SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 1, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Moskowitz, Freedman, Richter, Román, JJ.

2440 Telerep, LLC, et al., Index 600832/09
Plaintiffs-Appellants,

-against-

U.S. International Media, LLC, et al.,
Defendants-Respondents.

Kelley Drye & Warren LLP, New York (Richard E. Donovan of counsel), for appellants.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Joseph N. Sacca of counsel), for U.S. International Media, LLC, respondent.

Sonnenschein Nath & Rosenthal LLP, New York (Reid L. Ashinoff of counsel), for Martin Retail Group, LLC, respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered August 11, 2009, which granted defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(7), unanimously reversed, on the law, without costs, the motion denied, and the complaint reinstated.

Plaintiffs are national sales representatives for the sale of commercial advertising spots broadcast on their clients' television stations located throughout the United States. Plaintiffs sell national commercial spots to various media buyers who purchase air time on behalf of their client advertisers;

local advertising time is sold by the television stations themselves. Defendants are media buyers.

Plaintiffs entered into 84 contracts with various television stations. These contracts provide that plaintiffs shall act as the station's "sole and exclusive national sales representative for the sale of all of STATION'S time . . . for advertising purposes, excluding only [local sales] advertising."[1] The stations agreed that they would not "engage or use the services of any persons, firm or corporation other than [plaintiffs] in the sale of NATIONAL SPOT ADVERTISING."

Plaintiffs brought this action against defendants for tortious interference with contract and unfair trade practices. According to the complaint, defendants embarked on a campaign to induce and pressure the stations to sell national advertising spots directly to them in breach of the stations' obligations under the contracts. Defendants persisted, despite being warned that the stations' direct sales of national spots violated the exclusivity provisions of their contracts with plaintiffs. The complaint alleges that as a result of defendants' interference, the stations breached their contracts with plaintiffs, causing them to lose commissions and goodwill.

To plead a claim for tortious interference with contract, a

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[1] The contracts all contain substantially the same provisions for purposes of this appeal. The quoted language is taken from one such contract.

plaintiff must allege, inter alia, actual breach of a contract between the plaintiff and a third party (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]). Defendants maintain that the complaint does not allege a breach because the contracts do not bar direct sales of national spots by the television stations themselves but only prohibit sales by competing sales representatives. Plaintiffs, on the other hand, argue that, read as a whole, the contracts prohibit direct sales of national air time by the stations. In the alternative, plaintiffs contend that the contracts are ambiguous.

"A contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Greenfield v Philles Records*, 98 NY2d 562, 569-570 [2002] [internal quotation marks and citation omitted]). A contract is ambiguous if "on its face [it] is reasonably susceptible of more than one interpretation" (*Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]). If the court concludes that a contract is ambiguous, it cannot be construed as a matter of law, and dismissal under CPLR 3211(a)(7) is not appropriate (*see Hambrecht & Quist Guar. Fin., LLC v El Coronado Holdings, LLC*, 27 AD3d 204 [2006]).

We find that these contracts are ambiguous as to whether

they prohibit direct sales of national air time by the stations. First, although the agreements provide that plaintiffs are exclusive sales representatives, there is no provision that explicitly bars the stations themselves from selling national air time directly to buyers. Moreover, as defendants point out, the contracts provide that plaintiffs are entitled to commissions on national advertising sales "whether said contracts are written or obtained by [plaintiffs] or not." This language, together with the absence of a prohibition on direct sales, can be read as permitting the stations themselves to sell national advertising time as long as they pay plaintiffs a commission on the sales.

Other provisions of the contract, however, can reasonably be interpreted as prohibiting direct sales by the stations. First, the contracts require the stations to forward to plaintiffs "all orders for NATIONAL SPOT ADVERTISING received directly by STATION." In addition, the station agrees "to notify [plaintiffs] promptly when anyone makes a direct approach to STATION to buy NATIONAL SPOT ADVERTISING time, and to notify that prospective buyer that all such purchases will be made through [plaintiffs] and that contracts for all such orders will be issued by [plaintiffs]." Plaintiffs persuasively argue that it makes no sense that the stations would have to forward all orders directly received, and to tell such prospective buyers that the station cannot make a direct sale, yet then allow the stations to

do just that.

The cases cited by defendants do not require a different result. All of the cases involve a dispute over a real estate broker's right to a commission and do not address the precise question presented here - whether certain language in a sales representative contract, as a matter of law, prohibits direct sales by the principal.

Because we find that the contracts here are reasonably susceptible of more than one interpretation and thus are ambiguous, the complaint should not have been dismissed pre-answer before the development of a full factual record as to the parties' intent (*see Hambrecht & Quist Guar. Fin., LLC v El Coronado Holdings, LLC, supra*).

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

ENTERED: JUNE 1, 2010

CLERK

Gonzalez, P.J., Saxe, Nardelli, McGuire, Moskowitz, JJ.

2609 Satia Alrobaia, an infant by her mother and natural guardian Anita Severs, et al., Plaintiffs-Appellants, Index 23228/06

-against-

Park Lane Mosholu Corp., et al., Defendants-Respondents.

Barton, Barton & Plotkin LLP, New York (Thomas P. Giuffra of counsel), for appellants.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Marcia K. Raicus of counsel), for respondents.

Order, Supreme Court, Bronx County (Cynthia S. Kern, J.), entered August 19, 2009, which, in an action for personal injuries sustained in a crime allegedly caused by inadequate building security, granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion denied, and the complaint reinstated.

The motion court found that defendants were entitled to summary judgment because, as the infant plaintiff testified, the doors to the building were propped open when she arrived at the building. The court concluded that since plaintiffs could not produce any evidence as to when the doors had been propped open, or when the assailant entered the building, it was just as likely that the assailant entered the building through the open doors as

it was that he gained entrance because the locks were broken, and, thus, plaintiffs could not establish a causal connection between the broken locks and the attack. The argument on which the court relied, however, was raised for the first time in defendants' reply papers, and should not have been considered by the court in formulating its decision (*see Serradilla v Lords Corp.*, 50 AD3d 345, 346 [2008]).

Thus, summary judgment was improperly granted.

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

ENTERED: JUNE 1, 2010

CLERK

Gonzalez, P.J., Sweeny, Acosta, Renwick, Román, JJ.

2933 The People of the State of New York, Ind. 3799/03
Respondent,

-against-

Delroy Joe, etc.,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Jonathan M. Kirshbaum of counsel), and Chadbourne & Parke LLP, New York (Maureen Ketler Schad of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Patrick J. Hynes of counsel), for respondent.

Order, Supreme Court, New York County (Carol Berkman, J.), entered on or about July 9, 2009, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defense counsel did not render ineffective assistance by failing to object to a point assessment based on the age of a victim. Counsel could reasonably have found it pointless to demand proof that one of defendant's victims was under 17, since the People would have simply produced grand jury minutes establishing that fact. For the same reason, counsel's failure to challenge this assessment could not have prejudiced defendant.

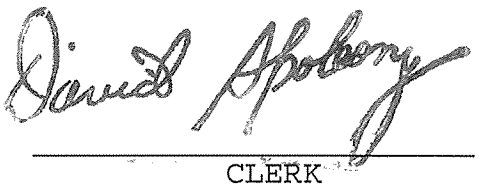
The court properly exercised its discretion in declining to grant a downward departure from defendant's presumptive risk

level (*see People v Mingo*, 12 NY3d 563, 568 n 2 [2009]; *People v Johnson*, 11 NY3d 416, 421 [2008]). The court was familiar with the seriousness of the underlying sex crime, as well as defendant's criminal record.

Defendant's claim that his assessment under the release without supervision category should have been 5 rather than 15 points is improperly raised for the first time on appeal (*see People v Mantilla*, 70 AD3d 477 [2010]). In any event, acceptance of this argument would lower defendant's point score to 120, which is still above the threshold for a level three adjudication, and such a reduction would not affect our determination that a downward departure is unwarranted.

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

ENTERED: JUNE 1, 2010



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Gonzalez, P.J., Sweeny, Acosta, Renwick, Román, JJ.

2934 Andrea Wilkinson, et al., Index 110445/04
Plaintiffs-Appellants,

-against-

Community Preservation Corporation, et al.,
Defendants-Respondents.

Law Office of Steven A. Morelli, Garden City, (Steven A. Morelli of counsel), for appellants.

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

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered March 11, 2009, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiff Wilkinson's claims, unanimously affirmed, without costs.

In support of her discrimination and retaliation claims, plaintiff Wilkinson failed to offer evidence to show that the legitimate, non-discriminatory reasons defendants articulated for their actions were false, contrived or pretextual (*see Koester v New York Blood Ctr.*, 55 AD3d 447 [2008]; *Stewart v Schulte Roth & Zabel LLP*, 44 AD3d 354 [2007], *lv denied* 10 NY3d 707 [2008]). Additionally, plaintiff's New York City Human Rights Law claims are not viable because the alleged discriminatory conduct took place in Albany and no alleged discriminatory decision took place

in New York City (*Hoffman v Parade Publs.*, 65 AD3d 48 [1st Dept. 2009]; *Duffy v Drake Beam Morin*, 1998 WL 252064 [SDNY 1998]).

Even assuming, arguendo, that plaintiff was a third-party beneficiary of the contract between defendant Community Preservation Corporation (CPC) and Ace Holding, LLC, she failed to show that the delays in payment by CPC constituted a breach of that contract. Nor did plaintiff show that defendants owed her a fiduciary duty (*see e.g. Chester Color Separations v Trefoil Capital Corp.*, 222 AD2d 276 [1995]).

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: JUNE 1, 2010

CLERK

Gonzalez, P.J., Sweeny, Acosta, Renwick, Román, JJ.

2935-
2935A In re Will of Ralph Schlaeger, Deceased. File No. 1034/07

Herbert H. Hochberg,
Proponent-Respondent,

-against-

Judith Schlaeger, et al.,
Objectants-Appellants.

Schuman Sall & Geist, White Plains (Gerald K. Geist of counsel), and Anderson Kill & Olick, P.C., New York (Linda Gerstel of counsel), for appellants.

Greenfield Stein & Senior, LLP, New York (Anne C. Bederka of counsel), for respondent.

Amended decree, Surrogate's Court, New York County (Kristin Booth Glen, S.), entered on or about August 10, 2009, admitting the subject will to probate, and bringing up for review an order, same court and Surrogate, entered on or about July 27, 2009, which granted proponent's motion for summary judgment dismissing the objections to probate and denied objectants' motion for further discovery, unanimously affirmed, without costs. Appeal from the above order unanimously dismissed, without costs, as subsumed in the appeal from the above decree.

Proponent met his burden of establishing the decedent's testamentary capacity with the self-proving affidavit of the attesting witnesses stating that the decedent was of "sound mind,

memory and understanding" and was not incompetent (*Matter of Friedman*, 26 AD3d 723, 725 [2006], *lv denied* 7 NY3d 711 [2006]; *Matter of Korn*, 25 AD3d 379, 379 [2006]; *Matter of Clapper*, 279 AD2d 730, 731 [2001]). In addition, proponent presented the testimony of five disinterested witnesses who each attested to the decedent's capacity on the date of execution, and also presented evidence that the decedent was aware of the assets passing under his will and knew that objectants were the natural objects of his bounty but consciously decided not to make a bequest to them (*see Matter of Kumstar*, 66 NY2d 691, 692 [1985]). No triable issues of fact bearing on capacity are raised by the medical records on which objectants rely, which show that while decedent was terminally ill and initially confused and disoriented upon his admission to the hospital, his cognitive facilities quickly improved and he was lucid on the days before and on the date he made the will (*see Matter of Margolis*, 218 AD2d 738, 739 [1995], *lv denied* 88 NY2d 802 [1996]; *see also Friedman*, 26 AD3d at 725; *Matter of Hedges*, 100 AD2d 586, 588 [1994], *appeal dismissed* 63 NY2d 944 [1984]). It therefore appears, as the Surrogate stated, that objectants' motion for further discovery to depose medical personnel who attended the decedent in the hospital amounts to a fishing expedition (*see Matter of Dietrich*, 271 AD2d 894 [2000]). The motion was also belated. Objectants offer no explanation for not having

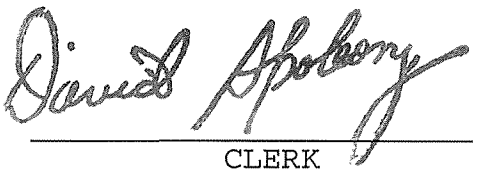
requested the decedent's medical records until almost a year after they commenced depositions, nor do they explain why they did not seek further discovery until four months after they received the medical records (*see Korn*, 25 AD3d at 380).

Proponent established prima facie due execution of the will with the affidavits and testimony of the attesting witnesses and attorney-drafter. Where, as here, the attorney-drafter supervises the execution of the will, there is a presumption of regularity that the will was properly executed in all respects (*Matter of Moskoff*, 41 AD3d 481, 482 [2007]; *Hedges*, 100 AD2d at 587). In addition, the attestation clause and self-proving affidavit give rise to a presumption of compliance with all statutory provisions and constitutes prima facie evidence of the facts attested to therein by the witnesses (*Moskoff*, *id.*; *Clapper*, 279 AD2d at 731). There was no inconsistency in the evidence regarding which of the two attorneys present supervised the execution of the will and, in any event, such a discrepancy would be insufficient to overcome the presumption of due execution raised by the self-proving affidavit (*see Matter of Leach*, 3 AD3d 763, 765 [2004]).

We have considered objectants' remaining arguments and find them to be without merit.

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

ENTERED: JUNE 1, 2010



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Gonzalez, P.J., Sweeny, Acosta, Renwick, Román, JJ.

2936-
2937-
2938-
2939-
2940 Lyman Carter,
Petitioner-Respondent,

-against-

Amy Wesson,
Respondent-Appellant.

M W Moody LLC, Brooklyn (Mark W. Moody of counsel), for appellant.

Davidoff Malito & Hutcher, LLP, Garden City (Leslie F. Barbara of counsel), for respondent.

Appeals from (1) order of the Family Court, New York County (Lori S. Sattler, J.), entered on or about February 17, 2010, which granted the petition for a writ of habeas corpus directing the appellant to produce the parties' child in New York for custody and visitation proceedings; (2) order, same court and Justice, entered on or about February 23, 2010, which, inter alia, granted appellant's motion to dismiss the petition and vacate the writ to the extent of setting the matter down for a hearing on the issue of whether the court has subject matter jurisdiction; (3) order, same court and Justice, entered on or about March 10, 2010, which, upon the court exercising temporary emergency jurisdiction, inter alia, appointed an attorney for the child and directed that the child be produced for a hearing; and

(4) from an order of the same court and Justice, entered on or about March 10, 2010, which denied appellant's motion to renew and reargue the order of February 23, 2010, unanimously dismissed, without costs.

