SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 21, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

2655 Ben Umeze, M.D., Index 25626/03
Plaintiff-Respondent,

-against-

Fidelis Care New York, et al.,
Defendants-Appellants.

Sedgwick, Detert, Moran & Arnold, LLP, New York (John T. Seybert of counsel), for appellants.

Law Offices of Joseph N. Obiora, Jamaica (Joseph N. Obiora of counsel), for respondent.

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about January 7, 2009, which granted defendants' motion pursuant to CPLR 3216 to dismiss the complaint for failure to prosecute to the extent of directing plaintiff to resume prosecution of the action within 10 days of service of the order with notice of entry, affirmed, without costs.

"When served with a 90-day demand pursuant to CPLR 3216, it is incumbent upon a plaintiff to comply with the demand by filing a note of issue or by moving, before the default date, to either vacate the notice or extend the 90-day period" (*Primiano v Ginsberg*, 55 AD3d 709, 709 [2008]; *see Serby v Long Is. Jewish Med. Ctr.*, 34 AD3d 441 [2006], *lv denied* 8 NY3d 805 [2007]).

Here, having done neither, to avoid dismissal, this pro se plaintiff was required to show both a "justifiable excuse for the delay and a good and meritorious cause of action" (CPLR 3216[e]). Furthermore, CPLR 3216 "is extremely forgiving of litigation delay" (*Baczkowski v Collins Constr. Co.*, 89 NY2d 499, 503 [1997]), and "[t]he nature and degree of the penalty to be imposed on a motion to dismiss for want of prosecution is a matter of discretion with the court" (*Espinoza v 373-381 Park Ave. S., LLC*, 68 AD3d 532, 533 [2009]).

Based on the foregoing principles and under the circumstances presented, the motion court did not abuse its discretion in granting the motion to dismiss conditioned on plaintiff resuming prosecution of the action within 10 days of service of the order with notice of entry. Plaintiff's attempts to obtain counsel twice during this litigation indicate that there was no intent to abandon the action (*see e.g. Di Simone v Good Samaritan Hosp.*, 100 NY2d 632, 633-634 [2003]). This includes that, in response to the 90-day notice, plaintiff contacted an attorney who, in a September 15, 2008 letter, stated that his firm was considering substituting for the "pro se plaintiff" and requested an additional 30 days to decide whether to take the case. Thus, plaintiff clearly met with an attorney in an attempt to resume this litigation. There is also evidence in the record that counsel for the defense refused to call back

plaintiff's initial counsel. Contrary to defendants' contention, the "complaint, verified by plaintiff on the basis of personal knowledge and which detailed [the defendants'] acts of negligence, was a sufficient affidavit of merits" (*Salch v Paratore*, 60 NY2d 851, 852-53 [1983]).

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

CATTERSON, J. (dissenting)

I must respectfully dissent because in my opinion, the motion court improvidently exercised its discretion by allowing the plaintiff additional time after he failed to file a note of issue in response to the defendants' 90-day demand, and failed to proffer a justifiable excuse for not so doing.

Specifically, I disagree with the majority's reliance on the Court of Appeals' observation in Baczkowski v. Collins Constr. Co. (89 N.Y.2d 499, 503, 655 N.Y.S.2d 848, 850, 678 N.E.2d 460, 462 (1997)) that CPLR 3216 is "extremely forgiving of litigation delay." The Court's observation is made upon the recitation of precisely those statutory requirements - filing the note of issue or tendering a justifiable excuse for not so doing – with which the plaintiff in this case failed to comply.

On October 21, 2003, the plaintiff, a provider physician, commenced this action pro se alleging, inter alia, breach of contract against defendant Fidelis, a health management organization and other defendants. On or about November 3, 2003, the defendants entered their notice of appearance. For approximately the next five years, the action remained dormant except for one set of interrogatories served by the defendants on the plaintiff.

On June 18, 2008, the plaintiff received notice pursuant to CPLR 3216 demanding that he resume prosecution within 90 days by

filing a note of issue. The 90-day period expired on September 16, 2008. It is undisputed that during those 90 days, the plaintiff did not file a note of issue.

On September 16, 2008, the defendants moved to dismiss for want of prosecution. Two days later, the defendants received a letter from an attorney writing on behalf of the plaintiff, requesting an additional 30 days in order to "determine whether or not to accept [plaintiff's] retainer."

On October 8, 2008, the plaintiff filed a pro se opposition to the motion to dismiss alleging, inter alia, that the defendant was responsible for any delay. On January 7, 2009, the court granted the defendant's motion to dismiss for failure to prosecute unless within 10 days of service of the order, the plaintiff resumed prosecution. This appeal by the defendants followed. For the reasons set forth below, I believe the court should have dismissed the action unconditionally.

It is well settled that an action may be dismissed for want of prosecution if: (1) at least one year has elapsed since the joinder of issue; (2) the defendant serves the plaintiff a written demand for a note of issue, which is to be filed within 90 days; and (3) the plaintiff fails to serve and file such note of issue. See C.P.L.R. 3216(b).

In this case, it is undisputed that all of the foregoing conditions were satisfied. Moreover, the plaintiff failed to

move before the default date to vacate the demand notice or extend the 90-day period which would have also avoided dismissal. See Primiano v. Ginsberg, 55 A.D.3d 709, 865 N.Y.S.2d 639 (2d Dept. 2008).

