SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 25, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Andrias, Saxe, Freedman, Manzanet-Daniels, JJ.

3889 In re Jacqueline Perez, Index 110920/09
Petitioner-Appellant,

-against-

John B. Rhea, as Chairman of the
New York City Housing Authority,
Respondent-Respondent.

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Reisman, Peirez & Reisman LLP, Garden City (Marc Sackin of counsel), for appellant.

Sonya M. Kaloyanides, New York (Seth E. Kramer of counsel), for respondent.

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Judgment, Supreme Court, New York County (Paul Feinman, J.), entered April 28, 2010, dismissing this Article 78 proceeding seeking to annul and vacate or, in the alternative, remand for imposition of a lesser penalty, the determination of the New York City Housing Authority (NYCHA) which terminated petitioner's tenancy based upon findings that she failed to report employment income, reversed, on the law, without costs, to grant the petition to the extent of vacating the penalty of termination and

remanding the matter to NYCHA for the imposition of a lesser penalty.

Where petitioner, a model tenant, has faithfully abided by an agreement with NYCHA to make full restitution of her rent underpayments, the decision to terminate her tenancy constituted a disproportionate penalty that would likely leave petitioner, the single mother of three children who also reside in the apartment, two of whom have diagnosed disabilities, homeless.

Petitioner Jacqueline Perez, 37 years of age, has lived in NYCHA housing for virtually her entire life and in the subject apartment for more than 17 years.

Petitioner alleged that in 2006, NYCHA sent a fax to petitioner's employer seeking verification of employment. Immediately thereafter, petitioner alleged that she and an assistant housing manager, Mr. Emmeric, had a conversation wherein petitioner admitted that she had mistakenly underreported her income. Petitioner alleged that Emmeric requested petitioner's presence at an informal meeting and informed her to bring copies of her pay stubs. Petitioner was not told to bring an attorney and was not informed that the meeting might result in commencement of termination of tenancy proceedings, even though, she asserts, the NYCHA manual provides that if "the Housing

Manager believes that termination proceedings should be initiated against a tenant, first Call-In Letter, Form 040.185 shall be used to call the tenant to the office for an interview," and that at the interview, "the tenant may be accompanied by someone, such as an attorney, to assist him/her."

Emmeric and Ms. Reid, another assistant housing manager, attended the meeting on behalf of NYCHA. Petitioner alleges that Emmeric and Reid reached an agreement with her wherein petitioner agreed to make NYCHA whole by paying a prorated increased amount of rent each month. NYCHA maintains that there is no evidence that such an "unwritten agreement" was reached. Nonetheless, following the meeting, petitioner alleges that she began paying a prorated increased amount of rent each month.

By letter dated July 6, 2006, Chief Investigator Christopher A. France requested that petitioner appear for an interview regarding her tenancy. At the meeting, petitioner once again admitted that she had underreported her income and offered to make full restitution. Petitioner was never informed that her tenancy was in jeopardy of being terminated.

By letter dated November 29, 2006, petitioner was informed that criminal charges were being brought against her due to the underreporting of her income. Petitioner subsequently pleaded

guilty to petit larceny, a class A misdemeanor. She was given a conditional discharge so long as she abided by the terms of a stipulation entered into among petitioner, the assistant district attorney, and NYCHA, wherein petitioner agreed to pay NYCHA the sum of $300 per month until the indebtedness was repaid. Petitioner, once again, was never informed that her tenancy might be terminated.

From July 2007 through the present, petitioner has fully complied with the repayment schedule set forth in the stipulation, and NYCHA does not claim otherwise. Nonetheless, on November 24, 2008, long after petitioner had commenced repayments, petitioner was notified that her tenancy was in danger of being terminated. The charges included non-desirability, misrepresentation, non-verifiable income and breach of rules and regulations in connection with the underreporting of income from 1999 to 2005.

At the hearing, NYCHA's chief investigator, Christopher A. France, conceded that petitioner had made arrangements to make full restitution of any outstanding monies owed NYCHA and did not dispute that petitioner was current with her restitution payments.

Petitioner admitted that she had mistakenly underreported

her income to NYCHA, but maintained that she had never intended to defraud the Housing Authority. She testified that she had never missed a restitution payment and had, as of the time of the hearing, repaid half of the indebtedness. She lived in the subject apartment with three children, one of whom is 17 years old and suffers from dyslexia and learning disabilities, and another who is 7 years old and has attention deficit disorder, learning disabilities and emotional problems.

Petitioner, who is employed as an assistant bookkeeper, testified that she did not earn enough to afford non-NYCHA housing and faced homelessness in the event of eviction.

The hearing officer sustained the charges and recommended termination of petitioner's tenancy, finding petitioner's testimony about "[t]he plight of the family, especially with a disabled child," to be "an insufficiently mitigating circumstance." NYCHA approved the decision and disposition finding petitioner tenant ineligible for continued occupancy and terminated her tenancy.

Petitioner thereafter brought this Article 78 proceeding, alleging that NYCHA's decision to terminate her tenancy was in violation of NYCHA's own mandated procedures and constituted a penalty so disproportionate to the offense as to be shocking to

the conscience.

We find that termination of petitioner's tenancy was "so disproportionate to the offense," underpayment of rent, "in the light of all the circumstances, as to be shocking to one's sense of fairness" (*Matter of Pell v Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]).

Petitioner is a long-time resident of NYCHA housing with an otherwise unblemished record. She has already repaid over $10,0000 of the amount owed and in a few years restitution will be complete.[1]

We have stated that "[t]he forfeiture of public housing accommodations is a drastic penalty because, for many of its residents, it constitutes a tenancy of last resort" (*Matter of Holiday v Franco*, 268 AD2d 138, 142 [2000] [citations omitted]). We have also found that where the circumstances underlying the charges against a tenant no longer exist, eviction of the tenant

[1]NYCHA maintains that termination of petitioner's tenancy does not shock the conscience because petitioner did not agree to pay restitution "voluntarily," but rather, as part of a plea agreement pursuant to which the charges against her were reduced. We disagree. In any event, petitioner alleges that she reached a verbal agreement to repay NYCHA when first informed that she had underreported her income, prior to the entry of the formal stipulation.

constitutes a disproportionate penalty (*see Matter of James v New York City Hous. Auth.*, 186 AD2d 498 [1992] [termination of tenancy for undesirability based on one incident where petitioner set a fire in the subject apartment "shocked the conscience" where petitioner had since entered counseling and was taking medication and there was no indication that she had returned to alcohol or abuse of illicit substances]).

Supreme Court found that termination of petitioner's tenancy was not an excessive penalty since she had concealed income. However, even if one classifies petitioner's offense as an intentional misrepresentation, evicting a tenant and her family may nonetheless constitute an unjustifiable penalty in light of the mitigating circumstances. The very case relied on by the Supreme Court, *Matter of Davis v NYC Hous. Preserv. & Dev.* (58 AD3d 418 [2009]), stands for this proposition. This Court found that termination of tenancy was "shockingly disproportionate to the offense," stating:

> "[The agency's] finding that petitioner intentionally failed to disclose her son's SSI benefits is supported by substantial evidence and has a rational basis in the record. The penalty of termination of the rent subsidy is shockingly disproportionate to the offense, however, since it will likely lead to homelessness for petitioner, a 25-year tenant, and the three minor children who

> live with her, one of whom is disabled (*id.* at 419 [citations omitted]).”

This is not an isolated holding. In *Matter of Gray v Donovan* (58 AD3d 488 [2009]), we found termination of the petitioner’s housing subsidy to be “shockingly disproportionate to the offense,” notwithstanding her failure to report income earned by two adult children, where the petitioner had lived in the building for more than 30 years, had no record of any prior offenses, and the record indicated that termination of the subsidy would likely lead to homelessness for the petitioner and her 13-year old son.

In *Matter of Williams v Donovan* (60 AD3d 594 [2009]), we vacated the penalty of termination of a housing subsidy and remitted for imposition of a lesser penalty, in spite of the fact that the tenant had failed to report income earned by an adult son, where the petitioner had resided in the apartment for 28 years and had an unblemished tenancy.

In *Matter of Vasquez v New York City Hous. Auth. (Robert Fulton Houses)* (57 AD3d 360 [2008]), we vacated the penalty of termination where the tenant, who was chronically delinquent in rent payments and had been charged with unauthorized use of an ATM card, made restitution of the amounts due to the complainant,

had no prior criminal record, and cared for a family member with disabilities.

Like the tenants in the cited cases, petitioner has admitted to underreporting income and has made every effort to cure the violation by making restitution. Termination of her tenancy would have severe consequences not only for petitioner but for the children she supports, two of whom have disabilities. Since the penalty is "shockingly disproportionate to the offense," we vacate the penalty and remit for imposition of a lesser penalty.

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

TOM, J.P. (dissenting)

Following an investigation by the Inspector General, petitioner, a tenant in New York City Housing Authority (NYCHA) public housing, was found to have concealed employment income, thereby depriving the NYCHA of $27,144 in rent. She was arrested on charges of grand larceny in the third degree and offering a false instrument for filing in the third degree. On July 25, 2008, she entered a negotiated plea of guilty to the crime of petit larceny in full satisfaction of the charges against her, receiving a conditional discharge in return for restitution in the amount of $20,000, to be paid in monthly installments.

In related administrative proceedings, NYCHA terminated petitioner's tenancy upon findings that she provided no explanation for failing to report her earned income to the NYCHA over a period of six years and that she had intentionally defrauded the agency. The Hearing Officer concluded that the learning disabilities of her sons, ages 7 and 17, were insufficient mitigating factors and that termination was the appropriate disposition. This article 78 proceeding ensued, culminating in Supreme Court's dismissal of the petition.

Stripped of its verbiage, the majority's rationale is that petitioner's tenancy should not be terminated because it might

render her homeless. Granted, this Court has observed that public housing is a last resort (*see Matter of Holiday v Franco*, 268 AD2d 138, 142 [2000]), but universal application of the principle would result in no tenant of public housing ever being evicted, whatever the grounds. The appropriate standard of review is whether the administrative penalty constitutes an abuse of discretion (CPLR 7803[3]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 232-234 [1974]), and if the sanction imposed does not shock the judicial conscience, it must be sustained (*Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]).

Here, petitioner was found to have intentionally defrauded the NYCHA over a six-year period. In accordance with her plea agreement, petitioner was required to repay only $20,000 of the more than $27,000 in rent that she avoided paying, which amounts to no penalty at all. If defrauding a governmental agency incurs no adverse consequence, others will be encouraged to engage in similar fraudulent conduct — hardly an outcome that promotes the ends of justice. Furthermore, the attention deficit hyperactivity disorder, dyslexia and unspecified emotional problems that affect her children are not such severe disabling

conditions as to render forfeiture of public housing accommodations a wholly disproportionate penalty.

As to the cases relied upon by the majority, in *Matter of Davis v New York City Dept. of Hous. Preserv. & Dev.* (58 AD3d 418, 419 [2009]), this Court considered the failure to report income to be both inadvertent and immaterial, noting, "[P]etitioner's omission of her son's income had no effect on the amount of rent subsidy she received." Likewise, in *Matter of Gray v Donovan* (58 AD3d 488, 488 [2009]), we stated, "[T]here is no indication . . . of the impact that petitioner's failure to report her adult children's income had, if any, on the amount of her housing subsidy." Similarly, in *Matter of Williams v Donovan* (60 AD3d 594, 595 [2009]), we indicated that the record did not reflect "the precise amount of excess subsidy received by petitioner, if any," remanding the matter to the agency for calculation and imposition of a lesser penalty.

More to the point is *Matter of Smith v New York City Hous. Auth.* (40 AD3d 235 [2007], *lv denied* 9 NY3d 816 [2007]), in which we upheld the termination of the petitioner's tenancy. The unauthorized occupancy of the apartment by petitioner's husband had the effect of concealing his income from the agency, "thereby producing a substantially lower rent" (*id.* at 235). While

acknowledging the long duration of her tenancy and the hardship to the tenant and her 15-year-old son, we concluded, "[W]e do not find that the penalty of termination shocks the conscience, especially since the termination of petitioner's tenancy was based on her own conduct" (*id.*).

