SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 10, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Moskowitz, DeGrasse, Manzanet-Daniels, Román, JJ.

1774 Maria Teresa Bacani, etc., et al., Index 118041/05
Plaintiffs-Respondents,

-against-

Lisa Rosenberg, M.D., et al.,
Defendants,

Deepak Nanda, M.D.,
Defendant-Appellant.

Russo, Keane & Toner, LLP, New York (Thomas F. Keane of counsel), for appellant.

Bubb Grogan & Cocca, LLP, Morristown, NJ (Christopher L. Deininger of counsel), for respondents.

Order, Supreme Court, New York County (Joan B. Carey, J.), entered on or about June 1, 2009, which, to the extent appealed from, denied the cross motion by defendant Nanda for summary judgment dismissing the medical malpractice complaint as against him, unanimously reversed, on the law, without costs, the cross motion granted, the complaint dismissed as against Dr. Nanda, and the action severed and continued as to the remaining defendants.

Plaintiff mother delivered a stillborn fetus ten days after fetal demise was diagnosed on September 17, 2004. At that time the fetus was in the 35th week of gestation. The autopsy report

contains the following notation:

> There were multifocal chronic and acute infarcts in the placenta (in addition to the expected post-IUFD changes), the presence of which suggests that uteroplacental insufficiency may have played a role in this fetal demise. However, the extended in utero retention time prevents a more conclusive statement as to the cause of death.

On or about February 26, 2004, plaintiff mother began her prenatal treatment with defendant Rosenberg, her obstetrician/gynecologist. Dr. Rosenberg referred the patient to Dr. Nanda, a perinatologist, who examined her on August 31, 2004. No anomalies were disclosed by a fetal anatomy sonogram performed by Dr. Nanda that day, although he did note a large fibroid in the lower uterine segment. Dr. Nanda advised Dr. Rosenberg in writing that a large fibroid may be associated with a slow, difficult or dysfunctional labor or postpartum hemorrhage. He instructed plaintiff mother to return for a follow-up examination in two weeks. In the interim, on September 6, 2004, six days after Dr. Nanda's examination, plaintiff mother returned to Dr. Rosenberg for an office visit. At the time of this visit, Dr. Rosenberg observed that the baby was growing well and the amniotic fluid volume was normal. According to plaintiff mother's deposition, she experienced no cramping, bleeding, pelvic pain or discharge at the time of her August office visit with Dr. Rosenberg or a follow-up visit with Dr. Nanda on September 17, 2004. Dr. Nanda performed another sonogram during

this follow-up visit, and detecting no heartbeat, he suspected fetal demise. On his advice, plaintiffs immediately went to a hospital where the death of the fetus was confirmed.

In plaintiffs' supplemental bill of particulars, it is alleged that Dr. Nanda deviated from a standard of medical care that required him to (1) inform plaintiffs that the fibroid was growing and large enough to injure the fetus, (2) provide sufficient antepartum fetal monitoring necessitated by plaintiff mother's advanced maternal age of 39, (3) provide the same monitoring necessitated by the fibroid, (4) supervise and monitor the treatment of plaintiff mother and her fetus, and (5) deliver plaintiff's child before fetal death occurred.

To make out a prima facie case of medical malpractice, a plaintiff must show that a defendant deviated from accepted medical practice and that the alleged deviation proximately caused injury or death (*see Koeppel v Park,* 228 AD2d 288, 289 [1996]). A medical malpractice defendant moving for summary judgment meets his initial burden by establishing that he did not deviate from accepted medical practice or proximately cause injury (*Mattis v Keen, Zhao,* 54 AD3d 610, 611 [2008]). Dr. Nanda submitted the expert affidavit of Dr. Sandra McCalla, a physician board-certified in obstetrics and gynecology. Dr. McCalla opined that uterine fibroids, in and of themselves, do not cause fetal demise. She also opined that in light of plaintiff mother's

history, clinical evaluation, prior sonogram results and August 31, 2004 sonogram, Dr. Nanda's request for a follow-up evaluation in two weeks after his August 31 examination was appropriate. Dr. McCalla further opined that based on the absence of prior known medical complications, nothing in plaintiff mother's prenatal history or the August 31 sonogram warranted any fetal testing or monitoring beyond what was done. As a basis for her opinions, Dr. McCalla cited the absence of reported vaginal bleeding, abdominal pain or discharge as noted above. She also made note of the fact that the sonogram revealed a normal pregnancy with fibroids, a vertex presentation with normal fetal heart rhythm, a normal heart chamber and a normal amniotic fluid volume. Based upon the foregoing, Dr. McCalla's affidavit established that Dr. Nanda did not deviate from accepted medical practice. Accordingly, the burden shifted to plaintiff to produce evidence in admissible form sufficient to establish the existence of a triable issue of fact (*see Sisko v New York Hosp.*, 231 AD2d 420, 422 [1996], *lv dismissed* 89 NY2d 982 [1997]). Once a medical malpractice defendant has established the absence of any departure from good and accepted medical practice causing injury, a plaintiff in opposition "must submit a physician's affidavit of merit attesting to a departure from accepted medical practice and containing the attesting doctor's opinion that the defendant's omissions or departures were a competent producing

cause of the injury" (*Domaradzki v Glen Cove Ob/Gyn Assoc.*, 242 AD2d 282 [1997]. Plaintiffs' expert, Dr. John T. Harrigan, who is also board-certified in obstetrics and gynecology, opined that Dr. Nanda deviated from the applicable standard of obstetrical and gynecological practice by failing to assess the risk of fetal death and failing to perform and recommend weekly fetal surveillance and/or testing of the fetus commencing on August 31, 2004, the date of his initial consultation. Supreme Court denied Dr. Nanda's cross motion, finding issues of fact and credibility as to whether Dr. Nanda had deviated from the applicable standard of medical care as opined by Dr. Harrigan. We disagree.

Dr. Harrigan stated in his affidavit that a review of unspecified "records indicates that [the fetus] died from uteroplacental insufficiency caused by both advanced maternal age and a uterine myoma." This claim of causation is at odds with the autopsy report, which stated that uteroplacental insufficiency "may have" played a role in the fetal demise. Moreover, the autopsy report did not attribute uteroplacental insufficiency to the factors recited in Dr. Harrigan's affidavit. Hence, Dr. Harrigan's opinion does not raise a triable issue of fact with respect to causation because it is not based on facts contained in the record or within his personal knowledge (*see Quinn v Aircraft Constr.*, 203 AD2d 444, 445 [1994]). Also, according to Dr. Harrigan, good medical practice would have

required Dr. Nanda to schedule plaintiff mother for fetal surveillance and testing on September 7 and 14, 2004. Here, his opinion was conclusory because he did not state what the surveillance and testing might have disclosed on those dates. In addition, Dr. Harrigan's affidavit failed to address the absence of signs of fetal distress, as indicated in plaintiff mother's deposition and Dr. Rosenberg's September 6, 2004 office examination. An expert's affidavit containing bare conclusory assertions is insufficient to defeat summary judgment (*Wright v New York City Hous. Auth.*, 208 AD2d 327, 331 [1995]). Accordingly, plaintiffs have not raised a triable issue of fact as to whether Dr. Nanda departed from accepted medical practice, and even if so, whether such departure was a competent producing cause of the fetus's death.

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

ENTERED: JUNE 10, 2010

CLERK

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

2094 The People of the State of New York, Respondent,

-against-

Dwight Ashe, Defendant-Appellant.

SCI 5765/06

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

Robert M. Morgenthau, District Attorney, New York (David M. Cohn of counsel), for respondent.

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered January 26, 2007, convicting defendant, upon his plea of guilty, of grand larceny in the first degree, and sentencing him to a term of 2⅓ to 7 years, reversed, on the law, the plea vacated, the superior court information dismissed, and the matter remanded to Supreme Court for further proceedings on the felony complaint.

The initial felony complaint charged defendant with grand larceny in the second degree. After it came to light that the total amount defendant embezzled from his employer exceeded $1 million, defendant agreed to waive prosecution by indictment and plead guilty to one count of grand larceny in the first degree. Defendant wrongly contends that the superior court information was jurisdictionally defective because it charged a crime of a higher degree than any of the crimes charged in the felony

complaint (*see People v Pierce*, 2010 N.Y. Slip Op. 01347). However, because the only offense contained in the superior court information was not an offense for which defendant was held for grand jury action, the SCI was jurisdictionally defective (*see People v Zanghi*, 79 NY2d 815 [1991]). *Zanghi* is indistinguishable from the present situation, and we have considered and rejected the People's arguments to the contrary.

All concur except McGuire, J. who concurs in a separate memorandum as follows:

McGUIRE, J. (concurring)

The record establishes, and defendant does not dispute, that after being aided by counsel at every step, from his arraignment to his guilty plea, he knowingly and intelligently waived his right to be prosecuted by indictment. The record also establishes, and defendant does not dispute, that he then knowingly and voluntarily both agreed to be prosecuted by a superior court information and pleaded guilty to the class B felony of first-degree grand larceny, for having stolen more than $1 million dollars. He freely admitted his guilt and agreed to the imposition of a state prison sentence. And a plea of guilty, of course, "generally marks the end of a criminal case, not a gateway to further litigation" (*People v Hansen*, 95 NY2d 227, 230 [2000]).

Nonetheless, defendant now argues, years later, when the People's ability to prosecute him for this serious felony may be compromised and even though he got exactly what he bargained for, that his conviction must be vacated. He makes no claim of innocence or that for some reason he did not know what he was doing. Rather, he relies on the purest of technicalities in arguing that he should not have been permitted to agree to be prosecuted by and plead guilty to a superior court information charging him with the precise crime he committed, first-degree grand larceny. More specifically, he maintains that under the

second sentence of CPL 195.20, as construed by the Court of Appeals in *People v Zanghi* (79 NY2d 815 [1991]), the information was jurisdictionally defective.

We all agree that *People v Zanghi* requires us to reverse defendant's conviction. I write separately for two reasons. First, I think it appropriate to discuss defendant's argument that the information is defective under *People v Zanghi* because the only offense contained in the superior court information was greater than any charged in the felony complaint. The majority correctly rejects this argument, as it does not matter that the sole offense charged in the information is greater than any charged in the felony complaint; what matters is that the sole offense charged in the information is not charged in the felony complaint and is not a lesser included offense of any offense charged in the felony complaint. Indeed, after oral argument of this appeal, the Court of Appeals, rejected this very argument (*People v Pierce*, 2010 N.Y. Slip Op. 01347). Second, I respectfully submit that the Court of Appeals should reconsider its decision in *People v Zanghi*. The second sentence of CPL 195.20 does not require that it be construed to prohibit the parties under all circumstances from agreeing to a superior court information charging only a crime that is neither charged in the felony complaint nor a lesser included offense of such a crime. Construing the statute to contain that prohibition, moreover,

serves no purpose as the prohibition neither protects a defendant from any evil nor vindicates any public policy consideration.

I

On November 22, 2006, defendant executed in open court a written waiver of his constitutional right to be prosecuted by indictment and consented to be prosecuted instead by a superior court information charging him with first-degree grand larceny, which requires that the value of the property stolen exceed $1 million (Penal Law § 155.42). More than three months earlier, defendant had been arrested and charged in a felony complaint with second-degree grand larceny, which requires that the value of the property stolen exceed $50,000 (Penal Law § 155.40[1]), and second-degree criminal possession of a forged instrument (Penal Law 170.25). The felony complaint charged that defendant was the head of accounts payable at Nina Footwear and had stolen approximately $700,000 from the company by issuing forged checks to himself and a codefendant. Notably, the felony complaint also alleged that defendant had admitted to the police that he had issued the checks in question and forged the signatures. Thereafter, as the minutes of the several proceedings in criminal court prior to November 22 establish, defense counsel and the prosecutor were negotiating a disposition.

At the outset of the proceedings on November 22, defense counsel made clear that defendant had not wanted and did not want

to be indicted by a grand jury. The court noted that a superior court information had been prepared and that the People would proceed to a grand jury if a disposition was not reached. Defense counsel then stated, "We did not want to be indicted in ... this matter."

After the court stated that the felony complaint charged defendant with stealing hundreds of thousands of dollars from Nina Footwear, the prosecutor stated that "since the complaint was drafted, there has been a significant amount discovered on top of that. It is now over 1 million dollars." The court then outlined on the record the disposition to which the parties had agreed: defendant would plead guilty to a superior court information charging him with first-degree grand larceny in exchange for a prison sentence of 2 1/3 to 7 years, pay some $100,000 in restitution and consent to the entry of judgment against him in the full amount of the theft, about $1.5 million.

The considered, knowing and voluntary character of all that transpired thereafter is clear and not disputed. Following discussions between the court and counsel, defendant signed a waiver of indictment form. As required by CPL 195.20, the written waiver of indictment contained a statement by defendant that he was aware that he had the right under the New York State Constitution to be prosecuted by a grand jury indictment, was waiving that right and consenting to be prosecuted by a superior

court information, and that the information would be charging the offense specified in the written waiver and have the same force and effect as an indictment filed by the grand jury. Also as required by CPL 195.20, the written waiver was signed by defendant in open court in the presence of his attorney, and the consent of the District Attorney was endorsed thereon.

In response to questions from the court, defendant said he understood both the waiver form and that there would not be an indictment, "consented to be prosecuted by a piece of paper called a superior court information," and wished to plead guilty to first-degree grand larceny, "the one and only count in the [s]uperior [c]ourt [i]nformation." Defendant then admitted that, over a two-year period from 2004 to 2006, he had stolen more than $1 million from Nina Footwear. He agreed both to the negotiated prison term of 2 1/3 to 7 years and to forfeiture of more than $100,000. In addition, he signed a confession of judgment for approximately $1.5 million. During the plea allocution, when the court asked whether any other promises had been made, defendant responded, "I just want it to be over with." He then confirmed that he both was pleading guilty voluntarily and in fact was guilty. At sentencing, on January 26, 2007, the court noted that defendant had pleaded guilty under a superior court information and that "[e]verything was agreed to ahead of time."

II

As defendant tacitly concedes, his waiver of the right to indictment does not violate anything in article I, § 6 of the New York State Constitution. In relevant part, that provision expressly states that "a person held for the action of a grand jury" upon a charge of a felony offense, "other than one punishable by death or life imprisonment, with the consent of the district attorney, may waive indictment by a grand jury and consent to be prosecuted on an information filed by the district attorney; such waiver shall be evidenced by written instrument signed by the defendant in open court in the presence of his or her counsel." Each of these constitutional conditions was satisfied here and defendant makes no claim to the contrary.

With respect to the nonconstitutional claims defendant does make, he misreads CPL 195.20 and contends that the superior court information was jurisdictionally defective "because it charged a higher level of offense than any charged in the felony complaint." As noted above, after oral argument of this appeal, the Court of Appeals rejected this contention (*People v Pierce*, *supra* [inclusion in superior court information of offense of higher grade than any charged in felony complaint does not, "standing alone, ... establish the invalidity of the [information] under *Zanghi*"]). The opinion in *Pierce*, however, principally focuses on another issue and the Court did not

discuss at any length why it rejected the claim that a superior court information may not charge a higher level of offense than any charged in the felony complaint. Explaining why the claim is meritless helps explain why I believe the Court should reconsider *People v Zanghi*.

