SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 2, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Andrias, Catterson, Renwick, Manzanet-Daniels, JJ.

3105 Helen Garber, Index 105673/06
Petitioner-Respondent-Appellant,

-against-

Jerry H. Lynn, D.D.S,
Defendant-Respondent,

Sol Stolzenberg, D.M.D. doing
business as Toothsavers, et al.,
Defendants-Appellants-Respondents.

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Mauro Goldberg & Lilling LLP, Great Neck (Katherine Herr Solomon of counsel), for appellants-respondents.

Joel M. Kotick, New York, for respondent-appellant.

The Law Firm of Steven I. Fried, P.C., New York (Steven I. Fried of counsel), for respondent.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered January 16, 2009, which denied the motion by defendants Sol Stolzenberg, D.M.D., d/b/a Toothsavers, and Raimone Perez to set aside the verdict and for a new trial and denied plaintiff's cross motion for an additur to the jury's award of $25,000 for past and future pain and suffering, modified, on the facts, to the extent of vacating the award for

punitive damages and directing a new trial on that issue unless plaintiff stipulates, within 30 days of service of a copy of this order, to decrease the award for punitive damages to $100,000, and vacating the award for of $25,000 for past and future pain and suffering and directing a new trial on that issue unless defendants stipulate, within 30 days of service of a copy of this order, to increase the award for past pain and suffering to $90,000, and the award for future pain and suffering to $60,000, and otherwise affirmed, without costs.

The jury found, inter alia, that defendant Toothsavers departed from good and accepted dental practice in fitting plaintiff's temporary upper bridge and that this deviation was a substantial factor in causing her injuries. We find that the evidence shows that defendants' ill-fitting bridge not only caused plaintiff to suffer severe pain but has also caused her gums to become incredibly swollen, to bleed easily and to trap bacteria. Problems with the bridge impaired her ability to chew and prevented her from being able to properly clean the area.

Indeed, the record reveals that at the time of trial plaintiff's gums had pulled away from the bone and bled when touched. Moreover, because defendants failed to properly fit crowns onto plaintiff's teeth, bacteria invaded her gingival pockets causing them to increase in size, allowing an infection

to enter the jaw bone. According to plaintiff's expert, in order to restore her upper mouth, plaintiff will require approximately 15 additional implants and 14 crowns and her lower mouth will require approximately seven implants. There also remains a possibility that plaintiff will require root canal work due to nerve damage. Based upon this record, we find that the award for past and future pain and suffering is not reasonable compensation (CPLR 5501[c]; *see Dansby v Trumpatori*, 24 AD3d 192 [2005]; *Guiton v Gottlieb*, 236 AD2d 203 [1997]).

Contrary to defendants' argument, the jury's liability determination was not inherently inconsistent. Nor can it be said that "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). Moreover, it is well settled that courts should refrain from speculating about a jury's deliberative process (*see Dubec v New York City Hous. Auth.*, 39 AD3d 410, 411 [2007]).

Irrespective of whether all the dental services rendered to plaintiff could be considered to have been performed by employees of Toothsavers or on Toothsavers' behalf, the interrogatory asking whether Toothsavers had departed from good and accepted dental practice in diagnosing plaintiff and formulating her

treatment may have been confusing, since it failed to make clear whether it referred to the original treatment plan or the plan as it evolved and it failed to identify and particular aspect of any treatment plan. However, since the basis for plaintiff's claim that she was injured by the treatment rendered to her at Toothsavers was not so much the treatment plan as the fit and placement of the temporary bridge, which the jury also found to have been a departure from good and accepted dental practice and a substantial factor in causing her injuries, any error in that regard was harmless.

The dissent adopts Toothsavers' argument that the issue of punitive damages should not have been submitted to the jury. However, there was considerable evidence that, despite the fact that defendant Perez was not licensed to practice dentistry in New York and therefore was not permitted to make an impression for a bridge or to insert a bridge, it was Perez who always fit, placed, adjusted and re-cemented plaintiff's temporary bridge. The unlicensed practice of dentistry is a crime, and there was ample evidence from which a jury could conclude that Toothsavers was callous in its indifference to such illegality by having Perez repeatedly conduct these complicated procedures. By having Perez fabricate, place and adjust plaintiff's temporary bridge, Toothsavers was engaging in exactly the sort of willful or wanton

negligence or recklessness that evinces a gross indifference to patient care, warranting deterrence, and supporting submission of the issue of punitive damages to the jury (*see Randi A. J. v Long Is. Surgi-Ctr.*, 46 AD3d 74 [2007]; *Brown v LaFontaine-Rish Med. Assoc.*, 33 AD3d 470 [2006]). However, upon de novo review of the jury's punitive damages award, we find $260,000 excessive, and we reduce it to $100,000 (*see Brown* at 471).

We have reviewed the parties remaining contentions and we find them unavailing.

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

CATTERSON, J. (dissenting)

Because I do not believe that the level of culpability of the defendants in this case warrants the imposition of punitive damages, I respectfully dissent and would vacate the punitive damages award of $260,000.

On July 29, 2005, Helen Garber consulted with Toothsavers to inquire about repairing her two chipped front teeth. Then 71 years of age and diabetic, Ms. Garber was also missing at least 13 teeth, previous dental work was eroding, and she had decay in at least one tooth. Following X-rays and an examination, she was advised that a comprehensive restorative plan to treat her dental conditions required implants, caps, and permanent bridgework.

She was initially provided with a cost quote of approximately $25,000, which was reduced to $5,000 once she explained that she was on a fixed income and that amount was all she could afford. She paid the fee, and treatment began that day.

Her upper teeth were ground down, and a temporary bridge was fabricated and fitted. On later visits, lower teeth were extracted and a dental implant procedure was performed. Throughout her treatment and despite several repairs, the temporary bridge was uncomfortable and ill-fitting causing Ms. Garber persistent pain from irritated and swollen gums, which

prevented her from being able to chew properly.

The defendants' dental records describe Ms. Garber as a difficult patient who delayed the placement of the permanent bridge, thereby prolonging her own discomfort with the temporary bridge because she was unhappy with the aesthetics of one tooth that did not resemble one in her magazine clipping.

Prior to the fitting of the permanent bridge which the defendants allege would likely have alleviated the pain she was experiencing and prevented the ensuing infection, she terminated treatment at Toothsavers and utilized the temporary bridge for *another three years* as she could not afford to have it replaced. She then commenced this dental malpractice action.

At trial in June 2008, the jury found that the fit of the upper temporary bridge and the treatment plan and subsequent procedures implemented by Toothsavers departed from good and accepted standards of care and were substantial factors in the cause of Ms. Garber's injuries. The jury further found that defendant Lynn departed from good and accepted standards of care in the manner in which he diagnosed and developed the treatment plan, but that his departure had not been a substantial factor in causing any of her injuries.

Ms. Garber was awarded a total of $100,000 in compensatory damages including $75,000 in past and future dental expenses,

$10,000 for past pain and suffering and $15,000 for future pain and suffering over five years. The court reserved decision on the issue of punitive damages, and, in a separate trial held shortly thereafter, a new panel of jurors awarded $260,000 in punitive damages.

The court denied the motion by defendants Sol Stolzenberg, D.M.D., d/b/a Toothsavers, and Raimone Perez (hereinafter collectively referred to as "Toothsavers") to set aside the verdict or, in the alternative, for a new trial. It also denied the plaintiff's cross motion for additur to the jury's award of $25,000 for past and future pain and suffering.

Toothsavers appealed, arguing in part that punitive damages are unwarranted in the absence of proof of malice or vindictive motive, outrageous or oppressive conduct, or wanton disregard for public safety. I agree for the reasons set forth below.

It is well settled that punitive damages are assessed, not to redress the private wrong committed, but to reflect society's condemnation of a tortfeasor's morally culpable conduct. Walker v. Sheldon, 10 N.Y.2d 401, 404-405, 223 N.Y.S.2d 488, 490-91, 179 N.E.2d 497, 498-99 (1961), citing Toomey v. Farley, 2 N.Y.2d 71, 83, 156 N.Y.S.2d 840, 849, 138 N.E.2d 221, 228 (1956). As such, punitive damages are awarded to inflict punishment and deter misconduct when there are aggravating circumstances that imply an

"evil or wrongful motive" (Jones v. Hospital for Joint Diseases & Med. Ctr., 96 A.D.2d 498, 498, 465 N.Y.S.2d 517, 517 (1983), citing Walker, 10 N.Y.2d at 404-405, 223 N.Y.S.2d at 490-91; Le Mistral, Inc. v. Columbia Broadcasting System, 61 A.D.2d 491, 495, 402 N.Y.S.2d 815, 818 (1st Dept. 1978), appeal dismissed, 46 N.Y.2d 940 (1979)), a "high degree of moral turpitude" (Parker v. Crown Equip. Corp., 39 A.D.3d 347, 348, 835 N.Y.S.2d 46, 47 (1st Dept. 2007)), or "wanton disregard for public safety" (Longo v. Armor El. Co., 307 A.D.2d 848, 850, 763 N.Y.S.2d 597, 599 (1st Dept. 2003)).

The level of egregiousness of the defendant's conduct must exceed that of ordinary malpractice and verge on criminality. Prozeralik v. Capital Cities Communications, 82 N.Y.2d 466, 479, 605 N.Y.S.2d 218, 225-26, 626 N.E.2d 34, 41-42 (1993), quoting PROSSER AND KEETON, TORTS § 2, at 9 (5th ed.) ("'has the character of outrage frequently associated with crime'"); McDougald v. Garber, 73 N.Y.2d 246, 254, 538 N.Y.S.2d 937, 939, 536 N.E.2d 372, 374 (1989), citing Sharapata v. Town of Islip, 56 N.Y.2d 332, 335, 452 N.Y.S.2d 347, 348-349, 437 N.E.2d 1104, 1105-1106 (1982) ("intentional, malicious, outrageous, or otherwise aggravated beyond mere negligence"); Lavanant v. General Acc. Ins. Co. of Am., 212 A.D.2d 450, 451, 622 N.Y.S.2d 726, 727 (1st Dept. 1995) ("wanton dishonesty as to imply criminal indifference to civil

obligations which is aimed at the public").

Even where the plaintiff can show gross negligence, punitive damages are awarded only in "'"singularly rare cases" . . . involving an improper state of mind or malice or cases involving wrongdoing to the public.'" Bothmer v. Schooler, Weinstein, Minsky & Lester, P.C., 266 A.D.2d 154, 154, 698 N.Y.S.2d 486, 487 (1st Dept. 1999), quoting Anonymous v. Streitferdt, 172 A.D.2d 440, 441, 568 N.Y.S.2d 946, 947 (1st Dept. 1991), quoting Rand & Paseka Mfg. Co. v. Holmes Protection, 130 A.D.2d 429, 431, 515 N.Y.S.2d 468, 470 (1987), lv. denied 70 N.Y.2d 615, 524 N.Y.S.2d 677, 519 N.E.2d 623 (1988).

Here, Toothsavers committed dental malpractice, but Ms. Garber presented no evidence that Toothsavers was motivated by ill-will or dishonesty that approaches criminal misconduct. Further, Toothsavers' treatment of Ms. Garber cannot be considered grossly indifferent to her care or patient care generally so as to endanger the public. Cf. Brown v. LaFontaine-Rish Med. Assoc., 33 A.D.3d 470, 471, 822 N.Y.S.2d 527, 528 (1st Dept. 2006) (punitive damages were awarded in a wrongful death action where the defendant clinic failed to verify physician credentials, engaged in fraudulent billing, lacked functioning life-saving surgical equipment, permitted unsupervised administration of anesthesia, and there was "ample evidence of

reprehensible conduct evincing a gross indifference to patient care"); see also Williams v. Halpern, 25 A.D.3d 467, 468, 808 N.Y.S.2d 68, 69 (1st Dept. 2006) (upholding punitive damages when a physician's negligent injection practice resulted in several patients contracting hepatitis demonstrating "a gross indifference to patient care and a danger to the public"). Although there was some dispute at trial as to whether a technician rather than a licensed dentist as required in New York fabricated the temporary bridge, this deviation would not constitute a level of willful or wanton negligence or recklessness that evokes a quality of outrageousness or moral turpitude justifying punitive damages.

The plaintiff's argument on her cross appeal, that the award for past and future pain and suffering deviated from reasonable compensation granted in comparable cases, ought to be rejected. A jury's verdict awarding compensatory damages should not be disturbed if it was supported by valid reasoning and permissible inferences from the evidence at trial, was not against the weight of the evidence, and did not deviate materially from reasonable compensation under the circumstances. Mejia v. JMM Audubon, 1 A.D.3d 261, 262, 767 N.Y.S.2d 427, 428 (1st Dept. 2003), citing Cohen v. Hallmark Cards, 45 N.Y.2d 493, 499, 410 N.Y.S.2d 282, 285, 382 N.E.2d 1145, 1148 (1978); CPLR 4404(a); 5501(c).

In considering the testimony of the parties and their witnesses, the jury, at the court's instruction, may well have credited Toothsavers' argument that Ms. Garber failed to mitigate damages by prematurely abandoning treatment, and decreased her award for pain and suffering accordingly. Because Ms. Garber's case is distinguishable from those with higher awards and her award for pain and suffering of $25,000 can be logically justified, an increase in compensatory damages by this court is insupportable.

