SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 22, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

4268 William Champion, et al., Index 109708/09
Plaintiffs-Respondents,

-against-

Blue Water Advisors, Inc., etc.,
Defendant-Appellant,

Giddins & Claman, LLP, etc.,
Defendant.

____

Rosabianca & Associates, P.L.L.C., New York (Jeremy Panzella of counsel), for appellant.

Kagan Lubic Lepper Lewis Gold & Colbert, LLP, New York (J. David Morrissy of counsel), for respondents.

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Judgment, Supreme Court, New York County (Doris Ling-Cohan, J.), entered April 28, 2010, awarding plaintiffs the total sum of $594,392.85 as against defendant Blue Water Advisors, Inc. a/k/a Blue Water Advisors LLC, upon an order of the same court and Justice, entered April 26, 2010, which granted plaintiffs’ motion for summary judgment and denied Blue Water’s cross motion for summary judgment on its counterclaims, unanimously affirmed, with costs.

The motion court properly granted summary judgment to the plaintiff purchasers (*see Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Atlantic Dev. Group, LLC v 296 E. 149th St., LLC*, 70 AD3d 528 [2010]). "When 'time of the essence' is expressly stated, the parties are obligated to strictly comply with the terms of the contract" (*Milad v Marcisak*, 307 AD2d 281, 282 [2003]). Plaintiffs demonstrated that they were prepared to close on June 9, 2009, and that the "time of the essence" date was set out in the parties' agreement. This entitled plaintiffs to demand immediate performance. When the seller failed to appear at the closing on June 9, the purchasers were within their rights to declare the seller in default (*see Grace v Nappa*, 46 NY2d 560, 565-66 [1979]; *115-17 Nassau St., LLC v Nassau Beekman, LLC*, 74 AD3d 537 [2010]). The fact that the seller claims it was ready and willing to close a day or two after the "law day" is immaterial (*see Spiegel v Kessler*, 216 AD2d 239, 241 [1995]). Once the seller was in breach, the purchasers had no further duty

to entertain the seller’s proposed alternate closing dates (*see Grace v Nappa* at 566; *115-17 Nassau St., LLC v Nassau Beekman, LLC* at 537). Accordingly, the motion was properly granted and the cross motion was properly denied.

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

ENTERED: MARCH 22, 2011

CLERK

Tom, J.P., Friedman, McGuire, Acosta, Román, JJ.

3080 White Plains Equities Associates, Inc., Plaintiff-Respondent, Index 302951/08

-against-

Vista Developers Corp., Defendant-Appellant.

Rosenberg Calica & Birney LLP, Garden City (Robert M. Calica of counsel), for appellant.

Goidel & Siegel, LLP, New York (Jonathan M. Goidel of counsel), for respondent.

Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered January 11, 2010, which denied defendant buyer's motion for summary judgment seeking a declaration, on its first counterclaim, that it duly terminated the parties' agreement pursuant to the terms thereof and is entitled to the return of its down payment, and granted plaintiff seller's cross motion for summary judgment on its first cause of action to the extent of declaring that plaintiff is entitled to retain defendant's $607,500 down payment as liquidated damages for breach, unanimously modified, on the law, to deny the cross motion, and otherwise affirmed, without costs.

The parties' written agreement for the purchase and sale of certain real property is ambiguous in pertinent part and,

therefore, cannot be construed as a matter of law. Accordingly, absent a more fully developed record containing parol evidence of the parties' intentions at the time of contracting, neither party is entitled to summary judgment declaring whether defendant buyer validly exercised a right of termination conferred on it by the agreement. The issues to be resolved in further proceedings upon remand include, at a minimum, the following: (1) whether the seller's service of the notice of the status of negotiations with tenants for the surrender of their leases or of possession of their premises under section 4.3(B) was a condition precedent to the expiration of the buyer's time in which to exercise its right under section 4.3(A) to cancel the agreement "[f]or any reason or for no reason at all . . . within five (5) business days after the expiration of the [60-day] Due Diligence Period" following execution of the agreement; and (2) whether the buyer's right to cancel the agreement under section 4.3(B)(d) based on the refusal of more than five tenants to surrender their leases or vacate their premises by a certain time was dependent on the seller's prior exercise of the right under section 4.3(B), "at [s]eller's sole option, . . . to terminate this Agreement during [the 60-day] Seller's Negotiation Period" following execution of the agreement. Given the apparent contradictions and redundancies

within the relevant portions of the agreement, and the indeterminacy of the relationship between various provisions at issue, a more fully developed evidentiary record must be assembled before the agreement can be authoritatively construed, either on a future summary judgment motion or at trial.

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

ENTERED: MARCH 22, 2011

CLERK

Andrias, J.P., Friedman, McGuire, Acosta, DeGrasse, JJ.

3223 The People of the State of New York, Ind. 738/06
Respondent,

-against-

Timothy Washington,
Defendant-Appellant.

____

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

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

____

Appeal from judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered October 17, 2007, as amended November 29, 2007, convicting defendant, after a jury trial, of two counts each of criminal possession of a weapon in the second and third degrees, and sentencing him, as a second violent felony offender, to an aggregate term of 12½ years, held in abeyance, and the matter remitted to Supreme Court for determination, based upon the evidence presented at the suppression hearing, of the issues raised at the hearing but not determined therein.

Defendant was a passenger in a car that the police lawfully stopped. After the police removed the occupants from the car and frisked them, an officer leaned into the car and saw a revolver, which he seized. Another officer had already obtained the driver's consent to search the car. However, the hearing

evidence is clear that, at the time of the search, the searching officer was not aware of the consent. The officer who obtained the driver's consent neither communicated that fact to the searching officer, nor otherwise directed him to search the car.

The hearing court found that the seizure of the revolver could not be justified under the plain view doctrine because the officer saw it only after leaning into the car. Instead, the court upheld the search on the sole basis of consent, concluding that the driver's consent justified the search even though it was not communicated to the officer who conducted the search. This was error. Although the existence of the communication may be established by inference (*see People v Gonzalez*, 91 NY2d 909, 910 [1998]), imputation of one officer's knowledge to another requires an actual communication between the officers (*see People v Brnja*, 50 NY2d 366, 373 n 4 [1980]; *People v Skinner*, 220 AD2d 350 [1995], *lv denied* 87 NY2d 1025 [1996]).

As alternative grounds for affirmance, the People argue, as they did at the suppression hearing, that the car occupants' furtive conduct in the back seat, upon the officers' approach, provided the officers with a "reasonable objective basis" to make a protective sweep of the back of the car to search for weapons (*see People v Mundo,* 99 NY2d 55, 57-59 [2002]; *People v Anderson*, 17 AD3d 166, 167-68 [2005]). Although there was testimony at the

suppression hearing on the issue, it was not resolved by the court. We therefore hold the case, reserve decision, and remit the matter Supreme Court to make findings of fact with respect to the issue based upon the evidence presented at the suppression hearing (*see People v LaFontaine*, 92 NY2d 470, 474-475 [1998]; *People v Jones*, 39 AD3d 1169 [2007]; *People v McDonnell*, 27 Misc 3d 56 [App Term, 2d Dept 2010]).

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

McGUIRE, J. (dissenting)

I respectfully dissent. The majority's position vindicates no right of defendant but permits fortuity to undermine the public's compelling interest in the enforcement of the criminal law. Consider the following not implausible hypothetical. The owner of a house in which a murder suspect is a guest not only tells investigating detectives at the police station that they are free to search the house, he or she also executes a written consent. Before the detectives get to the house, a police officer securing the house enters it and discovers the murder weapon in the erroneous belief that exigent circumstances supported the entry. Under the majority's view of the law, the weapon would have to be suppressed. Indeed, it would have to be suppressed if the house was owned by the murder suspect and he or she consented to the search.

Regardless of whether the officer who seized the gun had a lawful basis for leaning into the car, I would uphold the seizure because another officer already had obtained the driver's consent to search the car. Because the driver had given his consent, defendant was not aggrieved by any unlawful conduct of the seizing officer. That the consent had not been communicated to that officer does not make a difference because "the exclusionary remedy [is limited] to persons whose own protection has been

infringed by the search and seizure" (*People v Wesley*, 73 NY2d 351, 355 [1989]; *see also Rakas v Illinois*, 439 US 128, 134 [1978] [holding that "it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the [exclusionary] rule's protections"]); *cf. People v Horowitz,* 21 NY2d 55, 60 [1967] [upholding search because "it is not necessary for the officer making the arrest . . . to be, himself, in possession of information sufficient to constitute probable cause . . . provided that the police as a whole were in possession of information sufficient to constitute probable cause"]). Finally, although I need not reach the issue, it is far from clear that a search requiring probable cause occurred merely because the officer leaned into the car, breaking the plane of the doorwell, before seeing the butt of the gun on the floor protruding from under the driver's seat (*compare People v March*, 257 AD2d 631, 633 [1999], *lv denied* 93 NY2d 973 [1999] ["officer did nothing more intrusive than step into the van . . . in order to more readily observe its interior, and the court accepted as credible his testimony that the butt of the gun was in plain view"], *with People v Hernandez,* 238 AD2d 131, 132

[1997] [improper search to lean "deeply enough inside" car "to observe an item concealed up under or behind the dashboard"]; *see also United States v Snow*, 44 F3d 133, 135 [2d Cir 1995] [search entails "looking through, rummaging, probing, scrutiny and examining internally"] [internal quotation marks omitted]).

