SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 7, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Catterson, Richter, Román, JJ.

6073 Zalman Silber, Index 106312/10
Plaintiff-Appellant,

-against-

New York Life Insurance Company,
Defendant-Respondent.

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Bernbach Law Firm PLLC, White Plains (Jeffrey M. Bernbach of counsel), for appellant.

Morgan, Lewis & Bockius LLP, New York (Michael L. Banks of the bar of the State of Pennsylvania, admitted pro hac vice, of counsel), for respondent.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about April 18, 2011, which, inter alia, upon a search of the record, granted defendant summary judgment dismissing the complaint, unanimously affirmed, with costs.

The determination of this appeal requires the Court to invoke the most basic tenets of contract law. Plaintiff worked as a life insurance agent for defendant from 1987 until his agency contract was terminated on July 16, 2008. By summons and verified complaint dated May 12, 2010, plaintiff commenced this

breach of contract action. Plaintiff claims that defendant's termination of plaintiff and refusal to reinstate him or credit him with service time towards his retirement benefit violated an oral agreement between the parties, which caused plaintiff approximately $3,000,000 in damages.

Prior to discovery, plaintiff moved for summary judgment as to liability, arguing that the parties had entered into an oral agreement "that [p]laintiff would resign from [d]efendant pending the sale of his interest in a life settlement company . . . following which he was to be reinstated." Plaintiff asserted that the agreement was then memorialized in a letter from defendant to plaintiff. Plaintiff also argued that defendant should be equitably estopped from denying that it agreed to reinstate plaintiff if he divested himself of his outside interests.

In opposition to the motion, defendant submitted an affidavit attesting to the following: In November 2007, defendant learned that plaintiff had an ownership interest in a life settlement company, which purchased blocks of life insurance policies previously viaticated by their owners and then sold them to other financial institutions, including several prominent

hedge funds.[1]

Defendant asserts that it prohibits its agents from participating in such business because the industry is underregulated, with significant potential for fraud and abuse. Defendant further asserts that plaintiff never disclosed his interest in this business to defendant nor secured approval as required by defendant's company rules. In a March 2008 meeting, plaintiff was advised that he would be required to divest himself of his interest in the business. Defendant states that despite subsequent efforts to discuss the outstanding issue of his life settlement business, plaintiff failed to respond.

In support of his motion, plaintiff submitted, among other documents, correspondence between himself and defendant. In a letter to plaintiff, dated May 29, 2008, defendant's senior vice president (Senior VP) stated, in pertinent part:

"As we discussed, you agreed that you would resign

[1] A life settlement or viatical insurance company purchases life insurance policies from policy owners before the policies mature. A policy typically sells at a price discounted from the face amount of the policy but in excess of the premiums paid or cash surrender value. This allows a terminally ill or elderly policy holder access to the insurance money before his or her death. The word viatical comes from viaticum, the Latin word meaning "provisions for a journey," and in the Catholic faith refers to the communion given to a person near death as part of the Last Rites.

> as an agent of New York Life and that once your [life settlement] business was sold you would apply for reinstatement of your contract. I agreed that we would review your application for reinstatement at that time, and so long as all of your other outside business activities were acceptable to the Company, and there were no intervening compliance issues, we would reinstate your contract.
>
> . . .
>
> "If you are in agreement with the terms set forth in this letter, please sign below and return a copy of this letter to me."

It is undisputed that plaintiff did not sign and return the letter or resign. In a June 12 letter, the Senior VP stated that he had not received a response to the May 29 letter, and that he had unsuccessfully attempted to reach plaintiff by telephone. The Senior VP wrote that he was suspending plaintiff, and, unless he heard from him by June 16, he would terminate his agency contract. He also stated that the letter served as plaintiff's 30 days notice. The delivery receipt in the record indicates, and plaintiff does not dispute, that the letter was delivered to plaintiff's home the following day.

On June 13, plaintiff was arrested on felony criminal

charges of impersonating a doctor and performing gynecological examinations on young women.[2] Plaintiff responded to the Senior VP by letter dated June 16, 2008, explaining that he had been "tied up" and unable to respond sooner. Plaintiff's letter suggested that they address issues such as whether defendant would agree to certain underwriting concessions, the need to review plaintiff's other insurance products, credit of his service time upon reinstatement, and the sale of his life settlement business.

In a June 17, 2008 letter, before he received plaintiff's June 16 letter, the Senior VP again wrote to plaintiff to confirm that he was suspended as of June 16, and that his contract was being terminated effective July 16, 2008. Plaintiff responded by letter on June 20, 2008, claiming that he did not receive the June 12 letter and that their "correspondences must have crossed in the mail."

In a June 26, 2008 letter, the Senior VP terminated plaintiff and advised him that the allegations of plaintiff's recent arrest "raise serious compliance issues" and preclude his reinstatement. On July 18, defendant notified the New York

[2] The charges were dismissed the following year in October 2009.

Insurance Department that it had terminated plaintiff effective July 16, 2008 because of his "participat[ion] in life settlements in violation of Company policy" and his "arrest[] for impersonating a doctor."

Plaintiff alleges that after dismissal of the criminal charges a year later, his license to sell insurance was renewed by the New York Insurance Department, and in 2010 he applied for reinstatement with defendant. Defendant denied his application on March 10, 2010, without providing a reason.

The motion court denied plaintiff's summary judgment motion, granted summary judgement in favor of defendant, and dismissed the complaint pursuant to CPLR 3212(b). The motion court found that plaintiff's documentary evidence demonstrated that there was no contract, oral or otherwise, between the parties regarding plaintiff's reinstatement.

For the reasons set forth below, we agree with the motion court that there was no "meeting of the minds" constituting the formation of a contract between the parties. It is axiomatic that a party seeking to recover under a breach of contract theory must prove that a binding agreement was made as to all essential terms (*Paz v Singer Co.*, 151 AD2d 234, 235 [1989]). Courts look to the basic elements of the offer and the acceptance to

determine whether there is an objective meeting of the minds sufficient to give rise to a binding and enforceable contract (*Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589 [1999]). An agreement must have sufficiently definite terms and the parties must express their assent to those terms (*id.*).

In this case, plaintiff claims that the parties entered into an oral agreement, which was then confirmed in the May 29 letter from defendant. This contention is directly refuted by plaintiff's June 16 letter, in which he attempts to negotiate terms related to his employment and reinstatement. Plaintiff's claim that there would be no point in "moving forward" without resolving one of these terms indicates that it is a material term. Thus, plaintiff's own correspondence clearly indicates that material terms had not been agreed upon. Plaintiff's failure to show that the parties agreed to definite terms is fatal to his claim of a prior oral agreement.

Thus, as defendant asserts, the May 29 letter was merely an offer that plaintiff did not accept, and indeed rejected. "'It is a fundamental principle of contract law that a valid acceptance must comply with the terms of the offer'" (*Lamanna v Wing Yuen Realty*, 283 AD2d 165, 166 [2001], *lv denied* 96 NY2d 719

[2001], *quoting Roer v Cross County Med. Ctr. Corp.*, 83 AD2d 861 [1981]). Where "the offer specifies the ... mode of acceptance, an acceptance ... in any other manner[ ] is wholly nugatory and ineffectual" (*Rochester Home Equity v Guenette*, 6 AD3d 1119, 1120 [2004] [internal quotation marks and citation omitted]). Furthermore, a purported acceptance that is "qualified with conditions" is a rejection of the offer (*Lamanna*, 283 AD2d at 166 [2001] [internal quotation marks omitted]; *see Homayouni v Banque Paribas*, 241 AD2d 375, 376 [1997] ["whenever a purported acceptance is even slightly at variance with the terms of an offer, the qualified response operates as a rejection and termination of ... the initially offered terms"]).

Defendant's May 29 letter specified the manner of acceptance by providing, "If you are in agreement with the terms set forth in this letter, please sign below and return a copy of this letter to me." Plaintiff concedes that he did not return a signed copy of the May 29 letter as required in order to accept defendant's offer. Nor did he indicate his acceptance by complying with any of the terms set forth in the letter. Plaintiff did not resign, and his June 16 letter indicates that he had not closed on the sale of his life settlement business.

Not only did plaintiff fail to accept defendant's offer, his

June 16 letter specifically rejected the May 29 offer. As discussed above, plaintiff's letter is an attempt to further negotiate the terms of his employment or reinstatement. The letter specifically conditions his agreement on the resolution of certain outstanding employment/reinstatement issues. As such, the June 16 letter was a rejection of defendant's May 29 offer.

Even were we to deem plaintiff's June 16 letter an acceptance, plaintiff received defendant's revocation of the May 29 offer prior to acceptance. Revocation is effective at the moment that the offeree receives it, so long as the offer has not yet been accepted (*see Morton's of Chicago/Great Neck v Crab House*, 297 AD2d 335, 337 [2002]; *Buchbinder Tunick & Co. v Manhattan Natl. Life Ins. Co.*, 219 AD2d 463, 466 [1995]). Here, the June 12 letter notifying plaintiff of his impending termination, which was sent to plaintiff by overnight mail and received on June 13, constituted a revocation of the offer.

Since plaintiff's promissory estoppel claim was not pleaded as a cause of action in the complaint, the motion court correctly

declined to address it (*see Moscato v City of New York* [*Parks Dept.*], 183 AD2d 599 [1992]). 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: FEBRUARY 7, 2012

CLERK

Gonzalez, P.J., Friedman, Moskowitz, Acosta, Richter, JJ.

6295 Clara Caldwell, et al., Index 123568/02
Plaintiffs-Appellants, 590817/05
590639/08

-against-

Two Columbus Avenue Condominium, et al.,
Defendants-Respondents.
- - - - -
[And Other Actions]

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Richard Paul Stone, New York, for appellants.

Litchfield Cavo, LLP, New York (Mark A. Everett of counsel), for Two Columbus Avenue Condominim, The Residential Board of Managers of Two Columbus Avenue and The Condominium Board of Managers of Two Columbus Avenue, respondents.

Newman Myers Kreines Gross Hart, P.C., New York (Charles Dewey Cole, Jr., of counsel), for Two Columbus Associates LLC, New York Urban Property Management Corporation., and Urban Associates, LLC, respondents.

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Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered October 22, 2010, which, insofar as appealed from as limited by the briefs, granted the motion of defendants Two Columbus Avenue Condominium, The Residential Board of Managers of Two Columbus Avenue and The Condominium Board of managers of Two Columbus Avenue (the Condominium defendants) for summary judgment dismissing the first, third, and fourth causes of action (breach of contract, private nuisance, and negligence) as against them, granted the motion of defendants Urban Associates, LLC and New

York Urban Property Management Corporation for summary judgment dismissing the fourth cause of action (negligence) as against them, and granted the motion of defendant Two Columbus Associates, LLC (the Sponsor) for summary judgment dismissing the third and fifth causes of action (private nuisance and negligent misrepresentation) as against it, unanimously modified, on the law, to the extent of denying the Sponsor's motion for summary judgment with respect to the fifth cause of action (negligent misrepresentation) and reinstating that claim, and otherwise affirmed, without costs.

The Condominium defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the actions they took to remedy the water infiltration problems in plaintiffs' condominium unit were taken "in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes" (*Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537-538 [1990]).