First of all, CPL 195.20 contains no prohibition on the inclusion in a superior court information of a count alleging a higher level offense than that or those charged in a felony complaint (or for which the defendant was held for the action of a grand jury). In relevant part, the statute reads as follows: "The offenses named [in a superior court information] may include any offense for which the defendant was held for action of a grand jury and *any* offense or offenses properly joinable therewith pursuant to sections 200.20 and 200.40" (CPL 195.20 [emphasis added]).[1] Under CPL 200.20, the section applicable here, the level of an offense is irrelevant to the question of

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[1]The phrase "held for action of a grand jury" is not defined in a formal sense in the Criminal Procedure Law. An order of a local criminal court holding a defendant for grand jury action, however, "presupposes that a felony complaint has been filed, [the] defendant has been arraigned on the complaint and following a preliminary hearing (unless waived by the defendant), the local criminal court has found reasonable cause to believe the defendant committed a felony (*see*, CPL 180.10, 180.30, 180.70)" (*People v D'Amico*, 76 NY2d 877, 879 [1990]). I agree with the majority's implicit determination to reject the People's argument that first-degree grand larceny was one of the offenses for which defendant was held for action of the grand jury; whether a local criminal court could hold a defendant for action of a grand jury for an offense not charged in the felony complaint is an issue we need not address.

whether it is properly joinable with another offense.

Accordingly, the prohibition defendant finds in the second clause of this sentence is precluded by the plain language of the statute. As in *People v Menchetti* (76 NY2d 473 [1990]), the word "any" should be given its plain meaning. There, the Court of Appeals emphasized the same word in the first clause of this sentence in concluding that a superior court information could charge a lesser included offense of an offense for which a defendant was held for the action of a grand jury (*id.* at 477).[2] Defendant reads CPL 195.20 as if it stated that the offenses named in a superior court information "may include any offense for which the defendant was held for action of a grand jury and any offense or offenses properly joinable therewith pursuant to sections 200.20 and 200.40, except that no such joinable offense may be a higher level of offense than the offense or offenses for which the defendant was held for action of a grand jury." That reading of the statute, however, is impermissible (*see Matter of Chemical Specialties Mfrs. Assn. v Jorling*, 85 NY2d 382, 394 [1995]).

By contrast, another provision of the Criminal Procedure Law

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[2]The Court also observed in *People v Menchetti* that "[t]he plain language of [article I, § 6] does not require that the information contain the precise charge for which the defendant was held even though the waiver of indictment is necessarily a waiver of indictment on that charge" (76 NY2d at 477 [internal quotation marks omitted)].

does expressly qualify the broad sweep of the authority conferred by CPL 195.20 to allege in a superior court information "*any* offense properly joinable" (emphasis added) with an offense for which the defendant was held for action of a grand jury. CPL 200.15, after employing the same language as CPL 195.20 to define the offenses that may be included in a superior court information, goes on to prohibit the inclusion of "an offense not named in the written waiver of indictment executed pursuant to section 195.20." The existence of this express prohibition is another reason to reject the unstated prohibition defendant discovers in CPL 195.20 (*Morales v County of Nassau*, 94 NY2d 218, 224 [1999]).

Giving the second sentence of CPL 195.20 its natural meaning accords with common sense. The usefulness and practicality of the flexibility it affords to both the prosecution and the defense is apparent. Suppose, for example, that after a defendant is held for the action of a grand jury on a felony complaint charging the class D felony of second-degree assault (Penal Law § 120.05), the victim dies from her injuries. Because the class B felony of first-degree manslaughter (Penal Law § 125.20) is properly joinable with the second-degree assault charge (CPL 200.20 [2] [b]), the defendant could waive his right to indictment pursuant to an agreement to be prosecuted by a superior court information for the homicide offense. Another

example would be a case in which the defendant was charged in a felony complaint with the class E felony of third-degree rape for engaging in sexual intercourse with another person less than 17 years old (Penal Law § 130.25 [2]). If further investigation after the filing of the felony complaint revealed that the defendant was guilty of first-degree rape (Penal Law § 130.35 [1]) for having committed the rape (or another rape of the victim during a different criminal transaction) by means of forcible compulsion, CPL 195.20 would permit the defendant to waive indictment and agree to be prosecuted by a superior court information for the class B felony of first-degree rape (CPL 200.20 [2] [a], [b]).

This case also illustrates the good sense of CPL 195.20. When defendant was arrested and arraigned on the felony complaint, the full extent of his theft was unknown. Unquestionably, and defendant does not dispute, the first-degree grand larceny offense is properly joinable with both of the crimes alleged in the felony complaint, second-degree grand larceny and second-degree criminal possession of a forged instrument, regardless of whether the first-degree grand larceny charge is based on the same criminal transaction as those lesser offenses (CPL 200.20 [2] [a], [b], [c]). Of course, and as is discussed below, a defendant can secure significant benefits by waiving indictment.

III

Defendant is correct, however, that *People v Zanghi* requires reversal of his conviction. Zanghi was held for the action of a grand jury following his arraignment on a felony complaint charging criminal possession of stolen property in the *fourth* degree and the misdemeanor of unauthorized use of a motor vehicle in the third degree. He thereafter executed a written waiver of his right to indictment, consented to be prosecuted by a superior court information charging him solely with criminal possession of stolen property in the *third* degree and pleaded guilty to that crime. The Court of Appeals agreed with Zanghi's claim that the superior court information was jurisdictionally defective.

The Court explained its holding as follows:

> The language of CPL 195.20 makes clear that where 'joinable' offenses are included, the information must, at a minimum, also include at least one offense that was contained in the felony complaint ("offenses named [in the information] may include any offense for which the defendant was held * * * *and* any offense or offenses properly joinable *therewith*" [emphasis supplied]). Since the information here did not meet that criterion, it is unnecessary for us to decide in this case whether CPL 195.20's provision for including joinable offenses along with the offense for which the defendant was held is consistent with constitutional provisions for waiver of indictment" (*People v Zanghi*, 79 NY2d at 818 [brackets, emphasis and ellipsis in original]).

As is evident, the Court held that the information was jurisdictionally defective because it did not meet what the Court

believed to be a requirement of the statute, the requirement that it, "at a minimum, also include at least one offense that was contained in the felony complaint."[3] The Court expressly predicated its holding on the failure of the information to "meet that criterion" (*id.*), not on the ground that it charged an offense higher than any for which Zanghi was held for the action of a grand jury.

As also is evident, this case is indistinguishable from *People v Zanghi*. Because the superior court information charged only first-degree grand larceny, and that offense is not one for which defendant was held for the action of the grand jury, under *People v Zanghi* it is of no moment that first-degree grand larceny is properly joinable with both crimes charged in the felony complaint. The information is jurisdictionally defective nonetheless.

I respectfully submit that CPL 195.20 does not require a superior court information to charge at least one of the offenses charged in the felony complaint. In the first place, the sentence states that "[t]he offenses named *may* include *any* offense for which the defendant was held for action of a grand jury and *any* offense or offenses properly joinable therewith"

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[3]The Court's discussion of *People v Menchetti* (76 NY2d 473, *supra*), makes plain that this requirement is satisfied if the information charges only a lesser included offense of an offense charged in the felony complaint (*see People v Zanghi*, 79 NY2d at 817).

(emphasis added). Giving the words "may" and "any" their ordinary meaning, the statute authorizes the information to include any of two categories of offenses -- those for which the defendant was held for action of the grand jury and those properly joinable with the former category -- without requiring the inclusion of an offense from both categories or only the former category. A lease might permit tenants of an apartment building "to have any dog less than 30 lbs and any other domesticated animal that weighs less," but nobody would think that a tenant who has a cat also must have a dog. *People v Zanghi*, however, reads the sentence as if it stated that "[t]he offenses named *must* include *an* offense for which the defendant was held for action of a grand jury and *may include* any offense properly joinable therewith." The Legislature, of course, easily could have so stated if it intended that meaning (*Matter of Theroux v Reilly*, 1 NY3d 232, 240 [2003] ["If the Legislature had intended [a restriction], it easily could have and surely would have written the statute to say so"]; *see also id.* ["We may not create a limitation that the Legislature did not enact"]).

To be sure, as one court emphasized in construing the word "must" in this same sentence, there is authority that permits the word to be construed to mean "may" when "required by the context of the statute, by the facts surrounding the statute's enactment, or to effectuate the legislative intent" (*People v Herne*, 110

Misc 2d 152, 158 [Franklin County Ct. 1981]). There is no good reason, however, to give an unnatural reading to the word "may" in the present context. The two words in the sentence emphasized by the Court in *People v Zanghi*, "and" and "therewith," do not provide such a reason. As noted, particularly given that the opening clause states that the information "may" include any offense for which the defendant was held for the grand jury, it is not at all unreasonable to construe the clause that follows the word "and" to state a separate category of offenses that the information also may include.[4]

The Court did not explain in *People v Zanghi* why it believed the word "therewith" supported its holding that an offense joinable with an offense for which the defendant was held for action of a grand jury may be charged in a superior court information only if the latter offense also is charged. If the Court believed, however, that the word refers back to the superior court information, suffice it to say that another

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[4]Moreover, a principle of statutory construction permits the word "and" to be construed as "or," and vice versa, when doing so better effectuates legislative intent (*see People ex rel. Municipal Gas Co. of Albany v Rice*, 138 NY 151, 156 [1893] ["The words 'and' and 'or,' when used in a statute, are convertible as the sense may require. The substitution of the one for the other is frequently resorted to in the interpretation of statutes when the evident intention of the lawmakers requires it"]; *see also Matter of Long v Jerzewski*, 235 App Div 441, 442 [4th Dept 1932]).

reading of the sentence is reasonable. After all, the nearest antecedent to the word "therewith" (*see generally Matter of People v Applied Card Sys., Inc.*, 11 NY3d 105, 127 [2008, Read, J., dissenting] [discussing grammatical rule of the last antecedent], *cert. denied sub nom. Cross County Bank, Inc. V New York*, __ US__, 129 S Ct 999 [2009]), is not an accusatory instrument but the phrase "any offense for which the defendant was held for action of a grand jury." In any event, the sentence does not unambiguously require that when a joinable offense is charged in a superior court information, the information also must charge the offense charged in the felony complaint with which the former offense is joinable.

In *People v Herne*, the court believed that its interpretation of the second sentence of CPL 195.20, the same one later adopted by the Court of Appeals in *People v Zanghi*, was supported by the principle that "a statute should be construed so as to avoid doubts concerning its constitutionality" (110 Misc 2d at 158 [internal quotation marks omitted]). But construing the sentence to mandate that the information always include an offense for which the defendant was held for action of a grand jury raises, rather than avoids, a constitutional question, i.e., whether the statute impermissibly limits the right to waive

indictment conferred by NY Constitution, article I, § 6.[5] The constitutional text contains no language suggesting that the right to waive indictment is contingent on the inclusion in the information of at least one of the offenses for which a defendant was held for the action of a grand jury. Rather, apart from prohibiting a waiver when a person is held for the action of a grand jury for an offense punishable by death or life imprisonment, the text requires only that the person have been "held for the action of a grand jury upon a charge [for an infamous crime]" (NY Const, art I, § 6). The absence of any such textual support for requiring an information to include at least one of the offenses for which the defendant was held for the action of a grand jury is important, albeit not necessarily decisive (*cf. People v Page*, 88 NY2d 1, 9 [1996] [construing constitutional provision and observing that "[t]he most compelling criterion in the interpretation of an instrument is, of course, the language itself"][internal quotation marks omitted]).

Notably, when a person who has been held for the action of a grand jury is indicted, nothing in the Criminal Procedure Law

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[5]The court in *People v Herne* also believed its reading of the second sentence of CPL 195.20 to be supported by the principle that a "statute must not be given a construction which would make it an absurdity" (110 Misc 2d at 158). As is also discussed below, however, the construction adopted in *People v Herne* and *People v Zanghi* is the one that produces untenable consequences.

requires that the indictment allege at least one of the offenses for which he or she was held for the grand jury's action. To the contrary, the relevant statute requires only that the indictment "must charge at least one crime" (CPL 200.20 [1]). Again, nothing in the constitutional text suggests that a defendant who waives indictment, but not a defendant who is indicted after being charged in a felony complaint, must be charged with at least one of the offenses for which he or she was held for the action of a grand jury.

A constitutional provision, moreover, "is to be construed ... to give its provisions practical effect, so that it receives a fair and liberal construction, not only according to its letter, but also according to its spirit and the general purposes of the enactment" (*Ginsberg v Purcell*, 51 NY2d 272, 276 [1980] [internal quotation marks and citation omitted]). As Governor Rockefeller stated in proposing the amendment to article I, § 6, "[t]his procedural advance would undoubtedly speed disposition of serious cases and help to clear court calendars, without infringing upon a defendant's basic rights or the right of society to adequate protection" (Public Papers of Gov. Nelson A. Rockefeller, at 1152). In addition, Governor Rockefeller stated that a "substantial portion" of defendants who eventually plead guilty, "desiring to expedite the disposition of the charges against them, would favor waiving the requirement of a grand jury

indictment" (*id.*). In light of these statements of the amendment's purposes, stingy construction of it would be needed to invalidate a statute permitting a superior court information to allege only an offense joinable with one for which the defendant was held for action of a grand jury.

Other substantive considerations support my reading of CPL 195.20. The clear import of *Zanghi*, as well as the plain language of CPL 195.20 (and CPL 200.15), is that the information would be impeccable rather than jurisdictionally defective if it also alleged either of the offenses charged in the felony complaint (second-degree grand larceny or second-degree criminal possession of a forged instrument). The additional and crucial point is that the Legislature could not have had any reason to differentiate between the information to which defendant and the People agreed, charging only first-degree grand larceny, and the information to which they could have agreed, charging that offense and an offense, second-degree grand larceny, they evidently regarded as irrelevant to the prosecution and disposition of the case. Nothing, no substantive right of the defendant or any public policy objective, would be served by insisting that the information also charge an offense that the parties regarded as irrelevant.[6]

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[6]To the contrary, to the extent it results in fewer waivers, precluding a waiver of the right to indictment unless the superior court information alleges an offense for which the

Construing CPL 195.20 to require a superior court information to charge at least one offense for which the defendant was held for action of a grand jury entails a particularly odd if not quixotic consequence. If, as is clear, the information would have been valid had it also charged either of the offenses charged in the felony complaint, it follows that the information would be valid if that additional charge was second-degree grand larceny. (There is no textual support in CPL 195.20 for differentiating between the offenses for which the defendant was held for action of a grand jury). But that means the information is jurisdictionally defective because it failed to allege a legally irrelevant offense. After all, the second-degree offense is a lesser included offense of the first-degree offense (CPL 1.20 [37]), and the Criminal Procedure Law expressly permits a defendant to plead guilty to a lesser included offense. Thus, including a charge of second-degree grand larceny would add nothing, or at least nothing of substance, to the information.