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

ENTERED: MARCH 22, 2011

CLERK

Friedman, J.P., Catterson, Renwick, DeGrasse, JJ.

4027 Lisa Riley, et al., Index 303097/08
Plaintiffs-Respondents,

-against-

Segan, Nemerov & Singer, P.C., et al.,
Defendants-Appellants.

____

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Christopher Russo of counsel), for appellants.

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Order, Supreme Court, Bronx County (George D. Salerno, J.), entered September 29, 2008, which denied defendants' motion to dismiss, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Supreme Court denied defendants' motion based on its finding that the moving papers were deficient because a March 7, 2005 letter referenced therein was not attached. We find that Supreme Court should have considered the motion on the merits because it is clear that defendants mistakenly failed to attach the letter to their moving papers but corrected their mistake by including it on reply. Plaintiffs were not prejudiced in any way because they actually received the letter as an exhibit with their copy of the moving papers and so were able to address the letter in their opposition (*see Kennelly v Mobius Realty Holdings LLC*, 33

AD3d 380, 381-382 [2006]).

On the merits, the motion should be granted. By letter dated August 25, 2004, defendants unequivocally informed plaintiffs that they would not proceed with plaintiffs' case, thereby severing the attorney-client relationship. Given defendants' advice that they would not proceed with the action, the continuous representation doctrine ceased to be applicable and the toll of the statute of limitations came to an end (*see McCoy v Feinman*, 99 NY2d 295, 306 [2002]). Because the action was commenced more than three years after plaintiffs' receipt of the August 25, 2004 letter, it is time-barred (*see* CPLR 214[6]).

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

ENTERED: MARCH 22, 2011

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Richter, Manzanet-Daniels, JJ.

4304 Irving Sitnick, etc., et al., Index 110531/07
Plaintiffs-Appellants-Respondents,

-against-

Travelers Insurance Co.,
Defendant-Respondent-Appellant,

Matthew Crayne, etc., et al.,
Defendants.

____

Feder Kaszovitz LLP, New York (Alvin M. Feder of counsel), for appellants-respondents.

Lazare Potter & Giacovas, LLP, New York (Marci Goldstein Kokalas and Andrew M. Premisler of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Richard F. Braun, J.), entered on or about June 18, 2009, which granted defendant Travelers Insurance Co.'s motion for summary judgment declaring that it has no obligation under the homeowner's insurance policies to defend or indemnify plaintiffs in the underlying personal injury action, unanimously reversed, on the law, without costs, and the motion denied.

Issues of fact exist as to the reasonableness of plaintiff homeowner's proffered excuse for providing late notice of claim, i.e., that he was unaware that the policies covering his New York home also provided coverage for an incident that occurred at a restaurant in New Jersey in which a third party claims to have

suffered personal injury at the hands of plaintiff homeowner's minor son. Two other Departments have reached the same conclusion in similar circumstances (*see Seemann v Sterling Ins. Co.*, 267 AD2d 677 [1999]; *Padavan v Clemente*, 43 AD2d 729 [1973]). Here, as in *Seemann*, plaintiff homeowner acted with due diligence by immediately providing notice upon receipt of a letter from the injured party's attorney advising him to contact his insurance carrier.

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

ENTERED: MARCH 22, 2011

CLERK

Mazzarelli, J.P., Andrias, Catterson, Moskowitz, Román, JJ.

4370-
4371 Ira Nachem, Index 603145/07
Plaintiff-Respondent,

-against-

Property Markets Group, Inc., et al.,
Defendants-Appellants.

____

Katsky Korins LLP, New York (Mark Walfish of counsel), for appellants.

Stein Riso Mantel, LLP, New York (Gerard A. Riso of counsel), for respondent.

____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered August 25, 2010, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for summary judgment as to liability on his first cause of action and denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The terms of the agreement are unambiguous. Thus, resort to extrinsic evidence is inadmissible to vary the writing (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). The fact that the "Purchase Contract" had not yet been drafted does not alter our determination, since the agreement contemplates the execution of a "Purchase Contract" at some future date. We reject defendants' contention that "Purchase Contract" means

anything other than that accorded to the term in ordinary usage; or that "Purchase Contract" is a distinct term of art rendering the document ambiguous. As the past consideration is "expressed in the writing" and was "proved to have been given or performed," the contractual obligation is valid (General Obligations Law § 5-1105).

We have considered defendants' remaining arguments and find them unavailing.

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

ENTERED: MARCH 22, 2011

CLERK

Saxe, J.P., Friedman, Acosta, DeGrasse, Richter, JJ.

4501 Dennis Lafferty, et al., Plaintiffs, Index 104195/10 590597/10

-against-

Brook Andrew Hazelton, et al.,
Defendants.

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Douglas Elliman, LLC, etc.,
Third-Party Plaintiff-Appellant,

-against-

Jared Rich, et al.,
Third-Party Defendants-Respondents.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Joan M. Kenney, J.), entered on or about October 22, 2010,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated February 18, 2011,

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

ENTERED: MARCH 22, 2011

CLERK

Tom, J.P., Andrias, Sweeny, Moskowitz, Renwick, JJ.

4564 The People of the State of New York, Ind. 1406/07
Respondent,

-against-

Carolina Clementi,
Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered February 20, 2008, convicting defendant, after a jury trial, of forgery in the second and third degrees, offering a false instrument for filing in the first degree, identity theft in the first and third degrees, and falsely reporting an incident in the third degree, and sentencing her to an aggregate term of 2 to 6 years, unanimously affirmed.

The court properly exercised its discretion in denying defendant’s challenge for cause to a prospective juror with expertise in computer forensics, a field that was the subject of conflicting expert testimony at trial. The panelist unequivocally assured the court that, in reaching a verdict, he would “absolutely” not be influenced in any way by his own knowledge, and would not convey that knowledge during

deliberations. Accordingly, his responses did not call into question his ability to follow the court's instructions (*see People v Arnold*, 96 NY2d 358, 362 [2001]). Defendant argues that the panelist was an inherently unsuitable juror for a case involving his own particular area of expertise. However, the panelist expressed no difficulty in excluding that expertise from his own determination of the facts and from his discussions with other jurors. The court, which had the opportunity to see and hear the panelist, credited those assurances.

The court properly modified its pretrial ruling to permit introduction of an uncharged crime or bad act. A flyer posted in the victim's apartment building was probative of defendant's continued scheme to harass her ex-boyfriend's family members. The relevance and probative value of the flyer became apparent during the trial after defense counsel opened the door during cross-examination (*see People v Massie*, 2 NY3d 179 [2004]). In any event, any error in receipt of this evidence was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: MARCH 22, 2011

CLERK

Tom, J.P., Andrias, Sweeny, Moskowitz, Renwick, JJ.

4565 Ramon Cancel, etc., Index 302316/07
Plaintiff-Appellant,

-against-

Dr. Jonathan Posner, et al.,
Defendants-Respondents.

____

Alpert & Kaufman, LLP, New York (Norman A. Olch of counsel), for appellant.

Edward J. Guardaro, Jr., White Plains, for respondents.

____

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered October 28, 2009, which, to the extent appealed from, granted defendants' motion to dismiss plaintiff's medical malpractice cause of action as time-barred, unanimously affirmed, without costs.

It is undisputed that the medical malpractice claim was viable on the date of decedent's death on June 12, 2006. Pursuant to CPLR 210(a), plaintiff had until June 12, 2007 to bring the claim on decedent's behalf. Plaintiff did not commence this action until October 2007, four months after the expiration of the statute of limitations. We reject plaintiff's contention that the statute of limitations should have been tolled while his petition for letters of administration was pending in the Surrogate's Court (*see Wilson v New York City Health & Hosps.*

Corp., 36 AD3d 902, 903 [2007]). Plaintiff filed his petition on April 23, 2007, ten months after the decedent's death, and only two months before the statute of limitations was set to expire on the medical malpractice claim. Plaintiff did not obtain the letters and commence this action until after the expiration of the statute of limitations. Under the circumstances, there is no statutory remedy for tolling the statute of limitations (*cf. Bernardez v City of New York*, 100 AD2d 798 [1984]).

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

ENTERED: MARCH 22, 2011

CLERK

Tom, J.P., Andrias, Sweeny, Moskowitz, Renwick, JJ.

4566 In re Jennifer Murane, Index 110159/09
Petitioner-Appellant,

-against-

The Department of Education of the
City of New York,
Respondent-Respondent.

____

Law Offices of Stewart Lee Karlin, P.C., New York (Stewart Lee Karlin of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for respondent.

____

Order and judgment (one paper), Supreme Court, New York County (Michael D. Stallman, J.), entered December 31, 2009, which denied the petition seeking to, among other things, annul respondent's determination terminating petitioner's employment as a probationary teacher and to direct respondent to expunge petitioner's year-end unsatisfactory rating (U-rating) and reinstate her employment, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The court properly determined that petitioner's challenge to her termination as a probationary teacher is time-barred. Such a challenge must be brought within four months of the effective date of termination, and the petitioner's pursuit of administrative remedies does not toll the four-month statute of

limitations (*see* CPLR 217[1]; *Kahn v New York City Dept. of Educ.*, 79 AD3d 521, 522 [2010]). The effective date of petitioner's termination was July 26, 2007. Accordingly, her petition, filed on July 17, 2009, was untimely.