The parties were married in 2003, had a son in 2004, and separated in 2007. After the parties separated they shared custody of the child, with the child living part of the time with the father in Manhattan and part of the time with the mother at the former marital residence in Brooklyn. In June 2009, the mother was having financial difficulties and, with the father's consent, took the son with her to Texas where she planned to reside with the child's maternal grandmother while she trained to become a Pilates instructor. At the time the mother took the child to Texas, no divorce proceeding had been commenced and although the parties had a draft of a stipulation of settlement which they negotiated through a mediator, the stipulation had not been signed or executed, and thus, had no binding effect. In January 2010, despite the father's repeated demands, the mother refused to return the child to New York. Accordingly, on February 17, 2010, the father petitioned the Family Court, New York County, for a writ of habeas corpus which was granted. In addition to seeking habeas corpus relief, the father sought an order determining custody of and visitation with the child. The mother ultimately moved to dismiss the petition for lack of

subject matter jurisdiction.

The orders appealed from are intermediate orders in a habeas corpus proceeding from which no appeal lies (CPLR 7011; *Williams v Windham ChildCare*, 55 AD2d 146 [1976]; *Satti v Satti*, 55 AD2d 149 [1976], *affd* 43 NY2d 671 [1977]). The threshold issue of whether the Family Court has subject matter jurisdiction to entertain this custody proceeding, however, can be resolved by allowing the mother to testify by electronic means from Texas pursuant to Domestic Relations Law § 75-j. Moreover, there appears to be no need at this juncture to take the child out of school and produce him in New York until this threshold issue of jurisdiction is resolved.

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

ENTERED: JUNE 1, 2010

CLERK

Gonzalez, P.J., Sweeny, Acosta, Renwick, Román, JJ.

2941 Nancy Waldbaum Nimkoff, Index 350768/02
Plaintiff-Appellant-Respondent,

-against-

Ronald A. Nimkoff,
Defendant-Respondent-Appellant.

Katsky Korins, LLP, New York (Dennis C. Krieger of counsel), for appellant-respondent.

The Nimkoff Firm, New York (Ronald A. Nimkoff of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Joan B. Lobis, J.), entered August 13, 2008, which, after a nonjury trial, awarded plaintiff mother primary residential custody of the subject child, as well as final decision-making over, inter alia, educational and health issues, awarded defendant father final decision-making authority over, inter alia, the selection of the subject child's summer camp, prohibited the mother from enrolling the child in a religious day school, secular private school or boarding school without the father's prior written consent, and issued a comprehensive parental access schedule, unanimously affirmed, without costs.

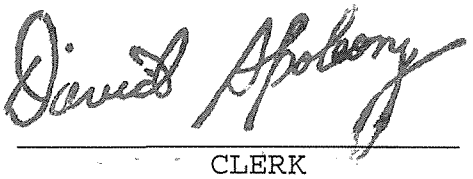
In the totality of the circumstances, the arrangement crafted by the court was in the child's best interest and has a sound and substantial basis in the record (*see Eschbach v Eschbach*, 56 NY2d 167 [1982]). Despite the parents' intolerance

for each other, the division of authority between the parents was appropriate to maintain the respective roles of each parent in the child's life (*see Mars v Mars*, 286 AD2d 201 [2001]). The court considered the appropriate factors in reaching its determination, including the mother's role as the child's primary caregiver, the strengths and weaknesses of both parents, the child's need for nurturing, guidance and the meaningful involvement of both parents, and the fact that the father had placed his own needs above the child's best interests. The court also properly set the terms of the comprehensive access schedule between the parties, considering the child's interest in the fullest possible healthy relationship with both parents (*see Weiss v Weiss*, 52 NY2d 170 [1981]).

Contrary to the father's claim on appeal, the trial court's evidentiary rulings were not improper. The record demonstrates, in this acrimonious custody trial, that the court providently limited cumulative proffered witnesses and evidence (*see Feldsberg v Nitschke*, 49 NY2d 636 [1980]).

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

ENTERED: JUNE 1, 2010



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Gonzalez, P.J., Sweeny, Acosta, Renwick, Román, JJ.

2942 The People of the State of New York, Ind. 3349/07
Respondent,

-against-

Pedro Vaillent, etc.,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered October 10, 2008, convicting defendant, upon his plea of guilty, of attempted criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of 5 years, unanimously affirmed.

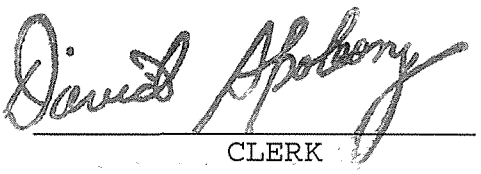
Defendant made a valid waiver of the right to appeal that forecloses his excessive sentence claim. Although the court's colloquy with defendant failed to make clear that the right to appeal is separate from the rights automatically forfeited upon a guilty plea (*see People v Williams*, 59 AD3d 339 [2009], *lv denied* 12 NY3d 861 [2009]), defendant also signed a waiver, and acknowledged on the record that he had understood it and discussed it with counsel. The written waiver cured any

ambiguity in the court's inquiry and is enforceable (*see People v Ramos*, 7 NY3d 737 [2006]). As an alternative holding, we perceive no basis for reducing the sentence.

Defendant also claims the court improperly calculated the 10-year qualifying period for his predicate felony from the date of a resentencing. While this claim survives the appeal waiver, we reject it on the merits (*see People v Jackson*, 174 Misc 2d 105 [Sup Ct NY County 1997]).

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

ENTERED: JUNE 1, 2010



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Gonzalez, P.J., Sweeny, Acosta, Renwick, Román, JJ.

2943 Tower Insurance Company of New York, Plaintiff-Appellant, Index 101692/08

-against-

Bruce Miles, etc., et al., Defendants-Respondents,

Gregg Selina, etc., et al., Defendants.

Mound Cotton Wollan & Greengrass, New York (Scott J. Sheldon of counsel), for appellant.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered December 8, 2009, which, insofar as appealed from as limited by the brief, denied plaintiff's motion for summary judgment declaring that it had no duty to defend or indemnify defendants Bruce Miles and 143 Selye Terrace, Inc. in an underlying personal injury action, unanimously reversed, on the law, without costs, the motion granted and it is declared that plaintiff has no duty to defend or indemnify Miles and 143 Selye Terrace.

Where, as here, the contract of insurance requires the insured to notify its liability carrier of a potential claim "as soon as practicable," such requirement acts as a condition precedent to coverage (*Great Canal Realty Corp. v Seneca Ins. Co., Inc*, 5 NY3d 742, 743 [2005]), and the insured's failure to provide timely notice of an occurrence vitiates the contract as a

matter of law (*see Argo Corp. v Greater N.Y. Mut. Ins. Co.*, 4 NY3d 332, 339 [2005]). Here, Miles became aware approximately one week after the incident that a patron of his bar had potentially assaulted another patron on his premises. Because defendants were knowledgeable of facts that suggested a reasonable possibility of a claim against them and failed to conduct a sufficient inquiry into the circumstances, their five-month delay in notifying plaintiff of the incident was unreasonable as a matter of law (*see e.g. Tower Ins. Co. of N.Y. v Christopher Ct. Hous. Co.*, 71 AD3d 500 [2010]; *SSBSS Realty Corp. v Public Serv. Mut. Ins. Co.*, 253 AD2d 583 [1998]). Miles' claimed belief of nonliability on the basis that none of his employees were involved in the incident was not reasonable under the circumstances (*see e.g. Tower Ins. Co. of N.Y. v Lin Hsin Long Co.*, 50 AD3d 305, 308 [2008]).

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

ENTERED: JUNE 1, 2010

CLERK

Gonzalez, P.J., Sweeny, Acosta, Renwick, Román, JJ.

2944-
2944A-
2944B Cherokee Owners Corp., Index 601201/05
Plaintiff-Appellant, 590777/09

-against-

DNA Contracting, LLC, et al.,
Defendants-Respondents.

[And A Third-Party Action]

Dunnington, Bartholow & Miller LLP, New York (Carol A. Sigmond of counsel), for appellant.

Jaspan Schlesinger LLP, Garden City (Charles W. Segal of counsel), for DNA Contracting LLC and Vigilant Insurance Company, respondents.

McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York (Brian J. Carey of counsel), for JMA Consultants, Inc., JMA Consultants and Engineers, P.C. and Joseph Canton, respondents.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered January 8, 2010, which denied plaintiff's motion to vacate a prior order of preclusion, unanimously reversed, on the law, without costs, the motion deemed a motion for renewal and, as so considered, granted, on condition that plaintiff's counsel pay $2,500 to defendants within 60 days of the date of this order. Order, same court and Justice, entered January 7, 2010, which denied plaintiff's motion for summary judgment on part of its breach of contract claim against defendant DNA Contracting, LLC (DNA) and granted the cross motion of DNA and Vigilant Insurance Company (Vigilant) for summary judgment dismissing the

complaint as against them, unanimously modified, on the law, to deny so much of the cross motion as sought to dismiss the sixth and eighth causes of action, and otherwise affirmed, without costs. Order, same court and Justice, entered January 8, 2010, which denied plaintiff's motion for partial summary judgment on its claim that defendants JMA Consultants, Inc. (JMA Inc.), JMA Consultants and Engineers, P.C. (JMA P.C.), and Joseph Canton engaged in the unauthorized practice of engineering, unanimously affirmed, without costs.

Although plaintiff's counsel failed to appear for several scheduled court appearances, the court erred in issuing an order pursuant to CPLR 3126 precluding plaintiff from introducing certain categories of evidence, when there was no discovery order outstanding as to those items and no notice had been given to plaintiff that the imposed sanction for failure to comply with discovery requests was imminent (*see Warner v Houghton*, 43 AD3d 376, 381 [2007], *affd* 10 NY3d 913 [2008]; *Postel v New York Univ. Hosp.*, 262 AD2d 40, 42 [1999]; *Garcia v Defex*, 59 AD3d 183 [2009]). Moreover, plaintiff demonstrated that it had substantially complied with multiple document demands and responded to numerous interrogatories; thus, there was no showing of a pattern of willful noncompliance with discovery obligations (see *Sidelev v Tsal-Tsalko*, 52 AD3d 398 [2008]; *Holliday v Jones*, 36 AD3d 557 [2007]). Contrary to defendants' assertions,

plaintiff's motion to vacate was not untimely, because plaintiff could not appeal as of right (CPLR 5701[a][2]), and the motion is properly viewed as a motion for renewal, which is not subject to a 30-day limitation (*see Postel*, 262 AD2d at 41-42; CPLR 2221[e]). Nevertheless, a monetary sanction is warranted by the repeated failure of plaintiff's counsel to calendar court appearances properly, which resulted in wasted time for the court and litigants (*see Postel* at 42; *see also Chelli v Kelly Group, P.C.*, 63 AD3d 632, 634 [2009]). The reversal of the order of preclusion, in turn, requires reinstatement of the breach of contract causes of action against DNA and Vigilant. Dismissal of the fraud cause of action is affirmed on the alternate ground that it merely duplicates the breach of contract allegations (*see Rivas v AmeriMed USA, Inc.*, 34 AD3d 250 [2006], *lv dismissed in part, denied in part* 8 NY3d 908 [2007]; *Non-Linear Trading Co. v Braddis Assoc.*, 243 AD2d 107, 118 [1998]).

Although plaintiff presented substantial evidence that DNA failed to provide contractually required manifests and other documents in connection with its asbestos abatement work, DNA submitted evidence in opposition sufficient to raise issues of fact whether it performed the contract and whether any damages resulted from the alleged breach. Plaintiff also failed to establish its entitlement to summary judgment against the JMA defendants on its claim that they engaged in unauthorized

practice of engineering, since they presented evidence that they disclosed to plaintiff that the engineering services would be provided by a professional corporation whose sole shareholder is a licensed engineer (*see Charlebois v Weller Assoc.*, 72 NY2d 587, 593 [1988]; *SKR Design Group v Yonehama, Inc.*, 230 AD2d 533, 537 [1997]).

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

ENTERED: JUNE 1, 2010

CLERK

Gonzalez, P.J., Sweeny, Acosta, Renwick, Román, JJ.

2945 Mercury Partners, Inc., Index 600814/09
Plaintiff-Appellant-Respondent,

-against-

White Eagle Partners, LLC,
Defendant-Respondent-Appellant.

Ali Weinberg, New York, for appellant-respondent.

Law Offices of Michael C. Marcus, Long Beach (Michael C. Marcus of counsel), and Schlam Stone & Dolan LLP, New York (David J. Katz of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered December 2, 2009, which incorporated an interim order denying plaintiff's motion for summary judgment, granted defendant's cross motion for sanctions to the extent of imposing sanctions in the amount of $2,635, and denied that portion of the cross motion seeking summary dismissal of the complaint or limitation of damages, unanimously affirmed, without costs.

Plaintiff, a placement agency, referred a candidate to defendant for employment. Even though defendant's principal told plaintiff's principal that the candidate had already been referred to him by another source, plaintiff, with defendant's consent, set up the initial employment interview of the candidate. Defendant's principal admittedly had a further discussion with plaintiff's principal wherein he allegedly gave some weight, albeit minimal, to the latter's opinion. This

presented an issue of fact as to the client employer's understanding, at the time of the referral, whether a fee might be owed were it to hire the candidate. The agreement is ambiguous as to whether plaintiff did actually refer a candidate, within the meaning of the contract, to a client already familiar with that candidate, and can be parsed in two different, equally logical ways (*see Delaware Otsego Corp. v Niagara Fire Ins. Co.*, 192 AD2d 911, 912 [1993], *lv dismissed* 82 NY2d 705 [1993]).

General Business Law § 185, which refers to a job applicant's fee, is not applicable in this case, and defendant's efforts to apply it by analogy are unpersuasive.

Given the withdrawal by plaintiff's counsel of a prior motion for summary judgment without notice to his adversary, it was not an improvident exercise of the court's discretion to conclude that said counsel had wasted the time of the court and defense counsel, warranting sanctions (*see CCS Communication Control v Kelly Intl. Forwarding Co.*, 166 AD2d 173, 175 [1990]).

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

ENTERED: JUNE 1, 2010

CLERK

Gonzalez, P.J., Sweeny, Acosta, Renwick, Román, JJ.

2946 Greenwich Capital Financial Products, Inc., Plaintiff-Appellant, Index 600462/08

-against-

Metin Negrin, Defendant-Respondent.

Kaye Scholer LLP, New York (Michael A. Lynn of counsel), for appellant.

Deutsch, Metz & Deutsch LLP, New York (Alfred N. Metz of counsel), for respondent.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered September 3, 2009, which denied plaintiff's motion for summary judgment and granted defendant's cross motion for summary judgment dismissing the complaint, unanimously modified, on the law, the cross motion denied with respect to the cause of action based on the Guaranty of Recourse Obligations (Recourse Guaranty), that cause of action reinstated, plaintiff's motion granted with respect to it, and the matter remanded for calculation of damages and entry of judgment, and otherwise affirmed, without costs.

Plaintiff entered into a Loan Agreement with Lexin Celebration III LLC (Lexin), pursuant to which Lexin borrowed funds for a condominium conversion project in Florida. The Loan was non-recourse as to Lexin, except with respect to particular acts and occurrences defined in Section 10.1 as "Borrower's

Recourse Liabilities," such as failure to pay real estate taxes, and "Springing Recourse Events," such as bankruptcy. The Loan Agreement also required Lexin to make certain payments to plaintiff, to be held in a subaccount for the purpose of paying taxes and insurance, as set forth in Section 3.3. Simultaneously with execution of the Loan Agreement, defendant Negrin executed two guaranties, the Recourse Guaranty, which refers to the borrower's recourse obligations under Section 10.1, and the Special Payment Guaranty, which refers to the borrower's payment obligation under Section 3.3.

