SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 4, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, McGuire, DeGrasse, Manzanet-Daniels, JJ.

1707-
1707A The People of the State of New York, Ind. 1565/04
Respondent,

-against-

Anthony Ortega,
Defendant-Appellant.

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

Anthony Ortega, appellant pro se.

Robert M. Morgenthau, District Attorney, New York (Jaime Bachrach of counsel), for respondent.

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered April 24, 2006, convicting defendant, upon his plea of guilty, of rape in the first degree, criminal contempt in the first degree, and two counts of criminal sexual act in the first degree, and sentencing him to an aggregate term of 12 years, and order, same court and Justice, entered on or about April 28, 2008, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

The record, including the submissions on defendant's CPL 440.10 motion, establishes that defendant's plea was knowing, intelligent and voluntary, and that it was not the product of ineffective assistance of counsel (*see People v Ford*, 86 NY2d 397, 404 [1995]). Counsel secured a favorable plea during a jury trial, at the end of the victim's direct examination.

With regard to the CPL 440.10 motion, while there may have been factual disputes about conversations trial counsel Gary Sunden, Esq., had with defendant and other persons, these disputes were immaterial. In his affidavit, defendant asserted that Sunden told him that intoxication was "not an applicable defense" to the charges against him, that "the defense of intoxication was not avail[able] to [him]," and that he "could not avail [himself] of the defense." These statements by counsel are not the same as a statement that intoxication is never a defense or that it is not a defense as a matter of law. Moreover, none of the individuals who submitted affidavits in support of defendant's motion asserted that Sunden had erroneously stated that intoxication was not a defense as a matter of law. Rather, two of the individuals, one of whom is an attorney, stated only that Sunden had said that the defense of intoxication "was not available in this case." Similarly, the third individual, defendant's uncle, asserted that he asked Sunden if defendant's claim that he had been "high" on drugs and

alcohol could be part of the defense, and Sunden responded that "that was no defense and that [defendant] was responsible for his actions." For his part, Sunden did not deny discussing intoxication with defendant. Rather, he asserted, inter alia, that defendant never said that he was so intoxicated that he did not know what was going on, and explained at length the factual basis for his judgment that a defense of intoxication was not viable. Thus, defendant's assertions in support of his CPL 440.10 motion did not raise a material issue of fact as to the effectiveness of counsel, and the motion was properly denied without a hearing (*see* CPL 440.30[4][a]).

Defendant's claim that a different attorney, who represented him at the early stages of the case, also rendered ineffective assistance with regard to a possible intoxication defense is unreviewable because it was not included in defendant's CPL 440.10 motion and it involves matters outside the record (*see People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we reject the claim.

Defendant's remaining challenges to the voluntariness of his plea are unpreserved (*see People v Lopez*, 71 NY2d 662, 666 [1988]), and we decline to review them in the interest of justice. As an alternative holding, we reject each of them on the merits. The court's explanation of the rights defendant was

waiving by pleading guilty was sufficient (*see People v Harris*, 61 NY2d 9 [1983]), particularly in light of the circumstance that defendant pleaded guilty in the midst of trial testimony and was well aware that he was giving up his right to litigate further his guilt or innocence. The court was not obligated to inquire about a possible intoxication defense, because defendant said nothing about intoxication in his plea allocution itself, regardless of what he may have said on other occasions (*see e.g. People v Fiallo*, 6 AD3d 176, 177 [2004], *lv denied* 3 NY3d 640 [2004]). Finally, since the court explicitly told defendant it intended to impose a five-year period of postrelease supervision, which the court imposed at sentencing, the requirements of *People v Catu* (4 NY3d 242 [2005]) were satisfied, and the court had no reason to inform defendant that it *could* have imposed a PRS term as low as 2½ years, but did not see fit to do so.

When taken together, defendant's written and oral waivers establish that he made a valid waiver of his right to appeal (*see People v Ramos*, 7 NY3d 737 [2006]). That waiver forecloses review of defendant's remaining claims. As an alternative

holding, we perceive no basis for reducing the sentence, and we find defendant's pro se claims without merit.

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

ENTERED: FEBRUARY 4, 2010

CLERK

Gonzalez, P.J., Buckley, Catterson, McGuire, Renwick, JJ.

464-
464A Robert M. Morgenthau, Index 400514/08
District Attorney of New York,
Plaintiff-Respondent,

-against-

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

Aron Goldman, et al.,
Defendants.

An appeal having been taken to this Court by the above-named appellants from orders of the Supreme Court, New York County (Martin Shulman, J.), entered on or about June 13, 2008 and July 25, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated January 11, 2010,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: FEBRUARY 4, 2010

CLERK

Gonzalez, P.J., Saxe, McGuire, Manzanet-Daniels, Román, JJ.

2099 The People of the State of New York, Ind. 519/07
Respondent,

-against-

Wayne Strachn,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Brian E. Rodkey 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 (Richard D. Carruthers, J.), rendered on or about November 2, 2007,

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: FEBRUARY 4, 2010

CLERK

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

Gonzalez, P.J., Saxe, McGuire, Manzanet-Daniels, Román, JJ.

2106 Warren Malone, Index 112242/07
Plaintiff-Appellant,

-against-

Daily News LP, etc.,
Defendant-Respondent.

Lipsig Price, PLLC, New York (Joshua C. Price of counsel), for appellant.

Anne B. Carroll, New York, for respondent.

Order, Supreme Court, New York County (Richard F. Braun, J.), entered January 5, 2009, which granted defendant's motion to dismiss the complaint, unanimously affirmed, with costs.