As in *Matter of Smith*, and unlike the cases relied upon by the majority, petitioner's intentional concealment of her earnings had a material and substantial effect on the reduction of her rent. Her payment of restitution was compelled by the prospect of imprisonment, not the willing exercise of her own free will. Finally, the loss of her tenancy is entirely attributable to her own conduct.

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

ENTERED: AUGUST 25, 2011

CLERK

Saxe, J.P., Moskowitz, Richter, Manzanet-Daniels, Román, JJ.

4098 Allan Salman, et al., Index 7153/06
Plaintiffs,

Zorazella Garcia,
Plaintiff-Appellant,

-against-

Hector Rosario, et al.,
Defendants,

Bassough Kanate,
Defendant-Respondent.

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Mitchell Dranow, Mineola, for appellant.

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

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Order, Supreme Court, Bronx County (Stanley Green, J.), entered on or about July 6, 2009, which, to the extent appealed from as limited by the briefs, upon renewal and reargument, adhered to a prior order, same court and Justice, entered December 4, 2008, granting defendant Kanate's motion for summary judgment dismissing plaintiff Garcia's complaint, modified, on the law and the facts and in the exercise of discretion, to deny the motion insofar as plaintiff claims a permanent limitation serious injury to her right knee, and otherwise affirmed, without costs.

As an initial matter, while plaintiff's doctors' conclusions were arguably based on medical information previously available and she could arguably have included this information in her original motion, a court has latitude, in the interest of justice, to grant renewal, even on facts known to the movant at the time of the original motion (*see Rancho Santa Fe Assn. v Dolan-King*, 36 AD3d 460 [2007]). Here, plaintiff's lawyer avers that she was unable to locate the records from Crotona Heights Medical, the initial treating facility after her emergency room visit, in time to submit those papers in opposition to defendant's summary judgment motion because that medical office had closed. The law firm was only able to locate the records in conjunction with another case.

On November 28, 2005, the then 21-year-old plaintiff was a passenger in a motor vehicle that defendant rear-ended with his vehicle. Shortly after the accident, an EMT removed plaintiff from the vehicle. At that time, plaintiff complained to the EMT that she had a "burning sensation going up her spine, [a] headache from her head hitting the car and [her] knee." Plaintiff testified that she had never hurt those body parts in any other accidents before or after the accident.

After the accident, plaintiff was taken by ambulance to the

emergency room at Metropolitan Hospital where she made the same physical complaints. The hospital took x-rays, but found nothing broken. Plaintiff believed she was then given a prescription for Motrin and was driven home.

Plaintiff testified that she missed three days of work after the accident and then returned to work. However, she had to quit work approximately three weeks before having knee surgery on March 30, 2006 because her knee was "extremely swollen." Plaintiff stated that, beginning approximately one week after the accident, she received physical therapy for approximately two months. Following her surgery in March 2006, plaintiff resumed physical therapy for approximately one month. In her affidavit in opposition, plaintiff explained her gap in treatment. She stated that once her no-fault benefits stopped, she could not afford to pay for medical care (*see Mendez v Mendez*, 72 AD3d 402 [2010] ["(p)laintiff's experts also explained any gap in her treatment by stating that she had reached the maximum benefit possible from the treatment"]). Plaintiff also testified that, as a result of the accident, she cannot stand for long periods, has difficulty walking and running, cannot lift heavy objects, has trouble sleeping and is sensitive to light.

Dr. Andrew Cordaro, who examined plaintiff just one month

after the accident, noted that plaintiff complained about her right knee. He referred her for x-rays and an evaluation with an orthopedic surgeon.[1] The MRI report from Dr. Andrew Caruthers, dated March 13, 2006, describes a "longitudinal tear of the lateral meniscus contacting superior surface" and "small knee joint effusion."

Most important, plaintiff's orthopedic surgeon, Dr. Ehrlich, who performed arthroscopic surgery on plaintiff's knee only four months after the accident, opined that "to a reasonable degree of medical certainty, the motor vehicle accident of 11/28/05 is the proximate cause of her condition, and not from a pre-existing or long standing degenerative process." Plaintiff's surgeon based this conclusion on his observations of plaintiff's knee during surgery (documented in the operative report plaintiff submitted on the original motion) and because plaintiff's MRI films (plaintiff submitted the MRI report on the original motion) did not depict the existence of osteophytes, show evidence of spondylosis or show other symptoms of degenerative processes.

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[1] Although the records from Dr. Cordaro's office are unsworn, it is of no moment. The documents are properly certified as business records (*see Mayblum v Schwarzbaum*, 253 AD2d 380 [1998]; CPLR 4518[a]), and are referenced only to show plaintiff's complaints and the doctor's referral rather than a medical opinion about a causal relation to the accident.

Thus, plaintiff's surgeon countered defendant's orthopedist's observation that plaintiff's injuries had no traumatic basis. Plaintiff's surgeon also documented range-of-motion limitations in the knee. Dr. Mian, who also conducted an orthopedic examination in 2008 and found deficits in plaintiff's range of motion, opined that the right knee tear was causally related to the accident. Thus, the evidence more than amply raised an issue of fact as to whether plaintiff had sustained a "serious injury" of a permanent nature to the right knee within the meaning of Insurance Law Section 5102(d).

Plaintiff's objective evidence of injury, four months post-accident, was sufficiently contemporaneous to establish that plaintiff had suffered a serious injury within the meaning of the statute. Dr. Ehrlich based his conclusions in large part on his actual observations of plaintiff's knee during the surgery he performed. This conclusion is significant because the doctor was able to see exactly what the injuries were. Moreover, in her affidavit, plaintiff stated that, prior to surgery, she had physical therapy five times a week for three months. It is not unreasonable to try to resolve an injury with physical therapy before resorting to surgery. The circumstances, i.e., plaintiff's initial medical exam that was close in time to the

accident, her intensive physical therapy, her young age and eventual surgery, make the four months between the accident and plaintiff's objective medical evidence sufficiently contemporanous to withstand a motion for summary judgment (*see Gonzalez v Vasquez*, 301 AD2d 438 [2003] [examining physician's affirmation correlating motorist's neck and back pain two years after rear-end collision to quantified range of motion limitations found on physical examination and bulging and herniated discs described in MRI reports, and opining that motorist's symptoms were permanent, raised genuine issue of material fact as to whether motorist suffered serious injury]; *see also Rosario v Universal Truck & Trailer Serv.*, 7 AD3d 306, 309 [2004]).

However, defendants did establish, prima facie, that plaintiff did not suffer a 90/180-day injury, and plaintiff failed to raise a triable issue of fact, given her testimony that she was out of work for only three days (*see Pou v E & S Wholesale Meats, Inc.*, 68 AD3d 446, 447 [2009]).

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

ROMÁN, J. (dissenting)

To the extent that the majority concludes that renewal of the motion court's order granting summary judgment in favor of Kanate was warranted, and that upon renewal Garcia's evidence precluded summary judgment, I dissent. Here, renewal would only have been warranted in the interest of justice, and to the extent that Garcia's evidentiary submission on renewal failed to establish any injury contemporaneous with her accident, renewal should have been denied.

To the extent that Garcia submitted medical evidence failing to establish treatment earlier than January 25, 2006, two months after this accident, Garcia failed to raise a triable issue of fact as to whether she sustained a serious injury because she failed to submit competent and admissible medical evidence of injury contemporaneous with her accident (*see Ortega v Maldonado*, 38 AD3d 388, 388 [2007]; *Toulson v Young Han Pae*, 13 AD3d 317, 319 [2004]; *Alicea v Troy Trans, Inc.*, 60 AD3d 521, 522 [2009]; *Migliaccio v Miruku*, 56 AD3d 393, 394 [2008]). Accordingly, the motion court properly granted Kanate's initial motion for summary judgment with respect to all categories of injury under Insurance Law § 5102.

On her motion to renew, seeking to remedy shortcomings in

her prior submission, Garcia tendered, inter alia, medical records, not previously submitted, purportedly evincing medical treatment contemporaneous with her accident. Specifically and to the extent relevant here, on renewal Garcia submitted records evincing a medical examination occurring a month after her accident. Nothing submitted competently evinced medical treatment at anytime prior thereto. A motion to renew "must be based upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore, not made known to the court" (*Foley v Roche*, 68 AD2d 558, 568 [1979]). However, when the proponent of renewal seeks to proffer new evidence of which he/she was previously aware but did not provide to the court on a prior motion, renewal may be granted if the interest of justice so dictate (*Tishman Constr. Corp. of N.Y. v City of New York*, 280 AD2d 374, 376-377 [2001]; *Mejia v Nanni*, 307 AD2d 870, 871 [2003]). Generally, the interest of justice require renewal when the newly submitted evidence changes the outcome of the prior motion. Here, Garcia sought renewal in order to have the motion court consider evidence previously known to her. Accordingly, renewal would have only been warranted if it served the interest of justice. At best, Garcia's medical evidence of injury on

renewal established medical treatment beginning no sooner than a month after her accident. A medical examination occurring a month after an accident is not contemporaneous. Given its plain and ordinary meaning, contemporaneous means "existing, happening in the same period of time" (Webster's New World Dictionary 300 [3rd college ed 2004]). Accordingly, insofar as Garcia's evidence on renewal did not evince medical treatment contemporaneous with the accident, renewal in the interest of justice should have been denied.

The majority takes the untenable position that not only is Garcia's medical examination, occurring a month after the accident, contemporaneous with her accident, but paradoxically that the report of her surgeon, who did not see plaintiff for the first time until *four* months after her accident, is sufficient to establish the causal link between Garcia's knee injury and her accident such that she raised an issue of fact precluding summary judgment in Kanate's favor. First, if a medical examination occurring one month after an accident is not contemporaneous, then an examination occurring four months after an accident is certainly less so (*Mancini v Lali NY, Inc.*, 77 AD3d 797, 798 [2010] [medical findings made by plaintiff's doctor four months after his accident not sufficiently contemporaneous with the

accident to establish a serious injury]); *Resek v Morreale*, 74 AD3d 1043, 1044-145 [2010] [medical findings made by plaintiff's doctor five months after his accident not sufficiently contemporaneous with the accident to establish a serious injury]). Moreover, even if we assume that this report was temporally contemporaneous with her accident, it was nevertheless bereft of any objective, qualitative, or quantitative evidence of injury to her knee (*Blackmon v Dinstuhl*, 27 AD3d 241, 242 [2006]; *Thompson v Abassi*, 15 AD3d 95, 98 [2005]). Second, contrary to the majority's assertion, the report of Garcia's orthopedist might have been probative as to her knee injury on the date he performed surgery, but standing alone, his observations on that date could not have been probative as to whether that injury was caused by this accident (*see Pommells v Perez*, 4 AD3d 101, 101-102 [2004], *affd* 4 NY3d 566 [2005] [medical opinion as to causation is speculative when the record is bereft of any evidence establishing contemporaneous medical treatment and the doctor proffering opinion sees plaintiff for the first time after a substantial period of time since the accident]; *Vaughan v Baez*, 305 AD2d 101, 101 (2003); *Shinn v Catanzaro*, 1 AD3d 195, 198-199 [2003]; *Komar v Showers*, 227 AD2d 135, 136 [1996]).

The majority relies on two cases in support of its holding,

Gonzalez v Vasquez (301 AD2d 438 [2003]) and *Rosario v Universal Truck & Trailer Serv., Inc.* (7 AD3d 306 [2004]), neither of which bears on the issue of contemporaneous medical treatment and both of which, to the extent that they allow a doctor to establish causation upon an initial examination conducted a substantial time after an accident, are at odds with *Vaughan, Shinn, Komar and Pommells*.