On the stated maturity date of November 1, 2007, Lexin did not pay the principal amount due, and it thereafter failed to make a payment of about $1.2 million, demanded by plaintiff purportedly pursuant to Section 3.3 for payment of real estate taxes, or to pay the real estate taxes when they became due on March 31, 2008. Plaintiff paid the real estate taxes in order to preserve its lien priority, demanded that Negrin reimburse it as guarantor of Lexin's special payment and recourse obligations, and commenced the instant action to recover against Negrin under both guaranties.

The motion court dismissed both claims, without considering the terms of the guaranties, on the ground that Lexin was not contractually obligated to pay real estate taxes after the stated maturity date of the loan, and therefore Negrin's liability was

not triggered under either guaranty. This was error since it is undisputed that the Loan Agreement expressly required Lexin to pay real estate taxes on its property throughout the "Term" of the Loan, which is defined to mean "the entire term of this Agreement, which shall expire upon repayment in full of the Debt and full performance of each and every obligation to be performed" by Lexin. Since Lexin did not pay the debt in full on the stated maturity date of the loan, its contractual obligation to pay real estate taxes continued even after it defaulted.

Under the Recourse Guaranty, Negrin agreed "absolutely and unconditionally" to pay "Guaranteed Obligations," defined as "(i) from [and] after the date of the accrual of any of Borrower's Recourse Liabilities and (ii) from and after the date that any Springing Recourse Event occurs, payment of all the Debt as and when the same is due in accordance with the Loan Documents . . ." The guaranty refers to the Loan Agreement for the definition of capitalized terms. Plaintiff contends that defendant's obligation under the Recourse Guaranty was triggered when Lexin failed to pay real estate taxes, resulting in accrual of a Borrower's Recourse Liability under Section 10.1. Defendant, arguing that "and" signals that both conditions must occur, argues that his liability could be triggered only if both a Borrower's Recourse Liability accrues *and* a Springing Recourse Event had also occurred.

The guaranty must be read in the context of the Loan Agreement, which was executed simultaneously (*see Components Direct v European Am. Bank and Trust Co.*, 175 AD2d 227, 230-231 [1991]; *see Hirsch v Rifkin*, 166 AD2d 293, 294 [1990]), and in a manner that accords the words their "fair and reasonable meaning," and achieves "a practical interpretation of the expressions of the parties" (*Duane Reade, Inc. v Cardtronics, LP*, 54 AD3d 137, 140 [2008]). Put otherwise, a "contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties" (*Matter of Lipper Holdings v Trident Holdings*, 1 AD3d 170, 171 [2003] [citations omitted]).

In this case, interpreting the two clauses in the definitional section of the Recourse Guaranty as referring to the two distinct categories of borrower's recourse obligations that are separately defined in Section 10.1 of the Loan Agreement produces a commercially reasonable and practical result (*see 111 Debt Acquisition LLC v Six Ventures, Ltd.*, 2009 WL 414181, 7-9 [SD Ohio 2009]). In contrast, Negrin's argument that the two clauses are conjunctive, so that his liability is triggered only when and if a Springing Recourse Event, such as bankruptcy or unauthorized transfer of the property were to occur, depends on "formalistic literalism" (*Duane Reade, Inc.* at 144), ignores common sense, and could lead to absurd results that would leave

the first clause without meaning. Construing the Recourse Guaranty to give it a fair and commercially reasonable meaning, the guarantor's liability was triggered when Lexin failed to pay real estate taxes, resulting in the accrual of a Borrower's Recourse Liability under Section 10.1 of the Loan Agreement.

Plaintiff's claim to recover on the Special Payment Guaranty, however, was correctly dismissed since Lexin fulfilled its contractual obligations to make the two payments required under Section 3.3, one at the time of execution of the Loan Agreement and a second on November 1, 2006. A third payment would have been required only if the borrower elected to extend the term of the Agreement for an additional year, which did not occur. Plaintiff relies on a clause in Section 3.3, which permitted it to require Lexin to make additional monthly contributions if it reasonably determined that the amount in the subaccount was insufficient to pay taxes coming due. However, reading that clause in the context of Section 3.3 as a whole, it is evident that it provided a mechanism for interim adjustments to the required deposits, and cannot be read to extend the

subaccount arrangement beyond the stated maturity date of the loan.

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

ENTERED: JUNE 1, 2010

CLERK

Gonzalez, P.J., Sweeny, Acosta, Renwick, Román, JJ.

2947 The People of the State of New York, Ind. 4575/08
Respondent,

-against-

Robert Lucas,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered May 20, 2009, as amended July 2, 2009, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the seventh degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to an aggregate 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 for disturbing the jury's determinations concerning

credibility. We do not find the police testimony to be implausible or materially inconsistent.

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

ENTERED: JUNE 1, 2010

CLERK

Gonzalez, P.J., Sweeny, Acosta, Renwick, Román, JJ.

2948 Verizon Directories Corp., Index 117782/05
Plaintiff-Appellant,

-against-

Continuum Health Partners, Inc.,
Defendant-Respondent.

Cohen & Krassner, New York (Paula R. Gilbert of counsel), for appellant.

Kornstein Veisz Wexler & Pollard, LLP, New York (Marvin Wexler of counsel), for respondent.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered April 21, 2009, which granted defendant's motion for summary judgment dismissing the complaint as time-barred, unanimously affirmed, with costs.

For purposes of CPLR 202, plaintiff is a "resident" of, and its cause of action accrued in, Delaware, the state of its incorporation (*see Global Fin. Corp. v Triarc Corp.*, 93 NY2d 525, 529-530 [1999]; *American Lumbermens Mut. Cas. Co. of Ill. v Cochrane*, 129 NYS2d 489 [1954], *affd* 284 App Div 884 [1954], *affd* 309 NY 1017 [1956]). We reject plaintiff's contention that, for purposes of the statute, it is a "resident" of New York, or that its cause of action accrued in this State, by virtue of its authorization to do business and asserted extensive presence here (*see Global Fin. Corp.*, 92 NY2d at 528-29). Hence, New York's six-year statute of limitations does not apply (*see* CPLR 202),

and the action is barred by Delaware's one-year statute (10 Del Code Ann, tit 10, § 8111).

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

ENTERED: JUNE 1, 2010

CLERK

Gonzalez, P.J., Sweeny, Acosta, Renwick, Román, JJ.

2949 The People of the State of New York, Ind. 401/06
Respondent,

-against-

Alton Mitchell,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Mitchell J. Briskey of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Ruth Pickholz, J., at *Darden* hearing; Lewis Bart Stone, J. at jury trial and sentence), rendered March 9, 2007, convicting defendant of criminal possession of a controlled substance in the third and fourth degrees and criminally using drug paraphernalia in the second degree, and sentencing him, as a second felony drug offender, to an aggregate term of 7 years, unanimously affirmed.

Defendant's legal sufficiency argument is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the verdict was based on legally sufficient evidence. Furthermore, the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. The credible evidence supports the conclusion that defendant possessed the

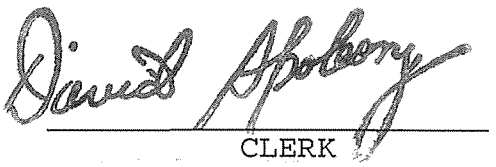
drugs in question.

Defendant did not preserve his Confrontation Clause argument, and we decline to review it in the interest of justice. As an alternative holding, we find that the business record at issue was not testimonial (*see People v Freycinet*, 11 NY3d 38 [2008]).

The actions taken by the court to maintain the confidentiality of an informant's identity in connection with a *Darden* hearing (*People v Darden*, 34 NY2d 177 [1974]) and other procedures relating to the search warrant were not unconstitutional (*People v Castillo*, 80 NY2d 578 [1992], *cert denied* 507 US 1033 [1993]).

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

ENTERED: JUNE 1, 2010



CLERK

Gonzalez, P.J., Sweeny, Acosta, Renwick, Román, JJ.

2950 Marguerite Reyes-Dawson, Index 107687/08
Plaintiff-Appellant,

-against-

Joseph Goddu, et al.,
Defendants,

James Wagman Architect, LLC,
Defendant-Respondent.

Stein Farkas & Schwartz LLP, New York (Esther E. Schwartz of counsel), for appellant.

Milber Makris Plousadis & Seiden, LLP, Woodbury (Jonathan P. Pirog of counsel), for respondent.

Order, Supreme Court, New York County (Louis B. York, J.), entered February 27, 2009, which, in this action seeking damages for purported trespass arising out of construction work performed upon certain residential property, granted the motion by defendant James Wagman Architect, LLC to dismiss the complaint as against it as being barred by the applicable statute of limitations, unanimously affirmed, without costs.

Pursuant to CPLR 214(6), an action instituted for malpractice "other than medical, dental or podiatric malpractice, regardless of whether the underlying theory is based in contract or tort" (*see Matter of R.M. Kliment & Frances Halsband, Architects [McKinsey & Co., Inc.]*, 3 NY3d 538, 539-540 [2004]) must be instituted within three years of the completion of the

work involved (*see City School Dist. of City of Newburgh v Stubbins & Assoc.*, 85 NY2d 535, 538 [1995]). However, while the complaint herein has alleged that the work in question was performed and completed in October of 2002, which was nearly six years prior to the commencement of the present matter, plaintiff maintains that because she lacked privity with defendant architect, her cause of action against such party did not accrue until she became aware of the extent of the damage in February of 2008. Indeed, it is clear that plaintiff had no professional relationship with the defendant and is not really suing for malpractice but on a claim of ordinary negligence against a party who happens to be an architect (*see* CPLR 214[4]).

Yet, even assuming that plaintiff's claim against the architect did not, of necessity, accrue upon completion of the work and could be brought within three years of when the damage to her property became apparent (*see Russell v Dunbar*, 40 AD3d 952, 953 [2007]), the motion court properly concluded that she either knew, or in the exercise of reasonable diligence, should have known in 2003, that which was apparent to anyone with technical competence to see. Indeed, plaintiff first brought suit in May of 2003 as a result of purported damage to her property that had been caused by the subject work, and she cannot now reasonably maintain that she was unaware, until 2008, of the real extent of the harm that had been inflicted upon her

property. Consequently, plaintiff's own neglect in failing to properly investigate the condition of her property by retaining an engineer to conduct an inspection cannot be used as the basis for tolling the statute of limitations.

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

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

ENTERED: JUNE 1, 2010

CLERK

Gonzalez, P.J., Sweeny, Acosta, Renwick, Román, JJ.

2951-
2951A In re Ana M.G., etc., And Another,

Dependent Children under the
Age of Eighteen Years, etc.,

Rosealba H., etc.,
Respondent-Appellant,

Catholic Guardian Society and Home Bureau,
Petitioner-Respondent.

Steven N. Feinman, White Plains, for appellant.

Joseph T. Gatti, New York, for respondent.

Orders, Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about March 20, 2009, which, insofar as appealed from, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject children and committed the custody and guardianship of the children to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

Respondent's argument that the petitions were jurisdictionally defective for failing to specify the diligent efforts the agency made to encourage and strengthen the parental relationship (Family Ct Act § 614[1][c]), was raised for the first time on appeal and is therefore unpreserved (see *Matter of Gina Rachel L.*, 44 AD3d 367 [2007]). Were we to review this

argument, we would find that the petitions sufficiently specified the agency's efforts, which included, inter alia, developing an appropriate service plan, referring respondent to drug rehabilitation programs, and arranging for and encouraging respondent to visit with the children (*see Matter of Toshea C.J.*, 62 AD3d 587 [2009]).

The evidence at the fact-finding hearing was clear and convincing with respect to the agency's diligent efforts. The evidence shows that the agency made diligent efforts as to reunification by formulating a service plan tailored to address respondent's drug use problem, referring her to drug treatment programs, and arranging visits between respondent and the children (*see* Social Services Law § 384-b[7][f]). Despite these efforts, respondent, due to her own uncooperativeness and indifference, missed a large majority of her scheduled visits and failed to complete a drug treatment program (*see Matter of Isabella Star G.*, 66 AD3d 536 [2009]; *Matter of Jonathan R.M.*, 26 AD3d 205 [2006]).

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

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

ENTERED: JUNE 1, 2010

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Román, JJ.

2065-
2065A &
M-5898
& M-81 Kevin Pludeman, et al., Index 101059/04
Plaintiffs-Appellants-Respondents,

-against-

Northern Leasing Systems, Inc., et al.,
Defendants-Respondents-Appellants.

Chittur & Associates, P.C., New York (Krishnan Chittur of counsel), for appellants-respondents.

Moses & Singer LLP, New York (Abraham Y. Skoff of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Martin Shulman, J.), entered June 30, 2009, which, insofar as appealed from as limited by the briefs, upon renewal of plaintiffs' motion for class certification, certified a class, defined the class as, in pertinent part, "[a]ll persons and entities who signed as lessees and/or guarantors . . . between January 1, 1999 and January 22, 2004 . . . and who made monthly loss and damage waiver . . . payments . . . to defendant Northern Leasing Systems, Inc.," and excluded from the class (1) lessees whose leases had been assigned to Northern Leasing; (2) lessees who entered into leases after January 22, 2004; and (3) lessees who signed agreements in which the term "LDW" or "Loss & Damage Waiver" was expressly written above the merger clause on the signature page of the agreement, and ordered that Northern Leasing bear the cost of

notifying the class, unanimously modified, on the law, to the extent of expanding the class to include (1) lessees/guarantors whose leases were assigned to Northern Leasing; (2) lessees/guarantors who executed leases with Northern Leasing, irrespective of whether they made loss damage waiver payments; and (3) lessees/guarantors who executed leases with Northern Leasing from January 1, 1999 through the date of this action's resolution, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered on or about April 24, 2009, unanimously dismissed, without costs, as subsumed in the appeal from the June 30, 2009 order.

Plaintiffs are small business owners who leased credit card point of sale (POS) equipment from Northern Leasing, which is in the business of leasing such equipment. The POS equipment was purportedly leased pursuant to a four page lease. Plaintiffs contend that the first page of the lease represents the entire agreement and that this page failed to disclose, inter alia, that plaintiffs were subject to a loss damage waiver (LDW) fee. Plaintiffs contend that Northern Leasing breached the equipment lease by charging and collecting LDW payments that were not disclosed on the first page of the lease. Plaintiff's claims sound in breach of contract and fraud.

The motion court granted plaintiffs' application for class certification with respect to the breach of contract claim,

finding that plaintiffs had satisfied the requisites of CPLR 901 and 902. The motion court also granted plaintiffs' application seeking that Northern Leasing bear the cost associated with providing court approved notices to all members of the class.

Plaintiffs appeal the portion of the motion court's order that limited the class definition to any lessees who entered into leases with Northern Leasing prior to commencement of this action and to any lessees who made LDW payments. Plaintiffs also appeal the motion court's failure to include in the class definition any lessees whose leases were assigned to Northern Leasing. Lastly, plaintiffs appeal the motion court's exclusion from the class definition of those lessees whose leases made reference to LDW on the first page. Northern Leasing appeals the motion court's decision to certify the class, alleging error in the court's conclusion that common issues predominate over those pertaining to individual class members and that the named plaintiffs are typical of the class, as well as its decision that Northen Leasing should bear the expense of providing court approved notices to all class members.