For these reasons, I would vacate the punitive damages award of $260,000 and otherwise affirm.

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

ENTERED: DECEMBER 2, 2010

CLERK

Saxe, J.P., Catterson, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

1974 Eric Wolfe, Index 110171/07
Petitioner,

-against-

Raymond W. Kelly, as Commissioner of the New York City Police Department, et al.,
Respondents.

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Norman A. Olch, New York, for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (John Hogrogian of counsel), for respondents.

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Determination of respondent Commissioner of the New York City Police Department, dated April 1, 2007, terminating petitioner's employment as a detective, unanimously annulled, without costs, the petition granted to the extent of dismissing Specifications No. 1 and No. 2 against petitioner, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Herman Cahn, J.], entered December 21, 2007) remanded for a determination of a new penalty on Specification No. 3.

In this article 78 proceeding, petitioner challenges a determination of the Commissioner of the New York City Police Department, which terminated his employment following a finding of guilt on charges of perjury and confiscation of drugs and money for personal gain. The petitioner was charged by the New

York City Police Department ("NYPD" or "the respondents") with, inter alia, stopping unidentified individuals in unspecified locations and confiscating unspecified amounts of narcotics and cash for his own personal gain on four occasions that occurred on unspecified dates at some time during a 24-month period between January 1998 and December 1999 – six to eight years prior to the petitioner's hearing. Petitioner asserts he was denied due process of law, and that the lack of specificity in the charges prevented him from preparing any type of defense other than offering a general denial of any wrongdoing. We agree.

Petitioner is a 17-year veteran, and was employed by the NYPD in 1990, first as an officer and later as a detective specializing in narcotics enforcement. The record reflects that he investigated narcotics complaints and regularly effected arrests and seizures. At his hearing, petitioner estimated that during his career he participated in approximately 450 seizures of drugs and money totaling a value of between 10 and 15 million dollars.

The record further reflects that at his last annual evaluation prior to the hearing, petitioner was rated as "highly competent" and it was noted that he had been awarded 30 medals (24 for excellent police duty, five for meritorious police duty, and one commendation). He had no prior disciplinary record.

On June 29, 2006, the Police Department's Internal Affairs Bureau ("IAB") issued disciplinary charges against petitioner. Specification 1 alleged that "on two separate occasions between January 1998 and December 1999," petitioner "stopped two individuals who were traveling in cabs and confiscated, without affecting [*sic*] an arrest and for personal monetary gain, a quantity of heroin from one, and a quantity of prescription drugs from the other."

Specification 2 alleged that "on two separate occasions between January 1998 and December 1999," petitioner "stopped two individuals and confiscated, for personal monetary gain, a quantity of United States currency." Specification 3 alleged that on or about and between April 23, 1998, and December 17, 1998, the petitioner testified falsely while under oath during an official court proceeding, in violation of Penal Law § 210.15.

Due to the lack of specificity in the charges, in particular, specifications 1 and 2, petitioner's attorney requested the equivalent of a bill of particulars. Subsequently, the bill amplified the charges only to the extent of stating that the alleged incident involving heroin occurred in the vicinity of Yankee Stadium in the Bronx. The bill also provided approximate

locations in uptown Manhattan for the alleged thefts of the prescription drugs and of the cash. The bill further stated that three of the four alleged incidents occurred with fellow detective, Julio Vasquez, present and the incident allegedly involving heroin occurred with both Vasquez and officer Thomas Rachko present.

At the hearing, there was testimony adduced that Vasquez was the petitioner's patrol partner for five years from 1996 to 2000, and that Rachko worked with the petitioner in the Department's Northern Manhattan Initiative during 1998 and 1999. Both Vasquez and Rachko admitted that during their careers with the NYPD, they were involved in serious crimes, many of which they committed together.

Vasquez admitted to stealing narcotics and cash from drug dealers, and recounted that through the thefts he had amassed approximately $800,000 between 1996 and 2001. Rachko testified to committing serious crimes from almost the day he joined the Department in the early 1980s, and stealing hundreds of thousands of dollars which he then used to satisfy his gambling addiction. His crimes included perjury based on testifying falsely before the grand jury. He acknowledged that he was not concerned by the fact that his perjury resulted in individuals being sent to jail.

In November 2003, Vasquez and Rachko were arrested for the theft of $169,000 from a narcotics merchant who was under federal surveillance. Both subsequently entered into cooperation agreements with federal authorities and pleaded guilty to grand larceny in the second degree. The terms of the agreements required Vasquez and Rachko "to testify at any proceeding in the Eastern District of New York or elsewhere as requested by the [U.S. Attorney's] Office." They were required to testify at petitioner's hearing.

In exchange for their testimony, Vasquez and Rachko were given the possibility of lighter sentences, and the Manhattan District Attorney's office agreed not to prosecute them for any crimes they may have committed in New York County. Both former officers were facing terms of life imprisonment at the time of petitioner's administrative hearing but had not been sentenced.

The Assistant Deputy Commissioner for Trials ("ADC") conducted a hearing on the charges in September and October of 2006. Vasquez testified as to all of the charges, and Rachko testified as to one incident in specification 1, as well as the perjury charges alleged in specification 3. After Vasquez concluded his testimony, the respondents submitted 10 IAB reports concerning the Bureau's investigation of petitioner. One of the

reports stated that Vasquez had accompanied IAB officers on a canvass to find the locations and individuals alluded to in specifications 1 and 2. The report, which was stipulated into evidence, showed that Vasquez had been unable to find or identify either the locations or the individuals.

Petitioner's counsel subsequently moved to dismiss the charges, arguing that petitioner's right to due process had been violated by the imprecise nature of the allegations and by the fact that he was unable to cross-examine Vasquez about the canvass. The ADC stated that he was "perturbed" by the failure of respondents to turn over the reports to petitioner's counsel, and that such failure "taint[s]" the case. Nevertheless, on February 15, 2007, the ADC released his decision, finding petitioner guilty of the three specifications, and recommending dismissal from the Department. The ADC concluded that petitioner's due process rights had not been violated given the "unique nature of the events alleged."

By order effective April 1, 2007, the Commissioner approved the ADC's recommendation and dismissed petitioner from his position with the NYPD. Petitioner commenced this article 78 proceeding in July 2007, contending, inter alia, that the order of dismissal was not supported by substantial evidence. He

further claimed that his right to due process was violated by the imprecise allegation of time in the first two specifications. By order entered December 21, 2007, the proceeding was transferred to this Court pursuant to CPLR 7804(g).

For the reasons set forth below, we agree with the petitioner that he was denied due process of law. It is well settled that the principles of due process applicable to criminal trials apply to government administrative proceedings (*Matter of Murray v Murphy*, 24 NY2d 150, 157 [1969]; *see also Matter of Ruffalo*, 390 US 544, 550 [1968]). Specifically, as respondents concede, the requirements of due process of law apply here because petitioner has a constitutionally protected property interest in continued public employment (*Gilbert v Homar*, 520 US 924, 928-929 [1997]).

Chief among the principles of due process is notice of the charges (*Matter of Murray v Murphy*, 24 NY2d at 157). In the context of an administrative hearing, the charges need to be "reasonably specific, in light of all the relevant circumstances, to apprise the party whose rights are being determined of the charges against him . . . and to allow for the preparation of an adequate defense" (*Matter of Block v Ambach*, 73 NY2d 323, 333 [1989]). Thus, the specificity of the notice of charges required

varies from case to case, but it must be specific enough to give actual notice to the party being charged (*id.*).

The petitioner correctly asserts that providing him with only a general time frame that spanned two entire years was not reasonably specific so as to satisfy due process requirements. The petitioner's alleged misconduct in specifications one and two applied to three or four discrete incidents and was therefore not an offense of an ongoing/continuing nature (*cf. People v Keindl*, 68 NY2d 410, 421 [1986] [finding a broad time period reasonable where the defendant endangered the welfare of a child over a long period of time]; *Matter of Block v Ambach*, 73 NY2d at 334).

Petitioner argues that the lack of specificity prohibited him from preparing an adequate defense. Respondents counter that petitioner could have offered an alibi defense by testifying about "any times during those two years when . . . he was not partners with Vasquez or Rachko." This is an incomprehensible – and inane – argument, and one that impermissibly shifts the burden of proof onto petitioner. Neither Vasquez nor Rachko was ever able to supply more information as to dates and times other than to testify that a couple of the alleged incidents occurred on a "sunny day." Presumably then, according to respondents, petitioner could have provided an alibi defense if he could have

shown that he had never worked with Vasquez or Rachko on any sunny day in 1998 or 1999. In any event, respondents ensured that such a task could not be attempted by petitioner given the unrefuted fact that petitioner's daily activity reports were cleaned out of his locker after he was charged, and never returned to him.

Equally incomprehensible is that, in denying petitioner's motion to dismiss for violation of due process, the ADC stated that "the unique nature of events alleged, the places where the misconduct occurred and the witnesses present, provided the defense with ample opportunity to prepare." The alleged incidents could only be assumed as "unique" if petitioner was, indeed, guilty as charged. Otherwise, as the record reflects, there was nothing at all unusual or "unique" about any of the circumstances surrounding the alleged misconduct.

The incidents in specifications one and two involved seizures of drugs and money. The record shows that petitioner was routinely and legitimately involved in such similar incidents on an almost daily basis as part of his job. Nothing else, but the *allegation* of confiscation for personal gain, distinguished the four incidents from legitimate buy and bust operations: the vaguely described locations were in the territory that petitioner

regularly patrolled; and the witnesses to the alleged misconduct were his patrol partner and another detective with whom petitioner frequently worked. In sum, none of the circumstances surrounding the alleged incidents were in any way unique or unusual compared to petitioner's daily routine as an undercover detective.

Had he been charged with wrongdoing on a specific date or at a specific location, petitioner would have had an opportunity to produce documentary evidence that arrests had been made and property had been vouchered and/or impounded, or simply that he had been on vacation or off duty. As it is, petitioner persuasively asserts that the vagueness about dates, locations and amounts of narcotics and money "smacks of a conscious avoidance of any specific fact which [petitioner] could refute."

Therefore, we find that the determination must be annulled as to charges 1 and 2. Given the foregoing, we do not need to reach the merits of petitioner's assertion that the findings of guilt as to specifications 1 and 2 were not supported by substantial evidence. We have considered petitioner's arguments with respect to specification 3 and find them unavailing given the low threshold in a substantial evidence analysis. Further, since petitioner's termination was determined by taking

into account a finding of guilt on all three charges, the petition is granted to the extent of remanding this matter for reconsideration of the penalty.

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

ENTERED: DECEMBER 2, 2010

CLERK

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

2288 Faith Kaminsky, Index 101974/06
Plaintiff-Appellant,

-against-

M.T.A. New York City
Transit Authority, et al.,
Defendants-Respondents.

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Gair, Gair, Conason, Steigman, Mackauf, Bloom & Rubinowitz, New York (Howard S. Hershenhorn of counsel), for appellant.

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

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Order, Supreme Court, New York County (Harold B. Beeler, J.), entered November 5, 2009, which, in an action for personal injuries, denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiff, a pedestrian, was struck by defendants' left-turning bus while crossing the street within the crosswalk at a controlled intersection. The traffic light was in plaintiff's favor at the time of the accident. Nevertheless, plaintiff's claim that she had the right of way hinges upon whether or not the bus was in motion when she stepped into the crosswalk (*see e.g. Fannon v Metropolitan Transp. Auth.*, 133 AD2d 211 [1987] *see also Brito v Manhattan & Bronx Surface Tr. Operating Auth.*, 188 AD2d 253 [1992], *appeal dismissed* 81 NY2d 993 [1993]). In this regard,

the bus operator testified that upon making his turn he scanned the intersection, checked his side-view mirror and observed no pedestrians crossing the street. This testimony was sufficient to raise a triable issue of fact as to whether plaintiff had the right of way when the accident occurred.

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

ENTERED: DECEMBER 2, 2010

CLERK

Saxe, J.P., Acosta, Freedman, Richter, Abdus-Salaam, JJ.

3504 Linda Boyd, Index 14783/99
Plaintiff-Respondent,

-against-

Manhattan and Bronx Surface
Transit Operating Authority, et al.,
Defendants-Appellants.

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

Law Office of Frances M. DeCaro, Bronx (Candice A. Pluchino of counsel), for respondent.

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Order, Supreme Court, Bronx County (John A. Barone, J.), entered November 30, 2009, which granted plaintiff's motion to set aside a jury verdict in defendant's favor, unanimously reversed, on the law and the facts, without costs, and the verdict reinstated. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiff brought this action to recover for injuries she sustained due to an allegedly defective metal strap she grabbed to steady herself when defendant's bus began to move. Plaintiff was heading toward the back of the bus, where there was open standing room, when the bus pulled away from the stop and lurched forward. Plaintiff grabbed the metal strap above her, and in so doing, twisted her shoulder when the strap slid out of place and down the

pole. Plaintiff alleged that defendant was negligent in its maintenance and pretrip inspection of the interior of the bus. Defendant argued that it did not have actual or constructive notice of the broken metal strap that led to plaintiff's injury, and thus was not negligent. The jury found that defendant was not negligent in its pretrip inspection of the interior of the bus or in failing to use reasonable care in maintaining the equipment. Plaintiff moved to set aside this verdict on the ground that disruptive comments by defense counsel prevented the jury from rendering a fair verdict.

