SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 31, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Sweeny, Richter, Manzanet-Daniels, JJ.

3962-
3962A Index 650532/08

Karl J. Wachter,
Plaintiff-Appellant,

-against-

Dow Kim,
Defendant-Respondent.

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Bartlit Beck Herman Palenchar & Scott LLP, Chicago, IL (John D. Byars of the bar of the State of Illinois, admitted pro hac vice, of counsel), for appellant.

Cole, Schotz, Meisel, Forman & Leonard, P.A., New York (Leo V. Leyva and Jed M. Weiss of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered September 17, 2009, which, insofar as appealed from as limited by the briefs, granted defendant's motion to dismiss the causes of action for breach of written contract and for unpaid wages under New York Labor Law §§ 193(1) and 198, unanimously reversed, on the law, without costs, and the motion denied. Appeal from order, same court and Justice, entered on or about June 9, 2010, which denied plaintiff's motion to vacate that portion of the aforementioned order that dismissed the claim for breach of written contract, unanimously dismissed, without

costs, as academic in light of the foregoing.

Defendant, formerly a senior executive at Merrill Lynch, left that firm to establish his own hedge fund. He intended to operate his new fund through nonparties Diamond Lake Investment Group, L.P. (the Limited Partnership) and Diamond Lake GP LLC. The general partner of the Limited Partnership was nonparty DLIG LLC (DLIG), and defendant was the managing member of DLIG. Plaintiff was hired to serve as a managing director of the Limited Partnership and as its general counsel. Also, plaintiff was made a limited partner of the Limited Partnership and a member of Diamond Lake GP LLC.

The essential rights and responsibilities of the parties with respect to plaintiff's employment by the Limited Partnership were stated in a term sheet. Central to this dispute is provision 10 of the term sheet, entitled "2007 and 2008 Guaranteed Cash Compensation." That provision provided that for the calendar year 2008, plaintiff would be paid "aggregate cash compensation" of at least $2,000,000. The "aggregate cash compensation" was comprised of four separate components delineated elsewhere in the term sheet. Those were (1) an annualized draw of $200,000, to be paid biweekly by the Limited Partnership; (2) a share of certain incentive compensation received by DLIG, (3) a share of management fees earned by the

Limited Partnership; and (4) any bonus to be made to plaintiff in the sole discretion of the Limited Partnership. Provision 10 of the term sheet further provided that for 2007, plaintiff would be paid "not less than an amount equal to the 2008 Guaranteed Compensation prorated by the number of months you actually perform services . . . in 2007." It further stated that "[i]f the entire 2007 Guaranteed Compensation and/or 2008 Guaranteed Compensation cannot be paid solely through Draw, cash distributions from Your Percentage of Incentive Compensation, Management Fees and Discretionary Bonus, any shortfall shall be payable to you on or prior to March 15 of the subsequent calendar year."

Finally, provision 10 of the term sheet stated that plaintiff's compensation in 2007 and 2008 would be paid by "Diamond Lake." "Diamond Lake" was defined in the first paragraph of the term sheet, which read, in pertinent part, as follows:

> "The following is a restated term sheet (the 'Term Sheet') summarizing the principal terms of your relationship with [the Limited Partnership] and Diamond Lake GP LLC or such other entity as may serve as general partner to any Diamond Lake fund (the 'General Partner' and collectively with the [Limited Partnership] *and their respective affiliates* and affiliated funds, 'Diamond Lake') on the basis of which a definitive agreement or agreements (the 'Agreement') will be entered

> into between the [Limited Partnership] and you (emphasis added)."

Defendant executed the term sheet in his capacity as the managing member of DLIG. The term "affiliate" was not defined in the term sheet.

Plaintiff began to work for the Limited Partnership in October 2007. However, in August 2008, defendant determined that he could not raise sufficient funds to make the venture viable, and he abandoned it. He informed all the employees, including plaintiff, that their services were no longer needed. Plaintiff contends that, at that point, he was owed more than $2.3 million of the guaranteed compensation provided for in provision 10 of the term sheet. Plaintiff filed a complaint against defendant asserting, as is relevant to this appeal, a cause of action for breach of contract based on provision 10 of the term sheet. Plaintiff alleged that defendant was personally liable to him because defendant was an "affiliate" of the Limited Partnership and DLIG, and therefore was included within the definition of "Diamond Lake" and was responsible for compensating him.