Plaintiffs' private nuisance claim against the Sponsor was properly dismissed since plaintiffs failed to demonstrate that the Sponsor engaged in intentional and unreasonable conduct or that it engaged in abnormally dangerous activities (*see Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 569

[1977]). To the extent plaintiffs' nuisance claim is based solely on negligence, it is duplicative of the fourth cause of action. The motion court erred, however, in finding that the Sponsor was entitled to summary judgment on the cause of action for negligent misrepresentation. Plaintiffs established that the sales agent provided incorrect information when he asserted that the water infiltration problems would be resolved when the building was sealed, that they reasonably relied to their detriment on this information when they entered into the contract to purchase the unit, and that there is a question of fact as to whether a special relationship existed between them and the sales agent who they allege was an agent of the Sponsor (*see J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]; *Joseph v NRT Inc.*, 43 AD3d 312 [2007]).

Urban Associates, as managing agent acting on behalf of the condominium, is not liable to plaintiffs, third parties to the management agreement, for nonfeasance (*see Pelton v 77 Park Ave. Condominium*, 38 AD3d 1, 11-12 [2006]), and there is no evidence that the management agreement was so "comprehensive and exclusive" as to entirely displace the condominium board's duty to maintain the premises (*see Clark v Kaplan*, 47 AD3d 462 [2008], *lv denied* 11 NY3d 701 [2008]).

Finally, the court properly granted New York Urban's motion to dismiss the negligence claim against it since it ceased managing the building before plaintiffs closed on the contract of sale and thus, cannot be held liable for any alleged incidents that took place after it no longer managed the building.

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

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

ENTERED: FEBRUARY 7, 2012

CLERK

Tom, J.P., Andrias, Acosta, Freedman, Richter, JJ.

5959 The People of the State of New York, Ind. 6187/07
Respondent,

-against-

Alexander Lewis,
Defendant-Appellant.

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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 (Beth Fisch Cohen of counsel), for respondent.

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Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered October 30, 2008, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree and petit larceny, and sentencing him to an aggregate term of 1 to 3 years, unanimously affirmed.

Defendant was charged with criminal possession of a weapon in the third degree based on the elements of criminal possession of a weapon in the fourth degree, elevated to the present charged felony due to a prior conviction of attempted robbery in the second degree. His contention that the jury instructions failed to provide any definition of the phrase "dangerous instrument" is unpreserved (*see People v Dekle*, 56 NY2d 835, 837 [1982]), and we decline to review it in the interest of justice. As an

alternative holding, we reject it on the merits. The theory of the defense at trial was that defendant did not intend to use the knife unlawfully, not that it did not constitute a dangerous instrument. Indeed, counsel characterized the knife as a "weapon" during his summation. Thus, given the failure to contest the knife's status, the court's instruction did not cause defendant any prejudice (*People v Wright*, 270 AD2d 176 [2000], *lv denied* 94 NY2d 954 [2000]; *see also People v Baker*, 298 AD2d 104 [2002], *lv denied* 99 NY2d 533 [2002]).

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

ENTERED: FEBRUARY 7, 2012

CLERK

Tom, J.P., Moskowitz, Richter, Abdus-Salaam, Román, JJ.

6251-
6252 Morgan Stanley Capital Partners III, L.P., et al.,
Plaintiffs-Respondents-Appellants,

-against-

J.C. Flowers II L.P., et al.,
Defendants-Appellants-Respondents.

Index 600983/08

Sullivan & Cromwell LLP, New York (Marc De Leeuw of counsel), for appellants-respondents.

Davis Polk & Wardwell LLP, New York (Amelia T.R. Starr of counsel), for respondents-appellants.

Order and judgment (one paper), Supreme Court, New York County (Charles E. Ramos, J.), entered July 15, 2010, to the extent it denied defendants' motion for summary judgment dismissing the complaint and granted plaintiffs' cross motion for summary judgment on the issue of liability, declaring that defendants improperly terminated the parties' stock purchase agreement, unanimously reversed, on the law, with costs, the declaration vacated, plaintiffs' motion denied and defendants' granted, and the remainder of the appeal dismissed as academic. The Clerk is directed to enter judgment in defendants' favor dismissing the complaint.

The stock purchase agreement provides that any party may

terminate the agreement by written notice at any time before the closing if the closing "shall not have occurred on or prior to August 31, 2007 so long as . . . the failure of the Closing to have occurred by such time is not due solely to regulatory action or inaction beyond the control of any party hereto." The parties' failure to close by August 31, 2007 was not due solely to regulatory action or inaction beyond their control, but was a result of the strategic choices they made in pursuing the necessary regulatory approvals for the transaction, including negotiating with the Connecticut regulator and waiting until approval was granted in Connecticut before seeking approval in three other states. Thus, after August 31, 2007, any of the parties had the option to terminate the agreement before closing.

Defendants did not waive their right to terminate the agreement by continuing to seek regulatory approval for the transaction after August 31, 2007. The agreement provided that its provisions could be amended or waived only in writing and that no failure or delay by any party in exercising any right, power or privilege under the agreement would operate as a waiver. In addition, defendants expressly retained their right to terminate the agreement in a September 15, 2007 e-mail to plaintiffs stating that neither their request for financial

information from Direct Response Corporation nor their filing of an amended approval application with the Connecticut regulator constituted a waiver of any right under the agreement, including, specifically, any right arising under the termination provision.

In view of the foregoing, plaintiffs' cross appeal from the denial of statutory interest on certain damages is academic.

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

ENTERED: FEBRUARY 7, 2012

CLERK

Mazzarelli, J.P., Andrias, Saxe, Freedman, Román, JJ.

6537 Blank Rome, LLP, Index 601809/05
Plaintiff-Respondent, 590823/10

-against-

Karl L. Parrish,
Defendant-Respondent.

- - - - -

Blank Rome LLP,
Third-Party Plaintiff-Respondent,

-against-

Bouchard Margules & Friedlander, P.A.,
et al.,
Third-Party Defendants-Appellants.

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Kaufman Borgeest & Ryan LLP, New York (Jonathan B. Bruno of counsel), for appellants.

Hinshaw & Culbertson, LLP, New York (Elizabeth K. Devine of counsel), for Blank Rome, LLP, respondent.

Osborn Law, P.C., New York (Daniel A. Osborn of counsel), for Karl L. Parrish, respondent.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered on or about March 25, 2011, which, in an action to recover unpaid legal fees, denied the motion of third-party defendants Bouchard Margules & Friedlander, P.A. and David Margules (collectively BMF) to dismiss the third-party complaint for indemnification and contribution, and granted plaintiff/third-party plaintiff Blank Rome LLP leave to amend the

third-party complaint, unanimously modified, on the law, to dismiss Blank Rome, LLP's cause of action for indemnification and to allow amendment of the third-party complaint to the extent of asserting additional allegations in furtherance of its cause of action for contribution, and otherwise affirmed, without costs.

Insofar as the third-party and proposed amended third-party complaints allege that BMF represented defendant, agreed to represent him with respect to the issues giving rise to the legal malpractice alleged in defendant's counterclaims, and that BMF was negligent with respect to such representation, the motion court properly declined to dismiss Blank Rome's third-party claims for contribution since this cause of action was sufficiently pleaded (*see Schauer v Joyce*, 54 NY2d 1, 5 [1981] ["two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them"] [internal quotation marks omitted]). However, the motion court erred when it denied BMF's motion to the extent it sought to dismiss the third-party cause of action for indemnification. In order to recover on a claim for common law indemnification, "the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the

proposed indemnitor was guilty of some negligence that contributed to the causation of the accident for which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law" (*Correia v Professional Data Mgt., Inc.*, 259 AD2d 60, 65 [1999]). Here, insofar as neither the third-party nor proposed amended third-party complaint assert that Blank Rome, LLP's liability is solely statutory and not based upon its own negligence, they fail to state a cause of action for common law indemnification. Blank Rome also fails to state a cause of action for contractual indemnification since "[a] party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987] [internal quotation marks omitted]; *Masciotta v Morse Diesel Intl., Inc.*, 303 AD2d 309, 310 [2003]). Here, neither the third-party nor the proposed amended third-party complaint identifies any agreement, let alone alleges that BMF ever agreed to indemnify Blank Rome, LLP for any legal malpractice committed in the course of its representation of the defendant.

With respect to Blank Rome, LLP's cause of action for

contribution, since the allegations within the proposed amended third-party complaint have merit and there has been no showing of prejudice, the motion court providently exercised its discretion in granting leave to amend the third-party complaint (*see Board of Mgrs. of 60 Greene Condominium v Acacia SoHo, LLC*, 63 AD3d 516, 517 [2009]).

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

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

ENTERED: FEBRUARY 7, 2012

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Richter, Abdus-Salaam JJ.

6715 The People of the State of New York, Ind. 1161/09
Respondent,

-against-

Miguel Ramos,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (John B.F. Martin of counsel), for respondent.

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Judgment, Supreme Court, New York County (Patricia Nunez, J.), rendered February 25, 2010, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the fourth degree, and sentencing him, as a second felony drug offender, to a term of 5 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). The circumstances, viewed as a whole, supported the conclusion that defendant was a participant in a drug-selling operation being conducted out of a vacant apartment, and that he was a possessor of a large quantity of drugs contained in a knapsack in the apartment (*see People v Jones*, 72 AD3d 452, *lv denied* 15 NY3d 806 [2010]).

The People's summation did not deprive defendant of his right to a fair trial. Given the context, the prosecutor's reference to the dangers of undercover police work was not a "safe streets" argument (*see People v Brown*, 17 NY3d 742, 743 [2011]). Instead, this line of argument was a permissible rebuttal to defendant's argument that the police paperwork was inadequate (*see People v Chandler*, 265 AD2d 239 [1999], *lv denied* 94 NY2d 902 [2000]). The prosecutor's comment on the codefendant's absence at trial was improper, but this isolated error was not so prejudicial as to warrant a new trial, particularly since the court's jury charge included an admonition to draw no inference from the codefendant's absence. Defendant's remaining challenges to the prosecutor's summation are unpreserved (*see People v Romero*, 7 NY3d 911, 912 [2006]), and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998];

People v D'Alessandro, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 7, 2012

CLERK

Mazzarelli, Andrias, DeGrasse, Richter, Abdus-Salaam, JJ.

6716 Tariq A. Hassan, Index 112534/09
Plaintiff-Appellant,

-against-

Eric Wallach Esq, et al.,
Defendants-Respondents.

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Andrew Lavoott Bluestone, New York, for appellant.

Kasowitz, Benson, Torres & Friedman LLP, New York (Natasha Romagnoli of counsel), for Eric Wallach and Kasowitz, Benson, Torres & Friedman, LLP, respondents.

Furman Kornfeld & Brennan LLP, New York (R. Evan Idahosa of counsel), for John Singer and Singer Deutch LLP, respondents.

Kaufman Borgeest & Ryan LLP, New York (Kristopher M. Dennis of counsel), for Mark Susswein, Esq., and Liddle & Robinson, LLP, respondents.

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Order, Supreme Court, New York County (Judith A. Gische, J.), entered December 22, 2010, which denied plaintiff's motion to vacate an order granting, on default, defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff commenced the instant action alleging that defendants committed malpractice by failing to commence a Sarbanes-Oxley (SOX) whistleblower action against his former employer, prior to the expiration of the statute of limitations. Defendants, in lieu of an answer, moved to dismiss the complaint

under CPLR 3211(a)(1) and (7). Plaintiff sought an extension of time to oppose the motion, defendants agreed to the extension and a stipulation was prepared but apparently not filed with the court by plaintiff's counsel. The motion was marked fully submitted and was granted on plaintiff's default. Despite plaintiff's lack of opposition, however, the motion court thoroughly reviewed plaintiff's claims and the documentary evidence submitted by defendants.