The trial court erred in setting aside the verdict. Although plaintiff claims that the remarks by defense counsel were so prejudicial as to warrant the setting aside of a jury verdict, the remarks, when made, did not prompt plaintiff's counsel to move for a mistrial. Indeed, plaintiff never sought this relief before the jury verdict was rendered, and specifically informed the court that she did not want a mistrial. Consequently, her argument respecting these remarks is not preserved for our review (*see Duran v Ardee Assoc.*, 290 AD2d 366 [2002]). Nor has plaintiff shown an error so fundamental as to constitute a gross injustice such that we should address this unpreserved claim (*see Whelehan v County of Monroe*, 35 AD2d 774 [1970]; *cf Heller v Louis Provenzano, Inc.*, 257 AD2d 378 [1999]).

The comment that plaintiff contends is the most egregious occurred when her counsel made a passing comment during defense counsel's cross-examination of a witness, which prompted defense counsel to ask the court to instruct plaintiff's counsel to "shut her mouth." The court immediately admonished both attorneys. The court specifically told defense counsel that he should refrain from using such inappropriate language. Although defense counsel's use of the words "shut her mouth" was improper and would have been better left unsaid, it did not create a climate of hostility that so obscured the issues as to have rendered the trial unfair (*Duran*, 290 AD2d at 367). Counsel for both parties were intemperate and often impatient with each other and the court throughout this proceeding.

Plaintiff also contends that defense counsel's objections during summation were numerous and groundless. Defense counsel frequently objected, arguing that plaintiff's counsel was misstating the record, and the court sustained some of these objections. For others, the court overruled the objections and issued curative instructions, stating that it was the jury's recollection of the evidence that controlled. Furthermore, the court instructed the jury that summation remarks by both attorneys were not evidence and that the jury was to reach a verdict based only on the evidence presented at trial. Also noteworthy is that

plaintiff's counsel objected nearly as many times as defense counsel, and on similar grounds, during defendant's summation.

Plaintiff fails to show that defense counsel's improper remarks affected the outcome of the trial. Plaintiff was able to put forth her case and call witnesses, in addition to testifying about how the metal strap moved when she grabbed it. Furthermore, the bus driver, who was plaintiff's witness, testified over the course of two days about his regular practice of visually inspecting the interior of the bus and noting any defects or safety hazards. The record shows that he made no notation of any defects or hazards on the day of plaintiff's injury. Even though the bus driver testified that he did not have any specific recollection of his pretrip inspection of the bus that day, the jury could have found defendant not negligent based on the testimony of the deputy general manager for the bus company's maintenance and administration department. He testified that the maintenance and repair records for this particular bus, for the period prior to plaintiff's accident, did not indicate that any metal strap was defective or had been recently repaired. In light of this testimony, which the jury reasonably could have found credible, there was no danger that the jury was so distracted and influenced by the exchanges between counsel that it reached a verdict unsupported by the evidence.

We have considered plaintiff's remaining contentions and find them without merit.

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

ENTERED: DECEMBER 2, 2010

CLERK

Tom, J.P., Friedman, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3747 Michael Nolan, Index 400046/07
Plaintiff-Appellant,

-against-

J.C.S. Realty, LLC,
Defendant-Respondent,

The Proctor & Gamble Company, et al.,
Defendants.

[And a Third-Party Action]

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Jonathan D'Agostino & Associates, P.C., Staten Island (Edward J. Pavia, Jr. of counsel), for appellant.

Peter Reilly & Associates, LLC, New York (Peter L. Reilly of counsel) for respondent.

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Order, Supreme Court, New York County (Judith J. Gische, J.), entered February 8, 2010, which, inter alia, granted defendant J.S.C. Realty's cross-motion for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action as against it, unanimously affirmed, without costs.

The record demonstrates that defendant timely served its motion (*see Azcona v Salem*, 49 AD3d 343 [2008]). In any event, the motion court could consider the motion to the extent that it addressed the same issues that were the subject of defendant TeleVast's undisputedly timely motion (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 71 AD3d 538, 540 [2010]).

Defendant demonstrated that it exercised no supervisory control over the activity that brought about plaintiff's injury (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]).

There is no evidence that J.C. Studios and defendant J.C.S. Realty did not operate as separate corporate entities (*see Figueiredo v New Palace Painters Supply Co. Inc.*, 39 AD3d 363, 364 [2007]).

We have reviewed plaintiff's remaining arguments and find them without merit.

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

ENTERED: DECEMBER 2, 2010

CLERK

Tom, J.P., Friedman, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3748-
3748A In re Erica B. and Another,

Dependent Children Under the Age
Of Eighteen Years, etc.,

Quentin B.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

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

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

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Order, Family Court, Bronx County (Monica Drinane, J.), entered on or about April 30, 2009, which, to the extent appealed from as limited by the briefs, determined, after a fact-finding hearing, that respondent father neglected the subject children, unanimously affirmed, without costs. Appeal from order of disposition, same court and Judge, entered on or about May 27, 2009, which, upon a fact-finding of neglect, inter alia, placed the children in foster care with the Administration for Children's Services (ACS), unanimously dismissed, without costs, as abandoned.

The father contends that the court lacked jurisdiction over

him because he did not have custody of the children and was barred from contact with them by an order of protection. However, in determining jurisdiction of the Family Court under Article 10, the child need not currently be in the care or custody of the respondent, if the court otherwise has jurisdiction over the matter (*see* Family Court Act § 1013[d]). A respondent in a neglect proceeding includes any parent or other person legally responsible for the child's care (*see* Family Court Act § 1012[a]). A parent may not avoid his responsibilities to his children merely because they are not in his custody (*see Matter of Brent HH.*, 309 AD2d 1016, 1017 [2003], *lv denied* 1 NY3d 506 [2004]).

The court properly concluded that the father was aware that the mother was not properly caring for the children based on his testimony that he traveled to Puerto Rico to get one of the children when he was informed that the child was not attending school for a couple of months, and based on the children's testimony that he was present when they visited their paternal grandparent. Neglect may include the failure to properly supervise by unreasonably allowing harm to be inflicted on a child (*see Matter of Alena O.*, 220 AD2d 358, 361 [1995]). The

fact that the father was barred from contact with the children did not relieve him of his parental duties.

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

ENTERED: DECEMBER 2, 2010

CLERK

Tom, J.P., Friedman, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3749 Winston Chiu, Index 601124/09
Plaintiff-Respondent-Appellant,

-against-

1-9 Bond Street Realty, Inc., et al.,
Defendants-Appellants-Respondents.

_____

Warshaw Burstein Cohen Schlesinger & Kuh, LLP, New York (Bruce H. Wiener of counsel), for appellants-respondents.

Michael C. Marcus, Long Beach, for respondent-appellant.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered December 11, 2009, which denied defendants' motion to dismiss the complaint and granted their alternative request to remove the action to Civil Court, and denied plaintiff's cross motion for summary judgment, unanimously affirmed, without costs.

Defendants argue that this action to recover on a promissory note is time-barred because it was not commenced within six years after the note's end date (CPLR 213[2]). However, defendant 1-9 Bond Street Realty, the obligor, made regular monthly installment payments after the end date and discontinued the payments only in the belief that its obligations under the note were satisfied. This conduct unequivocally evinced an intent to satisfy those obligations. Thus, the limitations period as to the balance, if any, on the note began to run when 1-9 Bond Street Realty ceased

making payments in December 2005 (*see Lew Morris Demolition Co. v Board of Educ. of City of N.Y.*, 40 NY2d 516, 521 [1976]; *Roth v Michelson*, 55 NY2d 278, 281 [1982]; *National Heritage Life Ins. Co. in Liquidation v Hill St. Assoc.*, 262 AD2d 378 [1999]).

Defendant Man Choi Chiu argues that the action should be dismissed as to him because plaintiff failed to give him notice of 1-9 Bond Street Realty's default. However, the note did not explicitly require notice to the guarantor of the obligor's default; it stated only that plaintiff would be permitted to proceed against the guarantor upon a "declared default" or the insolvency of the obligor. In any event, the complaint alleges that due demand was made of the obligor corporation, and the guarantor was the lone principal of the corporation.

The court correctly denied plaintiff's cross motion for summary judgment, since the court did not give notice of an intent to convert defendants' motion to dismiss pursuant to CPLR 3211 to a motion for summary judgment (CPLR 3212), and we find, contrary to plaintiff's contention, that defendants did not chart a summary judgment course. Defendants' papers centered on the statute of limitations issue, not the merits of the case.

Based on its reasonable inference that plaintiff's damages may be substantially less than the $200,000 demanded in the

complaint, the court properly granted defendants' motion to remove this action to Civil Court (*see* CPLR 325[d]).

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

ENTERED: DECEMBER 2, 2010

CLERK

Tom, J.P., Friedman, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3750-
3751 In re Matter of Sylvan Lawrence, File No. 175/82
Deceased.

- - - - - -

Graubard Miller,
Petitioner-Respondent,

-against-

Richard S. Lawrence, etc.,
Respondent-Appellant,

J. Wallberg, etc., et al.,
Respondents.

- - - - -

Richard S. Lawrence, etc., et al.,
Plaintiffs,

-against-

Graubard Miller, et al.,
Defendants.

_____

Greenfield Stein & Senior, LLP, New York (Norman A. Senior of counsel), for appellant.

Flemming Zulack Williamson & Zauderer LLP, New York (Mark C. Zauderer of counsel), for respondent.

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Orders, Surrogate's Court, New York County (Troy K. Webber, S.), entered on or about October 1, 2009, which, to the extent appealed from, confirmed the Referee's July 10, 2009 and September 30, 2009 reports recommending, respectively, that petitioner's application to withdraw its SCPA 2110 claim be granted without conditioning the withdrawal on the payment of attorneys' fees and

that respondent Richard Lawrence's motion for summary judgment dismissing petitioner's tortious interference claim be granted without imposing attorneys' fees, unanimously affirmed, without costs.

This proceeding arises from a fee dispute between petitioner Graubard Miller and its client of more than 20 years, Alice Lawrence, in connection with the estate of Mrs. Lawrence's late husband, Sylvan Lawrence. The history of the proceeding was reviewed by this Court in a prior appeal (48 AD3d 1 [2007], *affd* 11 NY3d 588 [2008]). At issue here is the voluntary discontinuance of petitioner's claim pursuant to SCPA 2110 against respondent, as executor, for legal fees for benefits conferred upon the estate (the 2110 claim) and its claim against respondent, individually, for tortious interference with a contract.

The Surrogate properly permitted petitioner to discontinue the 2110 claim without conditioning discontinuance on the payment of attorney's fees (*see* CPLR 3217[b]; *Beigel v Cohen*, 158 AD2d 339 [1990]). Respondent does not challenge the Referee's finding that the 2110 claim was not frivolous, and petitioner has asserted good faith reasons for its decision to withdraw the claim. Thus, no special circumstances exist to preclude discontinuance (*see Tucker v Tucker*, 55 NY2d 378, 383 [1982]).

Respondent's request for attorneys' fees as a sanction for

frivolous conduct, made for the first time in reply on his motion to dismiss the tortious interference claim, failed to comply with the notice requirement of 22 NYCRR 130-1.1(d). Accordingly, the Surrogate properly denied the request without prejudice to a separate application affording petitioner an opportunity to submit opposition (*see Leskinen v Fusco*, 18 AD3d 387, 389 [2005], *lv dismissed* 6 NY3d 807 [2006]).

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

ENTERED: DECEMBER 2, 2010

CLERK

Tom, J.P., Friedman, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3752 Eastside Exhibition Corp., Index 604492/02
Plaintiff-Appellant,

-against-

210 East 86th Street, Corp.,
Defendant-Respondent.

_____

Marcus Rosenberg & Diamond LLP, New York (David Rosenberg of counsel), for appellant.

Kaufman Friedman Plotnicki & Grun, LLP, New York (Howard Grun of counsel), for respondent.

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Order, Supreme Court, New York County, (Edward H. Lehner, J.), entered on or about July 30, 2009, which, after a hearing, determined that plaintiff was not entitled to any abatement of rent, unanimously affirmed, without costs.

"An appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as on the appellate court . . . [and] operates to foreclose reexamination of [the] question absent a showing of subsequent evidence or change of law" (*J-Mar Serv. Ctr., Inc. v Mahoney, Connor & Hussey*, 45 AD3d 809, 809 [2007] [internal quotation marks and citations omitted]; *see Martin v City of Cohoes*, 37 NY2d 162 [1975]). Accordingly, based upon our

prior determination, the motion court properly rejected plaintiff's claim.

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

ENTERED: DECEMBER 2, 2010

CLERK

Tom, J.P., Friedman, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3754 Asesd, LLC, Index 601437/09
Petitioner-Appellant,

-against-

Vanguard Construction and
Development Company, Inc.,
Respondent-Respondent,

American Arbitration Association,
Respondent.

_____

Jaffe, Ross & Light, LLP, New York (Steven R. Miller of counsel), for appellant.