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defendant was held for action of a grand jury is *counter* to public policy. The legislation implementing the constitutional right to waive indictment (L 1974, ch 467) was a Governor's Program Bill and, as Governor Wilson explained in the memorandum accompanying the bill, the "waiver of indictment procedure will permit ... a defendant to obtain a speedier trial and will save time and expense expended in unnecessary grand jury proceedings. The waiver [procedure] should also reduce the backlog of cases ... awaiting grand jury action" (Program Mem at 3); *see also* Governor's Approval Mem, 1974 McKinney's Session Laws of NY, at 2095). Of course, moreover, these statements of the purposes of the legislation are in accordance with Governor Rockefeller's statements about the purposes of the constitutional amendment.

In another case, moreover, the parties might agree after arraignment in local criminal court that although there is sufficient evidence to establish the defendant's guilt of an offense joinable with an offense charged in the felony complaint, the evidence is insufficient to support the charge or charges in the felony complaint. For example, if a felony complaint charged the class B felony of first-degree robbery (Penal Law § 160.15) and the prosecution later determined that it could prove only the class E felony of fourth-degree criminal possession of stolen property (Penal Law § 165.45), the defendant might be able to obtain a benefit by communicating to the prosecutor his willingness to waive indictment and plead guilty to the possession charge. It makes no sense to think the Legislature intended to preclude a defendant in those circumstances from waiving his or her right to indictment and agreeing to be prosecuted by a superior court information unless he also were willing to be accused of a baseless charge in the information. A defendant's right under the New York Constitution to waive his or her right to indictment is just that, a constitutional right (NY Const, art I, § 6). And it is not obvious how the exercise of that right lawfully could be conditioned on the defendant's willingness to have the information include a baseless or irrelevant charge (*cf. Kusper v Pontikes*, 414 US 51, 58-59 [1973] ["For even when pursuing a legitimate interest, a State may not

choose means that unnecessarily restrict constitutionally protected liberty"]).

Moreover, a rule prohibiting waiver of the right to indictment unless the superior court information alleges at least one offense charged in the felony complaint can be circumvented by the parties. After all, if the parties agreed to a superior court information charging only an offense joinable with an offense charged in the felony complaint, they could agree to have the defendant rearrested and charged with that offense in a new felony complaint (*cf. People v D'Amico*, 76 NY2d 877, *supra*). Presumably, another alternative would be for the parties to agree to amend the felony complaint, with any supporting depositions that might be necessary, pursuant to CPL 100.45. But requiring that the defendant be arrested anew or that new proceedings be commenced in criminal court on new or amended felony complaints is pointless. A procedural rule devoid of substance invites evasions that underscore its insubstantiality.[7]

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[7]Because no substantive reason is apparent for construing CPL 195.20 to embrace this rule, it can act as a trap for the unwary. Prosecutors and defense attorneys who are unaware of the rule are less likely to discover it through research. Perhaps for that reason, this case is not an isolated phenomenon. In at least eight cases, the Appellate Division has reversed convictions under *People v Zanghi*: *People v Morson*, 67 AD3d 1026 [2nd Dept 2009; *People v Edwards*, 39 AD3d 661 [2nd Dept 2007]; *People v Colon*, 39 AD3d 875 [2nd Dept 2007]; *People v Goforth*, 36 AD3d 1202 [4th Dept 2007], *lv denied* 8 NY3d 946 [2007]; *People v Kohl*, 19 AD3d 1155 [4th Dept 2005]; *People v Colon*, 16 AD3d 433, *supra; People v Quarcini*, 4 AD3d 864 [4th Dept 2004]; *People v Lucas*, 200 AD2d 414 [1st Dept 1994]; *see also People v Johnson*,

In sum, the text of CPL 195.20 does not compel the construction adopted in *People v Zanghi* and unreasonable consequences follow from that construction. Accordingly, the statute should be construed to permit the information to charge an offense joinable with an offense for which the defendant was held for action of a grand jury, regardless of whether the latter offense also is charged (*see e.g. In re Rouss*, 221 NY 81, 91 [1917] [Cardozo, J.] ["Consequences cannot alter statutes, but may help to fix their meaning. Statutes must be so construed, if possible, that absurdity and mischief may be avoided"]; *People v Santi*, 3 NY3d 234, 242 [2004] ["courts normally accord statutes their plain meaning, but will not blindly apply the words of a statute to arrive at an unreasonable or absurd result"] [internal quotation marks omitted]); *see also Matisoff v Dobi*, 90 NY2d 127, 133 [1997] ["where a statute's language is capable of various constructions, the 'obvious spirit and intent' of a statute necessarily informs the meaning and import to be accorded that language"]).

Finally, the mandate of CPL 470.05 (1) is relevant here. The Legislature's command is that "[a]n appellate court must determine an appeal without regard to technical errors or defects

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187 AD2d 990 [4th Dept 1992]; [defendant improperly sentenced as second violent felony offender because predicate conviction for second-degree robbery should have been vacated under *People v Zanghi*]).

which do not affect the substantial rights of the parties." Although this statute does not expressly direct courts how to construe provisions of the Criminal Procedure Law, its directive should be considered when a court is attempting to resolve an ambiguity in one of those provisions. As between two possible readings of a provision of the Criminal Procedure Law, surely an appellate court should not adopt the one turning on technicalities that do not affect the substantial rights of the parties. This case presents a conflict between two obligations of intermediate appellate courts, the duty to abide the decisions of the Court of Appeals and the duty to abide the mandates of the Legislature. While I think we should resolve the conflict by abiding the former obligation, I also think the mandate of CPL 470.05 (1) is sufficient to justify my invitation to the Court of Appeals, however presumptuous the invitation may be, to reconsider *People v Zanghi*.[8] But if I am wrong -- if, that is, the Legislature reasonably might have intended to bar the parties from agreeing to a superior court information charging only an offense joinable with one for which the defendant was held for action of a grand jury and such a bar is consistent with the

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[8]I recognize, of course, that the Court could conclude that adhering to *People v Zanghi* is appropriate on the basis of principles of stare decisis (*see e.g. People v Taylor*, 9 NY3d 129, 148-149 [2007]; *People v Bing*, 76 NY2d 331, 337-338 [1990]).

constitutional right to waive indictment -- the Court's disagreement with my position should be adequate recompense for the presumption.

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

ENTERED: JUNE 10, 2010

CLERK

Andrias, J.P., Saxe, Sweeny, Freedman, Román, JJ.

2240 Gessin Electrical Contractors, Inc., Index 104784/09
Plaintiff-Respondent,

-against-

95 Wall Associates, LLC,
Defendant-Appellant,

HRH Construction LLC, et al.,
Defendants.

D'Agostino, Levine, Landesman & Lederman, LLP, New York (Bruce H. Lederman of counsel), for appellant.

The Law Firm of Elias C. Schwartz, Great Neck (Michelle Englander of counsel), for respondent.

Order, Supreme Court, New York County (James A. Yates, J.), entered October 16, 2009, which declared null and void the agreement between plaintiff and defendant 95 Wall Associates, dated September 22, 2008, and denied said defendant's motion for summary judgment dismissing the complaint as against it and for judgment on its counterclaim, unanimously affirmed, with costs.

This action involves a claim for approximately $1.7 million in change orders that plaintiff, a contractor on a construction project, submitted to 95 Wall, the premises owner.

At a September 2008 meeting, attended by 95 Wall's chief financial officer, Joseph Moinian, and plaintiff's principals, David Wasserman and Cory Gessin, the parties, without counsel, agreed to resolve the dispute by having 95 Wall pay plaintiff

$500,000. However, 95 Wall did not realize that about $1.09 million of plaintiff's claim had already been satisfied by payments from the general contractor. Accordingly, 95 Wall thought it was settling the full $1.7 million claim for $500,000, and plaintiff thought it was settling a $580,000 balance for $500,000.

After the meeting, 95 Wall's in house counsel drafted a one-page agreement that provided in relevant part:

> 1. Owner and Contractor agree to value all change orders and extras . . . arising from the date of the inception of the Contract at the sum of $500,000 (the "Extra Amount").
>
> 2. Owner shall pay the Extra Amount as follows: (a) Owner shall make four payments of $75,000.00 each on a weekly basis. Contractor acknowledges receipt of 2 payments of $75,000.00 under this Agreement. The remaining weekly payments shall be paid on the date of full execution of this Agreement and on the same day in the following week; (b) Owner shall make four payments of $50,000.00, on the first business day of each month, commencing November 3, 2008 and on the first business day of each succeeding month thereafter.

The agreement also provided that plaintiff would not file any mechanic's lien as long as 95 Wall was not in breach, that lien waivers would be executed and held in escrow until each payment cleared, and that plaintiff would receive an additional $350,000 as a credit for certain rebates. Plaintiff signed the agreement without the benefit of counsel.

After 95 Wall paid the first $450,000 due under the agreement, it realized that it had already paid $1 million for

change orders and took the position that plaintiff had been overpaid. When 95 Wall refused to make any further payments, plaintiff filed a mechanic's lien for $555,237 and brought this action to enforce it. 95 Wall answered, counterclaimed for a $493,603 alleged overpayment, and moved for summary judgment.

The motion court directed an evidentiary hearing on the issue of what the parties intended and understood their agreement to be. After hearing testimony, the court, noting that the agreement had been drafted by an attorney who had not attended the negotiation session, found that

> the future payment schedule was because [plaintiff's principal] thought he was owed the money and that was the payment schedule for the money he thought he was owed.
>
> There is no theft or fraud here, it is just a payment schedule of a settlement of what he thought he was, what he was owed.
>
> On the other hand, I agree that [95 Wall's principal] just probably was totally unaware of what . . . 95 Wall had paid out in total.
>
> . . .
>
> I conclude there was no meeting of the minds. I credit that Gessin thought he was settling the 580 thousand dollar claim for 500 thousand dollars. And I credit Mr. Moinian when he says he thought he was paying eight point two million [the contract price] plus 500 thousand and that was it.

Accordingly, the court denied 95 Wall's summary judgment motion and declared the contract null and void.

The courts should construe a contract in a manner that

avoids inconsistencies and reasonably harmonizes its terms (*James v Jamie Towers Hous. Co.*, 294 AD2d 268, 269 [2002]). Where internal inconsistencies in a contract point to ambiguity, extrinsic evidence is admissible to determine the parties' intent (*see Federal Ins. Co. v Americas Ins. Co.*, 258 AD2d 39, 43 [1999]. The ultimate aim is to realize the parties' "reasonable expectations" through a practical interpretation of the contract language (*see Sutton v East Riv. Sav. Bank*, 55 NY2d 550, 555 [1982]). Even if parties intend to be bound by a contract, it is unenforceable if there is no meeting of the minds, i.e., if the parties understand the contract's material terms differently (*see Brands v Urban*, 182 AD2d 287 [1992]; *see also McNamara v Tourneau, Inc.*, 464 F Supp 2d 232, 238 [SD NY 2006]).

Here, although paragraph 1 of the settlement agreement values all change orders arising from the date of the inception of the underlying contract at $500,000, paragraph 2 provides that plaintiff will be paid $500,000 on specified future dates, and paragraph 5 adds $350,000 more in rebates, which demonstrates that plaintiff never intended to return over $400,000 to 95 Wall; there was no meeting of the minds on this material term.

In *Computer Assoc. Intl., Inc. v U.S. Balloon Mfg. Co., Inc.* (10 AD3d 699 [2004]), the buyer's witness established that the buyer understood the computer software "service pack" addendum to the parties' contract included all the educational services he

and his employees would need to use the software. When, shortly after contract execution, the seller tried to sell a separate education package at additional cost, the buyer sought to rescind the contract. In direct conflict with this testimony, the seller's witnesses established that they understood that educational services were not included in the contract price, but were to be included in a separate agreement. The Second Department found the language employed in the contract was not susceptible of only one meaning, and thus the contract was ambiguous as a matter of law. There was a reasonable basis for the parties' difference of opinion as to what the contract included or did not include, and thus the contract was unenforceable for lack of a meeting of the minds regarding a material element.

Similarly, in this case the motion court found that

> it would not have made sense for [Gessin's principal] to sign an agreement that says oh, I value all change orders, one point seven million dollars worth of change orders for 500 thousand, even though you already paid me 900 thousand dollars . . .
>
> I do not think when he signed it, that is the way that he read that paragraph, and I do not think . . . this is the kind of paragraph that is so crystal clear, to Mr. Gessin in his situation at that time that he was consciously agreeing to instead of getting 580 thousand dollars, instead he was agreeing to give back 400 thousand.

95 Wall contends that the contract must be enforced because it reflects its understanding of the parties' agreement. But

while it may have reflected 95 Wall's understanding insofar as it purported to settle "all change orders" for $500,000, 95 Wall ignores the contract provision stating that it would make future payments even though it had already paid plaintiff far more than $500,000. In effect, 95 Wall asks this Court to read the future payment provision out of the contract, but doing so would depart from the well-settled rule of construction that no provision of a contract should be left without force and effect (*see Corhill Corp. v S.D. Plants, Inc.*, 9 NY2d 595, 599 [1961]; *see also Acme Supply Co., Ltd. v City of New York*, 39 AD3d 331 [2007], *lv denied* 12 NY3d 701 [2009]). As the motion court determined as the finder of fact, 95 Wall believed that the parties were settling about $1.75 million worth of claims for a total of $500,000, and plaintiff believed that 95 Wall had agreed to pay it an additional $500,000 to settle its remaining claims. The written contract does not reflect either party's understanding.

Moreover, a court sitting in equity can rescind a contract for unilateral mistake if failure to rescind would unjustly enrich one party at the other's expense, and the parties can be returned to the status quo ante without prejudice (*Cox v Lehman Bros., Inc.*, 15 AD3d 239 [2005]; *see also Rosenblum v Manufacturers Trust Co.*, 270 NY 79, 84-85 [1936]). In *Cox*, the plaintiff maintained a margin account with the defendant broker, which was secured by stock in the account. The parties

stipulated that the broker would return 112,400 stock shares upon the plaintiff's payment of $60,000. After the plaintiff paid the money, the broker discovered there were only 81,700 shares in the account. The plaintiff sued to enforce the stipulation, but the trial court directed judgment for the broker on its counterclaim to rescind the stipulation. We affirmed, holding that enforcing the stipulation as written, by requiring the broker to purchase 30,700 shares on the market to give to the plaintiff (in addition to the 81,700 shares from the account) would create "a windfall" for the plaintiff. We noted that during the parties' settlement negotiations, the plaintiff never asked for more shares than were in the margin account, and that we saw "no indications that [the broker] lacked good faith or intentionally avoided making an inquiry it had reason to know would disclose the true facts" (15 AD3d at 240). Moreover, we concluded, rescinding the stipulation would restore the status quo ante.

Here, if 95 Wall's interpretation were accepted, i.e. that $1.7 million in change orders were settled for $500,000, 95 Wall would be unjustly enriched in that undisputedly plaintiff did not intend those terms. On the other hand, if plaintiff's interpretation were accepted, it would require 95 Wall to pay plaintiff about $1 million more than 95 Wall had intended. Under these circumstances, rescinding the contract restores the status quo ante, where 95 Wall has already paid plaintiff on some of its

claims, and the remaining claims are outstanding.

Accordingly, the motion court correctly determined that the written contract should be voided.

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

ENTERED: JUNE 10, 2010

CLERK

Tom, J.P., Sweeny, Catterson, Moskowitz, DeGrasse, JJ.

