SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 13, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Andrias, J.P., Nardelli, McGuire, Acosta, DeGrasse, JJ.

345 Alixandra C. Baker, et al., Plaintiffs-Appellants, Index 106380/02

-against-

16 Sutton Place Apartment Corporation, Defendant-Respondent.

Chadbourne & Parke LLP, New York (Elizabeth M. Miller of counsel), for appellants.

Braverman & Associates, P.C., New York (Scott S. Greenspun of counsel), for respondent.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered February 27, 2008, which denied plaintiffs' motion for a permanent injunction and granted defendant's cross motion for summary judgment dismissing the complaint, unanimously modified, on the law, to deny defendant's cross motion, and otherwise affirmed, with costs.

Plaintiffs, the tenants-shareholders of a penthouse apartment in defendant cooperative's residential building, seek an injunction precluding defendant from utilizing the common-area roof as a garden. Plaintiffs' apartment, which is on the building's lower roof, includes a terrace that is adjacent to, and wraps around, the apartment itself; the upper common-area

roof overlooks plaintiffs' terrace. In support of their motion, plaintiffs rely on paragraph 7 of article I of the proprietary lease (paragraph 7), as well as certain Building Rules and Regulations. Paragraph 7 states, in relevant part, "Lessor shall have the right to erect equipment on the roof, including radio and television aerials and antennas, for its use and the use of the lessees in the Building and shall have the right of access thereto for such installations and for the maintenance and repair thereof." According to plaintiffs, the specific grant of these two rights -- the right to erect equipment and the related right of access -- unambiguously excludes other rights, including any right of defendant to maintain a garden on the upper roof. Plaintiffs argue that this conclusion is required by the well-settled interpretive precept "*inclusio unius est exclusio alterius*" (*see Two Guys from Harrison -- N.Y. v S.F.R. Realty Assoc.*, 63 NY2d 396, 404 [1984]), and that even if paragraph 7 were ambiguous, it should be construed against defendant as the drafter of the lease (*see Uribe v Merchants Bank of N.Y.*, 91 NY2d 336, 341 [1998]).

Defendant argues that paragraph 7 regulates the rights of shareholders to use terraces, balconies and portions of the roof adjoining their apartments, not the common areas of the upper roof. It further argues that even if paragraph 7 does apply to the upper roof, it does not state that erecting equipment is the

only permitted use.

Paragraph 7 does not unambiguously support either side. With respect to defendant's position, the contention that paragraph 7 does not address the common roof areas is refuted by the plain language above-quoted. Other provisions of paragraph 7 do address the rights of shareholders to use terraces, balconies and "portion[s] of the roof adjoining" their apartments, but the quoted language, which refers simply to "the roof," clearly grants rights to defendant relating to the common roof; defendant's fall-back position renders the quoted language surplusage (*see Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007] ["A reading of the contract should not render any portion meaningless"]). After all, defendant would enjoy the same broad right to erect equipment and the same right of access if the provision were not in the lease.

Defendant's reliance on Building Rule and Regulation 14 is misplaced. Indeed, Rule 14 is irrelevant, because it purports only to prohibit shareholders from placing "planting beds . . . boxes or planting containers . . . on roof or penthouse terraces or balconies except . . . in accordance with the terms of a special written agreement with the Lessor."

Nor are plaintiffs entitled to summary judgment. Because the parties may have intended the quoted language to play the limited office of emphasizing the specified rights, we should not

be quick to conclude that paragraph 7 impliedly excludes all other uses of the upper roof (*see Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). Nor should this ambiguity be construed against defendant as the drafter of the lease without the aid of extrinsic evidence. We note, too, that a permanent injunction would appear to be unwarranted if defendant could defeat plaintiffs' claim by amending paragraph 7 (a subject about which we express no opinion). In any event, because the provision is ambiguous, the parties should be permitted to introduce extrinsic proof bearing on its intended meaning (*Evans v Famous Music Corp.*, 1 NY3d 452, 459 [2004]).

With regard to plaintiffs' argument that because they are the sole residents of the top floor, permitting other residents to utilize the hallway leading to their apartment to reach the proposed roof garden would violate Building Rule and Regulation 1, which limits the use of the hallways to ingress and egress from apartments, and interfere with their license, pursuant to Rule 8, to decorate and maintain the hallway, by causing "unreasonable wear and tear" to the improvements they made to the

hallway, they fail to establish that they are entitled to the exclusive use of the hallway or that their license to decorate would be infringed by permitting others access to the hallway.

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

ENTERED: APRIL 13, 2010

CLERK

Tom, J.P., Friedman, Moskowitz, Freedman, Abdus-Salaam, JJ.

1510 Vincenzo Ferriolo, Index 105667/04
Plaintiff-Appellant,

-against-

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

Decolator, Cohen & DiPrisco, LLP, Garden City (Joseph L. Decolator of counsel), for appellant.

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

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered March 11, 2008, which, upon reargument, granted defendants' motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for summary judgment on his cause of action pursuant to General Municipal Law § 205-e, unanimously affirmed, without costs.

Plaintiff was present in the precinct locker room when defendant Gian, a fellow police officer, accidentally discharged his Sig Sauer 9 mm semiautomatic weapon. Plaintiff's femur was shattered. Gian was in the process of moving his gun from his locker to a storage locker for inventory purposes. Plaintiff was donning his uniform before beginning his tour of duty and conversing with another officer when the gun went off.

Inasmuch as Gian was moving his weapon to a different location as part of his police duties, plaintiff's exposure to

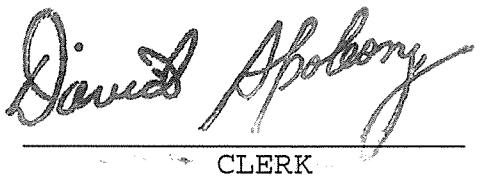
the risk of injury was occasioned by the performance of police duties by his fellow officer. Had plaintiff not been about to commence his tour of duty as a police officer, he would not have been in the precinct locker room changing into his uniform, and he would not have been injured by the discharge of Gian's weapon. Thus, plaintiff's common-law negligence claim is barred by the "firefighter rule" (General Obligations Law § 11-106[1]; *Wadler v City of New York*, ___ NY3d ___, 2010 NY Slip Op 01373 [2010]).

The motion court correctly dismissed plaintiff's General Municipal Law § 205-e cause of action predicated upon alleged violations of the Penal Law and the Labor Law. No criminal charges were brought against Gian, and plaintiff failed to come forward with compelling evidence that Gian's conduct was criminally negligent or criminally reckless so as to overcome the presumption that the Penal Law had not been violated (*see Williams v City of New York*, 2 NY3d 352, 366-367 [2004]). Nor was plaintiff's injury the type of workplace injury contemplated by Labor Law § 27-a (*see id.* at 367-368).

The decision and order of this Court entered herein on November 19, 2009 (67 AD3d 556) is hereby recalled and vacated (see M-5631, decided simultaneously herewith).

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

ENTERED: APRIL 13, 2010



CLERK

Andrias, J.P., Nardelli, Catterson, DeGrasse, Manzanet-Daniels, JJ.

2290 Shareen Sukram, Index 23500/04
Plaintiff-Appellant,

-against-

Anjost Corporation, et al.,
Defendants-Respondents.

Weiss & Rosenbloom, P.C., New York (Barry D. Weiss of counsel), for appellant.

Venable LLP, New York (Shaffin A. Datoo of counsel), for respondents.

Order, Supreme Court, Bronx County (Alan Saks, J.), entered on January 29, 2009, which granted defendants' motion for summary judgment dismissing the complaint alleging claims of unlawful discrimination due to sexual harassment and retaliatory firing, unanimously reversed, on the law, without costs, the motion denied, and the complaint reinstated.

Inasmuch as there are triable issues of fact as to, inter alia, whether defendants knew of their senior manager's acts of sexual harassment, the extent of such conduct, and whether they encouraged or condoned it (*see Clayton v Best Buy Co. Inc.*, 48 AD3d 277 [2008]), the grant of summary judgment dismissing the claims of unlawful discrimination under both the New York State Human Rights Law and the New York City Human Rights Law was not warranted.

Consequently, since disposition of the discrimination claims

must await adjudication by a factfinder, dismissal of the claims of unlawful retaliatory discharge from employment under both the State and City Human Rights Law was also precluded. In any event, the circumstances surrounding the alleged unlawful discharge present their own unique questions, including whether the reasons given by defendants were pretextual, that cannot be resolved on this record.

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

ENTERED: APRIL 13, 2010

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Freedman, Román, JJ.

2525-
2526-
2527 The People of the State of New York, Ind. 3998/06
Respondent,

-against-

Benjamin Santiago,
Defendant-Appellant.

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

Benjamin Santiago, appellant pro se.

Robert M. Morgenthau, District Attorney, New York (Philip J. Morrow of counsel), for respondent.

Judgment, Supreme Court, New York County (James A. Yates, J.), rendered June 26, 2007, as amended August 24, 2007, convicting defendant, after a jury trial, of robbery in the first and third degrees and criminal possession of a weapon in the third degree, and sentencing him, as a second violent felony offender, to an aggregate term of 13 years, and order, same court and Justice, entered on or about October 17, 2008, which denied defendant's CPL 440.10 motion to vacate the judgment, 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, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility, including its

resolution of inconsistencies in testimony. The credible evidence established that defendant used force to retain stolen merchandise.

