corp. v. 9 E. 96th St. Apt. Corp., 211 A.D.2d 262, 266, 629 N.Y.S.2d 382, 384 (1st Dept. 1995)(internal quotation marks omitted); see e.g. Cole v. Macklowe, 64 A.D.3d 480, 882 N.Y.S.2d 417 (1st Dept. 2009)(defendant breached the parties' contract when he indicated to plaintiff that he did not consider the agreement binding).

The plaintiffs' allegations also support a cause of action for the breach of the defendants' duty to negotiate in good

faith. It is well established that a covenant of good faith and fair dealing is implied in all contracts. Dalton v. Educational Testing Serv., 87 N.Y.2d 384, 389, 639 N.Y.S.2d 977, 979, 663 N.E.2d 289, 291 (1995). This includes the promise that "'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" Id., quoting Kirke La Shelle Co. v Armstrong Co., 263 N.Y. 79, 87, 188 N.E. 163, 167 (1933). The obligation to negotiate in good faith bars a party from insisting on conditions that are materially at odds with an already established preliminary agreement. Credit Suisse First Boston v Utrecht-America Fin. Co., 80 A.D.3d 485, 915 N.Y.S.2d 531 (1st Dept. 2011).

Here, the plaintiffs allege that on May 18, 2010, they provided a proposed "IRU Agreement," which the defendants rejected "without any justification." Instead, the defendants sent back the IRU with proposed changes that allegedly resulted in 10 "significant provisions" that were inconsistent with the terms of the settlement agreement. The plaintiffs allege that, despite several attempts to point out these inconsistencies, the defendants refused to entertain any other versions of the proposed IRU.

Furthermore, although neither the complaint nor the record

are specific as to the 10 inconsistencies in the IRU proposed by the defendants in 2010, we must accept the plaintiffs' allegation that they are "significant." Since it is conceivable that the defendants could have proposed terms in 2010 that are so unreasonably inconsistent with the settlement agreement that they rise to the level of bad faith, it would be premature to dismiss this part of the complaint at the pleading stage.

Finally, contrary to the defendants' argument, the plaintiffs' claims of breach of the duty to negotiate in good faith and breach of contract are not barred by res judicata or collateral estoppel. The doctrine of res judicata bars any claim "arising out of the same transaction or series of transactions even if based upon different theories or if seeking a different remedy." O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357, 445 N.Y.s.2d 687, 688, 429 N.E.2d 1158, 1159 (1981). Collateral estoppel "precludes a party from relitigating ... an issue clearly raised in a prior action or proceeding and decided against that party" and that party had a "full and fair opportunity" to litigate the issue. Parker v. Blauvelt Volunteer Fire Co., 93 N.Y.2d 343, 349, 712 N.E.2d 647, 651, 690 N.Y.S.2d 478, 482 (1999)(internal quotation marks omitted).

As discussed above, the plaintiffs' current claims arise from the alleged actions and omissions of the defendants *after*

the Court of Appeals decision. Thus, the conduct complained of now could not have been the basis for the breach of contract action previously dismissed by this Court and the Court of Appeals. Because this claim does not arise out of the same transactions or series of transactions previously litigated, this action is not barred by res judicata. Similarly, this action is not barred by collateral estoppel because the issues raised here were not raised or decided in the prior litigation. The defendants' assertions to the contrary, the defendants never argued in opposition to the previous breach of contract action that they had discharged their obligation to negotiate with the plaintiffs, nor did any court address that issue.

It should also be noted that the Court of Appeals did not previously determine the issue of whether the defendants' proposals were a breach of the duty to negotiate in good faith; it did not consider the substance or merit of the proposals; it simply held that the making of proposals was not a breach of the settlement agreement.

We have considered the defendants' remaining arguments and find them unpersuasive.

Accordingly, the order of the Supreme Court, New York County (Melvin L. Schweitzer, J.), entered June 20, 2011, which granted the motion of defendants Tyco Group, S.A.R.L., Tycom (US), Inc.,

Tyco International, LTD., Tyco International (US) Inc., and Tycom Ltd. to dismiss the complaint pursuant to CPLR 3211(a)(7), should be reversed, on the law, with costs, and the motion denied.

All concur except Friedman and Freedman, JJ.
who concur in an Opinion by Friedman, J.