2355 The People of the State of New York, Ind. 498/08
Appellant,

-against-

David Holland,
Defendant-Respondent.

Robert M. Morgenthau, District Attorney, New York (William P. Mahoney of counsel), for appellant.

Steven Banks, The Legal Aid Society, New York (Justin Diamant of counsel), for respondent.

Order, Supreme Court, New York County (Bonnie G. Wittner, J.), entered November 26, 2008, which granted defendant's motion to suppress physical evidence and statements, reversed, on the law, the motion denied, and the matter remanded for further proceedings consistent herewith.

On December 30, 2007, a team consisting of Police Officers Porras, Woodard and two others was on patrol in the vicinity of a public housing development. The area had been earmarked for patrol because of reports of drug dealing, robberies and gunshots. At approximately 1:40 a.m., the team approached a group of four to six individuals in front of 110 East 129th Street. Defendant, who was walking toward the group, changed his direction as the officers approached. Porras called out to defendant and asked him to stop. In response to Porras's questions, defendant stated that he did not live in the housing

development. At Porras's request, defendant handed over photo identification. Porras testified that his investigation was complete at that point, since nothing about defendant's photo identification aroused his suspicion. Porras did not, however, return the identification to defendant. Woodard, who did not hear the conversation between Porras and defendant, began asking defendant some of the same questions put to him by Porras. Defendant became irate and punched Porras. A struggle ensued as the officers arrested defendant for assault and disorderly conduct. Upon the arrest, quantities of crack cocaine and marijuana were recovered from defendant's person. The motion court granted defendant's motion to suppress physical evidence, as well as his statements, reasoning that "[e]ven if there was a basis for initially requesting information from defendant, which there was not, any such justification was exhausted after he answered Porr[a]s who was obligated to return the identification and allow him to leave." The court further found that what it described as "continued detention" was unlawful, and defendant's reaction to it was "proportionate to the circumstances." We disagree.

Once defendant punched Officer Porras, any allegedly unlawful conduct in stopping and questioning defendant was attenuated by his calculated, aggressive and wholly distinct

conduct (*see People v Mercado,* 229 AD2d 550 [1996]; *People v Stone,* 197 AD2d 356 [1993]). We distinguish *People v Felton* (78 NY2d 1063 [1991]), where there was no attenuation because the defendant's action in striking a police officer was in the words of the suppression court, "immediate, spontaneous and proportionate to the officer's attempt to lay hands on him when he refused to stop" (*id.* at 1064). Here, the police officers did not initiate any physical contact with defendant or attempt to do so before he punched Officer Porras. In this case, defendant's actions were far out of proportion to Officer Woodard's redundant questions. Hence, we disagree with the dissent's view that defendant's "minimal use of force in the attempt to get away from the officers was a direct consequence of his unlawful detention." For purposes of applying *Felton,* it is of no moment whether defendant punched or pushed Officer Porras, because, as stated above, the police officers did not initiate or attempt to initiate physical contact with defendant. For example, in *People v Sampson* (68 AD3d 1455 [2009]), the court found that a suspect's act in pushing a police officer did not dissipate the taint of an illegal stop because it was "a spontaneous reaction *to [the officer's] attempt to touch him,* and a direct consequence of the illegal seizure" (*id.* at 1458, emphasis added). In light of the foregoing, we need not resolve the issue of the legality of the

police officers' stopping and questioning defendant (*see Mercado*, 229 AD2d at 551).

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

TOM, J.P. (dissenting)

While under the circumstances of this case the police had an objective credible reason to approach defendant to request information, the officers' subsequent detention of defendant exceeded the scope of the permissible inquiry and violated his Fourth Amendment right to be free from undue interference with his liberty. Defendant's minimal use of force in the attempt to get away from the officers was a direct consequence of his unlawful detention and does not attenuate the illegally initiated police intrusion upon his freedom of movement.

Police officers Porras and Woodard testified at a combined *Mapp/Dunaway/Huntley* hearing before a judicial hearing officer. In the early morning of December 30, 2007, they were working with three other uniformed police officers "doing a perimeter check" of the area "[i]n front of 120 East 129th in the Jackie Robinson Housing Development" in upper Manhattan. Porras first noticed defendant at about 1:40 A.M. as he and the other officers entered the housing development, an area where he had made a number of prior arrests, mostly related to illegal narcotics. Defendant was walking toward a group of four to six people gathered in front of the building, as were the officers. Porras testified: "Once he saw us, he changed direction right away. That caught my attention at the time." Porras approached defendant and asked whether he lived in the area or in the development, to which

defendant responded, "No." Porras continued, "He was agitated at the time of the stop, and I asked him if he had any identification on him which he said he did and he presented it to me." Although defendant's identification card was in order, Officer Porras did not return it to him.

Woodard testified he became aware that Porras "was speaking alone with an individual and the individual was becoming a little loud and irate . . . After I approached, I asked Mr. Holland if he had identification, if he lived in the development." Even though defendant had already responded to these questions, Porras did not stop Woodard's inquiry. Defendant became more irate and louder. Woodard continued, "At this point in time Officer Arslanbeck had c[o]me over." Porras testified that defendant's "agitation" worried him and he "approached" the defendant. Woodard testified that defendant then "took a closed fist and swung at Officer Porras, turned around and tried to run through myself and Officer Arslanbeck . . . At that point in time we grabbed the defendant . . . and a struggle ensued." It took four officers approximately five minutes to subdue defendant, who was placed under arrest for "Assaulting an officer, disorderly conduct and resisting arrest." He related that a bag of crack cocaine and a ziplock bag containing marijuana were recovered from defendant's person.

Porras gave a somewhat different version of the events

leading up to the scuffle with defendant: "The defendant started acting very hostile. He started becoming very agitated," and took "one swing at me striking me in my shoulder, and when I flinched, he ran toward Officer Woodard. At that point, I went ahead and grabbed the defendant by the waist." During the resulting struggle, "he struck me again in the right forehead and underneath the right eye causing some swelling and small laceration." After three or four minutes, the officers were able to place defendant in handcuffs.

Defendant was charged with assault in the second degree, criminal possession of a controlled substance in the fifth degree and unlawful possession of marijuana. He moved to suppress statement and physical evidence as a result of the illegal stop and detention by the police.

Supreme Court granted defendant's motion to suppress testimony concerning any statements defendant may have given, and all physical evidence recovered, on the ground that the officers who confronted defendant lacked a reason to approach him, and in any event, once defendant answered the questions put to him by Officer Porras and provided identification, "Porr[a]s' investigation was complete, since he found nothing about the identification that aroused his suspicion. Nevertheless, he did not return the identification, in this way preventing defendant from leaving . . . Porr[a]s then assisted Woodard and P.O. Robin

in blocking defendant's egress . . . The continued detention was unlawful and the reaction of defendant proportionate to the circumstances. It does not attenuate the unlawful detention and render the contraband admissible."

On appeal, the People assert error in Supreme Court's finding that the police lacked a reason to approach defendant, arguing that defendant's "suspicious conduct within a crime-plagued, public housing area, late at night, only elevated the officers' predicate for inquiry." They also take issue with the court's portrayal of the officer's conduct as an "unlawful detention" of defendant, contending that Porras "was justified in his limited, non-accusatory questioning of the defendant," and assert that "Officer Woodard, in a very reasonable response to defendant's growing agitation, joined Officer Porras and unwittingly repeated Officer Porras' questions." Finally, the People dispute the court's finding that defendant's attempt to get away from the police officers was reasonable. In any event, they argue, "Defendant's striking Officer Porras was a completely independent act, which provided its own probable cause to arrest and attenuated the taint of any initial illegality from the contact between defendant and the police" (citing *People v Townes*, 41 NY2d 97 [1976]).

Deciding whether a search and seizure is reasonable under the Fourth Amendment requires that a court "consider whether or

not the action of the police was justified in its inception and whether or not it was reasonably related in scope to the circumstances which rendered its initiation permissible" (*People v Cantor*, 36 NY2d 106, 111 [1975]). While defendant does not concede the legitimacy of Porras's approach, the police are "given wide latitude to approach individuals and request information" (*People v De Bour*, 40 NY2d 210, 218 [1976]), which is construed as a "minimal intrusion" on individual privacy and security requiring only "some objective credible reason for that interference not necessarily indicative of criminality" (*id.* at 223). Defendant's presence "after midnight in an area known for its high incidence of drug activity" and his change of direction "to avoid walking past the uniformed officers" warranted Porras's approach to inquire about defendant's identity (*id.* at 220). Moreover, it has been observed that the right of the police to approach an individual to request information exists even absent any concrete indication of criminality (*People v Gray*, 90 AD2d 405, 407 [1982]).

Analysis turns to whether the subsequent action of the police was, in the *Cantor* court's words, "reasonably related in scope to the circumstances which rendered its initiation permissible" (36 NY2d at 111), i.e., to Porras's request for information as a result of defendant's abrupt change of direction. As Supreme Court observed, upon receiving defendant's

identification and finding nothing suspicious about it, the objective of Porras's inquiry was fulfilled and his investigation at an end. As this Court noted in *People v Barreras* (253 AD2d 369, 373 [1998]), once a defendant's papers are found to be in order, the initial justification for a stop is exhausted, and the police are obligated to permit the defendant to resume his journey. The salient characteristic of a request for information is that an individual who is approached by police must always be free to simply walk away (*see People v Flynn*, 15 AD3d 177, 178 [2005], *lv denied* 4 NY3d 853 [2005]).

Whether defendant's continued detention was proper depends on whether the circumstances afforded Porras and his fellow officers the minimum basis for a lawful detention — "a founded suspicion that criminal activity is afoot" (*Cantor*, 36 NY2d at 114) — so as to elevate the permissible intrusion with defendant's liberty beyond the minimally intrusive request for information (*see People v Leary*, 255 AD2d 527, 528 [1998]) to the next level of interference — the common-law right to inquire — which "permits a somewhat greater intrusion in that a policeman is entitled to interfere with a citizen to the extent necessary to gain explanatory information, but short of a forcible seizure" (*De Bour*, 40 NY2d at 223). The People, however, do not contend that the officers possessed the necessary basis to elevate their inquiry to this level, which requires a founded suspicion that

criminal activity is afoot. Rather, they avoid the question of detention by attempting to minimize the level of intrusion upon defendant's liberty and justify the seizure of evidence on an independent ground.

The record indicates that the officers' confrontation with defendant progressed beyond a simple request for information. Although defendant had finished answering the questions put to him by Porras, who determined that defendant's New York State identification card was in order, the officer nonetheless retained the card. The following exchange took place during the testimony of Porras at the suppression hearing:

THE COURT: Now, with that would that not necessarily complete your investigation at that point, yes or no?

THE WITNESS: No.

THE COURT: No. What else did you have to do?

THE WITNESS: At that point Officer Woodard wanted to ask him a few questions.

THE COURT: What did he ask him?

THE WITNESS: If he lived in the area as well.

THE COURT: Well, he already answered that. What else did he ask?

THE WITNESS: I don't remember anything else he asked.

On his cross examination, Woodard stated that when Porras began speaking to defendant, he and Officers Arslanbeck and Robin were some 20 to 25 feet away. Woodard confirmed that when he

asked defendant if he lived in the development and requested his identification, Porras did not communicate that he had previously asked the same question and that he was already in possession of defendant's New York State identification card. Woodard stated, "Mr. Holland was being loud, boisterous . . . It appeared that I had agitated him." Within 10 or 15 seconds of Woodard's follow-up request for identification, Arslanbeck arrived. Defendant was now confronted by at least three police officers, with a three-foot-high fence directly behind him, and was being subjected to repetitive questioning, while Porras continued to hold his identification card. It is reasonable to conclude, from these circumstances, that defendant was being subjected to harassment and intimidation (*cf. De Bour*, 40 NY2d at 220). In any event, the circumstances of the encounter are wholly inconsistent with a belief on defendant's part that he could reasonably disregard the police and go about his business (*see Florida v Bostick*, 501 US 429, 434 [1991]). "An individual to whom a police officer addresses a question has a constitutional right not to respond. He may remain silent or walk or run away" (*People v Howard*, 50 NY2d 583, 586 [1980], *cert denied* 449 US 1023 [1980]).

Commendably, the People do not argue that defendant's agitation provided a founded suspicion of criminality, which is a

position that the courts have rejected as devoid of merit (*see People v Banks*, 85 NY2d 558, 562 [1995], *cert denied* 516 US 868 [1995] [defendant's nervousness and minor discrepancies between his and his passenger's answers regarding their trip did not support reasonable suspicion of criminality]; *People v Milaski*, 62 NY2d 147 [1984]). Nor do they suggest that defendant presented any threat to the personal safety of the police. Rather, the People contend that an entirely separate justification for defendant's arrest was provided by his aggressive behavior toward Porras after Woodard questioned him and Arslanbeck arrived on the scene, which was described by Woodard as a strike with a "closed fist" landing "in the face area," and by Porras, variously, as a "punch" and a "push" to the shoulder. The officers' testimony was inconsistent with the information they recorded in their memo books, which reflect defendant's initial action as a "push."

The documentary evidence clearly showed that defendant was first detained/restrained before he tried to break away and that he pushed Porras, but had not thrown a punch at any time before he was detained. Woodard was impeached with his memo book, in which he entered, "Perp did push two AO's upon detainment," indicating himself and Porras. The entries by Porras described the events surrounding the officers' perimeter check in more detail:

> Multiple stopped including Holland, David DOB 11/2/84 for poss. drug sales – perp did push (2) A/O's; upon detainment perp did punch A/O w/ closed fist, perp was resisting being put in handcuffs approx 5 min.

On cross examination, Porras stated that at the time defendant became aggressive, "I had his identification still." When counsel inquired about the circumstances resulting in defendant's arrest, Porras responded, "Yes -- well he pushed me. Pushed the officer." Asked if they were pushed because defendant was attempting to leave, Porras responded, "He was trying to -- Yeah, he was trying to go." When the court inquired, "At what point did he push you?" the witness stated, "After he spoke to Officer Woodard."

Having failed to contest the issue of unlawful detention, the People seek to use the limited force employed by defendant in his attempt to get away from the police as an independent basis for his arrest, thereby attenuating the search and seizure of the contraband found on his person from the unlawful police conduct. They argue that "defendant's striking Officer Porras was not provoked by Woodard's repetitive questions. It was an act of aggression that went far beyond the conversation the officers were attempting to have with defendant." The People rely on *People v Townes*, in which a suspect subjected to the unconstitutional seizure of his person pulled a gun and attempted to fire it, even after the officers had identified themselves.

Under those circumstances, the Court of Appeals held that the defendant's "act was unjustified and criminal in nature (see Penal Law § 35.27) and unrelated to the initial albeit unlawful action on the part of the police" (41 NY2d at 102).

Relying on *People v Felton* (78 NY2d 1063 [1991]), defendant counters that his attempt to get away from the officers does not serve to attenuate the seizure from the unlawful police conduct "because it was an immediate, spontaneous and proportionate reaction to the unjustified detention." He notes that the testimony of Porras and Woodard, as well as the documentary evidence, confirms that he was prevented from departing, thereby exceeding the scope of a police request for information, and requiring suppression of the evidence obtained.