CPLR 902 states that a class action can only be maintained if the prerequisites promulgated by CPLR 901(a) are met (*Weinberg v Hertz Corp.*, 116 AD2d 1, 4 [1986], *affd* 69 NY2d 979 [1987]). Those prerequisites are (1) that the class is so numerous that joinder of all members is impracticable (numerosity); (2)

questions of law or fact common to the class predominate over questions of law or fact affecting individual class members (commonality); (3) the claims or defenses of the class representatives are typical of those in the class (typicality); (4) the class representatives will fairly and adequately protect the interests of the class; and (5) a class action represents the superior method of adjudicating the controversy (superiority) (*id.;* CPLR 901[a]). If the prerequisites set out in CPLR 901(a) are met, the court, in deciding whether to grant class action certification should then consider the additional factors promulgated by CPLR 902 such as the interest of individual class members in maintaining separate actions and the feasability thereof; the existence of pending litigation regarding the same controversy; the desirability of the proposed class forum; and the difficulties likely to be encountered in managing the class action (CPLR 902; *Ackerman v Price Waterhouse*, 252 AD2d 179, 191 [1998]).

Whether the facts presented on a motion for class certification satisfy the statutory criteria is within the sound discretion of the trial court (*Small v Lorillard Co.*, 94 NY2d 43, 52 [1999]; *CLC/CFI Liquidating Trust v Bloomingdale's, Inc.*, 50 AD3d 446, 447 [2008]; *Wilder v May Dept. Stores Co.*, 23 AD3d 646, 649 [2005]; *Klein v Robert's Am. Gourmet Food, Inc.*, 28 AD3d 63, 70 [2006]; *Ackerman* at 191; *Lauer v New York Tel. Co.*, 231 AD2d

126, 130 [1997]). However, this Court is also vested with the same discretion and may exercise it even if there has been no abuse by the trial court (*Small* at 52-53; *CLC/CFI Liquidating Trust* at 447; *Klein* at 70). The proponent of class certification bears the burden of establishing the criteria promulgated by CPLR 901(a) (*CLC/CFI Liquidating Trust* at 447; *Ackerman* at 191), and must do so by the tender of evidence in admissible form (*Feder v Staten Is. Hosp.*, 304 AD2d 470, 471 [2003]). Conclusory assertions are insufficient to satisfy the statutory criteria (*id.*; *Chimenti v American Express Co.*, 97 AD2d 351, 352 [1983]).

In determining whether an action should proceed as a class action, it is appropriate to consider whether the claims have merit (*Bloom v Cunard Line*, 76 AD2d 237, 240 [1980]). However this "inquiry is limited" (*id.*) and such threshold determination is not intended to be a substitute for summary judgment or trial (*Kudinov v. Kel-Tech Constr. Inc.*, 65 AD3d 481, 482 [2009]). Class action certification is thus appropriate if on the surface there appears to be a cause of action which is not a sham (*Brandon v Chefetz*, 106 AD2d 162, 168 [1985]).

CPLR 901(a)(2) requires that questions of law or fact common to the class predominate over any such questions affecting individual class members. Thus, when individualized proof is required for the claims alleged or individual factual questions with respect to individual class members preponderate,

commonality is lacking (*CLC/CFI Liquidating Trust* at 447; *DeFilippo v Mutual Life Ins. Co. of N.Y.*, 13 AD3d 178, 180-181 [2004], *lv dismissed* 5 NY3d 746 [2005]; *Banks v Carroll & Graf Publs.*, 267 AD2d 68, 69 [1999]). However, the rule requires predominance not identity or unanimity among class members (*Friar v Vanguard Holding Corp.*, 78 AD2d 83, 98 [1980]). Thus, commonality is not merely an inquiry into whether common issues outnumber individual issues but rather "whether the use of a class action would 'achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated" (*id.* at 97 [internal quotation and citation marks omitted]). Class certification is appropriate even when there are questions of law or fact not common to the class (*id.*; *Weinberg* at 6; *Kudinov* at 482; *Freeman v Great Lakes Energy Partners, L.L.C.*, 12 AD3d 1170, 1171 [2004]).

CPLR 901(a)(3) requires that the claims asserted by the plaintiff(s) seeking to represent the class, as well as any defenses to those claims, be typical of the claims made by and the defenses asserted against the class members. If it is shown that a plaintiff's claims derive "from the same practice or course of conduct that gave rise to the remaining claims of other class members and is based upon the same legal theory . . . [the typicality] requirement is satisfied" (*Friar* at 99; *see also Ackerman* at 201; *Freeman* at 1171). Typicality does not require

identity of issues and the typicality requirement is met even if the claims asserted by class members differ from those asserted by other class members (*Pruitt v Rockefeller Cetr. Props.*, 167 AD2d 14, 22 [1991]; *Super Glue Corp. v Avis Rent A Car Sys., Inc.*, 132 AD2d 604, 607 [1987]).

Northern Leasing claims that individual issues among the class members will predominate over common issues. Primarily, Northern Leasing claims that plaintiffs can only prevail on their breach of contract claim if they establish a valid excuse for failing to read the lease or to perceive that it consisted of four pages rather than just one. Northern Leasing contends that this excuse will be unique to each class member, thereby requiring a legion of individualized inquiries. Northern Leasing's contention is without merit.

Absent a valid excuse for failing to read a document, a party who signs the document is bound to its terms (*Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 304 [2001]; *Martin v Citibank, N.A.*, 64 AD3d 477, 477 [2009]; *Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 266 [2008], *lv dismissed* 12 NY2d 748 [2009]). Thus, if the breach of contract claim hinges on individual excuses for failing to read the contract or on oral representations to each putative class member at the time of the lease's execution (*McCracken v Best Buy Stores, L.P.*, 248 FRD 162, 167 (SD NY 2008), class

certification would be inappropriate (*id.*). However, in this case, liability could turn on a single issue. Central to the breach of contract claim is whether it is possible to construe the first page of the lease as a complete contract because of the merger clause, signature lines, and the space for the detailing of fees. Resolution of this issue does not require individualized proof, and is capable of being determined solely upon examination of the first page of the lease. Moreover, insofar as a merger clause requires the full application of the parol evidence rule, thereby barring extrinsic evidence to vary the terms of a writing (*Matter of Primex Intl. Corp. v Wal-Mart Stores*, 89 NY2d 594, 599 [1997]), the trial court could conclude that any extrinsic evidence, such as the circumstances regarding each lease's execution, including any oral representations, are barred, thereby precluding individualized proof. We have considered Northern Leasing's other arguments on the issue of commonality and find them unavailing.

Northern Leasing's assertion that want of typicality prevents class certification is also meritless. It is clear that the breach of contract claim asserted by the plaintiffs arises from the same course of conduct giving rise to the claims by other putative class members, namely, the execution of the leases, and that plaintiffs' claims and those of the putative class members are based upon the same legal theory, namely that

only the first page of the lease is enforceable (*Friar* at 99; *see also Ackerman* at 201; *Freeman* at 1171). Identity of issues is not required (*Pruitt* at 22; *Super Glue Corp.* at 607) and that the underlying facts of each individual plaintiff's claim vary, or that Northern Leasing's defenses vary, does not preclude class certification.

Northern Leasing also contends that the breach of contract claim is duplicative of and dependent on the fraud claim and thus not individually certifiable. However, this Court has already held that plaintiff's breach of contract claim is viable despite the existence of the fraud claim (40 AD3d 366, 368 [2007], *affd* 10 NY3d 486 [2008]). Moreover, the pleadings and evidence demonstrate that the breach of contract claim is independent of the fraud claim since the sole issue on the breach of contract claim, is the interpretation of the lease.

CPLR 904(d) authorizes the court to shift the cost of providing notice to class members when the interests of justice so mandate. In determining whether to shift the cost, the court considers the merits of the action, the defenses thereto, and the resources of the respective parties (*Fiala v Metropolitan Life Ins. Co.*, 17 Misc 3d 1102[A] [2007], *mod* 52 AD3d 251 [2005]; *Makastchan v Oxford Health Plans, Inc.*, NYLJ, Aug 3, 1998, Col 1 [defendants would bear the expense of notifying class members insofar as they were a large corporation, voluntarily engaged in

mass mailings, and plaintiffs were of modest means]). Inasmuch as plaintiffs' action is potentially meritorious, plaintiffs are small business owners, and Northern Leasing is a large corporation with hundreds of thousands of clients, it was not an abuse of discretion to have it bear the expense of notification. Moreover, mass notification and mailings present no substantial burden to Northern Leasing since it stands ready, willing, and able to provide leases, upon request, to each and every one of its clients.

Plaintiffs seek class certification for the time period beginning from January 1, 1999 through the conclusion of this litigation, asserting that Northern Leasing's alleged conduct continues to date. Accordingly, the class membership should not be limited to leases executed prior to the commencement of this action. Instead, the class period should include any claims arising from the execution of leases from January 1, 1999 through the date of the resolution of this action (*Langley v Coughlin*, 715 F Supp 522, 554 [1989], *appeal dismissed* 888 F2d 252 [1989] [since pleadings put defendants on notice that the claims alleged were continuing and would continue, the class definition should include claims arising after the commencement of the action]).

The instant class definition should include those plaintiffs, who made no LDW payments, but by virtue of the leases are nevertheless obligated to pay such fees because all LDW fees

are alleged to be unauthorized (*cf. Batas v Prudential Ins. Co. Of America*, 37 AD3d 320, 321 [2007] [class definition overbroad when it included members with no cause of action]; *Klein* at 71 [class definition should not be so over broad so as to include members not harmed by defendant's wrongful conduct]).

M-5898 &
M-81 ***Kevin Pludeman, et al. v Northern Leasing Systems, Inc., et al.***

Motion to strike joint record on appeal and cross motion seeking reimbursement of printing costs, costs on the motion, and sanctions denied.

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

ENTERED: JUNE 1, 2010

CLERK

Tom, J.P., Moskowitz, Renwick, DeGrasse, Manzanet-Daniels, JJ.

2205-
2206 Bobbi Spiegel, Index 107709/07
Plaintiff-Appellant,

-against-

Kevin Gingrich,
Defendant-Respondent.

Mallilo & Grossman, Esqs., Flushing (Francesco Pomara, Jr. of counsel), for appellant.

O'Hare Parnagian LLP, New York (Richard A. Menchini of counsel), for respondent.

Order, Supreme Court, New York County (Louis B. York, J.), entered September 28, 2009, which granted defendant's motion to strike plaintiff's supplemental amended bill of particulars, reversed, as an exercise of discretion, without costs. Appeal from order, same court, Justice and date of entry, which granted defendant's motion to preclude plaintiff's biomedical engineer from testifying at trial as to proximate cause, unanimously dismissed, without costs.

The motion court improvidently exercised its discretion in granting defendant's motion to strike plaintiff's supplemental bill of particulars (*see Tate v Collabello*, 58 NY2d 84 [1983]; *see also Pauling v Glickman*, 232 AD2d 465 [1996]; *Cardone v University Hosp.*, 78 AD2d 645 [1980], *lv dismissed* 52 NY2d 704 [1981]). "It is well settled that leave to amend or supplement a pleading should be freely granted . . . unless prejudice and

surprise directly result from the delay in seeking the amendment" (*Adams v Jamaica Hosp.*, 258 AD2d 604, 605 [1999]).

Here, there can be no legitimate claim of prejudice or surprise. In a progress note dated June 12, 2007, plaintiff's treating podiatrist, Dr. Doolan, assessed plaintiff with "chronic regional pain syndrome, RSD," i.e., reflex sympathetic dystrophy. Plaintiff's bill of particulars clearly apprised that she had sustained, inter alia, a proximal intra-articular fracture of the right first toe requiring surgery. The bill of particulars further advised that plaintiff had restricted range of motion of the right toe and right foot, and swelling and derangement of the right great toe.

The motion court, although it properly concluded that RSD was not a "new" injury, but a sequela of plaintiff's original injury, granted the motion to strike the supplemental bill of particulars because it was served 12 days before trial was scheduled to commence. This alleged "delay" resulted in the adjournment of the trial without date.

The CPLR contemplates that supplemental bills of particulars may be served 30 days before trial without leave of court (see CPLR 3043[b]). However, the CPLR grants a motion court the discretion to determine whether to allow a "late" supplemental bill, or an amended bill of particulars, provided no prejudice to the defendant results. Indeed, CPLR 3043[c], entitled

"discretion of court," provides, "[N]othing contained in the foregoing shall be deemed to limit the court in denying in a proper case, any one or more of the foregoing particulars, or in a proper case, in granting other, further or different particulars."

Defendant herein cannot seriously contend that he was prejudiced. He argued, before the motion court, that evidence of RSD was in the record as early as June 2007, citing Dr. Doolan's assessment. Further, the adjournment of the trial without a date furnished ample opportunity for defendant to conduct discovery concerning plaintiff's allegation that she suffers from RSD. Given the manifest lack of prejudice to defendant, together with the adjournment of the trial without a date, it was an improvident exercise of discretion for the motion court to grant the motion to strike plaintiff's supplemental bill of particulars, based solely on the fact that the supplemental bill was served 12 days before the scheduled trial date.

The pretrial order limiting the scope of plaintiff's expert's expected trial testimony is not appealable before a judgment after trial is rendered (*Santos v Nicolas*, 65 AD3d 941 [2009]). Thus, we dismiss the appeal from this order.

All concur except Tom, J.P. and DeGrasse, J. who dissent in part in a memorandum by DeGrasse, J. as follows:

DeGRASSE, J. (dissenting in part)

I respectfully dissent. Plaintiff was injured when she slipped and fell on defendant's boat. Her supplemental amended bill, served 14 days before trial, contravened the 30-day deadline set forth in CPLR 3043(b). She did not seek leave to serve a late supplemental bill, and offered no reasonable excuse for her delay (*see Torres v Educational Alliance*, 300 AD2d 469, 470-471 [2002]).

The pretrial order limiting the scope of plaintiff's expert's expected trial testimony is not appealable before a judgment after trial is rendered (*Santos v Nicolas*, 65 AD3d 941 [2009]). Accordingly, I would affirm the order entered September 28, 2009, which granted defendant's motion to strike plaintiff's supplemental amended bill of particulars, and dismiss the appeal from the order entered on the same date which granted defendant's motion to preclude plaintiff's biomedical engineer from testifying at trial as to proximate cause.

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

ENTERED: JUNE 1, 2010

CLERK

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

2533 The People of the State of New York, Ind. 4042/02
Respondent,

-against-

Steve Johnson,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Maxwell T. Wiley, J.), rendered March 21, 2007, convicting defendant, after a jury trial, of attempted murder in the second degree as a hate crime, two counts of attempted murder in the second degree, assault in the first degree as a hate crime, three counts of assault in the first degree, 15 counts each of kidnapping in the second degree as a hate crime and kidnapping in the second degree, five counts each of assault in the second degree as a hate crime and of assault in the second degree, and three counts each of criminal possession of a weapon in the second and third degrees, and sentencing him, as second violent felony offender, to an aggregate term of 240 years, affirmed.