While respondent concedes that the petition is not time-barred to the extent that it seeks review of the U-rating (*see Matter of Andersen v Klein*, 50 AD3d 296, 297 [2008]), petitioner has failed to show that the rating was arbitrary and capricious or made in bad faith. The detailed observation reports by the principal and assistant principal, describing petitioner's poor performance in class management, engagement of students, and lesson planning, provided a rational basis for the rating (*see id.*). Petitioner's contention that the principal was biased against her is speculative and insufficient to establish bad faith (*see Matter of Che Lin Tsao v Kelly*, 28 AD3d 320 [2006]).

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

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

ENTERED: MARCH 22, 2011

CLERK

Tom, J.P., Andrias, Sweeny, Moskowitz, Renwick, JJ.

4567-
4568 In re Kennya S.,

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

Evelyn F.,
Respondent-Appellant,

Kensader S.,
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

____

Susan Jacobs, The Center for Family Representation, New York (Daniel M. Gonen of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for ACS respondent.

Tamara A. Steckler, The Legal Aid Society, New York (John A. Newbery of counsel), attorney for the child.

____

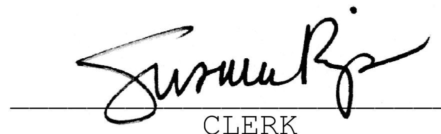
Order of disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about May 28, 2010, insofar as appealed from as limited by the briefs, bringing up for review a fact-finding determination that respondent mother neglected the subject child, unanimously reversed, on the law and the facts, without costs, the finding of neglect vacated, and the petition dismissed as against the mother.

The finding of neglect as against the mother was not supported by a preponderance of the evidence (*see* Family Court

Act § 1012[f]; § 1046[b][i]). The mother’s false statement that she, and not the father, hit the subject child with a belt, did not, under the circumstances, establish that the mother had failed to exercise a minimum degree of care, or that the child was in imminent danger of being impaired as a result of the false statement (*see Nicholson v Scoppetta*, 3 NY3d 357, 368-369 [2004]).

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

ENTERED: MARCH 22, 2011



CLERK

Tom, J.P., Andrias, Sweeny, Moskowitz, Renwick, JJ.

4569 Elizabeth Maidman, Index 304398/10
Plaintiff-Respondent,

-against-

Gregory Maidman,
Defendant-Appellant.

____

Brian D. Perskin, Brooklyn, for appellant.

Brett Kimmel, P.C., New York (Brett Kimmel of counsel), for respondent.

____

Order, Supreme Court, New York County (Laura E. Drager, J.), entered August 18, 2010, which, inter alia, directed defendant husband to pay to plaintiff wife $18,725 per month in unallocated, nontaxable monthly pendente lite spousal and child support and to pay all insurance premiums, automobile expenses, and the minimum payments on a Capital One loan, unanimously modified, on the law and the facts, to reduce the interim support award to $15,725, and otherwise affirmed, without costs.

Plaintiff wife earns approximately $36,000 per year working as an unlicensed optometrist three days per week. In addition, she previously also earned a consulting income of approximately $20,000, which income she did not anticipate earning in the future. Defendant husband is an attorney with significant experience in the real estate industry who recently started his

own law practice after leaving a lucrative position with a family owned business where he earned approximately $400,000 per year. The husband currently earns $36,000 per year in income from partnerships and/or royalties and an undisclosed amount from his private practice, which is in its infancy.

While the record, which includes the affidavit of the husband's psychiatrist, supports a finding that the husband's decision to leave his position was involuntary (*see Morris v Schroeder Capital Mgt. Intl.*, 7 NY3d 616 [2006]), we find that the court did not improvidently exercise its discretion in imputing more than $300,000 per year in income to the husband, given his experience and qualifications, his admitted earnings of $36,000 per year, his unknown earnings from his practice, the value of services provided to him in the form of an apartment and office, and the unknown value of his partnership interests (*see* Domestic Relations Law § 240[1-b][b][5]; Family Court Act § 413[1][a]; *Matter of Culhane v Holt*, 28 AD3d 251 [2006]; *K. v B.*, 13 AD3d 12 [2004], *lv denied* 4 NY3d 878 [2005]).

However, we find that the interim award, pursuant to which the husband's monthly obligations total almost $25,000, imposes too great a financial burden on the husband and we adjust it so

as to better accommodate between the reasonable needs of the husband and the financial means of the wife (*see* Domestic Relations Law § 236[B][6]; *Lasry v Lasry*, 180 AD2d 488 [1992]; *Hill v Hill*, 121 AD2d 270 [1986]).

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

ENTERED: MARCH 22, 2011

CLERK

Tom, J.P., Andrias, Sweeny, Moskowitz, Renwick, JJ.

4570 Decima Jno-Baptiste, Index 303773/07
Plaintiff-Respondent,

-against-

Paul J. Buckley,
Defendant-Appellant.

Votto & Cassata, LLP, Staten Island (Christopher J. Albee of counsel), for appellant.

Douglas & London, P.C., New York (Nicholas E. Warywoda of counsel), for respondent.

Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered July 15, 2010, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Defendant's submissions, including the affirmed report of an orthopedist and the transcript of plaintiff's deposition, met his prima facie burden of showing that plaintiff had not suffered a serious injury within the meaning of Insurance Law § 5102(d). In opposition, plaintiff failed to raise a triable issue with respect to whether she suffered a permanent consequential or significant limitation. The MRI report merely shows findings "suggestive of transient patellar dislocation." However, a dislocation alone, without evidence of some permanent or

significant limitation, does not constitute a serious injury (*see Licygiewicz v Stearns*, 61 AD3d 1254 [2009]).

The assertion of plaintiff's physiatrist that plaintiff suffered from an 18% loss of flexion in her right knee, conflicts with the affidavit of her physical therapist, indicating that, 18 months earlier, plaintiff had full range of motion in her right knee, and had reached maximum medical benefit from physical therapy. The physiatrist makes no attempt to explain the conflicting findings, and defendant is thus entitled to summary judgment on this basis (*see Pou v E&S Wholesale Meats, Inc.*, 68 AD3d 446, 447 [2009]).

The record also shows that plaintiff missed only one month of work after the accident. Although she claimed that she was unable to perform her usual and customary activities for more than 90 of the 180 days following the accident, without any substantiating medical documentation, plaintiff's testimony alone

does not suffice to show a serious injury under the 90/180-day category of Insurance Law § 5102(d) (*see Nelson v Distant*, 308 AD2d 338, 340 [2003]).

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

ENTERED: MARCH 22, 2011

CLERK

Tom, J.P., Andrias, Sweeny, Moskowitz, Renwick, JJ.

4571 In re Maria Villar, etc., Index 111137/09
Petitioner,

-against-

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

____

Edwin I. Schulman, Kew Gardens, for petitioner.

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

____

Determination of respondent Police Commissioner, dated April 7, 2009, dismissing petitioner from the Police Department, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Jane Solomon, J.], entered November 27, 2009) dismissed, without costs.

Respondent’s determination to dismiss petitioner from the Police Department is supported by substantial evidence that petitioner wrongfully discussed and divulged official department business with a person known to the department (*Matter of Purdy v*

Kreisberg, 47 NY2d 354 [1979]). Given the risk to the general public arising from the passing of sensitive information about a narcotics case to another subject of the same ongoing narcotics investigation, the penalty of dismissal does not shock our sense of fairness (*see Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001]).

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

ENTERED: MARCH 22, 2011

CLERK

Tom, J.P., Andrias, Sweeny, Moskowitz, Renwick, JJ.

4572 The People of the State of New York, Ind. 4719/08
Respondent,

-against-

Nikita Daniels,
Defendant-Appellant.

____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about July 16, 2009, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: MARCH 22, 2011

CLERK

Tom, J.P., Andrias, Sweeny, Moskowitz, Renwick, JJ.

4573 Israel Montalvo, Index 105506/08
Plaintiff-Respondent,

-against-

The New York and Presbyterian Hospital,
Defendant,

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

____

Rivkin Radler LLP, Uniondale (Stuart M. Bodoff of counsel), for appellants.

Robin Mary Heaney, Rockville Centre, for respondent.

____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered July 2, 2010, which denied the Columbia University defendants' motion for summary judgment dismissing the complaint, and granted plaintiff's cross motion for summary judgment on the issue of liability under Labor Law § 240(1), unanimously modified, on the law, to deny plaintiff's cross motion and to grant defendants' motion as to the Labor Law §§ 241(6) and 200 and common-law negligence causes of action, and otherwise affirmed, without costs.

Plaintiff was injured while attempting to replace a float and rod component in a condensate pump that was part of the heating system of a building. The pumping system was located in

a six-foot-deep pit, covered with metal grating, in the floor of the machine room. Plaintiff was called in to make the repair when the heating system shut down after the pumps stopped working because the component had broken off. He activated a "draining mechanism" and, while the water receded from the flooded machine room, he removed a section of the grating and stepped onto a remaining section to reach into the pit to retrieve the broken-off component. Plaintiff slipped on the grating, which was wet from the water that had overflowed the pit, the grating "gave in," and plaintiff fell into the scalding water.