The court properly denied defendant's motion to dismiss the indictment. In that motion, defendant claimed he was deprived of his right to testify before the grand jury, and that his attorney rendered ineffective assistance by disregarding defendant's desire to so testify. Even assuming the facts to be as defendant claims, this case is indistinguishable from *People v Simmons* (10 NY3d 946 [2008]), where "defendant failed to establish that he was prejudiced by the failure of his attorney to effectuate his appearance before the grand jury. Significantly, there is no claim that had he testified in the grand jury, the outcome would have been different" (*id.* at 949). On appeal, defendant offers no claim of prejudice except that his counsel relinquished defendant's purportedly personal right to testify before the grand jury. This argument incorrectly equates the right to testify before the grand jury with the right to testify at trial, and essentially argues for the type of per se rule that *Simmons*, as well as *People v Wiggins* (89 NY2d 872 [1996]) declined to adopt (*see People v Moore*, 61 AD3d 494 [2009], *lv denied* 12 NY3d 918 [2009]; *People v Cox*, 19 Misc 3d 1129[A], 2007 NY Slip Op 52553[U] [Sup Ct, NY County 2007]).

The court properly exercised its discretion in denying

defendant's CPL 440 motion without holding a hearing, since the trial record and defendant's submissions on the motion were sufficient to establish that the motion was without merit (*see* CPL 440.30[2]; *People v Satterfield*, 66 NY2d 796, 799-800 [1985]; *People v Jon*, 26 AD3d 245 [2006], *lv denied* 6 NY3d 849 [2006]).

We have considered and rejected defendant's pro se arguments.

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

ENTERED: APRIL 13, 2010

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Freedman, Román, JJ.

2528-
2528A Marguerite Acito, Index 5678/03
Plaintiff-Respondent,

-against-

Thomas Acito,
Defendant-Appellant.

Frank T. D'Onofrio, Jr., Scarsdale, for appellant.

Coyle & Associates, LLP, Bronx (Lorraine Coyle of counsel), for respondent.

Amended order, Supreme Court, Bronx County (Ellen Gesmer, J.), entered March 10, 2009, which granted plaintiff's motion to dismiss this divorce action based on the death of defendant and denied the temporary administrator's cross motion for an order substituting the decedent's estate as party defendant and entering judgment of divorce nunc pro tunc, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about January 7, 2009, unanimously dismissed, without costs, as superseded by the amended order.

Although the cross movant, defendant's son, is a nonparty in this divorce action, he is aggrieved by the denial of his cross motion, and thus has standing to prosecute this appeal (*Ricatto v Ricatto*, 4 AD3d 514, 515 [2004]). Nevertheless, the court properly dismissed this action, since a divorce action abates upon the death of one of the parties, unless the court has made a

final adjudication of divorce but has not performed "the mere ministerial act of entering the final judgment" (*Cornell v Cornell*, 7 NY2d 164, 170 [1959]). Here it cannot be said that little or nothing remained to be done before entry of judgment. On the contrary, the IAS court had indicated that a final judgment would not be signed and entered until the parties' stipulation of settlement was approved by the guardianship court. Since that approval was not obtained before defendant's death, the divorce action abated and judgment of divorce could not be entered nunc pro tunc based on the stipulation. At that point, the question of substitution became moot.

Contrary to the cross movant's contention, the so-ordered stipulation was not binding on the guardianship court. Indeed, that court had a duty to review and approve any settlement made in the divorce action, for the purpose of determining, among other things, whether it was in the best interests of the allegedly incapacitated person (*see* Mental Hygiene Law § 81.21[d], [e]). Defendant's death did not immediately abate the necessity for the guardianship court's approval. Indeed, a guardian's powers and the guardianship court's supervision may under certain circumstances continue even after the incapacitated person's death (*see e.g. Matter of Rose BB*, 262 AD2d 805, 807 [1999], *appeal and lv dismissed* 93 NY2d 1039 [1999]; *Matter of Saphier*, 167 Misc 2d 130 [1995]).

Although an acknowledgment is not required to enforce a written stipulation of settlement subscribed by the parties and so ordered by the court (*see Sanders v Copley*, 151 AD2d 350 [1989]), the stipulation is not binding because it was never approved by the guardianship court. Contrary to the cross movant's contention, equity does not require this or any other court to determine the validity of the stipulation.

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

ENTERED: APRIL 13, 2010

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Freedman, Román, JJ.

2529 Christopher I. Georgakis, Index 650322/08
Plaintiff-Respondent,

-against-

Excel Maritime Carriers Ltd.,
Defendant-Appellant,

NYSE Euronext,
Amicus Curiae.

Friedman Kaplan Seiler & Adelman LLP, New York (Edward A. Friedman of counsel), for appellant.

Brown Gavalas & Fromm LLP, New York (Peter Skoufalos of counsel), for respondent.

Milbank, Tweed, Hadley & McCloy, LLP, New York (Douglas W. Henkin of counsel), for amicus curiae.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered October 28, 2009, which denied defendant's motion to dismiss the complaint for lack of personal jurisdiction or on the ground of forum non conveniens, unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Even assuming that defendant transacted business in New York, CPLR 302(a)(1) does not authorize the courts to exercise jurisdiction over it, because there is no relationship between defendant's transaction of business and plaintiff's claims

against defendant (*see Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]; *Holness v Maritime Overseas Corp.*, 251 AD2d 220, 224 [1998]).

In any event, we find that New York is not a convenient forum for this litigation between a foreign corporation and its former CEO, in which both parties are residents of Greece, which arose from conduct occurring principally in Greece, and in which the bulk of the witnesses and evidence needed by defendant to defend the action are located in Greece (*see Gonzalez v Victoria Lebensversicherung AG*, 304 AD2d 427 [2003], *lv denied* 1 NY3d 506 [2004]; *Holness v Maritime Overseas Corp.*, 251 AD2d 220, 224 [1998]; *Blueye Nav. v Den Norske Bank*, 239 AD2d 192 [1997]).

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

ENTERED: APRIL 13, 2010

David Apolony

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Freedman, Román, JJ.

2530 The People of the State of New York, Ind. 3135/07
Respondent,

-against-

Dennis Mendoza,
Defendant-Appellant.

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

Order, Supreme Court, New York County (Charles H. Solomon, J.), rendered on or about April 14, 2009, unanimously affirmed, without costs.

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: APRIL 13, 2010

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Freedman, Román, JJ.

2532 In re Metropolitan Steel Industries, Inc., Petitioner-Respondent, Index 112051/08

-against-

Dormitory Authority State of New York, et al., Respondents-Appellants.

Michael A. Cardozo, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for Dormitory Authority State of New York, appellant.

Goetz Fitzpatrick LLP, New York (John B. Simoni, Jr. of counsel), for Les Constructions Beauce-Atlas, Inc., appellant.

Milber Makris Plousadis & Seiden, LLP, White Plains (Leonardo D'Alessandro of counsel), for respondent.

Appeal from order, Supreme Court, New York County (Eileen A. Rakower, J.), entered October 27, 2008, which vacated respondent Dormitory Authority's acceptance of the bid from respondent Les Construction Beauce-Atlas, unanimously dismissed, without costs, as moot.

Subsequent to the order appealed from, the Dormitory Authority awarded the contract to petitioner, which has since completed the work. Any exception to the mootness doctrine requires "(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or

important questions not previously passed on" (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]). The Dormitory Authority has satisfied the second requirement, and petitioner does not contest the third. However, neither respondent has presented facts showing a likelihood of repetition.

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

ENTERED: APRIL 13, 2010

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Freedman, Román, JJ.

2534 The People of the State of New York, Ind. 6307/07
Respondent,

-against-

Carlos Hernandez,
Defendant-Appellant.

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

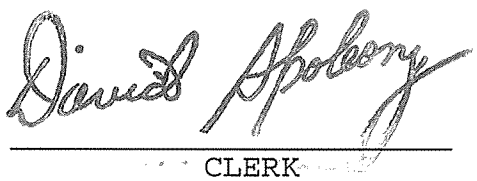
Cyrus R. Vance, Jr., District Attorney, New York (Matthew C. Williams of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Rena K. Uviller, J.), rendered on or about November 26, 2008,

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

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

ENTERED: APRIL 13, 2010



CLERK

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

Mazzarelli, J.P., Sweeny, Renwick, Freedman, Román, JJ.

2535 Michael F. Vukovich, Index 115989/05
Plaintiff-Appellant,

-against-

1345 Fee LLC, et al.,
Defendants-Respondents.

Lefkowitz, Hogan & Cassell, LLP, Jericho (Shaun K. Hogan of counsel), for appellant.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Denis Farrell of counsel), for 1345 Fee LLC, Alliance Capital Management Corporation, Alliance Capital Management L.P., Alliance Capital Management Holding LP., 1345 Leasehold, LLC and Plaza Construction Corp., respondents.

Shaub Ahmuty Citrin & Spratt LLP, Lake Success (Robert M. Ortiz of counsel), for ADCO Electrical Corp., respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered September 1, 2009, which, after a jury verdict in plaintiff's favor, granted the motion by defendant ADCO Electrical to set aside the awards for past and future pain and suffering and lost earnings only to the extent of granting a new trial solely as to the future awards, unless plaintiff stipulated to a reduction of such damages from $1,661,000 to $1 million for future pain and suffering, and from $2,103,249 to $1 million for future loss of earnings, unanimously affirmed, without costs.