Plaintiff also asserted a cause of action based on Labor Law §§ 193(1) and 198. He alleged that he was an "employee" within the meaning of Labor Law § 190(2), that defendant was his employer, and that the minimum guaranteed cash compensation

amounts were earnings for labor and services rendered to defendant. Therefore, plaintiff claimed, the unpaid compensation constituted "wages" within the meaning of Labor Law § 190(1), and defendant's failure to pay the unpaid balances of the minimum guaranteed cash compensation was an unlawful deduction from wages within the meaning of Labor Law § 193.

Defendant moved to dismiss the complaint for failure to state a cause of action. He argued that he had no personal liability to plaintiff because he signed the term sheet strictly in his capacity as the managing member of DLIG. He further maintained that the term sheet could not reasonably be construed as providing that "Diamond Lake" included individual, as opposed to corporate, affiliates. Defendant further argued that, even if he was individually liable to plaintiff, he could not have violated the Labor Law because the balance of compensation allegedly owed to plaintiff was discretionary and incentive-based, and thus did not constitute "wages" within the statute's definition.

The court granted defendant's motion and dismissed the complaint in its entirety.[1] The court found that defendant is

[1] The complaint also asserted causes of action for breach of oral contract and promissory estoppel. Plaintiff does not appeal from the dismissal of those claims.

not personally liable under the term sheet as an "affiliate," because the first paragraph of the term sheet "plainly states that it sets forth the rights and obligations as to [plaintiff] and any other Diamond Lake entity that may serve as a 'general partner,' [but] makes no references to an individual's status as an affiliate." The court stated that "[t]o read into the Term Sheet that the parties intended [defendant], individually, to be regarded as an affiliate . . . would amount to re-writing the agreement under the guise of contract interpretation." The court further found that the unpaid compensation was incentive-based and thus not covered by the Labor Law.

Plaintiff argues on appeal that the court erred because the term sheet does not unambiguously exclude defendant as an "affiliate" under the definition of the term "Diamond Lake." He contends that the court improperly focused on those parts of the term sheet's first paragraph that identify it as an agreement between plaintiff and an entity, and ignored the fact that "Diamond Lake," the obligor, is defined as including entities and their affiliates. He argues that a natural person such as defendant can be considered an "affiliate." Defendant answers that the court correctly construed the term sheet, because its first paragraph identifies the parties to the term sheet as plaintiff and

> "[the Limited Partnership] and Diamond Lake GP LLC or *such other entity as may serve as general partner* to any Diamond Lake fund ... on the basis of which a definitive agreement or agreements (the 'Agreement') will be entered into between the [Limited Partnership] and you" (emphasis added).

As to his claims pursuant to Labor Law §§ 193(1) and 198, plaintiff argues that the court similarly elided critical language in the term sheet. He contends that the court emphasized the fact that certain of the pay components provided for in the term sheet were contingent or discretionary, and ignored other language that, in absolute terms, guaranteed plaintiff minimum compensation. Defendant responds that, for purposes of the Labor Law definition of "wages," the discretionary nature of the individual pay components overrides the guarantee of a lump sum.

We first consider whether plaintiff has stated a cause of action for breach of contract against defendant in his personal capacity. If so, we must then consider whether he has stated a cause of action against defendant for violation of the Labor Law.

When interpreting a contract, we must consider the entire writing and not view particular words in isolation (*Matter of Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 [2003]). For purposes of this appeal, the goal in interpreting the agreement is to ascertain whether plaintiff has a claim that

defendant is personally obligated to pay him the minimum compensation he says is guaranteed by the term sheet. Further, on this appeal of the grant of a motion to dismiss pursuant to CPLR 3211, we are required to afford plaintiff the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d 83, 87 [1994]).

Plaintiff's claim depends not on the status of the parties to the agreement, but rather on whether defendant falls within the definition of "Diamond Lake," the party that, pursuant to provision 10 of the term sheet, is obligated to pay plaintiff's compensation. The operative language in this dispute is the definition of "Diamond Lake," which appears in the first paragraph of the term sheet, but which the court ignored. The term "Diamond Lake" does not necessarily represent a specific entity; rather, by the very terms of the term sheet, it represents the entity that acts as the general partner of the Limited Partnership, *in addition to* the Limited Partnership itself *and* those entities' "affiliates." Having determined that the definition of "Diamond Lake" is of paramount importance, we still must determine whether the definition unambiguously excludes the possibility that defendant is an "affiliate" or can reasonably be interpreted to embrace him as such. In doing so, we are guided by the principle that language in a contract is

unambiguous if it has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion'" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002], quoting *Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978]). Further, in deciding whether an agreement contains an ambiguity, we should:

> "'consider the relation of the parties and the circumstances under which it was executed. Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby'" (*Kass v Kass*, 91 NY2d 554, 566 [1998], quoting *Atwater & Co. v Panama R.R. Co.*, 246 NY 519, 524 [1927]).