The article that relied on statements of a tenant in the building plaintiff had purchased to convert for the use of his family did not communicate defamatory material. The statements specified in the complaint were either accurate or privileged insofar as they relied on documents in a judicial proceeding (Civil Rights Law § 74; *Fishof v Abady*, 280 AD2d 417 [2001]). Even if not accurate, they were not of a nature that would have held plaintiff up to contempt or ridicule in the community (*see Golub v Enquirer/Star Group*, 89 NY2d 1074 [1997]). Nor did

plaintiff allege how the statements might have harmed him in his business or trade (*id.*).

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

ENTERED: FEBRUARY 4, 2010

CLERK

Gonzalez, P.J., Saxe, McGuire, Manzanet-Daniels, Román, JJ.

2107 Reliance Construction Ltd., etc., Index 601373/08
Plaintiff-Appellant,

-against-

Jim Kennelly, etc., et al.,
Defendants-Respondents.

Greenberg, Trager & Herbst, LLP, New York (Richard J. Lambert of counsel), for appellant.

Seligson, Rothman & Rothman, New York (Alyne I. Diamond of counsel), for respondents.

Order, Supreme Court, New York County (Karen S. Smith, J.), entered December 22, 2008, which denied plaintiff's motion for summary judgment seeking to recover on two personal guaranties, unanimously reversed, on the law, with costs, the motion granted, plaintiff's claim for attorneys' fees and expenses severed, and the issue of the amount of attorneys' fees and expenses incurred in enforcing the guaranties remanded for a hearing unless the parties stipulate to the amount of such fees and expenses. The Clerk is directed to enter judgment against defendant Kennelly in the amount of $11,440,782.91 plus interest and against defendant Shaoul in the amount of $5,813,514.91 plus interest.

Plaintiff made a prima facie showing for summary judgment by proving the absolute and unconditional guaranties and the guarantors' failure to perform (*see Kensington House Co. v Oram*, 293 AD2d 304 [2002]). The court erred in failing to give effect

to the clear preclusion of the debtor's defenses, setoffs and counterclaims (*see Sterling Natl. Bank v Biaggi*, 47 AD3d 436 [2008]). While a guaranty is subject to the fulfillment of any condition precedent to the liability imposed therein (*see Madison Ave. Leasehold, LLC v Madison Bentley Assoc. LLC*, 30 AD3d 1, 10 [2006], *affd* 8 NY3d 59 [2006]), the instant guaranties predicated the guarantors' liability on the owner's default in making payment, not on its default on the legal obligation to do so; any other interpretation would render the greater portion of the guaranties meaningless (*see Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265, 274-275 [2007]). There was no issue of fact with respect to the amount of damages. Finally, the guarantors' claimed need for discovery relating to the debtor's separate liability cannot forestall summary judgment against them (*see Marine Midland Bank v Hakim*, 247 AD2d 345 [1998]).

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

ENTERED: FEBRUARY 4, 2010

CLERK

Gonzalez, P.J., Saxe, McGuire, Manzanet-Daniels, Román, JJ.

2108 In re John G., Jr.,

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

John G.,
Respondent-Appellant,

St. Dominic's Home,
Petitioner-Respondent,

Commissioner of the Administration
of Children's Services,
Respondent.

Robin G. Steinberg, The Bronx Defenders, New York (Florian Miedel of counsel), for appellant.

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for St. Dominic's Home, respondent.

Steven Banks, The Legal Aid Society, New York (Judith Waksberg of counsel), and DLA Piper LLP (US), New York (Barbara L. Seniawski of counsel), Law Guardian.

Order, Family Court, Bronx County (Allen Alpert, J.), entered on or about April 30, 2008, which terminated respondent father's parental rights and committed custody and guardianship of the subject child to petitioner agency and the Commissioner of Social Services of the City of New York for the purpose of adoption, and bringing up for review the order after dispositional hearing, same court and Judge, entered on or about October 31, 2006, unanimously affirmed, without costs.

Notwithstanding the agency's diligent efforts to reunite the child with his father (Social Services Law § 384-b[7][f]; *see*

Matter of Gina Rachel L., 44 AD3d 367 [2007]), respondent failed to meet his concomitant duty to plan for his son's future by refusing, even years after the event, to acknowledge his failure to protect the child from the effects of his mother's alcoholism that led to the need for foster care. Instead, respondent repeatedly described the removal as a "kidnapping" by the agency.

Permanent neglect may be found "where a parent fails to acknowledge the problem that led to . . . foster care placement in the first place" (*Matter of Alpacheta C.*, 41 AD3d 285 [2007], *lv denied* 9 NY3d 812 [2007]). Respondent's substantial compliance with plan components including drug-testing requirements does not avail him, inasmuch as a finding of permanent neglect may be found even where the parent has fully complied with the agency's plan (*Matter of Violeta P.*, 45 AD3d 352 [2007]).

The termination of parental rights was in the child's best interests (*Matter of Olushola W.A.*, 41 AD3d 179 [2007]). In light of the child's lengthy placement in foster care, substantial questions raised regarding respondent's capacity, and his treating psychologist's testimony of the child's need for

stability, the Family Court correctly declined to order a suspended judgment (*see Matter of Maryline A.*, 22 AD3d 227 [2005]).

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

ENTERED: FEBRUARY 4, 2010

CLERK

Gonzalez, P.J., Saxe, McGuire, Román, JJ.

2109 Maria Sepulveda, etc., et al., Index 21252/05
Plaintiffs-Respondents,

-against-

Ashlesha Dayal, M.D., et al.,
Defendants-Appellants.

Bartlett, McDonough, Bastone & Monaghan, LLP, White Plains (Edward J. Guardaro, Jr. of counsel), for appellants.

Bruce G. Clark & Associates, P.C., Port Washington (Bruce G. Clark of counsel), for respondents.