Goetz Fitzpatrick LLP, New York (John B. Simoni, Jr. of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered July 9, 2009, which, inter alia, denied petitioner's motion to compel respondent Vanguard to pay its half of certain fees required by the American Arbitration Association (AAA), unanimously affirmed, without costs.

As the AAA's rules provide that the remedy for a party's refusal to pay its share of arbitration fees is for the paying party to advance the nonpaying party's share of the fees, that is petitioner's recourse here. This Court cannot fashion another remedy (*see Matter of Salvano v Merrill Lynch, Pierce, Fenner & Smith,* 85 NY2d 173 [1995]). Nor was this a case where the AAA's rules violated public policy or due process (*cf. Brady v Williams*

Capital Group, L.P., 64 AD3d 127 [2009], *affd in part, mod in part and remitted* 14 NY3d 459 [2010]). Rather, the AAA's rules, which shift the burden to one party without informing the arbitrators of the issue, are consistent with this Court's past decisions (*see e.g. Coty Inc. v Anchor Constr.*, 7 AD3d 438 [2004]).

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

ENTERED: DECEMBER 2, 2010

CLERK

Tom, J.P., Friedman, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3755 Gurumurthy Kalyanaram, Index 115829/09
Petitioner-Appellant,

-against-

New York Institute of Technology,
Respondent-Respondent.

_____

Gallet Dreyer & Berkey, LLP, New York (David T. Azrin of counsel), for appellant.

Fulbright & Jaworski L.L.P., New York (Douglas P. Catalano of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (O. Peter Sherwood, J.), entered June 28, 2010, which denied the petition to vacate an arbitration award sustaining the decision of respondent to terminate petitioner's employment and granted respondent's cross motion to confirm the award, unanimously affirmed, with costs.

Petitioner failed to establish any of the grounds available for vacating the arbitration award, i.e., that it violates a strong public policy or is totally irrational or that the arbitrator exceeded his enumerated powers (*see Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479-480 [2006], *cert dismissed* 548 US 940 [2006]; *Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 308-309 [1984]).

To find a violation of public policy with respect to academic

freedom or the whistleblower or anti-retaliation statutes relied upon by petitioner, we would have to ignore specific factual and legal findings made by the arbitrator that the fraudulent conduct engaged in by petitioner did not fall within the parameters of academic freedom or the statutes, and then make an additional factual finding that petitioner was discharged for that conduct. Only then could we analyze whether the award violated purported public policy interests. However, courts must be able to conclude that public policy precludes enforcement of an award by examining the award "on its face, without engaging in extended factfinding or legal analysis" (*Matter of Sprinzen [Nomberg]*, 46 NY2d 623, 631 [1979]). Thus, the award cannot be vacated on public policy grounds.

The award cannot be vacated on the ground that the arbitrator exceeded his authority under the collective bargaining agreement. Although the agreement provides that a faculty member cannot be disciplined for speech uttered as a private citizen, to reach the conclusion urged by petitioner, that the e-mails at issue were not job-related and that he sent them as a private citizen, we would have to engage, impermissibly, in fact-finding and substitute our

judgment for that of the arbitrator (*Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 326 [1999]).

Nor can we conclude that the award is irrational in its finding that respondent satisfied its burden of demonstrating that petitioner sent the subject e-mails. An award will be found irrational only if there is no proof whatever to justify it and will be confirmed if there is "any plausible basis" for it (*see Azrielant v Azrielant*, 301 AD2d 269, 275 [2002], *lv denied* 99 NY2d 509 [2003] [internal quotation marks and citation omitted]). Challenges to the sufficiency or adequacy of the evidence to support an award are not grounds for vacating the award (*see Matter of Peckerman v D & D Assoc.*, 165 AD2d 289, 296 [1991]). In any event, there is a plausible basis in the record for the conclusion that the e-mails came from petitioner's home IP address; the fact that petitioner produced evidence that he was not at home when some of the e-mails were written is inconsequential since the evidence he produced was not conclusive and it did not relate to all of the e-mails but only to certain ones (*see Montanez v New York City Hous. Auth.*, 52 AD3d 338 [2008]).

Finally, there was no violation of petitioner's right to due process during the arbitration proceeding.

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

ENTERED: DECEMBER 2, 2010

CLERK

Tom, J.P., Friedman, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3756 Patricio Hendrickson, Index 21688/06
Plaintiff-Appellant,

-against-

Adventurous Realty II Corp., et al.,
Defendants,

Washington Mutual Bank, FA,
Defendant-Respondent.

_____

Stephen A. Katz, New York, for appellant.

Satterlee Stephens Burke & Burke LLP, New York (Alun W. Griffiths of counsel), for respondent.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered September 18, 2007, which granted the motion of defendant Washington Mutual Bank (WAMU) to dismiss the complaint against it for lack of subject matter jurisdiction, unanimously affirmed, with costs.

WAMU is a federal savings association operating under the supervision of the federal Office of Thrift Supervision, an agency established by the Home Owners' Loan Act (HOLA, 12 USC § 1462a[a]) and authorized to promulgate regulations (§ 1463[a][2]) that preempt state laws affecting the operations of federal savings associations (*see* 12 CFR 560.2[a]). The types of state laws expressly preempted by these regulations include those purporting to impose requirements regarding loan-related fees; disclosure and

advertising; processing, origination or servicing of mortgages; and disbursements and repayments (12 CFR 560.2[b][5], [9], [10], [11]).

Since plaintiff's claims based on state law more than incidentally concern the processing, origination or servicing of loans and WAMU's lending operations, the state laws invoked by plaintiff, as applied to his allegations, are expressly preempted by HOLA (*Monroig v Washington Mut. Bank, FA*, 19 AD3d 563 [2005]).

In view of our disposition, we need not reach plaintiff's remaining contention.

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

ENTERED: DECEMBER 2, 2010

CLERK

Tom, J.P., Friedman, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3759 The People of the State of New York, Ind. 1849/09
Respondent,

-against-

Steven Sposato,
Defendant-Appellant.

_____

Andrew C. Risoli, Eastchester, for appellant.

Robert T. Johnson, District Attorney, Bronx (Marc A. Sherman of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Steven L. Barrett, J.), rendered July 9, 2009, convicting defendant, upon his plea of guilty, of attempted disseminating indecent material to minors in the first degree, and sentencing him to a term of 5 years' probation, unanimously affirmed.

Regardless of the validity of the waiver of the right to appeal, we find no basis for reversal.

To the extent defendant is challenging the sufficiency of his plea allocution, that claim is unpreserved and we decline to review it in the interest of justice; the narrow exception to the preservation rule explained in *People v Lopez* (71 NY2d 662, 665-666 [1988]) does not apply since defendant's factual recitation did not negate any element of the crime or cast significant doubt on his guilt. In any event, the record

establishes the voluntariness of the plea.

To the extent defendant is challenging the sufficiency of the evidence that was presented to the grand jury and would have been presented had he gone to trial, such claims are foreclosed by a guilty plea (*People v Taylor*, 65 NY2d 1 [1985]; *People v Thomas*, 53 NY2d 338 [1981]). Defendant's challenge to geographical jurisdiction in Bronx County is likewise foreclosed, as well as being unpreserved for review, and we decline to review it in the interest of justice. As an alternative holding, we find that claim to be without merit because defendant's unlawful Internet communications from his computer in Westchester County to the computer in Bronx County of an undercover detective defendant believed to be a minor are deemed to have occurred in both jurisdictions (*see* CPL 20.40[1], 20.60[1]; Penal Law § 235.22).

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they primarily involve matters outside the record concerning communications between defendant and his attorney (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *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 Ford*, 86 NY2d 397, 404 [1995]; *see also Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: DECEMBER 2, 2010

CLERK

Tom, J.P., Friedman, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3761 The People of the State of New York, Ind. 1151/08
Respondent,

-against-

Alvaro Rojas,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Lewis Bart Stone, J.), rendered on or about June 11, 2009,

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: DECEMBER 2, 2010

CLERK

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

Tom, J.P., Friedman, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3762 Ramona Tapia, et al., Index 400536/08
Plaintiffs-Respondents, 401140/08

Juana Grullon, et al.,
Plaintiffs,

-against-

Successful Management Corp., et al.,
Defendants-Appellants,

600 Acad LLC, et al.,
Defendants.
- - - - -
Vladimir Dreytser, et al.,
Plaintiffs,

Aleksandr Flisfeder, et al.,
Plaintiffs-Respondents,

-against-

195 Realty, LLC, et al.,
Defendants,

West 187th Street Properties, Inc., et al.,
Defendants-Appellants.

_____

Horing Welikson & Rosen, P.C., Williston Park (Niles C. Welikson of counsel), for appellants.

Steven Banks, The Legal Aid Society, New York (Robert Desir of counsel), for Ramona Tapia and Mariya Koltun in Action 1, and Aleksandr Flisfeder and Khana Mostova in Action 2, respondents.

Michael A. Cardozo, Corporation Counsel, New York (Aaron M. Bloom of counsel), for municipal respondents.

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Judgment, Supreme Court, New York County (Marcy S. Friedman, J.), entered August 12, 2009, as clarified by orders, same court

and Justice, entered on or about January 29, 2010, granting plaintiffs' motion for declaratory and injunctive relief to the extent of declaring that the antidiscrimination clauses of the J-51 law and Local Law 10 prohibit defendant landlords Successful Management, Arbern 315 Ocean Parkway, West 187th Street Properties and 1347 Ocean (appellants) from refusing to accept "Section 8" benefits from plaintiffs, and directing them to accept plaintiffs' Section 8 vouchers and execute all related documents to effectuate their acceptance, unanimously affirmed, with costs.

Plaintiffs, longtime tenants in rent-stabilized buildings who were recently approved for Section 8 benefits under 42 USC § 1437f and seek to use Section 8 vouchers to pay a portion of their rent, are protected by the J-51 antidiscrimination statute and Local Law No. 10 (2008) of City of NY (New York City Admin Code §§ 11-243[k], 8-107[5]; *Kosoglyadov v 3130 Brighton Seventh, LLC*, 54 AD3d 822 [2008]; *see also Jones v Park Front Apts., LLC*, 73 AD3d 612 [2010]). The plain language of the J-51 law prohibits a landlord receiving J-51 tax benefits from "directly or indirectly" denying a dwelling accommodation "or any of the privileges or services incident" thereto "to *any person* because of . . . the[ir] use of, participation in, or being eligible for a governmentally funded housing assistance program, including . . . the section 8 housing voucher program" (Admin Code § 11-243[k], emphasis added).

Contrary to appellants' claim, the language does not distinguish between current and prospective tenants. Nor does the statute exclude tenants whose leases do not require their landlords to accept Section 8 benefits.

Similarly, the plain language of Local Law 10 prohibits discrimination against "any person or group of persons" by virtue of their "lawful source of income" (Admin Code § 8-107[5][a][1], [2]), which would include Section 8 vouchers. As with the J-51 statute, the language does not distinguish between current and prospective tenants. Nor does the statute exclude tenants whose leases do not require their landlords to accept Section 8 benefits. Accordingly, a plain reading of the statute does not support appellants' contention that it was only intended to protect prospective tenants or those with leases specifically permitting rental payments to be made with Section 8 benefits (*see Timkovsky v 56 Bennett, LLC*, 23 Misc 3d 997, 1001 [2009]).

Appellants' interpretation of these statutes lacks any basis in the text of the law and also makes no practical sense. As the motion court noted, under such interpretation, a landlord could refuse to accept the Section 8 voucher of an existing tenant, but would have to accept it if the tenant vacated the apartment and then moved back in. Such a reading would have to be rejected as leading to absurd results (*see id.*).

Appellants claim it is not discriminatory to refuse to accept Section 8 benefits from current tenants because they are not refusing to give these tenants a lease. However, it is discriminatory to "refus[e] to accept the means of payment proffered by [these tenants] solely because those means are obtained through a federal housing program" (*Kosoglyadov*, 54 AD3d at 824; *see also Cosmopolitan Assoc., L.L.C. v Fuentes*, 11 Misc 3d 37 [App Term 2006]). Indeed, appellants' refusal to accept Section 8 subsidies constitutes discrimination because it compels a tenant who wants to "use" a voucher or "participate" in the Section 8 program to seek housing elsewhere.

Even though the Section 8 program is voluntary, "state and local law may properly provide additional protections for recipients of section 8 rent subsidies even if those protections could limit an owner's ability to refuse to participate in the otherwise voluntary program" (*Kosoglyadov*, 54 AD3d at 824).

In support of their position, appellants selectively cite various documents related to Local Law 10's legislative history. However, these selective citations are unavailing and ignore the preamble to Local Law 10, which sets forth the legislative intent (*see* Note accompanying § 1 of Local Law 10 [Admin Code § 8-101]):

> Legislative Intent. The Council hereby finds that some landlords refuse to offer available units because of the source of income tenants,

including current tenants, plan to use to pay the rent. In parti
that landlords discriminate against holders of section 8 vouchers because of prejudices they hold about voucher holders. This bill would make it illegal to discriminate on that basis.