Plaintiff, who was 49 years old at the time of the accident and 53 when the trial took place, suffered head, neck and back injuries as the result of a fall from a ladder, precipitated by

an electrical shock he received when the nape of his neck came into contract with live, uncapped electrical wires protruding from an open junction box. The measure of damages awarded for personal injury is primarily a question for the jury, which is entitled to great deference based on its evaluation of the evidence, including conflicting expert testimony. However, a court may review a jury's award for pain and suffering to ascertain whether it deviates materially from what would be considered reasonable compensation under the circumstances (CPLR 5501[c]), and for lost earnings to determine if it was established with the requisite reasonable certainty (*see Behrens v Metropolitan Opera Assn., Inc.*, 18 AD3d 47, 51 [2005]).

The evidence presented at trial reveals that while this accident aggravated preexisting degenerative conditions, the two surgical procedures performed on plaintiff took place within a week of one another so as to minimize the recovery time and were largely successful in alleviating, albeit not eliminating, his symptoms; that another surgery was contemplated in the future; that he would need to continue undergoing physical therapy and take various anti-inflammatory muscle-relaxant and pain medication; and that he could no longer carry out manual labor, although he would not be precluded from performing sedentary work. The reduction of the jury's award was proper, since the award deviated from reasonable compensation under the

circumstances (*see Perez v Creations Assoc., L.P.*, 11 AD3d 328 [2004]).

As to the award for future lost earnings, plaintiff's economist projected this claim by presuming plaintiff would work as a steamfitter 50 weeks a year for another 12 years, under the collective bargaining agreement negotiated by Local 638 of the Steamfitters Union, while ignoring the fact that plaintiff had actually been working, both before and after the accident, through Local 355 of the Services Workers Union, at wages substantially less than those available through Local 638. This economic analysis utilized the higher wages and benefits available from Local 638, applying a growth rate of 3.5% per year through plaintiff's anticipated retirement at age 65, and assumed that he would work 35 hours per week (1,750 hours each year), notwithstanding testimony from the vice president of Local 638 that a steamfitter is lucky to work even 1,700 hours per year. This estimate, predicated on various assumptions that lacked any

evidentiary support, was unduly inflated, and thus justified the court's reduction of the jury's award.

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

ENTERED: APRIL 13, 2010

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Freedman, Román, JJ.

2536-
2536A Gilbert Lau, Index 120300/03
Plaintiff-Appellant,

-against-

S&M Enterprises, et al.,
Defendants-Respondents.

Gilbert Lau, appellant pro se.

Rizpah A. Morrow, New York, for respondents.

Order, Supreme Court, New York County (Harold B. Beeler, J.), entered on or about August 2, 2004, which denied plaintiff's motion to disqualify defendants' counsel, and order, same court and Justice, entered May 9, 2005, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff, a rent-controlled tenant in a building owned by defendant S&M Enterprises, brought this action for intentional and negligent infliction of emotional distress, alleging that defendants were aware that he suffered from mental illness when they instituted several allegedly unfounded summary proceedings against him.

The court properly denied plaintiff's motion to disqualify defendants' counsel, codefendant Morrow, as plaintiff failed to show that counsel's testimony would be necessary (*Davin v JMAM, LLC*, 27 AD3d 371 [2006]), or that his representation created a

conflict of interest (*Horn v Municipal Info. Servs.*, 282 AD2d 712 [2001]).

As to the summary dismissal, the elements of a claim for intentional infliction of emotional distress are (i) extreme and outrageous conduct, (ii) an intent to cause -- or disregard of a substantial probability of causing -- severe emotional distress, (iii) a causal connection between the conduct and the injury, and (iv) the resultant severe emotional distress (*Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]). The existence of extreme and outrageous conduct is also a necessary element for a claim of negligent infliction of emotional distress (*see Berrios v Our Lady of Mercy Med. Ctr.*, 20 AD3d 361, 362 [2005]).

The record established that the summary holdover proceedings brought against plaintiff, which arose out of persistent unsanitary conditions and multiple floods emanating from his apartment, were not unfounded. Defendants' conduct did not approach the threshold of outrageousness needed to support a cause of action for intentional or negligent infliction of emotional distress (*id.*; *see also Tartaro v Allstate Indem. Co.*, 56 AD3d 758, 759 [2008]).

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

ENTERED: APRIL 13, 2010

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Freedman, Román, JJ.

2537 Guadalupe Alamo, Index 301876/08
Plaintiff-Respondent,

-against-

Citident, Inc., et al.,
Defendants,

Patricia Phipps, D.D.S., D.M.D., et al.,
Defendants-Appellants.

Cuomo LLC, New York (Sherri A. Jayson of counsel), for appellants.

Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered December 26, 2008, which, to the extent appealed from, granted plaintiff's cross motion for leave to serve a supplemental summons and amended complaint upon defendant Phipps, unanimously affirmed, without costs.

For purposes of the statute of limitations, defendant dentist was united in interest with the timely-served defendant dental practice (CPLR 203[c]). Contrary to defendant Dr. Phipps' argument, the language of § 203(c) and its interpretive case law does not limit applicability of the unity-of-interest rule to new defendants who are sought to be added to an action after expiration of the applicable statute of limitations (*see e.g. Rahi v Fang*, 245 AD2d 13 [1997]; *Grossman v New York City Health & Hosps. Corp.*, 178 AD2d 323 [1991]). Furthermore, plaintiff met her burden of satisfying the three conditions for "relating back"

associated with application of the unity-of-interest rule (*see generally Buran v Coupal*, 87 NY2d 173 [1995]). Dr. Phipps acknowledges that the dental malpractice claims arose from her treatment of plaintiff at defendants' dental office, and that vicarious liability serves as the predominant basis for holding the corporate defendants liable in this action (*see generally Grossman*, 178 AD2d at 324-325). By reason of the united-in-interest relationship she shares with the corporate defendants, Dr. Phipps, who does not personally deny awareness of this action, can be charged with notice of its initiation, notwithstanding that she was no longer in the corporate defendants' employ when they were timely served with pleadings (*see e.g. Scheff v St. John's Episcopal Hosp.*, 115 AD2d 532, 534-535 [1985]).

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

ENTERED: APRIL 13, 2010

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Freedman, Román, JJ.

2538N Robert M. Morgenthau, as District Attorney of New York County, Plaintiff-Respondent, Index 400514/08

-against-

Gregory Vinarsky, etc., et al., Defendants,

Aron Goldman, Defendant-Appellant.

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

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

Order, Supreme Court, New York County (Martin Shulman, J.), entered June 17, 2008, which, in this CPLR article 13-A forfeiture action, to the extent appealed from, granted plaintiff's motion for a preliminary injunction and an order of attachment, and denied defendant Goldman's cross motion to vacate a temporary restraining order, same court and Justice, entered on or about March 7, 2008, unanimously affirmed, without costs.

The indictment filed in the criminal prosecution underlying this action, the affirmation of the assistant district attorney, and the affidavit of the police detective demonstrate the requisite "substantial probability" that plaintiff will prevail

on the forfeiture issue (CPLR 1312[3]; *Morgenthau v Citisource, Inc.*, 68 NY2d 211, 222 [1986]; *Morgenthau v Goldmen & Co.*, 283 AD2d 212 [2001]). In the absence of an affidavit establishing the unavailability of other assets to satisfy defendant Goldman's financial needs (CPLR 1312[4]), there is no basis for finding that the court failed to properly weigh plaintiff's need to preserve the availability of the subject assets against the hardship of injunction and attachment on defendant (CPLR 1312[3][b]).

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

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

ENTERED: APRIL 13, 2010

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
John W. Sweeny, Jr.
James M. Catterson
Dianne T. Renwick
Helen E. Freedman, JJ.

Index 112904/04
372

Deutsche Bank Trust Company of Americas,
Plaintiff-Appellant,

-against-

Tri-Links Investment Trust, et al.,
Defendants-Respondents.

Plaintiff appeals from an order of the Supreme Court, New York County (Richard B. Lowe, III, J.), which granted defendants' motion for summary judgment dismissing the complaint, and denied its motion for summary judgment.

O'Hare Parnagian LLP, New York (Robert A. O'Hare, Jr. and Michael G. Zarocostas of counsel), for appellant.

Constantine Cannon, LLP, New York (Amianna Stovall of counsel), for respondents.

FRIEDMAN, J.

The main issue on this appeal is whether defendant Tri-Links Investment Trust (Tri-Links),[1] against which plaintiff Bankers Trust Company (Bankers Trust)[2] asserts a contractual right to indemnification for the costs of defending and settling a prior lawsuit, was afforded sufficient notice of the lawsuit to enable Bankers Trust to recover indemnity without having to prove that it would have been held liable had the lawsuit been tried to judgment. On this record, we hold that Tri-Links' notice of the lawsuit brought against Bankers Trust by Western Mining & Investments, LLC (WMI) afforded Tri-Links ample opportunity to protect its interests in that proceeding, in which it could have intervened at any time. In particular, the evidence shows that Tri-Links had a copy of the complaint in the WMI action no later than May 2002, four months after the suit was commenced; that Bankers Trust directly notified Tri-Links of the action orally in March 2003, and then in writing in May 2003; that Tri-Links responded to a subpoena in the action in 2003; and that Bankers

---

[1]Tri-Links has been merged into defendant Nomura Special Situations Investment Trust (Nomura). In this opinion, the term "Tri-Links" is used to refer to both Tri-Links and Nomura.