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

ENTERED: AUGUST 25, 2011

CLERK

Sweeny, J.P., Moskowitz, DeGrasse, Freedman, Richter, JJ.

4195-
4195A In re Liquidation of Midland Insurance Company — Index 41294/86

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Everest Reinsurance Company,
Appellant-Respondent,

-against-

James J. Wrynn, Superintendent of Insurance of the State of New York, etc., et al.,
Respondents-Appellants.

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Baxter International Inc.,
Intervenor-Respondent.

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Budd Larner, P.C., New York (Joseph J. Schiavone of counsel), for appellant-respondent.

Simpson Thacher & Bartlett, LLP, New York (Barry R. Ostrager of counsel), for Swiss Reinsurance America Corporation, GE Reinsurance Corporation and Westport Insurance Corporation, and Hogan Lovells US LLP, New York (Sean Thomas Keely of counsel), for Clearwater Insurance Company, Metropolitan Group Property and Casualty Insurance Company, and Allianz S.p.A., respondents-appellants.

David Axinn, New York, for James J. Wrynn, respondent-appellant.

Nixon Peabody LLP, Boston, MA (Joseph C. Tanski, of the bar of the State of Massachusetts, admitted pro hac vice, of counsel), and Nixon Peabody LLP, New York (Barbara A. Lukeman of counsel), for California Insurance Guarantee Association, Connecticut Insurance Guaranty Association, District of Columbia Insurance Guaranty Association, Georgia Insurers Insolvency Pool, Maine Insurance Guaranty Association, Massachusetts Insurers Insolvency Fund, Mississippi Insurance Guaranty Association, New Hampshire Insurance Guaranty Association, Rhode Island Insurers Insolvency Fund, Texas Property & Casualty Insurance Guaranty Association, Vermont Property and Casualty Insurance Guaranty Association, and

Virginia Property and Casualty Insurance Guaranty Association, respondents-appellants.

Shapiro, Rodarte & Forman LLP, Santa Monica, CA (Cindy F. Forman of counsel), for Baxter International Inc., respondent.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered on or about January 15, 2008, which denied the motions of Everest Reinsurance Company to modify an anti-suit injunction and to vacate an order, same court and Justice, entered on or about November 8, 2006, and modified a claims allowance procedure order, same court (Beverly S. Cohen, J.), entered January 31, 1997, unanimously affirmed, without costs. Order, same court (Michael D. Stallman, J.), entered June 2, 2009, which set forth certain procedures for the allowance of claims against Midland Insurance Company, unanimously affirmed, without costs.

By order entered on or about April 3, 1986, Supreme Court (Thomas J. Hughes, J.) placed Midland Insurance Company in liquidation and permanently enjoined the commencement and prosecution of all actions against it (*see* Insurance Law § 7419[b]). Everest Reinsurance Company entered into excess of loss reinsurance treaties and facultative reinsurance certificates with Midland for policy periods in the 1970s and

1980s (collectively, the reinsurance contracts).[1] Claiming that its contractual rights were not being honored, Everest moved the court for an order modifying the injunction so as to permit an action by Everest for a judgment declaring its rights as well as those of the liquidator under the reinsurance contracts. Everest sought leave to sue for a judgment declaring that the liquidator breached the reinsurance contracts by failing to provide Everest with (a) proper information regarding claims, (b) an opportunity to participate in settlement negotiations with Midland policyholders and (c) an opportunity to participate in the claim allowance process. The relief Everest would have wanted to seek in its action was a declaration that it was not required to provide reinsurance for claims affected by the foregoing alleged breaches and a further declaration that Everest has the right to interpose defenses in the liquidator's settlement negotiations and claims allowance processes. On this appeal, Everest argues

[1]"A reinsurance contract is one by which a reinsurer agrees to indemnify a primary insurer for losses it pays to its policyholders" (*Matter of Midland Ins. Co.*, 79 NY2d 253, 258 [1992]). In exchange for the agreement to indemnify, the primary insurer "cedes" part of the premiums for its policies and the losses on those policies to the reinsurer (*id.*). A facultative insurance agreement is one issued to cover a particular risk while treaty reinsurance is obtained in advance of actual coverage and may apply to any risk the primary insurer covers (*id.*).

that the court committed error in denying its motion to modify the injunction.

Insurance Law § 7419(b) vests a liquidation court with broad authority to issue injunctions as it deems necessary to prevent interference with the liquidator or the proceeding, or the waste of the insurer's assets. Accordingly, a court has the unquestioned authority to vacate an anti-suit injunction in the interest of justice (*see Matter of Bean,* 207 App Div 276, 280 [1923], *affd* 238 NY 618 [1924]). A motion for such relief is addressed to the sound discretion of the court (*see Rosemont Enters. v Irving,* 49 AD2d 445, 448 [1975]). One claiming error in the exercise of a court's discretion has the burden of showing an abuse of such discretionary power (*id.*). Everest correctly cites *Matter of Bean v Stoddard* (207 App Div 276 [1923], *affd* 238 NY 618 [1924]) for the proposition that in a liquidation proceeding a court may vacate an injunction in the interest of justice. "The phrase 'interest of justice' implies conditions 'which assist, or are in aid of or in the furtherance of, justice [and] bring about the type of justice which results when the law is correctly applied and administered' after consideration of the interests of both the litigants and society" (*Hafkin v N. Shore Univ. Hosp.,* 279 AD2d 86, 90 [2000], *affd* 97 NY2d 95

[2001][citations omitted]).

In making its determination, the court found that Everest did not establish a likelihood of its success in proving that the liquidator violated its contractual investigation and interposition rights by refusing to allow Everest to participate in the allowance, disallowance and settlement of claims prior to their submission to the court. The court further noted that Everest will suffer no injury until it is called upon to make payment on claims that the liquidator allows and the court has approved. The court also recognized the public interest in the single management of a liquidation that Insurance Law § 7419(b) is intended to protect. Hence, we conclude that the court gave due consideration to the interest of justice in denying Everest's motion for an order vacating the anti-suit injunction. Although the court misstated Everest's burden on the motion to be proof by a preponderance of the evidence, we also find no abuse of discretion on the basis of the foregoing factors considered by the court.[2]

We reject Everest's argument that the court erroneously held

[2]Here the court relied on *Icy Splash Food & Beverage, Inc. v Henckel* (14 AD3d 595 [2005]), a case that is distinguishable because it involves the standard of proof on a trial as opposed to a motion.

that Everest's right to interpose defenses attaches only after the liquidator has allowed a claim. Under Insurance Law § 1308(a)(3), a reinsurance agreement may provide that where a claim is pending during an insurer's insolvency proceeding the reinsurer "may investigate such claim and interpose, at its own expense, in the proceeding where such claim is to be adjudicated any defenses which it deems available to the ceding company, its liquidator, receiver or statutory successor." Moreover, Insurance Law § 7432 and § 7433 provide for the processing of claims by the liquidator while § 7434(a)(1) contemplates the payment of claims upon the recommendation of the liquidator under the direction of the court. Hence, claims are adjudicated after they have been filed with the court.

Everest's claim of a right to interpose defenses at the commencement of a liquidation proceeding is also at odds with the very nature of reinsurance. Even where there is reinsurance, primary insurers are solely responsible for the investigation and defense of claims (*see Unigard Sec. Ins. Co. v North Riv. Ins. Co.*, 79 NY2d 576, 583 [1992]). "The reinsurer does not assume liability for losses paid . . .; its only obligation is to indemnify the primary insurer (*Matter of Midland Ins. Co.*, 79 NY2d at 258). The reinsurance contracts involved here contain

typical "follow the settlements" or "follow the fortunes" provisions which leave reinsurers little room to dispute the primary insurers' claims handling (*Unigard* at 583). By operation of a "follow the settlements" clause, a reinsurer is bound by the settlement or compromise of a claim agreed to by a cedent unless it can show impropriety in arriving at the settlement (*Excess Ins. Co. Ltd. v Factory Mut. Ins. Co.,* 3 NY3d 577, 583 n 3 [2004]). The reinsured's liability determinations are insulated from the reinsurer's challenge "'unless they are fraudulent, in bad faith, or the payments are clearly beyond the scope of the original policy or in excess of [the reinsurer's] agreed-to exposure'" (*Allstate Ins. Co. v Am. Home Assur. Co.,* 43 AD3d 113, 121 [2007], *quoting North Riv. Ins. Co. v Ace Am. Reins. Co.,* 361 F3d 134, 140 [2d Cir 2004], *lv denied* 10 NY3d 711 [2008][internal quotation marks and citation omitted]). We are, therefore, not persuaded by Everest's argument that a reinsurer's right to investigate claims and interpose defenses attaches with the commencement of a liquidation proceeding and even before the liquidator has decided to allow a claim.

We also reject Everest's claim that the court lacked the authority to order a reference for hearings before a referee on defenses to be interposed by the reinsurers. Since 1994,

objections to the liquidator's recommendations for the denial of policyholders' claims in this proceeding have been referred to a referee to hear and report (*see Matter of Midland Ins. Co.*, 71 AD3d 221, 223 [2010], *revd on other grounds* 16 NY3d 536 [2011]). The court's January 15, 2008 order provides for "a process in which [the reinsurers'] defenses can be adjudicated as part of the judicial approval process, involving a hearing before a referee equivalent to that provided where an objection is filed to the liquidator's disallowance of a claim." Accordingly, the court set up a mechanism for a referee to hear and report to the court on the reinsurers' defenses. CPLR 4001 enables a court to "appoint a referee to determine an issue, perform an act, or inquire and report in any case where this power was heretofore exercised and as may be hereafter authorized by law." The statute carries over the appointment powers exercised by courts "traditionally" or under prior law (Siegel, Practice Commentaries [McKinney's Cons Laws of NY, Book 7B, CPLR C4001:1]). CPLR 4001 became effective in 1962 (L 1962, ch 308). Courts exercised the power to appoint referees to hear and report in liquidation proceedings prior to that time (*see e.g. Matter of Natl. Sur. Co.*, 286 NY 216 [1941]) and since (*see e.g. Matter of Union Indem. Ins. Co.*, 67 AD3d 469 [2009], *lv denied* 14 NY3d 859

[2010]; *Matter of Midland Ins. Co. of New York,* 269 AD2d 50 [2000]). We, therefore, find the court's appointment of a referee to hear and report with respect to the reinsurers' defenses to be within the proper exercise of the court's powers pursuant to CPLR 4001. Also, contrary to the arguments of Everest and the other reinsurers, their rights to issue subpoenas and conduct discovery have not been foreclosed. Such matters are within the discretion of a referee to hear and report (*see* CPLR 4201).

The court properly denied Everest's motion for an order precluding the liquidator and Midland's policyholders from introducing evidence of settlements entered into by Everest as a direct insurer in other proceedings. The proffered evidence is relevant inasmuch as it is offered to refute Everest's claims by showing that Everest, as a direct insurer in other proceedings, utilized the claims handling methodology it seeks to challenge as a reinsurer in this proceeding. Everest's reliance on CPLR 4547 is misplaced because the disputed evidence is not offered "as proof of liability for or invalidity of any claim" (*id.*). Moreover, the statute does not limit the admissibility of evidence offered for another purpose (*id.*).