In its main charge on the insanity defense, and in its response to notes from the deliberating jury, the court properly read the Criminal Jury Instructions pattern charge on that

subject (CJI2d [NY] Insanity), and in each instance, properly declined to add language instructing the jury to consider defendant's capacity to know or appreciate the wrongfulness of his conduct from a subjective point of view relating to the false beliefs he allegedly held as a result of psychiatric illness. The standard language permitted the jury to accept defendant's insanity defense under the theory that his asserted thought disorder caused him to sincerely believe society would approve of his otherwise immoral acts because they were divinely commanded. The court was not obligated to add specific language to that effect, or to give any special instructions concerning a false belief that one's actions were in obedience to divine instructions (*see People v Wood*, 12 NY2d 69, 76 [1962]; *cf.* (*People v Adams*, 26 NY2d 129, 135-136 [1970], *cert denied* 399 US 931 [1970]). We also conclude that the supplemental instructions were meaningful responses to the jury's notes (*see People v Almodovar*, 62 NY2d 126, 131-132 [1984]; *People v Malloy*, 55 NY2d 296, 301-302 [1982], *cert denied* 459 US 847 [1982]). In any event, we note there was ample evidence from which the jury could conclude that defendant did not, in fact, have any delusions or hallucinations about being divinely commanded to commit his criminal acts.

The court properly denied defendant's challenge for cause to a prospective juror, who, notwithstanding her self-professed

"strong opinions" on the insanity defense based on research she had conducted on the defense while in college, declared that she could follow the court's instructions and be fair.

It is axiomatic that where potential jurors question or doubt that they can be fair, the court should either elicit unequivocal assurances of their ability to be impartial or excuse them (*cf. People v Bludson*, 97 NY2d 644, 646 [2001]; *People v Johnson*, 94 NY2d 600, 615 [2000]). "By contrast, where prospective jurors unambiguously state that, despite preexisting opinions that might indicate bias, they will decide the case impartially and based on the evidence, the trial court has discretion to deny the challenge for cause if it determines that the juror's promise to be impartial is credible" (*People v Arnold*, 96 NY2d 358, 363 [2001]).

The Court of Appeals has established a common sense rule regarding evaluation of potential juror bias, recognizing that "most if not all jurors bring some predispositions, of varying intensity, when they enter the jury box. It is only when it is shown that there is a substantial risk that such predispositions will affect the ability of the particular juror to discharge his responsibilities (a determination committed largely to judgment of the Trial Judge with his peculiar opportunities to make a fair evaluation) that his excuse is warranted" (*People v Williams*, 63 NY2d 882, 885 [1984]).

People v Arnold (*supra*), relied on by the dissent, is not to the contrary. The defendant in *Arnold* was accused of stabbing his former girlfriend. He asserted a justification defense, alleging that she initiated the incident by attacking him with a razor. During voir dire, one prospective juror, who held a bachelor's degree with a major in sociology and a minor in women's studies, stated that she had done "a lot of research" on domestic violence and battered woman's syndrome. When asked by defense counsel if she felt this would make her "another witness in the case, an expert if you will, on that area with the other jurors" creating "a problem" during deliberations, the prospective juror answered, "I think so." When defense counsel then asked if she would rather serve as a juror on another type of case, she responded, "I think I would."

Defense counsel's challenge for cause in *Arnold* was denied without further inquiry of the prospective juror. The Appellate Division reversed, holding that once a prospective juror voices doubt about her impartiality or ability to refrain from becoming an witness or expert in the jury room, "it was incumbent upon the court to ascertain that her prior state of mind would not influence her verdict and that she would render an impartial verdict based on the evidence" (272 AD2d 857, 858). In affirming, the Court of Appeals acknowledged that while "each juror inevitably brings to the jury room a lifetime of experience

that will necessarily inform her assessment of the witnesses and the evidence," when a juror reveals doubt about her ability to serve impartially because of that experience, that juror "must clearly express that any prior experiences or opinions that reveal the potential for bias will not prevent them from reaching an impartial verdict" (96 NY2d at 362).

Here, the prospective juror unequivocally stated in the initial voir dire that she could follow the court's instructions on the law. Unlike *Arnold*, the court here did conduct follow up questioning of the prospective juror and also permitted the prosecutor and defense counsel to make additional inquiries regarding her opinions, her ability to be fair to both sides and her commitment to render a verdict based solely on the evidence adduced at trial. During that individual questioning by the attorneys and the court, she again unequivocally stated that despite her prior experiences, biases and strong opinions, she could follow the court's instructions and apply them to the evidence in the case, whether she agreed with them or not. The fact that some of her responses were couched in terms such as "think" or "try" does not make her otherwise unequivocal answers less so (*see People v Shulman*, 6 NY3d 1, 28 [2005], *cert denied* 547 US 1043 [2006]; *see also People v Rivera*, 33 AD3d 303 [2006], *affd* 9 NY3d 904 [2007]).

The prospective juror's responses, taken in context and

viewed as a whole, did not cast doubt on her ability to reach a fair and impartial verdict (*see People v Chambers*, 97 NY2d 417, [2002]; *Arnold*, 96 NY2d at 363.

Defendant's claim under *People v Rosario* (9 NY2d 286 [1961], *cert denied* 368 US 866 [1961]) does not warrant reversal. The documents at issue did not qualify as *Rosario* material, and in any event, defendant was not prejudiced by their nondisclosure (*see* CPL 240.75).

We have considered and rejected defendant's remaining claims.

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

FREEDMAN, J. (dissenting)

I believe that pursuant to the Court of Appeals holding in *People v Arnold* (96 NY2d 358 [2001]), reversal is mandated because of the trial court's failure to grant defendant's challenge for cause for Prospective Juror Number 6.

Defendant's first trial resulted in a mistrial when the jury was unable to reach a verdict. On his retrial, defendant was convicted of 53 counts, including attempted murder in the second degree and assault in the first degree, both as hate crimes, and was acquitted of attempted murder in the first degree. The only defense raised was that defendant was not responsible by reason of mental disease when he committed the criminal acts. The psychiatrist called by the People found that defendant was legally sane when he acted, but other examining psychiatrists found defendant to be seriously delusional and/or insane.

During the voir dire, the court asked the prospective juror, an in-house lawyer for a company, if "you would be able to follow my legal instructions, whether or not they rang a bell or agreed with something you have studied already." She responded:

> I would say yes, but I think that I should disclose that when I was in college, I did a psychiatric internship at John[s] Hopkins, and I wrote a thesis paper that examined whether or not the insanity defense should be abolished.

The prospective juror added that she had taken a position in her paper, but "I think that I could listen and apply your

instructions." When the prosecutor asked the prospective juror whether her opinions about the insanity defense would prevent her from reaching a verdict, she replied that

> I would like to think I could follow the judge's instructions, but I have very strong opinions, and I think my experience with research of the insanity defense and their successes over the years, I don't know.

She added, "I don't know if I can ignore my prior experiences."

Defense counsel challenged the prospective juror for cause, arguing that she did not know if the prospective juror could be fair, given her strong opinions, and that she posed a danger of becoming an expert in the jury room. The court agreed to question the prospective juror further.

During the follow-up questioning, the prospective juror first indicated that she could apply the judge's definition of lack of capacity and follow his jury instructions, whether or not she agreed with them. However, on further questioning by defense counsel, the prospective juror stated that "I have very strong opinions of what constitutes a mental defect or mental illness that would make someone be found not guilty for their actions." She added that "As a lawyer, I would like to think I could listen to the judge," but "to be fair, I feel like I come in here with a strong bias."

When the prosecutor questioned the prospective juror, she stated:

> I can apply the law, but I find that listening to the evidence -- you have to interpret the law and apply the law to the way you interpret the evidence, and I feel I might be biased in the way that I interpret the evidence.

When the prosecutor then queried, "So, you can't give both sides a fair trial?" she responded, "I'd like to try, but I don't know if I would be the best person to do that."[1]

Thereafter, the court denied the challenge for cause, forcing defense counsel to exercise a peremptory challenge to remove the prospective juror. Before exercising the challenge, defense counsel noted for the record that the prospective juror had indicated she was coming to the case with a bias that would affect how she would listen to and evaluate the evidence. Thereafter, defendant exhausted all of his remaining challenges during the voir dire.

In *People v Arnold*, a case involving domestic violence, the Court of Appeals sustained reversal of a conviction where the trial court had denied the defendant's challenge for cause of a prospective juror who during voir dire had stated that while in college, she had researched the subjects of domestic violence and battered women's syndrome, and that her background might be "a problem." The prospective juror did not say she would not listen to the law or would be unfair. When the court asked the panel of

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[1]This sentence is from a corrected copy of the settled transcript.

prospective jurors whether they could follow the law as instructed and whether they agreed that they would not use this case as a "referendum" on "crime, domestic abuse or violence in the streets," the prospective juror answered "yes." As in this case, the defense counsel in *Arnold* peremptorily challenged the prospective juror after the court denied a for-cause challenge, and then exhausted remaining challenges before a jury was selected.

In *Arnold*, the Court of Appeals noted that CPL 270.20(1)(b) permits a juror to be challenged for cause if that juror "has a state of mind that is likely to preclude him from rendering an impartial verdict based upon the evidence adduced at trial." The court held that "a juror who has revealed doubt, because of prior knowledge or opinion, about her ability to serve impartially must be excused unless the juror states unequivocally on the record that she can be fair" (96 NY2d at 362). The Court added, "If there is any doubt about a prospective juror's impartiality, trial courts should err on the side of excusing the juror, since at worst the court will have 'replaced one impartial juror with another'" (*id.*, quoting *People v Culhane*, 33 NY2d 90, 108 n3 [1973]; *see also People v Johnson*, 94 NY2d 600 [2000]). The Court concluded that "[p]rospective jurors who make statements that cast serious doubt on their ability to render an impartial verdict, and who have given less-than-unequivocal assurances of

impartiality, must be excused" (96 NY2d at 363).

While the prospective juror in this case indicated that she would try to follow the judge's instructions and never said that she could not be fair, she twice stated that because of her extensive research into the insanity defense she was biased about how it should be applied, and that she felt her background would affect her interpretation of the law. Contrary to the majority, I find that in the context of the whole record, the prospective juror's self-acknowledged bias about the insanity defense, which was critical to defendant's case, was not the unequivocal assurance of impartiality to which defendant was entitled. Accordingly, the trial court should have granted the challenge for cause.

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

ENTERED: JUNE 1, 2010

CLERK

Saxe, J.P., Friedman, Nardelli, Freedman, Abdus-Salaam, JJ.

2749 Liana Suckishvili, Index 113639/08
Plaintiff-Appellant,

-against-

Visiting Nurse Service of New York, et al.,
Defendants-Respondents.

Pecoraro & Schiesel, New York (Steven G. Schiesel of counsel), for appellant.

Rosenblum & Newfield, LLC, White Plains (James Newfield of counsel), for Visiting Nurse Services and Patricia Anton Johnson, respondents.

Kaufman Borgeest & Ryan LLP, Valhalla (Jacqueline Mandell of counsel), for Premier Home Health Care Services, Inc., Priority Home Care, Inc. and Kathleen Jex, respondents.

Order, Supreme Court, New York County (Joan B. Lobis, J.), entered October 6, 2009, which denied plaintiff's motion for consolidation, unanimously affirmed, without costs.

There are no questions of law or fact common to both the instant medical malpractice action and the action alleging negligence by the driver of a motor vehicle (*see Cronin v Sordoni Skanska Constr. Corp.*, 36 AD3d 448 [2007]). In any event, since the medical malpractice action is still at the discovery stage and the negligence action is ready to be placed on the trial calendar, consolidation would result in undue delay in the resolution of the earlier action (*see id.*). Consolidation might

also result in jury confusion and prejudice to defendants (*see* *Addison v New York Presbyt. Hosp./Columbia Univ. Med. Ctr.*, 52 AD3d 269, 270 [2008]).

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

ENTERED: JUNE 1, 2010

CLERK

Mazzarelli, J.P., McGuire, DeGrasse, Freedman, Richter, JJ.

2913-
2914 The People of the State of New York, Ind. 3878/04
Respondent,

-against-

Ramon Martinez,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Christopher P. Marinelli of counsel), for respondent.

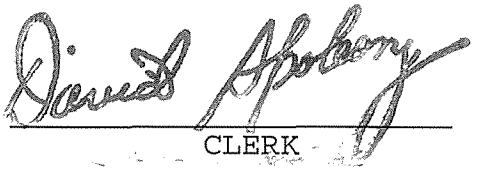
Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered April 7, 2005, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the second degree, and sentencing him to a term of 6 years to life, and order, same court and Justice, entered on or about January 7, 2008, which denied defendant's motion to be resentenced under the Drug Law Reform Act of 2005 (L 2005, ch 643, § 1), unanimously affirmed.

Since defendant is serving an aggregate term that includes a sentence for a violent felony, he is ineligible for resentencing. We decline defendant's invitation to revisit our holdings in *People v Quinones* (49 AD3 323 [2008], *lv dismissed* 10 NY3d 868 [2008]) and *People v Merejildo* (45 AD3d 429 [2007]), which involved the same issues raised on this appeal. Treating defendant's consecutive sentences for a drug felony and a violent

felony as merged into a single aggregate sentence as required by Penal Law § 70.30(1)(b), and determining his DRLA eligibility on that basis, do not constitute an addition to, or alteration of, a sentence, and do not deprive defendant of due process or violate CPL 430.10.

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

ENTERED: JUNE 1, 2010



CLERK

Mazzarelli, J.P., McGuire, DeGrasse, Freedman, Richter, JJ.

2915 Sean McGuire, Index 18332/06
Plaintiff-Appellant,

-against-

3901 Independence Owners, Inc., et al.,
Defendants-Respondents,

Metro Management and Development, Inc., et al.,
Defendants.

Burns & Harris, New York (Christopher J. Donadio of counsel), for appellant.

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for 3901 Independence Owners, Inc. and Goodman Management Co., Inc., respondents.

Traub Lieberman Straus & Shrewsberry, LLP, Hawthorne (Gerard Benvenuto of counsel), for Skyline Restoration, Inc., respondent.

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered March 5, 2009, which, in an action for personal injuries sustained in a slip and fall under a scaffold near the front of plaintiff's apartment building, insofar as appealed from as limited by the briefs, granted motions by defendants-respondents building owner, building manager, and masonry contractor for summary judgment respectively dismissing the complaint as against them, unanimously affirmed, without costs.

Plaintiff asserts that defendants created an unreasonably dangerous condition by constructing a scaffold sidewalk bridge that allowed rain water to accumulate on the walkway just outside

the front of the building, although plaintiff admits that there were no puddles, just a "build up of water on the surface of the brick" not deep enough to make a "splash." The complaint properly was dismissed because, as a matter of law, mere wetness on walking surfaces due to rain does not constitute a dangerous condition (*see Grinberg v Luna Park Hous. Corp.*, 69 AD3d 793 [2010]; *Cavorti v Winston*, 307 AD2d 1018 [2003]; *compare Schnur v City of New York*, 298 AD2d 332 [2002]). Plaintiff's expert's affidavit does not avail to show a dangerous condition, and, even if it did, his opinion that the scaffold was defectively designed so to allow water on top of the bridging to seep through and accumulate on the walkway below does not specify the violation of any accepted industry standards or practices and thus fails to show a defect (*see Jones v City of New York*, 32 AD3d 706, 707 [2006]; *Burke v Canyon Rd. Rest.*, 60 AD3d 558, 559 [2009]).