Order, Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered November 14, 2008, which, in an action for medical malpractice allegedly arising from defendants' failure to diagnose a neuroblastoma in ultrasounds taken of infant plaintiff, denied defendants' motion to amend their answer to include the affirmative defense of collateral estoppel and to dismiss the action on that ground, unanimously affirmed, with costs.

The record shows that prior to obtaining the medical records indicating which physicians had reviewed the sonograms taken during the pregnancy of plaintiff mother, plaintiffs commenced an action naming Montefiore Medical Center and the 43 radiologists employed at the time of the alleged malpractice. After ascertaining the identity of the four physicians who had interpreted the sonograms, none of whom had been named in the

first action, plaintiffs commenced a second action against those four physicians and Montefiore. The defendants in the first action subsequently moved for summary judgment and with plaintiffs failing to oppose, the motion was granted on default and judgment was entered in favor of those defendants. After the defendants moved to dismiss the second action, which was resolved by a stipulation discontinuing it "without prejudice to bringing a new action on behalf of the infant plaintiff," plaintiffs commenced this action naming the same four physicians, but not Montefiore.

Although leave to amend pleadings should be freely granted in the absence of prejudice or surprise (*see generally Fahey v County of Ontario*, 44 NY2d 934 [1978]), as the motion court found, the proposed amendment is lacking in merit (*see Board of Mgrs. of Gramercy Park Habitat Condominium v Zucker*, 190 AD2d 636 [1993]). To determine whether collateral estoppel applies, a two-part test must be satisfied. "First, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination" (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985]).

Defendants have failed to satisfy either prong, since the court in the first action did not decide the ultimate issue of

whether the instant defendants were negligent. Furthermore, plaintiffs did not have a full and fair opportunity to litigate their claims. By the time the defendants in the first action moved for summary judgment, plaintiffs were aware that those defendants had not been involved in their medical treatment and there was no reason to raise the merits of their claims (*see e.g. Baxter v Fulton Ice & Cube Co.*, 106 AD2d 82, 85-86 [1985]; *compare Kret v Brookdale Hosp. Med. Ctr.*, 61 NY2d 861 [1984], *affg* 93 AD2d 449 [1983]).

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

ENTERED: FEBRUARY 4, 2010

CLERK

Gonzalez, P.J., Saxe, McGuire, Manzanet-Daniels, Román, JJ.

2110 Shirley Fleming, etc., et al., Index 8021/05
Plaintiffs-Appellants.

-against-

Pedinol Pharmacal, Inc., et al.,
Defendants-Respondents.

Bailly and McMillan, LLP, White Plains (Katharine G. Hall of counsel), for appellants.

London Fischer LLP, New York (Richard L. Mendelsohn of counsel), for Pedinol Pharmacal, Inc., respondent.

Collier, Halpern, Newberg, Nolletti & Bock, LLP, White Plains (Harry J. Nicolay, Jr. of counsel), for Chattem, Inc., respondent.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered December 2, 2008, which granted defendants' motion for partial summary judgment dismissing the cause of action for wrongful death and so much of the cause of action for personal injuries as seeks to recover damages for pain and suffering experienced after November 4, 2004, unanimously affirmed, without costs.

Defendants made a prima facie showing entitling them to summary judgment dismissing the cause of action for wrongful death based on plaintiff's decedent's medical records, the deposition testimony of the decedent's treating physician, and the affirmation of a vascular surgeon (*see Browder v New York City Health & Hosps. Corp.*, 37 AD3d 375 [2007]). In response,

plaintiff failed to raise a triable issue of fact. While plaintiff's expert sufficiently demonstrated his expertise to render an opinion (*see Ocasio-Gary v Lawrence Hosp.*, __ AD3d __, 2010 NY Slip Op 00003, *3 [1st Dept, Jan. 5, 2010]), his affirmation did not address the deposition testimony of the decedent's treating physician and the affirmation of defendant's expert regarding the decedent's underlying medical conditions, and his opinion as to proximate cause was conclusory and contradicted by the record (*see Browder, supra*).

Since the decedent had stopped using defendants' allegedly harmful medicinal creams prior to November 4, 2004, by which time his initial skin wounds had healed, the claim for pain and suffering was properly limited to the period beginning with the decedent's first use of the creams and ending November 4, 2004.

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

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

ENTERED: FEBRUARY 4, 2010

CLERK

Saxe, J.P., Nardelli, Buckley, Acosta, Freedman JJ.

1151 In re Anthony Chiofalo, Index 115958/07
Petitioner,

-against-

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

Karasyk & Moschella, LLP, New York (Philip Karasyk of counsel), for petitioner.

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

Determination of respondent Police Commissioner, dated August 3, 2007, terminating petitioner's employment as a detective, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Sheila Abdus-Salaam, J.], entered May 22, 2008), dismissed, without costs.

Respondent Commissioner was entitled to substitute his own judgment for that of respondent assistant deputy commissioner of trials, including on matters of credibility, since that judgment is supported by substantial evidence (*see Matter of Dobrin v Safir*, 272 AD2d 134 [2000]; *see also Matter of Mancini v New York City Dept. of Envtl. Protection*, 26 AD3d 178 [2006]). In rejecting petitioner's claim that he ingested marijuana unknowingly, the Commissioner relied on the Police Department's

scientific evidence that inadvertently ingesting marijuana in contaminated food and inhaling secondhand smoke could not cause the high levels of marijuana in petitioner's hair samples (*see Connor v New York City Police Dept.*, 22 AD3d 425 [2005]). We reject petitioner's claim that using the radioimmunoassay method of hair testing violated his Fourth Amendment right against unreasonable search and seizure because the use of that method was not authorized by the Police Department's collective bargaining agreement with petitioner's union. The Court of Appeals has held that the Commissioner was empowered to choose the method of drug testing, and that choice was not subject to collective bargaining (*see Matter of City of New York v Patrolmen's Benevolent Assn. of City of N.Y., Inc.*, __ NY3d __, 2009 NY Slip Op 09314 [2009]).

