SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 21, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Saxe, J.P., Friedman, Catterson, Acosta, Richter, JJ.

4187 Fatima Seck, Index 300647/08
Plaintiff-Respondent,

-against-

Mustaffa Balla, et al.,
Defendants-Appellants.

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

Ephrem J. Wertenteil, New York, for respondent.

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Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered on or about April 12, 2010, which denied defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to dismiss the 90/180-day category of plaintiff's Insurance Law § 5102(d) claim, and otherwise affirmed, without costs.

On March 17, 2007, at around 6:00 A.M., plaintiff was returning home from work as restroom attendant at Webster Hall

when the livery cab she was riding in was struck from behind by a taxi cab owned by defendant Abes Service Corporation and operated by defendant Mustaffa Balla. Plaintiff was 39 years old and was four months pregnant.

An ambulance transported her to the emergency room at Bellevue Hospital, where she complained of pain in the lower back, neck, and left wrist. The hospital took Xrays of her cervical spine, but was unable to Xray her lumbar spine because of her pregnancy. She was released after a few hours, with instructions to return if she continued to have problems. She returned about three or four days later, complaining of lower back pain, and was told "to do therapy and massage at home."

She began treatment with Dr. Dorina Drukman and physical therapy at Grand Central Physical Medicine, and continued until early 2008, when her insurance benefits expired. MRIs were taken of plaintiff's spine after she gave birth in September 2007.

The MRI report of her cervical spine noted "degenerative disc disease, C2-3 through C6-7," a "small Schmorl's Node at C6," and "anterior marginal hypertrophic changes involving C5 and C6." It also noted mild disc bulge at C3-4, C6-7, and C4-5, and a small disc protrusion at C5-6. Further, there was "degenerative disease of the intervertebral disc from C2-3 through C6-7 with

loss of the normal cervical lordosis as well as mild flexion of [] the cervical curvature from C2 through C6." The MRI report of the lumbar spine indicated "central herniation at L3-4 with extension of disc into the neural foramen bilaterally," and herniation at L4-5 and L5-S1.

Plaintiff missed two days of work immediately after the accident. The third day was her normal day off, and she returned to work on the fourth day. Although she claimed she lost time from work thereafter, she could not provide the number of work days she missed due to the accident. Rather, she testified that she could not work seven days a week, and that she worked "maybe four days" if Webster Hall was opened seven days during a particular week. She stated that as of the date of her deposition, November 20, 2008, she still felt pain, which would intensify if she worked a lot. She said she could not work as much, go to the gym, carry her 22-pound baby on her back, or do laundry by herself, and had difficulty engaging in sex with her husband.

Defendants moved for summary judgment dismissing the complaint, arguing that plaintiff had not met the "serious injury" threshold. They relied on affirmations from an orthopedist and a neurologist who performed physical examinations

of plaintiff and found no limitation of movement, and on the opinion of a radiologist who asserted that the injuries shown in the MRIs were degenerative in origin rather than traumatically induced.

Although defendants assert that the claimed soft tissue injury was not caused by the accident, but was instead solely degenerative in etiology, plaintiff's treating physician asserted, to the contrary, that "notwithstanding any prior degeneration, Ms. Seck was asymptomatic. Thus the collision was a competent producing cause of her symptoms and impairments." A question of fact exists as to causation, and any questions about the credibility of the conflicting doctors' opinions are for the jury to resolve[1] *(Perl v Meher,* 18 NY3d 208 [2011]).

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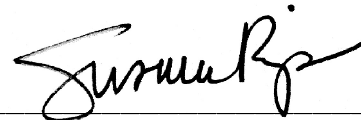
[1] We decline to find a triable issue of fact arising out of the nominal differences ascribed by the defendant's medical experts to what is, nevertheless, a normal range of motion.

However, plaintiff's claim under the 90/180-day prong of § 5102(d) fails as a matter of law because, according to plaintiff's own deposition testimony and the report of her treating osteopath, she returned to work part-time four days after the accident.

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

ENTERED: FEBRUARY 21, 2012



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Saxe J.P., Friedman, Renwick, DeGrasse, Freedman, JJ.

6177 Rosemarie SantiEsteban, et al., Index 102125/10
Plaintiffs-Respondents,

-against-

William Crowder, et al.,
Defendants-Appellants.

____

Houston Law Group, New York (Diarmuid Y. Houston of counsel), for appellants.

Patterson Belknap Webb & Tyler, LLP, New York (Matthew W.J. Webb of counsel), for respondents.

____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered July 7, 2010, which, insofar as appealed from as limited by the briefs, granted plaintiffs' motion for partial summary judgment as to liability on the causes of action alleging breach of fiduciary duty, conversion, and waste as against defendants William Crowder, Esquilla Crowder and Alfreda Barnes (defendants), unanimously modified, on the law, to the extent of denying the motion with respect to the causes of action for conversion and waste, and otherwise affirmed, without costs.