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

ENTERED: JUNE 1, 2010

David Friedman

CLERK

Mazzarelli, J.P., McGuire, DeGrasse, Freedman, Richter, JJ.

2916 Resat Keles, Index 107052/08
Plaintiff-Appellant,

-against-

The Trustees of Columbia University
in the City of New York, et al.,
Defendants-Respondents.

Alexander M. Dudelson, Brooklyn, for appellant

Friedman Kaplan Seiler & Adelman LLP, New York (Robert D. Kaplan of counsel), for respondents.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered April 17, 2009, which granted defendants' motion to dismiss the complaint and denied plaintiff's cross motion to amend the complaint, unanimously affirmed, with costs.

Although plaintiff styled his claims as based on contract and tort, none pertains to a specific enforceable promise or to negligence causing injury. In essence, plaintiff challenges Columbia's academic and administrative standards and decisions. "Strong policy considerations militate against the intervention of courts in controversies relating to an educational institution's judgment" on core academic policy regarding a student's academic performance and examinations (*Matter of Susan M. v New York Law School*, 76 NY2d 241, 245 [1990]). While decisions of academic institutions are not immune from judicial scrutiny, review should be restricted to special proceedings

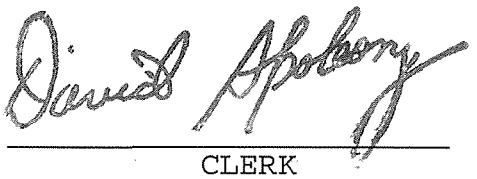
under CPLR Article 78, and only to determine whether the decision was arbitrary, capricious, irrational or in bad faith (*see Maas v Cornell Univ.*, 94 NY2d 87, 92 [1999]; *Susan M.*, 76 NY2d at 246). Courts have repeatedly declined to become involved in the evaluation of academic performance, reflecting "the policy that the administrative decisions of educational institutions involve the exercise of highly specialized professional judgment [that] these institutions are, for the most part, better suited to make" (*Maas*, 94 NY2d at 92; *see also Matter of Olsson v Board of Higher Educ. of City of N.Y.*, 49 NY2d 408, 413 [1980]).

This complaint is directed at such core academic determinations not cognizable in a breach of contract action: whether plaintiff's GPA was sufficient for him to continue as a teaching assistant, which subjects were properly included in his qualifying exam, whether an exam question reflected the course work, whether he was correctly determined to have failed a particular test, and whether the university improperly delayed in awarding him a degree. The court properly declined to convert the action to a special proceeding under Article 78, since plaintiff's claims would have been barred by the four-month

statute of limitations applicable thereto (*see Quintas v Pace Univ.*, 23 AD3d 246 [2005]).

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

ENTERED: JUNE 1, 2010



CLERK

Mazzarelli, J.P., McGuire, DeGrasse, Freedman, Richter, JJ.

2918 Leonard C. Aloi, Index 25546/02
Plaintiff-Respondent,

-against-

National Staffing, Inc., et al.,
Defendants,

Deborah Russo,
Defendant-Appellant.

Kornfeld & Associates, P.C., New York (Oren L. Sibony of counsel), for appellant.

Law Offices of Edmond J. Pryor, New York (Lisa D'Alessio Hymes of counsel), for respondent.

Order, Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered September 2, 2009, which denied defendant Russo's motion for summary judgment dismissing the amended complaint and for sanctions, unanimously affirmed, without costs.

This is not one of those rare cases where reasonable reliance can be determined on a motion for summary judgment, as in *Global Mins. & Metals Corp. v Holme* (35 AD3d 93, 99 [2006], *lv denied* 8 NY3d 804 [2007]). This was neither an arm's length transaction between strangers nor a circumstance where plaintiff was placed on notice that something was amiss or had information publicly available to him about the transaction. Rather, plaintiff asserts that in factoring the invoices, he relied on representations made by Russo, his niece. We cannot state that

such reliance was unreasonable as a matter of law (*see Braddock v Braddock*, 60 AD3d 84, 93 [2009]).

Whether plaintiff was actually damaged by Russo's representations presented an issue of fact. The record includes a list of invoices that plaintiff claims were improperly double-factored due to those representations, as well as the promissory notes assigned to him after he made payments on them. While plaintiff may have voluntarily paid the lenders, he alleged that he was a nominee acting in their financial interest. Therefore, it cannot be determined as a matter of law that plaintiff is foreclosed from recovering the sums he paid to the noteholders.

A further issue of fact had to do with Russo's scienter, as evidenced by sworn testimony and an affidavit pointing to her admission that she had knowingly sent already-factored invoices to plaintiff, and made statements evincing her knowledge of what had occurred (*see Fidelity & Deposit Co. of Md. v Andersen & Co.*, 131 AD2d 308 [1987]). To the extent she challenges evidence submitted by plaintiff in opposition to the motion because it was not provided in discovery, we find that to have been properly considered on the motion for summary judgment.

Plaintiff is not estopped from pursuing his fraud claim against Russo because his similar claims in a bankruptcy proceeding against defendant Kenneth Farrell, Sr. were dismissed

with prejudice pursuant to a stipulation (*see Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 456-457 [1985]).

There is insufficient evidence in the record to determine whether plaintiff's failure to provide certain records in discovery was willful and deliberate, or whether he actually turned over the bank statements as he now claims. Dismissal of the complaint is a drastic remedy that is not warranted here.

Denial of sanctions was proper in the absence of a showing that the complaint was completely devoid of merit.

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

ENTERED: JUNE 1, 2010

CLERK

Mazzarelli, J.P., McGuire, DeGrasse, Freedman, Richter, JJ.

2922 In re Asia Sonia J., etc.,

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

Lawrence J.,
Respondent-Appellant,

Commissioner of Social Services of the City of New York,
Petitioner,

The New York Foundling Hospital,
Petitioner-Respondent.

Patricia W. Jellen, Eastchester, for appellant.

Law Office of Jeremiah Quinlan, Hawthorne (Daniel Gartenstein of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Michael D. Scherz of counsel), Law Guardian.

Order, Family Court, New York County (Karen Lupuloff, J.), entered on or about March 11, 2009, which, after a hearing, denied respondent-appellant's (respondent) motion to vacate an order, same court (Sara P. Schechter, J.), entered on or about March 17, 2008, which had committed custody and guardianship of the subject child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, following findings, inter alia, that respondent was not a consent father as defined in Domestic Relations Law § 111 and had failed to appear at any stage of the proceeding although he had been personally served with the summons and petition, unanimously affirmed, without

costs.

No basis exists to disturb Family Court's findings crediting the testimony of the agency's process server describing proper service of process on respondent. Nor does respondent show a meritorious defense. While he does not deny that he is a notice parent limited to presenting evidence relevant to the child's best interests (Domestic Relations Law § 111-a[3]), he fails to adduce any such evidence, raise any claim of error in the court's findings relating to the child's best interests, or suggest any alternative dispositions. All he does is argue that his interest and concern with the child's welfare is confirmed by his unexplained, unsubstantiated participation in the termination proceeding that involved the child's older sisters (*Matter of Tamia J.*, 58 AD3d 580 [2009]). The finding that adoption is in the child's best interests is adequately supported by the testimony of the agency's caseworker at the dispositional inquest that the child has lived since birth with her older sisters in the kinship foster home of respondent's mother, with whom the child has bonded and who wishes to adopt the children. The

record is devoid of any evidence to the contrary (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984] [no presumption that child's best interests are served by return to the parent]).

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

ENTERED: JUNE 1, 2010

CLERK

Mazzarelli, J.P., McGuire, DeGrasse, Freedman, Richter, JJ.

2923 The People of the State of New York, Ind. 23/05
Respondent,

-against-

Nenad Jurlina,
Defendant-Appellant.

Mischel & Horn, P.C., New York (Richard E. Mischel of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered May 3, 2007, as amended May 10, 2007, convicting defendant, after a jury trial, of gang assault in the second degree, and sentencing him to a term of 9 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations and its rejection of defendant's justification defense. Defendant's arguments concerning the element of being "aided by two or more other persons actually present" (Penal Law § 120.06) are similar to arguments that were rejected on a codefendant's appeal (*People v Sanchez*, 57 AD3d 1 [2008], *affd* 13 NY3d 554 [2009]), and there is no reason to reach a different result.

Defendant did not preserve his challenge to the court's response to a jury note asking whether a factual scenario posited in the note could constitute gang assault, and we decline to review it in the interest of justice. As an alternative holding, we find that the court correctly stated the law (*see Sanchez*, 13 NY3d at 566-567), and appropriately responded to the jury's concern.

Defendant's challenges to the court's justification charge are also unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 1, 2010

CLERK

Mazzarelli, J.P., McGuire, DeGrasse, Freedman, Richter, JJ.

2925 April Zimmerman, et al., Index 18563/02
Plaintiffs-Respondents,

-against-

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

Michael A. Cardozo, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for appellants.

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

Order, Supreme Court, Bronx County (George D. Salerno, J.), entered on or about November 5, 2008, which granted plaintiffs' post-trial motion to set aside a jury verdict as to damages, and denied defendants' cross motion to set aside the verdict as to liability and damages, unanimously reversed, on the law, without costs, the cross motion granted, and the complaint dismissed. The clerk is directed to enter judgment accordingly.

In this action for personal injury sustained by a school psychologist during an altercation between two students, plaintiffs failed to allege or prove the existence of a special relationship that would establish an affirmative duty on defendants' part toward the injured party (*see Cuffy v New York*, 69 NY2d 255, 260-261 [1987]). There was no evidence that the Board of Education had undertaken any specific security measures for plaintiff Zimmerman's exclusive benefit beyond the general

security for which it was responsible (*see Vitale v City of New York*, 60 NY2d 861 [1983]), or that Zimmerman justifiably relied on any security measures or other assurances so as to lull her into a false sense of security or a belief that such measures were specifically intended for her exclusive benefit (*see Buder v City of New York*, 43 AD3d 720 [2007]; *see also Dinardo v City of New York*, 13 NY3d 872 [2009]).

Plaintiffs demonstrated no direct contact with agents of the Board of Education regarding such security measures or the incident leading to her injuries that might have created such a special relationship (*see e.g. Laratro v City of New York*, 8 NY3d 79 [2006]). Nor did she demonstrate that any such contacts in general might have alerted the Board to the need for enhanced protection under the circumstances (*see e.g. Euell v Incorporated Vil. of Hempstead*, 57 AD3d 837 [2008]).

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

ENTERED: JUNE 1, 2010

CLERK

Mazzarelli, J.P., McGuire, DeGrasse, Freedman, Richter, JJ.

2926 Matter of Aubrey Joseph, Sr., Index 15934/97
by Ethel Griffin, Public Administrator
of New York County,
Plaintiff-Appellant,

-against-

City of New York, et al.,
Defendants,

New York City Health and Hospitals Corporation,
Defendant-Respondent.

Fraiden & Palen, Bronx (Norman Fraiden of counsel), for appellant.

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

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered May 14, 2009, which granted the motion of defendant Health and Hospitals Corporation (HHC) for summary judgment on the claims against it, unanimously affirmed, without costs.

Plaintiff's decedent was treated at Lincoln Medical and Mental Health Center, a hospital owned and operated by HHC, for injuries sustained after being struck by a fire truck. During his hospital stay, the decedent was followed by the trauma, neurosurgery and orthopedics departments. A short leg cast was placed on the decedent's left foot. Daily follow-up entries noted continued monitoring of the patient's condition. Despite treatment, the decedent developed gangrene on his first and second toes, requiring amputation.

HHC established prima facie entitlement to summary judgment with its expert's affirmation setting forth that treatment of the decedent was within and in accordance with good and accepted practice, and was not the proximate cause of the decedent's injuries. Indeed, HHC's expert affirmed that the medical records did not show the cast on the decedent's left foot being applied too tightly or inappropriately, that the decedent did suffer from severe peripheral vascular disease of the left leg, and that it was this condition, combined with the crush injury to his left foot, that caused the gangrene. The expert opined that based on the comorbidities and the severity of the risks involved, the decedent was not a candidate for bypass surgery, conservative management of his gangrene was an appropriately reasonable exercise of judgment, and the treatment rendered did not contribute to the decedent's injuries.

In opposition, plaintiff failed to raise an issue of fact (*see Moore ex rel. Townsend v New York Med. Group, P.C.*, 44 AD3d 393, 395 [2007], *lv dismissed* 10 NY3d 740 [2008]). Plaintiff's expert's affirmation was conclusory and did not adequately address the prima facie showing in the detailed affirmation of HHC's expert (*see Rodriguez v Montefiore Med. Ctr.*, 28 AD3d 357 [2006]; *see also DeCintio v Lawrence Hosp.*, 33 AD3d 329 [2006]). Plaintiff's expert affirmed that the cast was applied "unnecessarily" and had not been monitored "properly." However,

he failed to address what other treatment modalities would have been appropriate, whether the treatment provided to the decedent was conservative management of his gangrene, or what, if any, impact the crush injury had on the development of gangrene. Nor did this expert respond to HHC's expert's assertion that the cast was an appropriate treatment for a patient presenting with the decedent's symptoms.

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

ENTERED: JUNE 1, 2010

CLERK

Mazzarelli, J.P., McGuire, DeGrasse, Freedman, Richter, JJ.

2928 The People of the State of New York, Ind. 43314C/05
Respondent,

-against-

Damon Smith,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Allen Howard Saperstein of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Joseph Dawson, J.), rendered November 12, 2008, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him, as a persistent violent felony offender, to a term of 25 years to life, unanimously affirmed.

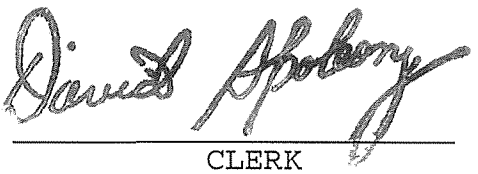
Defendant did not preserve his claims that the prosecutor's summation misstated the law of justification and that the court should have given a curative instruction, and we decline to review them in the interest of justice. As an alternative holding, we find that the remarks at issue were fair comment on the evidence and a proper response to the arguments of defense counsel (*see People v D'Alessandro*, 184 AD2d 114, 119 [1992], *lv denied* 81 NY2d 884 [1993]). The prosecutor did not claim that the number of stab wounds inflicted by defendant automatically negated his justification defense as a matter of law. Instead,

he highlighted the number of wounds in making a factual argument that the jury should reject defendant's self-defense claim.

We have considered and rejected defendant's ineffective assistance of counsel argument.

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

ENTERED: JUNE 1, 2010



CLERK

Mazzarelli, J.P., McGuire, DeGrasse, Freedman, Richter, JJ.

2930 The People of the State of New York, Ind. 3787/04
Respondent,

-against-

Luis Bracho,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Charles J. Tejada, J.), rendered February 4, 2005, as amended March 23, 2005, convicting defendant, after a jury trial, of three counts of sexual abuse in the first degree and two counts of endangering the welfare of a child, and sentencing him to an aggregate term of 5 years, unanimously affirmed.