Local Law 10 is not preempted by federal law. Indeed, in *Mother Zion Tenant Assn. v Donovan* (55 AD3d 333, 336-337 [2008], *lv dismissed* 11 NY3d 915 [2009]), this Court recognized that the Section 8 program, while voluntary in nature, did not preempt local antidiscrimination laws. Furthermore, in *Rosario v Diagonal Realty, LLC* (8 NY3d 755 [2007], *cert denied* 552 US 1141 [2008]), the Court of Appeals held that the 1998 amendments to the Section 8 program, which permitted landlords to opt out of the program after expiration of tenants' leases, did not preempt either the rent stabilization law provision requiring leases to be renewed upon the same terms and conditions as expiring leases, or the J-51 antidiscrimination clause prohibiting landlords from discriminating against tenants who receive Section 8 assistance (*id.*, 8 NY3d at 764 n 5; *see also Kosoglyadov,* 54 AD3d at 824). While the issue in *Rosario* and *Kosoglyadov* was the J-51 law, the same reasoning applies to Local Law 10, as it is also an antidiscrimination law providing many of the same protections as J-51 (*see Timkovsky*, 23 Misc 3d at 1006 n 12).

Nor does Local Law 10 violate the Urstadt Law (L 1971, ch 372, as amended by L 1971, ch 1012 [McKinney's Uncons Laws of NY §

8605]), which was intended to prohibit attempts, whether by local law or regulation, to expand the set of buildings subject to rent control or stabilization (*see City of New York v New York State Div. of Hous. & Community Renewal*, 97 NY2d 216, 227 [2001]). As the motion court succinctly noted, appellants' "acceptance of plaintiffs' Section 8 vouchers will have no impact in expanding the buildings subject to the rent stabilization law or expanding regulation under the rent laws, and thus does not offend the objective of the Urstadt Law."

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

ENTERED: DECEMBER 2, 2010

CLERK

Tom, J.P., Friedman, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3763 Thorner Harris, Index 112406/08
Plaintiff-Appellant,

-against-

Seward Park Housing Corporation, etc., et al.,
Defendants-Respondents.

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Lawrence J. Silberman, P.C., New York (Lawrence J. Silberman of counsel), for appellant.

Fiedelman & McGaw, Jericho (James K. O'Sullivan of counsel), for respondents.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered December 14, 2009, which, to the extent it denied renewal and adhered on reargument to so much of a prior ruling as granted defendants' motion to dismiss the first cause of action, unanimously affirmed insofar as appealable, and the appeal is otherwise dismissed, without costs.

Plaintiff did not appeal the order of June 19, 2009, which dismissed his complaint, nor did he make a motion during the statutory 30 days for such relief (CPLR 2221[d]). Despite recognizing the untimeliness of the motion, the court granted reargument with regard to the first cause of action for breach of contract, relying on *Liss v Trans Auto Sys.* (68 NY2d 15, 20 [1986]), and adhered to its prior ruling. In *Liss*, the Court of Appeals held that "regardless of statutory time limits concerning

motions to reargue, every court retains continuing jurisdiction to reconsider its prior interlocutory orders during the pendency of the action." Nevertheless, since the underlying order of June 19 had finally determined this action by dismissing the complaint, the matter was no longer pending and the court lacked the authority to consider the untimely request for reargument (*see Johnson v Incorporated Vil. of Freeport*, 303 AD2d 640 [2003]; *Sainphor v Hurtt*, 302 AD2d 511 [2003]), thus requiring dismissal of the present appeal to that extent.

Even were we to consider the merits of plaintiff's challenge to the dismissal of his claim for breach of contract, it is clear that he has no such viable cause of action. The elements of such a claim include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages (*see Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478 [2007]). There never was any enforceable agreement between these parties, but merely an application by plaintiff to purchase one of the apartments in defendant cooperative, which certainly had a right to insist -- as a condition precedent to the contract -- on the approval of the application by its Board of Directors. Defendant cooperative had a legitimate business interest in procuring the highest possible price for the sale of its units (*see Singh v Turtle Bay Towers Corp.*, 74 AD3d 568 [2010]), and

plaintiff, as a mere contract vendee of shares rather than a shareholder, did not have a cause of action for breach of contract against the cooperative (see *85 Fifth Ave. 4th Floor, LLC v I.A. Selig, LLC*, 45 AD3d 349 [2007]; *Aridas v 244 E. 60th St. Owners Corp.*, 292 AD2d 325 [2002]).

Finally, the motion court correctly determined that plaintiff was not entitled to renewal. *See* CPLR 2221(e).

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

ENTERED: DECEMBER 2, 2010

CLERK

Tom, J.P., Friedman, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3764 In re Trust f/b/o Erna Adler, etc., Index 102112/08
Settlor.
- - - - -
Stephen Adler,
Petitioner-Respondent,

Renata Adler,
Respondent-Appellant.

_____

Law Office of Kathy L. McFarland, Woodstock (Kathy L. McFarland of counsel), for appellant.

Law Offices of Allan E. Kirstein, New York (Allan E. Kirstein of counsel), for respondent.

_____

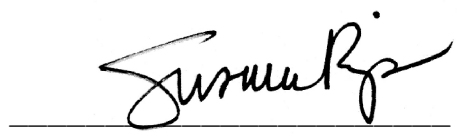
Order, Supreme Court, New York County (Alice Schlesinger, J.), entered October 5, 2009, which, upon reconsideration, adhered to an interpretation of the parties' settlement stipulation as requiring respondent to pay petitioner the $35,000 differential in the value of two parcels of property from her own personal funds, rather than from trust funds, unanimously reversed, on the law, without costs, and it is directed that the $35,000 be paid from trust funds.

The trust instrument unambiguously required the trustee to divide principal distributions into "equal parts" and gave the trustee discretion to allot trust assets among remainderman shares to fulfill this requirement (*see Matter of Matthews Trust No. 1*, 61 AD3d 511, 512 [2009], *lv denied* 13 NY3d 702 [2009]). The trust

provisions are not altered by the parties' stipulation of settlement (*see* EPTL 7-2.4; *Matter of Wallens*, 9 NY3d 117, 122 [2007]; *Rosner v Caplow*, 90 AD2d 44, 49 [1982], *affd* 60 NY2d 880 [1983]).

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

ENTERED: DECEMBER 2, 2010



CLERK

Tom, J.P., Friedman, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3765 Angel Rubio Ocasio, an infant by his guardian, Matitza Rosado, et al., Plaintiffs-Respondents, Index 350267/09

-against-

Town of Greenburgh, et al., Defendants,

Greenburgh Eleven Union Free School District, Defendant-Appellant.

_____

Cartafalsa Slattery Turpin & Lenoff, Tarrytown (Patricia A. Hughes of counsel), for appellant.

Krieger, Wilansky & Hupart, Bronx (Aaron N. Solomon of counsel), for respondents.

_____

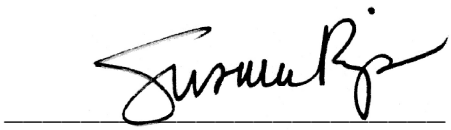
Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about November 27, 2009, which denied without prejudice defendant School District's motion for summary judgment, and also denied a change venue from Bronx to Westchester County, unanimously affirmed, without costs.

A central issue in this case is which defendant(s) owed a duty to the injured infant plaintiff, a passenger in a bus, the primary purpose of which was to transport students to and from Greenburgh Eleven Union Free School District. The District's affidavit offers only self-serving conclusions (*see Ayotte v Gervasio,* 81 NY2d 1062 [1993]), and summary disposition was

premature before completion of discovery (*see Palmer v Trachtenberg*, 268 AD2d 304 [2000]). In light of the alleged assault's occurrence in the Bronx and the presence of the municipal codefendants in this action, denial of change of venue outside New York City was a sound exercise of discretion (CPLR 504[3]; *see Fucito v Board of Educ. of City of N.Y.*, 190 AD2d 605 [1993]).

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

ENTERED: DECEMBER 2, 2010



CLERK

Tom, J.P., Friedman, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3766N Jawaun Craig Hall, Index 7212/06
Plaintiff-Appellant,

-against-

Elrac, Inc. doing business as
Enterprise Rent A Car,
Defendant-Respondent,

Lucas Alvarez, et al.,
Defendants.

_____

Ogen & Sedaghati, P.C., New York (Eitan Alexander Ogen of counsel), for appellant.

DeSimone, Aviles, Shorter & Oxamendi, LLP, New York (Benjamin A. Shatzky of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about October 9, 2009, which denied plaintiff's motion to strike defendant Elrac's answer, or alternatively, to order that a "spoliation inference charge" be given or to preclude defendant Elrac from defending against the allegation of negligence, unanimously affirmed, without costs.

We find that the IAS court properly considered the affidavit of defendant Elrac's senior account manager in the damage unit in concluding that defendant's disposal of the vehicle in question was not done in bad faith. Initially, plaintiff's claim that the affidavit was not in admissible form because it was signed outside

New York State but notarized by a New York notary, without providing a certificate of conformity as required by CPLR 2309(c) and Real Property Law § 299-a is unpreserved (*see Matapos Tech. Ltd. v Compania Andina de Comercio Ltda*, 68 AD3d 672, 673 [2009]; *P.T. Bank Cent. Asia v Chinese Am. Bank*, 229 AD2d 224, 229 [1997]). In any event, as long as the oath is duly given, authentication of the oathgiver's authority can be secured later, and given nunc pro tunc effect if necessary (*Matapos Tech. Ltd.*, 68 AD3d at 673).

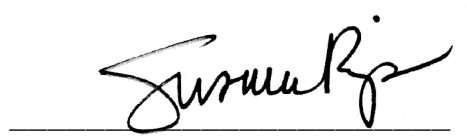
The affidavit was based on the affiant's personal knowledge and his review of the documents, including wholesale purchase order/bill of sale and the check received by defendant in payment for the wrecked vehicle, sold as salvage, which established the date of transfer. This is not a summary judgment motion, where the movant's evidence must be in admissible form, and even a summary judgment motion affords some flexibility to the party opposing the motion (*see Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 [1979]).

Absent proof that the destruction of the vehicle was willful, contumacious or in bad faith, the court properly declined to impose the drastic sanction of striking defendant's answer and, instead, deferred the issue of the appropriate

sanction for spoliation of evidence to trial (*see Christian v City of New York*, 269 AD2d 135, 137 [2000]).

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

ENTERED: DECEMBER 2, 2010



CLERK

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

3767 The People of the State of New York, Respondent, Ind. 976/08

-against-

Albert Andujar, Defendant-Appellant.

_____

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

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

_____

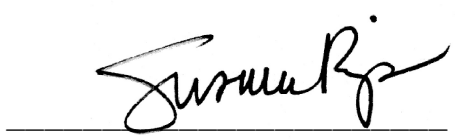
Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered May 26, 2007, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 6 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis to disturbing the jury's credibility determinations, including its rejection of defendant's testimony, which was the basis of his agency defense. The undercover officer's testimony

disproved that defense and established defendant's accessorial liability for the sale.

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

ENTERED: DECEMBER 2, 2010



CLERK

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

3768 Jorge Gasper, Index 113198/07
Plaintiff-Respondent, 590384/08

-against-

LC Main, LLC, et al.,
Defendants-Appellants,

The Ritz-Carlton Hotel Company
of New York, Inc.,
Defendant.

[And A Third-Party Action]

_____

Milber Makris Plousadis & Seiden, LLP, White Plains (David C. Zegarelli of counsel), for appellants.

Davidson & Cohen, P.C., Rockville Centre (Robin Mary Heaney of counsel), for respondent.

_____

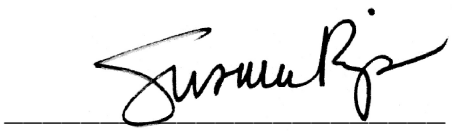
Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered April 12, 2010, which, in an action for personal injuries sustained when plaintiff cut his right thigh while operating a power circular hand saw at a construction site, insofar as appealed from as limited by the briefs, denied the motion of defendants-appellants site owner and general contractor (defendants) for summary judgment dismissing plaintiff's Labor Law § 241(6) claim, unanimously affirmed, without costs.

Defendants' expert relied, inter alia, on unauthenticated photographs of a circular saw as the basis for his opinion that

plaintiff was the sole proximate cause of the accident. Furthermore, defendants' expert mischaracterized plaintiff's EBT testimony in forming his conclusions. Thus, the photographs and deposition transcripts are insufficient to establish, as a matter of law (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]), that the saw complied with 12 NYCRR 23-1.12(c)(1), regulating the guarding of power-driven saws. Furthermore, we reject defendants' argument that, even if the saw was broken, the record establishes that plaintiff's misuse of the saw by using his right leg as a sawhorse, was the proximate cause of his injury. Plaintiff's testimony as well as that of other witnesses conflicts with that offered by defendants and creates issues of fact that cannot be resolved on a motion for summary judgment. Finally, there are issues of fact as to whether a saw horse or saw table was readily available, and whether plaintiff for no good reason refused to use them.

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

ENTERED: DECEMBER 2, 2010



CLERK

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

3769 Fitzroy Parker, Index 20634/04
Plaintiff-Respondent,

-against-

Hilario Alacantara, et al.,
Defendants-Appellants.

_____

Harvey Gladstein & Partners LLC, New York (Richard M. Sands of counsel), for appellants.