Accordingly, the plaintiff had one more opportunity to stave off dismissal pursuant CPLR 3216(e) by showing both a "justifiable excuse for the delay and a good and meritorious cause of action." CPLR 3216 (e); see also Turman v. Amity OBG Assoc., 170 A.D.2d 668, 668-69, 567 N.Y.S.2d 87, 88 (2d Dept. 1991) ("plaintiffs, to avoid the sanction of dismissal, were required to demonstrate a justifiable excuse for the delay in properly responding to the 90-day notice and that they had a meritorious cause of action"), citing Papadopoulas v. R.B. Supply Corp., 152 A.D.2d 522, 543 N.Y.S.2d 483 (2d Dept. 1989). Moreover, I believe, at this stage, the plaintiff was also obliged to show a justifiable excuse for the general five-year delay. See Baczkowski, 89 N.Y.2d at 503, 655 N.Y.S.2d at 851; see also Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3216:11 (previous delay "will be relevant only if [...] the plaintiff has failed to file the note of issue within the 90 days"); Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3216:25 ("if the plaintiff has not served and filed the note of issue within the 90-day period . . . we have at hand the situation in which delay prior to the

filing of the note of issue may be considered by the court on the CPLR 3216 motion").

In my opinion, the plaintiff failed to tender a justifiable excuse for both ignoring the 90-day demand notice and for the overall five-year delay period. During the 90-day demand period, the plaintiff's only action of record was a letter, dated September 15, 2008, from an attorney to the defendants' attorney requesting an additional 30 days in order to decide *whether to accept* the plaintiff's case. The letter, even though dated the day before the 90-day deadline expired, was received 2 days *after* the 90 days had elapsed and the defendants' motion to dismiss had been filed. In any event, even if the letter had arrived before the deadline, it could not be considered either as an application to extend the deadline or as providing a justifiable excuse for not filing the note of issue since the author did not represent the plaintiff and any such application or explanation must be filed with the court. See Davies v. Slotkin, 251 A.D.2d 533, 674 N.Y.S.2d 728 (2d Dept. 1998), lv. denied, 92 N.Y.2d 814, 683 N.Y.S.2d 174, 705 N.E.2d 1215 (1998) (plaintiff did not have an excuse where he sent the note of issue to the defendants before the expiration of 90 days but the note was never filed with the court); Stein v. Wainwright's Travel Serv., 92 A.D.2d 961, 460 N.Y.S.2d 659 (3d Dept. 1983).

Plaintiff tendered no excuse whatsoever for the failure to

respond to the 90-day notice. Nor did the plaintiff provide any justifiable excuse for the pre-existing five-year delay. The plaintiff merely maintained that he was not informed of the defendants' change of counsel which stalled his discovery efforts, and that he discovered the change when he went to the courthouse in August 2005, two years after commencing the action. This account is roundly refuted by the letter to plaintiff, of January 12, 2005, from the defendants' new counsel, which clearly included counsel's contact information in the letterhead. The plaintiff also claims that the defendants failed to comply with discovery demands. While this has been recognized as a justifiable excuse (see Davis v. Goodsell, 6 A.D.3d 382, 384, 774 N.Y.S.2d 568, 570 (2d Dept. 2004)), here, the plaintiff has failed to produce any actual evidence of alleged noncompliance; nor has he proffered any evidence of an attempt to avail himself of any of the available remedies, for example, moving to compel deposition. See Kent v. Maschio, 26 A.D.2d 644, 644, 272 N.Y.S.2d 403, 404 (2d Dept. 1966) (dismissing action where the plaintiff alleged that delay was due to the defendant's "uncooperative attitude," but provided no evidence thereof). In Baczkowski, the Court of Appeals held unequivocally that, "[w]ere courts routinely to deny motions to dismiss even after plaintiff has ignored the 90-day period without an adequate excuse, the procedure established by CPLR 3216 would be rendered

meaningless." 89 N.Y.2d at 505, 655 N.Y.S.2d at 851-852. In that case, the period of delay was five years, as it is in this case.

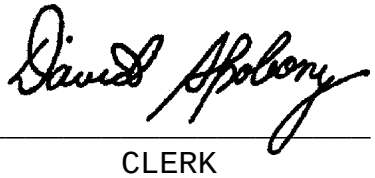
In my opinion, the plaintiff's unjustified delay and failure to respond to the 90-day demand are sufficient to warrant dismissal of the action unconditionally. It is nonetheless worth noting that plaintiff made no attempt to show a "good and meritorious" cause of action either. The plaintiff maintains in conclusory fashion that he "has substantial bona fide claims against defendants and has supportive evidence to prevail at trial." He also argues that his verified complaint is a sufficient showing of a meritorious cause of action. While it may be true that, on occasion, a verified complaint may be a sufficient affidavit of merits (Salch v. Paratore, 60 N.Y.2d 851, 852-53, 470 N.Y.S.2d 138, 138, 458 N.E.2d 379, 379 (1983)), in my opinion, this is not one of those occasions. First, the plaintiff relies on Hansel v. Lamb (227 A.D.2d 838, 642 N.Y.S.2d 407 (3d Dept. 1996)), for his argument that a verified complaint is a sufficient affidavit of merits. In that case, the Third Department relied on both the verified complaint and deposition testimony to deny dismissal. Rather, this action appears to be of the type we considered in Sortino v. Fisher, where we observed that "it is almost invariably true that neglected actions are of

little or no merit." 20 A.D.2d 25, 28, 245 N.Y.S.2d 186, 190 (1st Dept. 1963).