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

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

ENTERED: FEBRUARY 4, 2010

CLERK

Mazzarelli, J.P., Sweeny, Catterson, Acosta, Abdus-Salaam, JJ.

1459 Amcan Holdings, Inc., et al., Index 603393/07
Plaintiffs-Appellants-Respondents,

-against-

Canadian Imperial Bank of Commerce,
Defendant-Respondent-Appellant,

Canadian Imperial Holdings, Inc., et al.,
Defendants.

Scolaro, Shulman, Cohen, Fetter & Burstein, P.C., Syracuse (Chaim J. Jaffe of counsel), for appellants-respondents.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Scott D. Musoff of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Helen E. Freedman, J.), entered June 17, 2008, which granted defendants' motion to dismiss the complaint to the extent of dismissing all causes of action against defendants Canadian Imperial Holdings, CIBC World Markets, and CIBC, Inc., and the cause of action for breach of the implied covenant of good faith and fair dealing against defendant Canadian Imperial Bank of Commerce (CIBC), unanimously modified, on the law, the remaining causes of action against CIBC dismissed, and otherwise affirmed, with costs against plaintiffs.

Plaintiff companies are all controlled by one Richard Gray, who, in 2001, approached CIBC to obtain financing for the acquisition of a company called CWD Windows Division (CWD Division), as well as refinancing for the existing debt of Amcan and another company owned by Amcan, B.F. Rich Co. (BF Rich).

Gray also sought funding for the continuing operations of CWD Division and BF Rich. More specifically, plaintiffs sought a commitment from CIBC to furnish two separate lines of credit: (1) a revolving credit line to provide working capital, and (2) a non-revolving term loan.

The parties negotiated a "Draft Summary of Terms and Conditions" (Draft Summary), outlining the proposed terms of the two credit lines. After additional negotiations, the parties executed a writing entitled "Summary of Terms and Conditions" (Summary). Both documents contained a highlighted box at the top of the first page with the following language: "The Credit Facilities will only be established upon completion of definitive loan documentation, including a credit agreement . . . which will contain the terms and conditions set out in this Summary in addition to such other representations . . . and other terms and conditions . . . as CIBC may reasonably require."

The Summary itself contained specifics on a number of items, including, inter alia, detailed descriptions of the credit lines, the amount of funding to be provided under each, amortization and interest rates, fees, security, a proposed closing date and definitions of key terms. The Borrower was listed as CWD Division and BF Rich.

Under the subheading "Fees," the Summary provided for a $500,000 fee to CIBC, payable as follows: $50,000 payable on

acceptance of the Draft Summary, $150,000 payable upon acceptance of this committed offer and $300,000 payable upon the closing of this transaction. It is undisputed that plaintiffs paid the first two installments, which were not refunded by defendants when the deal was terminated.

Under the subheading "Conditions Precedent" were included what was "Usual and customary for transactions of this type," such as - for "Initial Funding," the "Execution and delivery of an acceptable formal loan agreement and security . . . documentation, which embodies the terms and conditions contained in this Summary."

Although there is a dispute over what happened next, it appears that prior to the execution of the final loan documents and credit agreement, CIBC discovered Gray had failed to disclose that certain entities he controlled, including Amcan, were subject to a preliminary injunction issued by New York County Supreme Court on October 21, 1996, which prohibited Amcan from assigning BF Rich shares as security for the loan, a condition precedent to closing the deal. Additionally, defendants claim plaintiffs failed to disclose that Gray had been held in contempt for violating the injunction, which contempt was upheld twice on appeal. Plaintiffs argue that defendants were aware of Gray's prior actions but proceeded with the deal in spite of that knowledge. CIBC broke off negotiations and the deal was never

consummated.

Six years later, plaintiffs commenced this action, asserting causes of action for breach of contract based on defendants' failure to close the loan, breach of defendants' obligation of good faith and fair dealing, and fraud. Defendants moved to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7). Defendants argued that the Summary was not a binding agreement, but a mere agreement to agree, and that they did not act arbitrarily in breaking off negotiations after learning about the preliminary injunction and contempt orders. Defendants further argued that assuming arguendo that the Summary was a binding agreement as plaintiffs failed state a cause of action because they did not to identify provisions of the Summary defendants had allegedly breached. Finally, defendants argued that Chariot Management lacked standing to sue, as it was neither a party to, nor a third-party beneficiary of, the Summary.

The motion was granted to dismiss against all defendants other than CIBC, holding that they were not parties to any agreement. The court also dismissed plaintiffs' cause of action against CIBC for breach of good faith and fair dealing, holding this claim duplicative of the breach-of-contract cause of action. In addition, it denied the motion to dismiss the cause of action against CIBC for breach of contract, finding that the circumstances presented at this preliminary stage of the

proceedings did not permit a determination as to whether the Summary was a binding agreement or merely an agreement to agree. The court also held that the portion of the motion to dismiss, for lack of standing, plaintiff Chariot Management's cause of action for breach of contract was premature.

The claim that defendants breached the implied covenant of good faith and fair dealing was properly dismissed as duplicative of the breach-of-contract claim, as both claims arise from the same facts (*Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [2009] and seek the identical damages for each alleged breach (*see Deer Park Enters., LLC v Ail Sys., Inc.*, 57 AD3d 711, 712 [2008]).