Despite some transparent attempts to elaborate upon the facts, the record is clear and supports the hearing court's determination that defendant was prevented from leaving the scene, and that his reaction was a proportionate response to the unlawful detention. Here, as Woodard questioned defendant, other officers gathered around defendant, who was backed up against a fence. There was no evidence offered at the hearing to show that the officers had kept a path open to allow him to leave at any time he wished. The memo book entries are a contemporaneous record of the officers' activities, maintained as part of their official duties, and constitute the most reliable account of

their encounter with defendant. In the seven months that intervened between arrest and hearing, the officers' recollection of the incident, particularly the sequence of events, had obviously become impaired because Woodard's testimony was inconsistent with that given by Porras, and Porras could not seem to recall whether he was first punched or pushed by defendant, although he was certain that defendant was trying to get away. The arresting officers were presumably cognizant of the need to justify their detention of defendant in order to preserve the physical evidence against him. What is consistently described in the documentary evidence as a push was subsequently represented at the hearing by Porras as a punch to the shoulder and by Woodard as a punch to the face.[1]

As noted in *Cantor* (36 NY2d at 112),

> Street encounters between the patrolman and the average citizen bring into play the most subtle aspects of our constitutional guarantees. While the police should be accorded great latitude in dealing with those situations with which they are confronted it should not be at the expense of our most cherished and fundamental rights. To tolerate an abuse of the power to seize or arrest would be to abandon the law-abiding citizen to the police officer's whim or caprice--and this we must not do. Whenever a street encounter amounts to a seizure it must pass constitutional muster.

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[1] The People do not attempt to justify defendant's arrest on the basis of any injury sustained by an officer during the struggle to place defendant in handcuffs.

At the time Porras completed his questioning of defendant, the purpose of the initial police approach was fulfilled. The continued retention of defendant's identification by Porras and the second series of the same questions put to defendant by Woodard elevated the degree of interference with defendant's liberty beyond the limited duration and scope permitted by a request for information (*see People v Mobley*, 48 AD3d 374, 375 [2008] [officers' second approach to request information was impermissible after they found nothing suspicious on their first approach]).

It was conceded by both Porras and Woodard that defendant was attempting to get away from the officers. As stated by Woodard, after pushing Porras, defendant "tried to run through myself and Officer Arslanbeck," and as stated by Porras, "Yeah, he was trying to go." The testimony establishes that after Porras completed his request for information, he was immediately joined by Woodard, and 10 to 15 seconds later by Arslanbeck; that the officers positioned themselves in front of defendant; and that defendant was standing directly in front of a three-foot fence. It is apparent from the congruous testimony of the two officers and the entries in their memo books that defendant tried to push Porras out of the way and escape between Woodard and Arslanbeck. It is equally apparent that the nature of the officers' confrontation with defendant had progressed from

"basic, nonthreatening questions regarding, for instance, identity, address or destination" that characterize a request for information (*Barreras*, 253 AD2d at 373) to "harassment or intimidation" stage (*De Bour*, 40 NY2d at 220) of an improper detention based on no more than vague suspicion (*see Cantor*, 36 NY2d at 114).

In view of the officers' concession that defendant was trying to get away from them, the documentary evidence and Porras's eventual admission at the hearing that defendant pushed him, the limited physical force used against Porras by defendant was an immediate response to his unjustified detention. It does not constitute an independent act sufficiently attenuated from the unlawful detention so as to dissipate the illegal taint associated with it (*cf. Townes*, 41 NY2d at 101-102), but was an immediate and direct consequence of that unlawful detention. There is thus no basis upon which to find attenuation and admit the evidence. As this Court noted in *People v Packer* (49 AD3d 184, 186 [2008], *affd* 10 NY3d 915 [2008]),

> While the effect of illegally initiated police intrusion may potentially become attenuated, as a practical matter there is rarely opportunity for the attenuation of primary official illegality in the context of brief, rapidly unfolding street or roadside encounters predicated on less than probable cause . . . [O]nce a wrongful police-initiated intrusion is established, suppression of closely after-acquired evidence appears to follow ineluctably.

The attempt to cite force against a police officer as an independent basis for arrest, on the theory that any such use of force is unjustified under Penal Law § 35.27, has been rejected. Where the physical response is "immediate, spontaneous and proportionate" to the unlawful police conduct, the unlawful detention is not attenuated (*Felton*, 78 NY2d at 1065). Whether defendant might be able to claim that he was justified in pushing past the officers or whether such defense is barred by § 35.27 is not before us on appeal, nor is it material. As the Court of Appeals has stated, "although the statute might preclude a justification defense to a charge of assault, it could not serve to transform the illegal arrest of defendant into a lawful one" (*id.*).

Finally, although the subsequent recovery of contraband from defendant established that Porras was correct in his hunch that defendant was in possession of illegal drugs, the propriety of a search is determined at its inception, not by its proceeds (*see Wong Sun v United States*, 371 US 471, 484 [1963]; *People v Sobotker*, 43 NY2d 559, 565 [1978]). That illegal drugs were recovered from defendant is merely fortuitous.

If the tactics employed by the police against defendant are countenanced, any person might be approached, detained, intimidated, harassed, even provoked into a display of aggression and thereupon arrested, effectively eviscerating Fourth Amendment

protections and "abandon[ing] the law-abiding citizen to the police officer's whim or caprice" (*Cantor*, 36 NY2d at 112). The Fourth Amendment serves to strike a balance between police power and individual freedom; it should not be dismissed as a hindrance to prosecution, to be dispensed with by resort to facile reasoning in the interest of sustaining a conviction.

Accordingly, the order should be affirmed.

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

ENTERED: JUNE 10, 2010

CLERK

Friedman, J.P., Sweeny, DeGrasse, Richter, Manzanet-Daniels, JJ.

2492 D.B. Zwirn Special Opportunities Fund, L.P., Plaintiff-Respondent, Index 601591/08

-against-

SCC Acquisitions, Inc., Defendant-Appellant,

John Doe 1 through John Doe 100, Defendants.

Thomas Whitelaw & Tyler LLP, Irvine, CA, (Joseph E. Thomas of the Bar of the State of California, admitted pro hac vice of counsel), for appellant.

Greenberg Traurig, LLP, New York (Daniel R. Milstein of counsel), and Eric V. Rowen, East Santa Monica, CA, of the Bar of the State of California, admitted pro hac vice, for respondent.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered September 22, 2009, which, in an action on two guarantees, granted plaintiff's motion for summary judgment as to liability and denied defendant's cross motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, plaintiff's motion denied, and defendant's cross motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiff is a large New York based hedge fund that invests its money in high risk transactions, including high risk real estate transactions and loans. Defendant and its affiliates, SunCal Copper Canyon, LLC (Copper Canyon) and SunCal-Southwind

JV, LLC (Southwind), are residential and commercial real estate developers that engage in high risk transactions.

In July 2005, plaintiff loaned Copper Canyon $35 million for a project in Nevada. About a year later, in May 2006, plaintiff made a $75 million revolving loan to Southwind for three projects in California. In 2007, both Copper Canyon and Southwind defaulted on their loans, prompting plaintiff to hold two nonjudicial foreclosure sales at which it bid on and obtained title to the Nevada and California properties. Plaintiff's bids were significantly lower than the outstanding debt on the properties, resulting in substantial deficiencies.

In May 2008, plaintiff commenced this action against defendant to recover the Southwind and Copper Canyon deficiencies plus interest, costs, and attorneys' fees. The action is based upon defendant having executed and delivered to plaintiff a separate carve-out guaranty in connection with each loan, in which defendant becomes liable for all or part of its affiliates' payment obligations upon the occurrence of certain events. At issue is whether defendant is liable under section 1(b)(ii)(e) of these carve-out guarantees, which states, in pertinent part, that defendant is responsible for "the outstanding principal amount of the Loan[s], and all other amounts due and owing under the Loan Documents, together with reasonable attorneys' fees, court costs and costs of the appeal" if the affiliate(s)

"admit[], in writing, its insolvency or inability to pay its debts as they become due." Plaintiff contends that certain financial reports that Southwind and Copper Canyon provided to it constituted such admissions.

The Copper Canyon documents were provided to plaintiff in accordance with the terms of the loan. They consisted of a balance sheet, an income statement, a project cost summary, a project cost detail and a general ledger for July 2007. Plaintiff claims that the balance sheet constituted a written admission because it listed Copper Canyon's cash and cash equivalents as $3,706, current assets as $191,001, and liabilities as $36,781,734.

The Southwind financial documents were provided to plaintiff in connection with Southwind's request to restructure its loan. The documents consisted of net operating income (NOI) calculations, a financial summary based upon its current capital structure, and a financial summary based upon a proposed new capital structure. The current financial summary listed Southwind's net sales proceeds as $131,436,223, total costs as $142,267,080, and current loss on the project as $17,684,533. The NOI calculations listed the purchase price of the California properties as approximately $73 million and their current value as approximately $38 million.

Plaintiff claims the only conclusion that could be drawn

from these financial documents is that the affiliates were insolvent and unable to pay their debts as they become due. The motion court agreed, reasoning that when financial statements show a borrower's liabilities exceed its assets, the borrower is effectively stating that it is insolvent.

It is well settled that a contractual provision that is "clear . . . on its face must be enforced according to the plain meaning of its terms" (*Duane Reade, Inc. v Cardtronics, LP*, 54 AD3d 137, 140 [2008]). Section 1(b)(ii)(e) is clear and requires an affiliate to actually admit in writing that it is insolvent or unable to pay its debts as they became due. This requirement was not satisfied merely because plaintiff, following its review of the data contained in the affiliates' financial reports, concluded the affiliates were unable to make their loan payments (*see Magten Asset Mgt. Corp. v Bank of N.Y.*, 15 Misc 3d 1132[A], 2007 NY Slip Op 50951[U], *4-6 [Sup Ct, NY County, May 8, 2007, Fried, J.]).

Although the affiliates' financial reports show they were experiencing financial difficulty, the statements contained in the reports were not written admissions as contemplated by section 1(b)(ii)(e) because they did not contain the express statement required by the contract. Notably, two months after plaintiff received the reports, plaintiff's attorney twice sent correspondence to the attorney for the affiliates and defendant

attempting to elicit written admissions of insolvency. Both the e-mail and the letter posed the same questions: "(i) [A]re the Southwind and Copper Canyon borrowers out of money, and (ii) will those borrowers make the loan payments that are past due and coming due this month?" It is abundantly clear that these questions were designed to extract written admissions from the affiliates. Thus, it is reasonable to conclude that plaintiff never believed that the financial reports it had already received contained the requisite written admissions, and that it needed further statements from the affiliates.

Plaintiff now contends that its questions were merely a request for clarification and it "desire[d] to give the [b]orrowers the opportunity to present all evidence available to them to avoid triggering liability under the Guarantees." This argument is inherently inconsistent with plaintiff's claim that the affiliates' financial documents contained written admissions triggering defendant's liability. If plaintiff truly believed the affiliates had made the requisite written admissions, then it would not have sent the correspondence described above. Rather, it would have promptly sought to hold defendant liable for the outstanding debt by invoking section 1(b)(ii)(e) of the guarantees.

Likewise, the fact that both affiliates defaulted on their loans is not dispositive because section 1(b)(ii)(e) is solely

concerned with whether a written admission was made, not whether an affiliate had financial problems or failed to make payments when due *(see Magten* at *5; *Atel Fin. Corp. v Quaker Coal Co.*, 132 F Supp 2d 1233, 1238 [ND Cal 2001], *affd* 321 F3d 924 [9th Cir 2003]). If the parties had intended to make defendant liable upon being in financial distress, language stating the same could have easily been included in the guarantees. Here, the guarantees did not include such language and the parties signed carve-out guarantees, rather than general guarantees.

Defendant's affirmative defense of fraudulent inducement has been rendered moot since the complaint is being dismissed.

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

ENTERED: JUNE 10, 2010

CLERK

Tom, J.P., Andrias, Catterson, Moskowitz, Acosta, JJ.

3010 Natalie Avant, Index 305777/08
Plaintiff,

-against-

Cepin Livery Corp.,,
Defendant-Respondent,

Ramon DeJesus,
Defendant,

Charlene Renee Herrera, et al.,
Defendants-Appellants.

Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis & Fishlinger, Uniondale (Gregory A. Cascino of counsel), for appellants.

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

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered August 14, 2009, which, insofar as appealed from as limited by the briefs, denied defendants-appellants' motion for summary judgment dismissing the complaint and all cross claims as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of appellants dismissing the complaint and all cross claims as against them.

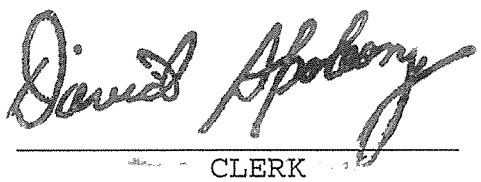
Plaintiff was a passenger in the backseat of defendant Cepin Livery Corp.'s vehicle when that vehicle struck the back of appellants' vehicle, which was stopped at a red light, before hitting another car; plaintiff sustained injuries as a result of

the accident. Under the circumstances, summary judgment in favor of appellants is warranted because when such a rear-end collision occurs, the owner and operator of the front vehicle are entitled to summary judgment on liability unless the driver of the following vehicle can provide a non-negligent explanation for the collision (*see Mullen v Rigor*, 8 AD3d 104 [2004]; *Johnson v Phillips*, 261 AD2d 269, 271 [1999]). Here, the opposition failed to provide such a non-negligent explanation (*see Grimes-Carrion v Carroll*, 13 AD3d 125 [2004]).

Contrary to the finding of the motion court, depositions are not needed since the opponents of the motion had personal knowledge of the facts (*cf.* CPLR 3212[f]), and failed to meet their obligation of laying bare their proof and presenting evidence sufficient to raise a triable issue of fact (*Morgan v New York Tel.*, 220 AD2d 728 [1995]).

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

ENTERED: JUNE 10, 2010



CLERK

Tom, J.P., Andrias, Catterson, Moskowitz, Acosta, JJ.

3011 In re Aaron B.,

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

Howard M. Simms, New York, for appellant.

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

Order of disposition, Family Court, Bronx County (Clark V. Richardson, J.), entered on or about February 7, 2007, which adjudicated appellant a juvenile delinquent upon his admission in Westchester County Family Court (transferred to Bronx County), that he committed an act that, if committed by an adult, would constitute the crime of grand larceny in the fourth degree, and placed him in the custody of the Office of Children and Family Services for a period of 18 months, unanimously reversed, on the law, without costs, and the matter remanded to Family Court, Bronx County for a new fact-finding hearing.

Appellant is entitled to vacatur of his admission because the court failed to comply with the allocution requirements of Family Court Act § 321.3(1). The allocution was inadequate because the court did not advise appellant that he had the rights to testify, call witnesses in his own behalf, and confront witnesses against him, or of the presentment agency's obligation

to prove his guilt beyond a reasonable doubt (*see Matter of David T.*, 59 AD3d 631 [2009]). Since this requirement is nonwaivable (*see* Family Ct Act § 321.3[1]), preservation is not required (*see Matter of Tyler D.*, 64 AD3d 1243 [2009]).