The guaranty associations that have appeared in this

proceeding assert that the court's order is erroneous to the extent that it allows a reinsurer to interpose defenses as to claims settled by the liquidator or claims the liquidator is bound by law to approve. The guaranty associations essentially argue that article 74 of the Insurance Law, which governs liquidation, trumps Insurance Law § 1308, which applies to reinsurance. We reject the guaranty associations' argument on the ground that liquidation cannot place a liquidator in a position different from that in which the insolvent insurer would have found itself but for the liquidation (*see Matter of Midland Ins. Co.*, 79 NY2d at 264-265).[3]

We reject the liquidator's argument that the claims procedures set forth in the June 2, 2009 order are inefficient insofar as they allow the reinsurers to interpose defenses at the claims allowance stage. On the contrary, the court's procedure provides a useful mechanism for the disposition of the reinsurers' defenses during liquidation or in a subsequent action

[3]The appendices before this Court are insufficient to enable us to pass on the guaranty associations' assertion that the liquidator is bound by the settlements of the associations' claims. We note that the issue was not addressed by the court below and the liquidator states in its brief that it was first raised by the guaranty associations on a motion for leave to reargue.

brought by the liquidator. 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: AUGUST 25, 2011

CLERK

Andrias, J.P., Catterson, Moskowitz, Abdus-Salaam, Román, JJ.

4473 The People of the State of New York, Ind. 3524/05
Respondent,

-against-

Reginald Swinton,
Defendant-Appellant.

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

Reginald Swinton, appellant pro se.

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

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Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered May 24, 2007, convicting defendant, after a jury trial, of rape in the first degree (two counts), criminal sexual act in the first degree (three counts), burglary in the second degree (three counts), robbery in the third degree (two counts) and attempted robbery in the third degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 150 years to life, unanimously affirmed.

On July 15, 2005, by a 16-count indictment, defendant was charged with multiple counts of forcible rape, forcible criminal sexual act, burglary, robbery, and attempted robbery. Specifically, it was alleged that on three separate dates, over

the course of two weeks, on the upper west and east sides of Manhattan and at approximately the same times, defendant broke into three separate premises, took money, and either sexually assaulted or raped the women whom he found inside.

At trial, with regard to the first incident, it was established that the assailant entered the victim's premises on East 89th Street through a window after she had gone to sleep, put a cushion over her face, asked for and took money from her purse, asked the victim to blindfold herself with her own shirt, threatened to kill her if she disobeyed, told her to "relax, relax" immediately prior to forcing her to have intercourse with him and then forced her to perform oral sex on him. With respect to the second incident, the evidence at trial established that the assailant entered the victim's premises on West 87th Street through a window after she had gone to sleep, put a pillow over her face, threatened to kill her if she disobeyed, asked the victim to blindfold herself with her husband's scarf, asked for and took money from her wallet, told her to "relax" before he forced her to have intercourse with him, and then forced her to perform oral sex. With regard to the third incident, the evidence at trial established that the assailant entered the victim's premises on East 89th Street through a window, again

after she had gone to sleep, put a pillow over the victim's face, asked for and looked for money, threatened to kill her, asked the victim to blindfold herself with her own t-shirt, forced her to perform oral sex and, telling her to "relax" several times, tried to force her to have intercourse. None of the victims could identify defendant. A palmprint found at the premises where the first incident occurred matched defendant's palmprint. Semen discovered at the premises where the second incident occurred yielded DNA matching defendant's DNA. However, no physical evidence linked defendant to the crimes committed within the third premises.

Because the assailant's identity with respect to the third incident could not be independently established and because the assailant's conduct during all three incidents was so similar and distinctive, the trial court properly allowed the jury to consider the issue of defendant's identity as the perpetrator of the third incident through the use of the assailant's modus operandi (*People v Beam*, 57 NY2d 241, 250-251 [1982]; *People v Allweiss*, 48 NY2d 40, 47 [1979]. Moreover, the trial court properly instructed the jury that it could not link defendant to the third crime merely because it concluded that he had a propensity for criminal activity, but could only do so if it

found that defendant had committed either of the first two incidents and that the assailant who committed the third employed the same unique distinctive conduct (*see Beam* at 250-253).

Defendant's contention that the crimes alleged and in particular the assailant's behavior during the crimes were neither similar nor unique enough to establish a pattern is meritless. On the contrary, all three incidents occurred within 15 days of each other and involved an assailant who broke into a premises through a window at night, covered his victim's face with a pillow or cushion, demanded that the victim blindfold herself with an article of her own clothing or clothing found within the victim's premises, repeatedly told each victim to "relax," demanded money, threatened to kill the victim, forced the victim to perform oral sex, and either forced or tried to force the victim to engage in sexual intercourse. Thus, the assailant's behavior gave rise to a distinct pattern making it "highly probative of. . .[his] identity" (*Beam* at 253; *People v Phillips*, 70 AD3d 562, 562 [2010], *lv denied* 16 NY2d 799 [2011] ["(t)he first three robberies, occurring within a short time period and in the public areas of apartment buildings located within close geographic proximity, had many similarities that

formed a 'distinctive repetitive pattern'"]; *People v Bryant*, 258 AD2d 293, 293 [1999], *lv denied* 93 NY2d 1043 [1999]; *People v West* 160 AD2d 301, 301-302 [1990], *lv denied* 76 NY2d 798 [1990] [distinctive modus operandi established when "attacks occurred within a two-month period against four unaccompanied women in the late afternoon in common areas of office buildings which were all located within a two-block-wide corridor between 30th and 45th Streets"]). While we acknowledge that the crimes here were not identical and that slight differences in their commission existed, "[i]t is not necessary that the pattern be ritualistic for it to be considered unique; it is sufficient that it be a pattern which is distinctive" (*Beam* at 253).

Defendant's challenge to the sufficiency and weight of the evidence with respect to his conviction for the third incident is without merit. A review of the record evinces that the jury's conclusion of guilt is rationally supported by the evidence adduced at trial (*People v Danielson*, 9 NY3d 342, 349 [2007]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Specifically, the verdict is supported by the testimony of the victim describing the third attack and the identification of the defendant as the perpetrator based on his unique modus operandi. For this very reason, it cannot be said that the verdict is against the weight

of the evidence since an acquittal on this record would have been unreasonable (*id.*).

Since the trial court permitted only limited inquiry into defendant's extensive criminal record, it minimized any potential prejudice and thus its *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*People v Hayes*, 97 NY2d 203 [2002]; *People v Walker*, 83 NY2d 455, 458-459 [1994]; *People v Pavao*, 59 NY2d 282, 292 [1983]).

We perceive no basis for reducing the sentence. In particular, defendant's contention that insofar as his sentence, in the aggregate, is illegal, should be vacated, and must be capped at 50 years pursuant to Penal Law § 70.30(1)(e)(vi), is meritless. Preliminarily, we note that the Penal Law (§ 70.30, *et seq.*) does "not restrict the number or length of the individual consecutive sentences that may be imposed, nor does it require that the aggregate sentence be vacated when ever the aggregate maximum [sentence] exceeds the limitation" (*People v Moore* 61 NY2d 575, 578 [1984]). Instead, the statute "merely requires that the Department of Correctional Services calculate the aggregate maximum length of imprisonment consistent with the applicable limitation" (*id.*; *People v Belle*, 277 AD2d 143, 143 [2000], *lv denied* 96 NY2d 780 [2001]). Moreover, where as here,

defendant was sentenced as a persistent violent felony offender, the cap imposed by Penal Law § 70.30(1)(e)(vi) does not apply and does not, in any event, warrant reduction of his sentence (*Roballo v Smith*, 63 NY2d 485, 489 [1984] ["(t)he purposes of both sections (Penal Law § 70.10, enhancing a defendant's sentence because he's a persistent felony offender and Penal Law § 70.30, *et seq*.) will be served if section 70.30. . .is read as excluding those situations when the defendant receives consecutive sentences, at least one of which is as a persistent felony offender"]).

We have considered and rejected defendant's pro se speedy trial claim.

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

ENTERED: AUGUST 25, 2011

CLERK

Andrias, J.P., Saxe, Friedman, Moskowitz, Richter, JJ.

4538-
4538A US Express Leasing, Inc., etc., Index 600305/08
Plaintiff-Appellant,

-against-

Elite Technology (NY), Inc., etc.,
et al.,
Defendants-Respondents.

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Halperin Battaglia Raicht, LLP, New York (Andrew P. Saulitis of counsel), for appellant.

Allan H. Carlin, New York, for respondents.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered March 3, 2009, which, to the extent appealed from, granted defendants' motion to dismiss the first and third causes of action, unanimously affirmed, without costs. Order, same court and Justice, entered October 30, 2009, which, upon reargument, granted defendants' motion to dismiss the second cause of action, unanimously modified, on the law, to reinstate the second claim, and otherwise affirmed, without costs.

Plaintiff, US Express Leasing, Inc. (USXL), is a leasing and financing company that provides financing for equipment dealers, vendors and their customers. Defendant, Elite Technology, Inc. (Elite), sells business equipment such as copiers, shredders and scanners, and arranges for the leasing, rental and financing of

such equipment. Defendant Michael Pavone is an officer and representative of Elite who dealt with USXL on Elite's behalf. In November 2006, USXL and Elite entered into a "Master Purchase Agreement & Assignment of Leases" (MPA) under which USXL would purchase equipment leases from Elite and in turn be entitled to collect the payments under the lease. The MPA defines leases as "lease, rental or finance agreements for equipment and/or software sold or distributed by [Elite] (the "Equipment") to certain qualified customers (each a "Customer") of [Elite]." Further, the MPA expressly provides that "[a]ll documentation for Leases will name [Elite] as the owner for such Leases," and "[i]mmediately upon the execution and delivery of the final documents by Customer, [Elite] will assign and sell all of its rights, title and interest in and to the Lease, including the Lease Documents and the Equipment, to USXL on a non-recourse basis."

Under the MPA, Elite also agreed to certain representations and warranties, including, that all documents executed by Elite's customers in connection with any lease are valid, legal, and genuine. The MPA further required Elite to agree that with regard to leases, it had no knowledge of any fact or circumstance that would impair the validity or collectability under any lease.

In April 2007, Pavone informed USXL that nonparty National International Marketing Groups, Inc. (National), wished to lease a photocopier system over a 63-month term. Pavone provided USXL with National's phone number, business address, and the name, address, and Social Security number for National's Personal Guarantor and President, John Samuel. The record reflects that USXL engaged in its own investigation of National, including performing a Google search, checking with the New York Secretary of State regarding the listing for National, and performing a credit check on Samuel. According to USXL's business notes, the Secretary of State did not have a listing for National, and the address search returned the name of a different company. However, USXL was able to confirm that National was incorporated in Delaware, and it received a positive credit history report on Samuel. USXL then requested National's finances from Elite. Elite subsequently provided USXL with an unsigned "Independent Accountants' Report," which reflected that National's financials were in good working order. According to Elite, this was the only documentation it had on National, and USXL accepted this without further question.

Based on this information, USXL entered into a rental agreement directly with National for the lease of photocopier

equipment, which USXL had purchased from Elite for $96,643.21. The rental agreement expressly required National to agree that USXL was the owner of the equipment. Samuel signed the rental agreement on National's behalf and as a personal guarantor. Elite was not named or referenced in the rental agreement between USXL and National. Thereafter, National never made any payments under the rental agreement. USXL then gave notice to Elite that it had breached its representations and warranties under the MPA and demanded that Elite repurchase the copier, as it was obligated to do. Elite refused, contending that the rental agreement between USXL and National did not fall under the MPA, and thus the warranties under it did not apply.

USXL commenced this action against Elite alleging breach of representations and warranties, and against Elite and Pavone for fraud and negligent misrepresentation. Elite and Pavone moved to dismiss for failure to state a cause of action. The motion court granted the motion as to the breach of representations and warranties and negligent misrepresentation claims, but denied the motion as to the fraud claim. However, upon reargument, the motion court granted defendants' motion to dismiss the fraud claim.

"Dismissal of a complaint pursuant to CPLR 3211(a)(1) is

warranted where 'the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law'" (*150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 4 [2004], quoting *Leon v Martinez*, 84 NY2d 83, 88 [1994]). Here, the written MPA contradicts USXL's allegations supporting its claim for breach of representations and warranties. According to the MPA, which contains the warranty clauses at issue in this case, the lease must list Elite as the equipment owner. However, the rental agreement between USXL and National listed USXL as the equipment owner, and therefore did not come within the MPA at all. Further, USXL did not purchase a lease, and all the rights thereunder, from Elite; rather, it purchased the actual equipment. The MPA only applies if the lease, as opposed to the equipment, is purchased. USXL then entered into a separate agreement, which did not involve Elite, with National. Thus, the rental agreement never qualified as a lease under the MPA, and therefore the representations and warranties in the MPA were never triggered.