Dinkes & Schwitzer, P.C., New York (Naomi J. Skura of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered on or about April 5, 2010, which, inter alia, in this action for serious injuries allegedly sustained in an automobile accident, granted plaintiff's motion to vacate his default and restored the matter to the trial calendar, unanimously affirmed, with costs.

A plaintiff moving to vacate a judgment under CPLR 5015(a) must demonstrate both a reasonable excuse for the default and a meritorious cause of action (see *e.g. Rugieri v Bannister*, 7 NY3d 742, 744 [2006]). Here, the motion court exercised its discretion in a provident manner in granting plaintiff's motion and restoring the action to the trial calendar. The record shows that when the

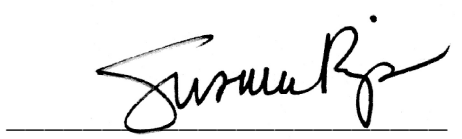
parties appeared in court for the purpose of selecting a jury, it was defendants who originally requested an adjournment and that plaintiff's attorney was present in court. The action was dismissed after plaintiff's counsel left to ascertain the status of settlement negotiations and failed to return for approximately one hour. There is no indication of any willful conduct on the part of counsel or that he had engaged in a pattern of seeking repeated adjournments or noncompliance with court orders. Accordingly, in view of the strong public policy favoring resolution of cases on their merits (*see e.g. Arrington v Bronx Jean Co., Inc.*, 76 AD3d 461, 462 [2010]), the court appropriately accepted the explanation offered by plaintiff for his counsel's temporary unavailability.

Plaintiff also established a meritorious cause of action by producing competent evidence including the police accident report, his deposition testimony and numerous medical records demonstrating that the vehicle which he had been driving was struck by defendants' automobile, thereby causing him to suffer serious injuries.

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

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

ENTERED: DECEMBER 2, 2010



CLERK

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

3770 In re Shane Chayann Orion S.,

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

Dexter F.,
Respondent-Appellant,

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

_____

Howard M. Simms, New York, for appellant.

John R. Eyerman, New York, for respondent.

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

_____

Order of disposition, Family Court, New York County (Jody Adams, J.), entered on or about March 4, 2009, which determined that the consent of respondent was not required for placement of his son for adoption, and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Respondent biological father failed to show entitlement to consent to the child's adoption (*see* Domestic Relations Law § 111[1][d]). After providing support for the child for about a year, respondent successfully moved to be relieved of this

obligation, and he thereafter failed to provide substantial and continuous financial support (*see Matter of Maxamillian*, 6 AD3d 349, 351 [2004]), other than modest gifts and clothing.

The evidentiary rulings at the parent status conference hearing were proper. "A Trial Judge necessarily is vested with broad discretion to determine the materiality and relevance of proposed evidence" (*Hyde v County of Rensselaer*, 51 NY2d 927, 929 [1980]). Contrary to respondent's assertion, the court did not improvidently exercise its discretion in refusing to admit in evidence the list allegedly reflecting his partial payments toward his child-support obligations. Since the proffered document was uncertified, his counsel was required to establish a proper foundation for its admission through testimony, which she failed to do (*see* Family Ct Act § 1046[a][iv]).

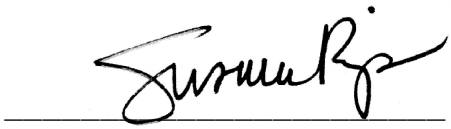
The court correctly precluded photographs allegedly depicting respondent with his son, and the testimony of two witnesses on respondent's behalf. His counsel failed to show that these photographs and testimony were "competent, material and relevant" (Family Ct Act § 1046[b][iii]) in deciding the issue of whether this child could be freed for adoption without respondent's consent.

"Any court in considering questions of child custody must make every effort to determine 'what is for the best interest of

the child, and what will best promote its welfare and happiness'" (*Eschbach v Eschbach*, 56 NY2d 167, 171 [1982], quoting Domestic Relations Law § 70[a]). Given a record showing that the foster parent has provided this child with a stable, loving home for most of his life and that he has thrived under such care, Family Court correctly determined it was in the child's best interest to be freed for adoption by this foster parent (*see Matter of Luz Maria V.*, 23 AD3d 192, 194 [2005], *lv denied* 6 NY3d 710 [2006]).

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

ENTERED: DECEMBER 2, 2010



CLERK

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

3774 The People of the State of New York, Ind. 2294/08
Respondent,

-against-

Duval Simmons,
Defendant-Appellant.

_____

Steven A. Banks, The Legal Aid Society, New York (Paul Wiener of counsel), for appellant.

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

_____

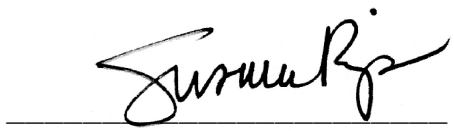
Judgment, Supreme Court, New York County (Renee A. White, J.), rendered March 17, 2009, convicting defendant, upon his plea of guilty, of criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

The court properly denied defendant's suppression motion. In a subway car, officers recognized defendant as a person with a history of repeatedly picking the pockets of subway passengers. They also knew he was on parole, and that a condition of his parole generally barred him from being in the subway system. As defendant concedes, the officers had an objective, credible reason to approach him and ask for an explanation as to why he was in the subway. When an officer said, "[P]olice," and "Duval, stop, I

need to talk to you," this was not a seizure, and no other police actions at that point went beyond a request for information (*see People v Reyes*, 83 NY2d 945 [1994], *cert denied*, 513 US 991 [1994]; *People v Bora*, 83 NY2d 531, 535-536 [1994]; *People v Grunwald*, 29 AD3d 33, 38 [2006], *lv denied*, 6 NY3d 848 [2006]). When defendant admitted he knew he was not allowed to be in the subway, and gave a meritless and suspicious excuse for being there, these factors, taken together with their knowledge of defendant's criminal history, gave the police a founded suspicion that defendant was in the subway to commit a crime, and not merely that he was a parole violator whom they should report to the Division of Parole. Since the police now had a founded suspicion of criminality, an officer made a proper level II inquiry when he asked defendant whether he had "anything that he shouldn't have" (*see e.g. People v Joseph*, 38 AD3d 403, 404 [2007], *lv denied*, 9 NY3d 866 [2007]), resulting in the recovery of contraband.

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

ENTERED: DECEMBER 2, 2010



CLERK

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

3775 Toni Ann Dattilo, etc., Index 107350/06
Plaintiff-Appellant,

-against-

Best Transportation Incorporated, et al.,
Defendants-Respondents.

_____

Law Office of Lawrence M. Simon, Goshen (Lawrence M. Simon of counsel), for appellant.

Rubin, Fiorella & Friedman LLP, New York (Shelley R. Halber of counsel), for Best Transportation Inc., Interpool/Titling/Acquisition LLC and Terell Sharafa Worley, respondents.

Cartiglia, Connolly & Russo, Garden City (Lynne M. Nolan of counsel), for Margarita L. Ortega-Alvarez and Margarita A. Guaman, respondents.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered August 3, 2009, which granted the motion of defendants Best Transportation, Interpool/Titling/Acquisition and Worley (collectively, the tractor trailer defendants) and the cross motion of defendants Ortega-Alvarez and Guaman for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff's decedent's motorcycle struck the rear of the Guaman car in the middle lane on the approach to the upper level of the George Washington Bridge. The decedent was thrown from his

motorcycle into the path of a tractor trailer driven by Worley, which was in the left lane.

Where evidence of the cause of an accident is undisputed, the question whether any act or omission of the defendant was the proximate cause is for the court and not the jury (*D'Avilar v Folks Elec. Inc.*, 67 AD3d 472 [2009]).

The tractor trailer defendants established their entitlement to summary judgment based on the emergency doctrine, which recognizes that when an actor is faced with a sudden and unexpected circumstance leaving little or no time for thought, deliberation or consideration, or causing the actor to be reasonably so disturbed that he must make a speedy decision without weighing alternative courses of action, the actor might not be negligent if his actions are reasonable and prudent in the context of the emergency (*Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327 [1991]). While it is often a jury question whether a person's reaction to an emergency was reasonable, summary resolution is possible when the individual presents sufficient evidence to support the reasonableness of his actions and there is no evidentiary showing from the opposition sufficient to raise a legitimate issue of fact on the issue (*Ward v Cox*, 38 AD3d 313, 314 [2007]).

The evidence established that the decedent's motorcycle

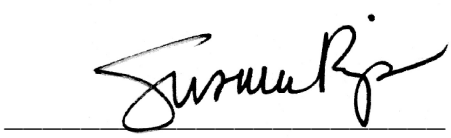
struck the rear of the Guaman vehicle when he accelerated in order to proceed into the left lane in front of the tractor trailer, and that he was thrown from his motorcycle into the path of the tractor trailer. Worley was traveling in the left-most lane, adjacent to the Guaman vehicle on his right, and did not see the impact between the motorcycle and that car. He hit his brakes as soon as he saw the motorcycle airborne, but could not move left or right to avoid striking the decedent. The evidence thus showed that Worley was faced with an emergency not of his own making.

A rear-end collision with a vehicle that is slowing down establishes a prima facie case of negligence on the part of the driver of the rear vehicle, and imposes a duty on him to come forward with an adequate nonnegligent explanation for the accident (*see Cabrera v Rodriguez*, 72 AD3d 553 [2010]). Defendants sustained their burden of presenting prima facie evidence that the decedent's negligence was the proximate cause of the accident because he failed to maintain a safe distance between his motorcycle and the rear of the Guaman car (*see* Vehicle & Traffic Law § 1129). Plaintiff failed to rebut the presumption applicable in rear-end collisions (*cf. Tutrani v County of Suffolk*, 10 NY3d 906 [2008]).

Plaintiff failed to present evidence raising a triable issue of fact as to whether any negligence on the part of any of the defendants was a substantial factor in causing the accident.

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

ENTERED: DECEMBER 2, 2010



CLERK

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

3778 In re Richard A. Nelke, Jr., Index 111840/09
Petitioner,

-against-

Department of Motor Vehicles of
the State of New York,
Respondent.

_____

Melli, Guerin, Wall & Messineo P.C., New York (Kevin A. Addor of counsel), for petitioner.

Andrew M. Cuomo, Attorney General, New York (Robert C. Weisz of counsel), for respondent.

_____

Determination after hearing by respondent's appeals board, dated May 8, 2009, which affirmed petitioner's traffic conviction, unanimously confirmed, the petition denied, and this proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Jane S. Solomon, J.], entered November 10, 2009), dismissed, without costs.

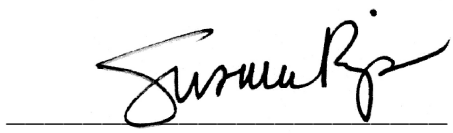
Petitioner was charged with disobeying a red light, in violation of Vehicle and Traffic Law § 1111(d)(1). The police officer testified that while stationed at an intersection, he observed petitioner's vehicle drive through a red light, and then followed it without losing sight, issuing petitioner the ticket two blocks away. Petitioner claimed he was at a different intersection and that the officer had mistaken his car for another

vehicle.

This Court's review of an administrative agency's determination after a hearing is limited to whether the determination was supported by substantial evidence, and in doing so, deference must be given to the fact-finding and credibility determinations of the agency (*Matter of DeOliveira v New York State Dept. of Motor Vehicles*, 271 AD2d 607 [2000]). While petitioner's evidence conflicted with the officer's testimony, we must defer to respondent's decision to credit the officer's account.

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

ENTERED: DECEMBER 2, 2010



CLERK

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

3779 The People of the State of New York, Ind. 221/09
Respondent,

-against-

Shelton R. Beaman,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Aaron I. Sato of counsel), for respondent.

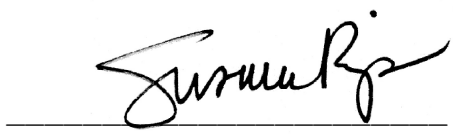
_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael J. Obus, J.), rendered on or about January 6, 2010,

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: DECEMBER 2, 2010



CLERK

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

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

3780 Aftab Mirza, Index 109168/07
Plaintiff-Appellant,

-against-

HSBC Bank USA, Inc.,
Defendant-Respondent.

_____

Aftab Mirza, appellant pro se.

Office of General Counsel, New York (Meredith Leigh Friedman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered July 16, 2009, which, insofar as appealed from as limited by the briefs, in this action alleging unlawful employment discrimination based on plaintiff's disability, granted defendant's cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

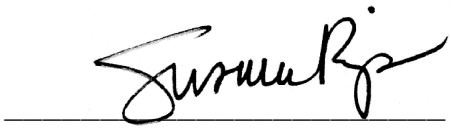
Dismissal of the complaint was warranted since defendant presented valid reasons for plaintiff's termination, and in response, plaintiff failed "to raise a question of fact concerning either the falsity of defendant's proffered basis for the termination or that discrimination was more likely the real reason" (*Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]). Indeed, the record establishes that plaintiff's termination resulted from defendant's reduction in workforce after a decline

in business volume and was necessary to increase department efficiency (*see Di Mascio v General Elec. Co.*, 27 AD3d 854, 855 [2006]), and plaintiff's suspicions are insufficient to establish that defendant's stated reasons for the termination were pretextual (*see Brennan v Metropolitan Opera Assn.*, 284 AD2d 66, 71-72 [2001]).