This derivative action concerns a 54-unit, low-income cooperative created pursuant to New York City's Tenants Interim Leasing Program in 1985. Plaintiffs, who are cooperative shareholders suing on behalf of themselves and the corporation,

moved for summary judgment on their claims for breach of fiduciary duty, conversion, and waste, based on evidence that, while serving as directors of the cooperative and controlling its finances, defendants paid themselves salaries without authorization. The motion court granted partial summary judgment as to defendants' liability for the claims. We modify.

Plaintiffs submit entries from the cooperative's ledgers and other evidence indicating that defendants paid themselves or their children "management fees," "salary," and funds for "computers." The ledgers indicate that, from 2007 through 2009, the payments from corporate funds totaled about $220,000. The payments were never authorized by board resolution, although article 10, section 1 of the cooperative's bylaws provides that directors shall not be paid "for services performed by them for the corporation in any capacity, unless a resolution authorizing such remuneration is unanimously adopted by the Board before the services are undertaken."

Defendants admit that they each received 4 percent of the cooperative's monthly revenue but claim that they were entitled to the payments for acting as the cooperative's managers. Defendant William Crowder states that he was paid an additional $150 per week for serving as the building's superintendent.

According to defendants, their services included collecting maintenance payments from the shareholders, trying to collect arrearages, administering the sale of units and attending closings, paying the cooperative's bills, maintaining the building and supervising repairs and other work.

In receiving the cooperative's funds, defendants unquestionably failed to comply with the bylaws, and their argument to the contrary is unavailing. They contend that a provision in the cooperative's offering plan that permitted self-management modified the bylaws' requirement that the board unanimously pass a resolution before directors could be paid for their services. However, the offering plan does not conflict with the provisions of the bylaws but instead supplements them. The compensation of directors to "self-manage" the cooperative still requires unanimous board approval.

Defendants' contention that the shareholders ratified the payments also fails. Defendants submit affidavits from other shareholders indicating that they knew defendants were being paid to manage and maintain the building, approved of the arrangement, and thought that the payments to defendants were comparable to what third parties would receive for the services. Claiming that the affidavits constitute ratification, defendants rely on a

provision of the bylaws pursuant to which self-interested contracts or transactions between directors and the cooperative can be “authorized” by the shareholders. However, the provision contemplates authorization by a vote cast at a duly held shareholders’ meeting, which never occurred.

Since defendants’ payments to themselves were unauthorized, as a matter of law, they are liable for breach of fiduciary duty (*see Aronoff v Albanese*, 85 AD2d 3, 5 [1982]). However, as the motion court noted, plaintiffs must prove the actual damages, if any, that these payments caused the cooperative since defendants performed valuable services for the cooperative in exchange for the remuneration.

However, summary judgment should not have been granted to plaintiffs with respect to the claims that, by receiving the payments, defendants committed waste and conversion. The essence of a waste claim is “the diversion of corporate assets for improper or unnecessary purposes” (*id.* at 5). To disprove a waste claim, a director who had a personal interest in challenged payments has the burden of showing that they were made in good faith and were fair to the corporation (*id.*; *see also In re Franklin National Bank Securities Litigation*, 2 BR 687, 707 [ED NY 1979], *affd* 633 F2d 203 [2nd Cir 1980] [applying New York law]). In this case, defendants raise issues of fact as to

whether the payments they received, even if unauthorized, were made in good faith for the legitimate purpose of fairly compensating them for their services to the cooperative (*see Aronoff*, 85 AD2d at 4-7).

Plaintiffs are not entitled to summary judgment on their conversion claim for unauthorized payments because their submission failed to establish all the elements of such a claim as a matter of law (*see Republic of Haiti v Duvalier*, 211 AD2d 379, 384 [1995]). The other allegedly converted property, which includes shares of the corporation, is not at issue in this appeal.

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

ENTERED: FEBRUARY 21, 2012

CLERK

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

6237-
6238 In re Jack J. Grynberg, et al.,
Petitioners-Appellants-Respondents,

Index 116840/04

-against-

BP Exploration Operating
Company Limited, et al.,
Respondents-Respondents-Appellants.

____

Law Offices of Daniel L. Abrams, PLLC, New York (Daniel L. Abrams of counsel), for Jack J. Grynberg, appellant-respondent.

Frankfurt Kurnit Klein & Selz, P.C., New York (Ronald C. Minkoff of counsel), for Grynberg Production Corporation (Texas), Inc., Grynberg Production Corporation (Colorado), Inc. and Pricaspian Deveopment Corporation (Texas), appellants-respondents.

Sullivan & Cromwell LLP, New York (John L. Hardiman of counsel), for BP Exploration Operating Company Limited, respondent-appellant.

Emmet, Marvin & Martin, LLP, New York (Kenneth M. Bialo of counsel), for Statoil ASA, respondent-appellant.