[2]As reflected in the caption, Bankers Trust is now known as Deutsche Bank Trust Company of Americas. This opinion refers to plaintiff as Bankers Trust, whether the time under discussion is before or after the name change.

Trust, by letter dated February 3, 2004, invited Tri-Links to discuss the matter in light of the latter's contractual indemnity obligation and the plaintiff's progressively decreasing settlement demands. The case was finally settled in March 2004, only after Tri-Links, in response to a February 26 letter advising that a settlement was contemplated, denied having any indemnity obligation at all with respect to the matter.

Given the notice established by the foregoing facts, Bankers Trust need not prove its own liability to WMI to prevail on its claim for contractual indemnity. Moreover, the record fully establishes that Bankers Trust was sued in the WMI action for conduct in its capacity as agent of a group of lenders, which triggers the applicability of the relevant indemnity agreement. Hence, the record establishes, as a matter of law, that Bankers Trust is entitled to contractual indemnity for its settlement of the WMI action, as well as for the expenses it reasonably incurred in defending the suit. Accordingly, we reverse the order appealed from, deny Tri-Links' motion for summary judgment, and grant Bankers Trust's motion for summary judgment as to liability on its cause of action for contractual indemnity.

The pertinent factual background is more fully set forth in this Court's decision on the prior appeal in this case (43 AD3d 56, 57-60 [2007]). To summarize briefly, Bankers Trust was the

agent for a group of lenders to Centennial Resources, Inc. (Centennial), a company in the midst of bankruptcy proceedings, pursuant to a Debtor-in-Possession Credit and Guaranty Agreement, dated October 14, 1998 (the DIP Agreement). Under section 11.06 of the DIP Agreement, the DIP lending group is obligated to indemnify Bankers Trust against any damage or liability it might incur by reason of actions taken in its capacity as agent for the group. Section 11.06 provides in pertinent part:

> "11.06. Indemnification. To the extent the Agent [Bankers Trust] is not reimbursed and indemnified by the Borrower [Centennial], the Lenders will reimburse and indemnify the Agent . . . for and against any and all liabilities, obligations, losses, damages, penalties, claims, actions, judgments, costs, expenses or disbursements of whatsoever kind or nature which may be imposed on, asserted against or incurred by the Agent in performing its respective duties hereunder or under any other Loan Document or the Orders [of the bankruptcy court], in any way relating or arising out of this Agreement or any other Loan Document or the Orders provided that no Lender shall be liable for any portion of such liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses or disbursements resulting from the gross negligence or willful misconduct of the Agent."

In May 1999, the New York City law firm of Richards Spears Kibbe & Orbe filed a notice of appearance in the Centennial bankruptcy case on behalf of Tri-Links, which had begun acquiring interests in the DIP lending group.

During the course of the Centennial bankruptcy, WMI negotiated an agreement to purchase Centennial's assets with

Bankers Trust, among others. Before the hearing on the motion to obtain the bankruptcy court's approval of the sale, however, Tri-Links had acquired a majority in interest of the DIP lending group. Tri-Links opposed the WMI deal, and instructed Bankers Trust, as contractual agent for the DIP lending group, to object to the transaction at the May 1999 hearing. Bankers Trust (which, in its individual capacity, supported the WMI deal) followed these instructions, as it was obligated to do, and the motion for approval of the asset sale was withdrawn.

In January 2002, WMI commenced an action in federal court against Bankers Trust, in which it asserted a number of contractual and tort theories for imposing liability on Bankers Trust based on the failure of WMI's effort to purchase Centennial's assets. So far as can be discerned from the record, Tri-Links first received notice of the WMI action in May 2002, when Bankers Trust filed with the court presiding over the Centennial bankruptcy case an open letter, dated May 1, 2002, announcing the commencement of the WMI action against it.[3] Tri-

---

[3]Bankers Trust's May 2002 letter to the bankruptcy court states, among other things:

> "Recently, an action was initiated against . . . Bankers Trust [i.e., the WMI action] . . . . Bankers Trust was one of the DIP Lenders in the above-referenced bankruptcy cases [i.e., the Centennial bankruptcy], which cases remain pending before Your

Links, which by May 2002 had become Centennial's largest creditor, had filed an appearance in the Centennial bankruptcy case (as previously noted), and thus, through its counsel in that proceeding, had notice of Bankers Trust's May 2002 letter to the bankruptcy court.

Also in May 2002, counsel for the Centennial liquidating agent -- an attorney whom Tri-Links, as Centennial's largest creditor, had selected -- sent Tri-Links (1) Bankers Trust's aforementioned letter to the bankruptcy court, (2) the WMI complaint, and (3) a memorandum, dated May 16, 2002, discussing, among other matters, the WMI action and Bankers Trust's reservation of its contractual indemnity rights with respect thereto. Thereafter, in July 2002, apparently following up on his May 2002 memorandum, the same attorney sent Tri-Links an additional memorandum concerning the WMI action, in which he advised Tri-Links to "lay [*sic*] low and let [Bankers Trust] make the next move, which may never happen."

Although, as discussed above, Tri-Links had been aware of the WMI action since May 2002 at the latest, direct contact

---

> Honor. [WMI] . . . appeared before Your Honor in an unsuccessful effort to acquire the debtors [*sic*] assets. In the [WMI action], WMI now sues Bankers Trust in connection with its having submitted, as agent, objections in the [bankruptcy case] to the proposed asset sale to . . . WMI."

between representatives of Bankers Trust and Tri-Links concerning the WMI action began in March 2003, the month issue was joined in that lawsuit, after Bankers Trust's motion to dismiss was denied.[4] Bankers Trust's outside counsel (Scott Musoff, Esq., of Skadden, Arps, Slate, Meagher & Flom LLP) recounted in his affirmation that he spoke with Tri-Links' in-house counsel on or about March 27, 2003, at which time the two attorneys "discussed the WMI Action against Bankers Trust, the need to get information from Tri-Links and the likelihood that someone from Tri-Links would be deposed." Subsequently, under cover of a letter dated May 8, 2003, an attorney at the Skadden firm, on Bankers Trust's behalf, sent Tri-Links' in-house counsel, among other documents, the complaint in the WMI action (which, again, had already been in Tri-Links' possession for at least a year) and the DIP agreement (which contains the indemnity provision sought to be

---

[4]The WMI action was originally filed in Kentucky federal court in January 2002. In lieu of answering, Bankers Trust moved to dismiss for failure to state a claim, arguing that it was improperly being sued for actions it had taken as an agent for a disclosed principal. During the pendency of the motion to dismiss, the action was transferred to Delaware federal court. In March 2003, the Delaware federal court denied the motion to dismiss on the ground that it could not then resolve a choice of law issue it deemed necessary to the resolution of the motion. We note that Bankers Trust claims that it sent formal notice of the action to Tri-Links (and other members of the DIP lending group) by letter dated March 11, 2003. Tri-Links, however, denies receiving the March 11 letter, and Bankers Trust does not rely on the letter on this appeal.

enforced in this action). In a conversation with Tri-Links' outside counsel that occurred around this time, Musoff took the position (as he later testified) that Bankers Trust and Tri-Links "were all in this together" with regard to the WMI action. In response, Tri-Links' counsel declared that her client, fearing the "litigious" nature of WMI's principal, did not want to be a named party in the WMI action.

In June 2003, WMI served Tri-Links with a subpoena demanding the production of documents in the WMI action. In response to the subpoena, Tri-Links' counsel, after consulting with Bankers Trust's counsel, asserted a joint attorney-client privilege between Tri-Links and Bankers Trust arising from the latter's status as agent of the Centennial DIP lending group, of which Tri-Links constituted the majority in interest. On this basis, Tri-Links declined to produce certain documents requested by WMI's subpoena, as stated in an October 2003 letter from Tri-Links' counsel to WMI's counsel. In addition, Tri-Links' counsel represented a former Tri-Links employee who was deposed in the WMI action.

Thus, Tri-Links had been well aware of the WMI action for nearly two years -- and actively involved in the litigation of that suit for nearly a year -- when, by letter dated February 3, 2004, Bankers Trust's counsel reminded Tri-Links of its indemnity

obligation to Bankers Trust under the DIP agreement and advised it that the court presiding over the WMI action, having refused to entertain summary judgment motions, had scheduled the case to go to trial before a jury on March 15, 2004. He further advised Tri-Links that "WMI has made several settlement demands, which it has revised downward over time," and concluded with the statement that "we want to discuss this matter . . . in light of your [indemnity] obligations to Bankers Trust under Section 11.06 of the Centennial DIP Agreement." It is undisputed that Tri-Links did not respond to this letter.

By letter dated February 26, 2004, Bankers Trust advised Tri-Links that it was contemplating a settlement of the WMI action, involving a contemplated payment of $2.7 million to WMI (which, in its complaint, alleged damages of $225 million). Bankers Trust's letter asked Tri-Links to contact the sender "immediately" to discuss the matter. By letter dated March 2, 2004, Tri-Links' counsel responded, taking the position that the WMI action "d[id] not involve" Tri-Links and denying that Tri-Links owed any indemnity obligations to Bankers Trust with respect to the WMI action. The next day, Bankers Trust and WMI executed a settlement agreement; a stipulation dismissing the WMI

action was filed on March 4, 2004.[5] At no point did Tri-Links appear in court to object to the settlement.