The word "affiliate" is not commonly understood to apply only to entities. To the contrary, the word has been defined as "an affiliated *person* or organization" (Merriam-Webster's Collegiate Dictionary 21 [11th ed 2003] [emphasis added]). Thus, it cannot be said that defendant could not be considered an affiliate of the entities at issue herein. Moreover, the fact that the first paragraph of the term sheet referred to "Diamond Lake" as including "affiliates and affiliated *funds*" (emphasis added) bespeaks a possible intention to differentiate between entities and individuals. In addition, while the parties' intentions are as yet unclear, it cannot be said that, under the

circumstances, the parties could not possibly have intended defendant to be considered an "affiliate." After all, defendant was not a mere functionary of the hedge fund. Rather, he was the impetus for the formation of the venture and the person upon whom its success or failure would depend. He was also the person who plaintiff could reasonably have assumed would fund his compensation until such time as the venture was self-sufficient.

Having considered the parties' arguments in light of the basic precepts of contract interpretation outlined above, we conclude that the word "affiliate" as used in the term sheet is ambiguous as to whether individuals, such as defendant, are included in the definition of "Diamond Lake" and thus obligated to pay plaintiff the compensation promised in the term sheet. Accordingly, the court erred in dismissing plaintiff's breach of contract cause of action. We move on to whether plaintiff has stated a cause of action against defendant under the Labor Law.

We recognize that the Labor Law does not consider as "wages" subject to the statute "[d]iscretionary additional remuneration, as a share in a reward to all employees for the success of the employer's entrepreneurship" (*Truelove v Northeast Capital & Advisory*, 95 NY2d 220, 224 [2000]). It is also true that much of the compensation that the term sheet provides is to be paid to plaintiff can be characterized as contingent and discretionary.

However, provision 10 of the term sheet overrides the discretionary nature of these individual pay components by stating, without qualification, that plaintiff "*shall* receive" (emphasis added) aggregate cash compensation of *not less than* $2,000,000 in 2008 and a prorated portion thereof in 2007. Moreover, the term sheet provides that if the various components of the pay package, including those that are discretionary and/or incentive-based, are insufficient to reach the "2007 Guaranteed Compensation" and "2008 Guaranteed Compensation," "any shortfall *shall* be payable" (emphasis added) to plaintiff by "Diamond Lake." This language indicates that the "2007 Guaranteed Compensation" and "2008 Guaranteed Compensation" are sums certain that "Diamond Lake" must pay to plaintiff and has no discretion not to pay. Accordingly, such compensation is "wages" that are protected by Labor Law §§ 193(1) and 198, and the court erred in dismissing plaintiff's claim under the statute.

We have considered defendant's remaining contentions and find them without merit.

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

ENTERED: MARCH 31, 2011

CLERK

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

4666 The People of the State of New York, Respondent, Ind. 1532/08

-against-

Nathan Mack, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Thomas A. Farber, J.), rendered December 11, 2008, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to a term of 5 years, unanimously affirmed.

The court properly denied defendant's motion to suppress physical evidence and statements. There is no basis for disturbing any of the court's credibility determinations (*see People v Prochilo*, 41 NY2d 759, 761 [1977]).

The record supports the court's finding that an officer saw defendant picking up a pistol and placing it in his jacket pocket. This provided the officer with probable cause to pursue and arrest defendant.

Defendant did not preserve his claim that the police should

have obtained a warrant before searching his jacket, and the hearing court did not "expressly decide[]" that issue *(see People v Turriago*, 90 NY2d 77, 83-84 [1997]). We decline to review this claim in the interest of justice. As an alternative holding, we reject it on the merits since the jacket was properly searched incident to a lawful arrest (*see People v Smith*, 59 NY2d 454 [1983]). Although defendant testified at the hearing that he discarded his jacket before he was apprehended, the search would still have been lawful under that version of the facts, because this would have constituted an abandonment in the course of a lawful pursuit (*see People v Ramirez-Portoreal*, 88 NY2d 99, 110 [1996]).