The complaint also fails to state a cause of action for negligent misrepresentation. To make out a prima facie case of negligent misrepresentation, the plaintiff must show "(1) the existence of a special or privity-like relationship imposing a

duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]). USXL alleges no facts to indicate the type of special relationship of trust or confidence that would give rise to a duty on the part of Elite or Pavone to impart correct information (*see Mandarin Trading Ltd. v Wildenstein,* 16 NY3d 173, 180 [2011]; *Kimmell v Schaefer*, 89 NY2d 257, 263 [1996]; *Dobroshi v Bank of Am., N.A.*, 65 AD3d 882, 884 [2009], *lv dismissed* 14 NY3d 785 [2010]). Nor does USXL contend that Elite possessed any specialized knowledge or expertise as it pertained to the finance and leasing industry (*Mandarin Trading Ltd.*, 16 NY3d at 180; *Kimmell*, 89 NY2d at 263). A special relationship does not arise out of an ordinary arm's length business transaction between two parties *(Mateo v Senterfitt*, 82 AD3d 515, 516-517 [2011]; *Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491, 492 [2006]).

USXL's second cause of action should not have been dismissed. To make out a prima facie case of fraud, plaintiff must allege "representation of material fact, falisty, scienter,

reliance and injury" (*Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 [1999])[1]. On a motion to dismiss, pursuant to CPLR 3211, the complaint is to be afforded a liberal construction; the court accepts the facts as alleged in the complaint as true, accords the plaintiff the benefit of every possible inference, and determines only whether the facts as alleged fit within any cognizable legal theory (*Leon*, 84 NY2d at 87-88). There is no dispute here that defendants falsely misrepresented a material fact in the form of an inaccurate accountant's report, and that plaintiff relied on it to its detriment resulting in significant monetary loss. The resolution of this motion turns primarily on whether the issue of reasonable reliance can be resolved as a matter of law based on the evidence, or whether plaintiff, for pleading purposes, has met its burden.

The reasonableness of plaintiff's reliance finds some support in the fact that, from the information Elite provided, USXL was able to conduct a credit history check of National's personal guarantor, and determine that National was incorporated in Delaware. USXL also obtained an accountant's report from

[1]In its briefing, defendant appears to have confused the elements of negligent misrepresentation, which requires the presence of a special relationship, with the elements of fraud, which does not.

Elite, which showed that National's finances were in good working order. Furthermore, the parties had some business dealings with each other prior to the receipt of the accountant's report, though the extent of their dealings cannot be determined from the submissions on this motion.

On the other hand, the reasonableness of USXL's reliance could be undermined by its acceptance of an unsigned accountant's report and its awareness of an address search showing the name of a company other than National. We conclude, however, that these factors do not, in this case, entitle defendants to dismissal of the fraud claim based on documentary evidence. Indeed, there is a strong inference in USXL's pleadings, considered as a whole, of an active scheme by defendants to fraudulently induce USXL to enter into a fictional transaction. Any issues raised by defendants as to the reasonableness of USXL's actions can be

explored at later stages of the proceedings (*Knight Sec. v Fiduciary Trust Co.*, 5 AD3d 172, 173 [2004] [finding that the question of the plaintiff's reasonable reliance on the defendant's misrepresentations implicated factual issues inappropriate for resolution on a CPLR 3211 motion]).

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

ENTERED: AUGUST 25, 2011

CLERK

Mazzarelli, J.P., Sweeney, DeGrasse, Richter, Manzanet-Daniels, JJ.

5021N Mia Henderson-Jones, etc., Index 115360/06
5021NA Plaintiff-Appellant,

-against-

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

Police Officer and/or Detectives, etc.,
Defendants,

Cyrus R. Vance, Jr., District Attorney,
New York County,
Nonparty Respondent.

_____

Lowell D. Willinger, New York (Warren J. Willinger of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Andrew S. Wellin of counsel), for municipal respondents.

Cyrus R. Vance, Jr., District Attorney, New York (Richard Nahas of counsel), for nonparty respondent.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered June 1, 2010, which denied plaintiff's motion to strike the answer of defendants City of New York and Commissioner Kelly for failure to comply with discovery orders, unanimously reversed, on the facts, without costs, the motion granted and the answer stricken, and the matter remanded for entry of a default judgment and an inquest on damages. Order, same court (Saliann Scarpulla, J.), entered December 1, 2009, which, to the extent

appealed from as limited by the briefs, granted plaintiff's motion to strike the defendants' answers for failure to comply with discovery orders only to the extent of ordering defendants to produce certain supplemental responses within 30 days, and denied plaintiff's motion for leave to amend the complaint to substitute Sergeant John Van Orden as party defendant for officer #3 and to compel New York County Assistant District Attorney Patricia Bailey to appear for deposition, unanimously modified, on the law and the facts, to grant the motion for leave to amend the complaint to substitute Sergeant John Van Orden as party defendant for officer #3, and the appeal therefrom otherwise dismissed, without costs, as academic.

Plaintiff alleges that on October 27, 2005, 10 police officers entered her home without a search warrant, arrested her and took her to the precinct, where she was subjected to a strip search. She was then transferred to the Manhattan Detention Complex, where she was strip-searched again and held for 30 hours. On October 28, 2005, the Manhattan District Attorney's Office decided not to prosecute plaintiff.

Plaintiff was able to partially identify only two of the officers involved in her arrest. One was the arresting officer, whose last name she remembered as Sierra and whose shield number

she noticed and remembered. The other was a female officer, whose name she did not identify but whose shield number she noticed and remembered.

Plaintiff timely served a notice of claim, and sought to ascertain the identity of all of the officers involved in the search and arrest by requesting information from the New York City Police Department and the District Attorney's Office pursuant to the Freedom of Information Law. However, she received no information in response. On October 13, 2006, she commenced this action. The case caption named Sierra by his last name and shield number and the female officer by shield number only. The seven other defendants were named as "those individuals who accompanied Detective Sierra into plaintiffs' apartment and participated in the illegal acts hereinafter alleged."

Shortly after commencing the action, plaintiff served her first notice for discovery and inspection, which sought, inter alia, the identity of all police officers involved in her arrest and detention. Plaintiff also provided defendants with an authorization, so-ordered by the court on January 31, 2007, for disclosure of all records "relating to the investigation leading up to [her] arrest, . . . including the names and addresses of

the involved detectives and police officers." At the same time, the court granted plaintiff an extension of the time provided by CPLR 306-b to identify and serve the unidentified defendants. On April 6, 2007, the court granted plaintiff's motion pursuant to CPLR 308(4) for leave to effectuate service of process upon the unknown police officers by serving the Police Commissioner and Corporation Counsel.

Also in April 2007, a preliminary conference was conducted that resulted in an order directing defendants to disclose, inter alia, the criminal complaint, the follow-up report, the arrest report, memo book entries for the incident in question, the on-line booking sheet, and a patrol guide. In response to the discovery notice and the preliminary conference order, defendants provided only the name of the female officer, Sergeant Wendy Gomez-Smith, a one page arrest report, and an illegible copy of the court detention pen record for the Manhattan Detention Complex.

In August 2007, plaintiff moved for default judgments against the unknown officers, Detective Sierra and Sergeant Gomez-Smith, and for an order striking defendants' answer for failure to provide discovery. On October 19, 2007, preceding oral argument on the motion, plaintiff served a second notice for

discovery and inspection seeking the names of all officers assigned to the Manhattan Gang Squad on October 27, 2005, and copies of their memo book entries of October 27-29, 2005. On the return date of the motion, defendants provided three affidavits related to the motion to compel. One was by Sierra, now retired, who stated that all of plaintiff's arrest and detention documents had been kept by him in a folder, which he had left in his old desk. Another affidavit was by Gomez-Smith, who attested that she was currently assigned to the Manhattan North Investigations Unit. She stated that she went to her old Gang Squad office, searched "old desks, lockers, and the drawers where each of us kept our arrest paperwork," but could not locate Sierra's folder on plaintiff or her own memo book for that time period.

The court granted plaintiff's motion for a default judgment against the unknown police officers, but denied the motion as to Detective Sierra, and compelled plaintiff to accept his answer nunc pro tunc. (Plaintiff agreed to accept the answer of Gomez-Smith.) The court noted that persons identified later could be substituted by any party, and that those substituted persons could move to vacate the default. As to the discovery issues, the court expressed skepticism that the documents that defendants had produced represented a complete response to plaintiff's

request, but suggested that plaintiff depose Sierra and revisit the discovery dispute at a later date, if necessary.

The deposition of Sierra was scheduled for December 11, 2007, but he failed to appear. He also failed to appear at the deposition rescheduled for two weeks later. When Sierra finally appeared on January 9, 2008, he identified Sergeant John Van Orden as the supervisor of the search at plaintiff's home.

On March 5, 2008, defendants served a response to the October 19, 2007 preliminary conference order. They objected to providing the names of the officers assigned to the Gang Squad and their memo books, on the grounds that the demand was overbroad, protected by law enforcement privilege, and irrelevant, since there was no showing that all the officers assigned to the Manhattan Gang Squad were involved in plaintiff's arrest and detention.

Also on March 5, 2008, a compliance conference was held, at which the court directed defendants to "identify the name, rank, & badge numbers of *all* NYPD personnel who responded to and otherwise participated in the arrest of Mia Henderson-Jones and Englebert Jones . . . If said person is not disclosed to plaintiff's counsel within 25 days of entry of this order, the defendants shall be precluded from calling that individual at

trial (emphasis in original)." The court directed the production of Sierra for his continued deposition, and ordered that Gomez-Smith and Sergeant Van Orden be deposed as well.

Neither Van Orden, at his deposition, nor Sierra, at his continued deposition, could recall the identity of any other officers present that evening. They also gave conflicting reports of who found the marijuana, where the officer was when he observed it, and whether the marijuana was in the living room or a bedroom. Van Orden did not have specific recall of most of the events concerning the search warrant and its execution, but testified that he had a memo book for that evening at work and would make it available.

On August 11, 2008, plaintiff served a third notice for discovery and inspection, making specific reference to Van Orden's testimony, seeking, inter alia, any paperwork concerning her arrest and roll call and sign in sheets for the Gang Squad.

At a January 23, 2009 compliance conference, a so-ordered stipulation was executed stating that "[plaintiff] will move or subpoena for deposition of New York County DA's office, Patricia Bailey, Chief of Special Litigation Bureau, regarding basis for decision not to prosecute plaintiff." The stipulation also stated that plaintiff would move to enforce compliance with her

notices for discovery and inspection and to substitute Van Orden for one of the unidentified defendants.

In May 2009, defendants still not having disclosed the names of all of the officers, plaintiff moved, pursuant to CPLR 3126(3), for an order striking their answer for willfully and contumaciously failing to comply with prior orders and notices. Plaintiff also moved, pursuant to CPLR 1021 and 1024, to substitute Van Orden as a party in lieu of unknown officer #3, and for an order compelling Assistant District Attorney Patricia Bailey to appear for a deposition and produce records. Finally, the motion sought to compel the District Attorney's office to produce Bailey for a deposition. Defendants disputed that they had acted willfully and contumaciously, contending that they had diligently attempted to provide documentation regarding plaintiff's arrest and brief detention. As for the substitution request, defendants maintained that Van Orden had never been served, and thus the court lacked jurisdiction over him. They further argued that the fact that plaintiff waited a year and a half before moving to substitute should bar the substitution. The District Attorney's Office also opposed the motion, on the grounds that plaintiff had failed to show special circumstances warranting disclosure from a nonparty, that, in any event, the

District Attorney's Office had not been able to locate a document explaining why it declined to prosecute, and that even if it could find such a document, there was a substantial probability that the document would be privileged.