In the present action, Bankers Trust seeks to recover substantially all of the sums it expended in defending and settling the WMI action (allegedly amounting to $6.35 million) from Tri-Links pursuant to the indemnity provision of the DIP agreement.[6] After discovery, Tri-Links moved for summary judgment on the grounds that Bankers Trust was sued by WMI for actions that Bankers Trust took in its individual capacity (rather than in its capacity as agent of the DIP lending group), that Bankers Trust failed both to provide Tri-Links with adequate "notice" of the WMI action and to "tender" the defense of the action, and that the settlement amount was "unreasonable." Bankers Trust moved for summary judgment in its favor, arguing

---

[5]The settlement agreement incorporated a general release of all members of the DIP lending group, including Tri-Links and its affiliates. Tri-Links' counsel had provided Bankers Trust's counsel with the proper corporate names by which to identify Tri-Links and its affiliates as beneficiaries of the release.

[6]Bankers Trust's first amended complaint alleges that Tri-Links has a 99.16% share of the indemnity obligation under the DIP agreement, corresponding to the percentage in interest of the DIP lending group it ultimately acquired. We note that Bankers Trust's complaint asserts, in addition to the cause of action for contractual indemnification, a cause of action for common-law indemnification. On this appeal, however, Bankers Trust does not appear to argue that it is entitled to summary judgment on the common-law claim.

that it had proven all the facts necessary to establish its right to contractual indemnity.

Supreme Court granted Tri-Links' motion and dismissed the complaint, relying on two independent grounds. First, the court found that Bankers Trust had been sued in its individual capacity, not in its capacity as agent for the DIP lending group, and, therefore, no right of indemnity arose in connection with the WMI action. Second, the court held that Bankers Trust was required to prove that it could have been held liable to WMI, since it gave Tri-Links insufficient notice of the WMI action, and had failed to prove such potential liability. We now reverse.

We turn first to the issue of whether WMI sued Bankers Trust in the latter's capacity as agent for the DIP lending group. Stated otherwise, the question presented is whether the claims asserted against Bankers Trust in the WMI action fall within the scope of the indemnity provision of the DIP Agreement. To reiterate, that provision, section 11.06, obligates the members of the DIP lending group to indemnify Bankers Trust

> "for and against any and all liabilities, obligations, losses, damages, penalties, claims, actions, judgments, costs, expenses or disbursements of whatsoever kind or nature which may be imposed on, asserted against or incurred by [Bankers Trust] *in performing its . . . duties hereunder . . . , in any way relating or arising out of this Agreement*" (emphasis added).

Whatever self-serving characterization WMI placed on its claims against Bankers Trust, those claims unquestionably fell within the plain meaning of section 11.06. WMI's lawsuit against Bankers Trust was based on the latter's filing of an objection to WMI's proposal to purchase Centennial's assets, an action that WMI claimed was wrongful as to it. Bankers Trust objected to the WMI deal in its role as contractual agent of the DIP lending group, as the written objection states on its face. Moreover, Bankers Trust filed the objection precisely because it was directed to do so by Tri-Links, which had acquired a majority in interest of the group. In fact, the objection filed by Bankers Trust did not reflect its own preference; in its capacity as an individual member of the lending group, Bankers Trust had supported the WMI deal. Thus, the WMI action plainly arose, in essential part, from Bankers Trust's "performing its . . . duties [under the DIP Agreement] . . . , in any way relating or arising out of [the DIP Agreement]" (*sic*), and thus fell within the scope of the DIP Agreement's indemnification provision.[7]

---

[7]Tri-Links' argument that the WMI action falls within section 11.06's exclusion for losses "resulting from the gross negligence or willful misconduct of [Bankers Trust]" is without merit. The record contains no evidence of "gross negligence or willful misconduct" by Bankers Trust. While the complaint in the WMI action included a claim that Bankers Trust committed "promissory fraud" and other torts, such "unsubstantiated allegations of fraud and misconduct are insufficient to bar

This brings us to the issue of whether Tri-Links had sufficient notice of the WMI action to permit Bankers Trust to recover indemnity for the settlement upon a showing of its reasonableness, without having to establish that WMI would have prevailed had the suit been tried to judgment. While section 11.06 of the DIP Agreement says nothing about notice, it is well-established under New York law that, where an indemnitor does not receive notice of an action settled by the indemnitee, "in order to recover reimbursement [for the settlement], [the indemnitee] must establish that [it] would have been liable and that there was no good defense to the liability" (*Feuer v Menkes Feuer, Inc.*, 8 AD2d 294, 299 [1959]). Where the indemnitor does receive notice of the claim against the indemnitee, however, "the general rule is that the indemnitor will be bound by any reasonable good faith settlement the indemnitee might thereafter make" (*Coleman v J.R.'s Tavern*, 212 AD2d 568, 568 [1995]; *see e.g. Slepian v Motelson*, 66 AD3d 871, 872 [2009]; *CIGNA Corp. v Lincoln Natl. Corp.*, 6 AD3d 298, 299 [2004]; *Fidelity Natl. Tit. Ins. Co. of N.Y. v First N.Y. Tit. & Abstract*, 269 AD2d 560, 561 [2000]; *Goldmark Indus. v Tessoriere*, 256 AD2d 306, 307 [1998]; *Shihab v Bank of N.Y.*, 211 AD2d 430, 431 [1995]; *Horn Constr. Co. v MT*

---

indemnification pursuant to" the DIP Agreement (*Meyerson v Tullman*, 281 AD2d 170, 171 [2001]).

Sec. Serv. Corp., 97 AD2d 786 [1983]; *Gray Mfg. Co. v Pathe Indus.*, 33 AD2d 739 [1969], *affd* 26 NY2d 1045 [1970]).

On this record, it is abundantly clear that Tri-Links had more than ample notice of the WMI action and was therefore able to take whatever steps it deemed necessary to protect its interests in that matter. To recapitulate, it is undisputed that Tri-Links received notice of the WMI action and of the settlement therein as follows:

- Tri-Links had notice of the WMI action, and received a copy of the complaint therein, no later than May 2002.

- Counsel to Centennial's liquidating agent -- an attorney selected by Tri-Links -- sent Tri-Links memoranda in May and June of 2002 discussing the WMI action and specifically noting that Bankers Trust had reserved its indemnification rights with respect thereto.

- Bankers Trust and Tri-Links, through their respective counsel, had discussions concerning the WMI action beginning in March 2003, the month that Bankers Trust's motion to dismiss was denied and issue was joined.

- Bankers Trust's adversary in the WMI action served a subpoena upon Tri-Links in June 2003, in response to which Tri-Links produced certain documents and, as to certain other responsive documents in its possession, asserted an attorney-client privilege held jointly with Bankers Trust, after consulting with Bankers Trust's counsel.

- Thus, by the time Bankers Trust notified Tri-Links of the contemplated settlement of the WMI action in February 2004, Tri-Links had

been aware of the action, and in possession of a copy of the complaint therein, for nearly two years, and had been in contact with Bankers Trust's counsel concerning the action for nearly one year.

- By letter dated February 3, 2004, Bankers Trust told Tri-Links that "we want to discuss this matter [the WMI action] with you in light of your obligations to Bankers Trust under Section 11.06 of the Centennial DIP Agreement," and specifically referring to WMI's settlement demands, "which it has revised downward over time," and to the scheduled trial date of March 15, 2004.

- By letter dated February 26, 2004, Bankers Trust advised Tri-Links that Bankers Trust was "contemplating entering into a settlement" of the WMI action that would involve paying WMI less than 2% of the amount of damages it claimed. After Tri-Links responded by disclaiming any indemnity obligation to Bankers Trust relating to the WMI action, the settlement was finalized.

We hold that the notice established by the foregoing undisputed facts bound Tri-Links to any reasonable and good faith settlement of the WMI action. As to the timeliness of the notice, given that the DIP Agreement sets forth no particular requirements, Tri-Links' undisputed awareness of the WMI action and possession of the complaint no later than May 2002, and its contact with Bankers Trust's counsel concerning the matter from March 2003 (when issue was joined) until the case settled nearly a year later, was sufficient. While it was not until February 2004 that Bankers Trust clearly articulated its intent to seek

indemnification, "[n]o particular form of notice and no formal notice is necessary" to bind an indemnitor (*Prescott v Le Conte*, 83 App Div 482, 487 [1903], *affd* 178 NY 585 [1904]; *see also* NY Jur 2d, Contribution, Indemnity and Subrogation § 107), and a sophisticated business entity such as Tri-Links cannot claim to have been unaware of the significance of the WMI action to its own interests.