Plaintiff moved to vacate the order and his motion was denied. On appeal, plaintiff argues that the motion court applied an improper standard, conducting an analysis under CPLR 5015(a) to determine whether plaintiff had a reasonable excuse for the default and a meritorious cause of action rather than excusing the default based on law office failure and proceeding to a de novo review of the motion to dismiss.

The motion court's analysis was proper. In any event, contrary to plaintiff's contention, the court engaged in a de novo review, afforded plaintiff every possible favorable inference, accepted his pleadings as true, and considered the affidavit plaintiff submitted in support of the motion in an effort to sustain his pleading (*Underpinning & Found. Constr., Inc. v Chase Manhattan Bank*, 46 NY2d 459, 462 [1979]; *Ackerman v*

Vertical Club Corp., 94 AD2d 665 [1983]).

Plaintiff's motion was properly denied because the underlying complaint was without merit. Plaintiff failed to show that "but for" his attorneys' negligence, he would not have been damaged (*Maillet v Campbell*, 280 AD2d 526, 527 [2001]). To initiate a SOX claim, a charge of retaliation must be filed with the United States Department of Labor within 90 days of the date the employee receives a definite notice of termination (former 18 USC § 1514A[b][2][d]). Plaintiff received notice of his termination on July 23, 2008 and thus, the statute of limitations expired on October 23, 2008.

As applied to defendant Kasowitz, Benson, Torres & Friedman, LLP and its member, defendant Eric Wallach, the record is clear that the firm ended its representation of plaintiff in early September 2008, prior to the expiration of the limitation period, shortly after it learned that plaintiff's employer had evidence supporting an absolute defense in that he was terminated due to his own discriminatory conduct. As to defendant Singer Deutch LLP and its member, John Singer, the record is clear that Singer never undertook representation of plaintiff, but merely referred him to defendant Liddle & Robinson LLP and its member, Marc Susswein. Plaintiff, however, did not retain Liddle until after

the 90-day limitation period had expired. Thus, his malpractice claim against each defendant was properly dismissed.

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: FEBRUARY 7, 2012

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Richter, Abdus-Salaam, JJ.

6718 In re Jabez F., and Another,

Dependent Children Under
18 Years of Age, etc.,

Martha L.,
Respondent-Appellant,

Bernard F.,
Respondent,

Commissioner of Administration for
Children's Service,
Petitioner-Respondent.

_____

Patricia W. Jellen, Eastchester, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for Administration for Children Services, respondent.

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

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Order of disposition, Family Court, New York County (Jody Adams, J.), entered on or about November 1, 2010, which, upon a finding of neglect, placed the subject children with the Commissioner of Social Services until the completion of the next permanency hearing, scheduled for April 8, 2011, unanimously affirmed, insofar as it brings up for review the fact-finding determination, and the appeal otherwise dismissed as moot, without costs.

Respondent mother's claim that the court, following a hearing pursuant to Family Court Act § 1028, erred in denying her application to have the children returned to her pending the neglect proceeding was rendered moot by the subsequent fact-finding determination of neglect (*see Matter of Charnel T.*, 49 AD3d 427 [2008]).

The Family Court's determination that neglect was proved by a preponderance of the evidence was amply supported by the record. The mother had, inter alia, a conviction of aggravated sexual abuse of her older children in another state, for which she served five years, a long history of drug abuse that extended, by her own admission, five months into her pregnancy with the younger of the subject children, and a history of serious mental illness (*see Matter of Justice T.*, 305 AD2d 1076 [2003], *lv denied* 100 NY2d 512 [2003]).

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

ENTERED: FEBRUARY 7, 2012

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Richter, Abdus-Salaam, JJ.

6721 In re Geneva Aiken, Index 105145/10
Petitioner-Appellant,

-against-

City of New York, et al.,
Respondents-Respondents.

_____

Glass Krakower LLP, New York (Bryan D. Glass of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Cynthia S. Kern, J.), entered August 2, 2010, which granted respondents' cross motion to confirm a post-hearing arbitration award finding that petitioner was guilty of three of the specifications charged, and that the Department of Education (DOE) had just cause for terminating her from her position as a tenured secretary, and to dismiss the petition brought pursuant to CPLR article 75 seeking to vacate said award, unanimously affirmed, without costs.

The evidence sufficiently supports the findings that petitioner, a secretary, whose duties included entering data into the DOE computers regarding hours worked by staff had entered hours in the system for herself in excess of the hours she was

permitted to work, without authorization; that she did not work the additional hours; and that following her reassignment, she improperly reentered the computer system and changed the fraudulent numbers. There exists no basis for disturbing the credibility determinations of the Hearing Officer (*see Lackow v Department of Educ. (or "Board") of City of N.Y.*, 51 AD3d 563, 568 [1987]).

Petitioner's denial of knowledge of the limit of hours she was permitted to work was refuted by the testimony of the school principal, petitioner's union representative and a letter of August 15, 2007, signed by petitioner. Such testimony and evidence supports the conclusion that petitioner admitted knowing what her proper hours were, as well as admitting that she had not worked the extra hours which she had given herself.

The conclusion that petitioner had not actually worked those hours was further supported by her inability to explain why she had allegedly used two different sets of timecards for the same days with the first set showing her proper working hours and the second set, which was photocopied and not turned over to DOE until the hearing, purporting to show that she worked the extra hours. The Hearing Officer reasonably concluded that petitioner had fabricated the photocopies of the second set of timecards,

particularly since no other documents, such as the original timecards or petitioner's own timesheets, supported the photocopies. Moreover, petitioner did not attempt to dispute that, after being terminated, she reentered the DOE computer and changed her number of hours worked to reflect her proper work hours, in an apparent attempt to cover up her wrongdoing.

The penalty of termination was in accord with due process and was justified by petitioner's actions, particularly where petitioner refused to accept any responsibility for her actions and asserted her innocence in the face of the overwhelming evidence to the contrary (*see Matter of Hegarty v Board of Educ. of City of N.Y.*, 5 AD3d 771 [2004]; *see also Matter of Chaplin v New York City Dept. of Educ.*, 48 AD3d 226 [2008]).

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

ENTERED: FEBRUARY 7, 2012

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Richter, Abdus-Salaam, JJ.

6722-
6723 Fundamental Long Term Care Holdings, LLC, et al.,
Plaintiffs-Appellants,

-against-

Cammeby's Funding LLC, et al.,
Defendants-Respondents.

– – – – –

Cammeby's Funding LLC, et al.,
Counterclaim-Plaintiffs-Respondents,

-against-

Fundamental Long Term Care Holdings, LLC, et al.,
Counterclaim-Defendants-Appellants.

Index 650332/11

Arent Fox LLP, New York (Allen G. Reiter of counsel), for Fundemental Long Term Care Holdings, LLC, appellant.

DLA Piper LLP (US), New York (Shand S. Stephens of counsel), for Leonard Grunstein and Murray Forman, appellants.

Dechert LLP, New York (Steven A. Engel of counsel), for respondents.

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered August 29, 2011, which granted defendants' motion for summary judgment and denied plaintiffs' cross motion for summary judgment, unanimously affirmed, with costs. Order, same court and Justice, entered October 6, 2011, which, inter alia, dismissed the complaint and directed the Clerk to enter judgment

declaring that plaintiff Fundamental Long Term Care Holdings, LLC (the LLC) must issue ownership of 1/3 of its equity units to defendant Cammeby's Funding LLC's designee without regard to the capital contribution requirement in the LLC operating agreement, unanimously affirmed, with costs.

Regardless of which document was executed first, the motion court correctly found unambiguous the parties' option agreement entitling defendant Cammeby's to acquire units of the LLC for $1,000 without the need for any capital contribution. We note that the integration clause in the option agreement bars parol evidence of the parties' intent and of any other agreements or understandings (*see Torres v D'Alesso*, 80 AD3d 46 [2010]). Under the circumstances, we reject plaintiffs' contention that defendants obtained an improper windfall.

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

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

ENTERED: FEBRUARY 7, 2012

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Richter, Abdus-Salaam, JJ.

6724 The People of the State of New York, Ind. 2764/03
Respondent,

-against-

Jorge Adoms,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Rebekah J. Pazmiño of counsel), for appellate.

Robert T. Johnson, District Attorney, Bronx (Noah J. Chamoy of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Robert A. Sackett, J.), rendered May 20, 2004, convicting defendant, after a jury trial, of rape in the first and second degrees, rape in the third degree (three counts), sexual abuse in the first degree, and endangering the welfare of a child, and sentencing him to an aggregate term of 15 years, unanimously affirmed.

The court properly exercised its discretion in permitting expert testimony relating to child sexual abuse syndrome (CSAS). The expert's testimony provided a possible explanation, beyond the knowledge of the average juror, for the victim's delay in reporting repeated instances of sexual abuse occurring over a long period of time (*see People v Carroll*, 95 NY2d 375, 387 [2000]; *People v Gilley*, 4 AD3d 127, 128 [2004], *lv denied* 2 NY3d

799 [2004]). Regardless of whether defendant expressly raised the issue of delayed disclosure, the jury may have been concerned that the delay impacted the victim's credibility. Furthermore, the expert did not improperly bolster the victim's testimony (*see People v Spicola*, 16 NY3d 441, 465-66 [2011], *cert denied* __US __, 132 S Ct 400 [2011]).

Defendant did not preserve his arguments that the victim's explanation of the reasons for her delayed disclosure obviated any need for expert testimony, or that CSAS is not a scientifically valid theory. As alternative holding, we reject those arguments.

Defendant expressly waived his present claim that the court should have instructed the jury on the use of expert testimony (*see People v Gonzalez*, 99 NY2d 76, 83 [2002]). As an alternative holding, we find that the absence of that instruction did not cause defendant any prejudice.

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

ENTERED: FEBRUARY 7, 2012

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Richter, Abdus-Salaam, JJ.

6725 Ambac Assurance Corporation, et al., Index 600070/10
M-5734 Plaintiffs-Appellants,

-against-

DLJ Mortgage Capital, Inc., et al.,
Defendants-Respondents.

_____

Patterson Belknap Webb & Tyler LLP, New York (Harry Sandick of counsel), for appellants.

Orrick, Herrington & Sutcliffe LLP, New York (John Ansbro of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 3, 2011, which granted defendants' motion seeking, inter alia, to compel the production of certain documents related to a third-party consultant's work, unanimously reversed, on the law, without costs, and the motion denied.

This action arises from the securitization of home equity lines of credit, which were aggregated into a "pool" by defendant DLJ Mortgage Capital, Inc., and then transferred to a trust that was formed to issue securities to investors. The securities would be paid down based on the cash flow from the pooled loans. Defendant Credit Suisse Securities USA LLC served as the underwriter for the public offering of these securities, and plaintiff Ambac Assurance Corporation, through plaintiff The

Segregated Account of AMBAC Assurance Corporation, issued an insurance policy guaranteeing payment of certain classes of the securities issued.

When the loans began to default at what plaintiffs considered to be a high rate, they retained a law firm, which retained RMG Global (RMG) to conduct a forensic re-underwriting review of the loans in the securitization. Following plaintiffs' commencement of this action based on RMG's findings, defendants served demands seeking any and all records surrounding RMG's review. Plaintiffs provided defendants with RMG's conclusions and the raw data RMG used in its analysis of the loans at issue. However, asserting the attorney work product and trial preparation privileges, plaintiffs objected to the remainder of defendants' demands, including any correspondence between RMG and the law firm plaintiffs retained, and documents concerning the methodology employed by RMG in its review.