Finally, although the plaintiff has been pro se for the majority of the elapsed time, this is no excuse for his delay. See Katz v. Robinson Silverman Pearce Aronsohn & Berman, 277 A.D.2d 70, 72, 717 N.Y.S.2d 13, 15 (1st Dept. 2000) (dismissing the pro se plaintiff's action for failure to file a note of issue); Reine v. Port Auth. of N.Y. & N.J., 234 A.D.2d 138, 650 N.Y.S.2d 736 (1st Dept. 1996) (dismissing pro se plaintiff's action for failure to show a meritorious claim). The liberal construction allowed pro se litigants (see, e.g., Matter of Zelodius C. v. Danny L., 39 A.D.3d 320, 833 N.Y.S.2d 470 (1st Dept. 2007)), does not absolve a plaintiff of his or her duty to actually prosecute the case. See Yule v. Comerford, 140 A.D.2d 981, 982, 529 N.Y.S.2d 653, 653 (4th Dept. 1988) (holding that the trial court erred when it did not insist on an affidavit of merits because the plaintiff was pro se).

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

ENTERED: SEPTEMBER 21, 2010



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

2180 The People of the State of New York, Ind. 5730/08
Appellant,

-against-

Jason Mack,
Defendant-Respondent.

Robert M. Morgenthau, District Attorney, New York (Marc Krupnick of counsel), for appellant.

Alice L. Fontier, New York for respondent.

Order, Supreme Court, New York County (Renee A. White, J.), entered on or about February 17, 2009, which, upon an inspection of grand jury minutes, granted defendant's motion to dismiss an indictment charging sexual abuse in the first degree, affirmed.

Defendant was charged with sexual abuse in the first and third degrees under a prior indictment. By the first-degree sexual abuse count it was alleged that on March 22, 2002 defendant subjected another to sexual contact by forcible compulsion.[1] Upon defendant's motion and after inspecting the grand jury minutes, the court reduced the first-degree sexual abuse charge to another charge of third-degree sexual abuse. The court based its determination upon a finding that the evidence was insufficient to establish the element of forcible compulsion.

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[1]This third-degree sexual abuse count relates to a subsequent incident involving a different complainant.

The case based on the March 22, 2002 incident was resubmitted to a new grand jury and defendant was again charged with first-degree sexual abuse by way of the instant one-count indictment. This appeal stems from the court's dismissal of the indictment on the same ground, i.e., insufficient evidence of forcible compulsion.[2]

It is alleged that defendant rubbed his penis against the then 14-year old complainant's lower back while standing behind her on a crowded subway car. The complainant testified that she felt "weird movements" which stopped each of the three times she turned around. She "kind of figured it was just because the train was moving really fast and it was really crowded." When asked if she tried to get away from defendant, the complainant further testified that she couldn't because the train was crowded and seats were to her immediate right. The complainant also gave the following testimony: "I felt the movement. I didn't know actually what was going on until I was ready to leave the train, and I pulled my sleeve down and I wiped myself and I noticed that there was semen on my jeans and on my coat."

The standard on a motion to dismiss an indictment on the ground that the evidence before the grand jury was not legally sufficient to establish the offense charged is whether there was

[2]The ruling leaves intact the court's reduction of the charge to third degree sexual abuse under the earlier indictment.

"competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof" (*People v Warner-Lambert Co.*, 51 NY2d 295, 298-299 [1980], *cert denied* 450 US 1031 [1981]; CPL 70.10[1]). Forcible compulsion, as an element of a sex offense, means "(a) use of physical force; or (b) a threat, express or implied, which places a person in fear of immediate death or physical injury to himself, herself or another person, or in fear that he, she or another person will immediately be kidnapped" (Penal Law § 130.00[8]). The People posit that defendant used "physical force and threat of force" to commit the act of sexual abuse. We thus assume that the People have invoked both statutory theories.

While the conduct described in the grand jury presentation was reprehensible, the evidence was legally insufficient to establish the use of physical force. Instead, it established the use of stealth to commit the crime. We base this conclusion upon the complainant's testimony that defendant stopped making the movements each time she turned around as well as her testimony that she did not know what had occurred until she discovered the semen on her clothing. Citing *People v Del Campo* (281 AD2d 279 [2001], *lv denied* 97 NY2d 640 [2001]), the People argue that defendant used physical force by pinning the complainant in the crowded subway car so that she could not move. *Del Campo* is plainly distinguishable because the defendant in that case

forcibly limited his victim's freedom of movement by lifting her off the ground (*id.*). That is a far cry from the furtive behavior described by the complainant in this case. We, therefore, reject the People's theory that legally sufficient evidence of physical force was presented to the grand jury.

Equally unavailing is the theory that defendant used his superior size and age to intimidate the complainant. Although the complainant testified in conclusory fashion that she felt threatened, the grand jury was not presented with detailed facts to support the claim (*cf. People v Mirabal*, 278 AD2d 526, 527 [2000]). More to the point, the grand jury heard no evidence from which it could have been inferred that the complainant was placed in fear of immediate death, physical injury or kidnapping as required by Penal Law § 130.00(8).