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

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

ENTERED: DECEMBER 2, 2010



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

3781 June Slater, Index 118382/06
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant,

The City of New York,
Defendant,

Stealth Contracting, Inc.,
Defendant-Appellant-Respondent.

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Herzfeld & Rubin, P.C., New York (David B. Hamm of counsel), for appellant.

Hodgson Russ LLP, New York (Margaret Cmielewski of counsel), for appellant-respondent.

Kahn Gordon Timko & Rodriques, P.C., New York (Nicholas I. Timko of counsel), for respondent.

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Order, Supreme Court, New York County (Carol Edmead, J.), entered March 15, 2010, which, inter alia, denied defendants Stealth Contracting, Inc.'s and New York City Housing Authority's (NYCHA) motions for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, the motions granted and the complaint dismissed as against Stealth and NYCHA. The Clerk is directed to enter judgment accordingly.

On the morning of February 14, 2006, plaintiff tripped and fell on black ice on a walkway outside her residence, which was

owned and maintained by NYCHA. At that time, the walkway was covered by a sidewalk shed installed by Stealth.

Plaintiff testified at her deposition that she did not notice any ice or hazardous conditions on the walkway prior to her fall. She testified that at the time she fell, she observed that the entire area was covered by black ice. After she fell, she remained seated for twenty minutes and saw moisture coming down from the side of the shed but did not feel or see any water dripping on her. NYCHA's premises caretaker testified that, upon arriving at the scene of the accident, he observed a small patch of barely visible black ice, as well as some water dripping "by the ceiling or the roof" of the shed, which consisted of drops, rather than a steady stream of water.

The motion court properly found that Stealth neither had actual or constructive knowledge of any hazard, but erred in denying Stealth's motion for summary judgment. Plaintiff's reference to a few drops of water and an alleged defect in the shed to explain both how the ice patch formed and how the entire accident site was covered with ice is speculation. As such, it cannot serve to defeat Stealth's motion for summary judgment (*Listopad v Sherwood Equities, Inc.*, 52 AD3d 300 [2008]).

The motion court also erred in denying NYCHA's motion for summary judgment. The record contains no evidence that NYCHA had

constructive or actual notice of the black ice, or that it created the condition (*see Killeen v Our Lady of Mercy Med. Ctr.*, 35 AD3d 205 [2006]; *Solazzo v New York City Trans. Auth.*, 21 AD3d 735 [2005], *affd* 6 NY3d 734 [2005]; *Cardinale* at 666-667). The affidavit offered by plaintiff of a NYCHA employee who stated that she also fell on the date of the accident contains no indication that she notified NYCHA of her mishap. Further, the affidavit of plaintiff's son, which stated that earlier in the morning he observed slippery conditions and water cascading down the center of the shed, directly contradicted plaintiff's testimony that she did not observe any hazardous condition prior to her fall. As such, that affidavit, introduced solely in opposition to summary judgment, is self-serving and should have been disregarded. Finally, given the above, NYCHA is not entitled to indemnification for its defense costs.

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

ENTERED: DECEMBER 2, 2010

CLERK

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

3782 Onekey LLC, Index 110579/08
Petitioner-Respondent,

-against-

The Environmental Control Board
of the City of New York,
Respondent-Appellant.

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Michael A. Cardozo, Corporation Counsel, New York (John Hogrogian of counsel), for appellant.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered July 8, 2009, which granted the petition to vacate respondent's determination that petitioner violated Administrative Code of City of NY § 27-1009(a) by failing to safeguard the public and property affected by its construction operations, unanimously reversed, on the law, without costs, the petition denied and the proceeding brought pursuant to CPLR article 78 dismissed.

Respondent's interpretation of Administrative Code § 27-1009(a) (amended and renumbered at § 28-3301.2, effective July 1, 2008) was rational, and its determination that petitioner violated the provision is supported by substantial evidence (*see Matter of Pell v Board of Educ. of Union Free School Dist. No 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]).

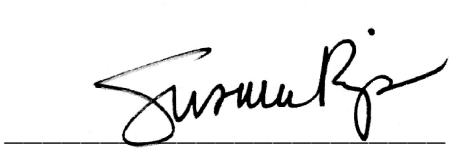
Section 27-1009(a) provided that "[a] contractor engaged in building work shall institute and maintain safety measures and provide all equipment or temporary construction necessary to safeguard all persons and property affected by such contractor's operations." The evidence is uncontroverted that petitioner was hired to construct a building foundation on a lot that had previously been excavated to a depth of approximately 10 feet, and subsequently removed from the excavated site a basement wall that the record indicates buttressed the adjoining building's deteriorating foundation. Petitioner thereafter informed the owners of both lots of the foundation's instability. Although it stopped work, petitioner failed to protect and maintain the side of the excavated lot by shoring, retaining or bracing it, as required by Administrative Code § 27-1032(a) (amended and renumbered at § 28-3304.4.1, effective July 1, 2008). Furthermore, petitioner allowed standing water to collect on the excavated lot, in violation of Administrative Code § 27-1031(d) (amended and renumbered at § 28-3304.8, effective July 1, 2008), which the record indicates further threatened the integrity of the adjoining building's foundation.

As respondent found, it is irrelevant that petitioner did not cause the deterioration of the adjoining structure's

foundation, because Administrative Code § 27-1009(a) required it to safeguard "all persons and property affected by [its] operations."

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

ENTERED: DECEMBER 2, 2010



CLERK

Andrias, J.P., Saxe, Friedman, Nardelli, Acosta, JJ.

3193 Applehead Pictures LLC, Index 602606/07
Plaintiff-Respondent,

Ronald O. Perelman, derivatively and on behalf of Applehead Pictures LLC,
Plaintiff,

-against-

Ronald O. Perelman,
Defendant-Appellant,

Ellen Barkin, et al.,
Defendants.

_____

Stillman, Friedman & Shechtman, P.C., New York (Charles A. Stillman of counsel), for appellant.

Susman Godfrey LLP, New York (Jacob W. Buchdahl of counsel), for respondent.

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Judgment, Supreme Court, New York County (Debra A. James, J.), entered January 7, 2010, affirmed, with costs.

Opinion by Nardelli, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David B. Saxe
David Friedman
Eugene Nardelli
Rolando T. Acosta, JJ.

3193
Index 602606/07

_____x

Applehead Pictures LLC,
Plaintiff-Respondent,

Ronald O. Perelman, derivatively and on behalf of Applehead Pictures LLC,
Plaintiff,

-against-

Ronald O. Perelman,
Defendant-Appellant,

Ellen Barkin, et al.,
Defendants.

_____x

Defendant Ronald O. Pererlman appeals from a judgment of the Supreme Court, New York County (Debra A. James, J.), entered January 7, 2010, awarding plaintiff Applehead damages against defendant Perelman, and bringing up for review underlying orders, same court and Justice, entered December 21, 2009, which granted Applehead's motion for partial summary judgment and denied Perelman's motion for summary judgment dismissing Applehead's complaint and his motion and cross motion for an order sealing the record on the summary judgment motions.

Stillman, Friedman & Shechtman, P.C., New York (Charles A. Stillman, Scott M. Himes and Daniel V. Shapiro of counsel), for appellant.

Susman Godfrey LLP, New York (Jacob W. Buchdahl, Stephen D. Susman and Rebecca S. Tinio of counsel), for respondent.

NARDELLI, J.

The primary issue presented is whether two separately executed agreements - a marital separation agreement and a business operating agreement - can be deemed to be one integrated contract so that an alleged breach of the separation agreement can constitute a breach of the operating agreement that would justify a rescission of obligations under the operating agreement. We hold in the negative.

Plaintiff Applehead Pictures LLC is a Delaware limited liability company formed by defendant Ronald Perelman, along with his then wife, defendant Ellen Barkin, and her brother, defendant George Barkin, for the purpose of developing and producing feature films. Perelman and Ellen Barkin were married on June 28, 2000, after entering into a prenuptial agreement in which they agreed that, in the event of a civil divorce, "both parties will fully cooperate with each other in obtaining a Get or other religious divorce or annulment and each will promptly execute and deliver all documents required therefor," and, if required, personally appear before any religious court, tribunal or body. Perelman was obligated to pay all expenses in connection with the obtaining of a Get.

The prenuptial agreement also includes confidentiality provisions pursuant to which the parties agreed, among other

things, not to, directly or indirectly, publish or issue press releases or grant interviews concerning specified "Prohibited Topics" or photographs, letters, diaries, and other specified items. They also agreed to take action to have the file sealed in any action between them for divorce.

Five years later, on November 29, 2005, Perelman, Barkin and her brother, George Barkin, formed Applehead, a Delaware limited liability company, for the purpose of developing and producing feature films, and entered into an operating agreement. The parties agreed that Applehead's business would be managed by the three members, except that the Barkins would have authority over day-to-day operations. Perelman was required to make capital contributions in the total amount of $3,433,750 ($1,675,000 for fiscal year 2006, and the same amount for fiscal year 2007, plus up to $83,750 to cover increased operating expenses for 2007). Profits were allocated 25% to Perelman, and 37.5% to each of the Barkins, and all losses were allocated to Perelman.

At her deposition, Ellen Barkin testified that Applehead was formed after her brother had acquired the rights to a book by author Richard Yates, Easter Parade, through a company she owned, Barkin LLC. Perelman had not approved of her career as an actor, and they agreed that the production company would provide a way for her to continue working in the film industry. As its senior

executive, Applehead hired Caroline Kaplan, who had extensive experience in the movie industry. Kaplan testified the aim was to establish Applehead as a "go-to company for writers and directors," and to begin developing about three to five film properties.

On February 9, 2006, Perelman and Barkin entered into a separation agreement and stipulation of settlement, and a judgment of divorce was entered five days later on February 14, 2006. The separation agreement incorporated and ratified the prenuptial agreement, including its provisions concerning confidentiality and the obtaining of a Get. It also provided that "the parties shall take all steps necessary to comply with the provisions of the [prenuptial agreement] and obtain a Get within three days of Wife's receipt of all of the payments required pursuant to paragraph 2," which provided for payment of about $10.5 million pursuant to the prenuptial agreement. The separation agreement further provided that Barkin would cause Applehead to vacate its offices, which were in the marital residence, by February 28, 2006.

On February 9, 2006, the same day the separation agreement was executed, Perelman, Barkin and George Barkin executed an amended operating agreement for Applehead. Nothing in the terms of the amended operating agreement made performance of its

obligations conditioned upon compliance with the terms of the separation agreement. The amended agreement continued Perelman's obligation to make capital contributions in the total amount of $3,433,750 over the next two years, and provided a schedule for quarterly payments to be made starting on March 15, 2006 and continuing until December 15, 2007. Perelman's interest in net profits was reduced to 2%, and he continued to be responsible for 100% of losses. It is undisputed that Perelman did not pay the first amount due on March 15, 2006 or any of the subsequent amounts owed.

In or about June 2007, Barkin created a new company, Applehead Pictures II LLC, in order to handle "any new projects," and, according to Ellen Barkin, not have them "bogged down in litigation with Ronald Perelman," which Applehead anticipated commencing to recover the money owed to it. The rights to Easter Parade were conveyed to Applehead II. Applehead II never had any separate offices, employees or bank accounts. Its separate expenses were borne by Barkin, and in January 2008, Applehead II reassigned all of its assets to Applehead.

On August 1, 2007, Applehead commenced a breach of contract action against Perelman to recover $3.4 million in damages resulting from his alleged breach of the amended operating agreement. After a motion to disqualify plaintiff's counsel was

denied (*see* 55 AD3d 348 [2008]), Perelman filed an answer in which he admitted that he had not made the capital contributions required under the operating agreement, but asserted affirmative defenses, including that any obligation on his part was "excused by prior breaches," and that there had been a "failure of consideration."

On November 27, 2007, Perelman commenced this derivative action on behalf of Applehead against, inter alia, the Barkins and Caroline Kaplan, as well as Applehead as a nominal defendant. Perelman alleged that defendants had covertly established Applehead II in May 2007 to compete with Applehead, used its funds to pay for a competing venture, and paid at least $7,000 to an entity owned by Barkin. He further alleged that George Barkin did not spend his full time working on behalf of Applehead as "initially contemplated," although he was paid $250,000 annually. The two actions were eventually consolidated in an order.

By notice of motion dated April 23, 2009, Applehead moved for partial summary judgment against Perelman on its claim for breach of the amended operating agreement, and relied on Perelman's admission in his answer that he had not made the required payments. It argued that, under the Delaware Limited Liability Act, Perelman did not have a valid defense, since an LLC member is "obligated to a limited liability company to

perform any promise to contribute cash or property to perform services, even if the member is unable to perform because of death, disability or any other reason," and "the obligation of a member to make a contribution . . . may be compromised only by consent of all the members" (Del Code Ann, tit 6, §18-502(a),(b)). It further argued that Perelman could not force renegotiation of the agreement, which does not permit dissolution even in the event of death or insanity of a member, and does not permit a member to withdraw or resign.