The causes of action asserted by Chariot Management against all defendants should have been dismissed for lack of standing. The documents belie plaintiffs' allegation that Chariot Management - which was not identified as a "Borrower," or listed as a signatory to either the Summary or the draft Credit Agreement - was an intended third-party beneficiary of the Summary (*see LaSalle Natl. Bank v Ernst & Young*, 285 AD2d 101, 108-109 [2001]).

"In determining whether a contract exists, the inquiry centers upon the parties' intent to be bound, i.e., whether there was a 'meeting of the minds' regarding the material terms of the

transaction" (*Central Fed. Sav. v National Westminister Bank, U.S.A.*, 176 AD2d 131, 132 [1991]). Generally, where the parties anticipate that a signed writing is required, there is no contract until one is delivered (*see Scheck v Francis*, 26 NY2d 466, 470-471 [1970]).

Here, both the Draft Summary and Summary documents clearly state the credit facilities "will only be established upon completion of definitive loan documentation," which would contain not only the terms and conditions in those documents but also such "other terms and conditions . . . as CIBC may reasonably require." Although the Summary was detailed in its terms, it was clearly dependent on a future definitive agreement, including a credit agreement. At no point did the parties explicitly state that they intended to be bound by the Summary pending the final Credit Agreement, nor did they waive the finalization of such agreement (*see Prospect St. Ventures I, LLC v Eclipsys Solutions Corp.*, 23 AD3d 213 [2005]; *see also Hollinger Digital v LookSmart, Ltd.*, 267 AD2d 77 [1999]).

The parties disagree on whether the Draft Summary and Summary fall into a Type I (fully negotiated) or Type II (terms still to be negotiated) preliminary agreement, commonly used in federal cases addressing the issue of whether a particular document is an enforceable agreement or merely an agreement to

agree (*see Teachers Ins. and Annuity Assn of Am. v Tribune Co.*, 670 F Supp 491, 498 [SD NY 1987]). However, our Court of Appeals recently rejected the Federal Type I/Type II classifications as too rigid, holding that in determining whether the document in a given case is an enforceable contract or an agreement to agree, the question should be asked in terms of "whether the agreement contemplated the negotiation of later agreements and if the consummation of those agreements was a precondition to a party's performance" (*IDT Corp. v Tyco Group*, S.A.R.L., 13 NY3d 209, 213 n 3 [2009]).

Here, the Summary made a number of references to future definitive documentation, starting with the box on page one of the Summary. The fact that the Summary was extensive and contained specific information regarding many of the terms to be contained in the ultimate loan documents and credit agreements does not change the fact that defendants clearly expressed an intent not to be bound until those documents were actually executed. As a result, the motion to dismiss the complaint should have been granted in its entirety with respect to CIBC.

Based on the foregoing, there is no need to address the remaining issues raised by the parties on the appeal and cross appeal.

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

ENTERED: FEBRUARY 4, 2010

CLERK

Friedman, J.P., Sweeny, Freedman, Abdus-Salaam, JJ.

1747 Ginezra Associates LLC, Index 104858/07
Plaintiff-Appellant,

-against-

Kostas Ifantopoulos, et al.,
Defendants-Respondents.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for appellant.

Simon, Eisenberg & Baum, LLP, New York (Edward Paul Alperi of counsel), for Kostas Ifantopoulos, respondent.

Alterman & Boop LLP, New York (Arlene F. Boop of counsel), for Suzanne Pillsbury, respondent.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered June 25, 2008, which denied plaintiff's motion for summary judgment and granted defendants' cross motion for summary judgment dismissing the complaint, unanimously modified, on the law, defendant Pillsbury's cross motion denied, the complaint reinstated as against her, and otherwise affirmed, without costs.

Plaintiff landlord seeks to evict defendants from one of the units in its building. The building in question is an "interim multiple dwelling" under the Loft Law (Multiple Dwelling Law § 281). Pillsbury rents the second- and third-floor lofts, each of which is self-contained, each having a kitchen and bathroom, as well as separate entrances to the street. She resides solely in the second-floor unit and has never occupied the third-floor loft.

When Pillsbury commenced her residency in the building, the third-floor loft was occupied by nonparty Avi Fima under a subtenant agreement with Pillsbury's predecessor. Without Pillsbury's knowledge, sometime prior to 1985 Fima vacated the third-floor loft and defendant Ifantopoulos moved in. Thereafter, Pillsbury became aware of Ifantopoulos's occupancy and he has been paying rent to Pillsbury for the third floor loft since that time.

In 1996 plaintiff brought a holdover proceeding in Civil Court to recover possession of the third floor, contending that the third-floor loft was not Pillsbury's primary residence as she actually lived in the second floor area of the leased unit. That court, after doing an extensive analysis of the premises, including the configuration of the unit, and the existence of partitions, separate kitchens, bathrooms and entrances, dismissed the petition. The court held that pursuant to Real Property Law § 235-f, every residential rental agreement is construed to permit occupancy for the tenant, the tenant's immediate family and an additional occupant. The court specifically found that in this case, that additional occupant was Ifantopoulos and therefore, Pillsbury "resided" in the entire apartment, both second and third floors. Of note is the fact that Civil Court also found Pillsbury's lease permitted a subtenant, so in either case, Ifantopoulos' presence did not negate Pillsbury's occupancy

of the entire premises pursuant to her lease. In denying plaintiff's motion for reargument, the Civil Court held that plaintiff's claim of rent overcharging in the sublease required a different manner of proof that had not been presented. The Appellate Term affirmed the Civil Court's dismissal of the petition, in a decision replete with references to the arrangement between the defendants as a sublet or subtenancy.