Defendants argue that the float and rod component required replacement as a result of normal wear and tear, and therefore that plaintiff was engaged in nonactionable routine maintenance when he was injured. Plaintiff testified that this particular component was not routinely replaced due to wear and tear, and that he had replaced it only four or five times in his 25 years as a mechanic. However, there is no evidence in the record establishing the cause of the component's breaking or the work that was involved in replacing it. Thus, it cannot be determined as a matter of law whether plaintiff was engaged in routine maintenance or a repair covered under Labor Law § 240(1) when he was injured (*compare Abbatiello v Lancaster Studio Assoc.*, 3 NY3d 46, 49-50, 53 [2004] [loosening "a few screws" and draining tap

to remedy defective cable signal caused by rainwater accumulating in junction boxes constituted routine maintenance], *with Parente v 277 Park Ave. LLC*, 63 AD3d 613 [2009] [plaintiff covered by statute where there was no evidence that wear and tear caused malfunction of fan, which did not break down regularly, and that repair required only routine maintenance]).

As plaintiff was not engaged in construction, demolition or excavation when he was injured, he is not eligible for the protection of Labor Law § 241(6). His Labor Law § 200 and common-law negligence causes of action are not viable because he was injured in the course of remedying a condition that he was charged to ameliorate (*see e.g. Polgano v New York City Educ. Constr. Fund*, 6 AD3d 222 [2004], *lv denied* 3 NY3d 601 [2004]).

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

ENTERED: MARCH 22, 2011

CLERK

Tom, J.P., Andrias, Sweeny, Moskowitz, Renwick, JJ.

4574 The People of the State of New York, Ind. 3130/09
Respondent,

-against-

Rafael Silva,
Defendant-Appellant.

____

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

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

____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Robert M. Stolz, J.), rendered on or about January 13, 2010,

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

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

ENTERED: MARCH 22, 2011

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CLERK

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

Tom, J.P., Andrias, Sweeny, Moskowitz, Renwick, JJ.

4575 DaimlerChrysler Insurance Company, etc., Index 115218/08
Plaintiff-Respondent,

-against-

Aliou Seck, et al.,
Defendants,

Nationwide Assurance Company,
Defendant-Appellant.

____

Milber Makris Plousadis & Seiden, LLP, Woodbury (Sarah M. Ziolkowski of counsel), for appellant.

Buckley, Zinober & Curtis, P.A., New York (Robert N. Mizrahi of counsel), for respondent.

____

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered October 26, 2010, which denied defendant-appellant's (Nationwide) motion to vacate a prior order, same court and Justice, entered June 3, 2010, granting plaintiff's motion, on default, striking Nationwide's answer, and directing plaintiff to file a note of issue for an inquest, unanimously reversed, on the law, the facts and in the exercise of discretion, with costs, the motion to vacate granted, the answer reinstated, the Clerk directed to strike the plaintiff's note of issue, and the matter remanded for further proceedings.

An order striking an answer should be vacated where a defendant can show a reasonable excuse for default (CPLR 5015

[a]), and a meritorious defense (*see Harwood v Chaliha*, 291 AD2d 234 [2002]). Here, Nationwide demonstrated that its failure to oppose plaintiff's motion was neither willful, nor part of a pattern of dilatory behavior (*see Chelli v Kelly Group, P.C.*, 63 AD3d 632 [2009]). Plaintiff has failed to point to any evidence that the relatively short delay of four months caused it to change its position or other prejudice (*see Mutual Mar. Off., Inc. v Joy Constr. Corp.*, 39 AD3d 417 [2007]; *Forastieri v Hasset*, 167 AD2d 125 [1990]). In light of the strong public policy of this State to dispose of cases on their merits, the motion court improvidently exercised its discretion in denying Nationwide's motion to vacate the default order (*Harwood*, 291 AD2d 234).

Vacatur is particularly warranted in that questions surround whether Nationwide was served with the motion in the first instance, and in that plaintiff's notice of motion sought only to extend its time to file a note of issue, with no relief requested against Nationwide (*see* CPLR 2214[a]).

Nationwide made a sufficient showing of a meritorious defense to the underlying motion, and the plaintiff's action. The drastic remedy of striking an answer is inappropriate, absent a clear showing that defendant's failure to comply with discovery demands was willful or contumacious (*see Weissman v 20 E. 9th St.*

Corp., 48 AD3d 242 [2008]). In its underlying motion, plaintiff failed to submit sufficient proof that Nationwide was in violation of a prior order, including the order allegedly violated (*see Ramirez v New York City Hous. Auth.*, 57 AD3d 231 [2008]). Moreover, delays in discovery were caused by both parties' actions, making a unilateral sanction inappropriate (*see Sifonte v Carol Gardens Hous. Co., Inc.*, 70 AD2d 563 [1979]).

Nationwide also demonstrated potentially meritorious legal and factual defenses to plaintiff's claims (*see Murphy v Kuhn*, 90 NY2d 266 [1997]; *Pavia v State Farm Mut. Auto. Ins. Co.*, 82 NY2d 445 [1993]).

In light of the foregoing, we need not reach the parties' remaining contentions.

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

ENTERED: MARCH 22, 2011

CLERK

Tom, J.P., Andrias, Sweeny, Moskowitz, Renwick, JJ.

4576 Victor L. Townes, Index 300449/08
Plaintiff-Respondent,

-against-

Harlem Group, Inc., et al.,
Defendants-Appellants,

Sharon J. Allen,
Defendant.

____

Mead Hecht Conklin & Gallagher, LLP, Mamaroneck (Elizabeth M. Hecht of counsel), for appellants.

Helen Dalton & Associates, P.C., Forest Hills (Natia Shalolashvili of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered July 9, 2010, which, denied defendants-appellants' motion for summary judgment seeking to dismiss the complaint on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to grant the motion as to plaintiff's significant limitation use claims with respect to of his cervical spine, lumbar spine, and right knee, and otherwise affirmed, without costs.

Supreme Court properly determined that appellants made a prima facie showing of entitlement to summary judgment as to plaintiff's claims of "significant limitation of use" of his cervical spine, lumbar spine, and right knee (Insurance Law §

5102[d]). Appellants submitted competent and objective medical evidence that plaintiff did not suffer a loss of range of motion as to any of those organs or systems (*see Toure v Avis Rent a Car Systems*, 98 NY2d 345, 350 [2002]). Appellants also submitted sufficient evidence that plaintiff's conditions were degenerative or age-related, which shifted the burden of refuting the same to plaintiff (*see Carrasco v Mendez*, 4 NY3d 566, 580 [2005]; *Rodriguez v Abdallah*, 858 NYS2d 169, 171 [2008]).

Supreme Court also properly determined that appellants met their initial burden as to plaintiff's 90/180-day claim by offering the affirmed reports of a radiologist who, after examining MRI images of plaintiff's alleged injuries taken during the relevant period, concluded that the injuries were "only age-related degenerative changes" (*Reyes v Esquilin*, 54 AD3d 625, 615 [2008]). In any event, plaintiff submitted competent evidence that sufficiently raises a question of fact as to his 90/180-day claim. The affirmation of plaintiff's treating physician specifically incorporates by reference her reports of her examination conducted on September 25, 2006, two weeks after the accident, and December 21, 2006, over 2 months after the accident, both which tend to support this claim.

With respect to his alleged significant limitation of use claims, plaintiff failed to raise an issue of fact (*see Wadford v*

Gruz, 35 AD3d 258, 258 [2006]). While plaintiff's treating physician thoroughly conducted and aptly explained the objective testing methods employed for each of plaintiff's three injured body parts in properly affirmed reports based on examination conducted within weeks of the accident (*see Dufel v Green*, 84 NY2d 795, 798 [1995]; *Engles v Claude*, 39 AD3d 357 [2007]), plaintiff has failed to submit any proof of a recent medical examination showing a loss of range of motion in his cervical spine, lumbar spine, and right knee (*see Antonio v Gear Trans Corp.*, 65 AD3d 869 [2009]; *Thompson v Abbasi*, 15 AD3d 95, 97 [2005]).

We have considered appellants' remaining contentions, and find them unpersuasive.

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

ENTERED: MARCH 22, 2011

CLERK

Tom, J.P., Andrias, Sweeny, Moskowitz, Renwick, JJ.

4577 Domingo Canelo, et al., Index 307821/08
Plaintiffs-Respondents,

-against-

Genolg Transit, Inc., et al.,
Defendants-Appellants.

____

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

Gerard DeCapua, Rockville Centre, for respondents.

____

Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered July 15, 2010, which denied defendants’ motion for summary judgment dismissing the complaint on the ground that plaintiff Gilberto Canelo did not sustain a serious injury within the meaning of the Insurance Law, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendants established their entitlement to summary judgment dismissing the 90/180-day claim based upon, inter alia, plaintiff's deposition testimony that he had not been confined to bed and did not miss work following the accident (*see Lopez v Abdul-Wahab*, 67 AD3d 598 [2009]). Plaintiff failed to raise a triable issue of fact as to whether he was incapacitated from performing all of his usual and customary activities for at least

90 out of 180 days following the accident.

The failure of defendants' experts to review plaintiff's medical records does not require denial of defendants' motion with regard to the claim of permanent injury (*see DeJesus v Paulino*, 61 AD3d 605, 607 [2009]). The record establishes that defendants' neurologist detailed the specific objective tests he used in his personal examination of plaintiff, which revealed full range of motion, and their radiologist found, upon review of plaintiff's MRI films, no evidence of disc bulging or herniation.