The result is not changed by the fact that Bankers Trust did not specifically tender the defense of the suit to Tri-Links. Tri-Links, having accumulated substantially all of the loans governed by the DIP Agreement (and thus substantially all of the indemnity obligation under the DIP Agreement) by the time the WMI action was commenced, could have offered to take over Bankers Trust's defense at any time. Indeed, Tri-Links does not deny that, given its potential indemnity obligation, it could have intervened in the WMI action at its own instance. Rather than offer to take over Bankers Trust's defense or intervene, Tri-Links made a deliberate choice to stay on the sidelines and to allow Bankers Trust to defend the suit on its own. While there was nothing wrong with Tri-Links' decision to remain a spectator to the litigation, it cannot now avoid its obligation to indemnify Bankers Trust for settling the matter reasonably and in good faith (*see Oceanic Steam Nav. Co. v Campania Transatlantica*

Espanola, 144 NY 663, 665 [1895] ["It is sufficient that the party against whom ultimate liability is claimed is fully and fairly informed of that claim and that the action is pending with full opportunity to defend or to participate in the defense"] [O'Brien, J.]; *Prescott v Le Conte*, 83 App Div at 487 [indemnitors were bound by judgment against indemnitee, notwithstanding that "they were not notified to come in and defend the action," because indemnitors "had notice of the commencement of the action and an opportunity to defend the same, and under all the authorities this is sufficient, *so far as notice is concerned*, without any express notice to defend, to make the judgment binding upon them"] [emphasis in original]).

We see no issue as to whether Tri-Links received sufficient notice of the settlement negotiations between Bankers Trust and WMI, given that Bankers Trust's letter of February 3, 2004 requested that Tri-Links discuss the WMI action in light of Tri-Links' indemnity obligations, the imminent trial date, and WMI's progressively decreasing settlement demands. This letter was sent a month before the settlement was executed on March 3, 2004.[8] Thus, Bankers Trust did "notify [its] indemnitor about

---

[8]The dissent states that "Bankers Trust . . . notified the court [presiding over the WMI action], on February 22, 2004, that the matter had been settled." The February 22 letter to which the dissent refers (which was sent by WMI's counsel, not Bankers

[the] impending settlement" (*Chase Manhattan Bank v 264 Water St. Assoc.*, 222 AD2d 229, 231 [1995]). In any event, what bound Tri-Links to any reasonable settlement Bankers Trust might conclude with WMI was not specific notice of the settlement negotiations, but notice of the action itself, which Tri-Links had had for many months before the February 3, 2004 letter. Again, Tri-Links had known of the action since May 2002 and had been in contact with Bankers Trust concerning the action since March 2003, the month issue was joined. Having had such notice of the WMI action, and having nonetheless failed to offer to take up Bankers Trust's defense, Tri-Links is bound by Bankers Trust's settlement with WMI "to the extent that it was reasonable and entered into in good faith" (*CIGNA*, 6 AD3d at 299).

Although the point is not legally dispositive, we also note that there is some incongruity between Tri-Links' efforts to avoid its indemnity obligation based on the asserted insufficiency of the notice it had of the WMI action and, on the

---

Trust's), while it does state that the parties had "today . . . settled this matter," also states: "We anticipate immediately drafting final settlement documents and promptly submitting a stipulation of dismissal with prejudice to the Court." Thus, the settlement was neither final nor binding as of February 22, 2004. The February 22 letter states that it was being sent to the court on that date (a Sunday) because the parties were requesting the cancellation of the pretrial conference scheduled for the next day.

other hand, its denial that it had any such obligation when informed that Bankers Trust was on the verge of settling the case essentially for nuisance value. On this record, it appears that, whenever Bankers Trust invoked its indemnity rights under the DIP Agreement, and however explicitly it did so, Tri-Links would have responded by rejecting out of hand the suggestion that it had any obligation to indemnify Bankers Trust in connection with the WMI action.

As to the reasonableness of the settlement, there does not appear to be any issue. The case was settled for less than 2% of the $225 million in damages alleged in WMI's complaint, and the settlement amount (evidently, $2.7 million) was not much more than the range of the estimated legal fees and expenses of a jury trial ($1.75 to $2.25 million). While Bankers Trust vigorously denied having any liability to WMI throughout the litigation, the case was settled after the court had declared that it would not entertain summary judgment motions and had set an imminent date for a jury trial. Under these circumstances, it cannot be said, notwithstanding the apparent weakness of WMI's claims, that there was no possibility that litigating the case to the end would result in a judgment against Bankers Trust in an amount greater than the settlement (*see Pahl v Grenier*, 279 AD2d 882, 884 [2001] [no issue as to reasonableness of settlement, although a defense

was available at trial]; *Clarostat Mfg. Co. v Travelers Indem. Co.*, 115 AD2d 386, 388-389 [1985] [no issue as to reasonableness of settlement before retrial]; *Waltz v MRC Mgt., LLC*, 378 F Supp 2d 440, 442-443 [SD NY 2005] [no issue as to reasonableness of settlement before trial, although defense verdict was possible]; *see also Fidelity Natl. Tit. Ins.*, 269 AD2d at 562 [granting summary judgment for indemnification of settlement were indemnitee showed that it "could have been held liable if it had proceeded to trial"]; *Goldmark Indus.*, 256 AD2d at 307 [same]; *Coleman*, 212 AD2d at 569 [same]). In light of the unpredictability of juries and the amount of damages WMI was claiming, Tri-Links cannot identify anything in the record that would place in question either the reasonableness or the good faith of the settlement. Thus, even if Tri-Links had not been given an opportunity to participate in the settlement negotiations (which it was), there would not be any grounds for denying Bankers Trust the indemnity for which it bargained. An indemnitor with notice "cannot object to a settlement merely because it believed it could have driven a tougher bargain, or been a tougher litigator" (*Conopco, Inc. v Imperial Chem. Indus. PLC*, 1999 WL 1021077, *5 [SD NY 1999]).

We note that Bankers Trust seeks indemnification both for the cost of the settlement of the WMI action and for the cost of

litigating that action prior to settlement, i.e., the attorneys' fees and other litigation expenses that were incurred in defending the case. Even if there were an issue as to whether Bankers Trust failed to give sufficient notice of the WMI action for purposes of recovering indemnity for the settlement, or if there were an issue as to the reasonableness of the settlement, we would see no basis -- and Tri-Links has articulated none -- for denying Bankers Trust indemnification for the attorneys' fees and other litigation expenses it reasonably incurred in defending the WMI action. Accordingly, under any view of the case, Bankers Trust is entitled as a matter of law to recover such reasonable defense costs, which have yet to be precisely quantified.

In closing, we observe that, at bottom, what occurred in this case is that Bankers Trust, at the direction of Tri-Links, abandoned its own position on the WMI deal and instead asserted Tri-Links' position. As a result, Bankers Trust was sued by WMI. Tri-Links was bound by an agreement to indemnify Bankers Trust for the cost of that suit, which arose from Bankers Trust's adoption of Tri-Links' position. We see no reason why Tri-Links should not make good on its promise.

Accordingly, the order of the Supreme Court, New York County (Richard B. Lowe, III, J.), which granted defendants' motion for summary judgment dismissing the complaint, and denied plaintiff's

motion for summary judgment, should be reversed, on the law, with costs, defendants' motion denied, and plaintiff's motion granted.

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

SWEENY, J. (dissenting)

Since I believe that there is an issue of fact whether defendants were properly placed on notice that plaintiff would be invoking its contractual right of indemnification, I dissent.

As part of a bankruptcy proceeding commenced by entities referred to as Centennial Resources, Inc. (Centennial), the predecessor companies of plaintiff (Bankers Trust) and defendant Tri-Links Investment Trust provided a $15 million debtor-in-possession (DIP) loan to Centennial. This loan was memorialized in a Debtor-in-Possession Credit and Guaranty Agreement (DIP Agreement) executed by Centennial as borrower and, inter alia, Tri-Links' predecessors as lenders. Bankers Trust participated in the agreement both as a lender and as agent for the lenders.

The agreement contained a broad indemnity agreement in favor of Bankers Trust as agent, in which the lenders agreed to indemnify Bankers Trust for "any and all liabilities" it incurred in performing its duties "in any way relating or arising" from the DIP Agreement, excluding gross negligence and willful misconduct.

Defendants initially were minority members of the DIP lending group by reason of the small portion of the loan they funded. Centennial, as part of the bankruptcy proceedings, was negotiating a sale of its assets to a third party, Western Mining

and Investments, LLC (WMI). These negotiations resulted in an Asset Purchase Agreement (APA) between Centennial and WMI. The majority of the DIP lenders favored the proposed sale; defendants did not. The proposed sale was subject to the approval of the bankruptcy court.

The DIP lenders directed Bankers Trust as agent to inform WMI of the majority position and defendants' minority opposition. Defendants thereafter purchased the majority of the claims of the DIP lending group. As the new majority, defendants directed Bankers Trust to object to the sale of Centennial's assets to WMI at the bankruptcy hearing, which objection Bankers Trust duly filed. Bankers Trust then sold its individual interests in the DIP loan to defendants. The bankruptcy court did not approve the sale to WMI.

In January 2002, WMI commenced an action against Bankers Trust in the U.S. District Court for the Western District of Kentucky over the failed sale of Centennial's assets, claiming it suffered $225 million in damages. The complaint alleged that Bankers Trust made an enforceable oral promise to WMI that the majority of the DIP lenders would approve the sale of Centennial's assets, and that this alleged promise was breached by Bankers Trust's filing (at defendants' direction) of the lending group's objection to the sale. After Bankers Trust

argued that WMI's claims were without merit because it had at all times acted as the agent of a disclosed principal, WMI amended its complaint to add a claim for breach of an alleged "implied warranty of authority" to cause the DIP lending group to approve the transaction.

Bankers Trust retained counsel to defend it in the action but did not formally notify defendants that it had been sued or that it had retained counsel. Defendants allege that Bankers Trust never tendered defense of the WMI action to them or notified them that it intended to seek indemnification.