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Order and judgment (one paper), Supreme Court, New York County (Jane S. Solomon, J.), entered January 6, 2011, which, to the extent appealed from, granted respondents' motion to confirm Award 2 and Award 4 of the Final Decision and Award in Arbitration and granted the cross motion of petitioner Jack J. Grynberg to vacate Award 11 for sanctions against him, unanimously modified, on the law, to the extent of granting petitioners' cross motion to vacate Award 4 and remanding this matter to the arbitrator for reconsideration of Award 4

consistent with this opinion, and otherwise affirmed, without costs.

The arbitrator's failure to determine the nature of the disputed payment warrants the vacatur of Award 4. Petitioners claim that this payment constituted a bribe. Respondents assert it was a bona fide cost of doing business. We remand for the arbitrator to determine the nature of the payment. Contrary to the arbitrator's finding, deducting a payment intended to be a bribe to a public official is unenforceable as violative of public policy (*see Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 326 [1999]; *Matter of Crosstown Operating Corp. [8910 5th Ave. Rest.]*, 191 AD2d 384 [1993]; Penal Law art 200).

We reject petitioners' argument that the arbitrator was required to hear expert valuation evidence related to Award 2 and deemed important by petitioners; the arbitrator's findings of fact rendered such evidence moot (*New York State Correctional Officers & Police Benevolent Assn.*, 94 NY2d at 326 ["even in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role of overseers to conform the award to their sense of justice"]). Therefore, any failure by the

arbitrator to consider such evidence neither renders the final award incomplete nor constitutes misconduct under CPLR 7511.

The arbitrator's imposition of the $3 million award in sanctions against Jack Grynberg (Award 11) was punitive in nature, regardless of the label attached. Accordingly, the award violated public policy and was properly vacated (*see Garrity v Lyle Stuart, Inc.*, 40 NY2d 354, 356 [1976]; *Matter of MKC Dev. Corp. v Weiss*, 203 AD2d 573, 574 [1994]).

We have considered the parties' remaining contentions and find them unavailing.

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

ENTERED: FEBRUARY 21, 2012

CLERK

Mazzarelli, J.P., Saxe, Catterson, Acosta, Román, JJ.

6623 Rhonda Greenapple, etc., Index 108683/10
Plaintiffs-Appellant,

-against-

Capital One, N.A., etc., et al.,
Defendants,

Goldberg Weprin Finkel Goldstein LLP,
Defendant-Respondent.

____

Law Offices of Allan H. Carlin, New York (Allan H. Carlin of counsel), for appellant.

Goldberg Weprin Finkel Goldstein LLP, New York (Matthew Hearle of counsel), for respondent.

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Order, Supreme Court, New York County (James A. Yates, J.), entered November 29, 2010, which granted the motion of defendant Goldberg Weprin Finkel Goldstein LLP (Goldberg) to dismiss the complaint as against it, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff and defendant Park Madison Associates, LLC (Park) executed a purchase agreement whereby plaintiff agreed to purchase a condominium unit located at 23 East 22nd Street, New York, New York. Park was both the sponsor and the agent for the owners of the condominium. Plaintiff paid a deposit of $104,000, which was held in escrow by Goldberg. Pursuant to the escrow agreement, Goldberg, as the escrow agent, was required to hold

the deposit money in an escrow account "until otherwise directed . . . in a writing signed by both [s]ponsor and purchaser." The purchase agreement also exempted Goldberg from liability in the performance of its duties as escrow agent, "except for [its] own gross negligence or willful misconduct."

Plaintiff sought to rescind the purchase agreement and requested the return of her deposit. Goldberg rejected plaintiff's rescission asserting that the purchase agreement had already been terminated by plaintiff years earlier, at which time Goldberg returned her deposit to Park, which in turn tendered it to plaintiff. In support of its rejection, Goldberg provided plaintiff with a copy of a termination agreement, signed by plaintiff and authorizing the release of plaintiff's deposit to Park. Also annexed to the termination agreement was a general release in Park's favor, to which plaintiff's notarized signature was affixed. Lastly, Goldberg provided a copy of the refund check, made payable to plaintiff and double-endorsed, first by plaintiff, and then by Slazer Enterprises LLC (Slazer), one of the owners of the condominium, for deposit into Slazer's bank account.

Alleging that she never received her deposit, that she never executed the termination agreement and that it was thus a

forgery, plaintiff's complaint states, inter alia, that Goldberg breached the fiduciary duty it owed as her escrow agent by drafting the termination agreement to require delivery of plaintiff's deposit to Park, instead of requiring delivery of her deposit directly to her, and by failing to exercise reasonable care to ensure that the termination agreement was in fact executed by plaintiff prior to delivering her deposit to Park. In addition, plaintiff alleges that Goldberg enabled, aided and abetted Park in a "scheme" to convert her deposit and that Goldberg "intentionally, wantonly, and recklessly disregarded its fiduciary duties."