FRIEDMAN, J. (concurring)

I concur in reversing the order appealed from, and in denying the motion to dismiss the complaint, on the following grounds. In granting summary judgment dismissing the complaint in the previous action (*see IDT Corp. v Tyco Group, S.A.R.L.*, 13 NY3d 209 [2009], *affg* 54 AD3d 273 [2008]), neither the Court of Appeals nor this Court held that the obligations of defendants (collectively, Tyco) under the parties' 2000 settlement agreement had been discharged. Rather, the basis for the dismissal of the earlier action was that the post-discovery record on which those appeals were decided established that, during the period reflected in the record, Tyco had merely proposed terms inconsistent with the settlement and had not definitively repudiated its obligation to abide by the terms of the settlement agreement, if insisted upon by plaintiffs (collectively, IDT) (*see* 13 NY3d at 214-215; 54 AD3d at 275-276). In the present action - which is still at the pleading stage, Tyco having moved to dismiss the new complaint under CPLR 3211(a)(1), (5) and (7)- IDT specifically alleges that, in October 2010 (after the earlier action had been dismissed), Tyco went beyond merely proposing terms inconsistent with the settlement agreement and

> "insist[ed] on terms that conflicted with the Settlement Agreement and made a definite and final communication to IDT of Tyco's intent

> to forgo its obligations under the Settlement Agreement, including its obligation to provide to IDT the use of the Wavelengths described in the Settlement Agreement for fifteen years and in a manner fully consistent with that described in the Settlement Agreement."

Given our obligation, at this pre-discovery stage of the proceeding, to assume the truth of the allegations of the complaint and to draw all reasonable inferences in favor of the pleader, the above-quoted allegation of paragraph 50 of the present complaint suffices to sustain the causes of action asserted therein for breach of the settlement agreement and breach of the obligation to negotiate in good faith. Again, it has never been adjudicated that Tyco's obligations under the settlement agreement have been discharged. Further, the conduct described in paragraph 50 of the present complaint allegedly occurred after the dismissal of the previous action, and neither of the appellate decisions dismissing the previous complaint held

that conduct of that kind, if proven, would not constitute a breach of Tyco's obligations. Accordingly, the dismissal of the previous action does not bar the present action as either res judicata or collateral estoppel.

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

ENTERED: DECEMBER 27, 2012

CLERK

Tom, J.P., Mazzarelli, Saxe, Catterson, DeGrasse, JJ.

8136 Yahaira Hernandez, et al., Index 104989/07
Plaintiffs-Appellants,

-against-

Dr. Arden Kaisman,
Defendant-Respondent.

Fred Lichtmacher, New York, for appellants.

Alan G. Serrins, New York, for respondent.

Order, Supreme Court, New York County (Debra A. James, J.), entered April 19, 2011, modified, on the law, to reinstate plaintiffs' claim for sexual discrimination brought under the City law, and otherwise affirmed, without costs.

Opinion by Mazzarelli, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Angela M. Mazzarelli
David B. Saxe
James M. Catterson
Leland G. DeGrasse, JJ.

8136
Index 104989/07

______________________________________x

Yahaira Hernandez, et al.,
Plaintiffs-Appellants,

-against-

Dr. Arden Kaisman,
Defendant-Respondent.

______________________________________x

Plaintiffs appeal from the order of the Supreme Court, New York County (Debra A. James, J.), entered April 19, 2011, which granted defendant's motion for summary judgment dismissing the cause of action alleging violations of the New York State and City Human Rights Laws.

Fred Lichtmacher, New York, for appellants.

Alan G. Serrins, New York, for respondent.

MAZZARELLI, J.P.

Plaintiffs, all women, worked for defendant and another doctor, in their medical office. Plaintiff Hernandez was employed in defendant's office from January 2006 through December 2006, as a medical clerk, and then as an assistant office manager. Plaintiff Herarte was employed by defendant as a medical clerk for over three years. Plaintiff Stern began working in the office as a physician's assistant in June 2003.

Plaintiffs allege that, in violation of the New York State Human Rights Law (Executive Law § 296) (State HRL) and New York City Human Rights Law (Administrative Code of the City of New York § 8-107) (City HRL), defendant created a sexually hostile work environment in the office. Most of the incidents of which they complain occurred in the latter half of 2006, at which time plaintiffs left defendant's employ. The focus of plaintiffs' complaint is on a series of emails sent by defendant in October and November 2006 containing what plaintiffs describe as offensive and obscene material.

The first of these emails was sent to all three plaintiffs as well as other male and female employees. The body of the email read, "This is hysterical. Do not listen if u are potentially offended," and attached an audio clip of a lecture given by a "professor" on the many uses of the word "Fuck,"

including its sexual connotation.