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

CATTERSON, J. (dissenting)

In my opinion, the evidence in this case may not be sufficient to convict the defendant after trial. However, the evidence presented to the grand jury was nonetheless legally sufficient to establish the element of forcible compulsion, and hence the court erred in reducing the charge of first-degree sexual abuse. Therefore, I respectfully dissent. The Court of Appeals has held that, when reviewing the dismissal of an indictment, the standard of "legally sufficient means prima facie, not proof beyond a reasonable doubt." See People v. Mayo, 36 N.Y.2d 1002, 1004, 374 N.Y.S.2d 609, 609, 337 N.E.2d 124, 124 (1975). The Court has also held that, an indictment cannot be dismissed merely because there may not be sufficient evidence to establish the defendant's guilt at trial. In People v. Jennings (69 N.Y.2d 103, 114, 512 N.Y.S.2d 652, 657, 504 N.E.2d 1079, 1084 (1986)), the Court held that in granting dismissal of the indictments, the reviewing Justice had erroneously applied a higher standard than required to determine whether the People's evidence was sufficient.

In this case, two grand juries on two separate occasions handed up indictments on the count of first-degree sexual abuse after hearing, inter alia, testimony that the defendant purposely chose subways at rush hour when he was able to "rub up against women . . . while [the train] was crowded."

According to the testimony elicited in the second grand jury presentation, the 14-year-old victim was on a crowded subway train when she felt defendant making strange movements behind her and touching her lower back. Each time she turned around to look at defendant, he would temporarily stop moving. She tried to move away from defendant, but was unable to do so because seats and other passengers were in her way. After the incident was over, she found semen (subsequently linked to defendant) on her clothing. The defendant, 29 years old at the time of the incident, was 5'9" tall, and weighed at least 300 pounds -- approximately twice the victim's weight and seven inches taller than she.

In a prior order, not at issue on appeal, the court reduced the charge of first-degree sexual abuse to third-degree sexual abuse. The People re-presented the case to the grand jury and obtained a new indictment for first-degree sexual abuse. The court dismissed the indictment on the ground that the evidence was insufficient to establish the element of forcible compulsion.

Pursuant to CPL 70.10(1), "[l]egally sufficient evidence" is defined as: "competent evidence, which, if accepted as true, would establish every element of an offense charged." Pursuant to Penal Law § 130.65, "[a] person is guilty of sexual abuse in the first degree when he or she subjects another person to sexual contact: 1. [b]y forcible compulsion." It is uncontested that

the defendant subjected the victim to sexual contact. "'Sexual contact' means any touching of the sexual or other intimate parts of a person not married to the actor for the purpose of gratifying sexual desire of either party . . . [i]nclud[ing] the touching of . . . the victim by the actor, whether directly or through clothing." (Penal Law § 130.00[3]).

Further, "'forcible compulsion'" means to compel by either: a. use of physical force; or b. a threat, express or implied, which places a person in fear of immediate death or physical injury to himself, herself or another person, or in fear that he, she or another person will immediately be kidnapped." (Penal Law § 130.00[8]). In my opinion, the evidence presented to the grand jury was sufficient to establish that the defendant used physical force.

Evidence presented to a grand jury must be viewed in the light most favorable to the prosecution and questions regarding the weight or quality of the evidence should be deferred. See People v. Swamp, 84 N.Y.2d 725, 730, 622 N.Y.S.2d 472, 474, 646 N.E.2d 774, 776 (1995). The prosecution merely has to establish a prima facie case, not proof beyond a reasonable doubt. See id. The possibility that alternative conclusions may be drawn from the facts is irrelevant "as long as the [g]rand [j]ury could

rationally have drawn the guilty inference." People v. Deegan, 69 N.Y.2d 976, 979, 516 N.Y.S.2d 651, 652, 509 N.E.2d 345, 346 (1987).

Although mere touching does not rise to the level of physical force contemplated by the Penal Law, an act has been held to be forcible if it limits the victim's freedom of movement. See People v. Del Campo, 281 A.D.2d 279, 722 N.Y.S.2d 148 (1st Dept. 2001), lv. denied, 97 N.Y.2d 640, 735 N.Y.S.2d 497, 761 N.E.2d 2 (2001) (finding the act of lifting the victim off the ground was plainly forcible). Specifically, this Court has determined that trapping a victim and blocking the victim's means of escape may amount to physical force. See People v. Read, 228 A.D.2d 304, 644 N.Y.S.2d 201 (1st Dept. 1996), lv. denied, 88 N.Y.2d 1071, 651 N.Y.S.2d 415, 674 N.E.2d 345 (1996); People v. Bennett, 219 A.D.2d 570, 631 N.Y.S.2d 834 (1st Dept. 1995), lv. denied, 87 N.Y.2d 844, 638 N.Y.S.2d 602, 661 N.E.2d 1383 (1995). The People aptly draw an analogy from these two cases to the instant case insofar as this Court deemed that the use of a "human wall" amounted to physical force in robbery cases. In Bennett, this Court found that when the defendant and three others "formed a human wall that blocked the victim's path," it was legally sufficient to establish the use of physical force required for a robbery. Bennett, 219 A.D.2d at 570, 631 N.Y.S.2d at 834. Additionally, in Read, this Court found that

there was legally sufficient evidence establishing "at the least [a] threatened . . . use of force by the manner in which [the defendant and his accomplices] surrounded defendant and prevented his movement," when they formed a human wall around the victim, and then proceeded to rob the victim. Read, 228 A.D.2d at 305, 644 N.Y.S.2d at 201-02.