The court declined to impose a sanction. It found that the sanction of striking a pleading was unwarranted, since plaintiff had not shown that defendants had acted willfully. To the contrary, the court found that they had "substantially complied" with their discovery obligations, and that their responses concerning the precinct command log, and Sierra's folder, were sufficient. The court struck plaintiff's request for copies of all memo book entries for the date in question for all on-duty officers as overbroad, irrelevant and privileged.

The court, however, found the affidavit by Sergeant Gomez-Smith concerning her search for Sierra's folder and memo books inadequate, since it did not mention a specific search for the DD-5's. Finally, finding their objections inadequate, the court directed defendants to provide the names, ranks and badge numbers of the officers that participated in the arrest and detention, "or provide an affidavit by a person with knowledge as to the nature and scope of the search which failed to uncover any responsive documents" within 30 days of the order.

As to plaintiff's motion to substitute Van Orden, the court found that jurisdiction was never obtained over Van Orden, because the service upon an unnamed officer at One Police Plaza was insufficient to give Van Orden notice. Moreover, the court found that more than a year had elapsed since plaintiff learned Van Orden's name on January 9, 2008, and that Van Orden had been prejudiced by plaintiff's delay in substituting his name, particularly since a default judgment had been entered against him on November 11, 2007. Finally, the court denied any relief against the District Attorney's Office, stating that plaintiff was required to serve a subpoena before she was entitled to information from a nonparty.

In response to the court's order, defendants provided plaintiff with five separate affidavits, two of which are relevant on this appeal. One was by Lieutenant Sean Frey of the Manhattan Gang Squad, who indicated that he searched "in and around retired Detective Sierra's former desk, as well as in file cabinets," but could not locate any DD-5's (complaint follow-ups), chain of custody reports, TAC plans or any other documentation of plaintiff's arrest. Van Orden averred in his own affidavit that he searched all of his former desks and lockers but could not find his activity log (or memo book),

although he had testified earlier to having kept it.

In February 2010, plaintiff moved again to strike defendants' answer for failure to provide the discovery required in the first discovery order, as well as the long-outstanding demand for the names of the police officers present when plaintiff was arrested. Plaintiff argued that the affidavits that defendants had provided either were identical to affidavits submitted earlier in connection with the case, which were deemed insufficient under the prior order, or failed to demonstrate that a meaningful and genuine search had been made. Plaintiff also submitted an affidavit, and supplemental affidavit, by a former police officer who had experience with the NYPD's Civilian Complaint Bureau. The former officer opined that many of the documents sought, such as the DD-5, the online booking worksheet, and the arrest supplemental reports, were kept in secondary locations, and thus the lost Sierra folder was not dispositive as to whether defendants could find the records. The expert further opined that a search should be made of records kept by the Support Service Bureau at 1 Police Plaza, where closed case and arrest files could be accessed. He was of the overall opinion that the searches conducted by defendants were extremely limited and that their averments that they knew of "no other places"

where the documents would be "lack[ed] integrity."

In opposition, defendants argued that they had been complying with all discovery orders and that many of the documents sought by plaintiff had been lost, were unavailable, or did not exist. As to plaintiff's expert's opinion that they had not conducted a good faith search, defendants argued that "the City is not required to search in every location that Plaintiff's 'expert' *speculates* documents could be . . . Lt. Frey searched in the only places he knows where the case/arrest file would be kept."

By order entered on June 1, 2010, the court stated, "Upon the foregoing papers, it is ordered that this motion to strike defendant's answer is denied."

"[I]t is well settled that the drastic remedy of striking a party's pleading pursuant to CPLR 3126 for failure to comply with a discovery order is appropriate only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith" (*McGilvery v New York City Tr. Auth.*, 213 AD2d 322, 324 [1995]). Willful and contumacious behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses (*see Johnson v City of New York*, 188 AD2d 302 [1992]; *Nunez v City of New York*, 37 AD3d

434 [2007]). A party that permits discovery to "trickl[e] in . . [with a] cavalier attitude . . should not escape adverse consequence" (*Figdor v City of New York*, 33 AD3d 560, 561 [2006]).

As drastic as the penalty of striking an answer is, it serves the important function of deterring obstreporous litigation behavior. Indeed, the Court of Appeals recently made the following observation:

> "As this Court has repeatedly emphasized, our court system is dependent on all parties engaged in litigation abiding by the rules of proper practice. The failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in which cases can linger for years without resolution. Furthermore, those lawyers who engage their best efforts to comply with practice rules are also effectively penalized because they must somehow explain to their clients why they cannot secure timely responses from recalcitrant adversaries, which leads to the erosion of their attorney-client relationships as well. For these reasons, it is important to adhere to the position we declared a decade ago that if the credibility of court orders and the integrity of our

> judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (*Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 81 [2010] [internal quotation marks, alteration, and citations omitted]).

Defendants' behavior in this matter clearly implicates the values articulated in *Gibbs*. Plaintiff was required to serve three discovery notices on defendants to determine the identities of the officers who executed the warrant, and to this day defendants have not complied. The information sought is simple and straightforward, and, most importantly, easily discoverable. The discovery demands were made in addition to a FOIL request and the furnishing of an authorization designed to lessen defendants' burden in searching for the appropriate names. Moreover, defendants were ordered by the court, on no fewer than three occasions, to produce documents containing the officers' names or to reveal the names outright. To the extent defendants made any effort to divulge the names of the officers who executed the search warrant, they made the effort only because plaintiff pressed the issue. It is not unreasonable to deduce from this record that had plaintiff not sought enforcement of unequivocal court orders requiring the production of the officers' names, defendants, to this day, would not have provided even the scant information that they eventually provided. Moreover, defendants

failed to demonstrate that they even attempted to comply with their discovery obligations. An affidavit regarding the unavailability of documents that are the subject of a discovery order must document a thorough search conducted in good faith. It should include details such as "where the subject records were likely to be kept, what efforts, if any, were made to preserve them, whether such records were routinely destroyed, [and] whether a search [was] conducted in every location where the records were likely to be found" *(Jackson v City of New York*, 185 AD2d 768, 770 [1992]).

Here, the affidavits submitted by defendants reveal that the efforts that defendants maintain they took to ascertain the names of the officers were so unimaginative and lacking in diligence that it is hard to characterize them as anything other than willfully designed to thwart plaintiff. Searching old desks and lockers is woefully insufficient. As demonstrated by the unchallenged affidavit by plaintiff's expert, the Police Department is a sophisticated bureaucracy with a system for collecting and storing information concerning arrests and prisoner processing that is not limited to the furniture and notebooks assigned to the officers involved. Indeed, defendants did not even attempt to explain why it would have been futile to

search the areas and databases suggested by plaintiff's expert. They addressed the expert's opinion only to the extent of impugning his qualifications.

Defendants' argument that plaintiff's request for the documents containing the names of all 50 of the Gang Squad officers was overbroad reveals a disdain for the numerous court orders issued in this case. From the early stages of the litigation, defendants were directed, in absolute terms, to disclose the names of the officers involved in the execution of the warrant on plaintiff's apartment. Thus, the format of plaintiff's initial requests for the information is irrelevant. Defendants could have appealed from the orders, but they did not. That they continue to argue, even now, that plaintiff asked for the documents in an imprecise manner confirms their outright disdain for the court's authority to supervise discovery.

As to the substitution of Sergeant Van Orden, plaintiff demonstrated that she made a diligent inquiry to identify the names of the officers involved before commencing this action (*see* CPLR 1024; *Goldberg v Boatmax://, Inc.*, 41 AD3d 255 [2007]). She served the unidentified officers by an alternative means of service authorized by the court pursuant to CPLR 308(5) (*see Harkness v Doe*, 261 AD2d 846 [1999]). Thus, she should have been

permitted to substitute Van Orden as a defendant. We reject defendants' position that plaintiff waited too long to move to substitute Van Orden; the substitution was "deemed" effective when plaintiff learned of Van Orden's identity (CPLR § 1024; *see Woodburn Ct. Assoc. I v Wingate Mgt. Co.*, 243 AD2d 1043, 1045 [1997]).

Finally, plaintiff's appeal from the denial of her motion to compel discovery from the Manhattan District Attorney's Office has been rendered academic by our striking of defendants' answer.

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

ENTERED: AUGUST 25, 2011

CLERK

Tom, J.P., Saxe, Acosta, Abdus-Salaam, JJ.

5156 Michael Mulgrew, etc., Index 113813/10
Petitioner-Appellant,

-against-

Board of Education of the City School
District of the City of New York, et al.,
Respondents-Respondents.

Dow Jones & Company, Inc., et al.,
Intervenors-Respondents.

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New York State United Teachers,
American Federation of Teachers
and National Education Association,
Amici Curiae.

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Stroock & Stroock & Lavan LLP, New York (Charles G. Moerdler of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo of counsel), for Board of Education of the City School District of the City of New York and Joel I. Klein, respondents.

Levine Sullivan Koch & Schulz, LLP, New York (David A. Schulz of counsel), for Dow Jones & Company, Inc., NYP Holdings, Inc., Daily News, L.P., The New York Times Company and NY1 News, respondents.

Richard E. Casagrande, New York, for amici curiae.

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Order and judgment (one paper), Supreme Court, New York County (Cynthia S. Kern, J.), entered January 11, 2011, which, to the extent appealed from as limited by the briefs, denied the

petition and dismissed the proceeding brought pursuant to CPLR article 78 seeking to enjoin respondents from releasing, in response to Freedom of Information Law (FOIL) requests, Teacher Data Reports that disclose teachers' names, unanimously affirmed, without costs.

Supreme Court improperly reviewed respondents' determination to release the requested reports under the "arbitrary and capricious" standard set forth in CPLR 7803(3). The court should have determined whether respondents' determination "was affected by an error of law" (CPLR 7803[3]). In any event, the matter need not be remanded since respondents properly determined that the requested reports should be released under FOIL (*cf. Matter of Verizon N.Y., Inc. v Devita*, 60 AD3d 956, 957 [2009]).

Public agency records, like the ones at issue here, are presumptively open for public inspection and copying, and the party seeking an exemption from disclosure has the burden of proving entitlement to the exemption (Public Officers Law § 89 [5][e]; *see Matter of Bahnken v New York City Fire Dept.*, 17 AD3d 228, 229 [2005], *lv denied* 6 NY3d 701 [2005]). Petitioner, as the party claiming the exemption, failed to sustain that burden. Although the materials sought are, in fact, intra-agency materials under Public Officers Law § 87(2)(g), they are

nonetheless subject to disclosure as "statistical or factual tabulations or data" under § 87(2)(g)(I) (*see Matter of New York 1 News v Office of President of Borough of Staten Is.*, 231 AD2d 524, 525 [1996]). "The mere fact that some of the data might be an estimate or a recommendation does not convert it into an expression of opinion" subject to a FOIL exemption (*Matter of Polansky v Regan*, 81 AD2d 102, 104 [1981]; *see also Ingram v Axelrod*, 90 AD2d 568 [1982]).

The requested reports also do not fall under the exemption for personal privacy set forth in Public Officers Law § 87(2)(b). Although privacy interests are implicated by the type of information sought to be redacted, the release of the information does not fall within one of the six examples of an "unwarranted invasion of personal privacy" set forth in Public Officers Law § 89(2)(b) (*see Matter of New York Times Co. v City of N.Y. Fire Dept.*, 4 NY3d 477, 485 [2005]). Further, when balancing the privacy interests at stake against the public interest in disclosure of the information (*see id.*), we conclude that the requested reports should be disclosed. Indeed, the reports concern information of a type that is of compelling interest to the public, namely, the proficiency of public employees in the

performance of their job duties (*see Stern v FBI*, 737 F2d 84, 92 [1984]).