The second email was sent to all three plaintiffs as well as other male and female employees, and was titled "How to choose your holiday turkey." It attached a video of volunteers on a hidden camera style show who had been blindfolded and asked to feel what they thought were Butterball turkeys. The camera ultimately revealed that the subjects were actually feeling the naked buttocks of a man.

The third email contained a moving image of a snow sculpture in the shape of a penis "ejaculating" snow balls. The body of the email read "You know how every winter we have everybody send the snowball email thing out to everybody. Well this is paybacks for all that crap they have sent out to me. PS Don't send it back to me!!!!" The email also instructed that "you have been hit with a snow ball" and urged the viewer to send the email on to others.

The fourth email was sent to plaintiffs Hernandez and Herarte, as well as other male and female employees, and was titled "Birthday Vibrator." The email attached a scene from the R-rated 2001 movie "Not Another Teen Movie," in which a girl attempts to masturbate with a large vibrator under her bed covers on her birthday and her family enters her room with a birthday cake. The scene ends with the vibrator landing in the cake and

splattering cake on everyone.

The fifth email was sent to plaintiff Hernandez as well as other male and female employees and was titled "The Perfect Woman." It attached an image of a headless female body with two pairs of legs.

In addition to the emails, plaintiffs further alleged that defendant told Hernandez that she should get breast implants and offered to take her to a doctor who could perform the procedure; that defendant pointed out to Hernandez on one occasion that her underwear was exposed but told her that she should not have adjusted her pants because he had been "enjoying" himself; that defendant placed whipped cream on the side of his mouth and asked Hernandez if "this looked familiar"; that defendant referred to himself as "pimp Kaisman"; that defendant repeatedly told Herarte that she needed to lose weight; that defendant once touched Herarte's rear end and told her she needed to "tighten it up"; that defendant attempted to get Herarte to socialize with his male friends despite her refusal; that Stern found condoms placed by defendant in a drawer that was accessible to all employees; that all the plaintiffs were aware that defendant took females, including other female employees, into rooms for extended periods of time; that defendant often spoke in public about his affinity for women with large breasts; that defendant frequently walked

around the office in only long johns and a tee shirt; and that defendant showed Hernandez and Herarte a pen holder which was a model of a person and in which the pen would be inserted into its "rectum."

Defendant moved for summary judgment dismissing plaintiffs' claims under the State HRL and City HRL. He argued that plaintiffs' claims for hostile work environment under the State HRL should be dismissed because the evidence failed to satisfy the "severe and pervasive" standard required for a claim, and because no reasonable jury could find that plaintiffs perceived the environment to be hostile or abusive on account of their gender. He also asserted that the evidence showed that none of plaintiffs' employment was altered as a result of any alleged harassment and that plaintiffs could not demonstrate that they were treated differently from male employees or that the alleged conduct occurred because of their sex. Acknowledging the relaxed standard under the City HRL, defendant asserted that the evidence was nevertheless inadequate to prove a violation of the statute.

In opposition, plaintiffs argued that defendant committed numerous perverted actions between September 2006 and December 2006 which were directed at women and derogatory in nature, thereby creating a hostile work environment. They further claimed that defendant's acts were clearly gender based and were

subjectively intolerable to plaintiffs. They added that the totality of the circumstances demonstrated that the conduct alleged was so pervasive as to create an objectively hostile work environment. Plaintiffs separately contended that the court was required to resolve all issues of fact in their favor and that defendant's actions interfered with their ability to perform their jobs and forced them to leave the office.

The court granted defendant's motion, finding that the evidence did not support plaintiffs' hostile environment claim under the State HRL since much of the complained-of conduct was directed at both the men and the women in the office and could be perceived as offensive to people of either sex. It further found that the conduct directed specifically at the plaintiffs due to their gender was too sporadic to rise to an actionable level.

The motion court observed that plaintiffs did not miss work due to defendant's behavior and that their salaries were not impacted. The court concluded that, even considering the totality of the circumstances in a light most favorable to plaintiffs, a reasonable person could not find that plaintiffs were subjected to a hostile work environment because they had only been exposed to "mere offensive utterance[s]" on several occasions, as opposed to pervasive, ongoing harassment. In that regard, the court remarked that while Herarte and Stern worked

for defendant for over three years, the emails were sent over a one-month time period and defendant's other behavior was sporadic.

As for the comments defendant made to Hernandez about her breasts and her buttocks, the court found that they were not so extraordinarily severe as to sustain a claim. The court also found that much of what plaintiffs stated about defendant's alleged sexual behavior with other employees and visitors was second or third-hand and did not amount to a change in the terms of plaintiffs' employment.