In the instant case, the defendant pushed himself into the subway behind the victim, trapped her in the throng of riders, and thus prevented her from moving in the subway car. Hence, the evidence, when viewed in a light most favorable to the prosecution, demonstrates that he used the presence of the crowds on the subway to form a "human wall" to trap the victim. In his testimony before the grand jury, Detective Sandomir, of the Manhattan Special Victims Squad, testified that during an interview, the defendant admitted that he rode *crowded* subway cars, so he could sexually satisfy himself by rubbing against women. Indeed, it is evident that the defendant's specific strategy was to trap his victims between himself and other subway passengers on a crowded car.

The defendant, like the motion court, attempts to distinguish Bennett and Read, on the basis that those two cases involved the defendant's accomplices. I find that argument unpersuasive because the underlying motivation of the defendants in all three cases was the same: to *purposely use others to block*

the victim from escaping. Whether the defendant uses accomplices or innocent bystanders is irrelevant. As the People correctly assert, the focus should be on the restraint accomplished by the defendant.

Further, this Court has consistently found forcible compulsion where the defendant uses superior age, size and strength to prevent the victim from escaping. People v. Webster, 205 A.D.2d 312, 613 N.Y.S.2d 12 (1st Dept. 1994), lv. denied, 84 N.Y.2d 834, 617 N.Y.S.2d 155, 641 N.E.2d 176 (1994) (sufficient proof of forcible compulsion by use of physical force when older, larger, and stronger defendant came up behind his 12-year-old daughter in the kitchen, pushed his body up against her and then violated her); People v. Cobb, 188 A.D.2d 308, 591 N.Y.S.2d 153 (1st Dept. 1992), lv. denied, 81 N.Y.2d 969, 598 N.Y.S.2d 770, 615 N.E.2d 227 (1993) (forcible compulsion found in a first-degree sodomy charge when 23-year-old defendant laid on top of the 11-year-old victim, and used his physical dominance to prevent her from leaving); People v. Yeaden, 156 A.D.2d 208, 548 N.Y.S.2d 468 (1st Dept. 1989), lv. denied, 75 N.Y.2d 872, 553 N.Y.S.2d 304, 552 N.E.2d 883 (1990) (defendant's use of his superior age, size and strength to pull his nine-year-old daughter onto his bed was sufficient evidence of forcible compulsion.) In Yeaden, this Court emphasized that it was unnecessary for the People to prove actual violent conduct, and

that "[f]orcible compulsion was shown by evidence of the defendant dominating his smaller and weaker daughter and preventing her from leaving him." Yeaden, 156 A.D.2d at 208, 548 N.Y.S.2d at 469. Similarly, in People v. Dorsey (104 Misc. 2d 963, 429 N.Y.S.2d 828 [Sup. Ct., Bronx County 1980], mod. on other grounds, 89 A.D.2d 521, 452 N.Y.S.2d 210 (1st Dept. 1982)), the court found sufficient evidence of forcible compulsion where the defendant, who was seven inches taller and more than 70 pounds heavier, trapped the victim in an elevator, and did not use any overt force against the victim other than what was necessary to complete the sexual acts.

I strongly disagree with the majority's characterization of defendant's conduct as "furtive behavior." While obviously the defendant was furtive insofar as he accomplished his perverted act in a subway car full of people by "stealth," I contend that there is nothing furtive about a 300-pound man rubbing his exposed penis and ejaculating on a trapped child. Hence, I would reverse the motion court's dismissal of the indictment on a count of first-degree sexual abuse.

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

ENTERED: SEPTEMBER 21, 2010

CLERK

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

2300 Barbara J. Cirone, et al., Index 600272/08
Plaintiffs-Appellants,

-against-

Tower Insurance Company of New York,
Defendant-Respondent.

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Godosky & Gentile, P.C., New York (Brian J. Isaac of counsel), for appellants.

Law Office of Max W. Gershweir, New York (Max W. Gershweir of counsel), for respondent.

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Order, Supreme Court, New York County (Debra A. James, J.), entered February 3, 2009, which granted defendant Tower Insurance Company's motion for summary judgment dismissing the complaint, affirmed, without costs.

Plaintiffs were injured when struck by an employee of Navana Restaurant, Inc., who was making deliveries on a bicycle. Plaintiffs commenced a personal injury action against Navana, who was insured under a policy issued by Tower. Tower brought a declaratory judgment action against Navana to confirm the propriety of its disclaimer of coverage, and the court granted Tower summary judgment on the grounds that Navana's delay in notifying Tower of the occurrence was not reasonably excusable, thereby relieving Tower of the duty to defend and indemnify Navana in the underlying action.

Plaintiffs obtained a judgment in the personal injury action against Navana and proceeded to bring a direct action against Tower as injured parties suing under Insurance Law § 3420(b)(1). In that action, the motion court granted summary judgment to plaintiffs, holding that they gave Tower proper notice of the accident. Tower appealed, and this Court affirmed (39 AD3d 435 [2007], *lv denied* 9 NY3d 808 [2007]).

Thereafter, Navana assigned all of its rights and claims against Tower to plaintiffs, who, as Navana's assignees, commenced this action based upon claims that Tower refused to settle the personal injury action within the policy limits in bad faith.