An escrow agent owes the parties to the transaction a fiduciary duty (*Talansky v Schulman,* 2 AD3d 355, 359 [2003]), and therefore the agent, as a fiduciary, has "a strict obligation to protect the rights of [the] parties" for whom he or she acts as escrowee (*Grinblat v Taubenblat*, 107 AD2d 735, 736 [1985]). Moreover, an escrow agent has a duty not to deliver the monies in escrow except upon strict compliance with the conditions imposed by the controlling agreement (*Farago v Burke*, 262 NY 229, 233 [1933]). Here, insofar as the complaint alleges that Goldberg failed to ensure that the termination agreement and accompanying documents were in fact executed by plaintiff prior to releasing

her deposit, it sufficiently states that Goldberg failed to strictly comply with the conditions imposed by the escrow agreement, which mandated release of the monies only upon a writing signed by the plaintiff. Additionally, notwithstanding that the purchase agreement between plaintiff and Goldberg premises Goldberg's liability only upon demonstration of gross negligence or willful misconduct, the complaint nevertheless states a cause of action for breach of fiduciary duty under this diminished standard of care insofar as it alleges that Goldberg enabled, aided and abetted Park in a scheme to convert plaintiff's deposit by intentionally, wantonly, and recklessly disregarding its fiduciary duties. Since the complaint alleges that Goldberg intentionally participated in the scheme to convert plaintiff's deposit, it sufficiently alleges that Goldberg was grossly negligent (*Colnaghi U.S.A. v Jewelers Protection Servs.,* 81 NY2d 821, 823-824 [1993] [gross negligence is "conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing"] [internal quotation marks omitted]), thereby breaching the duty of trust and loyalty it owed plaintiff as her fiduciary (*Bardach v Chain Bakers, Inc.*, 265 App Div 24, 27 [1942] [as a trustee, an escrow agent owes his fiduciary "the highest kind of loyalty"], *affd* 290 NY 813 [1943]). Hence,

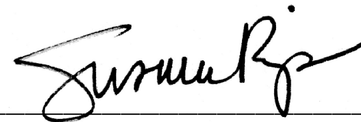
plaintiff’s complaint, the allegations of which on a motion to dismiss we must accept as true (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]), states a cause of action for breach of fiduciary duty. The motion court thus erred in granting Goldberg’s motion to dismiss pursuant to CPLR 3211(a)(7).

The motion court also erred in granting Goldberg’s motion pursuant to CPLR 3211(a)(1) since a pre-answer motion for dismissal based upon documentary evidence should only be granted when “the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Here, the same documents submitted by Goldberg evince that the plaintiff’s signature on the termination agreement varies greatly from her signature on the purchase agreement. Accordingly, Goldberg’s documentary evidence fails to establish that it released plaintiff’s deposit upon a writing actually signed by her. Goldberg thus fails to utterly refute the allegations in plaintiff’s complaint. Moreover, Goldberg’s documentary evidence in no way refutes Goldberg’s participation in a scheme to convert the deposit, and thus fails to establish a

defense to plaintiff's allegation that Goldberg drafted the termination agreement to enable, aid and abet Park in a scheme to convert the deposit.

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

ENTERED: FEBRUARY 21, 2012



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

6719-6720 In re Rodman & Renshaw, LLC, et al., Index 651877/10
Petitioners-Respondents,

-against-

Matthew N. Murray,
Respondent-Appellant.

____

Schlam Stone & Dolan LLP, New York (David J. Katz of counsel), for appellant.

Wilk Auslander LLP, New York (Jay S. Auslander of counsel), for respondents.

____

Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered October 13, 2011, awarding petitioners the total amount of $16,048,447.06, and bringing up for review an order, same court and Justice, entered August 16, 2011, which, in this proceeding brought pursuant to CPLR article 75, granted petitioners' motion to confirm an arbitration award, and denied respondent's cross motion to vacate the award of damages, unanimously affirmed, without costs. Appeal from the August 16, 2011 order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The arbitration award was not marked by manifest disregard of the law, as there was no showing that the arbitrators had ignored or refused to apply a governing legal principle that was

well defined, explicit, and clearly applicable to the case (*see Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 481 [2006]). Nor has respondent established that the award was irrational or violative of a strong public policy (*see Kalyanaram v New York Inst. of Tech.*, 79 AD3d 418, 419 [2010], *lv denied* 17 NY3d 712 [2011]).

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

ENTERED: FEBRUARY 21, 2012

CLERK

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

6847 The People of the State of New York, Ind.1095/09
Respondent,

-against-

Michael Atkins,
Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered September 16, 2009, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of 3½ years, unanimously affirmed.