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

ENTERED: JUNE 10, 2010

CLERK

Tom, J.P., Andrias, Catterson, Moskowitz, Acosta, JJ.

3012 Lourdes Nieves, Index 108448/04
Plaintiff-Appellant,

-against-

Jose Castillo, et al.,
Defendants-Respondents.

Arnold DiJoseph, New York, for appellant.

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

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered March 30, 2009, which granted defendants' motion for summary judgment dismissing the complaint for failure to show serious injury, unanimously affirmed, without costs.

Defendants carried their prima facie burden regarding plaintiff's claim of permanent injuries; contrary to plaintiff's assertion, defendants' medical expert's findings in this regard were based on objective tests. In opposition, plaintiff failed to raise an issue of fact, since one of her physicians did not opine as to causation of her claimed injuries (*see Gibbs v Hee Hong*, 63 AD3d 559, 559 [2009]), the other's conclusion that the accident had aggravated a degenerative condition of her cervical spine was unexplained and speculative (*see Gorden v Tibulcio*, 50 AD3d 460, 464 [2008]), and neither addressed defendants' medical expert's normal findings regarding plaintiff's lumbar spine,

shoulder, and knee (*see Glover v Capres Contr. Corp.*, 61 AD3d 549, 549 [2009]). The medical opinions submitted in support of plaintiff's supplemental showing, based on MRIs and examinations more than four years after the accident, were too remote to be probative (*see Pou v E&S Wholesale Meats, Inc.*, 68 AD3d 446, 447 [2009]).

Defendants carried their burden regarding plaintiff's 90/180 claim based on her deposition testimony that she missed only six weeks of work (*see Williams v Baldor Specialty Foods, Inc.*, 70 AD3d 522, 522-523 [2010]; *Byong Yol Li v Canela*, 70 AD3d 584, 584 [2010]). In opposition, plaintiff failed to raise an issue of fact, since she did not submit probative evidence of causation (*see Amamedi v Archibala*, 70 AD3d 449, 450 [2010]), medical evidence of her claimed inability to perform certain daily activities (*see Weinberg v Okapi Taxi, Inc.*, __ AD3d __, 2010 NY Slip Op 3791 [May 4, 2010]), or documentation from her employer (*see Ortiz v Ash Leasing, Inc.*, 63 AD3d 556, 557 [2009]).

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

ENTERED: JUNE 10, 2010

CLERK

Tom, J.P., Andrias, Catterson, Moskowitz, Acosta, JJ.

3013 The People of the State of New York, Ind. 4463/08
Respondent,

-against-

Kevin J. Rotolo, also known as
Kevin Kearney, etc.,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Brian E. Rodkey of counsel), for respondent.

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

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

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

ENTERED: JUNE 10, 2010

CLERK

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

Tom, J.P., Andrias, Catterson, Moskowitz, Acosta, JJ.

3014
M-2634 The People of the State of New York, Ind. 58077C/04
Respondent,

-against-

Jesus Pratts,
Defendant-Appellant.

- - - -

New York City Bar Association,
Amicus Curiae.

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

Robert T. Johnson, District Attorney, Bronx (Maureen L. Grosdidier of counsel), for respondent.

Judith Whiting, New York (Lily Goetz of counsel), for amicus curiae.

Order, Supreme Court, Bronx County (John P. Collins, J.), rendered December 1, 2009, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

Defendant, a reincarcerated parole violator, is not eligible to be resentenced under the 2009 Drug Law Reform Act (L 2009, ch 56). We conclude that the 2009 DLRA, like its predecessors, "was not intended to apply to those offenders who have served their term of imprisonment, have been released from prison to parole supervision, and whose parole is then violated, with a resulting period of incarceration" (*People v Bagby*, 11 Misc 3d 882, 887 [2006]). The purpose of the DRLA resentencing provisions is to relieve prison inmates of onerous sentences of incarceration.

This defendant was relieved of his sentence of incarceration when he was paroled, and he could have remained at liberty by adhering to his parole conditions. Moreover, had he done so for two years, he could have also been relieved of his entire sentence, including parole, pursuant to Executive Law § 259-j(3-a). "If defendant had not violated his parole conditions, he would not have been in the custody of the Department of Correctional Services when he moved to be resentenced, and he would therefore have been ineligible for resentencing" (*People v Rodriguez*, 68 AD3d 676, 676 [2009]). There is no reason to believe that the Legislature intended parole violations to trigger resentencing opportunities (*see People v Mills*, 11 NY3d 527, 537 [2008]; *Bagby*, 11 Misc 3d at 887). A statutory interpretation that is "contrary to the dictates of reason or leads to unreasonable results is presumed to be against the legislative intent" (McKinney's Cons Laws of NY, Book 1, Statutes § 143).

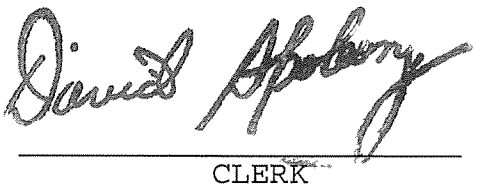
We have considered and rejected defendant's remaining arguments, including those addressed to the alleged distinctions between the 2009 DRLA and its predecessors.

M-2634 ***People v Jesus Pratts***

Motion seeking leave to appear and file brief as amicus curiae granted.

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

ENTERED: JUNE 10, 2010



CLERK

Tom, J.P., Andrias, Catterson, Moskowitz, Acosta, JJ.

3015 115-117 Nassau St., LLC. Index 600991/08
etc., et al.,
Plaintiffs-Respondents-Appellants,

-against-

Nassau Beekman, LLC, et al.,
Defendants-Appellants-Respondents.

Claude Castro & Associates, PLLC, New York (Claude Castro of counsel), for appellants-respondents.

Brill & Meisel, New York (Allen H. Brill of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Richard B. Lowe, III, J.), entered February 23, 2009, which, inter alia, granted plaintiffs' motion for summary judgment to the extent of declaring that defendants had defaulted on their obligation to close under an agreement for the sale of a premises, thereby terminating the agreement and forfeiting the down payment made thereunder, denied plaintiffs' motion to the extent that it sought a similar declaration that defendants had defaulted on their obligation to close under a related agreement for the sale of air space rights, denied defendants' cross motion for summary judgment and dismissed their counterclaims related to the premises transaction, unanimously affirmed, without costs.

Defendants defaulted under a real estate purchase and sale agreement when they failed to proceed with the closing, the time of which plaintiffs properly made "of the essence" after having

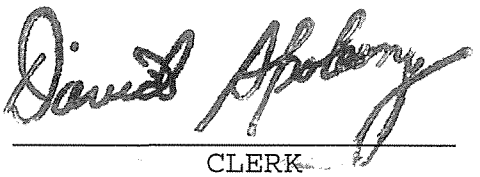
consented to defendants' previous request for two adjournments of the closing (see *Friedman v O'Brien*, 287 AD2d 311 [2001]). Plaintiffs acted within their rights by refusing to consent to an additional adjournment, and once the closing was aborted, were under no obligation to entertain further proposals from defendants, "for if defendant[s] had failed to satisfy a material element of the contract, [they were] already in default" (*Grace v Nappa*, 46 NY2d 560, 566 [1979]). Defendants' default entitled plaintiffs to declare the agreement terminated and to retain the down payment (see *Friedman*, 287 AD2d 311; *Zahl v Greenfield*, 162 AD2d 449 [1990], *lv denied* 76 NY2d 709 [1990]).

Defendants also defaulted under a separate agreement to purchase appurtenant air space rights from plaintiffs when they failed to proceed with closing on that transaction, the time of which had also been made "of the essence." However, having reviewed the record, we agree with the Supreme Court that summary judgment on that issue was precluded by a triable issue of material fact as to whether the parties entered the agreement to

purchase air space rights under a mutual mistaken belief that such rights were available (*see Matter of Gould v Board of Educ. of Sewanhaka Cent. High School Dist.*, 81 NY2d 446, 453 [1993]).

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

ENTERED: JUNE 10, 2010



CLERK

Tom, J.P., Andrias, Catterson, Moskowitz, Acosta, JJ.

3017-
3018-
3019 Thomas G. Issing, et al., Index 116265/06
Plaintiffs-Appellants, 590077/08

-against-

Madison Square Garden, Inc., etc., et al.,
Defendant.

- - - -

Beck's North American Inc., et al.,
Third-Party Plaintiffs,

-against-

Madison Square Garden Center, Inc., etc.,
Third-Party Defendant-Respondent.

Barry, McTiernan & Moore, New York (Laurel A. Wedinger of counsel), for appellants.

Tarshis & Hammerman, New York (Carol R. Finocchio of counsel), for respondent.

Judgment, Supreme Court, New York County (Louis B. York, J.), entered October 5, 2009, dismissing the complaint and third-party complaint, and bringing up for review orders, same court and Justice, entered May 6, 2009 and August 14, 2009, which, in an action for personal injuries sustained in a slip and fall on third-party defendant's premises, inter alia, granted third-party defendant's motion to strike plaintiffs' amended bill of particulars and to dismiss the complaint, unanimously reversed, on the law, without costs, the judgment vacated, third-party defendant's motion denied, and the amended bill of particulars,

complaint, and third-party complaint reinstated.

Plaintiffs properly amended their bill of particulars, without leave of the court (CPLR 3042[b]), so as to allege that the accident occurred on February 3, 2004, not March 29, 2004 as they originally had alleged in their complaint and first bill of particulars. The change concerned a factual detail in the pleading that, contrary to the motion court's conclusion, did not constitute a new claim requiring a motion for leave to amend the complaint; nor did it cause prejudice (*see Drwal v 101 Ltd. Partnership*, 271 AD2d 227 [2000]). As the dismissal of the complaint was based on the prior striking of the amended bill of particulars, our denial of the motion to strike necessarily requires denial of the motion to dismiss.

Even assuming, arguendo, that plaintiffs were required to seek leave to amend the complaint so as to allege the different accident date, the evidence contained in their cross motion for that relief was sufficient. More particularly, plaintiffs sufficiently showed, for present purposes (*see Hospital for Joint Diseases Orthopaedic Inst. v Katsikis*, 173 AD2d 210 [1991]), that the injured plaintiff slipped and was injured on a hazardous wet surface while playing indoor basketball at third-party defendant's arena and immediately sought emergency medical treatment, the records of the emergency room he visited are

corroborative of a February 3, 2004 accident date, this was the only time plaintiff had ever gone to this emergency room, and defendants had sponsored the basketball game.

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

ENTERED: JUNE 10, 2010

CLERK

Tom, J.P., Andrias, Catterson, Moskowitz, Acosta, JJ.

3020-
3021 Vladimir Gusinsky, Index No. 600426/08
Plaintiff-Respondent,

-against-

Sagi Genger, et al.,
Defendants-Appellants.

McLaughlin & Stern, LLP, New York (Alan E. Sash of counsel), for Sagi Genger and AG Real Estate Partners, L.P., appellants.

Eric R. Bernstein, P.C., New York (Alan E. Sash of counsel), for AG Holdings Company, appellant.

Covington & Burling LLP, New York (C. William Phillips of counsel), for respondent.

Judgment, Supreme Court, New York County (Jane S. Solomon, J.), entered December 31, 2009, in favor of plaintiff and against defendant AG Holdings Company in the principal amount of $3,895,744.75, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered December 22, 2009, which, inter alia, granted plaintiff's motion for partial summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

There is no merit to defendants' claim that the subject promissory note and allonge (an amendment to the note that changed the currency in which it was payable to Canadian dollars) are unenforceable under governing Nova Scotia law because they were executed for the illegal purpose of making a bribe. As the

motion court found, such claim is refuted by defendants' own admissions in pleadings and memoranda that the loan was made for a legitimate business purpose, and is otherwise conclusory and insufficient to defeat summary judgment (*see Banesto Banking Corp. v Teitler*, 172 AD2d 469 [1991]; *see also Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]). We also reject defendants' argument that the validity of the allonge turns on an issue of fact as to Nova Scotia law. The construction of foreign law is a legal question appropriate for summary resolution and can be based, inter alia, on expert affidavits interpreting the relevant legal provisions (*see Harris S.A. De C.V. v Grupo Sistemas Integrales De Telecomunicacion S.A. De C.V.*, 279 AD2d 263, 264 [2001], *lv denied* 96 NY2d 709 [2001]; *Itar-Tass Russian News Agency v Russian Kurier, Inc.*, 153 F3d 82, 92 [2d Cir 1998]). Here, both parties' experts on Nova Scotia law stated that the essential element of consideration is that each party exchange something of value, and defendants' expert did not state whether there was consideration for the allonge. Thus, based on the opinion of plaintiff's expert, the motion court correctly found that the allonge generated its own consideration, in that it could have benefitted either party depending on currency fluctuations over which they had no control

(*see generally Apfel v Prudential-Bache Sec.*, 81 NY2d 470, 476 [1993]).

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

ENTERED: JUNE 10, 2010

CLERK

Tom, J.P., Andrias, Catterson, Moskowitz, Acosta, JJ.

3022 Alayne Salvador, Index 18014/05
Plaintiff-Respondent,

-against-

The New York Botanical Garden,
Defendant-Appellant,

Verizon New York, Inc.,
Defendant.

Eustace & Marquez, White Plains (Heath A. Bender of counsel), for appellant.

Vozza & Huguenot, Bronx (Marie R. Hodukavich of counsel), for respondent.

Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered on or about December 19, 2008, which denied defendant-appellant's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

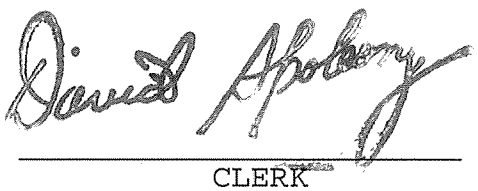
Plaintiff alleges that she was injured on appellant's premises when she ran into a telephone enclosure in a darkened hallway while chasing a young child left in her care. We previously held that the evidence showed that defendant Verizon New York, Inc. was entitled to summary judgment because it neither installed the telephone enclosure that extended from the wall nor maintained the premises and its lighting, and thus, "there [was] no causal connection between plaintiff's injury and Verizon's conduct" (*see* 71 AD3d 422, 423 [2010]).

The photographs presented in support of appellant's motion

depict an open and obvious condition, and while such a condition may negate the landowner's duty to warn, it does not obviate the owner's duty to ensure that its premises are maintained in a reasonably safe condition *(see Westbrook v WR Activities-Cabrera Mkts.,* 5 AD3d 69, 73 [2004]). Here, appellant failed to establish that the condition was not inherently dangerous as a matter of law inasmuch as a jury may reasonably find that the placement of the telephone enclosure protruding over the handrail on a ramp that inclined downward into a darkened hallway created an unsafe condition which appellant had a duty to remedy *(see Garcia v Best Value Discount Corp.,* 67 AD3d 480 [2009]). The record is inconclusive on the installation of the phone enclosure. If appellant caused or created the condition by selecting and installing the telephone enclosure, a showing of notice was not required. Nor did appellant establish, as a matter of law, that plaintiff's injuries resulted solely from her own culpable conduct *(see Sweeney v Bruckner Plaza Assoc.,* 57 AD3d 347 [2008]).