In opposition, plaintiff failed to raise a triable issue of fact. Although plaintiff's radiologist opined that plaintiff suffered permanent injuries that were caused by the car accident, and provided quantifications for loss in range of motion, he failed to address the findings of defendants' radiologist that plaintiff's spinal condition was the result of pre-existing degenerative changes (*see Delfino v Luzon*, 60 AD3d 196, 198 [2009]). Plaintiff's expert also failed to address plaintiff's prior motor vehicle accident in which he injured his cervical and lumbar spine, which renders his conclusion as to causation speculative (*see Zhijian Yang v Alston*, 73 AD3d 562, 563 [2010]). Furthermore, plaintiff's treating physician failed to quantify any loss in the ranges of motion of the cervical spine at plaintiff's last examination, and the physician's finding of a 9%

cervical disability and a 10% lumbar disability were not of sufficient magnitude to qualify as a "significant" or "important" limitation of use (*see Arrowood v Lowinger*, 294 AD2d 315 [2002]; *Bandoian v Bernstein*, 254 AD2d 205 [1998]).

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

ENTERED: MARCH 22, 2011

CLERK

Tom, J.P., Andrias, Sweeny, Moskowitz, Renwick, JJ.

4578 In re Ronnie Allen, Index 400132/09
Petitioner-Appellant,

-against-

Division of Human Rights, et al.,
Respondents,

MTA New York City Transit,
Respondent-Respondent.

____

Law Offices of Stewart Lee Karlin, P.C., New York (Stewart Lee Karlin of counsel), for appellant.

Martin B. Schnabel, Brooklyn (Mariel A. Tanne of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Edward H. Lehner, J.), entered July 10, 2009, denying the petition and dismissing this article 78 proceeding to annul the determination of the New York State Division of Human Rights, dated December 4, 2008, unanimously affirmed, without costs.

The challenged determination that there existed no probable cause to believe that respondent New York City Transit Authority had engaged in age and/or national origin discrimination was rationally based and therefore not subject to judicial

disturbance (*see Gaskin v Westbourne Assoc., L.P.*, 59 AD3d 362 [2009]; *Matter of Malone v New York City Commn. on Human Rights*, 29 AD3d 364 [2006]; *Matter of McFarland v New York State Div. of Human Rights*, 241 AD2d 108 [1998]).

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

ENTERED: MARCH 22, 2011

CLERK

Tom, J.P., Andrias, Sweeny, Moskowitz, Renwick, JJ.

4579 The People of the State of New York, Ind. 6249/07
Respondent,

-against-

Richard Brown,
Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, New York County (Robert H. Straus, J.H.O. at suppression hearing; Robert M. Stolz, J. at suppression ruling, jury trial and sentence), rendered May 6, 2009, convicting defendant of criminal possession of a controlled substance in the first degree, and sentencing him to a term of 8 years, unanimously affirmed.

The court properly denied defendant's suppression motion. Police officers, as part of a "Clean Halls" initiative, at the request of the landlord, properly approached defendant to request information after they saw him acting suspiciously in a hallway of a building known for the presence of trespassers and drug dealers. Before the plainclothes officers were able to identify themselves, defendant pushed one of the officers with enough force to knock him down, and ran downstairs. This gave rise to

at least reasonable suspicion that defendant had committed harassment or attempted assault. Accordingly, the police lawfully pursued defendant, as a result of which defendant dropped his bag, causing cocaine to spill out. We reject defendant's attempt to extend *People v Felton* (78 NY2d 1063 [1976]) and its progeny to this case, as those cases are limited to circumstances where a defendant is responding to unlawful conduct by police. Defendant claims that he was justified in using physical force against the disguised officers, whom he reasonably believed to be robbers. However, we find that the officers acted reasonably in pursuing him. Any evidence suggesting justification under Penal Law article 35 was not so substantial as to negate reasonable suspicion of criminality or immunize defendant from being chased by the police (*cf*. *People v Dunnell*, 63 AD3d 535 [2009], *lv denied* 13 NY3d 796 [2009] [possibility that complainant was actual aggressor and defendant was actual victim did not undermine probable cause]; *see also*

People v Roberson, 299 AD2d 300 [2002], *lv denied* 99 NY2d 619 [2003]).

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

ENTERED: MARCH 22, 2011

CLERK

Tom, J.P., Andrias, Sweeny, Moskowitz, Renwick, JJ.

4580 Warshaw Burstein Cohen Schlesinger & Kuh, LLP, Plaintiff-Respondent, Index 116683/09

-against-

Eric A. Longmire, Defendant-Appellant.

Law Office of Daniel L. Abrams, PLLC, New York (Daniel L. Abrams of counsel), for appellant.

Warshaw Burstein Cohen Schlesinger & Kuh, LLP, New York (Avi Lew of counsel), for respondent.

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered on or about December 6, 2010, as amended by order, same court and Justice, entered on or about December 9, 2010, which granted plaintiff's motion to disqualify defendant's counsel from representing him, unanimously affirmed, without costs.

Plaintiff law firm demonstrated that defendant's counsel played a vital role in the final settlement negotiations flowing from a settlement offer that plaintiff had allegedly previously procured and that defendant client later accepted, that the negotiations were an important part of the underlying dispute, that defendant's counsel was likely to be a key witness at trial, and that his proposed testimony would be adverse to his client's interests (*see Sokolow, Dunaud, Mercadier & Carreras v Lacher*,

299 AD2d 64, 75-76 [2002]; *Martinez v Suozzi*, 186 AD2d 378 [1992]).

While plaintiff improperly submitted the affirmation, rather than affidavit, of a partner (*see* CPLR 2106), under the circumstances, "this defect was merely a technical procedural irregularity which did not prejudice the defendant" (*see Board of Mgrs. of Ocean Terrace Towne House Condominium v Lent*, 148 AD2d 408 [1989], *lv denied* 75 NY2d 702 [1989]; see CPLR 2001).

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

ENTERED: MARCH 22, 2011

CLERK

Tom, J.P., Andrias, Sweeny, Moskowitz, Renwick, JJ.

4581 Meadow Star LLC, Index 603165/08
Plaintiff-Respondent,

-against-

Harry Macklowe, et al.,
Defendants-Appellants.

____

Willkie Farr & Gallagher LLP, New York (Stephen Greiner of counsel), for appellants.

Herbert Beigel & Associates, Tucson, AZ (Herbert Beigel, of the Arizona Bar, admitted pro hac vice, of counsel), for respondent.

____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered September 29, 2010, which, insofar as appealed from, denied defendants' motion to dismiss plaintiff's causes of action for breach of contract, unanimously affirmed, with costs.

Defendants maintain that dismissal of the breach of contract claim was warranted since no equity contribution was required under the parties' agreement inasmuch as the two conditions of funding were not met. This argument fails because although section 3.1 of the Partnership Agreement for the proposed acquisition clearly stated that each partner was to make a $600 million capital contribution on or before November 27, 2006, the conditions under which the funding will occur are ambiguous (*see Eagle Indus., Inc. v DeVilbiss Health Care, Inc.*, 702 A2d 1228, 1232 [Del 1997]). For example, the joint bid letter dated

November 15, 2006 could be reasonably construed to make the conditions under which funding would occur, i.e., an ultimate purchase price of no more than $49 per share and a capital contribution of no more than $1.2 billion, subject to the completion of the short diligence period of 10 business days. If due diligence was completed prior to November 27, 2006, and it did not appear the transaction would close, no capital contribution would be required. If due diligence was completed subsequent to November 27, 2006, and it did not appear the transaction would close, capital contributions made by November 27, 2006 would be returned. Thus, even if more than $1.2 billion in equity was ultimately required, the refund provision of Section 3.1 would have been triggered.

Furthermore, contrary to defendants' contention, the liquidated damages amount sought by plaintiffs was not unenforceable as a matter of law. To determine whether the amount is a penalty or liquidated damages, Delaware courts apply a two-part test: "Where damages are uncertain and the amount agreed upon is reasonable, such an agreement will not be disturbed" (*Lee Bldrs, Inc. v Wells*, 34 Del Ch 307, 309, 103 A2d 918, 919 [1954]). Defendants have failed to demonstrate that "Failure to Contribute" amount at issue, $60 million, or 10% of the $600 million capital contribution to be made by each partner,

was unenforceable (*see Piccotti's Rest. v Gracie's, Inc.*, 1988 WL 15338, *2-3, Del Super LEXIS 48, *3-9 [Del 1988]; *see also United Rentals, Inc. v Ram Holdings, Inc.*, 937 A2d 810, 825-26 [Del 2007]).

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

ENTERED: MARCH 22, 2011

CLERK

Tom, J.P., Andrias, Sweeny, Moskowitz, Renwick, JJ.

4582 Sheila Love, Index 25404/04
Plaintiff-Appellant,

-against-

The New York City Housing Authority,
Defendant-Respondent.

____

William A. Gallina, Bronx (Frank V. Kelly of counsel), for appellant.

Cullen and Dykman LLP, Brooklyn (Joseph Miller of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered February 5, 2010, which, in an action for personal injuries allegedly sustained when plaintiff slipped and fell on a wet substance as she descended an interior stairwell in defendant's building, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established its prima facie entitlement to judgment as a matter of law by establishing that it did not have notice of the condition that allegedly caused plaintiff to fall. Defendant's caretaker testified that she followed the janitorial schedule pursuant to which she would have swept all the staircases in the morning, mopped the stairs any time she encountered a wet condition and informed the supervisor of any

complaints she would receive.