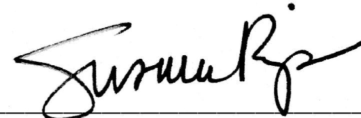
The record establishes the voluntariness of defendant's plea, and the court properly denied defendant's plea withdrawal motion (*see People v Frederick*, 45 NY2d 520 [1978]). During the plea allocution, whenever defendant made a statement creating an ambiguity about the voluntariness of the plea, the court made a further inquiry that established that defendant was pleading

guilty of his own free will. The court made clear to defendant that it was his choice whether to plead guilty or go to trial.

We have considered and rejected defendant's remaining claims.

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

ENTERED: FEBRUARY 21, 2012



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

6848 Ariel Ness, Index 110804/10
Plaintiff-Respondent,

-against-

James B. Fellus,
Defendant-Appellant.

____

Tagliaferro & LoPresti, LLP, New York (Marc X. LoPresti of counsel), for appellant.

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

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Second amended order and judgment (one paper), Supreme Court, New York County (O. Peter Sherwood, J.), entered April 5, 2011, inter alia, awarding plaintiff the principal sum of $500,000, and bringing up for review an order, same court and Justice, entered March 17, 2011, which granted plaintiff’s motion for summary judgment in lieu of complaint, unanimously affirmed, with costs.

Plaintiff established his entitlement to summary judgment by producing the “Loan Note” for $500,000 executed by defendant on May 28, 2008 (Note 1) and demonstrating that defendant failed to pay in accordance with the note’s terms (*see* CPLR 3213; *Wachovia Bank, N.A. v Silverman*, 84 AD3d 611 [2011]). In opposition, defendant failed to present evidence to support his contention

that the repayment obligations of Note 1 were superceded or abrogated by a promissory note for $500,000 executed by defendant's company, Joab Capital, and plaintiff (Note 2) (*see e.g. Hirsch v Rifkin*, 166 AD2d 293 [1990]). The record shows that plaintiff transferred $500,000 to defendant personally after defendant had executed Note 1 and that the transfer predated the execution of Note 2 by at least 10 days and also predated defendant's purchase, using the loan funds, of shares of Jesup Lamont, Inc. (JLI) and the subsequent transfer of those shares to Joab Capital. Moreover, Note 1 provides that "[t]he Borrower agrees to remain fully bound until this note shall be fully paid, notwithstanding any extension, modification or waiver given by the Lender in writing." Defendant offered no evidence that any modification, extension or waiver was given.

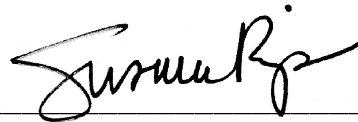
Defendant's argument that the loan under Note 1 was in fact a disguised investment that plaintiff made in JLI, with defendant's assistance in the transaction, is refuted by the documentary evidence, including the language of the two notes and correspondence between the parties.

Defendant also failed to raise an issue of fact whether he signed Note 1 in his personal capacity. There is no indication beneath defendant's signature on Note 1 that he signed in his

corporate capacity (*see e.g. Republic Natl. Bank of N.Y. v GSO Inc.*, 177 AD2d 417 [1991]). Nor can it be gleaned from the note's definition of "Borrower" that defendant signed in a corporate capacity. Indeed, in his affidavit, defendant did not claim to have signed the note in his capacity as a representative of Joab Capital. Moreover, in his May 29, 2008 e-mail to defendant, plaintiff stated that defendant was to sign Note 1 in his personal capacity and to include his home address, and the record shows that plaintiff transferred the $500,000 to defendant in defendant's name and into his personal bank account.

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

ENTERED: FEBRUARY 21, 2012



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

6849 In re Corey Dwayne B.,

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

Dwayne B.,
Respondent-Appellant,

Raquel R.,
Respondent,

Cardinal McClosky Services,
Petitioner-Respondent.

____

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

Geoffrey P. Berman, Larchmont, for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Patricia Colella of counsel), attorney for the child.

____

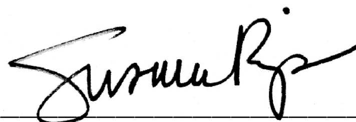
Order of disposition, Family Court, New York County (Jody Adams, J.), entered on or about December 16, 2010, which, to the extent appealed from, determined that respondent father's consent for the adoption of his child was not required, unanimously affirmed, without costs.

The father admitted that he had not provided consistent child support, despite having the means to do so, and had failed to maintain regular visitation or communication with the child or the agency (*see* Domestic Relations Law § 111[1][d],[e]; *Matter of*

Isabella Star G., 66 AD3d 536, 537 [2009]). The agency's alleged failure to inform the father of his parental obligations did not excuse him from fulfilling those obligations (*see Matter of Marc Jaleel G. [Marc E.G.]*, 74 AD3d 689, 690 [2010]).

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

ENTERED: FEBRUARY 21, 2012



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

6852 Margaret Alston, Index 107389/08
Plaintiff-Appellant,

-against-

Zabar's & Co., Inc., etc., et al.,
Defendants-Respondents.