However, in May 2002, counsel for the Centennial bankruptcy estate sent defendants' New York counsel a copy of the complaint in the WMI action and advised defendants that Bankers Trust had reserved its indemnification rights against the estate. In May 2003, Bankers Trust's counsel in the WMI action sent defendants another copy of the WMI complaint and certain other documents relevant to the litigation. From mid-2003 to early 2004, defendants participated in the WMI action as a third party, providing witnesses and documents and actively assisting Bankers Trust in the defense of the action. In fact, at one point during the litigation, defendants refused to turn certain documents over to WMI based on an asserted joint-defense privilege with Bankers Trust.

Settlement talks began between Bankers Trust and WMI. As the trial date neared and the talks intensified, on February 3, 2004, Bankers Trust finally gave defendants formal notice of the WMI action and made a formal request for indemnification under the DIP Agreement. That same letter advised defendants that the matter was scheduled for trial on March 15, 2004, that Bankers Trust was aggressively preparing for trial, and that WMI had made several settlement offers "which it ha[d] revised downward over time." On February 22, WMI's counsel advised the court that the action was settled. Bankers Trust sent a follow-up letter to defendants on February 26 (four days after it notified the court that the matter had been settled), notifying them that it was "contemplating" a settlement with WMI for $2.7 million, and requested that defendants contact them "if you wish to discuss this matter." Defendants notified Bankers Trust on March 2 that they were taking the position that the WMI action did not involve them and that therefore they were under no indemnity obligation.

The WMI settlement agreement was signed by Bankers Trust and WMI on March 3, 2004 in the amount of $2.7 million. As part of the agreement, Bankers Trust obtained releases on behalf of the DIP Lenders, including defendants. Bankers Trust argues that by accepting the benefit of the releases without objection, defendants approved the settlement. Defendants claim that they

made it clear to Bankers Trust that they did not consent to the settlement or admit liability for WMI's claims or Bankers Trust's claim for indemnification.

On this appeal, defendants argue that the indemnification provision of the DIP Agreement was not triggered as a result of Bankers Trust's failure to timely notify them of the WMI action or to tender defendants the opportunity to defend the action.

We addressed the issue of notice and tender in *Feuer v Menkes Feuer, Inc.* (8 AD2d 294 [1959]). We held that "an indemnitee is not required to give notice of claims against him to the indemnitor" in the absence of a "specific provision in the contract of indemnity" (at 298). However, if the indemnitee fails to notify the indemnitor, "in order to recover reimbursement, he must establish that he would have been liable" and that the amount paid in settlement was a reasonable amount and entered into in good faith (at 299).

While it is true that Bankers Trust did not give defendants formal notice of the WMI action until February 3, 2004, the indemnification agreement does not require such formal notice.

It is well established that unless otherwise specified in the contract, no particular form of notice is required for an indemnitee's notice of a claim to his indemnitor (*See Prescott v*

Le Conte, 83 App div 482, 487 [1903], *affd* 178 NY 585 [1904]; *see also Combustion Eng'g Inc. v Imetal*, 235 F Supp 2d, 265 273 [2002]). Indeed, such notice need not even be in writing; it "may be implied from knowledge of the pendency of the action and participation in its defense" (NY Jur 2d, Contribution, Indemnity and Subrogation § 107).

However, where an indemnitee does not give notice, it must meet the *Feuer* requirements of demonstrating that it would have been liable in the underlying action and that the ultimate settlement entered into was reasonable and made in good faith.

The record shows that, in May 2003, Bankers Trust's counsel made defendants aware of the action when he sent defendants a second copy of the complaint. As the majority correctly points out, defendants were in fact aware of the litigation as early as May 2002. However, notification of the litigation did not come from Bankers Trust until May 2003, and it was incumbent upon Bankers Trust to provide notice of the action. From at least May 2003, defendants took an active role in the litigation, closely aligning themselves with Bankers Trust's position in the litigation.

Defendants however, contend that, although they were made aware of the litigation, at no time before February 3, 2004 did Bankers Trust notify them that it intended to invoke the

indemnification provisions of the DIP Agreement, nor did it tender the defense of the WMI action to them. They argue that any claimed notice preceding the letter of February 3 was not sufficient. Moreover, defendants point out that the February 3rd notice was given while Bankers Trust was already deeply involved in settlement negotiations that led to the February 22nd notification to the court that the matter had been settled.

The majority argues that since defendants had notice of the litigation, such notice, by whatever means obtained is sufficient. However, the case law on this issue places the burden upon the indemnitee to notify the indemnitor of the litigation and that it seeks indemnification pursuant to the indemnification agreement between them. Here, there is a question whether Bankers Trust gave adequate notice of the impending settlement to defendants.

As the majority concedes, Bankers Trust first notified defendants of settlement negotiations by letter dated February 3, 2004. In that letter, for the first time, Bankers Trust invoked its indemnification rights. Although the letter stated that WMI had made several settlement offers, which were revised downward from time to time, and invited defendants to participate in the settlement discussions, defendants did not respond to the letter. What is missing from the letter is the fact that Bankers Trust

was already deeply involved in settlement negotiations and was close to a settlement. Indeed, in a follow-up letter to defendants dated February 26, 2004, Bankers Trust advised that it was "contemplating" a settlement in the sum of $2.7 million. However, Bankers Trust had already notified the court, on February 22, 2004, that the matter had been settled.

By letter dated March 2, 2004, defendants took the position that the WMI action did not involve them and denied any indemnification obligation. This is quite a curious position coming from parties who were involved in this litigation and were aligned in interest with Bankers Trust. Be that as it may, the next day, Bankers Trust and WMI filed a stipulation of settlement.

There is no question that "[a]n indemnitee who fails to notify an indemnitor about an impending settlement proceeds at his own risk. In order to recover reimbursement, he must establish that there was liability, without a good defense, and that the amount of the settlement was reasonable" (*Chase Manhattan Bank v 264 Water St. Assoc.*, 222 AD2d 229, 231 [1995], citing *Feuer v Menkes Feuer, Inc.*, 8 AD2d 294 [1959]).

Thus, there is a question whether Bankers Trust's notification to defendants of the settlement negotiations was sufficient to permit defendants to meaningfully participate

therein. While Bankers Trust argues that defendants refused to participate in the settlement of the WMI action and are therefore estopped from challenging it, there is an issue as to when defendants were made aware of the proposed settlement or whether they were, in fact, presented with essentially a *fait accompli*, rather than a genuine opportunity to participate in the settlement negotiations. As a result, there is a question whether the notice of settlement negotiations given by Bankers Trust was timely made and in good faith. The determination of such issues, relying on questions of credibility, is not appropriately made on a summary judgment motion (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]).

On the question of Bankers Trust's liability in the WMI action, it made no claim in its papers that it would have been liable in the underlying action. Its argument in the motion court and on appeal relies on the defense that the agent of a disclosed principal cannot be held liable for its actions taken as an agent (*see News Am. Mktg., Inc. v Lepage Bakeries, Inc.*, 16 AD3d 146, 147 [2005]). Since the trial court in the WMI action determined that no motions for summary judgment would be entertained, Bankers Trust could not test its defense except at trial.

Defendants contend that the major portion of WMI's claimed

damages consisted of future profits which, would have been speculative at best and therefore would not result in a jury verdict against Bankers Trust. In turn, Bankers Trust argues that the settlement of less than 2% of claimed damages is reasonable.

While defendants present no evidence to contradict the reasonableness of this settlement, the question of course turns on whether Bankers Trust was liable in the WMI action. As noted, this is an issue that must be determined at trial.

Based upon the conflicting claims on the issue of notice of settlement, and the evidence submitted by the parties in support of their respective positions, it is clear that an issue of fact exists as to the sufficiency of the notice of settlement given to defendants. Therefore, both motions for summary judgment on this issue should have been denied and the matter should be remanded for trial on the above-discussed issues.

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

ENTERED: APRIL 13, 2010

CLERK

APR 13 2010

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
Eugene Nardelli
John T. Buckley
Rolando T. Acosta
Helen E. Freedman, JJ.

Index 103717/08
1166-
1167

Robert E. Steinberg, Esq.,
Plaintiff-Appellant,

-against-

Stanley Schnapp, Esq.,
Defendant-Respondent.

Plaintiff appeals from a judgment of the Supreme Court, New York County (Jane S. Solomon, J.), entered October 27, 2008, dismissing the complaint and from an order of the same court and Justice, entered on or about September 16, 2008, which granted defendant's motion for summary judgment.

Robert E. Steinberg, New York, appellant pro se.

Avrom R. Vann, PC, New York (Avrom R. Vann of counsel), for respondent.

NARDELLI, J.

At issue is the propriety of the motion court's dismissal of an attorney's claims under the theories of quantum meruit, as well as tortious interference with advantageous economic relationships. Both plaintiff Robert Steinberg and defendant Stanley Schnapp are attorneys admitted to practice in New York. Non-party Leon Baer Borstein also is an attorney, and was the preliminary executor of the estate of Isi Fischzang.