Plaintiff commenced the instant action in 2007, again alleging that Pillsbury did not primarily reside on the third floor of the unit. However, in its motion for summary judgment, plaintiff argued, for the first time, that defendants had forfeited any right to the third floor because Pillsbury was engaged in rent overcharging. Pillsbury cross-moved to dismiss, arguing that in the 1996 action, the court ruled she and Ifantopoulos were roommates, that nothing had changed in the interim, and that the present action was barred by the doctrines of res judicata and collateral estoppel.

As related to this appeal, the IAS court denied plaintiff's motion for summary judgment and granted Pillsbury's motion to dismiss the complaint.

The doctrine of res judicata holds that a final judgment bars further actions between the same parties on either the same cause of action or any claim related to the same course of conduct, unless the requisite elements and proof required for the

new claim "vary materially" from those of the claim in the prior action (*Lukowsky v Shalit*, 110 AD2d 563, 566 [1985]). Under the doctrine of collateral estoppel, issues of law and questions of fact necessarily decided by a court of competent jurisdiction remain binding upon the parties and those in privity with them in all subsequent litigation in which the same issues are material. A party asserting collateral estoppel must demonstrate that there is an identity of issue that has necessarily been decided in the prior action and is decisive of the present action, and that there must have been a full and fair opportunity to contest the decision now said to be controlling (*id.* at 567).

Here, the complaint asserts the identical claim based on identical facts as the 1996 action, i.e., that the subtenant's presence on the third floor means that the tenant does not live there. In the absence of any change in circumstances, preclusive effect should be given to the Appellate Term's determination that the tenant occupied the third floor portion of the loft for purposes of primary residence. The IAS court thus properly dismissed that cause of action in the complaint on the basis of res judicata.

However, the IAS court also deemed the rent-overcharging claim, raised in plaintiff's motion for summary judgment, to be an amendment to plaintiff's complaint as an added cause of action. This is a different claim than the one based on primary

residence (*see* Rent Stabilization Code [9 NYCRR] § 2524.3[h]). Unlike the Civil Court in the 1996 action, the Appellate Term did not make a finding that the parties herein were roommates. While finding that there was one leasehold for the two-floor unit, it also found that the "subletting of part of the space was always contemplated and permitted," and that the landlord could not "excise a portion of the leasehold for nonprimary residence purposes." Accordingly, the rent-profiteering cause of action is separate and distinct from the residence claim; it is not precluded by res judicata or collateral estoppel, and must be reinstated.

That being said, plaintiff's motion for summary judgment was properly denied. Plaintiff can only recover possession of the unit if it is established that tenant Pillsbury engaged in rent profiteering with respect to her sublease (*see BLF Realty Holding Corp. v Kasher*, 299 AD2d 87 [2002], *lv dismissed* 100 NY2d 535 [2003]). While it appears that Pillsbury charged her subtenant more than his proportionate share of the legal rent, the amount

was not in excess of the legal rent. As a result, there is an issue of fact as to whether Pillsbury engaged in commercial exploitation or rent profiteering.

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

ENTERED: FEBRUARY 4, 2010

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
Richard T. Andrias
Dianne T. Renwick
Sallie Manzanet-Daniels, JJ.

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Index 116230/07

x

Peter F. Edelman,
Plaintiff-Appellant,

-against-

Claudia Poster,
Defendant-Respondent.

x

Plaintiff appeals from an order of the Supreme Court, New York County (Emily Jane Goodman, J.), entered March 12, 2009, which denied his motion for summary judgment and granted defendant's cross motion to dismiss the complaint.

Peter F. Edelman, New York, appellant pro se.

Howard Benjamin, New York, for respondent.

ANDRIAS, J.

Pursuant to three separate written retainer agreements, the plaintiff-appellant, an attorney, represented the defendant-respondent in a matrimonial action and related appeals. In 2007, he commenced this action against plaintiff to recover, under theories of breach of contract and of account stated, the sum of $155,934.05, plus interest, representing fees allegedly due for services rendered under the retainer agreements. Plaintiff also sought to recover the attorney's fees incurred in the prosecution of this action.

Plaintiff moved for summary judgment and defendant cross-moved to dismiss the complaint. Characterizing the issue before it as "one of pure contract interpretation," the Supreme Court dismissed the complaint, finding that plaintiff breached the unambiguous retainer agreements by failing to give defendant 30 days' notice of her right to fee arbitration prior to commencing suit. We now consider whether in performing its analysis, the Supreme Court erred when it held that the retainer agreements may be construed without reference to the matrimonial rules governing retainers, fee disputes and arbitration in domestic relation matters that were in effect at the time the retainer agreements were executed.

The rules pertaining to retainers, fee disputes and

arbitration in domestic relations matters, found at 22 NYCRR part 1400 (the matrimonial rules), were "promulgated to address abuses in the practice of matrimonial law and to protect the public" (*Julien v Machson*, 245 AD2d 122, 122 [1997]). At the time the parties executed the retainer agreements in this case, March 10, 1997, August 17, 1999 and July 6, 2001, respectively, arbitration was governed by 22 NYCRR part 136, which provided for binding arbitration of fee disputes at the client's option (22 NYCRR 136.2), where the amount in dispute did not exceed $100,000 (22 NYCRR 136.4[a]). An attorney's "utter failure to abide by these rules" precludes the attorney from collecting fees, even if the services were already rendered (*Julien v Machson*, supra; *see also Mulcahy v Mulcahy*, 285 AD2d 587 [2001]). Where there has been "substantial compliance" with the matrimonial rules, an attorney will be allowed to recover the fees owed for services rendered, but not yet been paid for. (*See Flanagan v Flanagan*, 267 AD2d 80 [1999]; *Markard v Markard*, 263 AD2d 470 [1999]).