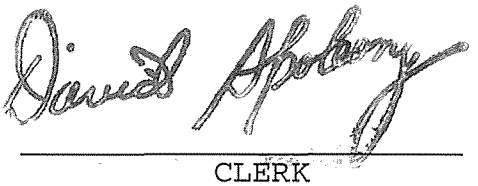
The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determination to credit the testimony of the two child victims. Each child's testimony was supported by surrounding circumstances.

Defendant's challenges to the prosecutor's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the

merits (*see People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]). The remarks at issue constituted fair comment on the evidence and were responsive to defendant's summation, and the court's thorough instructions made it clear that defendant had no burden of proof (*see People v Santiago*, 52 NY2d 865 [1981]).

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

ENTERED: JUNE 1, 2010



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JUN 1 2010

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
David Friedman
Rolando T. Acosta
Dianne T. Renwick
Sheila Abdus-Salaam, JJ.

Index 604262/07
1643

CPS Operating Company LLC,
Plaintiff-Respondent,

-against-

Pathmark Stores, Inc.,
Defendant-Appellant.

Defendant appeals from an order of the Supreme Court, New York County (Herman Cahn, J.H.O.), entered February 27, 2009, which, to the extent appealed from, denied their motion for summary judgment dismissing the complaint.

Pillsbury Winthrop Shaw Pittman LLP, New York (E. Leo Milonas, Frederick A. Brodie and Anne C. Lefever of counsel), for appellant.

Morrison Cohen LLP, New York (Y. David Scharf and David A. Piedra of counsel), for respondent.

ACOSTA, J.

This appeal requires us to consider whether a real estate agreement, with an underlying consent requirement, negotiated at arm's length by sophisticated, counseled business people with full knowledge of the consent requirement and its potential risks, must be vacated. On the facts of this case, where plaintiff is using the consent requirement to avoid its obligations under the agreement, we hold that the parties are bound by the terms of the agreement.

The New York City Department of Housing Preservation and Development (HPD) sold two parcels of land on Cherry Street in lower Manhattan, which were part of an urban renewal plan for neighborhood revitalization. The purchasers agreed to develop the properties, subject to the terms and conditions in so-called land disposition agreements restricting use and development, breach of which would enable the City to reclaim the properties. The June 3, 1981 disposition agreement between the City and purchaser Cherry-Pike Corporation provided for a Pathmark supermarket to be constructed and operated for 25 years. The purchaser could lease or sublease to a tenant other than Pathmark upon obtaining the prior written approval of HPD, "which shall not be unreasonably withheld or delayed." The purchasers of the parcels subsequently entered into lease agreements with

defendant Pathmark. Pursuant to one of the leases, Pathmark was to use the land as a supermarket for 25 years. Article 22 of the lease permitted Pathmark to sublet or assign the lease, and did not specifically make reference to the disposition agreement or the HPD consent requirement for assignment of the lease. The second lease permitted non-food retail operations. Thereafter, intervenor Cherry Street LLC acquired the interests of the original purchasers of the properties and became Pathmark's landlord.[1]

As a result of the steep rise in the value of Manhattan real estate between 1981 and 2007, it became evident that operating a supermarket was not the most profitable use of the premises, and Cherry Street began to explore potential redevelopment schemes. Indeed, Cherry Street's principal testified that Cherry Street expected to receive HPD approval to use the land for some other purpose because HPD "would want more housing." Meanwhile, Extell Development, Inc., a sophisticated real estate developer, formed plaintiff CPS Operating Company LLC for the purpose of acquiring Pathmark's rights under its two leases with Cherry Street.

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[1]Cherry Street's motion to intervene was granted to the extent of permitting Cherry Street to serve and file a notice of appearance, and requiring the parties to serve any and all papers served in the action upon counsel for Cherry Street and to notify counsel for Cherry Street of anything that took place in the action.

Consequently, both Cherry Street and Extell had embarked upon competing attempts to develop the property by, in part, assuming Pathmark's leasehold interest therein. Indeed, Extell endeavored, unsuccessfully, to purchase Cherry Street's interest in the parcels before commencing negotiations with Pathmark, albeit it continued to negotiate with Cherry Street LLC thereafter.

Eventually, on August 14, 1997, Extell, through CPS, entered into an assignment contract with Pathmark under which CPS would purchase Pathmark's leasehold interest in the two parcels for the total price of $87 million. A deposit of $5 million was placed in an interest-bearing escrow account. Section 16 of the assignment contract provided, "Seller or Buyer shall be in default under this Contract if either fails to comply with any material covenant, agreement or obligation within any time limits required by this Contract."

Significantly, and dispositive of this appeal, the Leasehold Assignment Contract provided that Pathmark's leasehold interests were to be transferred "subject . . . to the Permitted Exceptions . . ., the leases, zoning ordinances and laws" (section 3), and the "permitted exceptions" included both the "Terms, Covenants, Conditions, Provisions and Reverter set forth in the Land Disposition Agreement dated as of 6/3/1981 between The City of

New York and Cherry Pike Corp." (Leasehold Assignment Contract, Scedule C-1 § 1[a]) and the "Terms, covenants, Conditions, Provisions of the Lease, dated as of 8/6/1981 between Cherry-Pike Corp., landlord, and [Pathmark], tenant" (*id.*, Schedule C-1 [2]). Pathmark also represented and warranted to CPS that it was "not prohibited from consummating the transactions contemplated in this Contract, by any (i) law or regulation, (ii) agreement, instrument or restriction to which [Pathmark] is a party or is bound (*other than* the . . . *Permitted Exceptions)* or (iii) order or judgment against [Pathmark]" (Leasehold Assignment Contract § 8[a] [emphasis added]), and that "as of the Closing, there will exist no material default by the tenant [Pathmark] under any leases which would enable the landlord thereunder to terminate such Lease" (*id.* at § 8[f]). Pathmark was "selling the Property 'as-is, where is' with all faults and without representation, warranty or condition with respect to physical condition, building operations, merchantability or fitness for a particular purpose and without any other warranty or representation whatsoever by [Pathmark]" (*id.* at § 9).

Before the adjourned closing date, Cherry Street delivered a notice to Pathmark that consummation of the assignment contract would constitute a default of the supermarket lease and the underlying disposition agreement with HPD. Pathmark took no

action to cure the alleged default, contending that it did not seek HPD's approval of the assignment of the supermarket lease to CPS because CPS had waived this requirement.

In any event, after receiving notice of Cherry Street's position regarding the HPD consent provision, CPS nonetheless placed an additional $1 million in escrow to extend the closing by one month. When market forces changed, however, CPS relied on the HPD consent requirement to terminate the contract and demand the return of its deposit. CPS commenced this declaratory judgment action, and both parties moved unsuccessfully for summary judgment. On appeal, Pathmark argues in part that it was not mandated to procure HPD's consent to the assignment because CPS waived the consent requirement by listing the underlying disposition agreement as a "Permitted Exception" in the assignment contract. Pathmark is correct.

The record is very clear that CPS, a sophisticated real estate development firm, was aware of the consent requirement but was willing to go forward nonetheless. In fact, even after receiving a copy of Cherry Street's October 31, 2007 letter to Pathmark directing Pathmark's attention to section 403(B) of the land disposition agreement that contained the HPD consent requirement, CPS put down an additional $1 million to adjourn the closing by one month. This makes perfect sense since Cherry

Street expected to receive HPD approval to use the land for some other purpose. It was only when market forces changed that CPS sought to get out of the deal. CPS is now using the consent requirement as a pretext to avoid its obligations under the agreement. Indeed, if CPS were truly concerned about HPD's interest, it could have brought HPD in as a party. Under these circumstances, CPS should be held to its end of the bargain (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004] ["[W]hen parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms," particularly in "the context of real property transactions, where commercial certainty is of paramount concern, and where . . . the instrument was negotiated between sophisticated, counseled, business people negotiating at arm's length"] [internal quotation marks and citations omitted]).

Moreover, here, where two sophisticated real estate business entities were willing to take the risk involved in negotiating the assignment of a lease with an underlying consent requirement, the requirement can be treated as a "permitted exception." Where a real estate contract identifies an exception as a "permitted exception," the transaction is to proceed despite that exception (*see, Rozen v 7 Calf Cr., LLC*, 52 AD3d 590, 591-592 [2008] [where contract for sale of real property was "subject to" list of

"permitted exceptions," defendants could not deliver title as required because "there was a recorded exception which was *not* included as a permitted exception in the contract"] [emphasis added]); *681 Chestnut Ridge Rd. LLC v Edwin Gould Found. for Children*, 23 Misc 3d 1110[A], 2009 NY Slip Op 50694[U] *5 [2009], [dismissing claim of breach of easement on title being transferred, because easement was "permitted exception" in contract]; *Dunn v Arniotes*, 15 Misc 3d 1144[A], 2007 NY Slip Op 51141[U], *4 [2007] [where real estate contract identified zoning as "permitted exception," party could not purport to rescind contract based on zoning changes]).

Here, in light of this settled principle and the parties' clear, unambiguous contract listing both the 1981 disposition agreement between the City and Cherry-Pike and the lease between Cherry-Pike and Pathmark as "Permitted Exceptions" there is no triable issue of fact whether Pathmark was required to obtain HPD's approval prior to assigning its lease to CPS.

Moreover, the "permitted exceptions" were recognized by the parties in the "Representations" section of the assignment contract, and the assignment contract provided that Pathmark would convey insurable leasehold interest "free and clear of all liens and encumbrances, *other than the "Permitted Exceptions"* (emphasis added). CPS knew very well what it was getting itself

into. In fact, it initially attempted to negotiate directly with Cherry Street LLC in an unsuccessful bid to obtain an interest in the parcels before commencing negotiations with Pathmark. CPS simply took a calculated risk that did not pay off.

In a well-reasoned dissent, our learned colleague maintains that Pathmark cannot rely on the Permitted Exceptions provisions of the assignment contract because the HPD-approval provision qualifies as a covenant running with the land that is binding on Pathmark. The purpose of the provision in the land disposition agreement requiring the operation of a supermarket for 25 years, he points out, was to enable the City to effectuate important public policies, specifically to remediate urban blight and create a viable residential neighborhood. To allow Pathmark to avoid the HPD-approval provision would contravene the very purpose of the approval requirement. Although these are valid concerns, we do not find them dispositive of this appeal.

Initially, it should be noted that the City, which imposed the HPD-consent provision 25 years earlier, is not seeking to intervene in the proceedings. This comes as no surprise since only 17 months remained on the 25-year period contemplated by the original agreement, and the assignment agreement between CPS and Pathmark provided for the continued operation of the supermarket by Pathmark for the immediate future. But, even if the City

intervened and sought to enforce the covenant, that is the risk that Pathmark was willing to take. The provision, after all, provided that the property could be leased or subleased to some other tenant upon obtaining HPD's written approval, "which shall not be reasonably withheld or delayed," and CPS's principals assumed that they could get the necessary approval from HPD to use the land for some other purpose and were willing to take the risk of HPD's refusal to approve. It should also be noted that this was not a very big risk. Indeed, as noted above, Cherry Street expected to receive HPD approval to use the land for some other purpose.

In this respect, *328 Owners Corp. v 330 W. 86 Oaks Corp.* (8 NY3d 372 [2007]), relied upon by our dissenting colleague, is distinguishable because there the City sought to enforce the covenant running with the land. Here, on the other hand, the City never sought to intervene, and CPS, which is now attempting to enforce the covenant, was willing to work around it, as evidenced by its listing the requirement as a "permitted exception" and putting down an additional $1 million deposit even after Cherry Street broached the subject.

Nor does the result we reach constitute a subversion of the land disposition agreement, because the result here does not preclude its ultimate enforcement. The issue here is who will

bear the loss from CPS's withdrawal from the contract. Given the circumstances of this case, CPS should bear the loss.

Last, Cherry Street's carefully worded letter was not a "default notice" constituting an automatic breach of the assignment contract. In fact, it never stated that Pathmark was in default. Rather, the letter stated Cherry Street's disapproval of the false assumption that Extell would demolish the building immediately, even though the assignment contract contemplated that Pathmark would continue to operate its supermarket for the time being. In any event, the lease expressly provided that Pathmark could assign the lease, and the disposition agreement between Cherry-Pike and the City did not place any obligations on Pathmark. Given Extell's negotiations with Cherry Street, it clearly was attempting to obtain both Pathmark's and Cherry Street's interest in the property, and the letter may well have been intended to give Cherry Street an advantage in the bargaining process. Regardless of the intent of the letter, it was not a default letter entitling CPS to back away from the agreement.

Accordingly, the order of the Supreme Court, New York County (Herman Cahn, J.H.O.), entered February 27, 2009, which, to the extent appealed from, denied defendant's motion for summary judgment dismissing the complaint, should be reversed, on the law, without costs, the motion granted, and the complaint dismissed.

All concur except Saxe, J.P. who dissents in an Opinion.

SAXE, J.P. (dissenting)

Today, the majority ignores a clear and unassailable land use restriction contained in a land disposition agreement entered into many years ago by the City of New York's Department of Housing Preservation and Development (HPD) and a prior purchaser of the land, as part of an urban renewal plan. Its ruling would authorize a transfer of property in the absence of HPD approval of the conveyance, although the land disposition agreement concerning the property requires that any such transfer first be approved by HPD. I believe that this restriction on transfers contained in that land disposition agreement is binding, as a covenant running with the land, against any subsequent transferee of the property, and that it serves a bona fide public purpose, so that it is not for the present parties to blithely ignore this clear restraint.

This dispute concerns two adjacent parcels of real property just north of the South Street Seaport, an area of Manhattan that was subject to a 1967 urban renewal plan under which the City, in 1981, sold one of the properties with the express purpose of having a supermarket constructed and operated on the property for the next 25 years. To ensure that the property would not be turned over to another party for some other use during that 25-year period, when the City conveyed the property it included a

provision that during that period, the property could be leased or subleased to a tenant other than the supermarket "*only* upon obtaining the prior written approval of H.P.D." (emphasis added). This appeal concerns a contract by which the lessee, defendant Pathmark, agreed to assign its leasehold interest to plaintiff CPS Operating Company LLC, although it neither obtained nor sought HPD approval. It requires us to decide whether Pathmark may, in effect, avoid the requirement of obtaining such approval by including in the lease assignment contract a provision listing the underlying land disposition agreement containing the pre-approval requirement as a "permitted exception."

In the land disposition agreement dated June 3, 1981, the City of New York sold 227 Cherry Street to Cherry-Pike Corporation to be developed in accordance with the guidelines set forth in the urban renewal plan. The agreement therefore contained a variety of terms and conditions limiting the transfer, development and use of the property, including, in particular, a provision that the purchaser would develop the property as a supermarket and lease it to Supermarkets General Corporation for operation of a Pathmark supermarket. The agreement further provided that during the 25-year period after construction of the supermarket was completed, the property could be leased or subleased to some other tenant "only upon obtaining

the prior written approval of H.P.D.[,] which shall not be unreasonably withheld or delayed."

On August 6, 1981, Cherry-Pike, as landlord, and Supermarkets General Corporation, now known as Pathmark Stores, Inc., as tenant, entered into the long-term lease contemplated in the earlier land disposition agreement, pursuant to which Pathmark was to construct and then operate a supermarket on the 227 Cherry Street parcel. The lease did not specifically make reference to the June 1981 disposition agreement or the requirement of HPD approval for assignment of the lease; indeed, contrary to the land disposition agreement, Article 22 of the lease specifically permitted Pathmark to sublet or assign the lease.