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

ENTERED: JUNE 10, 2010



CLERK

Tom, J.P., Andrias, Catterson, Moskowitz, Acosta, JJ.

3024 The People of the State of New York, Ind. 4708/07
Respondent,

-against-

Juan Carlos Baez,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered October 10, 2008, convicting defendant, upon his plea of guilty, of attempted rape in the first degree, and sentencing him to a term of 9 years, with 10 years' postrelease supervision, unanimously affirmed.

Defendant challenges the term of postrelease supervision on the ground that the crime "may" have been committed before the effective date of the legislation (Penal Law § 70.45[2-a]) that increased the periods of PRS authorized for certain sex crimes. This is the type of unlawful-sentence claim that requires preservation because it involves a factual dispute (*see People v Samms*, 95 NY2d 52, 56-58 [2000]), and we decline to review this unpreserved claim in the interest of justice. As an alternative holding, we find that the indictment and plea allocution

establish that the crime was completed after the statutory change. Accordingly, there was no ex post facto violation.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 10, 2010

CLERK

Tom, J.P., Andrias, Catterson, Moskowitz, Acosta, JJ.

3025 Clara A. Rivas, Index 300766/07
Plaintiff-Appellant,

-against-

Crotona Estates Housing Development Fund Company, Inc.,
Defendant-Respondent.

Philip Newman, PC, Bronx (Philip Newman of counsel), for appellant.

Wade Clark Mulcahy, New York (Nicole Y. Brown of counsel), for respondent.

Order, Supreme Court, Bronx County (John A. Barone, J.), entered October 30, 2009, which, in an action for personal injuries sustained when plaintiff tripped and fell in the foyer of defendant's building, granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion denied and the complaint reinstated.

The motion court improperly determined that dismissal of the complaint was warranted on the ground that the defect that allegedly caused plaintiff's accident was so trivial as to be nonactionable. The photographs, which show a missing portion of a triangular tile in the lobby floor, do not unequivocally demonstrate that that defect is trivial (*see Abreu v New York City Hous. Auth.*, 61 AD3d 420 [2009]). In the absence of evidence demonstrating the depth of the defect, and in light of

plaintiff's testimony that her injury resulted from her heel getting caught in a hole caused by a missing tile, issues of fact remain as to whether the nature of the defect was such as to constitute a tripping hazard (*see Elliott v East 220th St. Realty Co. LLC*, 1 AD3d 262, 263 [2003]).

Furthermore, the fact that plaintiff was aware of the defect prior to her injury is not relevant to the question of whether the defect was significant. The open and obvious nature of an obstacle or defect simply negates the property owner's duty to warn of it; "it does not eliminate the property owner's duty to ensure that its property is reasonably safe" (*Lawson v Riverbay Corp.*, 64 AD3d 445, 446 [2009]).

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

ENTERED: JUNE 10, 2010

CLERK

Tom, J.P., Andrias, Catterson, Moskowitz, Acosta, JJ.

3026N Sehera Food Services Inc. doing business as Apple Café, Plaintiff-Appellant, Index 108325/07

-against-

Empire State Building Company L.L.C., Defendant-Respondent.

Penn Proefriedt Schwarzfeld & Schwartz, New York (Mark I. Zelko of counsel), for appellant.

Stern Tannenbaum & Bell LLP, New York (Francine Nisim of counsel), for respondent.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered January 22, 2010, which, inter alia, denied plaintiff's motion for leave to amend its complaint to add a cause of action for fraud in the inducement, unanimously affirmed, without costs.

Supreme Court providently exercised its discretion in denying leave to amend, since plaintiff's proposed claim of fraudulent inducement was not viable (*see e.g. Thomas Crimmins Contr. Co. v City of New York*, 74 NY2d 166, 170 [1989]), as it failed to allege a material misrepresentation made with the intention of inducing reliance (*see Rivera v JRJ Land Prop. Corp.*, 27 AD3d 361, 364 [2006]). Rather, plaintiff claimed that when the subject lease was executed, individuals purchasing tickets to the Empire State Building's observation deck walked directly past the subject premises, and that defendant failed to

disclose a future plan to relocate the ticket office, diverting such traffic away from the premises. Plaintiff acknowledged that the lease contains no provision obligating defendant to direct ticket purchasers past the premises and that during lease negotiations no guarantees were made regarding the route to be followed by such purchasers. As such, plaintiff's claim is actually one for fraudulent concealment, which is also not viable, since there is no duty to disclose in a non-fiduciary, arm's length transaction between a landlord and tenant (see *Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491, 492 [2006]).

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

ENTERED: JUNE 10, 2010

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David Friedman
Rolando T. Acosta
Leland G. DeGrasse
Nelson S. Román, JJ.

Index 603336/04
1909

Pramer S.C.A.,
Plaintiff-Appellant,

-against-

Abaplus International Corporation,
et al.,
Defendants-Respondents.

Plaintiff appeals from an order of the Supreme Court, New York County (Melvin L. Schweitzer, J.), entered March 31, 2009, which dismissed all claims against VDI and Vargas, and claims sounding in fraud, breach of the implied covenant of good faith and fair dealing and unjust enrichment against Abaplus.

Baker Botts, LLP, New York (Richard B. Harper and Kristin Flood of counsel), for appellant.

Haynes and Boone, LLP, New York (Kenneth J. Rubinstein and Carmen Seto of counsel), for respondents.

ACOSTA, J.

In this appeal we are called on to revisit New York's long-arm jurisdiction statute and to determine whether a plaintiff can plead a cause of action for unjust enrichment when it has adequately pleaded that an alleged bribery induced a fraudulent agreement. For the foregoing reasons, we modify the order of Supreme Court to the extent of reinstating the claims against defendant Abaplus sounding in fraud and unjust enrichment.

Plaintiff, which provides television services to cable and satellite distributors primarily in Spain and Latin America, has its principal place of business in Argentina. Abaplus, which offers programming for television services such as those provided by plaintiff, is incorporated in the British Virgin Islands, and maintains offices and places of business in Miami, Buenos Aires, and Montevideo, Uruguay. Defendant Vargas Distribution (VDI), which was dissolved in August 2006, was a Panamanian corporation, also with offices and its principal place of business in Montevideo. Defendant Arturo Vargas, who owned VDI as well as Abaplus, is a citizen of Uruguay.

On January 29, 2001, plaintiff entered into an agreement with VDI whereby the latter would supply cable programming to plaintiff for the South American market for the years 2001 through 2003. That agreement is not presently litigated,

although plaintiff argues that it was linked with a 2002 replacement contract with Abaplus in a manner that demonstrates an ongoing bribery scheme carried out by Abaplus's principal (Vargas) and plaintiff's former CEO, Claudio Bevilacqua.

On December 16, 2002, plaintiff and Abaplus entered into an agreement replacing the VDI agreement. This agreement is the basis of the Supreme Court ruling and the present appeal. Plaintiff alleged in its complaint that Abaplus was actually part of the Vargas programming sales group, so Vargas remained the party in interest. Plaintiff further alleged that VDI provided the programming until December 31, 2002, which Abaplus continued thereafter, so in plaintiff's view, the entities are obviously related.

The 2002 agreement is written in Spanish; there is no allegation that it was entered into in New York. The parties agreed, however, to submit to the jurisdiction of New York courts to resolve any disputes arising under the agreement, and that New York law would govern any litigation.

Plaintiff alleged that Vargas and the corporate defendants engaged in a fraudulent scheme involving plaintiff's CEO whereby defendants bribed Bevilacqua to commit plaintiff to paying inflated prices for "inferior programming," a scheme that was continued under the 2002 agreement. Additionally, Abaplus was

alleged to have breached the 2002 agreement by failing to provide plaintiff with the promised programing per year, and also tried to supply plaintiff programming to which Abaplus did not own the distribution rights.

After it terminated Bevilacqua's employment on January 14, 2004, plaintiff continued an investigation that had been ongoing with respect to certain of Bevilacqua's activities during his employment. In 2006, plaintiff discovered that its contractual relationships with entities controlled by Vargas, including the present one, which had been negotiated by Bevilacqua and Vargas, had resulted from a kickback scheme.

Specifically, starting in January 2001 (i.e., during the term of the VDI contract), Bevilacqua committed plaintiff to pay for programming at highly inflated prices, and kickbacks were paid into personal bank accounts controlled by Bevilacqua. Bevilacqua utilized a Citibank account in New York, which he had opened in his niece's name but to which he retained signatory rights, to accept the kickbacks. The niece used that account while she resided in Bevilacqua's New York apartment, but stopped doing so when she left New York and returned to Argentina in early 2001.

According to plaintiff, it wired $300,000 to VDI's account at Dresdner Bank Lateinamerika AG, pursuant to the agreement, on

July 25, 2001. Plaintiff's investigation uncovered that three weeks later, VDI wired $150,000 from that same account to Bevilacqua's niece's Citibank account in New York. On November 13, 2001, plaintiff wired $100,733.11 to VDI's account at Northern Trust International, which then was credited to a Merrill Lynch account. The next day, VDI wired $50,000 to the Citibank account.

Plaintiff claimed that Bevilacqua maintained total control over negotiations and executed both agreements without involving any of plaintiff's other corporate officers, and that defendants failed to disclose to plaintiff or its shareholders that Bevilacqua had been disloyal to it and had accepted payments to his personal benefit in exchange to binding plaintiff to a commercially unreasonable agreement, and that defendants were part of the fraudulent scheme.

Plaintiff asserted five causes of action against the corporate defendants and Vargas personally: common law fraud, breach of the implied covenant of good faith and fair dealing (against only Abaplus), unjust enrichment, breach of contract (against only Abaplus) and declaratory judgement (against only Abaplus).

Motions were made by Abaplus and Vargas in November 2007, and by VDI in January 2008, to dismiss the complaint for lack of

jurisdiction and, alternatively, for failure to state a cause of action.

They averred that Vargas, a foreign citizen, transacted no business in New York, as manifested by the absence of any purposeful activity in New York bearing a substantial relationship with the transaction underlying the dispute. They further argued that Vargas did not commit a tort within New York State, or a tort outside of New York causing injury in New York. With respect to the fraud claim, defendants argued the alleged wire transfers were made by VDI and not Abaplus, and took place prior to when Abaplus signed the agreement with plaintiff.

The Special Referee's report, dated August 15, 2008, concluded that neither VDI nor Vargas individually had any contacts with New York that would provide a basis for New York long-arm jurisdiction. The report concluded that just as mailing documents or funds to New York does not rise to the level of activity contemplated as a basis for personal jurisdiction, so too, merely wiring funds into a bank account in New York fails to provide a basis for New York jurisdiction. Nor was there a basis for jurisdiction predicated on tortious conduct on the theory that Bevilacqua's niece, when she resided in New York, was a conspirator, since there was no allegation that she knew of let alone intentionally participated in any scheme involving

kickbacks that funded the Citibank account. Moreover, since defendants did not own or control that bank account, payments into the account did not invoke New York jurisdiction.

With respect to the tort and contract theories asserted in the complaint, the report concluded that allegedly improper wire transfers underlying the fraud claim were made by VDI and not Abaplus, and took place a year before Abaplus entered the subject agreement, and the complaint thus failed to state a cause of action against Abaplus. The report also noted that the implied covenant of good faith and fair dealing is not an independent claim and was encompassed within the breach of contract (and fraud) claims, which also precluded the unjust enrichment claim against Abaplus. In March 2009, Supreme Court adopted the special referee's findings and recommendations. Specifically, the court rejected plaintiff's contention at oral argument that by wiring the funds to the New York account, Vargas and VDI "directed" tortious activities in New York, and that Bevilacqua acted as a coconspirator with Vargas and VDI by receiving those funds in New York. The court further found that plaintiff failed to connect those funds with the subsequent contract with Abaplus. The court also noted that regardless of the prior contractual relations between plaintiff and VDI, the contract presently in litigation was the 2002 agreement between plaintiff and Abaplus,

particularly given the timing of the kickback payments to Bevilacqua.

The court dismissed the fraud claim against Abaplus because the complaint failed to connect the alleged bribes involving VDI and Vargas to the Abaplus contract. The court also dismissed the unjust enrichment claim against Abaplus, since there was a valid contract between plaintiff and Abaplus; moreover, the court held that the breach of contract claim subsumed the implied covenant claim against Abaplus.

Claims against Arturo Vargas and VDI

Supreme Court properly dismissed all the claims against VDI and Vargas on jurisdictional grounds. It has long been established that in order to satisfy due process, a defendant who is not physically present in a state must have minimum contacts with the state, thereby availing itself of the protections and benefits of the laws of that state, before the state may exercise in personam jurisdiction over it and thereby subject it to legal process (*International Shoe Co. v State of Washington*, 326 US 310 [1945]). Plaintiff has failed to carry its burden of establishing personal jurisdiction over VDI and Vargas under New York's long-arm statute (*see O'Brien v Hackensack Univ. Med. Center*, 305 AD2d 199 [2003]).

CPLR 302 codifies the basis for in personam jurisdiction in

New York against nondomiciliaries. The salient consideration, again, is whether the assertion of jurisdiction comports with due process (*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 216-219 [2000]). Even if a defendant has engaged in purposeful acts in New York, there must also exist a substantial relationship between those particular acts and the transaction giving rise to the plaintiff's cause of action (*McGowan v Smith*, 52 NY2d 268, 272 [1981]). The greater the distance between the transaction giving rise to the injury and the defendant's New York contacts, the less likely will there be a basis for New York jurisdiction.

CPLR 302(a)(1) allows for New York jurisdiction when the defendant transacts any business within the state or contracts anywhere to supply goods or services in the state and the claim arises out of that transaction. This has typically contemplated an ongoing business relationship between the parties, with some New York contacts. The focus is on the contacts between the nonresident defendant and the business centered in New York (*Corporate Campaign v Local 7837, United Paperworkers Intl. Union*, 265 AD2d 274 [1999]).

CPLR 302(a)(1) also creates New York jurisdiction over any party whose agent undertakes certain acts. Notably, it must be the *defendant's* agent. The plaintiff may not rely on its own activity, or the activity of *its* agent, as a predicate for

jurisdiction over the defendant. By merely accepting funds from, or placing an order with, the defendant, the plaintiff's agent does not become the defendant's agent (*Barington Capital Group v Arsenault*, 281 AD2d 166 [2001]). Moreover, claims against a corporate defendant, if jurisdictionally viable, do not provide a basis for personal jurisdiction over a corporate official or employee who acts on behalf of the corporation (*see Laufer v Ostrow*, 55 NY2d 305 [1982] [no personal jurisdiction over company president in individual capacity]).

In the instant action, none of the parties to this litigation has a New York presence, and neither the 2001 contract with VDI nor the 2002 contract with Abaplus called for the delivery of goods or services in New York. The only straw grasped by plaintiff to invoke the jurisdiction of New York courts over VDI and Vargas is the allegation that VDI deposited bribes into a New York bank account purportedly controlled by plaintiff's former agent, which, by inference, were intended to produce a subsequent corrupt 2002 contract with Abaplus, a Vargas-controlled entity.

Preliminarily, there are no allegations that Vargas personally conducted any transaction in New York, notwithstanding

his possible corporate affiliation, so jurisdiction cannot be obtained over him as an individual (*Laufer v Ostrow*, 55 NY2d 305, *supra*).