In granting defendant's motion for summary judgment dismissing the complaint on the ground that the plaintiff-attorney failed to give defendant notice of her right to arbitrate prior to commencing suit, the Supreme Court found that defendant was entitled to such notice "regardless of the existence of 22 NYCRR 136, *et seq.*, and regardless of plaintiff's

unexpressed intention that the arbitration be governed by that section" because the unambiguous "writing contains no reference at all to 22 NYCRR 136, *et seq.*, no reference to a 30 day period to respond to a notice of a fee dispute [*sic*], and no mention of a jurisdictional limit to disputes that defendant may arbitrate." The court further stated that even if the agreement was ambiguous, it must be construed against plaintiff as drafter.

Because we do not believe that the parties' retainer agreements may be interpreted without reference to the matrimonial rules in effect at the time they were entered, which governed the attorney-client relationship in domestic relations matters with respect to fee disputes and arbitration, we reverse the grant of summary judgment in defendant's favor and reinstate the complaint. A contrary result would do violence to the very rules we endeavor to enforce and penalize an attorney who complied in all respects with the matrimonial rules in effect at the time each retainer agreement was drafted and executed.

Under New York law, an enforceable contract requires mutual assent to its essential terms and conditions. If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract (*see Matter of 166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.*, 78 NY2d 88, 91 [1991]; *Mellen & Jayne, Inc. v AIM Promotions, Inc.*, 33 AD3d 676 [2006]). "[A]

court will not order a party to submit to arbitration absent evidence of that party's unequivocal intent to arbitrate the relevant dispute and unless the dispute falls clearly within that class of claims which the parties agreed to refer to arbitration" (*Primavera Labs. v Avon Prods.*, 297 AD2d 505, 505 [2002] [internal quotation marks and citations omitted]).

In the case before us, by agreement dated February 28, 1997 and executed March 10, 1997, plaintiff was retained by defendant to prosecute an action for divorce in *Poster v Poster*. The agreement provided in pertinent part:

> While I seek to avoid any disputes concerning the payment of our fee, in the event such a dispute does arise, you have the right, at your election, to seek arbitration, the results of which are binding on both parties. *I shall advise you in writing by certified mail that you have 30 days from receipt of such notice in which to elect to resolve the dispute by arbitration, and I shall enclose a copy of the arbitration rules and a form for requesting arbitration.* If no action is pending and if you do not timely enforce your rights to enter into fee arbitration, I may commence legal proceedings against you to recover any unpaid fee (emphasis added).

By agreement dated May 10, 1999 and executed August 17, 1999, and by agreement dated July 3, 2001 and executed July 6, 2001, plaintiff was also retained by defendant to represent her in appeals related to the divorce action. Each of these retainers included the same arbitration clause.

Attached to each of the three retainer agreements was a copy of a "Statement of Client's Rights and Responsibilities" which informed the client of what he or she is "entitled to by law or by custom." Consistent with the retainer agreement, the statement provides, among other things, that "[i]n the event of a fee dispute, you have the right to seek arbitration, the results of which are binding. *Your attorney will provide you with the necessary information regarding arbitration in the event of a fee dispute, or upon your request*" (emphasis added).

While these retainer agreements evidence a clear intent to give defendant the right to binding arbitration of fee disputes at her option, to be governed by arbitration rules to be provided by plaintiff, material terms are missing in that they do not specify what those rules are or identify the forum for the arbitration. However, there is no requirement that an agreement to arbitrate be encompassed in "a single comprehensive document" (5 NY Jur 2d, Arbitration and Award § 17, at 45-46; *see also American States Ins. Co. v Sorrell*, 258 AD2d 782, 783 [1999]), and where it is clear from the language of an agreement that the parties intended to be bound and there exists an objective method for supplying a missing term, the court should endeavor to hold the parties to their bargain (*166 Mamaroneck Ave.*, 78 NY2d at 91; *see also Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d

475, 483 [1989] *cert denied* 498 US 816 [1990] [before rejecting an agreement as indefinite, a court must be satisfied that the agreement cannot be rendered reasonably certain by reference to an extrinsic standard that makes its meaning clear]; *Marshall Granger & Co., CPA's, P.C. v Sanossian & Sardis, LLP*, 15 AD3d 631, 632 [2005]).

The subject retainer agreements and statement of client's rights and responsibilities, read together, advise defendant of the rights to which she was "entitled to by law or by custom," including the right to arbitrate fee disputes, and reference arbitration rules to be provided by plaintiff upon a fee dispute or at defendant's request. Given this language, applying the principles of contract interpretation set forth above, there is an objective method to attach a sufficiently definite meaning to the arbitration clause and to supply the missing information as to the arbitration forum and governing rules, to wit, the matrimonial rules, which, pursuant to 22 NYCRR 1400.1, "apply to all attorneys who . . . undertake to represent a client in a claim, action or proceeding . . . for divorce."

An analysis of the retainer agreements demonstrates that they were drafted in accordance with the matrimonial rules. Pursuant to 22 NYCRR 1400.2, the attorney must provide "a prospective client with a statement of client's rights and

responsibilities, in a form prescribed by the Appellate Divisions, at the initial conference and prior to the signing of a written retainer agreement." Here, a copy of that statement was undisputedly annexed to each retainer agreement.

Pursuant to 22 NYCRR 1400.3, the matrimonial attorney is required to "execute a written agreement with the client setting forth in plain language the terms of compensation and the nature of services to be rendered . . ." Section 1400.3 further provides for the inclusion of certain information in the retainer agreement, including the amount of the advance retainer and what it covers, the client's right to cancel, the hourly rate of each person whose time may be charged to the client, and the disbursements not included in the fee. Each of these requirements is addressed in the subject retainer agreements.