The motion court properly granted Tower's motion and dismissed the bad-faith claims. Given that Navana failed to comply with the notice provisions of the policy at issue, it would be estopped from contending that Tower improperly refused to settle the underlying personal injury action within the applicable policy limits. As Navana's assignees, plaintiffs are now suing upon a claim which is subject to the same defenses Tower could have asserted against Navana (*see e.g. Madison Liquidity Invs. 119, LLC v Griffith*, 57 AD3d 438, 440 [2008]). For example, *Zeldin v Interboro Mut. Indem. Ins. Co.* (44 AD3d 652 [2007]) involves an action brought by claimant/assignee standing in the shoes of an insured who had inexcusably failed to notify

the carrier of the underlying accident. The Court held that the insurer's defenses against the insured were good as against the claimant (*id.* at 653; *see also Daus v Lumbermen's Mut. Cas. Co.,* 241 AD2d 665, 666 [1997], *lv denied* 90 NY2d 812 [1997]). We disagree with the dissent's view that *Zeldin* should be distinguished because the assignee in that case, unlike plaintiffs in this action, did not bring a separate declaratory action against the insurer. That factor is of no moment because plaintiffs in this action are suing solely in their capacity as assignees. Therefore, their status is unaffected by their prior declaratory judgment action against Tower. "[A]n assignee never stands in any better position than his assignor" (*Madison Liquidity Invs. 119, LLC,* 57 AD3d at 440) [internal quotation marks and Citations omitted]. We further disagree with the dissent's position that *Zeldin* is distinguishable because plaintiffs in this case are relying on their own notice to Tower as opposed to notice provided by Navana, the insured. "The obligation of the injured party to protect his interests by seeing that proper notification is given to the wrongdoer's carrier is independent of the contractual duties of the insured" (*Agway Ins. v Alvarez,* 258 AD2d 487, 488 [1999]).

Furthermore, plaintiffs' failure to litigate the bad-faith claims in the Insurance Law § 3420 action against Tower bars litigation of those claims in this action, as both sets of claims

arise from the same series of transactions (*see generally O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]).

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

CATTERSON, J. (dissenting)

Because I believe that the plaintiffs, as injured parties in a motor vehicle accident, have standing to pursue a bad-faith claim against the insurer, I respectfully dissent.

Tower and the majority rely on Zeldin v. Interboro Mut. Indem. Ins. Co. (44 A.D.3d 652, 834 N.Y.S.2d 366 (2d Dept. 2007)) for the proposition that plaintiffs stand in the shoes of the underlying insured Navana and are thus estopped from asserting a bad faith claim against the insurer. This is a misreading of the import of Zeldin.

In Zeldin, the plaintiff was injured while a passenger in the car of the insured Markman; she sued Markman and obtained a default judgment for over $2 million. At the time of the accident, Markman had a $25,000 liability policy with Interboro, but he failed to timely notify Interboro of the claim pursuant to the terms of the policy. Markman ultimately assigned his claim against Interboro to the plaintiff. The plaintiff then commenced a bad faith action against Interboro. The Second Department, as the majority correctly recognized, held that the plaintiff, who stood in Markman's shoes, could not contend that the disclaimer was improper. 44 A.D.3d at 653, 834 N.Y.S.2d at 368.

However, more importantly for purposes of the instant case, the Zeldin court went on to hold: "Significantly, the plaintiff did not commence a declaratory judgment action against Interboro

in her capacity as the injured party, seeking a declaration that Interboro was obligated to defend Markman . . . As a result, any defenses Interboro might have had against Markman were good against the plaintiff." Id. The exact opposite is true in this case. Plaintiffs succeeded on their declaratory judgment claim both in the trial court and on the prior appeal in this Court. See Cirone v. Tower Ins. Co. of New York, 39 A.D.3d 435, 835 N.Y.S.2d 111 (1st Dept. 2007), lv. denied, 9 N.Y.3d 808, 844 N.Y.S.2d 784, 876 N.E.2d 513 (2007). The holding in Zeldin is therefore favorable to *plaintiffs'* position.

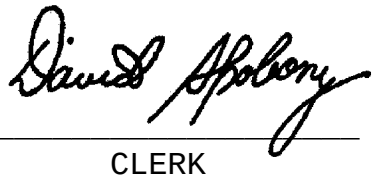
Before the motion court and in their briefs to this Court, plaintiffs pointed out that Tower failed to pay the judgment both before and after the entry of Justice Karen S. Smith's decision in the underlying action and that Tower's counsel's attempt to negotiate a judgment two times higher than the policy limits showed further evidence of bad faith. Thus, plaintiffs were not seeking to relitigate the declaratory judgment action between Tower and its insured, but rather to obtain recovery for the amount Navana was exposed to because of Tower's disregard of its duties to its insured even after it was established that Tower had to perform under the policy because the plaintiffs gave timely notice.

In my view, this case is significantly distinguishable from the facts of Zeldin because the plaintiffs are not relying on

notice provided by the insured, Navana, but rather their own timely notice. Therefore, the bad-faith claim is not barred by the rationale of Zeldin.

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

ENTERED: SEPTEMBER 21, 2010



CLERK

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

2927 Berton Forman, M.D., et al., Index 603709/08
Plaintiffs-Respondents,

-against-

The Guardian Life Insurance Company of America,
Defendant-Appellant.

_____

Leader & Berkon LLP, New York (Glen Silverstein of counsel), for appellant.

Kenneth L. Kutner, New York for respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered October 5, 2009, which denied defendant's motion pursuant to CPLR 3211 to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff Berton Forman is a licensed anesthesiologist and the sole officer, director and shareholder of plaintiff Rockville Recovery Associates, Ltd. Forman and Rockville offer the service of auditing insurance claims of physicians and hospitals for possible fraud and assisting in the recovery of insurance funds fraudulently received by them. Defendant The Guardian Life Insurance Company of America is a health insurer.