The court properly determined that defendant's post-*Miranda* statements were sufficiently attenuated from earlier statements that had not been preceded by *Miranda* warnings. The pre-*Miranda* statements were made during sporadic, casual conversation between defendant and the arresting officer during processing, in which the officer asked a few questions that followed up on defendant's spontaneous statements and inquiries about his case. Although the officer should have preceded his questions with *Miranda* warnings, there was a pronounced break between defendant's inadmissible statements and his later statements, made after more focused questioning by other officers and an Assistant District

Attorney (*see People v White*, 10 NY3d 286, 291 [2008], *cert denied* 555 US __, 129 S Ct 221 [2008]; *People v Paulman*, 5 NY3d 122, 130-131 [2005]). Furthermore, defendant demonstrated an unqualified desire to speak to the police from the time of his arrest. Defendant was eager to give what he considered to be an exculpatory or mitigating explanation for his possession of the pistol. We have considered and rejected defendant's remaining claims regarding his statements.

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

ENTERED: MARCH 31, 2011

CLERK

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

4667 Joseph V. Curcio, Index 111515/08
Plaintiff-Respondent,

-against-

Samson Construction Co., Inc., etc.,
Defendant-Appellant,

Pile Foundation Construction Co., Inc., et al.,
Defendants.

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McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York (Michael C. Delaney of counsel), for appellant.

Holland & Knight LLP, New York (Deborah C. Roth of counsel), for respondent.

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Order, Supreme Court, New York County (Jane S. Solomon, J.), entered December 2, 2009, which granted plaintiff's motion for partial summary judgment on his breach of contract claim in the amount of $3,331,506, unanimously reversed, on the law, with costs, and the motion denied.

The court erred in granting plaintiff summary judgment on his claim for a share of defendant Samson Construction Co., Inc.'s net profits. Although, pursuant to his employment agreement, plaintiff was to receive, inter alia, 50% of Samson's net profits, the record clearly presents triable issues as to whether plaintiff has been paid the amounts sought, and whether Samson operated at a net loss in 2007. In its determination of

the motion, the court should not have considered plaintiff's submissions to be more credible than those of Samson (*see generally Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]; *Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]).

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

ENTERED: MARCH 31, 2011

CLERK

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

4669 In re Manuel H.,

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

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Tamara A. Steckler, The Legal Aid Society, New York (Amy Hausknecht of counsel), for appellant.

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

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Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about August 5, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crimes of attempted robbery in the second degree, grand larceny in the fourth degree, attempted grand larceny in the fourth degree, assault in the third degree, and menacing in the third degree, and placed him with the Office of Children and Family Services for a period of 18 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. The record

fails to support appellant's assertion that the victim exaggerated the extent of appellant's unlawful conduct.

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

ENTERED: MARCH 31, 2011

CLERK

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

4670 In re Martin Wynyard, et al., File 621M/02
Petitioners-Appellants,

—against—

Rotraut L.U. Beiny, et al.,
Respondents-Respondents,

The Antique Company of New York, Inc.,
Intervening Petitioner.

[And A Third-Party Action]

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Peter G. Eikenberry, New York, for appellants.

Patterson Belknap Webb & Tyler LLP, New York (John D. Winter of counsel), for respondents.

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Order, Surrogate's Court, Bronx County (Lee L. Holzman, S.), entered on or about June 17, 2009, which, to the extent appealed from as limited by the briefs, denied petitioners' motion for summary judgment declaring, on their second cause of action, that certain assets are the property of intervening petitioner The Antique Company of New York, Inc. (ACNY), and dismissed that cause of action, unanimously affirmed, without costs.

Petitioners' cause of action for a judgment declaring "ACNY the owner of the 'Z' goods held by the Liechtenstein Trusts" is barred by the doctrine of the election of remedies (*see American Woolen Co. of N.Y. v Samuelsohn*, 226 NY 61 [1919]). Petitioners have already been awarded a money judgment equivalent to 45% of

the value of the "Z" goods as against respondent Rotraut Beiny, who is the sole beneficiary of the Liechtenstein Trusts (*see Matter of Beiny*, 16 AD3d 221 [2005]). They now seek a judgment declaring against the same wrongdoer (Rotraut Beiny) based on the same wrongdoing (conversion of the "Z" goods) (*see Sabeno v Mitsubishi Motors Credit of Am., Inc.*, 20 AD3d 466 [2005]).