On October 20, 1995, a similar land disposition agreement conveyed the neighboring parcel at 235-247 Cherry Street, also restricting the use and development of the property. A lease providing for the construction of a commercial building containing a pharmacy, termed "non-food retail operations," was entered into on June 12, 1996. In 2003, Cherry Street LLC purchased the fee for 227 Cherry Street and the leasehold of 235-247 Cherry Street and is now Pathmark's landlord for both pieces of property.

The 25-year period in which the land disposition agreement

required the 227 Cherry Street property to be used for a supermarket, and in which HPD approval was required for any transfer of an interest in the property, ended on January 13, 2009, 25 years from the date on which a temporary certificate of occupancy was first issued for the supermarket.

Some time around 2004, Manhattan real estate developer Extell Development, Inc., begin looking into the acquisition of rights to redevelop both properties, the real estate having substantially increased in value since its initial development. In 2007, Extell formed plaintiff CPS Operating Company for the purpose of acquiring Pathmark's rights under the two leases, in contemplation of the eventual use of the property for something more profitable than a supermarket. On August 14, 2007, approximately 17 months before the expiration of the 25-year period, the parties entered into the contract under scrutiny here, by which Pathmark agreed to sell its leasehold interest in the properties to CPS for a price of $87 million. The closing date was set for November 30, 2007, and earnest money in the amount of $5 million was deposited. Thereafter, by letter dated November 23, 2007, CPS adjourned the closing to December 28, 2007, as it was permitted to do by the contract upon depositing an additional $1 million in earnest money.

In a letter to Pathmark dated October 31, 2007, Cherry

Street LLC, the fee owner of the property, protested that the contract between Pathmark and CPS was "in abrogation of the specific requirements under the Lease and at law," characterized the deal as having been made "with the full knowledge that, upon acquisition of the Lease, Extell shall demolish Tenant's Building . . . and construct a new building for residential condominium units," and asserted that the sale of the leasehold violated section 401(B) of the land disposition agreement, which permitted a sublease during the 25-year period only upon HPD approval. The letter concluded by demanding that Pathmark rescind its contract with CPS/Extell.

Pathmark responded to this letter with a letter dated November 2, 2007, denying any violation of the lease or any other agreement. Copies of both letters were forwarded to CPS on November 5, 2007.

On December 27, 2007, the day before the adjourned closing date, CPS sent a letter to Pathmark in which it characterized the October 31, 2007 letter from Cherry Street LLC as a notice that Pathmark was in breach of the lease for failing to obtain HPD approval to the leasehold assignment, terminated the contract in reliance on that asserted breach, and demanded return of its $6 million in earnest money. The next day CPS commenced this action seeking a declaration of the parties' rights and the return of

its earnest money. Pathmark's position, as conveyed in its letter dated December 31, 2007 and its answer and counterclaim, is that CPS defaulted under the contract by failing to complete the closing scheduled for December 28, 2007, and that therefore Pathmark was entitled to retain the earnest money. It sought declaratory relief in its favor.

Both parties moved unsuccessfully for summary judgment. The motion court held that a question of fact was presented as to whether CPS intended to waive its right to have Pathmark obtain HPD approval of the assignment. Only Pathmark appeals; CPS now agrees that material issues of fact preclude summary judgment.

CPS contends that Cherry Street's October 31, 2007 letter to Pathmark constituted a default notice, entitling CPS to terminate the contract based on the inaccuracy of Pathmark's representations in section 8 of the leasehold assignment contract that it was "not prohibited from consummating the transaction[]" and that there was "no material default by [Pathmark] under any Leases which would entitle the landlord thereunder to terminate such Lease." Further, CPS asserts, the absence of HPD approval violated section 12 of the leasehold assignment contract, which required Pathmark to convey an "insurable leasehold interest."

Pathmark, for its part, contends that it was fully in compliance with its contractual obligations and that CPS's claim

of breach was specious, an attempt to avoid a contract that intervening market forces had rendered unprofitable. In arguing that CPS's action must be dismissed as a matter of law, Pathmark suggests that the court must consider the surrounding events and circumstances to properly understand the import of the parties' actions. For one thing, it asserts, when the current fee owner of the property, Cherry Street LLC, purchased the fee interest in the land in 2003, it did so with the express intent of redeveloping the properties, which would necessarily include its acquiring the leasehold back from Pathmark; in fact, Pathmark asserts, Cherry Street LLC had negotiated, albeit unsuccessfully, to purchase the leasehold back from it. Furthermore, when Extell began negotiations with Pathmark to acquire the leasehold, it was simultaneously negotiating with Cherry Street LLC to purchase its fee interest in the property, and when CPS made the deal with Pathmark, it did so in the expectation that it would ultimately reach a deal with Cherry Street LLC as well.

Thus, Pathmark suggests, Extell and Cherry Street LLC were effectively competitors in the quest to obtain the right to redevelop the property, and, consequently, Cherry Street's October 31, 2007 letter to Pathmark, asserting that the lease assignment contract breached the underlying lease and the land disposition agreement, was not the objective assessment of a

disinterested landowner, but, rather, was a strategic effort to protect its own interests. Further, CPS's treatment of Cherry Street's letter as a valid notice of default was not an honest assessment of the validity of the letter as such, but was rather a means of attempting to avoid a valid contract because the value of the real estate had become drastically reduced in the intervening months.

Pathmark also points out that CPS's deposit of an additional $1 million in earnest money on November 23, 2007 so as to adjourn the closing for a month, despite having received notification of the October 31, 2007 letter from Cherry Street, demonstrates that it gave no real credence to Cherry Street's claim that the lease assignment breached any contractual duty of Pathmark's.

The majority now rules in Pathmark's favor, dismissing CPS's complaint on the ground that there was no default, reasoning that the HPD-approval requirement may be treated as a "permitted exception," subject to which CPS had agreed to take the property, and that the circumstances show that in any event CPS was willing to close on the deal without prior HPD approval.

I respectfully disagree, concluding that regardless of the parties' intentions or beliefs, they may not be permitted to avoid, by agreement, the requirement that HPD pre-approve any transfer of the subject property. Allowing the parties to avoid

the HPD approval requirement either by interpreting the permitted exceptions provision of the parties' contract to allow the transfer despite a lack of prior approval, or by allowing the buyer to waive that requirement, improperly subverts the important component of the land disposition agreement by which the City ensured that its urban renewal plan would not be eviscerated or undermined.

Preliminarily, it is important to recognize that the land disposition agreement's requirement of prior HPD approval before any assignment of the lease is equally binding on Pathmark as on the original signatories to the agreement, even though Pathmark's lease specifically *permits* assignments. While Pathmark was not a party to the land disposition agreement between the City and the purchaser of the property, Pathmark is nevertheless bound by the HPD-approval provision, because the provision qualifies as a covenant running with the land, that is, a restriction on the use of the property that is binding on subsequent grantees (*see Neponsit Prop. Owners' Assn. v Emigrant Indus. Sav. Bank*, 278 NY 248 [1938]). As such, it was binding on Pathmark to the same degree as it was on Cherry-Pike or Cherry Street LLC (*see 328 Owners Corp. v 330 W. 86 Oaks Corp.*, 8 NY3d 372 [2007]).

The permitted exceptions provision of the lease assignment contract does not entitle Pathmark to convey its interest in the

leasehold despite the absence of HPD approval, because the concept of permitted exceptions does not include this type of requirement.

"Permitted exceptions" are generally understood as encumbrances listed in a real property contract that need not be removed by the seller (*see* 3 Warren's Weed, New York Real Property § 32.70 [5th ed] [Practice Tip]). When a real estate contract identifies an encumbrance on title as a permitted exception, it is expected by the parties that the transaction can and will proceed despite that encumbrance (*681 Chestnut Ridge Rd. LLC v Edwin Gould Found. for Children*, 23 Misc 3d 1110[A], 2009 NY Slip Op 50694[u] [2009]).

The permitted exceptions listed in the contract at issue here are typical; they include zoning restrictions, easements, encroachments, adverse possession claims, existing mortgages, leases, and existing code violations (*see e.g. 681 Chestnut Ridge Rd. LLC v Edwin Gould Found. for Children, supra; O.W. Siebert Co. v Kramer*, 107 Misc 2d 520, 521 [1980]). The hallmark of such typical permitted exceptions is that they affect good title, but do not preclude the buyer from taking title. Basically, the use of permitted exceptions arranges for the buyer to step into the shoes of the seller and take exactly that form of encumbered title that the seller currently possesses.

The requirement of prior HPD approval is fundamentally different. It does not merely encumber the property; rather, it prohibits the transfer of any interest in the property in its absence. Unlike permitted exceptions, the requirement of HPD approval to the transfer cannot be passed along to be resolved by the next possessor of the property, because if the parties do not comply with it, the transfer itself is impermissible. So, although the list of permitted exceptions includes the "terms [and] covenants" of the land disposition agreement, and the HPD approval requirement is among those terms and covenants, the provision of the land disposition agreement that requires HPD approval to a conveyance of the property does not qualify as a permitted exception.

The essence of why the HPD approval requirement may not be avoided as a permitted exception, subject to which the buyer may agree to take the property, is because it represents a right belonging to the City, not to either party. It was inserted in the land disposition agreement to protect the City's interest in remediating urban blight and revitalizing the neighborhood in accordance with the urban renewal plan, by ensuring that for a sufficient period of time, an amenity necessary to support a residential neighborhood would be available to residents of the area. To accomplish that end, it sought to ensure that private

owners could not enter into an agreement turning the property over to another private party for a use other than the one that the City's plan required. To approve of a deal that would allow the parties to transfer the property without obtaining the required HPD approval, by the expedient of terming that requirement a permitted exception, is to contravene the important principles of land use underlying the land disposition agreement itself.

It is worth noting that there is a sense in which the HPD approval requirement *can* properly be treated as a permitted exception. That is, even following a proper, HPD-approved transfer, the requirement would remain to be complied with by the purchaser of the property, applicable to any further transfers during the 25-year period. So, listing the requirement as a permitted exception functions as a recognition by the buyer that the requirement will be imposed on it, in turn, once the property is conveyed. But the requirement can be treated as a permitted exception only to that extent. It may not be used to permit a party to evade a contractual duty to take an affirmative step prior to conveying an interest in the property, and may not be understood to shift to CPS, after the contemplated conveyance, an obligation that fell to Pathmark prior to the contemplated conveyance.

The error in accepting the proposition that HPD approval may be ignored because it is listed as a permitted exception can be seen more clearly by considering a hypothetical situation in which the equivalent conveyance is arranged after only five years of the 25-year period in which HPD approval is required, without any action being taken to obtain that approval. The proponent of the deal might argue, as Pathmark does here, that the conveyance is proper and may proceed unless the City takes steps to prevent it. But it is difficult to imagine that, so soon after the land was first conveyed as part of a long-term urban development plan, a court could issue a ruling authorizing a conveyance of the lease in the absence of the requisite HPD approval simply because the City had not been brought into the case by either party to the proposed transaction. The failure to abide by a pre-condition to the proposed conveyance of the lease is apparent from the face of the documents, and would necessitate finding the conveyance impermissible.

Yet the majority finds that the proposed conveyance does not amount to a breach of Pathmark's obligations under the land disposition agreement, despite the lack of HPD approval, and suggests that authorizing the lease assignment would not subvert the very purpose of that agreement because its ruling "does not preclude [the land disposition agreement's] ultimate

enforcement." I cannot accept the suggestion that the City's continuing entitlement to take legal action challenging the lease assignment even after the deal has closed justifies authorizing a lease assignment contract that on its face violates the land disposition agreement.

The City should not need to intervene in a litigation or take any other additional action to protect the interests it already took steps to protect in 1981 by including in the land disposition agreement the requirement that HPD pre-approve any transfer of the property. If the requirement has not been complied with, it should be apparent that a pre-condition to the proposed conveyance has not been satisfied. By ignoring the pre-condition just because the City has not taken additional legal action to stop the parties' transaction, this Court effectively obliterates that pre-condition.

It is true that in the circumstances presented here only 17 months remained on the 25-year period, so, as a practical matter, it was pointless for the City to make any objection to the lack of application for HPD approval; there would, in fact, be no change in the use of the land until after the expiration of the 25-year period. But, our decision as to whether the parties could, by contract, transfer the subject property despite the failure to comply with the HPD approval requirement should be

founded on the terms of the controlling documents. It should not depend on whether the time remaining on the HPD approval requirement was 10 years or 10 months, and it should not depend on whether, as a practical matter, the injury to the City will be severe enough to prompt it to take affirmative legal action.

As the majority correctly observes, to all appearances, CPS entered into the contract willing to close on the deal without concern for prior HPD approval, and its willingness to ignore the approval requirement was further demonstrated when it deposited an additional $1 million in earnest money *after* Cherry Street's notice dated October 31, 2007. The majority makes much of the notion that CPS is using the consent obligation pretextually, in order to avoid its obligations under the parties' contract. But resolution of this appeal cannot properly turn on the premise that CPS had been willing to ignore the requirement of HPD approval until plummeting property values prompted it to extricate itself from the deal by taking advantage of Cherry Street LLC's earlier assertion that the parties' deal breached the underlying land use documents. To say that until December 28, 2007, CPS had shown that it was willing to take the risk that, after the conveyance, HPD might not approve of its intended use of the land, or that it expected to receive HPD approval for its intended use, may be true, but it misses the point. CPS did

not have the authority to agree to eliminate the City's right to prevent the transfer itself, which the City could do by declining to approve the deal.

It makes no difference whether CPS's sudden reliance on a violation of the land disposition agreement was disingenuous. Enforcement of the consent requirement has nothing whatsoever to do with any party's motivation or self-interest. Whatever CPS's motivations, the legal question remains the same: Was CPS correct in asserting that Pathmark was in default of the contract because, in violation of the land disposition agreement, HPD approval for the deal had not been obtained? And, if Pathmark was in default, was that a default that CPS was entitled to waive?

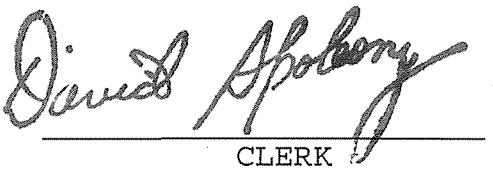
Although Cherry Street's October 31, 2007 letter was incorrect insofar as it protested that the lease assignment was invalid because the assignee planned to construct a residential condominium -- in fact there was no definite plan at that point, and, indeed, the assignment contemplated subleasing the supermarket back to Pathmark until the expiration of the 25-year period, when HPD approval would no longer be needed -- nevertheless, the letter correctly pointed out the violation of the requirement of HPD approval for a lease, sublease or assignment, which had to be satisfied before the lease assignment

could properly be completed.

In moving for summary judgment, Pathmark argued that as a matter of law the permitted exceptions provision of the lease assignment contract freed it from the obligation to obtain the approval of HPD prior to conveying its interest. Because the motion court correctly rejected that reasoning, its denial of the motion was proper, and should be affirmed.

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

ENTERED: JUNE 1, 2010



CLERK