At least three documents relevant to this appeal appear in the record. In an undated and unsigned writing, Borstein advised that he had retained both Steinberg and Schnapp "as my attorneys with respect to all legal proceedings and asset administration concerning the wills, assets and estate of the late Isi Fischzang." Borstein also prepared a document dated September 2007, and entitled "Contract of Employment of Attorneys at Law." It provided that Steinberg was to serve as "trial counsel for all litigation issues," while Schnapp was designated as "the general counsel for the fiduciary and estate, with respect to all litigation proceedings concerning the wills, assets and estate of the late Isi Fischzang." There is also a June 2007 document, offered in reply papers from Schnapp, and signed by Borstein, in which Borstein also advises that he retained both Schnapp and Steinberg. In none of these documents, or in any other contained

in the record, is there any suggestion of privity between Schnapp and Steinberg.

The arrangement among the attorneys did not last long, and on March 12, 2008 Steinberg instituted the action which gives rise to this appeal. He asserted two causes of action against Schnapp for quantum meruit and interference with advantageous economic relationships. In the quantum meruit cause of action he alleged that he had performed professional legal services for Schnapp at Schnapp's "special instance and request," but in connection with the Fischzang estate. He further alleged that he was orally retained by Schnapp, and that Borstein had confirmed the retainer in a writing. The services for which he seeks payment were services performed in conjunction with the estate, including two appearances in Surrogate's Court and negotiations with lawyers representing the decedent's widow.

In the claim for tortious interference Steinberg alleges that he was fired because the "underlying client" (Borstein) had become dissatisfied with the delays in the probate of the estate, but that Schnapp fired Steinberg to shift the blame for the delays to Steinberg. Notably, Steinberg acknowledges that the "underlying client" could have requested his discharge "whimsically or capriciously or for any reason or for no reason, but the discharge would remain 'without cause.'" His concern

that there is an intimation that his termination was "for cause" apparently provides much of the impetus for this litigation.

By motion dated June 4, 2008, after issue was joined, Schnapp moved, pursuant to CPLR 3212, for summary judgment dismissing the complaint, arguing that he had never retained plaintiff to perform any legal services, and that it was Borstein who had discharged Steinberg as special litigation counsel to the estate. Schnapp also noted that regardless of whether the discharge was for cause, Borstein had the right to terminate Steinberg at any time. In a reply affirmation Borstein himself confirmed that he had terminated Steinberg because he was unhappy with Steinberg's work product.

The court granted the motion, determining that Steinberg's claim for compensation lay against Borstein, who retained him. Plaintiff now challenges the court's dismissal of the complaint on the merits, and as premature, arguing that he has not been afforded discovery of relevant material evidentiary facts as to both of his claims.

The essence of Steinberg's argument to this Court with regard to the quantum meruit claim is that where two attorneys were retained by the preliminary executor, and one is designated trial counsel under the Rules of the Surrogate's Court, the attorney who is designated "Of Counsel" (Steinberg) should be

permitted to seek his legal fees from trial counsel (Schnapp). As will be discussed, he does not explain why the preliminary executor, who signed the written retainer agreement, should not, at least, be a party to any such complaint. He further advances that the unique relationship of the two attorneys in this case requires the application of a different rule of law that must scrutinize whether one attorney has intentionally disparaged or wrongfully shifted blame onto the other.

Steinberg's quantum meruit claim against Schnapp is particularly perplexing, since the record not only contains the various documents prepared by Borstein memorializing his retention of Steinberg as "trial counsel for all litigation issues," but Steinberg's own admission (in his affidavit in response to the motion for summary judgment) that he had been retained by the estate. Further, there is nothing in the record to support even an intimation that an attorney-client relationship existed between himself and Schnapp. Inchoate in his complaint and the averments in support is a veiled concern that he might face a legal malpractice action for actions for which he was not responsible. Why a claim in quantum meruit against co-counsel would forestall such an action is left unsaid, but, in any event, the only issue before us with regard to the quantum meruit claim is whether Steinberg has raised any

questions of fact as to Schnapp's argument that he has failed to state a cause of action. We find none.

"[W]e are required to adjudicate [parties'] rights according to the unambiguous terms of the contract and therefore must give the words and phrases employed their plain meaning (*Laba v Carey*, 29 NY2d 302, 308 [1971]). The plain language of all the written documents presented in this record evidences that Steinberg's client was the estate, and not Schnapp. Certainly, "[i]f a client exercises the right to discharge an attorney after some services are performed but prior to the completion of the services for which the fee was agreed upon, the discharged attorney is entitled to recover compensation *from the client* measured by the fair and reasonable value of the completed services" (*Matter of Cooperman*, 83 NY2d 465, 473 [1994] [emphasis added]). In this case Steinberg has sought to recover compensation for his services from a party who did not have any obligation to compensate him - his co-counsel - with whom he was clearly not in privity. There is not even a suggestion that the estate is an undisclosed principal, in which case liability might attach to Schnapp, under time-honored principles *(see e.g. Ell Dee Clothing Co. v Marsh*, 247 NY 392, 397 [1928]).

In his allegations against Schnapp for tortious interference with advantageous economic relationship, Steinberg, appears, in

the first instance, to at least have brought his claim against a party who could theoretically be liable, were there any merit to the charges. Review of his complaint, however, compromises even this impression. At paragraph 35 he refers not only to the advantageous economic relationship between himself "and other persons and entities not parties hereto" (presumably, the estate), he also refers to "the advantageous economic relationship between Plaintiff and Defendant (i.e., himself and Schnapp)." It is evident that if there were an economic relationship, advantageous or otherwise, between Steinberg and Schnapp, Schnapp could not be liable in tort for interfering with his own economic relationship, but might be liable for breach of contract. As discussed above, there is nothing in the record to support a conclusion that a contractual relationship existed between Steinberg and Schnapp. Thus, any claim for tortious interference based upon contractual relations between Schnapp and him must necessarily fail.

The claim for interference with the estate contract is also unavailing. As the Court of Appeals has observed, "tortious interference" can take many forms, and the degree of protection upon which a plaintiff can rely "is defined by the nature of the plaintiff's enforceable legal rights" (*NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 621 [1996]). "Thus, where

there is an existing, enforceable contract and a defendant's deliberate interference results in a breach of that contract, a plaintiff may recover damages for tortious interference with contractual relations even if the defendant was engaged in lawful behavior" (*id.*). On the other hand, "[w]here there has been no breach of an existing contract, but only interference with prospective contract rights . . . plaintiff must show more culpable conduct on the part of the defendant" (*id.*).

In this case, the economic relationship at issue is one between an attorney and a client. "[A]s a general rule, where there is a contractual relationship between a lawyer and client, the client has the right 'to terminate the attorney-client relationship *at any time with or without cause*'" (*Atkins & O'Brien v ISS Intl. Serv. Sys.*, 252 AD2d 446, 447-448 [1998], quoting *Cooperman*, 83 NY2d at 472). Consequently, since Steinberg's contract was terminable at will, the economic relations which he claims he lost are derived from a non-binding relationship. He is therefore required to demonstrate, as a general rule, that Schnapp's conduct constituted a crime or an independent tort (*Carvel Corp. v Noonan*, 3 NY3d 182, 190 [2004]). Allegations of mere self-interest or economic motivations will not suffice (*see Phillips v Carter*, 58 AD3d 528 [2009]).

Steinberg intimates in his complaint that Schnapp failed to

communicate certain problems concerning the probate of the estate to Borstein, but left Steinberg to incur the client's dissatisfaction. His concerns are amplified in his affidavit in opposition to the motion for summary judgment, in which he suggests that any fees he earned are being withheld as a result of allegations made by Schnapp concerning the quality of his work. The specifics are not offered. At best, Steinberg is suggesting that Schnapp made an inaccurate statement about the quality of Steinberg's work, which statement led Borstein to terminate the attorney relationship, a relationship that is terminable at will, in any event. Such statements would be neither tortious nor criminal.

As an at-will employee Steinberg may not "evade the employment-at-will rule by recasting [his] cause of action in the garb of tortious interference with [his] employment" (*Marino v Vunk*, 39 AD3d 339, 340 [2007], citing *Ingle v Glamore Motor Sales*, 73 NY2d 183, 189 [1989]), particularly in the absence of any support in the record for his contention that Schnapp resorted to "the requisite unlawful means or malicious intent to sustain such a claim" (*Interweb, Inc. v iPayment, Inc.*, 12 AD3d 164, 165 [2004], *lv dismissed* 4 NY3d 776 [2005]; *see also Snyder v Sony Music Entertainment*, 252 AD2d 294, 299-300 [1999] [to establish a claim for tortious interference with prospective

economic advantage, "a plaintiff must demonstrate that the defendant's interference with its prospective business relations was accomplished by 'wrongful means' or that defendant acted for the sole purpose of harming the plaintiff"]). The generalized contentions about what Schnapp might have said do not raise a factual issue as to whether his conduct was actionable.

Finally, Steinberg's request for additional discovery, when he has offered nothing but speculative and conclusory averments to substantiate his contention that Schnapp tortiously interfered with his contract with the estate, must be rejected. "A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (*Bailey v New York City Tr. Auth.*, 270 AD2d 156 [2000]). Steinberg's vague claims that he was made to bear the blame for purported problems in probating the estate, whatever they might be, do not meet the minimum showing necessary to forestall summary judgment.

Accordingly, the judgment of the Supreme Court, New York County (Jane S. Solomon, J.), entered October 27, 2008, dismissing the complaint, should be affirmed, without costs, and the appeal from the order of the same court and Justice, entered on or about September 16, 2008, which granted defendant's motion for summary judgment, should be dismissed, without costs, as

subsumed in the appeal from the judgment.

All concur.

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

ENTERED: APRIL 13, 2010

CLERK