Applehead also contended that regardless of whether Barkin had breached the separation agreement, Perelman's capital commitment to Applehead was still independently enforceable since the two agreements did not form a "unitary contract," as they involved different parties, served different purposes, and did not refer to each other. Further, the parol evidence rule precluded Perelman from relying on extrinsic evidence to establish that they were interdependent components of a single contract, even if the impetus for the separation agreement and the amendment to the operating agreement arose from the marital situation, since the two agreements relate to different transactions, and Perelman assumed his obligation to capitalize Applehead prior to the divorce.

Perelman opposed Applehead's motion for summary judgment and

cross-moved on May 5, 2009 for an order directing that his opposition and supporting papers be filed under seal. By notice dated April 24, 2009, he separately moved for an order granting summary judgment dismissing Applehead's complaint and directing that all papers submitted on the motion be filed under seal.

In support of his contention that the agreements were interdependent, Perelman submitted a letter from Barkin's matrimonial counsel to an attorney who represented Applehead, in which counsel stated, in part, that "[a]s part of that settlement, certain provisions regarding Applehead Pictures, LLC were changed." As support for his claim that Barkin had breached the obligation of confidentiality under the separation agreement, Perelman annexed media articles published in 2006 and 2007, including a March 19, 2006 New York Magazine article, which discussed the parties' marriage and relationship, and defendant's business and personal affairs. Perelman also contended that Applehead's damages should be mitigated by amounts Barkin contributed to it, referring to her deposition testimony that, starting in March 2006, she had made contributions amounting to between $1.5 and $2 million to Applehead. Perelman further offered evidence, including the 2007 New York tax return of Applehead, which he claimed showed that the Barkins worked only part-time for Applehead, and a credit card statement for December

2006, "reflecting over $9,000 of charges by Ms. Barkin for matters apparently unrelated to any legitimate business purpose."

The motion court granted Applehead's motion for summary judgment. It also denied Perelman's motion and cross motion to seal the record of the motion, finding that he had not shown good cause why his interests outweigh the public's right to access court records.

The court rejected Perelman's argument that Barkin's alleged breaches of the separation agreement relieved him of his funding obligations under the operating agreement. It found that extrinsic evidence could not be considered because the operating agreement "by its very terms stands on its own and is enforceable separately from, and without reference to, the separation agreement." The two contracts are governed by laws of two different states, serve different purposes and do not have identical parties, and therefore are "two distinct and unrelated agreements, imposing separate obligations."

The court also found that the claim that the Barkins had breached their fiduciary duties to Applehead was unavailing since those claimed breaches were the subject of the separate derivative claims, and are not a defense to enforcement of the operating agreement, since the Barkins are not alleged to have breached any obligations under that agreement. The court also

relied on the provisions of the Delaware Limited Liability Company Act which provide that the obligation of a member "to perform any promise to contribute cash" is enforceable even if the member is unable to perform, and that the obligation "may be compromised only by consent of all the members" (6 Del Code Ann, tit 6, §18-502).

Finally, the court rejected Perelman's argument that Applehead had not specified the nature of the damages it sought and could not establish lost profits, as well as his argument that damages should be "mitigated due to Ms. Barkin's voluntary funding to Applehead" under the "*Drinkwater* exception" to the collateral source rule. The court determined that the exception is a New York rule, not applicable in this case since the operating agreement is subject to Delaware law.

On this appeal, Perelman contends there are issues of fact concerning Barkin's alleged breaches of her obligations under the separation agreement to take steps to obtain a Get and maintain confidentiality, that, if proven, would relieve him of his obligation under the operating agreement because the two agreements are interdependent. He additionally argues that he was relieved of his capital contribution obligations because Applehead breached the covenant of good faith and fair dealing by transferring assets to Applehead II, and the Barkins engaged in

mismanagement and waste of assets.

Generally, "all contemporaneous instruments between the same parties relating to the same subject matter are to be read together and interpreted as forming part of one and the same transaction" (*see TBS Enters. v Grobe*, 114 AD2d 445, 446 [1985] [internal quotation marks and citation omitted], *lv denied* 67 NY2d 602 [1986]). Nevertheless, "separate written agreements involving different parties, serving different purposes and not referring to each other [are] not intended to be interdependent or somehow combined to form a unitary contract" (*Schonfeld v Thompson*, 243 AD2d 343, 343 [1997]; *see also National Union Fire Ins. Co. of Pittsburgh, Pa. v Clairmont*, 231 AD2d 239 [1997], *lv denied* 91 NY2d 866 [1997]. As this Court stated in *National Union*, "Manifestly, one agreement may follow from and even have as its *raison d'etre* another and yet be independently enforceable" (*id.* at 241). Additionally, "in the absence of some clear indication that the parties had a contrary intention, contracts manifesting separate assents to be bound are generally presumed to be separable" (*id.* at 241-242, citing *Ripley v International Rys. Of Cent. Am.*, 8 NY2d 430, 438 [1960]).

The record makes clear that the amended operating agreement and the separation agreement were not intended to be interdependent. The separation agreement, executed, naturally,

only by Perelman and Barkin, recited that the parties intended to "settle their financial and property rights amicably and fulfill their other rights and obligations in conformity with and in addition to the terms of the Prenuptial Agreement." It made no reference to the original operating agreement or the amendment to the operating agreement, but only required Barkin to cause Applehead to vacate its offices in the marital residence.

The operating agreement, in contrast, was executed by Perelman, Barkin, and George Barkin in order to conduct a film development business, in accordance with the Delaware Limited Liability Company Act. It was amended by the three members when the separation agreement was executed by Perelman and Barkin, in order to remove Perelman from involvement in management and reduce his share of profits. Perelman's capital contribution obligation arose prior to the execution of the separation agreement, and was restated in the amended operating agreement without any reference to the separation agreement or any indication that it was now conditional upon Barkin's performance of her obligations under the separation agreement. Nothing in the agreements support Perelman's contention that Barkin's promises in the separation agreement provided consideration for the amendment to the operating agreement.

Even if the agreements were found to be intertwined, the

allegation that Barkin breached the provision of the separation agreement involving the Get is meritless. The separation agreement merely requires both parties to cooperate in obtaining a Get. Contrary to Perelman's contention, Barkin was not required to initiate proceedings to obtain a Get, and Perelman himself apparently did not do anything to advance proceedings before the religious tribunals until April 2008, which was over two years after the divorce and well after he had breached his obligations under the operating agreement.

Also unavailing is Perelman's claim that Barkin breached the confidentiality provision of the separation agreement. As Applehead notes, the March 2006 article in New York Magazine stated that Barkin "declined multiple requests to comment for this story, citing the confidentiality of their divorce agreement," and Barkin testified that she did not cooperate or answer a fact checker's questions. Perelman produces no contrary evidence. The other articles were all published after Perelman's breach, and also reflect that Barkin refused to comment on aspects of the marriage because of the confidentiality agreement. Perelman has not submitted any admissible evidence in support of his claim that Barkin breached the confidentiality agreement. It is also noteworthy that Perelman did not specifically plead the alleged breach in the answer filed in February 2009.

In any event, under Delaware law, the Barkins' alleged breaches would not operate to relieve Perelman of his independent obligations to the company. Delaware imposes an obligation on a member to "perform any promise to contribute cash or property or to perform services, even if the member is unable to perform because of death, disability or any other reason" (6 Del Code Ann, tit 6, §18-502[a]). A member's obligation "to make a contribution . . . may be compromised only by consent of all the members" (section 18-502[b]).

Further, the Barkins' alleged wrongdoing or breach of the covenant of good faith and fair dealing are not actions for which Applehead can be held responsible, but, rather, create a cause of action on behalf of Applehead. It is settled that a Delaware corporation cannot be held liable for directors' breaches of fiduciary duty. To do so "would be flatly inconsistent with the rationale of vicarious liability since it would shift the cost of the directors' breach from the directors to the corporation and hence to the shareholders, the class harmed by the breach" (*Arnold v Society for Sav. Bancorp, Inc.*, 678 A2d 533, 539 [1996] [internal quotation marks and citation omitted]).

Perelman also contends that Applehead's damages must be reduced by the amount of Barkin's "gratuitous" contribution to Applehead, under the *Drinkwater* exception to the collateral

source rule. The *Drinkwater* doctrine, a minority New York rule, is a narrow exception to the collateral source rule, which the Court of Appeals has described as "inherently a tort concept" (*see Inchaustegui v 666 5th Ave. Ltd. Partnership,* 96 NY2d 111, 114-116 [2001], citing *Drinkwater v Dinsmore*, 80 NY 390 [1880]). The "collateral source rule" requires the tortfeasor to bear the full cost of the injury he or she has caused regardless of any benefit the victim has received from an independent or "collateral" source *(see Inchaustegui,* 96 NY2d at 115). The *Drinkwater* exception precludes an injured party from recovering when a third party gratuitously provides benefits. The rationale is to prevent double recoveries and avoid unjust enrichment by an injured person (*Moore v Leggette*, 24 AD2d 891 [1965], *affd* 18 NY2d 864 [1966]). The exception is inapplicable in this action seeking to enforce the contractual obligation of a member of a Delaware limited liability company to make a capital contribution (*see* Del Code Ann, tit 6, §18-502).

The one case cited by Perelman in support of the proposition that the *Drinkwater* exception applies in contract cases arose from a claim for lost wages. The court reasoned that the exception did *not* apply to unemployment benefits received by a discharged employee because they were actually collateral benefits extended to an employee in consideration for previous

services, rather than gratuitous payments (*Rutzen v Montroe County Long Term Care Program, Inc.*, 104 Misc 2d 1000 [1980]).

Perelman also argues that the court erred in denying his request that the records be sealed, since the parties contracted for confidentiality, and that good cause for sealing had been shown given their concerns for privacy and the lack of countervailing public interest other than "sensationalized curiosity." Applehead does not oppose Perelman's request for sealing.

Uniform Rules for Trial Courts (22 NYCRR) § 216.1(a) provides that "a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof," and requires the court to "consider the interests of the public as well as of the parties." The presumption of the benefit of public access to court proceedings takes precedence, and sealing of court papers is permitted only to serve compelling objectives, such as when the need for secrecy outweighs the public's right to access, e.g., in the case of trade secrets (*see Danco Labs. v Chemical Works of Gedeon Richter*, 274 AD2d 1, 6-7 [2000]). Thus, the court is required to make its own inquiry to determine whether sealing is warranted (*see Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.U.*, 28 AD3d

322, 324 [2006], *lv denied* 10 NY3d 705 [2008]), and the court will not approve wholesale sealing of motion papers, even when both sides to the litigation request sealing (see *Matter of Hofmann,* 284 AD2d 92 [2001]). Since there is no absolute definition, a finding of good cause, in essence, "boils down to . . . the prudent exercise of the court's discretion" (*Mancheski v Gabelli Group Capital Partners*, 39 AD3d 499, 502 [2007] [internal quotation marks and citation omitted]).

This Court has stated, "[W]e remind the bench and bar that, even where the parties seek to stipulate to such relief, the trial court should not pro forma approve an anonymous caption, but should exercise its discretion to limit the public nature of judicial proceedings sparingly and then, only when unusual circumstances necessitate it" (*Anonymous v Anonymous,* 27 AD3d 356, 361 [2006] [internal quotation marks and citation omitted] [no showing evident in case involving child support]).

Perelman argues that the parties contracted for confidentiality, recognizing "their mutual privacy interests and the desirability of avoiding publicity about their personal lives," and such agreements are generally enforceable. He also relies on Domestic Relations Law § 235(1), which provides that in a matrimonial action, separation proceedings or child custody proceedings, an officer of the court must maintain the

confidentiality of "pleadings, affidavits, findings of fact, conclusions of law, judgment of dissolution, written agreement of separation or memorandum thereof," and not permit copying or examination of such documents by anyone other than a party or his or her counsel. The rule reflects a "clear legislative design that those proceedings be kept secret and confidential" (*Shiles v News Syndicate Co.*, 27 NY2d 9, 14 [1970], *cert denied* 400 US 999 [1971]). Perelman argues the documents are of minimal public interest and that he had to rely on them to defend the instant action (*see Dawson v White & Case*, 184 AD2d 246 [1992] [sealing record of accounting of a law firm; 'mere curiosity' does not constitute legitimate public interest]; *see also Matter of Twentieth Century Fox Film Corp.*, 190 AD2d 483 [1993]).

In this case, however, Perelman annexed the prenuptial agreement, separation agreement and divorce judgment to the motion papers, and sought sealing of the entire record of the motion, not just the matrimonial documents. As a practical matter, if Perelman had filed those documents separately, and sought a limited order requesting that the confidentiality of those documents be maintained, such relief could appropriately have been granted (*see* Domestic Relations Law §235[1]). Since Perelman chose to annex all three documents in support of his defense to this breach of contract action, without first seeking

a sealing order, we conclude that the court properly exercised its discretion in denying the motion.

Accordingly, the judgment of the Supreme Court, New York County (Debra A. James, J.), entered January 7, 2010, awarding plaintiff Applehead $4,367,421 against defendant Perelman, and bringing up for review underlying orders, same court and Justice, entered December 21, 2009, which granted plaintiff Applehead's motion for partial summary judgment and denied Perelman's motion for summary judgment dismissing Applehead's complaint and his motion and cross motion for an order sealing the record on the summary judgment motions, should be affirmed, with costs.

All concur.

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

ENTERED: DECEMBER 2, 2010

CLERK