Further, as to arbitration, 22 NYCRR 1400.3 provides:

> 13. Should a dispute arise concerning the attorney's fee, the client may seek arbitration; the attorney shall provide information concerning fee arbitration in the event of such dispute or upon the client's request.

Again, each of the retainer agreements and statement of client's rights and responsibilities conforms with 22 NYCRR 1400.3, which did not mandate that the applicable court rule governing the arbitration be expressly identified in the retainer

agreement. It is worthy of note that in contrast, 22 NYCRR 1215.1(b)(2), effective March 4, 2002, requires that the retainer agreement "where applicable, shall provide that the client may have a right to arbitrate fee disputes *under Part 137 of the Rules of the Chief Administrator*" (emphasis added). Significantly, the arbitration clause used by plaintiff substantially conformed with the Sample Retainer Agreement Forms then approved by the N.Y. Chapter of the American Academy of Matrimonial Lawyers and the Family Law Section of N.Y.S. Bar Association, two of the leading organizations dedicated to enforcing and enhancing professionalism in this often contentious area of law.

Applying the matrimonial rules, the complaint should not have been dismissed based on plaintiff's failure to provide defendant with an arbitration notice in advance of litigation. 22 NYCRR 1400.7, "Fee Arbitration" provides:

> In the event of a fee dispute between attorney and client, the client may seek to resolve the dispute by arbitration, pursuant to a fee arbitration program established by the Chief Administrator of the Courts and subject to the approval of the justices of the Appellate Divisions.

Under 22 NYCRR Part 136, a client could request arbitration pursuant to 22 NYCRR 136.5(e) either in response to notice from the attorney pursuant to section 136.5(a), upon consent pursuant

to section 136.5(d), or upon the client's own initiative.

Under 22 NYCRR 136.5[a], where a fee dispute arises, the attorney must inform the client in writing that he or she has 30 days from receipt of the notice in which to elect to resolve the dispute by arbitration. The attorney must also include standard instructions developed by the Chief Administrator regarding the arbitration procedure, and a copy of a request for arbitration. "If the client does not file the request for arbitration within the 30-day period, the attorney may commence an action to recover the fee and the client no longer shall have the right to request arbitration pursuant to this Part with respect to the fee dispute at issue" (22 NYCRR 136.5[b]). "An attorney who institutes an action to recover a fee must allege in the complaint that the client received notice under this rule of his or her right to pursue arbitration and did not file a timely request for arbitration" (22 NYCRR 137.5[c]).

While these provisions, which are consistent with the arbitration clause in the retainer agreement, impose a notice requirement, pursuant to 22 NYCRR 136.4, "Jurisdiction",

> (a) The arbitration program may not hear any fee dispute in which the amount in dispute is in excess of $ 100,000, including disbursements.
>
> (b) The Administrative Judge may decline to accept or continue to arbitrate a dispute in which substantial legal questions are raised in addition to the basic fee

> dispute or with respect to which no attorney's services have been rendered for at least two years.

Accordingly, in the event of a fee dispute between a matrimonial attorney and client, under Part 136 the client had the right to seek binding arbitration of the dispute *provided* that the amount in dispute was not in excess of $100,000.

Here, in accordance with the matrimonial rules, plaintiff presented executed written retainer agreements (*see* 22 NYCRR 1400.3) which contain a fee arbitration provision (*see* 22 NYCRR 1400.7) and attached a copy of the statement of client's rights and responsibilities (*see* 22 NYCRR 1400.2). In his complaint, plaintiff alleged "[t]hat neither Part 136, nor Part 137 of the Uniform Rules is applicable because of the amount in controversy, and, as to the latter Part, also because representation of Poster commenced in 1997." Given that it is undisputed that the amount in dispute exceeds $100,000, the parties' fee dispute is not subject to arbitration under the matrimonial rules, and plaintiff's complaint states a valid cause of action that should not have been dismissed on the basis of his failure to give defendant notice of her right to arbitrate (*compare Migdal, Pollack & Rosenkrantz LLP v Coleman*, 6 Misc 3d 378 [Sup Ct NY County 2004] ["In conclusion, the court finds that since the amount in dispute with respect to the fees covered by part 136

was less than $100,000 at the time of the filing of this action, and plaintiff failed to give the notice with respect to arbitration required therein and thus was unable to assert in its complaint the allegation of compliance as required by section 136.5 (c), the complaint as pleaded (for 'legal services in connection with the dissolution of his marriage') is dismissed"]).

However, issues of fact preclude the grant of summary judgment in plaintiff's favor and the order should be affirmed in that respect. Indeed, with respect to plaintiff's request for summary judgment on his cause of action for an account stated, the Supreme Court (Judith J. Gische, J.) observed at a December 20, 2002 hearing in connection with defendant's application to have plaintiff turn over her file, that "there is a significant dispute between [plaintiff] and the client regarding the amount of fees that are outstanding."

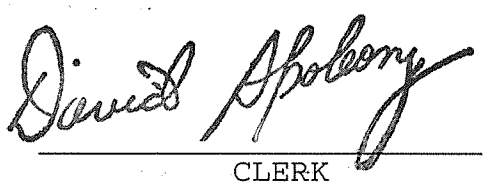
Accordingly, the order of the Supreme Court, New York County (Emily Jane Goodman, J.), entered March 12, 2009, which denied plaintiff's motion for summary judgment and granted defendant's cross motion to dismiss the complaint should be modified, on the

law, to deny defendant's cross motion to dismiss and to reinstate the complaint, and otherwise affirmed, without costs.

All concur.

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

ENTERED: FEBRUARY 4, 2010



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