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: AUGUST 25, 2011

CLERK

Tom, J.P., Catterson, Moskowitz, Freedman, Richter, JJ.

5349 Allison Yusefa Hugh, Index 20473/05
Plaintiff-Respondent,

-against-

Ferdinand Ofodile, M.D.,
Defendant-Appellant.

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Mauro Lilling Naparty LLP, Great Neck (Katherine Herr Solomon of counsel), for appellant.

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph of counsel), for respondent.

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Order, Supreme Court, Bronx County (Alan Saks, J.), entered January 5, 2009, which, after a jury verdict awarding plaintiff $10 million and $50 million for past and future pain and suffering, respectively, granted defendant's CPLR 4404(a) motion to the extent of directing a new trial on the issue of damages unless plaintiff stipulated to reduce the awards to $1 million for past pain and suffering and $3 million for future pain and suffering, modified, on the facts, to vacate said awards, and the matter remanded for a new trial on the issue of damages, unless plaintiff stipulates, within 30 days of service of a copy of this order with notice of entry, to reduce the award for past pain and suffering to $300,000 and the award for future pain and suffering to $300,000, and otherwise affirmed, without costs.

Plaintiff, then age 38 and weighing 380 pounds, underwent gastric bypass surgery, ultimately losing 200 pounds. After the surgery, she had excess skin on her abdomen, buttocks, and thighs, which caused considerable discomfort from chafing and difficulty walking, and she sought surgery to remove the excess skin from her thighs. Plaintiff consulted with several plastic and reconstructive surgeons. She rejected recommended full body lift surgery because it was too invasive, but was interested in a procedure known as the medial thigh lift. Two surgeons with whom plaintiff consulted in 2003, however, told her that the latter procedure carried a risk of vaginal widening and labial stretching. Plaintiff rejected the medial thigh lift because of that risk. In 2005, she consulted defendant, who she claims indicated that he would perform a lateral thigh lift, making incisions on the outside of her thighs, which would not cause vaginal widening or the flattening of the labia majora often incidental to a medial thigh lift. Plaintiff acknowledged that defendant told her of such risks of surgery as lung collapse, thrombosis, and infection, but claimed that he did not inform her of the risk of vaginal widening or labial distortion.

Defendant ended up performing a medial thigh lift because plaintiff had so much loose skin. Plaintiff was left with

flattening of the labia majora and some scarring as a result of wound breakdown. She did not complain to defendant concerning her condition or the type of surgery that had been performed, stating afterward, "He already cut me there. At that time I just, I - I couldn't believe it. I just - I just said okay."

Defendant disputed plaintiff's claim that he did not tell her of the possibility of vaginal widening and labial change incident to his performing a medial thigh lift, which he might have to perform to remove the excess skin from her inner thighs. However, defendant's notes indicate merely that patient "wants thigh lift" and "[needs T-type skin excision" and "understands that skin will stretch and may meloid." The consent form that plaintiff signed did not mention a medial thigh lift or say anything about vaginal widening or labial distortion. Plaintiff also testified that, on the day of surgery, defendant marked only the outside of her hips; defendant testified that he performed the surgery in accordance with the markings he had made before it. Defendant testified that, in his opinion, plaintiff's vagina was "essentially" the same both before and after the surgery, without widening, and was within the normal limits, although the shape was slightly different.

Plaintiff's claims are based on lack of informed consent and

deviation from good and accepted medical practice. As to the lack of informed consent, she avers that she would not have undergone the thigh lift had she known that defendant was going to perform a medial lift, which she knew carried the risk of the vaginal condition from which she now suffers. Although plaintiff's expert admitted that this was the most common surgery for a thigh lift, the jury was within its right to credit plaintiff's testimony that she would not have undergone the procedure and to conclude that a reasonable person in plaintiff's position would not have consented to or undergone the procedure had she been properly informed. This Court has held that expert testimony concerning what a reasonable person would have done is not necessary to prosecute a lack of informed consent claim *(see Andersen v Delaney*, 269 AD2d 193 [2000]; *Osorno v Brainier*, 242 AD2d 511 [1997], *lv denied* 91 NY2d 813 [1998]). The jury had the right to disbelieve defendant's claim that he had properly warned plaintiff.

As to the claim based on a departure from good and accepted medical practice, plaintiff's expert testified that the degree of scarring and flattening showed that defendant removed too much tissue, although the expert acknowledged that such a result could have occurred without any departure. The jury found in

plaintiff's favor on both the lack of informed consent claim and the departure claim. In effect, it found that a reasonable person properly informed would not have undergone the surgery. It apparently rejected defendant's expert's conclusion that wound breakdown, caused at least in part by plaintiff's own actions following surgery, was responsible for some of the scarring and altered appearance of the labia. Although the evidence of a departure was not overwhelming, the jury's conclusion does not mandate reversal. A jury verdict should not be set aside unless it could not have been reached on any fair interpretation of the evidence (*Nicastro v Park*, 113 AD2d 129 [1985]).

With respect to damages, plaintiff testified that she commenced a sexual relationship after the surgery at issue but sometimes experiences discomfort during sexual relations. Plaintiff also had complaints of a bladder and yeast infection and uterine prolapse, which led to a referral to Dr. Christina Kwon, a urogynecologist. Dr. Kwon examined plaintiff on three occasions in the period 2006 through 2009 and noted on each occasion that plaintiff had normal external genitalia. At her 2006 visit to Dr. Kwon, plaintiff filled out a form indicating that she had a satisfactory, and usually pain-free, sexual relationship. Dr. Margaret Nachtigall, plaintiff's former

gynecologist, testified that the appearance of plaintiff's labia post surgery was not normal, in that the labia appeared to be flush with the thighs. Her records however, only note scarring and do not note an abnormal appearance of the genitalia. Moreover, no physician linked any pain during sexual relations or the bladder infections to the thigh lift surgery. Nor did any physician report vaginal widening. The trial court did not dismiss the claim for vaginal or labial pain although it told plaintiff's counsel that "[t]here really isn't much on that and I'll assume that it will play a very small role in your damages claim." In fact, there wasn't any expert testimony at all relating to physical pain other than some tightness during sexual relations, and that claim for damages therefor should have been limited. Plaintiff's claims for emotional pain as a result of the surgery remain, although it is noted that plaintiff suffered from significant depression before the surgery. However, the dissent's characterization of the photos of plaintiff's labia as showing a complete distortion is at best extremely subjective and not supported by the record.

We find that the reduced damages award is excessive to the extent indicated, since it deviates materially from what would be reasonable compensation under the circumstances (*see L.S. v*

Harouche, 260 AD2d 250 [1999] [where record on appeal shows an 18 year old underwent labial surgery resulting in injuries much more serious than those of the instant plaintiff, and this Court sustained reduced verdict of $1,750,000]; *Rabinowitz v Elimian,* 55 AD3d 813 [2008] [sustaining an award of $750,000 to plaintiff and her husband where the record shows that plaintiff sustained a complete disintegration of her sphincter muscle leading to bowel incontinence]; *Sutch v Yarinsky*, 292 AD2d 715 [2002]; *Beverly H. v Jewish Hosp. & Med. Ctr. of Brooklyn*, 135 AD2d 497, 497-498 [1987]). In these cases, the plaintiffs sustained injuries much more severe than those sustained by the instant plaintiff.

All concur except Catterson and Richter, JJ. who dissent in part in a memorandum by Richter, J. as follows:

RICHTER, J. (dissenting in part)

I dissent in part, because I believe the majority has reduced the damages for future pain and suffering to a level that cannot be considered reasonable compensation under the circumstances, although I agree with the reduction to $300,000 for past pain and suffering. I would reduce the award for future pain and suffering to $1,300,000.

After surgery, plaintiff discovered incisions along her groin and on the insides of her thighs, and no incisions along the outside of her thighs where the doctor had marked her before surgery. Just over a week after the thigh lift, plaintiff was hospitalized for 11 days because the wounds from the incisions had broken down, and she had developed an infection. Specifically, her wounds had opened up, were emitting a discharge, and continued to bleed profusely. As a result, plaintiff's external labia became tethered as the skin around the vagina was pulled towards the wound. Plaintiff's vagina is now permanently deformed and disfigured so that the labia appears to be flush with her thighs.

Before the thigh lift, plaintiff enjoyed biking, walking, modeling and socializing. She had recently started her own event planning business, which required her to network and socialize on

a regular basis. However, plaintiff's life changed after the thigh lift left her permanently deformed and disfigured. She testified that she no longer wished to be out with other people, which was a big part of her business, and that she experienced deep sadness and depression. Subsequently, plaintiff stopped modeling and, in 2006, dissolved her business. More importantly, plaintiff testified that she experienced pain and discomfort during sexual relations. Specifically, she felt a pulling and tightness whenever she attempted sexual activity. Although plaintiff was not in a relationship prior to the thigh lift, she began a relationship thereafter, but it was difficult to maintain due to the pain she experienced during intimacy. Plaintiff testified that as a result of her intimacy problems, the relationship assumed an on-again, off-again status, only adding to her emotional pain.

Moreover, plaintiff's deformity cannot be corrected by more surgery. After the thigh lift, plaintiff inquired about corrective surgery; she was told by one doctor to leave her condition alone and move on with her life, as there was nothing that could be done. Although plaintiff's expert doctor informed her that an experimental surgery option might be available, even he was doubtful as to the likelihood of its success. It is clear

that the irreversible nature of plaintiff's deformity continues to negatively impact her life in a variety of ways.

In addition to plaintiff's testimony describing her now deformed vagina and the resulting pain, she submitted photographs to show the major disfigurement that resulted from the surgery. The graphic photos show how the skin pulled completely away from her vagina, resulting in the total distortion of both the labia minora and the labia majora. Plaintiff's expert testified, and the pictures show, that the mound of tissue that was once plaintiff's labia minor and majora is now flattened just like regular skin.

The majority incorrectly suggests that it is subjective to describe the photographs as showing a horrible injury. However, plaintiff's gynecologist testified at trial that before the surgery, plaintiff had no labial abnormalities. After surgery, the doctor said the area was flat, like a scar, and when shown the photos, stated it was not a normal vagina. The majority, in questioning the extent of the injury, gives inadequate consideration to the fact that the jury had an opportunity to view the photos and was entitled to credit the gynecologist's testimony that the appearance of the vagina was not normal.

The majority gives short shrift to plaintiff's testimony

that sexual relations post surgery were painful, focusing instead on a passing comment made by the trial court when it denied defendant's motion to dismiss. It was entirely reasonable for the jury to conclude that painful sexual relations for someone aged 40 could cause significant future pain and suffering. The majority also notes that plaintiff was depressed, and plaintiff explained that this was due in part to her mother's passing away. But, whatever depression plaintiff had before surgery, it did not prevent her from functioning, and she had started her own business. It is only since the surgery, which resulted in genital disfigurement, something that can have a lifelong impact, that plaintiff is reluctant to go out and socialize with other people.

The cases relied on by the majority are distinguishable and highlight why plaintiff here should receive a higher amount. In *Sutch v Yarinsky* (292 AD2d 715 [2002]), the jury awarded the plaintiff $800,000 as compensation for a deformed breast that resulted from a bilateral breast reduction. Notably, the plaintiff in *Sutch* had the option of semi-reconstructive surgery to improve the appearance of her breast and nipple. Likewise, in *Beverly H. v Jewish Hosp. & Med. Ctr. of Brooklyn* (135 AD2d 497 [1987]), the jury awarded the plaintiff $1,500,000, which the

trial court reduced to $700,000, as compensation for the recto vaginal fistula that developed as a result of a midline episiotomy performed in an effort to shorten the plaintiff's time in labor. There too, the plaintiff had the option of corrective surgery, and by the time the case reached the Second Department, her injury had been substantially corrected.