Defendants moved to compel disclosure on the ground that plaintiffs had placed RMG's findings "at issue," and plaintiffs opposed, without providing evidence to establish the basis for their assertion of privilege. Defendants argued, in reply, that plaintiffs failed to meet their burden of establishing privilege in the first instance. The court granted defendants' motion,

both on the ground that plaintiffs failed to meet their burden of establishing privilege and on the ground that they waived privilege by placing the materials "at issue."

Although the party challenging disclosure bears the burden of establishing that the information sought is immune from disclosure (*see Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 376-377 [1991]), defendants here, as proponents of the motion, did not challenge the existence of a privilege until their reply. "[T]he function of a reply affidavit is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of the motion" (*Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 [1992]). Accordingly, the court erred in granting defendants' motion on burden grounds.

Furthermore, the "'[a]t issue' waiver of privilege occurs where a party affirmatively places the subject matter of its own privileged communication at issue in litigation, so that invasion of the privilege is required to determine the validity of a claim or defense of the party asserting the privilege, and application of the privilege would deprive the adversary of vital information" (*Deutsche Bank Trust Co. of Ams. v Tri-Links Inv. Trust*, 43 AD3d 56, 63 [2007]). However, the fact "that a

privileged communication contains information relevant to issues the parties are litigating does not, without more, place the contents of the privileged communication itself 'at issue' in the lawsuit" (*id.* at 64; *see also Long Is. Light. Co. v Allianz Underwriters Ins. Co.*, 301 AD2d 23, 33 [2002]). Generally, no "at issue" waiver is found where the party asserting the privilege does not need the privileged documents to sustain its cause of action (*see Deutsche Bank* at 65).

Here, plaintiffs did not waive privilege by placing RMG's review of the loans "at issue." All references to the "third-party consultant" in their complaint could be stricken and it would still stand. Mention of a third-party consultant was not made as an element of the claim, but as a good-faith basis for the allegations made. Since plaintiffs do not "need the privileged documents to sustain [their] cause of action," they have not "waived the attorney-client privilege by injecting privileged materials into the lawsuit" (*Manufacturers & Traders Trust Co. v Servotronics, Inc.*, 132 AD2d 392, 397 [1987]). Nor did plaintiffs waive the privilege by making a selective non-disclosure (*see Carone v Venator Group*, 289 AD2d 185 [2001]).

M-5734- ***Ambac Assurance v DLJ Mortgage***

Motion seeking to have the Court take judicial notice of certain court records granted on consent.

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

ENTERED: FEBRUARY 7, 2012

CLERK

Mazzarelli J.P., Andrias, DeGrasse, Richter, Abdus-Salaam, JJ.

6726 In re Chi-Chuan Wang, etc., Index 2550/03
Deceased.

– – – – –

Yien-Koo Wang King,
Objectant-Appellant,

-against-

Shou-Kung Wang, et al.,
Proponent-Respondents,

Public Administrator of the
County of New York,
Petitioner-Respondent.

_____

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

Koss & Schonfeld LLP, New York (Simcha D. Schonfeld of counsel), for Shou-King Wang and Andrew Wang, respondents.

Schram & Graber, P.C., New York (Peter S. Schram of counsel), for Public Administrator of the County of New York, respondent.

_____

Order, Surrogate's Court, New York County (Kristen Booth Glen, S.), entered January 21, 2011, which, to the extent appealed from, stayed the trial of the probate proceeding pending the outcome of a related proceeding under Surrogate's Court Procedure Act (SCPA) § 2103, unanimously affirmed, without costs.

The court did not improvidently exercise its discretion in issuing the stay pursuant to CPLR 2201, since property of the

estate which the Public Administrator may uncover in the SCPA proceeding appears to be directly relevant to resolving, inter alia, the competing wills' provisions as to "eligibility to receive letters" (SCPA 707[1][e]). Moreover, given the current insolvency of the estate, without the benefit of increasing the estate's value through the SCPA 2103 proceeding, winning in the probate proceeding may be merely a pyrrhic victory.

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

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

ENTERED: FEBRUARY 7, 2012

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Richter, Abdus-Salaam, JJ.

6727 Murray Hill Mews Owners Corp., Index 570055/10
Petitioner-Appellant,

-against-

Rio Restaurant Associates L.P.,
Respondent-Respondent.

_____

Cozen O'Connor, New York (Menachem J. Kastner of counsel), for appellant.

Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Richard G. Leland of counsel), for respondent.

_____

Order of the Appellate Term of the Supreme Court, First Department, entered on or about December 7, 2010, which, to the extent appealed from as limited by the briefs, reversed an order of the Civil Court, New York County (Jeffrey K. Oing, J.), entered January 7, 2010, granting petitioner-landlord's motion for summary judgment in its favor and to dismiss respondent-tenant's first affirmative defense, denied the motion and reinstated the first affirmative defense, unanimously reversed, on the law, with costs, petitioner's motion granted, respondent's first affirmative defense dismissed, and the matter remanded to Civil Court for entry of judgment in petitioner's favor.

There is no ambiguity in the rent escalation clause of the parties' lease (*see Greenfield v Philles Records*, 98 NY2d 562,

569-570 [2002]). Pursuant to the plain terms of the clause, the fixed rental is a changing, not static, figure to be used in determining annual rent increases, including increases based on changes in the consumer price index. This interpretation of the clause best accords with the remainder of the lease (*see Rentways, Inc. v O'Neill Milk & Cream Co.*, 308 NY 342, 347 [1955]). Further, when viewing the parties' course of conduct — including respondent's consistent payment for over eight years, without protest, of rent increases based on a compounded fixed rent figure, and its renegotiation of the renewal lease on the same terms as the original lease — it is clear that petitioner's construction of the escalation clause comports with the parties' intent (*see CBS Inc. v P.A. Bldg. Co.*, 200 AD2d 527 [1994]). Respondent's affirmative defense that it was overcharged is undermined by its admitted receipt of at least some of the rent notices and its long-term acquiescence in petitioner's interpretation of the escalation clause (*see CBS, Inc.*, 200 AD2d at 527). Even if the result of this construction is economically harsh, where, as here, the lease is entered into at

arm's length between two sophisticated parties, the courts will not interfere (*George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 217-218 [1978]; *CBS Inc.*, 200 AD2d at 527).

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

ENTERED: FEBRUARY 7, 2012

CLERK

Mazzarelli J.P., Andrias, DeGrasse, Richter, Abdus-Salaam, JJ.

6728 The People of the State of New York, Ind. 5041/10
Respondent,

-against-

Frederick Giunta,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Jared Wolkowitz 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 (Bonnie G. Wittner, J.), rendered on or about March 9, 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: FEBRUARY 7, 2012

CLERK

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

Mazzarelli, J.P., Andrias, DeGrasse, Richter, Abdus-Salaam JJ.

6729 Kristian Clase, an Infant by Her Mother and Natural Guardian Ariselda Lopez,
Plaintiff-Appellant,

-against-

New York City Health and Hospitals Corporation (North Central Bronx Hospital), et al.,
Defendants-Respondents.

Index 21539/06

_____

Fitzgerald & Fitzgerald, P.C., Yonkers (Mitchell L. Gittin of counsel), for appellant.

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

_____

Judgment, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered May 6, 2010, dismissing the complaint, and bringing up for review an order, same court and Justice, entered January 25, 2010, which denied plaintiff's motion to deem the notice of claim timely filed nunc pro tunc, and granted defendants' cross motion to dismiss the complaint pursuant to General Municipal Law § 50-e, unanimously affirmed, without costs.

Supreme Court properly considered the relevant statutory factors (*see* General Municipal Law § 50-e [5]) and providently exercised its discretion in denying plaintiff's motion. Plaintiff's infancy did weigh in his favor (*see Lisandro v New*

York City Health and Hosps. Corp. [Metropolitan Hosp. Ctr.], 50 AD3d 304 [2008], *lv denied* 10 NY3d 715 [2008]), but denial was warranted under the totality of the factors.

Plaintiff's reliance upon the medical records to show that defendants "acquired actual knowledge of the essential facts constituting the claim within [90 days from when the claim accrued] or within a reasonable time thereafter" is unavailing (General Municipal Law § 50-e [5]). The records do not, on their face, give any indication of the infant's brain injuries nor malpractice on defendants' part causing the same (*see Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 537 [2006]; *Perez v New York City Health & Hosps. Corp.*, 81 AD3d 448 [2011]).

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: FEBRUARY 7, 2012

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Richter, Abdus-Salaam, JJ.

6731 The People of the State of New York, Ind. 6191/07
Respondent,

-against-

Ronald Brown,
Defendant-Appellant.

_____

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

Ronald Brown, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (John Cataldo, J. at suppression hearing; Thomas Farber, J. at jury trial and sentencing), rendered March 19, 2009, convicting defendant of criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to a term of seven years, unanimously affirmed.

The hearing court properly denied defendant's suppression motion in all respects. During a lawful traffic stop, an officer asked defendant if there was anything in the car the officer should know about, and, after an initial denial, defendant admitted he possessed marijuana. This statement was not subject to suppression for lack of *Miranda* warnings, because defendant

was not in custody for *Miranda* purposes (*see Berkemer v McCarty*, 468 US 420, 436-440 [1984]; *People v Bennett*, 70 NY2d 891 [1987]; *People v Feili*, 27 AD3d 318 [2006], *lv denied* 6 NY3d 894 [2006]). The stop was not unduly prolonged, and the officer's repetition of the question did not transform the inquiry into custodial interrogation.

Defendant did not preserve his argument concerning the possibility that he had been taken into custody under an outstanding bench warrant before he made the statement, and we decline to review it in the interest of justice. As an alternative holding, we find that the hearing evidence shows that defendant made the statement before the officer told him about the open warrant.

Defendant's claims of ineffective assistance of counsel, including those raised in his pro se brief, are not reviewable on direct appeal and would require a further record to be developed by way of a CPL 440.10 motion (*see People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). In particular, defendant asserts that his

counsel should have moved to reopen the suppression hearing based on trial testimony allegedly suggesting that the officer told defendant about the open warrant before defendant admitted possessing marijuana. However, the trial testimony in this regard was ambiguous at best. Regardless of whether counsel should have moved to reopen the hearing, defendant has not established that reopening would have led to suppression of the statement, or that even if counsel obtained suppression of the statement on *Miranda* grounds, he would have also obtained suppression of the pistol that was recovered as a result of the statement (*cf*. *United States v Patane*, 542 US 630 [2004]).

The verdict 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]). The circumstances, viewed in light of the statutory presumption of possession by all occupants of a vehicle (*see* Penal Law § 265.15[3]), support the inference that defendant knowingly possessed the pistol found in the car.

The trial court appropriately exercised its discretion in denying defendant's request for an adverse inference instruction concerning the People's failure to preserve taped police radio communications. There was no bad faith or lack of diligence on the part of the People, and defendant was not prejudiced in that

he was furnished with the Sprint report, which afforded him sufficient opportunity for impeachment (*see e.g. People v Marengo*, 276 AD2d 358, 359 [2000], *lv denied* 95 NY2d 936 [2000]). Defendant's claim that the actual recording would have had additional value is speculative. For the same reasons, we also reject defendant's argument that the hearing court should have drawn an adverse inference from the loss of the tapes.