____

Alexander J. Wulwick, New York, for appellant.

Hammill, O'Brien, Croutier, Dempsey, Pender & Koehler, P.C., Syosset (James V. Deegan of counsel), for respondents.

____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered September 2, 2010, which, insofar as appealed from, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants met their initial burden to demonstrate their entitlement to judgment as a matter of law by submitting plaintiff's deposition testimony stating that she did not know what caused her fall and did not observe anything on the floor before or after the accident (*see Raghu v New York City Hous. Auth.*, 72 AD3d 480, 482 [2010]; *Reed v Piran Realty Corp.*, 30 AD3d 319, 320 [2006], *lv denied* 8 NY3d 801 [2007]).

Plaintiff failed to meet her burden to raise a triable issue of fact. The affidavit by an expert engineer was insufficient to raise a question of fact as to whether the combination of the

slope of the floor and the coefficient of friction on parts of the floor lacking anti-slip strips caused the accident, given that the expert failed to establish that plaintiff was walking on an area without the strips immediately prior to the accident (*see Sarmiento v C & E Assoc.*, 40 AD3d 524, 526-527 [2007]; *Sanders v Morris Hgts. Mews Assoc.*, 69 AD3d 432 [2010]). Moreover, the expert's affidavit failed to show that the condition of the accident site at the time of the examination was the same as at the time of the accident (*see Santiago v United Artists Communications*, 263 AD2d 407, 407-408 [1999]).

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

ENTERED: FEBRUARY 21, 2012

CLERK

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

6853 The People of the State of New York, Ind. 4596/06
Respondent,

-against-

Walter Cates, Sr.,
Defendant-Appellant.

____

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

Walter Cates, Sr., appellant pro se.

Robert T. Johnson, District Attorney, Bronx (Thomas R. Villecco of counsel) for respondent.

____

Judgment, Supreme Court, Bronx County (John W. Carter, J.), rendered June 10, 2009, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

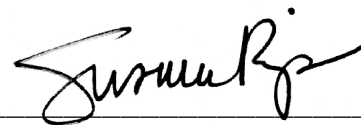
The court properly declined to charge assault in the third degree as a lesser included offense since there was no reasonable view of the evidence, viewed in a light most favorable to defendant, that he was guilty of that charge but not of either murder or manslaughter. Nothing in either the People’s case or defendant’s testimony supported a theory that defendant participated in the vicious beating of the victim, but was merely a bystander to the victim’s immediately ensuing death by

strangulation (*see People v Martinez*, 30 AD3d 353 [2006], *lv denied* 7 NY3d 868 [2006]). Under the evidence, defendant either acted with a community of purpose with the other participants throughout the incident, or he did not participate at all and was not guilty of any crime (*see e.g. People v White*, 29 AD3d 457 [2006], *lv denied* 7 NY3d 819 [2006]).

Defendant's pro se ineffective assistance of counsel claims are unreviewable on direct appeal for lack of a sufficient record (*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]; *Strickland v Washington*, 466 US 668 [1984]). Defendant's remaining pro se claims are without merit.

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

ENTERED: FEBRUARY 21, 2012



CLERK

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

6854-
6855 Daniel Peralta, et al.,
Plaintiffs-Respondents,

Index 310518/08

-against-

The City of New York,
Defendant-Appellant,

P.O. Maurice Harrington, etc., et al.,
Defendants.

____

Michael A. Cardozo, Corporation Counsel, New York (Jane L. Gordon of counsel), for appellant.

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

____

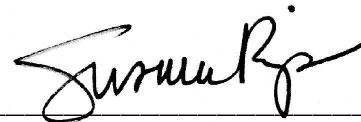
Appeal from order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered June 22, 2010, which, to the extent appealed from as limited by the briefs, denied the motion of defendant City of New York to dismiss plaintiffs' claim pursuant to 42 USC § 1983, unanimously dismissed, without costs, as untimely.

In its motion papers for reargument of the order denying its motion to dismiss, the City included a copy of the order appealed from, stamped with the date of its entry, and an affirmation by an attorney in support of the motion which referred to the enclosed order. This was sufficient to trigger the 30-day period

to take an appeal for both parties (CPLR 5513[a]; *see Norstar Bank of Upstate NY v Office Control Sys.*, 78 NY2d 1110 [1991]; *Matter of Xander Corp. v Haberman*, 41 AD3d 489, 490 [2007]; *compare Matter of Reynolds v Dustman*, 1 NY3d 559 [2003]).

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

ENTERED: FEBRUARY 21, 2012



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CORRECTED ORDER - FEBRUARY 27, 2012

Andrias, J.P., Saxe, Freedman, Richter, JJ.