Plaintiff's opposition does not raise a triable issue of fact. The evidence fails to demonstrate a specific recurring dangerous condition routinely left unaddressed by defendant, as opposed to a mere "general awareness" of such a condition, for which defendant is not liable (*see Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]; *Rodriguez v 520 Audubon Assoc.*, 71 AD3d 417 [2010]). Plaintiff's assertion that defendant should have been required to patrol its staircases 24 hours a day is unavailing (*see Berger v ISK Manhattan, Inc.*, 10 AD3d 510, 512-513 [2004]).

We have considered plaintiff's other arguments and find them unavailing.

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

ENTERED: MARCH 22, 2011

CLERK

Tom, J.P., Andrias, Sweeny, Moskowitz, Renwick, JJ.

4583N In re Lois Katz, et al., Index 602045/09
Petitioners-Respondents,

-against-

Charles Alpert, et al.,
Respondents-Appellants.

____

Heller, Horowitz & Feit, P.C., New York (Stuart A. Blander of counsel), for appellants.

Stroock & Stroock & Lavan LLP, New York (Joel Cohen of counsel), for respondents.

____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered October 2, 2009, which granted the petition to permanently stay arbitration pursuant to CPLR 7503(b), unanimously affirmed, with costs.

The court properly determined that respondents failed to demonstrate that the 1996 A. Alpert Trust was the alter ego of Abraham Alpert. There is no showing that Alpert dominated and controlled the trust or acted to perpetrate a fraud or injustice. Accordingly, the trust is not subject to the arbitration provision to which Alpert was bound (*see TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339-340 [1998]). Contrary to respondents' contention, the evidence does not raise a "substantial question" requiring a hearing on the issue of arbitrability (CPLR 7503[a]).

Given the foregoing, we need not decide whether respondents' claims are barred by the six-year statute of limitations governing breach of contract claims, or whether they are revived by the relation-back doctrine.

We have considered respondents' remaining contentions and find them unavailing.

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

ENTERED: MARCH 22, 2011

CLERK

Sweeny, J.P., Moskowitz, Renwick, DeGrasse, Román, JJ.

3865 Randi Rhodes, also known as Randi Robertson, Index 602906/05
Plaintiff-Appellant,

-against-

Steven Edward Herz, et al.,
Defendants-Respondents.

____

John R. Sachs, Jr., New York, for appellant.

LaRocca Hornik Rosen Greenberg & Blaha LLP, New York (Amy D. Carlin of counsel), for respondents.

____

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered March 5, 2010, affirmed, with costs.

Opinion by Román, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, J.P.
Karla Moskowitz
Dianne T. Renwick
Leland G. DeGrasse
Nelson S. Román, JJ.

3865
Index 602906/05

_______________________________________x

Randi Rhodes, also known as
Randi Robertson,
Plaintiff-Appellant,

-against-

Steven Edward Herz, et al.,
Defendants-Respondents.
_______________________________________x

Plaintiff appeals from an order of the Supreme Court, New York County (Michael D. Stallman, J.), entered March 5, 2010, which granted defendants' motion to dismiss plaintiff's first, fifth, sixth, and seventh causes of action, premised on violations of General Business Law article 11.

John R. Sachs, Jr., New York, and Gaulin Group PLLC, New York (Robert V. Gaulin of counsel), for appellant.

LaRocca Hornik Rosen Greenberg & Blaha LLP, New York (Amy D. Carlin and Lawrence S. Rosen of counsel), for respondents.

ROMÁN, J.

The issue before us is whether article 11 of the General Business Law, by its terms, provides an express private right of action and whether, in the absence of such an express right, one is nevertheless implied. We hold, and indeed not for the first time, that article 11 does not provide either an express or an implied private right of action against licensed or unlicensed employment agencies or their agents. Accordingly, plaintiff's first, fifth, sixth and seventh causes of action, premised on violations of article 11, were properly dismissed.

According to the complaint[1], plaintiff, a nationally syndicated radio talk show host, entered into a Comprehensive Employment Agent and Managerial Contract with defendant IF Management, Inc. Prior to the contract's execution, defendant Steven Edward Herz, an employee of IF Management, Inc., represented that he was an employment agent and that IF Management, Inc. could act as plaintiff's employment agent, manager and law firm. Carol Perry was also employed by IF Management, Inc. and, along with the other defendants, acted as

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[1] When deciding a motion to dismiss a complaint, pursuant to CPLR 3211, as is the case here, all allegations in the complaint are deemed to be true, and all reasonable inferences which can be drawn therefrom shall be resolved in favor of the plaintiff (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]).

plaintiff’s employment agent. During the contract’s term, defendants discussed and explored employment opportunities for plaintiff. In particular, defendants attempted to negotiate a publishing contract on plaintiff’s behalf with Miramax, negotiated a salary increase with Air America Radio, and sought to obtain plaintiff employment with Westwood One, a radio network, and Sirius, a satellite radio network. Since defendants failed to perform their obligations under the contract, plaintiff timely sought to terminate it. Defendants, however, refused to accept the termination.

Plaintiff asserts several causes of action, but only four are relevant to this appeal. Plaintiff’s first cause of action seeks to void the contract between her and the defendants and seeks to recover all monies paid by plaintiff to defendants during the contract’s term. Plaintiff premises this relief on the ground that defendants acted as her employment agents without a license, thereby violating General Business Law § 172, and that by simultaneously acting as her employment agents, managers and attorneys, defendants also violated General Business Law § 187(8). Plaintiff’s fifth cause of action seeks monetary damages on the ground that in failing to disclose that they were not licensed to act as her employment agents and in unlawfully engaging in prohibited employment procurement activities,

defendants breached their fiduciary duty. Plaintiff's sixth and seventh causes of action, both for unjust enrichment, are virtually identical, and therein she seeks damages, equal to all fees plaintiff paid to the defendants, as well as an accounting of defendants' profits for the contract term. The unjust enrichment claim is premised on violation of General Business Law § 172, insofar as defendants were not licensed to act as plaintiff's employment agents, and on a violation of General Business Law § 185, to the extent that the fees charged by the defendants were unlawful.

Subsequent to the commencement of this action, defendants moved to dismiss plaintiff's first, fifth, sixth, and seventh causes of action pursuant to CPLR 3211(a)(2) (want of subject matter jurisdiction) and 3211(a)(7) (failure to state a cause of action). Defendants argued that insofar as article 11 provides for neither an express nor an implied private right of action, plaintiff's causes of action, to the extent premised on violations of article 11, merited dismissal. To the extent that defendants asserted a counterclaim against the plaintiff for breach of contract, they also sought an order enjoining plaintiff from asserting any affirmative defenses premised on defendants' alleged violation of article 11. The motion court granted defendants' motion, finding that while article 11 provides for a

limited express right of action against a licensed employment agency, it provides no similar express private right of action here, where the defendants were unlicensed during the relevant period. The motion court further held that, given article 11's comprehensive enforcement mechanism, no private right of action against an unlicensed employment agency existed. The motion court denied the portion of defendants' application seeking to enjoin plaintiff from raising a violation of article 11 as an affirmative defense to defendants' counterclaims. Plaintiff appeals and we affirm.

Article 11 applies to all employment agencies within the state (General Business Law § 170), and defines an employment agency as any person, who, for a fee, procures or attempts to procure employment for persons seeking employment or engagements (General Business Law § 171[2][a][1]). The statute imposes a licensing requirement and as such, no person may "maintain, own, operate or carry on any employment agency" (General Business Law § 172) without a license obtained from the state's Commissioner of Labor, or if within New York City, the Commissioner of the Department of Consumer Affairs (*id.*). Additionally, anyone operating an employment agency is required to file a bond in the sum of five thousand dollars (General Business Law § 177[1]), payable to the people of the State of New York or the City of New

York (General Business Law § 177[2]), and the bond

> "shall be conditioned that the person applying for the [employment agency] license will comply with this article, and shall pay all damages occasioned to any person by reason of any misstatement, misrepresentation, fraud or deceit, or any unlawful act or omission of any licensed person . . . committed or omitted in the business conducted under such license or caused by any other violation of this article . . ." (*id.*).

Claims or suits upon the bond "may be brought in the name of the person damaged" and "[t]he commissioner may institute a suit against the bond on behalf of any person damaged" (General Business Law § 178). Fees chargeable by an employment agency are limited to those within article 11 (General Business Law § 185), and an employment agency which collects fees in contravention of the article's provisions is required to return the excess portions thereof within seven days after a demand is made (General Business Law § 186).

Enforcement of article 11 is statutorily delegated to the State Commissioner of Labor, except that in New York City, it is enforced by the Commissioner of Consumer Affairs (General Business Law § 189[1]). Commensurate with his enforcement powers, the Commissioner, upon reasonable grounds to believe that an employment agency is violating article 11, has the authority to subpoena the records of the employment agency, subpoena

witnesses, and conduct an investigation (General Business Law § 189[2]). As against a licensed person, complaints shall be made orally or in writing to the commissioner, who may then investigate, hold a hearing, take testimony, subpoena witnesses and direct production of documents (General Business Law § 189[4]). If after a hearing it is determined that the licensed agency has violated article 11, the commissioner may suspend or revoke the agency or person's license and/or levy a fine (General Business Law § 189[5]). Additionally, most violations of article 11, including the operation of an employment agency without a license, are misdemeanors, punishable by a fine of up to one thousand dollars and by imprisonment not to exceed one year (General Business Law § 190). Other violations, such as the failure to conspicuously post certain sections of article 11 (General Business Law § 188), are punishable by a fine of no more than one hundred dollars or imprisonment not to exceed thirty days (General Business Law § 190). The Commissioner in New York City is also vested with additional powers, authorizing him to bring proceedings against anyone operating a business without a license where the same is required (Administrative Code of the City of New York § 20-105). Pursuant to the Administrative Code, it is unlawful to engage in the unlicensed operation of any business requiring a license and such conduct is punishable by

imposition of a one hundred dollar fine for each day the person operates without a license (*id.*). The Commissioner can also order that an unlicensed person cease operation of any business for which a license is required, can order the sealing of the premises where such unlicensed business is taking place, and can order the removal of any items utilized in connection with the unlicensed business (*id.*).