While acknowledging the broader reach of the City HRL, the court held that plaintiffs nevertheless failed to rebut defendant's prima facie showing that they were treated no worse than the male employees in the office. Indeed, the court noted, much of defendant's behavior could be considered equally offensive and inappropriate to male and female employees. The court separately found that the clear gender-based conduct could be reasonably found to be no more than "petty slights and trivial inconveniences."

The United States Supreme Court, in cases brought under Title VII, has held that a hostile work environment exists "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or

pervasive to alter the conditions of the victim's employment and create an abusive working environment" (*Harris v Forklift Sys.* 510 US 17, 21 [1993] [citations and internal quotation marks omitted]).

> "Whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required" (*id.* at 23).

In addition, "the conduct must both have altered the conditions of the victim's employment by being subjectively perceived as abusive by the plaintiff, and have created an objectively hostile or abusive environment--one that a reasonable person would find to be so" (*id.* at 21).

Of course, there can be no claim for sexual discrimination, including that based on a hostile work environment, unless the plaintiff was treated differently *because of* her sex (*see Oncale v Sundowner Offshore Servs.*, 523 US 75, 80 [1998]).

> "The mere fact that men and women are both exposed to the same offensive circumstances

> on the job site, however, does not mean that, as a matter of law, their work conditions are equally harsh. The objective hostility of a work environment depends on the totality of the circumstances. Further, the perspective from which the evidence must be assessed is that of a reasonable person in the plaintiff's position, considering all the circumstances including the social context in which particular behavior occurs and is experienced by its target"

(*Petrosino v Bell Atlantic,* 385 F3d 210, 221 [2d Cir 2004]).

Here, defendant argues that plaintiffs were not treated differently based on their sex because both women and men were exposed to the emails distributed by him. This, however, ignores the "social context" in which the emails were distributed. That context involved several incidents in which defendant clearly objectified women. These included touching Herarte's backside and suggesting she "tighten" it up, telling Hernandez she should get a breast enlargement and that he "enjoyed" looking at her exposed underwear, and generally commenting that he liked large-breasted women. Considering the totality of the circumstances, a jury could reasonably determine that the emails were sent in an effort to specifically provoke a reaction from the women in the office, and that they were therefore singled out from the male employees.

This does not mean that plaintiffs have submitted sufficient evidence to establish an issue of fact whether they were

subjected to a hostile workplace environment. We accept as true plaintiffs' deposition testimony that, subjectively, they viewed defendant's behavior as offensive and that it made coming to work extremely stressful and upsetting. We must determine, however, whether a reasonable person would have objectively considered the environment to have been sexually hostile.

Until recently, New York State courts routinely analyzed this element of the hostile workplace environment claims in the same manner, whether brought under the State HRL or the City HRL (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 330 n 3 [2004]). Courts subjected both types of claims to the "severe and pervasive" standard. Under this standard, courts were required to dismiss hostile work environment claims brought under the State and City Human Rights Laws where the environment was not objectively hostile because the behavior complained of amounted to no more than "mild" or "isolated" incidents that could not be said to permeate the workplace (*id.* at 311 [finding that racial epithets did not "pervade" the workplace, having allegedly occurred on three occasions over nine years]; *Alfano v Costello*, 294 F3d 365 [2d Cir 2002] [reversing verdict in favor of plaintiff based on five incidents when she was told she ate carrots and other food "seductively," carrots were placed in her presence arranged to mimic male genitalia, and a vulgar cartoon

was left in plaintiff's mailbox]; *Brennan v Metropolitan Opera Assn,* 192 F3d 310 [2d Cir 1999] [one episode of "lewd banter" over the course of three years]). At the same time, courts would uphold sexual discrimination claims brought under both statutes where women were subjected to sexual ridicule "day after day over the course of several years without supervisory intervention" (*Petrosino,* 385 F3d at 222; *see Raniola v Bratton*, 243 F3d 610, 621 [2d Cir 2001] [finding triable issue of fact where plaintiff was allegedly subjected to offensive sex-based remarks, workplace sabotage, disproportionately burdensome work assignments, and one serious public threat of physical harm over 30 months]).