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

ENTERED: FEBRUARY 7, 2012

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Richter, Abdus-Salaam, JJ.

6732 Estate of Stephen Haderski, etc., File 2929/04
Deceased.

– – – – –

In re Mazur Carp Rubin & Schulman, P.C., etc.,
Petitioner-Respondent,

-against-

Ruth A. Haderski, et al.,
Respondents-Appellants.

_____

Romeo J. Salta, New York, for appellants.

Mazur Carp & Rubin, P.C., New York (Frank L. Wagner of counsel), for respondent.

_____

Amended decree, Surrogate's Court, New York County (Kristin Booth Glen, S.), entered on or about September 16, 2010, after a bench trial, awarding petitioner compensation for legal services performed, and bringing up for review an order, same court and Surrogate, entered on or about January 14, 2010, which denied respondents' motion for summary judgment dismissing the petition, and granted petitioner's motion for summary judgment on the issue of liability for its discharge, unanimously affirmed, with costs.

Respondents argue that petitioner's request for a separate retainer agreement signed by respondent Ruth Haderski as administrator of the decedent's estate was a breach of contract

and evidence of professional misconduct. This argument is unpreserved and, in any event, unsupported by the evidence, which fails to raise an issue of fact whether, as respondents now claim, the second retainer agreement caused a breach in their relationship with petitioner. Since respondents' termination of petitioner was therefore not for cause, petitioner is entitled to the reasonable value of the services it rendered them (*see Nabi v Sells*, 70 AD3d 252, 254-55 [2009]). In determining the reasonable value of those services, the Surrogate properly considered the relevant factors (*see Matter of Freeman*, 34 NY2d 1, 9 [1974]). The court also properly attached prejudgment interest to the decree pursuant to CPLR 5001 (*see Ash & Miller v Freedman*, 114 AD2d 823 [1985]).

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

ENTERED: FEBRUARY 7, 2012

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Richter, Abdus-Salaam, JJ.

6734 Raymin Cabrera, et al., Index 7680/07
Plaintiffs-Respondents,

-against-

New York City Department
of Education, et al.,
Defendants-Appellants,

Temco Service Industries, Inc.,
Defendant.

_____

Lester Schwab Katz & Dwyer, LLP, New York (John Sandercock of counsel), for appellants.

Seligson, Rothman & Rothman, New York (Martin S. Rothman of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Barry Salman, J.), entered October 6, 2011, which denied defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to grant the motion as to defendant City of New York, and otherwise affirmed, without costs.

Defendant Department of Education (DOE) is not entitled to summary judgment because there is sufficient evidence in the record to raise a question of fact as to whether it knew of a recurring dangerous condition in the fence and routinely left it unaddressed (*see Uhlich v Canada Dry Bottling Co. of N.Y.*, 305 AD2d 107 [2003]) or whether it undertook repairs and performed

them negligently (*see e.g. Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226-227 [2002]).

The City is not a proper party to this action (*see Bailey v City of New York*, 55 AD3d 426 [2008]).

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

ENTERED: FEBRUARY 7, 2012

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Richter, Abdus-Salaam, JJ.

6736 The People of the State of New York, Ind. 2502/09
Respondent,

-against-

Obseas Mercado,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Nicholas A. Duston of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Carol Berkman, J. at suppression hearing; Juan M. Merchan, J. at plea and sentencing), rendered May 6, 2010, convicting defendant of attempted assault in the first degree, and sentencing him, as a second violent felony offender, to a term of seven years, unanimously affirmed.

The court properly denied defendant's motion to suppress a statement he made to the police. Although defendant was in custody, and had not yet received *Miranda* warnings, the record supports the court's finding that the statement was spontaneous and was not the product of custodial interrogation. Where, as here, a defendant's inquiry concerning the reason for an arrest is "immediately met by a brief and relatively innocuous answer by

the police officer," there is no interrogation or its functional equivalent (*People v Rivers*, 56 NY2d 476, 480 [1982]; *compare People v Lanahan*, 55 NY2d 711 [1981]).

In any event, defendant blurted out the statement at issue at least an hour after the officer responded to defendant's question as to why he was being arrested. The statement was not made at the precinct where defendant was advised of the charges, but instead was made in the police car on the way to the hospital, where defendant had requested to go in order to receive medication. Thus, even if advising defendant of the charges against him could be considered "interrogation," the statement was attenuated from the purported interrogation (*see People v Paulman*, 5 NY3d 122, 130-131 [2005]).

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

ENTERED: FEBRUARY 7, 2012

CLERK

Saxe, J.P., Friedman, Catterson, Freedman, Manzanet-Daniels, JJ.

6737 The People of the State of New York, Ind. 6167/08
Respondent,

-against-

Melody Rivera,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered July 10, 2009, as amended September 1, 2009 and September 22, 2009, convicting defendant, after a jury trial, of grand larceny in the fourth degree (two counts) and jostling, and sentencing her, as a second felony offender, to an aggregate term of 1½ to 3 years, unanimously affirmed.

The court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]). Defendant failed to meet her burden of establishing that the prosecutor's facially nondiscriminatory reasons for peremptorily challenging two prospective jurors were pretextual (*see People v Payne*, 88 NY2d 172, 181 [1996]). The record supports the court's rejection of defendant's claims of pretext, and these findings, based

primarily on the court's assessment of the prosecutor's credibility, are entitled to great deference (*see Snyder v Louisiana*, 552 US 472, 477 [2008]; *People v Hernandez*, 75 NY2d 350 [1990], *affd* 500 US 352 [1991]).

The prosecutor's overall impression of one of the panelists at issue was that she lacked the intellectual capacity to understand the case. The prosecutor explained that the other panelist at issue reacted angrily when the prosecutor mispronounced her name. There is no basis for disturbing the court's acceptance of these explanations as genuine. We do not find any disparate treatment by the prosecutor of similarly situated panelists.

Defendant did not preserve her challenge to a detective's testimony as to defendant's presence in a surveillance videotape, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits.

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

ENTERED: FEBRUARY 7, 2012

CLERK

Saxe, J.P., Friedman, Catterson, Freedman, Manzanet-Daniels, JJ.

6739 In re Claudio M.,
Petitioner-Appellant,

-against-

Janet R.,
Respondent-Respondent.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Dora M. Lassinger, East Rockaway, for respondent.

_____

Order, Family Court, Bronx County (Alma Cordova, J.), entered on or about November 19, 2010, which dismissed the father's petition for sanctions against respondent mother for violating a court order of visitation, unanimously affirmed, without costs.

The Family Court properly dismissed the petition, which alleged that respondent had willfully violated the order of visitation by refusing to drop off the child for two weeks of summer visitation with petitioner to have commenced on August 15, 2010. At the attendant hearing, petitioner conceded that he received respondent's March 3, 2010 letter informing him that she was taking the child on vacation from August 21 through September 5, 2010. Petitioner then notified respondent on April 26, 2010 that pursuant to the order of visitation he wished to exercise

his two-week summer visitation at a time that he obviously knew would overlap with respondent's previously-scheduled plans. Under these circumstances, the Family Court was within its discretion in finding that petitioner acted unreasonably and that respondent did not willfully violate the visitation schedule.

We have considered the remainder of petitioner's contentions and find them unavailing.

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

ENTERED: FEBRUARY 7, 2012

CLERK

Saxe, J.P., Friedman, Catterson, Freedman, Manzanet-Daniels, JJ.

6740 The People of the State of New York, Ind. 6477/08
Respondent,

-against-

Roman Tejada,
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 (Richard Nahas of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about June 9, 2010,

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: FEBRUARY 7, 2012

CLERK

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

Saxe, J.P., Friedman, Catterson, Freedman, Manzanet-Daniels, JJ.

6742 Vernon Henry, et al., Index 21392/05
Plaintiffs-Respondents,

-against-

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

_____

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

David P. Kownacki, New York, for respondents.

_____

Judgment, Supreme Court, Bronx County (Lucy Billings, J.), entered on or about August 3, 2010, insofar as appealed from, awarding plaintiff Vernon Henry, after a jury trial on damages, $1,000,000 and $1,500,000, respectively, for past and future pain and suffering, $165,000 and $575,000, respectively, for past and future lost earnings, and, as reduced by the trial court, $36,000 for future medical expenses, unanimously modified, on the law, to reduce the award for future lost earnings to $275,000, and, on the facts, to vacate the award for future pain and suffering and order a new trial solely as to those damages, unless plaintiffs, within 30 days of service of a copy of this order with notice of entry, stipulate to accept a reduced award for future pain and suffering to $500,000 and to entry of an amended judgment in

accordance therewith, and otherwise affirmed, without costs.

The award for future lost earnings must be reduced, as indicated above, to conform to the evidence.

The admission of plaintiff's dental testimony as to causation was proper. While the dentist did not render his opinion with "a reasonable degree of medical certainty," causation was established by his testimony, when considered in its entirety, and plaintiff's history of first noticing the loose teeth in the hospital following the accident (*see Matott v Ward*, 48 NY2d 455, 460 [1979]). The weight to be accorded to conflicting expert testimony was within the province of the jury (*see Torricelli v Pisacano*, 9 AD3d 291, 293 [2004], *lv denied* 3 NY3d 612 [2004]).

Plaintiff sustained multiple injuries in a fall from a mechanical scaffold to the ground, including fractures to the left superior and inferior pubic rami, sacrum, ilium, three ribs and left radial neck, and the loss of nine teeth. While these injuries required plaintiff to be hospitalized for five days and plaintiff was unable to return to work for 19 months, he did not require surgery and, aside from his pelvic fractures, which continued to cause pain and make it difficult for plaintiff to walk, plaintiff's injuries had healed well, and plaintiff had

returned to his job as an electrician without restriction. Accordingly, we find that, based on a review of cases involving similar injuries, the award for future pain and suffering deviated materially from what would be reasonable compensation and we reduce it accordingly (*compare DeVirgilio v Feller Precision Stage Lifts, Inc.*, 47 AD3d 522 [2008], *lv denied* 10 NY3d 709 [2008]; *Brzozowy v ELRAC, Inc.*, 39 AD3d 451 [2007]; *Purcell v Axelsen*, 286 AD2d 379 [2001]; *Lind v City of New York*, 270 AD2d 315 [2000]).

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

ENTERED: FEBRUARY 7, 2012

CLERK

Saxe, J.P., Friedman, Catterson, Freedman, Manzanet-Daniels, JJ.

6743 Atlantic Aviation Investments LLC, Index 602286/09
Plaintiff-Respondent,

-against-

MatlinPatterson Global Advisers LLC, et al.,
Defendants-Appellants.

– – – – –

[And a Third Party Action].

_____

Simpson Thacher & Bartlett LLP, New York (Thomas C. Rice and David J. Woll of counsel), for appellants.

Cleary Gottlieb Steen & Hamilton LLP, New York (Jeffrey A. Rosenthal of counsel), for respondent.

_____

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered May 5, 2011, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment on the issue of liability on its claim for breach of contract against defendants Volo Logistics LLC, MatlinPatterson Global Opportunities Partners II LP and MatlinPatterson Global Opportunities Partners (Cayman) II LP (collectively the MP Funds), unanimously affirmed, with costs.