As will be discussed in detail below, plaintiff's first, fifth, sixth and seventh causes of action, premised upon defendants' violation of article 11, were properly dismissed.

Preliminarily, we affirm because we have previously determined that article 11 provides no private right of action[2]

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[2] Plaintiff cites to several cases which she purports evince this state's long standing history of allowing private actions for violations of article 11. Plaintiff's contention is without merit. In light of *Morin v Curtis Assoc. Personnel* (56 AD2d 817, 817 [1977]) and *Greater N.Y. Mut. Ins. Co. v Wehinger Serv.* (NYLJ, May 14, 1974, p 2, col 2, [Sup Ct, NY County, May 7, 1974, Frank, J.], *affd* 47 AD2d 604 [1975], *lv denied* 36 NY2d 643 [1975]), any case and, in particular any in this Department, which holds the existence of a private right of action for a violation of article 11 is contrary to our case law. Lower court cases such as *Friedkin v Harry Walker, Inc.* (90 Misc 2d 680 [1977]), which, in any event, never addressed the issue of the existence of a private right of action, should not be followed. For similar reasons and because in the absence of a private right of action there can exist no affirmative defense pursuant to such right (*Banque Indosuez v Pandeff*, 193 AD2d 265, 271 [1993]; *P & T Iron Works v Talisman Contracting Co., Inc.*, 18 AD3d 527, 528 [2005]), cases like *Pine v Laine* (36 AD2d 924 [1971], *affd* 31 NY2d 988 [1973]), also cited and relied upon by plaintiff, where the issue of the existence of a private right of action was not

(*Morin v Curtis Assoc. Personnel*, 56 AD2d 817, 817 [1977]; *Greater N.Y. Mut. Ins. Co. v Wehinger Serv.*, NYLJ, May 14, 1974, at 2, col 2, [Sup Ct, NY County, May 7, 1974, Frank, J.], *affd* 47 AD2d 604 [1975], *lv denied* 36 NY2d 643 [1975]). In *Greater N.Y.* and then again in *Morin*, we held that a violation of General Business Law § 187 could not be litigated in a plenary action and could only be litigated administratively. In *Greater N.Y.*, plaintiff sued defendant, an employment agency, alleging, inter alia, that the defendant, in order to derive commissions, induced the plaintiff's employees to terminate their employment, thereafter procuring jobs for them elsewhere. The plaintiff alleged that the defendant's actions violated General Business Law § 187, and upon the defendant's motion to dismiss the plaintiff's complaint for want of subject matter jurisdiction, the action was dismissed (*id.*). In granting the defendants' motion, the motion court held that because enforcement of the statute was delegated to the Commissioner of Consumer Affairs, the plaintiff's only recourse for a violation of this section of the General Business Law was the administrative remedy provided by General Business Law § 189 (*id.*). Specifically, the motion

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raised and where the court dismissed an action upon an affirmative defense premised on a violation of article 11, should also not be followed.

court held that "the prohibition in such section [General Business Law § 187] is to be enforced in this locality [the City of New York,] by the Commissioner of Consumer Affairs of New York City (General Business Law § 189), and the *only remedy available to plaintiff with respect to the statute is the administrative procedure detailed therein*" (*id.* at 8 [citation omitted and emphasis added]). Plaintiff appealed, we affirmed (47 AD2d 604 [1975]), and leave to appeal to the Court of Appeals was denied (36 NY2d 643 [1975]). Two years later, in *Morin*, we were confronted with nearly identical facts, and relying on *Greater N.Y.*, we affirmed dismissal of the plaintiff's complaint (*Morin* at 817). Accordingly, our holdings in both *Greater N.Y.* and *Morin* stand for the proposition that a violation of article 11 does not give rise to a private right of action, express or implied.

Notwithstanding the above-cited cases, there being a dearth of appellate case law on this issue, we feel the time is ripe for elaboration.

In order to determine whether article 11 contains an express private right of action, we begin with a review of the statute itself. Contrary to plaintiff's assertions, the holding of the motion court and the holding in *Shelton v Elite Model Mgt., Inc.* (11 Misc 3d 345 [2005]), we again conclude that article 11 does

not promulgate an express right of action. While General Business Law § 177 requires a bond conditioned on compliance with article 11 and requiring payment for "all damages occasioned to any person by reason of any misstatement, misrepresentation, fraud or deceit, or any unlawful act or omission" and General Business Law § 178 states that claims or suits may be brought in the name of the person damaged upon the bond," the latter section delegates the initiation of an action upon the bond to the commissioner who "may institute a suit against the bond on behalf of any person damaged." Thus, it is only the commissioner who can institute an action upon the bond and against the licensed employment agency and not the individual sustaining injury or damages. The fact that the commissioner's power to initiate an action upon the bond is not compulsory under this section is not, as some might argue, an indication of an express limited private right of action. Instead, the discretion afforded to the commissioner under General Business Law § 178 is merely a recognition that the initiation of a claim or suit on an employee's behalf will not always be required because General Business Law § 189(2) vests the commissioner with broad investigatory powers such that a suit might be obviated.

Logically, if article 11 promulgated an express private right, we would expect to find it in General Business Law § 189,

the article's enforcement section. Accordingly, the absence of such an express right in General Business Law § 189, which instead, vests all enforcement powers of the article in the Commissioner is quite telling (*accord Columbia Artists Mgt., LLC v Swenson & Burnakus, Inc.*, 2008 WL 4387808; 2008 US Dist LEXIS 74377 [SD NY 2008]; *Masters v Wilhelmina Model Agency, Inc*, 2003 WL 145556, 2003 US Dist LEXIS 698 [SD NY 2003]). General Business Law § 190, the article's penalties provision, where we would also expect to find an express private right of action, is similarly bereft of any language promulgating such right. Instead, this section, the only section addressing penalties and remedies against an unlicensed agency, states that such transgression can solely be redressed through the initiation of criminal proceedings (General Business Law § 190). Any assertion that General Business Law § 186 provides an express private right of action against unlicensed employment agencies, as the court held in *Shelton*, is meritless. While General Business Law § 186 requires the return of fees upon demand, enforcement for noncompliance, is governed by General Business Law §§ 189 and 190, which again, contain no express right of action.

When the language of article 11 is compared with the language in a legion of other statutes which *do* provide an express private right of action, it is manifestly evident that

article 11 cannot be read to provide such right of action. For example, General Business Law § 899-n, which provides an express right of action to an educational institution for damages stemming from a violation of that statute states that "[a]n educational institution *shall have a right of action* against an athlete agent for damages caused by any violation of this article" (emphasis added). General Business Law § 609, providing an express private action for damages incurred in the bailment and storage of goods, states that "[a]ny consumer bailor damaged by an unlawful detention of his goods or any other violation of this article *may bring an action for recovery of damages* and the return of his goods" (emphasis added). General Obligations Law § 11-100, providing an express private right action for injuries stemming from intoxication, states, "Any person who shall be injured in person, property, means of support or otherwise, by reason of the intoxication or impairment [of a person under 21 years of age] . . . *shall have a right of action to recover actual damages* . . ." (emphasis added). No such language can be found in article 11.

Since article 11 provides no express private right of action, our inquiry must then turn to whether the article may nevertheless fairly be read to imply a private right of action.

Where a statute fails to expressly prescribe a private right

of action, one can nevertheless be implied, provided that it is consistent with the legislative intent, (*Uhr v East Greenbush Cent. School Dist.*, 94 NY2d 32, 38 [1999]; *Brian Hoxie's Painting Co., Inc. v Casto-Meridian Cent. School Dist.*, 76 NY2d 207, 211 [1990]; *Sheehy v Big Flats Community Day,* 73 NY2d 629, 633 [1989]; *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 325 [1983]). A private right of action will be implied if (1) the plaintiff is a member of the class for whose benefit the statute was enacted; (2) the recognition of such right promotes the legislative purpose which undergirds the statute; and (3) the creation of such right is consistent with the legislative scheme for the statute (*Sheehy* at 633). Legislative intent is thus the linchpin in any case where a private right of action is to be implied. As the court in *Burns* aptly stated,

> "The far better course is for the Legislature to specify in the statute itself whether its provisions are exclusive and, if not, whether private litigants are intended to have a cause of action for violation of those provisions. *Absent explicit legislative direction, however, it is for the courts to determine, in light of those provisions, particularly those relating to sanctions and enforcement, and their legislative history, and of existing common-law and statutory remedies, with which legislative familiarity is presumed, what the Legislature intended"* (59 NY2d at 325 [emphasis added]).