Plaintiff here does not have the option of corrective surgery. She testified that one doctor informed her that there may be an experimental procedure available, but that it may not be successful. She also testified that another doctor told her there was nothing that could be done. The fact that plaintiff does not have the option of corrective surgery increases the compensation for future pain and suffering that would be reasonable, and thus warrants a higher damages award. Additionally, plaintiff was only 40 years old when the resulting disfigurement occurred. She has a long life ahead of her, yet she will now have to face intimacy problems and pain during sexual relations for several decades.

It is difficult to find a case with analogous facts given the nature of plaintiff's deformity and the lack of a surgical remedy. Nevertheless, an examination of cases decided several years ago shows that the adjusted award here should be higher

than the amount set by the majority (*see e.g. Suria v Shiffman*, 107 AD2d 309 [1985], *modified on other grounds* 67 NY2d 87 [1986] [plaintiff was awarded $800,000 as compensation for permanent breast deformity, as well as swelling, infections, and discoloration resulting from improper silicone injections]). Moreover, the award of $1,300,000 for future pain and suffering is still a significant reduction from the jury's original award, and from the trial court's own reduction.

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

ENTERED: AUGUST 25, 2011

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Richter, Abdus-Salaam, JJ.

5396N Lewis Elias, Index 107664/07
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

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Gershbaum & Weisz, P.C., New York (Charles Gershbaum of counsel), for appellant.

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

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered October 15, 2010, which granted plaintiff's motion to strike defendant's answer for failure to comply with discovery requests only to the extent of, among other things, ordering defendant to comply with outstanding discovery requests within 30 days or face the striking of its answer, unanimously reversed, on the law, the facts and in the exercise of discretion, without costs, defendant's answer stricken and the matter remanded for an inquest on damages.

Although we previously directed defendant to comply fully with the outstanding discovery requests and ordered it to pay plaintiff $7,500 as a penalty for the delay in complying (71 AD3d 506 [2010]), defendant has still failed to comply fully. Over a

three-year period, the City has repeatedly failed to provide discovery, despite nine court orders and sanctions imposed by this Court. These circumstances "create[ ] an inference of willful and contumacious conduct" (*Brewster v FTM Servo, Corp.*, 44 AD3d 351, 352 [2007]) and warrant the ultimate sanction of striking defendant's answer.

In this personal injury action, plaintiff alleges that he was injured, due to the City's negligence, when he tripped over the stub of a downed sign pole. Plaintiff filed a complaint in June 2007. In July 2007, he served a notice of discovery and inspection, requesting Department of Transportation (DOT) documents and other information related to the intersection where the accident occurred, for the five years preceding the accident. The City answered the complaint on or about August 15, 2007. The motion court issued a case scheduling order[1] on September 28, 2007 directing the City to provide to plaintiff, within ninety days, materials including permits, permit applications, repair orders, repair records, records of violations, and records of complaints, for the two years preceding the accident. The City

[1] A standard case scheduling order for cases involving New York City sets forth specific discovery to be provided for all such cases.

did not fully comply with this order, or with orders issued at ensuing compliance conferences – on April 9, 2008, July 2, 2008, and October 29, 2008 – which directed the City to provide, by specified dates, the results of a "2-year search for DOT signs records" for the relevant location.[2]

Plaintiff served a supplemental notice of discovery and inspection on or about October 30, 2008. On February 11, 2009, the court issued a discovery order again requiring the City to "provide P with results of a search [of] DOT records" by March 2, 2009.

The City filed a "Response to Compliance Conference Stipulation" dated April 24, 2009, that purported to respond to the court's order of October 29, 2008, and to provide the "[r]esults of a DOT signs search." Annexed as part of the response was a DOT form letter, dated April 6, 2009, stating that a search related to "Riverside Drive b/w West 126th Street and Tiemann Place, Manhattan," for the two years prior to and including the date of the accident, had "produce[d] no records." The letter was accompanied by a two-page printout that ostensibly constituted the search results.

[2] Four judges have presided and issued discovery orders directed to defendant in this case.

Evidently finding that the City's disclosures did not satisfactorily respond to plaintiff's discovery demands, the court directed the City, in an order dated May 20, 2009, to respond to plaintiff's discovery notices of July 2, 2007 and October 30, 2008 by June 20, 2009, and to produce a "person with knowledge" for deposition on July 22, 2009.

In a motion dated May 20, 2009, plaintiff moved, pursuant to CPLR 3126, to strike the City's answer for willful and contumacious noncompliance with multiple discovery orders. The City opposed the motion to strike its answer. Among the exhibits to the City's affirmation were two "responses," dated June 18, 2009, one purporting to address the July 2, 2007 discovery notice and the March 20, 2009 compliance conference order, and the other purporting to address the October 30, 2008 supplemental discovery notice and the May 20, 2009 compliance conference order.

The motion court granted plaintiff's motion only to the extent of ordering the City to comply with any outstanding discovery within thirty days (order of July 16, 2009). The court also denied plaintiff's request for an affidavit detailing defendant's search for relevant records, without prejudice to renewal after deposition of the City's witness on July 22, 2009. The court stated that "[f]ailure by defendant to comply with this

order may result in an order striking the pleadings or precluding the introduction of evidence upon submission to the court of an affirmation of noncompliance with a copy of this order attached, on notice to opposing counsel."

Plaintiff appealed from the July 16, 2009 order denying his motion to strike the City's answer. In the interim, on September 9, 2009, the court issued yet another order directing the City to provide the results of a two-year records search. On December 9, 2009, the court ordered, inter alia, that the City "respond to [plaintiff's] letter of October 28, 2009 w/in 30 days of faxed receipt to attn of [the assigned assistant corporation counsel]." The order further directed the City to produce a witness "with knowledge of sign records on January 14, 2010."

On or about January 15, 2010, plaintiff served a supplemental notice of discovery and inspection. In contrast to previous demands, which asked for records regarding the sidewalk "near the west side" of Riverside Drive where it intersects with Tiemann Place, the January 15, 2010 demands asked for records "for the west side" of Riverside Drive where it intersects with Tiemann Place . . ."

In an order dated March 16, 2010, this Court declined to find that the motion court abused its discretion (in the July

2009 order) in denying plaintiff's motion to strike the City's answer (71 AD3d 506 [2010]). However, based on the City's delay, its noncompliance with court orders, and its failure to object to discovery demands at the "last two compliance conferences," we concluded that imposition of a monetary sanction was appropriate. We directed the City to pay a $7500 penalty to plaintiff and to "comply fully with the outstanding requests."

On April 21, 2010, Supreme Court issued a compliance conference order. The order, which is illegible in the record on appeal, is described in the City's May 11, 2010 "Response to Compliance Conference Order dated April 21, 2010/Response to Supplemental Notice for Discovery and Inspection dated January 15, 2010." According to the City, "[i]tem (1)" in the April 21, 2010 order was a directive to the City to respond to plaintiff's supplemental notice for discovery and inspection dated January 15, 2010. The City responded to this directive by broadly objecting to plaintiff's demands in the January 15, 2010 notice and annexing "DOT Sign Records," consisting of two DOT form letters dated March 18, 2010. One of the letters stated that a search related to "Riverside Drive & Tiemann Place," had "produced no records." The second letter stated that the results of a traffic signs search were enclosed, and was accompanied by a

six-page printout. "Item (2)" in the April 21, 2010 order, the City indicated, was a directive for the City to "respond to request for 311 reports, field worker reports, route sheets, sign lists, worksheets, history, and intersection order." The City asserted the same objections to these demands and also asserted that they were duplicative of prior demands to which the City had already supplied responses. The City then referred plaintiff to its April 24, 2009, June 18, 2009 and June 19, 2009 responses.

In a June 9, 2010 order, the court directed the City "to respond to [plaintiff's] discovery notice dated 1/15/10 for the location of west side of Riverside Dr at Tiemann PL north to St Clair and south to W 122nd." On or about July 12, 2010, the City responded to the court's June 9, 2010 order. An appended DOT form letter dated July 6, 2010 again advised that a search regarding "Riverside Drive and Tiemann Place, Manhattan" "produced no records" for the two years prior to and including the day of the accident.

In August 2010, plaintiff again moved for an order striking the City's answer on the ground that the City had willfully failed to comply with numerous discovery orders. In opposition, the City, emphasizing the drastic nature of the relief sought, argued that its conduct was not "willful and contumacious" and

that when such a showing has not been made, an appropriate sanction for dilatory conduct is to permit a defaulting party "one final opportunity to comply." Further, the City contended that, in its submissions dated July 12, 2010 and May 11, 2010, it had fully complied with the court's June 9, 2010 order and adequately responded to plaintiff's January 15, 2010 supplemental discovery notice.

In an order dated October 13, 2010, the court denied nine of plaintiff's demands, three of them on the ground that "City represents documents have been produced." But the court ordered the City to produce, within thirty days, "written complaints, and/or prior written notices, repair orders, [and] cut forms, for the sidewalk on the west side of Riverside Drive, at its intersection with Tiemann Place, for 2 years prior to the date of accident" and to provide an "affidavit if no documents exist" within 45 days. Finally, the court stated that "[f]ailure to comply with this order will result in the striking of the City's answer (emphasis in original)."

In sum, although over three years had passed since plaintiff had first sought this discovery which is central to the prosecution of his action, and despite the nine court orders directing defendant to comply with outstanding discovery, the

motion court acceded to defendant's request to be given one more opportunity to provide the discovery. Defendant has offered no excuse for its failure to produce the documents. Apparently, the imposition by this Court of a significant sanction was not sufficient to deter defendant from continuing its cavalier noncompliance with court-ordered discovery. In our view, the history of defendant's untimely, unresponsive and lax approach to complying with the court's previous orders warrants the striking of defendant's answer (*see Byam v City of New York*, 68 AD3d 798 [2009]).

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

ENTERED: AUGUST 25, 2011

CLERK

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

5469 The People of the State of New York, Ind. 4787/07
Respondent,

-against-

Eric Kenley,
Defendant-Appellant.

_____

Cardozo Criminal Appeals Clinic, New York, (Stanley Neustadter of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered July 30, 2008, convicting defendant, after a jury trial, of robbery in the first degree (two counts), robbery in the second degree and attempted robbery in the first degree, and sentencing him, as a second violent felony offender, to an aggregate term of 15 years, unanimously reversed, on the law, defendant's motion to suppress lineup identifications made by the witnesses to the two alleged robberies granted, and the matter remanded for a new trial preceded by an independent source hearing regarding those witnesses.

A defendant is not entitled to a lineup in which the fillers are "nearly identical to him" (*People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). However, a lineup is

unduly suggestive when only the defendant matches a key aspect of the description of the perpetrator provided by a witness or witnesses (*see Foster v California*, 394 US 440, 441-43 [1969]; *People v Owens*, 74 NY2d 677, 678 [1989]).

Defendant was charged with two robberies that occurred on the same morning. The witnesses to the robberies described the driver of the getaway car, respectively, as "a huge, big, fat, black guy," "a real big, real huge black guy," and "very heavy-set [and] large."

A review of the lineup photograph reveals that defendant, who weighed 400 pounds, was the only participant who fits these descriptions. Although the fillers were large men, there was a very noticeable weight difference between defendant and the fillers. While the lineup participants were seated, and this can sometimes satisfactorily minimize differences in weight, it is clear from the photo that there was a marked difference between defendant and the fillers.

We do not mean to suggest that the police are obligated to find grossly overweight fillers when dealing with the situation presented here, and we recognize the practical difficulties that would be involved in doing so. Instead, this situation would call for the use of some kind of covering to conceal the weight

difference (*see e.g. People v Murphy*, 1 AD3d 184 [2003], *lv denied* 4 NY3d 801 [2005]).

There is a reasonable possibility that the tainted testimony of the witnesses to the first robbery contributed to defendant's conviction of the second. Therefore, a new trial is required as to the second robbery as well.

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

ENTERED: AUGUST 25, 2011

CLERK