Under the plain language of the parties' Memorandum of Understanding (MOU) and the embedded Make-Whole Agreement, nonparty VarigLog was an "affiliate" of Volo, an indirect wholly-

owned subsidiary of the MP Funds. The sale of the shares at issue was an "Exit," as expressly defined in the MOU. Under the Make-Whole Agreement, Volo and the MP Funds are obligated to ratably share with plaintiff the funds received by VarigLog, Volo's affiliate, in connection with the sale of shares.

We find that the parties' agreements are unambiguous. Thus, there is no need to resort to extrinsic evidence to discern their meaning (*see South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 278 [2005]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162-163 [1990]). This is so regardless of whether the Make-Whole Agreement is carved out from the MOU's merger clause. Although the parties clearly intended for the Make-Whole Agreement to be an interim arrangement, to be supplanted by a "definitive final agreement" upon the Second Closing, it is nonetheless facially complete and contains all of the essential terms of an enforceable contract.

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: FEBRUARY 7, 2012

CLERK

Saxe, J.P., Friedman, Catterson, Freedman, Manzanet-Daniels, JJ.

6744-
6744A-
6744B

The People of the State of New York,
Respondent,

-against-

John Walden,
Defendant-Appellant.

Ind. 99013/09

_____

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

Robert T. Johnson, District Attorney, Bronx (Robert R. Sandusky, III of counsel), for respondent.

_____

Orders, Supreme Court, Bronx County (Megan Tallmer, J.), entered on or about April 14, 2009, which adjudicated defendant a level two sex offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the adjudication to that of a level one sex offender, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered on or about September 14, 2009, which, upon reargument, adhered to the prior decision, unanimously dismissed, without costs, as academic.

The court erred in initially designating defendant a level three offender rather than a level two offender. The record at best, only supports the level two classification. We exercise

our independent discretion to grant defendant a downward departure to level one (*see People v Johnson*, 11 NY3d 416, 421 [2008]).

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

ENTERED: FEBRUARY 7, 2012

CLERK

Saxe, J.P., Friedman, Catterson, Freedman, Manzanet-Daniels, JJ.

6745-
6746 Shamieka B.,
Petitioner-Respondent,

-against-

Lishomwa H.,
Respondent-Appellant.

_____

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

_____

Order, Family Court, Bronx County (Fernando H. Silva, J.), entered on or about November 16, 2010, denying respondent father's objections to the Support Magistrate's order of October 7, 2010, which found that respondent willfully refused to pay child support for the subject child from March 2008 through August 2008, awarded petitioner arrears in the principal sum of $13,234.41 for the period from March 28, 2008 to October 1, 2010, and reduced respondent's child support obligation to $300 per month nunc pro tunc to September 14, 2009, unanimously modified, on the facts, to grant the downward modification nunc pro tunc to July 13, 2009, and otherwise affirmed, without costs.

The court properly determined that the father's failure to comply with the child support order from March 28, 2008 through August 21, 2008 was willful since he admitted being employed

during this time period, and that he paid other financial obligations (*see Matter of Powers v Powers*, 86 NY2d 63, 68-70 [1995]).

There was no evidence that the father was prejudiced by the inclusion of arrears from an earlier time period in that the petition advised that the petitioner may amend to include additional arrears, and pleadings are to be liberally construed (CPLR 3026).

In our view, the father demonstrated a substantial change in circumstances as to his child support obligation beginning in July 2009, when his medical records reflect debilitating symptoms related to commencement of chemotherapy (*see Matter of Boden v Boden*, 42 NY2d 210, 213 [1977]).

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

ENTERED: FEBRUARY 7, 2012

CLERK

Saxe, J.P., Friedman, Catterson, Freedman, Manzanet-Daniels, JJ.

6747-
6748 Randall's Island Aquatic Leisure, LLC, et al., Plaintiffs-Appellants,

-against-

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

Index 111146/09

Law Office of John Hoggan, PLLC, Albany (John D. Hoggan, Jr., of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo of counsel), for The City of New York, The New York City Department of Parks and Recreation and The New York City Economic Development Corporation, respondents.

Weil, Gotshal & Manges LLP, New York (Jonathan Bloom of counsel), for The Randall's Island Sports Foundation, respondent.

Order, Supreme Court, New York County (Karen S. Smith, J.), entered July 22, 2010, which granted defendants City of New York, New York City Department of Parks and Recreation, and New York City Economic Development Corporation's motion to dismiss the complaint as against them, unanimously affirmed, without costs.

Defendant New York City Economic Development Corporation (EDC) and plaintiffs Aquatic Development Group, Inc. (ADG) and Recreation Development, Inc. (RDI) are not signatories to the "Waterpark Concession Agreement" between plaintiff Randall's Island Aquatic Leisure, LLC (RIAL) and the City (through the

Department of Parks and Recreation), which governs this dispute. Thus, ADG and RDI are not proper plaintiffs, and EDC is not a proper defendant, which alone is a sufficient ground on which to dismiss the complaint as against it. There can be no breach of contract claim against a non-signatory to the contract (*Nuevo El Barrio Rehabilitación de Vivienda y Economía, Inc. v Moreight Realty Corp.*, 87 AD3d 465, 467 [2011]). There can be no claim of breach of the implied covenant of good faith and fair dealing without a contract (*American-European Art Assoc. v Trend Galleries*, 227 AD2d 170, 171 [1996]). And there can be no quasi-contract claim against a third-party non-signatory to a contract that covers the subject matter of the claim (*Bellino Schwartz Padob Adv. v Solaris Mktg. Group*, 222 AD2d 313, 313 [1995]).

The breach of contract claim against the City for terminating the agreement to build a recreation center fails because plaintiffs did not comply with the obligation to obtain financing. Plaintiffs' allegation of a course of conduct and oral promises extending their financing deadlines is belied by the record, which demonstrates that all extensions granted by the City were in writing, and reserved to the City all of its rights under the agreement, including the right to terminate if plaintiffs failed to meet certain financing conditions.

Obtaining loan commitments by a date certain was a contractual obligation. Plaintiffs failed to meet the condition, and the City terminated the agreement. Thus, the breach of contract claim was correctly dismissed as against it (*see Jericho Group, Ltd. v Midtown Dev., L.P.*, 32 AD3d 294, 298 [2006]). The good faith and fair dealing claim fails because the City's termination of the agreement was consistent with the agreement's express terms (*Phoenix Capital Invs. LLC v Ellington Mgt. Group, L.L.C.*, 51 AD3d 549, 550 [2008]). The promissory estoppel claims fail because the statement that "possible loans" were being "considered" is not an allegation of clear and unambiguous promises upon which plaintiffs could reasonably have relied (*see New York City Health & Hosps. Corp. v St. Barnabas Hosp.*, 10 AD3d 489, 491 [2004]). The estoppel claims fail for the additional reason that they do not allege "dut[ies] independent of the agreement" (*see Celle v Barclays Bank P.L.C.*, 48 AD3d 301, 303 [2008]).

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: FEBRUARY 7, 2012

CLERK

Saxe, J.P., Friedman, Catterson, Freedman, Manzanet-Daniels, JJ.

6749 Tereza Flusserova, Index 104177/09
Plaintiff-Appellant,

-against-

Julian Schnabel, et al.,
Defendants-Respondents.

– – – – –

Julian Schnabel, et al.,
Third-Party Plaintiffs.

-against-

Radoslaw Szczesny, doing business
as Maiden Brooklyn,
Third Party Defendants,

Genie Industries Inc.,
Third Party Defendant-Respondent.

_____

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

Tarter Krinsky & Drogin LLP, New York (David J. Pfeffer of counsel), for Julian Schnabel, 360 Development Corp., 360 West 11th LLC, and Stella Maris, Inc., respondents.

Gallagher, Walker, Bianco & Plastaras LLC, Mineola (Michael R. Walker of counsel), for Genie Industries Inc., respondent.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered December 2, 2010, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In opposition to defendants' prima facie showing that plaintiff released her claims against them, plaintiff failed to present any evidence that the release she signed was not "fairly and knowingly made" (*see Johnson v Lebanese Am. Univ.*, 84 AD3d 427, 430 [2011] [internal quotation marks and citations omitted]). Plaintiff's claims that as a Czech immigrant with limited English she was taken advantage of by defendants lack merit in any event. According to her own testimony, taken in English in the absence of an interpreter, English is only one of several languages plaintiff speaks; she has written college-level papers in English, translated English for Czech speakers, and communicated with her coworkers and her boyfriend in English. In addition, plaintiff testified that she read the release and did not understand it, but she made no effort to have someone read and explain it to her before signing it (*see Shklovskiy v Khan*, 273 AD2d 371 [2000]). Accordingly, her claim that she believed she was signing a receipt for the money she was paid does not avail her.

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: FEBRUARY 7, 2012

CLERK

Saxe, J.P., Friedman, Catterson, Freedman, Manzanet-Daniels, JJ.

6750 In re Dana Andrews, Index No. 100196/10
Petitioner-Appellant,

-against-

The Board of Education of the
City School District of the City of
New York, et al.,
Respondent-Respondent.

_____

Richard E. Casagrande, New York (Melinda G. Gordon of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Kristin M. Helmers of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Joan A. Madden, J.), entered October 28, 2010, denying the petition for a declaration that petitioner acquired tenure by estoppel and to compel respondents to reinstate her as a tenured teacher, inter alia, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Although petitioner did not receive the 60-day written notice that she was not recommended for tenure, as required by Education Law §§ 2573(1)(a) and 3012(2), and taught for one day after the expiration of her probationary term, we find that she did not acquire tenure by estoppel, since the record shows that respondents did not, "with full knowledge and consent," permit

her to continue to teach after her probationary term expired (*see Matter of Gould v Board of Educ. of Sewanhaka Cent. High School Dist.*, 81 NY2d 446, 451 [1993] [internal quotation marks omitted]). It is undisputed that petitioner was informed in May 2009 that her employment would be discontinued, and when she reported for duty on September 8, 2009, she was told immediately that she had been terminated, and was given no further assignments. Nor was she paid for that day's work. Respondents' actions "speak loudly against any supposition that [they] meant to perpetuate [petitioner's] employment" (*Matter of Hagen v Board of Educ. of Cohoes City School Dist.*, 59 AD2d 806, 806-807 [1977], *lv denied* 44 NY2d 647 [1978]).

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

ENTERED: FEBRUARY 7, 2012

CLERK

Saxe, J.P., Friedman, Catterson, Freedman, Manzanet-Daniels, JJ.

6753 The People of the State of New York, Ind. 3418/09
Respondent,

-against-

Derek Samuel,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Marcy L. Kahn, J. at hearings; Analisa Torres, J. at jury trial and sentencing), rendered June 1, 2010, convicting defendant of robbery in the first and second degrees, and sentencing him, as a persistent violent felony offender, to concurrent terms of 20 years to life, unanimously affirmed.

The court properly denied defendant's motion to suppress identification testimony. The record supports the hearing court's finding that the photo array and lineup were not unduly suggestive. As to each procedure, defendant and the other participants were reasonably similar in appearance, and there was no substantial likelihood that defendant would be singled out for identification (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert*

denied 498 US 833 [1990]).

The court also properly denied defendant's motion to suppress statements. There was no violation of *Payton v New York* (445 US 573 [1980]). The police never entered defendant's apartment. Instead, at the request of the police, defendant's parole officer asked defendant to come into the hallway outside his apartment, and this procedure was permissible (*see People v Wallace*, 250 AD2d 398 [1998]).