Commencing in or about May 2003, Rockville and Guardian entered into a series of written contracts pursuant to which Rockville provided claim auditing services for Guardian. Under

the agreements, Rockville was responsible for investigating claims of health care providers identified by Guardian to determine whether the claims were fraudulent. Rockville's services under the contracts included investigating the claims for fraudulent activity, contacting providers that Rockville determined had engaged in fraud, and negotiating the return of the amounts owed. The contracts provided that Rockville was entitled to a fee of 25% of all funds it successfully recovered. The parties' most recent contract expired in 2006, but plaintiffs allege that the agreements nevertheless continued to be in effect based on the parties' course of conduct.

According to the complaint, from 2003 to 2008, plaintiffs uncovered significant overbilling by medical providers totaling tens of millions of dollars. Plaintiffs allege that they provided their findings to Guardian but Guardian did not commence litigation against the providers to recover the funds. The complaint further states that the reason Guardian failed to pursue claims against certain health care providers was because, unbeknownst to plaintiffs, Guardian had entered into a contract waiving its right to conduct post-payment claim audits of those providers. The complaint asserts causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, quantum meruit, unjust enrichment and promissory and equitable estoppel.

Guardian's decision not to pursue litigation to recover on the fraudulent claims does not constitute a breach of the agreements. The complaint does not allege that Guardian was under any contractual obligation to commence such litigation. Even if the complaint could be construed to allege such an obligation, the contracts between the parties do not contain any language requiring Guardian to bring suit or to take any other action to collect on the fraudulent billings *(Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [2001] ["the provisions of the contract delineating the rights of the parties prevail over the allegations set forth in the complaint"]).

Nevertheless, the breach of contract claim was properly sustained based upon a warranty clause contained in the 2005 agreement. Under that contract, Rockville was entitled to receive a fee of 25% of all funds it successfully recovered as a result of its audits. The complaint alleges that Guardian entered into a separate contract with a certain health care plan not to conduct post-payment audits and that Guardian did not inform plaintiffs of this agreement. Plaintiffs further allege that, despite the agreement with the health care plan, Guardian asked Rockville to perform audits of claims from providers in that plan. Plaintiffs contend that this contractual obligation prohibited Guardian from conducting post-payment audits as to

approximately 90% of its claims. These allegations state a breach of the warranty clause in which Guardian represented that there were no agreements "that might conflict or interfere with, limit, or be inconsistent with or otherwise affect any of the provisions of this Agreement." Because the alleged third-party contract effectively precluded any possibility of recovery by Rockville for certain claims that Guardian asked Rockville to audit, plaintiffs have pleaded a breach of the warranty clause.

The complaint also states a cause of action for breach of the implied covenant of good faith and fair dealing. It is axiomatic that all contracts imply a covenant of good faith and fair dealing in the course of performance (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). "This covenant embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract'" (*id.*, quoting *Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995], quoting *Kirke La Shelle Co. v Armstrong Co.*, 263 NY 79, 87 [1933]). In essence, the complaint alleges that Guardian frustrated the basic purpose of the parties' contracts by providing Rockville with claims to audit while at the same time entering into an agreement preventing Rockville from pursuing recovery of funds relating to those claims. Thus, the work given to Rockville to perform would be work for which, from the

inception, it could never recover. These allegations are sufficient to sustain the claim for breach of the implied covenant. No basis exists to dismiss this cause of action as duplicative of the breach of contract claim because the warranty clause appears in only the 2005 contract and not in all the agreements at issue here.

Plaintiffs are entitled to proceed in the alternative upon quasi-contractual theories because there is a question whether the parties' course of conduct evidenced their assent to continue the terms of the 2005 contract after its expiration (*see Halliwell v Gordon*, 61 AD3d 932, 934 [2009]; *Winick Realty Group LLC v Austin & Assoc.*, 51 AD3d 408 [2008]). The quantum meruit claim was properly sustained because the complaint alleges the performance of claim auditing services by plaintiffs in good faith, the acceptance of such services by Guardian, plaintiffs' expectation of compensation, and the reasonable value of the services (*see Tesser v Allboro Equip. Co.*, 302 AD2d 589, 590 [2003]). The allegation that Guardian changed its fraud prevention policies as a result of plaintiffs' auditing services resulting in millions of dollars in savings to Guardian states a claim for unjust enrichment (*see Nakamura v Fujii*, 253 AD2d 387, 390 [1998]). Although the terms of the 2005 contract might appear to preclude this claim, there is, as indicated, a question whether that contract expired or continued based on the parties'

course of conduct.

Reading the complaint in a light most favorable to plaintiffs, the cause of action for promissory estoppel was correctly sustained. The pleadings allege that defendants made a clear and unambiguous promise to pursue claims plaintiffs identified as fraudulent, that plaintiffs reasonably relied on this promise in performing their work, and that they were injured by defendant's failure to pursue the claims (*see Arfa v Zamir*, 55 AD3d 508 [2008]). The allegations concerning Guardian's concealment of the third-party contract from plaintiffs also are sufficient, for pleading purposes, to support the claim for equitable estoppel (*see De Angelis v American Capital Access*, 280 AD2d 409 [2001]).

We have considered the parties' remaining contentions and find them unavailing.