The first prong of the abovementioned test is often the

simplest to resolve, since whether the proponent of an implied private right of action is within the class for whose benefit a statute was enacted is usually manifest from the language itself (*see Uhr at* 38-39 [court found that plaintiff, a student, was undoubtedly a member of the class for whose benefit Education Law § 905(1) was enacted insofar as the statute mandated that students be screened for scoliosis]; *Sheehy* at 633-634 [court found that plaintiff, a minor, was a member of the class for whose benefit Penal Law § 260.20(4), prohibiting sale of alcohol to minors, was enacted]).

Resolution of the second prong, whether an implied private right of action promotes the legislative purpose, is a two-part inquiry, requiring determination of (1) what the Legislature was seeking to accomplish in enacting the statute; and (2) whether a private right of action promotes that objective (*Uhr* at 38). To that end, it is of course helpful to look at the statute's legislative history, such as amendments to the statute itself, and the memoranda and/or letters submitted during the legislative process (*id*. at 38-39 [purpose of statute established by reviewing an amendment thereto as well as a letter submitted in support thereof]; *Brian Hoxie's Painting Co.* 76 NY2d at 213 [purpose of statute established by reviewing memorandum submitted in support of its passage]).

The third prong, whether an implied private right of action is consistent with the legislative scheme is "the most critical . . . in determining whether to recognize a private cause of action where one is not expressly provided . . ." (*id.* at 212). Here, the relevant inquiry is whether the private right of action coalesces smoothly with the legislative goal, in particular with its enforcement mechanism, or whether it is completely at odds with the same (*Uhr* at 40). As the Court of Appeals stated in *Uhr*,

> "In assessing the 'consistency' prong, public and private avenues of enforcement do not always harmonize with one another. A private enforcement mechanism may be consistent with one statutory scheme, but in another the prospect may disserve the goal of consistency--like having two drivers at the wheel. Both may ultimately, at least in theory, promote statutory compliance, but they are born of different motivations and may produce a different allocation of benefits owing to differences in approach" (*id.*).

Thus, whether a private right of action is consistent with the legislative scheme often depends in large measure on whether the statute has a potent or extensive enforcement mechanism[3] and

[3] To the extent that in *Goldberg v Enterprise Rent-A-Car Co.* (14 AD3d 417 [2005]), we previously held that a potent enforcement mechanism was, by itself, dispositive of whether a private right of action is consistent with the legislative scheme, that case should not be followed. It is clear that potency is but one factor and thus, by itself, not determinative

whether that method of enforcement was intended to be exclusive (*id.*; *Brian Hoxie's Painting Co.,* 76 NY2d at 212-213). In *Uhr*, the court concluded that an implied private right of action would have been inconsistent with Education Law § 905(1), because not only did that statute carry its own potent enforcement mechanism, charging the Commissioner of Education with that statute's enforcement, but its legislative history evinced an intent to immunize the defendant school district from liability (*id.* at 40-41). Similarly, in *Burns*, the court would not find an implied private right of action, finding that the crushing personal liability such right would impose on unions and employees for violation of the Taylor Law was inconsistent with the legislative scheme, which over the years had relaxed the sanctions and liability imposed on those who violated the statute (*Burns*, 59 NY2d at 329-330).

Article 11 has its genesis in Chapter 432 of the Laws of New York, enacted on April 27, 1904. Chapter 432 was enacted because there was a need at the time to regulate employment agencies and protect employees from victimization at the hands of unscrupulous

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(*see AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 AD3d 6, 17 [2008] [holding that to the extent that *Carrube v New York City Tr. Auth.* (291 AD2d 558 [2002]), proscribes a private right of action solely upon the finding of a potent enforcement mechanism, it should not be followed]).

employment agencies (*Dorrell Assoc. v Urb Prods. Corp.*, 67 Misc 2d 716, 718 [1971]). The need for regulation was so great that newspaper articles regarding this issue were then quite common. For example, on April 12, 1904, an article in the New York Times with respect to employment agencies, read, in part:

> "The investigation of the [employment] agencies in New York City, covering two years, shows beyond a doubt that at least 30 per cent of these agencies are used as supply stations for questionable places, and that no law in existence, except the law of abduction, which is wholly inadequate, can touch offices misleading girls from honest labor into immoral lives. The present law requires no bond, no character, no responsibility from a man who wishes to run such an office. Upon the payment of $25 any man, even the proprietor of a disorderly or gambling house, can open an agency for supplying labor. Such agency can be kept in a saloon, in a disease-laden or vermin infested building . . ." (*A Bill That Should Be Passed*, New York Times, Apr. 12, 1904, p 8, col 3).

Significantly, with regard to Chapter 432, section 2 imposed a licensing requirement, and while section 8 delegated enforcement to the commissioner, section 3, imposing a bond requirement, also promulgated a limited express right of action against a licensed employment agency. Specifically, section 3 stated "[i]f any person shall be aggrieved by the misconduct of any such licensed person, and shall recover judgment against him therefor, such person may . . . *maintain an action in his own*

name upon the bond . . . in any court having jurisdiction . . .” (chapter 432 of the Laws of 1904, § 3 [emphasis added]). As against an unlicensed agency, the sole remedy was, as it is today, penal sanctions and fines at the commissioner’s behest, (*id.* at § 8).

Article 11 was first enacted in 1909, and it incorporated much of the language found within its predecessor, Chapter 432. Specifically, like Chapter 432, it provided a limited express right of action against a licensed employment agency (General Business Law § 171 [1909]), the commissioner was still charged with enforcing the article (General Business Law § 178 [1909]), and the remedy against any unlicensed employment agency, or violations of the article, namely penal sanctions and fines, remained unchanged (*id*.). By 1958, however, because of its then “many weaknesses, ambiguities, and unfair and out-dated provisions . . .” (Mem of Joint Legislative Comm on Industrial and Labor Conditions, 1958 NY Legis Ann, at 280), article 11 was amended and, largely resembling its present incarnation, what was once Section 171 became the definition section and the limited express right of action previously contained therein was omitted. Instead, Section 178 read, as it does today, that claims or suits could be “brought in the name of the person damaged upon the bond” (L 1958, ch 893 § 7), and while enforcement of the article

was still delegated to the commissioner, he was now vested with a panoply of enhanced powers to aid him in enforcing the article (L 1958, ch 893 § 20; *see* General Business Law § 189). The commissioner was given the authority to investigate violations of the statute and, incident thereto, could now subpoena documents and witnesses (*id.*).

In 1975, article 11 was once again amended. Much like the amendment in 1958, the Legislature again delegated more enforcement powers to the commissioner. A review of a budget report prepared by the New York State Senate reveals that what was driving the 1975 amendment was that "[t]he Department of Labor has evidence of a series of placement agency abuses which justify the more stringent regulatory provisions of this legislation" (Budget Report on Bills, Jul. 10, 1975 at 2, Bill Jacket, L 1975, ch 632). To address these abuses, the bill would now specify that "the Industrial Commissioner [would] institute suit on behalf of the person damaged and increase the penalty for violations of the employment agency statutes" (*id.*). Significantly, Section 178, as amended in 1975, contained the very language we see today, authorizing the commissioner to initiate suit on behalf of an injured person against a licensed employment agency and upon the bond.

Based on the foregoing we conclude that an implied private

right of action for a violation of article 11 is at odds with the legislative intent, inasmuch as it is inconsistent with the legislative scheme. Certainly, plaintiff, who alleges to have contracted with defendants for the procurement of employment is within the class article 11 was enacted to benefit. To the extent that a private action would deter future unlawful behavior by defendants and other employment agencies and agents, an implied private right of action would wholly promote the legislative purpose. This is particularly true since private actions would expose employment agencies and agents to much broader liability because the potential damages could exceed the size of the bond and in the case of unlicensed employment agencies, the fines they are subject to pursuant to General Business Law § 190.

However, a private right of action would be wholly inconsistent with the legislative scheme. Article 11 has a potent enforcement mechanism (*Uhr* at 40-41) which, as per the 1958 and 1975 amendments, eroded and ultimately eliminate the private right of action once prescribed and delegate all enforcement to the Commissioner. While an enforcement mechanism can always be made more potent, article 11's enforcement mechanism vesting the commissioner with broad investigatory, adjudication, and sanctioning power is quite extensive (General

Business Law § 189), even exposing violators to imprisonment for up to one year (General Business Law § 190). The 1975 amendment itself is perhaps the most compelling evidence that the Legislature intended that the sole recourse for article 11's violation would be that enumerated therein. With the 1975 amendment, the Legislature not only delegated to the commissioner the power to initiate the previously prescribed private action against a licensed employment agency, but also declined to promulgate any express private right of action, despite the fact that we had recently declined to find such right in *Greater N.Y.* (*Sheehy* at 635 [no private right of action could be implied for defendant's violation of General Obligations Law § 11-101, because the Legislature's failure to expressly provide such right, despite case law precluding such right in a nearly identical statute evinced intent to preclude such right]; *Uhr* at 41 [Legislature's failure to prescribe an express right of action for violation of Employment Law § 905(2), despite case law declining to imply such right was evidence of intent to preclude a private right of action]). The Legislature is presumed to know that before it amended article 11 in 1975, we found that article 11 provided no private right of action, and could have, but chose not to, express that right in the subsequent amendment.

Accordingly, the order of the Supreme Court, New York County

(Michael D. Stallman, J.), entered March 5, 2010, which granted defendants' motion to dismiss plaintiff's first, fifth, sixth, and seventh causes of action, premised on violations of General Business Law article 11, should be affirmed, with costs.

All concur.

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

ENTERED: MARCH 22, 2011

CLERK