The "severe and pervasive" standard was intended to forge "a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury (*Harris*, 510 US at 21). However, in *Williams v New York City Hous. Auth.* (61 AD3d 62 [1st Dept 2009]), this Court concluded that the standard no longer applied to the New York City HRL. That was because the City HRL had been amended by the Local Civil Rights Restoration Act of 2005, which expressly mandated that the City HRL be "construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions

comparably-worded to provisions of this title, have been so construed" (Local Law No. 85 [2005] of City of New York § 7). Bearing this principle in mind, this Court held in *Williams* that, for purposes of hostile workplace environment claims brought under the City HRL, "questions of 'severity' and 'pervasiveness' are applicable to consideration of the scope of permissible damages, but not to the question of underlying liability" (61 AD3d at 76). On the other hand, however, *Williams* recognized that the City HRL is not a "general civility code," such that an employer can be held liable for "petty slights and trivial inconveniences (*id.* at 79-80). At bottom, *Williams* held, "[f]or [City] HRL liability . . . the primary issue for a trier of fact in harassment cases, as in other terms and conditions cases, is whether the plaintiff has been treated less well than other employees because of her gender. At the summary judgment stage, judgment should normally be denied to a defendant if there exist triable issues of fact as to whether such conduct occurred" (*id.* at 78).

Because of *Williams*, we are required to analyze plaintiffs' State and City HRL claims separately. Subjecting the State claim to the "severe and pervasive" standard, plaintiffs fall short. There is no question that the emails that defendant circulated in the office were inappropriate. However, their distribution by

defendant is closer to what would be described as "boorish" behavior than the "severe" types of incidents which have been found to create a hostile workplace environment (*see e.g. Patane v Clark*, 508 F3d 106 [2d Cir 2007] [plaintiff stated claim for hostile workplace discrimination by alleging she was regularly required to handle pornographic videotapes while opening supervisor's mail and supervisor once viewed hard core pornographic websites on her workplace computer]). The only email that contained what could arguably be described as pornographic material was the video excerpt entitled "Birthday Vibrator" and it does not appear that the clip was explicit. The other offensive incidents, including defendant's touching Herarte's rear end and suggesting she "tighten" it up, telling Hernandez she should get a breast enlargement and that he "enjoyed" looking at her exposed underwear, and generally commenting that he liked large-breasted women, are too sporadic to be considered "pervasive."

While we find that the complained-of incidents do not rise to the level of "severe and pervasive" for purposes of a claim pursuant to the State HRL, this does not dispose of the question whether plaintiffs' City HRL claim is still viable. Indeed, we can only dismiss the latter claim if we determine that this is a "truly insubstantial case" in which defendant's behavior cannot

be said to fall within the "broad range of conduct that falls between 'severe and pervasive' on the one hand and a 'petty slight or trivial inconvenience' on the other" (*Williams*, 61 AD3d at 80). Considering the totality of the circumstances, this is not a "truly insubstantial case." Viewed independently, defendant's dissemination of emails containing mildly offensive sexual media content may not have been enough to rise to the level of a hostile environment under the City HRL. However, the overall context in which the emails were sent cannot be ignored. The record supports plaintiffs' claim that defendant took a perverse pleasure in demeaning and embarrassing his female employees. This was obvious from his statements, related by plaintiffs, concerning, in the case of Hernandez, the size of her breasts, and in the case of Herarte, the size of her backside. While such statements may have been isolated, that is irrelevant under the City HRL, since "[o]ne can easily imagine a single comment that objectifies women being made in circumstances where that comment would, for example, signal views about the role of women in the workplace and be actionable" (*Williams*, 61 AD3d at 84, n 30). Here, the comments and emails objectifying women's bodies and exposing them to sexual ridicule, even if considered "isolated," clearly signaled that defendant considered it appropriate to foster an office environment that degraded women.

As this Court recognized in *Williams*, "the text and legislative history [of the Restoration Act] represent a desire that the City HRL 'meld the broadest vision of social justice with the strongest law enforcement deterrent.' Whether or not that desire is wise as a matter of legislative policy, our judicial function is to give force to legislative decisions" (*id.* at 68-69). Because, at the very least, defendant's conduct can be characterized as having subjected plaintiffs to "differential treatment," the broad remedial purposes of the City HRL would be countermanded by dismissal of the claim.

Accordingly, the order of the Supreme Court, New York County (Debra A. James, J.), entered April 19, 2011, which granted defendant's motion for summary judgment dismissing the cause of action alleging violations of the New York State and City human rights laws, should be modified, on the law, to reinstate plaintiffs' claim for sexual discrimination brought under the City law, and otherwise affirmed, without costs.

All concur.

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

ENTERED: DECEMBER 27, 2012

CLERK