There is no basis to disturb the hearing court's finding that defendant's initial interview, which was not preceded by *Miranda* warnings, was not custodial. A reasonable innocent person in defendant's position would not have thought he was in custody (*see People v Yukl*, 25 NY2d 585 [1969], *cert denied* 400 US 851 [1970]; *see also Stansbury v California*, 511 US 318 [1994]). Defendant agreed to accompany the police to the precinct, where he remained in an interview room. During the period that preceded *Miranda* warnings, the police did not restrain defendant in any way or do anything to convey that he was not free to leave (*see People v Dillhunt*, 41 AD3d 216 [2007], *lv denied* 10 NY3d 764 [2008]).

Even assuming a *Payton* or *Miranda* violation, or both, there was sufficient attenuation so that defendant's later statements

were not tainted. Defendant's made his post-*Miranda* statements after a significant time lapse, and he made no incriminating statements during the pre-*Miranda* interview (*see People v White*, 10 NY3d 286, 291 [2008], *cert denied* 555 US 897 [2008]). Furthermore, there was nothing flagrant about the alleged *Payton* violation. Defendant's videotaped interview was even further attenuated from any *Payton* or *Miranda* violation, since it was made at a different location to a different interviewer. In any event, even assuming any error in the admission of either of the two statements, the error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]), in light of the overwhelming evidence of defendant's guilt and the generally exculpatory nature of his statements.

We have considered and rejected defendant's remaining claims, including his challenges to the admissibility of recordings of phone calls he made while in prison.

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

ENTERED: FEBRUARY 7, 2012

CLERK

Saxe, J.P., Friedman, Catterson, Freedman, Manzanet-Daniels, JJ.

6754 The People of the State of New York, Ind. 5005/08
Respondent,

-against-

Gregory Somoza,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J. at suppression hearing; Kibbie F. Payne, J. at plea and sentencing), rendered November 5, 2009, convicting defendant of criminal possession of stolen property in the third degree and unauthorized use of a vehicle in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 2½ to 5 years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal (*see People v Ramos*, 7 NY3d 737 [2006]; *People v Lopez*, 6 NY3d 248 [2006]). The court did not conflate the right to appeal with the rights automatically forfeited by pleading guilty. Defendant orally confirmed that he understood he was giving up his right to appeal (*compare People v Bradshaw*, __NY3d__, 2011 NY Slip Op

08963 [Dec 13, 2011]). In addition, the colloquy was supplemented by a written waiver.

Regardless of whether defendant made a valid waiver of his right to appeal, we conclude that the hearing court properly denied defendant's suppression motion.

There is no basis for disturbing the court's credibility determinations, which are supported by the record.

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

ENTERED: FEBRUARY 7, 2012

CLERK

Saxe, J.P., Friedman, Catterson, Freedman, Manzanet-Daniels, JJ.

6755 Joseph Cohen, et al., Index 601936/08
Plaintiffs-Appellants,

-against-

Business Payments Systems, LLC,
Defendant-Respondent.

_____

Ephrem J. Wertenteil, New York, for appellants.

Tamir Law Group, New York (Isaac B. Tamir of counsel), for respondent.

_____

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered March 3, 2010, which denied plaintiffs' motion for summary judgment and granted defendant's cross motion for summary judgment dismissing the complaint and for attorney's fees, unanimously reversed, on the law, without costs, defendant's motion denied, plaintiffs' motion granted, and the matter remanded for a determination of payments and attorneys' fees due plaintiffs under the subject Residual Purchase Agreements.

Defendant Business Payments Systems (BPS) is engaged in the business of marketing and selling credit card processing services to merchants. On August 22, 2005, BPS entered into a Sales Agreement with the limited liability company One Stop, of which plaintiff Joseph Cohen is a principal. The Sales Agreement

defined "Residual" to mean all merchant revenues collected by BPS "in excess of the fees set forth in Exhibit A." Thus, the "Residual" payments which BPS remitted to One Stop were governed by a fee schedule annexed as "Exhibit A" to the Sales Agreement, which set forth BPS's share of the commission on every credit card transaction. The "Residual" payment owed to One Stop was the amount over and above the amounts set forth in the fee schedule.

Subsequent to the Sales Agreement between BPS and One Stop, plaintiffs' purchased from BPS the rights to collect BPS's share of the future commissions on credit card transactions from various BPS merchant accounts. The Residual Purchase Agreements were honored by BPS until June 2008, when BPS ceased remitting the fees to plaintiffs, as One Stop's agents, based on the plaintiffs' breach of the non-compete and confidentiality provisions of the Sales Agreement.

We find that the provisions of the Sales Agreement were incorporated by reference into the Residual Purchase Agreements (*see PaineWebber Inc. v Bybyk*, 81 F3d 1193, 1201 [2d Cir 1996]), including the definition of "Residuals." Pursuant to the plain language of the Sales Agreement (*Vintage, LLC v Laws Constr. Corp.*, 13 NY3d 847, 849 [2009]), however, the "Residual" payments

therein meant only that portion of the fees over and above the fees that were paid to BPS, i.e., that portion of the fees that were earned by One Stop which procured merchants to obtain NPS processing services. When read together with Paragraph 6.4 of the Sales Agreement, "Certain Post-Termination Rights" (*see HSBC Bank USA v National Equity Corp.*, 279 AD2d 251, 253 [2001]), it is clear that upon termination of the Sales Agreement with cause (as was the case here), all Residual payments to One Stop would cease.

Nevertheless, it is the portion of the future fees attributable to BPS that is the subject of the Residual Purchase Agreements, which, by definition, would not cease immediately upon termination for cause. For this reason, we remand the matter for a determination of payments due plaintiffs under the Residual Purchase Agreements. In addition, plaintiffs, as

prevailing parties, are entitled to attorneys' fees under Paragraph 7 of the residual Purchase Agreements.

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

ENTERED: FEBRUARY 7, 2012

CLERK

Saxe, J.P., Friedman, Catterson, Freedman, JJ.

6757 Edward J. Minskoff Index 601640/08
Equities, Inc., et al.,
Plaintiffs-Appellants-Respondents,

-against-

Crystal Window & Door Systems, Ltd.,
Defendant-Respondent-Appellant,

Crystal Curtain Wall Systems Corp., etc.,
Defendant.

_____

Wasserman Grubin & Rogers, LLP, New York (Michael T. Rogers of counsel), for appellants-respondents.

Farrell Fritz, P.C., New York (Michael T. Fitzgerald of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 30, 2011, which, to the extent appealed from, granted, in part, defendant Crystal Window & Door Systems, Ltd.'s (Crystal Window) motion for summary judgment dismissing the eighth cause of action alleging breach of a guaranty asserted by plaintiffs Edward J. Minskoff Equities, Inc. (Minskoff) and 270 Greenwich Street Associates, LLC (270 Greenwich), granted plaintiff HRH Construction, LLC (HRH) summary judgment on the eighth cause of action, and denied the same relief to Minskoff and 270 Greenwich, unanimously modified, on the law, to deny that branch of Crystal Window's motion seeking

summary judgment dismissing the eighth cause of action as to Minskoff and 270 Greenwich, and otherwise affirmed, without costs.

In this action for breach of guaranty on a construction project, there are questions of fact regarding whether 270 Greenwich and Minskoff, as owner and manager of the building being renovated, were the intended third-party beneficiaries of a guaranty entered into between HRH, the general contractor, and Crystal Window, the subcontractor, pursuant to which Crystal Window guaranteed the performance of its subsidiary, defendant Crystal Curtain Wall Systems Corp. (CCWS), on the subcontract with HRH. The guaranty explicitly called for completion of the subcontract which described Minskoff and 270 Greenwich as direct beneficiaries of the work to be performed. Further, the guaranty provided that it would not terminate until HRH received payment from 270 Greenwich which payment would be made only after HRH attested to substantial completion of the subcontract work.

The intent of the parties, as gleaned from the language of the guaranty, is that completion of the subcontract dictated whether the obligation on the guaranty would arise, thereby suggesting that 270 Greenwich and Minskoff, as intended beneficiaries of the subcontract, can recover as third party

beneficiaries of the guaranty (*see Bank of Tokyo-Mitsubishi, Ltd., N.Y. Branch v Kvaerner a.s.*, 243 AD2d 1, 6-8 [1998]*; Alicea v City of New York*, 145 AD2d 315, 317 [1988]). However, the fact that the guaranty was entered into pursuant to the requirements of a supplemental agreement to the subcontract which supplemental agreement expressly stated that it did not confer any legal right, remedy or claim on anyone other than the parties thereto (i.e., HRH and CCWS), raises a factual issue as to whether the guaranty, given its broad language, was drafted for the immediate benefit of Minskoff and 270 Greenwich.

Contrary to Crystal Window's arguments, the terms of the guaranty are neither indefinite nor ambiguous as to Crystal Window's rights and obligations thereunder as it specifically required CCWS's completion of the subcontract and the terms of the subcontract were clearly defined (*see Bank of Tokyo-Mitsubishi,* 243 AD2d at 7-8).

We have considered the parties' additional arguments and find them unavailing.

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

ENTERED: FEBRUARY 7, 2012

CLERK

Saxe, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Román, JJ.

5996 Camille Khaira, Index 312487/10
Plaintiff-Respondent,

-against-

Jasvinder Singh Khaira,
Defendant-Appellant.

_____

Moses Preston & Ziegelman, LLP, New York (Robert M. Preston of counsel), for appellant.

Mayerson Stutman Abramowitz, LLP, New York (Harold A. Mayerson of counsel), for respondent.

_____

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered April 1, 2011, modified, on the law, to delete the directive that defendant pay the stepson's health care insurance and other health care costs, to vacate the unallocated maintenance-child support award, and to remand the matter for a reconsideration of the award in light of the directives of Domestic Relations Law § 236[B][5-a], and otherwise affirmed, without costs.

Opinion by Saxe, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
John W. Sweeny, Jr.,
Leland G. DeGrasse
Sallie Manzanet-Daniels
Nelson S. Román, JJ.

5996
Index 312487/10

_____x
Camille Khaira,
Plaintiff-Respondent,

-against-

Jasvinder Singh Khaira
Defendant-Appellant.
_____x

Defendant appeals from an order of the Supreme Court, New York County (Deborah A. Kaplan, J.), entered April 1, 2011, which, insofar as appealed from as limited by the briefs, awarded plaintiff interim counsel fees and unallocated maintenance and child support, and directed defendant to pay health care insurance and unreimbursed health care costs for his stepson.

Moses Preston & Ziegelman, LLP, New York (Robert M. Preston and Judith Ackerman of counsel), for appellant.

Mayerson Stutman Abramowitz, LLP, New York (Harold A. Mayerson and Stephen A. Zorn of counsel), for respondent.

SAXE, J.

This appeal gives us the opportunity to consider the new guidelines for awards of temporary spousal maintenance under Domestic Relations Law § 236(B)(5-a), particularly with regard to the circumstances in which the court may deviate from the guideline amount derived by formula (the presumptive award), and the procedures that must be undertaken to do so.

The parties married on July 8, 2006, having jointly purchased the marital residence the month before. They have two sons, born December 25, 2007 and December 1, 2009. The wife also has a son from a previous marriage, born February 1, 1992. In September of 2010, the husband voluntarily moved out of the marital residence, and in October 2010, the wife commenced this divorce proceeding. She moved for pendente lite support, asking for monthly maintenance of $11,500 and child support of $7,290, and a direction that the husband directly pay the carrying costs on the marital residence, child care expenses, and all health care expenses for the family.