6856 GCP Capital Group LLC, Index 102879/08
Plaintiff-Appellant,

-against-

Monday Properties Investments,
LLC, et al.,
Defendants-Respondents.

Goetz Fitzpatrick LLP, New York (Howard M. Rubin of counsel) for appellant.

Schulte Roth & Zabel LLP, New York (Robert M. Abrahams of counsel) for respondents.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered December 9, 2010, which granted defendants' motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for summary judgment, unanimously affirmed, with costs.

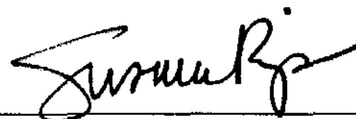
Plaintiff failed to sustain its burden of showing that the condition precedent in the parties' letter agreement was prevented or rendered impossible by defendants in order to avoid liability to plaintiff (*see Creighton v Milbauer*, 191 AD2d 162, 165 [1993]; *cf. North40RE Realty v Bishop*, 2 AD3d 1184 [2003]). On the contrary, the record presented no issue of fact as to whether defendants acted in bad faith to frustrate the parties'

agreement. Further, the record presents no issue of fact as to whether defendants frustrated plaintiff's efforts to consummate a transaction. Rather, the record shows that any deal between plaintiff and the party ultimately providing preferred equity financing came about as a result of a third party's efforts in obtaining financing for the transaction at issue, and that plaintiff had no role in that transaction. Moreover the deal that was ultimately struck concerning the ownership of 230 Park Avenue differed substantially from the one that formed the basis of the letter agreement between the parties. Consequently, the IAS court properly granted summary judgment to defendants.

Plaintiff's remaining contentions are either unpreserved or unavailing.

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

ENTERED: FEBRUARY 21, 2012



CLERK

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

6857-
6858 Amy Stuart Wells, Index 310427/09
Plaintiff-Respondent,

-against-

Todd W. Serman,
Defendant-Appellant.

____

Todd W. Serman, New York, appellant pro se.

Adam Richards LLC, New York (Adam Richards of counsel), for respondent.

____

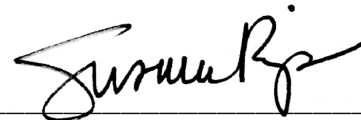
Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered October 15, 2010, which granted plaintiff's motion for an award of interim counsel fees in the amount of $17,850, unanimously reversed, on the law, without costs, and the motion denied. Appeal from order, same court and Justice, entered January 3, 2011, which denied defendant's motion to renew and reargue, unanimously dismissed, without costs, as academic.

Supreme Court's award of interim counsel fees to plaintiff, the monied spouse, based solely on defendant's conduct in

delaying the litigation, was improper under Domestic Relations Law § 237. An award of counsel fees under DRL § 237 cannot be made merely to punish a party for claimed discovery delays or for seeking a jury trial on grounds (*see Silverman v Silverman*, 304 AD2d 41, 47-48 [2003]).

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

ENTERED: FEBRUARY 21, 2012



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

6859 The People of the State of New York, Ind. 152/10
Respondent,

-against-

Randy Vasquez,
Defendant-Appellant.

____

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

____

Judgment, Supreme Court, New York County (Daniel FitzGerald, J.), rendered on or about February 11, 2010, unanimously affirmed.

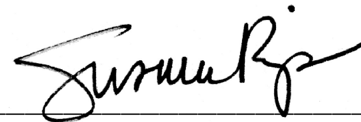
Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

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

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

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

ENTERED: FEBRUARY 21, 2012



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

6860 In re Christina M.,

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

Daniel R. Katz, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for Presentment Agency.

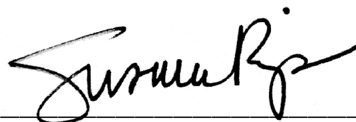
Order of disposition, Family Court, Bronx County (Nancy M. Bannon, J.), entered on or about October 6, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed acts that, if committed by an adult, would constitute the crimes of robbery in the second degree, grand larceny in the fourth degree, criminal possession of stolen property in the fifth degree, and menacing in the third degree, and placed her on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion when it denied appellant's request for an adjournment in contemplation of dismissal, and instead adjudicated her a juvenile delinquent and placed her on probation. The court adopted the least restrictive dispositional alternative consistent with appellant's needs and

those of the community (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). The seriousness of the offenses and appellant's poor school attendance record justified a longer period of supervision than an ACD would have provided.

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

ENTERED: FEBRUARY 21, 2012



CLERK

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

6865 The People of the State of New York, Ind. 3833/08
Respondent,

-against-

Harold Taylor,
Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered December 16, 2008, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 23 years to life, unanimously affirmed.