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

ENTERED: SEPTEMBER 21, 2010

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Tom, J.P., Sweeny, Catterson, McGuire, Román, JJ.

3164 Hermany Farms, Inc., Index 250572/08
Plaintiff-Respondent,

-against-

Seneca Insurance Company, Inc.,
Defendant-Appellant.

_____

Tese & Milner, New York (Michael M. Milner of counsel), for appellant.

Christopher E. Finger, Bronx for respondent.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered February 2, 2010, which, in this action seeking a declaration as to insurance coverage, inter alia, granted plaintiff's cross motion for summary judgment declaring that defendant is obligated to defend and indemnify it in the underlying personal injury action, unanimously reversed, on the law, without costs, and the cross motion denied.

Plaintiff Hermany Farms Inc. (“Hermany”), is the owner and operator of a milk processing plant in the Bronx owned by two families, the Marrows and the Schwartzes. Gregory Broome, the plaintiff in the underlying action, was a milkman employed by Knoll Creek, a distributor of milk bottled by Hermany. Knoll Creek is owned by Norman Marrow, a part owner and treasurer of Hermany, whose office is located on Hermany’s premises.

On August 23, 2005, with no witnesses present, Broome fell

at the milk processing plant at Hermany. Through his employer, Broome applied for workers' compensation on August 30, 2005 – seven days after the accident. One year later, on August 7, 2006, Broome commenced a personal injury action against Hermany. Upon receiving the summons and complaint, Robert Marrow, chief operating officer of Hermany notified defendant Seneca Insurance Company of the claim.

Seneca disclaimed coverage on the grounds that Hermany had failed to provide notice to Seneca as soon as practicable after the occurrence giving rise to the lawsuit. Seneca asserted that its own investigation into the accident had revealed that "Knoll Creek Dairy was aware of the incident on the day it occurred, August 23, 2005 and filed a Worker's Compensation report." Seneca maintained that the knowledge of the accident should be imputed to Hermany because not only is Norman Marrow the owner and President of Knoll Creek Dairy, but "he is also an officer [*sic*] of Hermany."

Hermany instituted the present declaratory judgment action demanding that Seneca defend and indemnify it in the underlying lawsuit. On August 21, 2009, Seneca moved for summary judgment declaring that Seneca properly disclaimed coverage of the claim due to Hermany's unreasonable delay in notifying Seneca. On October 26, 2009, Hermany cross-moved for summary judgment on the grounds that Seneca is obligated to defend and indemnify since

the failure to give Seneca timely notice of the incident was excused by a good-faith belief in non-liability.

The court denied Seneca's motion and granted Hermany's cross motion for summary judgment declaring that Seneca was obligated to defend and indemnify Hermany in the underlying personal injury action. We now reverse for the reasons set forth below.

It is well established that when a policy of liability insurance requires notice of an occurrence be given as soon as practicable, such notice must be provided within a reasonable period of time, and the failure to give such notice relieves the insurer of its obligations under the contract (*see Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742 [2005]). We note that, in the absence of an excuse, even a 60-day delay in notifying the insurer is not "as soon as practicable." Such late notice would violate the notice condition of the insurance policy as a matter of law (*see Steinberg v Hermitage Inc. Co.*, 26 AD3d 426, 427 [2006]).

There are, however, circumstances which excuse a failure to give timely notice. Where the insured has "a good-faith, reasonable belief of non-liability," the Court of Appeals has found that a violation of the prerequisite of "timely notice" may not exclude an insurer from defending and indemnifying the

insured (*see Great Canal Realty Corp.,* 5 NY3d at 743-744, citing *Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 441 [1972]). When an insured claims a good-faith belief of non-liability, "the insured bears the burden of establishing the reasonableness of the proffered excuse" (*Great Canal Realty Corp.*, 5 NY3d at 744).

On appeal, Hermany argues that Robert Marrow was the person charged with overseeing daily operations, and thus solely responsible for the policy notification. It further argues that Robert Marrow first became aware of the accident one year later in August of 2006 when he was served with a summons and complaint. He testified that, it was only upon receipt of the summons and complaint that he ascertained that Broome "fell off a truck that he had been working on while it was parked at the Harmony platform."

We find this argument unavailing. The employees of both businesses, Knoll Creek and Hermany, testified at deposition that they knew the accident occurred. Indeed, Hermany's platform supervisor, Edward Barry, testified that he was immediately summoned to the scene of the incident. When he was informed Broome fell, he "went over to the end of the platform, and I seen him laying on the ground, and right away I called 911, and the ambulance came." Further, Norman Marrow confirmed that he saw the workers' compensation form that was prepared by Knoll Creek's

bookkeeper. He testified, "I saw it some days later when [the bookkeeper] mailed it in." He acknowledged that the form stated that Broome had "stepped off back of platform." That admission is fatal to Hermany's argument since it is reasonable to believe that Hermany, through its owners, knew of the incident within days of its happening and long before receipt of the summons and complaint. Given that the incident occurred on Hermany's property, Hermany could reasonably believe that a claim for liability would arise. At the very least, the workers' compensation form should have prompted Hermany to obtain a clarification of how the incident occurred (see *White v City of New York*, 81 NY2d 955, 958 [1993]). Hence, we find that Hermany has failed in its burden of establishing the reasonableness of its proferred excuse, and therefore the court erred in granting Hermany summary judgment.

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

ENTERED: SEPTEMBER 21, 2010

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