With respect to the jurisdictional predicate for VDI, notwithstanding the possible fact that it and Abaplus had common ownerships, they were separate entities, so payments by one could not be imputed to the other. Plaintiff argues that Abaplus merely continued the existing corrupt relationship with Bevilacqua, so the New York jurisdictional link with VDI, existing by virtue of its payments to Bevilacqua's New York account, should extend also to the successor contract with Abaplus.

The principal flaw in this reasoning is that the mere payment into a New York account does not alone provide a basis for New York jurisdiction (*Baptichon v Nevada State Bank*, 304 F Supp2d 451 [ED NY 2004], *affd* 125 Fed Appx 374 [2d Cir 2005]; *Daewoo Intl [Am.] Corp. v Orion Eng'g & Serv*, 2003 US Dist LEXIS 18696, 2003 WL22400198 [SD NY 2003]), especially when all aspects of the transaction occur out of state (*Continental Field Serv. Corp. v ITEC Intl.*, 894 F Supp 151 [SD NY 1995]), absent more extensive New York banking relating to the transaction in issue (*see Indosuez Intl. Fin. v National Reserve Bank*, 98 NY2d 238 [2002]). The due process considerations underlying long-arm

jurisdiction are thus not invoked. In other words, there is no reasonable basis to conclude that because one defendant made certain payments into a personal bank account allegedly controlled by Bevilacqua in New York, any or all defendants should have expected to be subjected to a lawsuit in New York by plaintiff over a foreign contract providing for foreign services involving parties who are all foreign to New York.

CPLR 302(a)(2) invokes New York jurisdiction when the defendant has allegedly committed a tortious act in New York. CPLR 302(a)(3) allows for New York jurisdiction when an out-of-state tort causes injury within New York. Neither of these jurisdictional predicates is satisfied.

To find that a defendant has committed a tortious act in New York, our courts have traditionally required the defendant's presence here at the time of the tort (*Kramer v Vogl*, 17 NY2d 27 [1966]; *see also Longines-Wittnauer Watch Co. v Barnes & Reinecke*, 15 NY2d 443 [1965], *cert denied sub nom. Estwing Mfg. Co. v Singer*, 382 US 905 [1965]), a requirement not satisfied even when the instrument of the tort itself is in New York (*Bauer Indus. v Shannon Luminous Materials Co.*, 52 AD2d 897 [1976] [document containing fraudulent misrepresentations received in New York insufficient]). Moreover, contract claims do not constitute a tortious act within the meaning of the statute

(*Fantis Foods v Standard Importing Co.*, 49 NY2d 317, 324 [1980]).

Plaintiff's theory of a conspiracy to perpetrate fraud, which had a New York presence, is unavailing. First, the mere conclusory claim that an activity is a conspiracy does not make it so (*Lamarr v Klein*, 35 AD2d 248 [1970], *affd* 30 NY2d 757 [1972]), especially when the complaint fails to establish that the alleged coconspirators knew their act would have an affect in New York (*Marie v Altshuler*, 30 AD3d 271, 272 [2006]). In any event, the sole strand connecting the putative conspiracy to New York is the Citibank account. Insofar as can be ascertained from the complaint, the legal owner of the Citibank account was Bevilacqua's niece, about whom there are no allegations, so that there is no basis to conclude that she was a coconspirator. Even the allegation that Bevilacqua actually controlled the account adds no salience in the absence of evidence as to where the deposits were made from, or any consequential results in New York. The 2002 Abaplus contract itself relates to out-of-state performance.

Nor is there a basis to invoke New York jurisdiction on the theory that a tort was committed by defendants out of state that caused an in-state injury. As already noted, contract claims are not torts for such purposes (*Fantis Foods*, 49 NY2d at 324), leaving only the fraud claim as the potential tort. However,

there are no allegations as to where the out-of-state tortious conduct occurred. The situs of the injury, for long-arm purposes under CPLR 302(a)(3), is where the event giving rise to the injury occurred (*Marie*, 30 AD3d at 272-273; *Hermann v Sharon Hosp.*, 135 AD2d 682 [1987]). Moreover, for commercial torts causing economic damages, losses within New York will be necessary to establish a jurisdictional predicate. For example, in *Fantis Foods*, a New York buyer purchased cheese from a Greek supplier, which cargo was allegedly converted by the supplier at sea before it could be delivered for sale to Chicago. The Court held that there was no situs of injury in New York for purposes of long-arm jurisdiction (*cf. Sybron Corp. v Wetzel*, 46 NY2d 197 [1978] [where a New Jersey company tried to steal trade secrets from a New York manufacturer, causing loss of sales in New York]). Simply put, without any presence, business, contacts or sales in New York, and no sales in New York, plaintiff has not suffered any injury here.

Claims against Abaplus

Supreme Court erred in dismissing the fraud and the unjust enrichment claims against defendant Abaplus, which agreed to jurisdiction in New York.

Plaintiff properly stated a cause of action for fraud against Abaplus. In making such a claim, the circumstances

alleging the fraud must be stated in detail (CPLR 3016[b]). To meet this requirement, a plaintiff must bring forth facts sufficient to permit a reasonable inference of the alleged fraud (*see Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486 [2008]). In accepting the facts alleged by plaintiff as true, as we must in the context of a CPLR 3211(a)(7) motion to dismiss, plaintiff's amended complaint has alleged with specificity the elements of fraud, namely, "material misrepresentation of fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff, and damages" (*Art Capital Group, LLC v Neuhaus*, 70 AD3d 605, 607 [2010]).

Plaintiff has alleged that Abaplus participated in a scheme with Bevilacqua whereby defendants made improper payments to Bevilacqua, in exchange for which Bevilacqua committed plaintiff to a contract to pay grossly inflated prices for cable television programming. Plaintiff was unaware of the disloyalty of its chief executive officer, who was harming the company to enrich himself. Defendants, with the assistance of Bevilacqua, allegedly misrepresented to plaintiff the true consideration for the 2001 and 2002 agreements, and according to plaintiff, had it known the truth about the nature of Bevilacqua's relationship with Vargas, it would not have entered into any agreement with Abaplus.

We disagree with the dissent that the facts of this case fall within the "special facts" doctrine, which holds that absent a fiduciary relationship between parties, there is nonetheless a duty to disclose when one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair (*see Swersky v Dreyer & Traub*, 219 AD2d 321, 327 [1996]). Plaintiff sufficiently pleaded the elements of the fraudulent scheme, i.e., that Abaplus conferred a benefit on plaintiff's unfaithful employee to influence his conduct to the detriment of plaintiff. We note that the fraud cause of action based on plaintiff's bribery-related allegations arises from the common law of torts (*see Sardanis v Sumitomo Corp.*, 279 AD2d 225, 229-230 [2001]; *accord Niagara Mohawk Power Corp. v Freed*, 265 AD2d 938, 939-940 [1999] [sustaining a fraud cause of action based on alleged bribery by the plaintiff's employee]). We adhere to our prior holding in *Sardanis* that a private right of action is not implied under the commercial bribery provisions of the Penal Law, and the dissent does not disagree with *Sardanis* on this point but ignores the plain language of *Sardanis* that such a private right of action does exist under tort law (279 AD2d at 229-230).

Were the "special facts" doctrine applicable, plaintiff's claim of commercial bribery would nonetheless be viable. Here, if proven as alleged, both plaintiff's former CEO and Abaplus had

superior knowledge of essential facts that rendered the contract inherently unfair to plaintiff. Specifically, as noted, plaintiff alleges that Abaplus bribed plaintiff's CEO to commit plaintiff to paying grossly inflated prices for programming, including some to which Abaplus did not even own the distribution rights. The dissent misses the mark by placing plaintiff's former CEO on the opposite end of the contractual agreement with Abaplus. This is because the facts as alleged demonstrate that the CEO's actions were not for the benefit of his employer, but rather for his own personal benefit and that of Abaplus. We do not believe that his fraudulent acts should be imputed to his employer, who was not aware of the bribery scheme.

Contrary to Abaplus's argument, the claim of fraud is independent of the breach of contract claim inasmuch as plaintiff alleged that Abaplus breached a duty of reasonable care distinct from its contractual obligations by fraudulently inducing plaintiff to enter agreements (see *Niagara Mohawk*, 265 AD2d at 939-940). A "defendant may be liable in tort when it has breached a duty of reasonable care distinct from its contractual obligations, or when it has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316 [1995]).

Supreme Court also erred in dismissing plaintiff's unjust enrichment claim against Abaplus. Contrary to the court's holding, a claim for unjust enrichment is not duplicative of a breach of contract claim where the plaintiff alleges that the contracts were induced by fraud (*Niagara Mohawk*, 265 AD2d at 939). In other words, the equitable remedy of unjust enrichment will not be precluded in the event it is determined that the contracts are voided as having been induced by fraud.

Supreme Court correctly dismissed plaintiff's cause of action of breach of the implied covenant of good faith and fair dealing, as subsumed in the breach of contract action. We disagree with the dissent that the breach of implied covenant and breach of contract claims are discrete. Both are based on the same underlying facts (*see e.g. Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [2010]).

Accordingly, the order of Supreme Court, New York County (Melvin L. Schweitzer, J.), entered March 31, 2009, which dismissed all claims against VDI and Vargas, and claims sounding in fraud, breach of the implied covenant of good faith and fair dealing and unjust enrichment against Abaplus, should be

modified, on the law, the fraud and unjust enrichment claims against Abaplus reinstated, and otherwise affirmed, without costs.

All concur except Andrias, J.P. and DeGrasse, J. who dissent in part in an Opinion by DeGrasse, J.

DeGRASSE, J. (dissenting in part)

This appeal is from Supreme Court's dismissal of plaintiff's claims against defendants Vargas Distribution (VDI) and Arturo Vargas on the ground of lack of personal jurisdiction. Plaintiff also appeals from the court's dismissal of its claims sounding in fraud, unjust enrichment and breach of the implied covenant of good faith and fair dealing against defendant Abaplus for failure to state a cause of action. I agree with the majority's conclusion that Supreme Court lacked personal jurisdiction over VDI and Vargas. I disagree, however, with the majority's finding that the complaint states causes of action sounding in fraud and unjust enrichment. I further disagree with the majority's conclusion that the cause of action for breach of the implied covenant of good faith and fair dealing was properly dismissed.

This action involves contracts by which VDI and Abaplus were to supply cable television programming to plaintiff. It is alleged in the amended complaint that Abaplus paid and concealed bribes to Claudio Bevilaqua, plaintiff's former chief executive officer, in order to induce him to authorize plaintiff's payment of inflated prices for the programming.

To state a claim for fraud, a plaintiff must allege misrepresentation or concealment of a material fact, falsity, scienter by the wrongdoer, justifiable reliance on the deception,

and resulting injury (*Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495 [2006]). As set forth above, plaintiff's fraud claim is based on an allegation of fraudulent concealment. Absent a fiduciary relationship between the parties, a duty to disclose arises only under the "special facts" doctrine, where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair (*Jana L. v West 129th St. Realty Corp.*, 22 AD3d 274, 277 [2005]). The majority misreads the instant complaint in stating that plaintiff alleges that defendants "misrepresented to plaintiff the true consideration for the 2001 and 2002 agreements." Rather, plaintiff bases its fraud claim upon the allegation that "[i]n reliance on Defendants' material omission (i.e., the failure to disclose that Bevilaqua was accepting bribes from Vargas and/or the companies he controlled), Pramer continued operating under the agreements negotiated by Bevilaqua and Vargas." In light of this core allegation, plaintiff's fraud claim falls squarely within the special facts doctrine set forth above.

In any event, the fraud claim was properly dismissed because it is alleged to be based on commercial bribery. Here, plaintiff relies upon *Niagara Mohawk Power Corp. v Freed* (265 AD2d 938 [1999]), a case the majority also cites for the proposition that a private remedy for an employer harmed by the bribery of its

employee exists under tort law. In *Sardanis v Sumitomo Corp.* (279 AD2d 225 [2001]), however, this Court expressly disagreed with *Niagara Mohawk*, holding that a private right of action does not exist under the commercial bribery provisions of the Penal Law (*id.* at 229-230). Despite *Sardanis*, the majority posits that the fraud cause of action based on plaintiff's "bribery-related allegations" arises in common-law tort. In the same paragraph, however, the majority purports to adhere to *Sardanis* by acknowledging that a private right of action is not implied under the commercial bribery provisions of the Penal Law. Hence, the majority seems to be saying that the actionability of commercial bribery depends on whether a complaint invokes the common law or the Penal Law. I submit that under *Sardanis* commercial bribery cannot be maintained in tort in either case. Here, I take judicial notice of the complaint that was part of the record before the *Sardanis* Court.[1] That pleading does not set forth the Penal Law or any other statute as a basis for its commercial bribery claim. Nevertheless, the *Sardanis* Court reached the conclusion alluded to above. Based on the foregoing, I submit that commercial bribery is not actionable as a species of fraud (*see Wint v ABN Amro Mtge. Group, Inc.*, 19 AD3d 588 [2005]). The

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[1]This Court may take judicial notice of undisputed court records and files (*Matter of Khatibi v Weill*, 8 AD3d 485 [2004]).

conclusion I reach would not leave plaintiff without redress for the alleged bribery. A remedy can be found in the cause of action for breach of the implied covenant of good faith and fair dealing discussed below.

I also disagree with the majority's conclusion that Supreme Court erred in dismissing the unjust enrichment claim against Abaplus. A plaintiff cannot maintain an unjust enrichment claim while simultaneously alleging the existence of an express contract covering the same subject matter (*see MJM Adv. v Panasonic Indus. Co.*, 294 AD2d 265 [2002], *citing Clark-Fitzpatrick, Inc. v Long Is. R. R. Co.*, 70 NY2d 382, 388-389 [1987]). In this instance, plaintiff alleges the existence of a contract that is also admitted in Abaplus's answer to the amended complaint. The majority reasons that the equitable remedy of unjust enrichment will not be precluded in the event it is determined that the contracts are voided as being induced by fraud. Plaintiff, however, seeks no such equitable relief. Instead, plaintiff seeks a declaration that the contract has been terminated pursuant to its own provisions. This relief is based on contract.

I also part company with the majority insofar as it concludes that the cause of action based on a breach of the implied covenant of good faith and fair dealing was properly

dismissed. Under New York law, the implied covenant embraces a pledge that no party to a contract shall do anything that will have the effect of destroying or injuring another party's right to receive the fruits of the contract (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). The covenant of "good faith and fair dealing . . . is breached when a party acts in a manner that - although not expressly forbidden by any contractual provision - would deprive the other party of receiving the benefits under their agreement" (*Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 267 [2008], *lv dismissed* 12 NY3d 748 [2009]). Supreme Court dismissed plaintiff's implied covenant of good faith and fair dealing claim, finding it to be subsumed by the breach of contract cause of action. This was error. Plaintiff's breach of covenant claim is based upon the alleged bribery scheme, while the contract claim recites discrete contractual provisions involving the amount of programming provided by Abaplus, as well as distribution rights. Accordingly, I would modify Supreme Court's order only to the

extent of reinstating the breach of implied covenant of good faith and fair dealing cause of action.

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

ENTERED: JUNE 10, 2010

CLERK