The court was not obligated, sua sponte, to order a CPL article 730 examination (*see Pate v Robinson*, 383 US 375 [1966]; *People v Tortorici*, 92 NY2d 757 [1999], *cert denied* 528 US 834 [1999]; *People v Morgan*, 87 NY2d 878 [1995]). Although, at times, defendant engaged in obnoxious behavior and made outrageous statements, he did not manifest an inability to understand the proceedings or assist in his defense. Defendant was generally lucid and took an active role in his defense (*see e.g. People v Mendez*, 306 AD2d 143 [2003], *lv denied* 100 NY2d 622

[2003]). Furthermore, the court ordered a psychiatric examination in aid of sentencing. Although this was not an article 730 competency examination, the psychiatrist's report did not raise any doubts about defendant's competency.

The court conducted a sufficient inquiry into defendant's motion for assignment of substitute counsel and the assigned counsel's motion to be relieved. Although a more detailed inquiry would have been the best practice, the court accorded both defendant and his counsel a suitable opportunity to address the issue, and properly concluded that there was no good cause for a substitution. A defendant's "unjustified hostility toward his counsel" does not require substitution, nor does an "artificial conflict" created by a defendant who files meritless complaints against counsel (*People v Walton*, 14 AD3d 419, 420 [2005], *lv denied* 5 NY3d 796 [2005]).

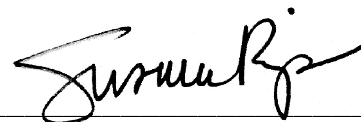
The court properly declined to charge justification since there was no reasonable view of the evidence, when viewed most favorably to defendant, to support that defense (*see People v Goetz*, 68 NY2d 96, 105-106 [1986]; *People v Watts*, 57 NY2d 299, 301 [1982]). Defendant asked for a charge on the use of deadly force to prevent the commission of a robbery (*see* Penal Law § 35.15[2][b]). In the first place, the evidence established that

the unarmed deceased attempted, at most, to commit a nonforcible larceny. In any event, at the time defendant stabbed the deceased 16 times, the deceased had been knocked to the ground and posed no immediate threat.

After a proper inquiry, the court properly exercised its discretion in denying defendant's request to replace a sworn juror who had a conversation about her jury service with a colleague who was a former assistant district attorney. The court properly determined that the juror, who gave unequivocal assurances of her impartiality, was fit to continue serving and to render a fair verdict. The juror did not have a relationship with the prosecution that would create an implied bias (*see People v Furey*, __NY3d__, 2011 NY Slip Op 9000 [2011]). Since the juror did not discuss anything about the facts of the case with her colleague, there was no misconduct serious enough to require disqualification (*see e.g. People v Gordon*, 11 AD3d 342 [2004], *lv denied* 4 NY3d 744 [2004]).

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

ENTERED: FEBRUARY 21, 2012



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

6867 Harry Dubin, Index 350528/04
Plaintiff-Appellant,

-against-

Aviva (Dubin) Drescher,
Defendant-Respondent.

____

Law Offices of Pamela A. Phillips, New York (Pamela A. Phillips of counsel), for appellant.

Chemtob Moss Forman & Talbert, LLP, New York (Susan M. Moss of counsel), for respondent.

____

Order and judgment (one paper), Supreme Court, New York County (Matthew F. Cooper, J.), entered April 18, 2011, to the extent appealed from, adjudging plaintiff guilty of contempt of court for having willfully disobeyed the settlement agreement and the judgment of divorce by failing to pay basic child support and additional expenses in the amount of $143,705 as directed, and ordering that he be incarcerated for a maximum of 90 days if he fails to make an initial payment of $80,000 to defendant within 30 days, and that he pay $10,000 per month, after the initial payment is made, until the balance is paid, unanimously modified, on the law, to reduce the payment owing from $143,705 to $99,955, and otherwise affirmed, without costs.

Plaintiff failed to establish his inability to pay the basic

child support he owes (*see Matter of Powers v Powers*, 86 NY2d 63, 69-70 [1995]). He did not show that he has suffered a diminution in his lifestyle (*see id.*). He did not show that he has made reasonable efforts to obtain gainful employment (*see Matter of Maria T. v Kwame A.*, 35 AD3d 239 [2006]).

However, calculating plaintiff's support obligations based on his actual income, pursuant to the settlement agreement, we find that the amount due to defendant, including certain reimbursed expenses, is $99,955. The contract does not provide that plaintiff's support obligations will not be readjusted if he fails to provide defendant with the documentation necessary to determine his income, and we may not rewrite the contract so to provide (*see Fiore v Fiore*, 46 NY2d 971 [1979]. Moreover, our construction is consistent with the parties' conduct (*see Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42, 47 [1956]).

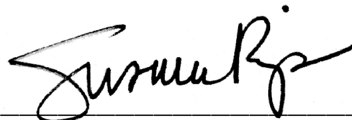
As the record demonstrates that defendant has been prejudiced by plaintiff's failure to pay his support obligations for approximately three years and that she is otherwise without

recourse to collect the amount owed, we find that the pay-off schedule directed by the court was reasonable.

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 21, 2012



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