To determine temporary maintenance, the motion court had to apply Domestic Relations Law § 236(B)(5-a), which had become effective on October 12, 2010, just days before the motion was made. The court determined the presumptive award to be $11,500 per month, awarded the wife $13,870 in unallocated spousal and

child support, tax deductible to the husband, and required the husband to directly pay to the lender the monthly mortgage payments on the marital residence in which the wife and the children continue to reside, and the health care insurance premiums and unreimbursed health care expenses for the family, including his stepson. It also directed the husband to pay the wife interim counsel fees in the amount of $42,000.

On appeal, the husband contends that the motion court awarded the wife an excessive sum because it failed to consider his actual, documented net monthly income and cash flow, and incorrectly calculated his annual income by including non-recurring earnings such as a one-time bonus arising out of a Blackstone IPO, and illiquid, noncash equity compensation arising out of the same IPO. He challenges the counsel fee award on the ground that the wife's mother guaranteed her counsel fee obligation, and counsel has been paid in full to date. He also challenges the directive that he pay the health care expenses of his stepson.

The new Domestic Relations Law § 236(B)(5-a) reflects a substantial change in the Legislature's approach to temporary maintenance. The previous spousal maintenance provision gave the court great leeway, directing only in general terms that it order maintenance "in such amount as justice requires," considering the

parties' standard of living during the marriage, the reasonable needs of the non-monied spouse and the monied spouse's ability to pay, and with regard to a list of factors such as the parties' respective earning capacities (former Domestic Relations Law § 236[B][6]). Courts applying that provision observed that pendente lite maintenance was awarded to "tide over the more needy party, not to determine the correct ultimate distribution and to ensure that a needy spouse is provided with funds for his or her support and reasonable needs" (*see e.g. Iannone v Iannone*, 31 AD3d 713, 714 [2006] [internal quotation marks and citations omitted]).

The new provision, rather than aiming merely to "tide over" the non-monied spouse, creates a substantial presumptive entitlement. In an effort to provide "consistency and predictability in calculating temporary spousal maintenance awards" (Assembly Memorandum in Support, 2010 McKinney's Session Laws of NY, at 1943), the Legislature created formulas for the court to apply to the parties' reported income, as it did when it enacted the Child Support Standards Act (Domestic Relations Law § 240[1-b]; Family Court Act § 413). Further, the statute requires the court to explain any deviation from the result reached by the formula.

The new formula for temporary maintenance requires the court

to begin with the parties' gross income as reflected in their most recent federal tax returns, less FICA and city taxes. The court must make two alternate initial calculations, based on the payee's income and the payor's income up to an initial cap of $500,000: first, the difference between 30% of the payor's income and 20% of the payee's income, and second, 40% of the parties' combined incomes, less the payee's income. The lesser of the results of these two calculations is the "guideline amount of temporary maintenance" (§ 236[B][5-a][c][1]). Where the payor's income exceeds $500,000, "the court shall determine any additional guideline amount of temporary maintenance through consideration of [19 enumerated] factors" (§ 236[B][5-a][c][2][a]), and "shall set forth the factors it considered and the reasons for its decision" (subd [c][2][b]). Next, the court must consider whether the guideline amount -- the presumptive award -- would be "unjust or inappropriate," on consideration of 17 enumerated factors (§ 236[B][5-a][e][1]).[1]

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[1] One of those factors in particular has been the subject of substantial criticism: Factor (n), requiring the consideration of "marital property subject to [equitable] distribution," has been challenged as inappropriate in this early stage of the litigation, since it is more appropriately considered in determining final support at the conclusion of trial, after equitable distribution has been determined (*see* Rosenberg, Outside Counsel, "Multiple Flaws Abound in New Interim Spousal Support Statute," NYLJ, Feb. 25, 2011, at 4, col 1; Stashenko, "City Bar Suggests Changes in Maintenance Rules," NYLJ, Nov. 4,

The motion court properly followed the initial procedures. It applied the $500,000 cap to the husband's income, and using $60,000 as the wife's income, based on the monthly payments she acknowledged receiving from her parents, performed the two calculations: for the first, it subtracted 20% of $60,000 ($12,000) from 30% of $500,000 ($150,000), arriving at $138,000; for the second, it calculated 40% of $560,000 ($224,000), then deducted $60,000, arriving at $164,000. It properly treated the lesser of these two calculations, $138,000, as the guideline amount.

At that point, the court observed that the parties' 2008 joint income tax return reflected an adjusted gross income of $851,549, almost all from the husband's earnings at the investment firm the Blackstone Group, and that their 2009 tax return reflected an adjusted gross income of $1,063,426, also almost entirely from the husband's employment. However, it did

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2011 at 4, col 2. Another concern has been raised by Justice Jeffrey Sunshine regarding factor (q), "any other factor which the court shall expressly find to be just and proper." Justice Sunshine points out that while that factor seems to give the court broad discretion to find the guideline amount "unjust or inappropriate," courts may not simply reject the guideline amount as an act of equity, reasoning that the amount is simply too much money and causes a "resource shift," since consistency in maintenance awards is the statute's primary concern, and the creation of a "resource shift" between the parties is the statute's purpose (*see Scott M. v Ilona M.*, 31 Misc 3d 353, 363 [2011]).

not then proceed to explicitly discuss whether an additional amount of maintenance was warranted from the portion of the husband's income that exceeded the $500,000 cap, as required by § 236(B)(5-a)(c)(2).

Instead, the court next examined the wife's submitted monthly expense budget of approximately $21,267 and concluded that with the exception of claims for $1,000 for gifts and $225 for charitable contributions, the remainder ($20,041), which included $4,125 for the cost of a nanny, represented the wife's and the children's reasonable needs. In essence, the court simply ruled that the husband should pay the full amount of the wife's and the children's claimed needs, partly through his payment of the mortgage on the marital residence ($5,317) and the family's health care premiums and unreimbursed medical expenses ($855), and partly through monthly payments to the wife of $13,870. In other words, the court awarded the wife $20,041 in unallocated spousal and child support without setting out a calculation of appropriate child support and without discussing or even mentioning the factors in Domestic Relations Law § 236[B][5-a][c][2]).

In considering the husband's challenge to the award, we reject, at the outset, his suggestion that his support obligation should have been calculated based solely on his base pay, without

reference to his bonus, or that the court should have taken into consideration his net pay. The statute instructs the court to base the calculations on the payor's gross income as reported in his federal income tax return, and the motion court properly did exactly that, correctly treating the husband's bonuses as income and ignoring his reliance on his net income (which, of course, can be manipulated with deductions and deferred compensation).

However, the motion court did not strictly comply with the requisites of Domestic Relations Law § 236(B)(5-a).

The wife points out that if the motion court had determined the child support component of its award with reference to the CSSA, by taking 25% of $130,000, it would have arrived at a presumptive child support award of $2,418 per month. She argues that since that sum, when added to the spousal support award of $11,500, is just a few dollars more than the cash sum awarded to the wife as unallocated support, the pendente lite award is proper. The problem with this contention, however, is that it assumes the propriety of treating mortgage and health care costs as add-ons, rather than as expenses included in the support covered by the formula of Domestic Relations Law § 236(B)(5-a)(c). That is, it suggests that the formula was intended to cover the support needs of the non-monied spouse, such as food and

clothing, but *not* the cost of the mortgage payments for her residence.

No language in either the new temporary maintenance provision or the CSSA specifically addresses whether the statutory formulas are intended to include the portion of the carrying costs of their residence attributable to the non-monied spouse and the children. As one commentator has pointed out, the new law

> "does not factor in child support issues or payment of household expenses. Is the recipient supposed to pay for everything in the house from this money? Is the payor supposed to stop paying those bills? What about all the double counting of housing, child care, and medical insurance between this law and the child support law?" (*see* Rosenberg, Outside Counsel, "Multiple Flaws Abound in New Interim Spousal Support Statute," NYLJ, Feb. 25, 2011, at 4, col 1, *supra*).

But, in the absence of a specific reference to the carrying charges for the marital residence, we consider it reasonable and logical to view the formula adopted by the new maintenance provision as covering all the spouse's basic living expenses, including housing costs as well as the costs of food and clothing and other usual expenses.

It is true that before the enactment of the new maintenance provision, it was a common practice to award spousal support partly in direct cash payments and partly in payments to third

parties. This was often not only eminently reasonable, but also the most expedient way of covering payment of the necessities, and protecting the home as a marital asset. However, we believe that the new approach of calculating spousal support payments to the non-monied spouse by means of a formula is intended to arrive at the amount that will cover all the payee's presumptive reasonable expenses. By calculating the guideline amount and then simply adding the direct mortgage payment on top of that, the motion court awarded more than the amount reached by the formula, without providing the required explanation.

It is quite possible that directing payment above and beyond the guideline amount may be appropriate in certain situations. For instance, the direct mortgage payment might be justifiable as additional support when the payor's income exceeds $500,000 and the applicable factors listed in Domestic Relations Law § 236(B)(5-a)(c)(2)(a) are taken into account; or, depending on the size of the mortgage payment, perhaps only part of it should be treated as the payee's housing costs, and the remainder should be treated as the upkeep of a marital investment. Perhaps there are other reasons why the guideline amount is unjust or inappropriate. It may well be that in this case, consideration of the enumerated factors, such as the stark difference in the parties' current earning capacities, their standard of living

during the marriage, and the need to pay for day care, would justify the motion court's direction that the husband pay as additional maintenance a specified portion of his income beyond the $500,000 cap; indeed, that may have been the motion court's implicit intent. However, because the statute expressly requires the court to both make and explain that determination (*see* Domestic Relations Law § 236[B][5-a][c][2][b]), this Court cannot permit the award to remain as it currently stands. While the ultimate support award may well be appropriate, it must be appropriately supported and explained. We therefore modify so as to vacate the support award and remand the matter for a reconsideration of the award in light of the directives of Domestic Relations Law § 236(B)(5-a).

We also vacate the portion of the order that places responsibility on the husband for his stepson's health care insurance and unreimbursed health care expenses. There is no allegation that the stepson "is a recipient of public assistance[] or that he is in danger of becoming a public charge" (*Matter of Dora T.J. v Jean-Paul A.S.*, 224 AD2d 420, 421 [1996]), and no other legal rationale for imposing that obligation on the husband.

Finally, we uphold the award of counsel fees to the wife as the "less monied spouse" (*see* Domestic Relations Law § 237[a]).

The statute provides that "[p]ayment of any retainer fees to the attorney for the petitioning party shall not preclude any awards of fees and expenses to an applicant which would otherwise be allowed under this section"; the husband's argument that no award of fees was appropriate because the wife's mother paid her attorney's retainer fee fails to rebut the presumption in favor of the award.

Accordingly, the order of the Supreme Court, New York County (Deborah A. Kaplan, J.), entered April 1, 2011, which, insofar as appealed from as limited by the briefs, awarded plaintiff interim counsel fees and $13,780 per month in unallocated maintenance and child support, and directed defendant to pay health care insurance and unreimbursed health care costs for his stepson, should be modified, on the law, to delete the directive that defendant pay the stepson's health care insurance and other health care costs, to vacate the unallocated maintenance-child

support award, and to remand the matter for a reconsideration of the award in light of the directives of Domestic Relations Law § 236(B)(5-a), and otherwise affirmed, without costs.

All concur.

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

ENTERED: FEBRUARY 7, 2012

CLERK