To the extent petitioners contend that the election of remedies does not apply because ACNY was never compensated, the contention is without merit. At the time of the aforementioned conversion, petitioners owned 45% of ACNY and respondents owned 55%. Accordingly, petitioners were compensated by the award of a money judgment equivalent to 45% of the value of the "Z" goods. Petitioners' present contention that ACNY should be declared to own 100% of the "Z" goods not only is inconsistent with the factual basis for the monetary award, but also would result in both a double payment by Rotraut Beiny and a double award to

petitioners, who, pursuant to the parties' settlement agreement, now own 100% of ACNY.

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

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

ENTERED: MARCH 31, 2011

CLERK

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

4672 Silver Oak Capital L.L.C., et al., Index 603750/08
Plaintiffs-Respondents-Appellants,

-against-

UBS AG, etc., et al.,
Defendants-Appellants-Respondents.

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Munger, Tolles & Olson LLP, Los Angeles, CA (Robert L. Dell Angelo of the bar of the State of California admitted pro hac vice, of counsel), for appellants-respondents.

Kaplan Landau LLP, New York (Mark Landau, Mary Cecilia Sweeney and Paul Evans of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered May 11, 2010, which granted so much of defendants' motion pursuant to CPLR 3211(a)(7) as sought to dismiss the negligent misrepresentation and unjust enrichment claims against all defendants and the fraud and aiding and abetting fraud claims as against UBS AG and UBS Securities, and denied so much of the motion as sought to dismiss the fraud and aiding and abetting fraud claims as against UBS Financial, unanimously modified, on the law, to deny the motion as to the negligent misrepresentation claim as against UBS Financial and as to the unjust enrichment claim as against UBS Financial and UBS Securities, and otherwise affirmed, without costs.

The bar order issued in a federal class action that

expressly relieved defendants from further liability for claims arising from the collapse of a certain dishonest scheme does not preclude plaintiffs' claims, to the extent plaintiffs' claims are based on different legal theories (and facts further to those in common with the class members' claims) and independent damages (*see Gerber Elec. Tech. Co., Ltd.*, 329 F3d 297 [2d Cir 2003], *cert denied* 540 US 966 [2003]; *National Super Spuds, Inc. v New York Mercantile Exch.*, 660 F2d 9, 18 n 7 [2d Cir 1981]).

Plaintiffs allege, in sufficient detail to state causes of action for fraud and aiding and abetting fraud, that UBS Financial, through its officers and personnel, actively participated in plaintiffs' private placement transaction and in the dishonest scheme (*see Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 493 [2008]; *National Westminster Bank v Weksel*, 124 AD2d 144, 147-148 [1987], *lv denied* 70 NY2d 604 [1987]). Contrary to Financial's argument, plaintiffs sufficiently allege loss causation since it was foreseeable that they would sustain a pecuniary loss as a result of relying on Financial's alleged misrepresentations (*see Sterling Natl. Bank v Ernst & Young, LLP*, 9 Misc 3d 1129[A], 2005 NY Slip Op 51850[U], *6 [2005]). Nor do the general disclaimers contained in the private placement memorandum avail Financial since they were not specifically applicable to the alleged misrepresentation at issue (*see*

Steinhardt Group v Citicorp, 272 AD2d 255, 256-257 [2000]).

Plaintiffs' claims of negligent misrepresentation and unjust enrichment are not barred by the Martin Act (General Business Law article 23-A; *see Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Mgt. Inc.*, 80 AD3d 293 [2010]; *CMMF, LLC v J.P. Morgan Inv. Mgt. Inc.*, 78 AD3d 562, 563-564 [2010]). Plaintiffs sufficiently allege that Financial had unique and special knowledge about the source of the financing for the company in which they invested (namely, looted assets of the alleged dishonest scheme) to state a cause of action for negligent misrepresentation as against Financial (*see Kimmell v Schaefer*, 89 NY2d 257 [1996]). Plaintiffs' allegations that the placement fee paid to Securities via Financial was taken directly from the funds they invested are sufficient to state a cause of action for unjust enrichment as against Securities and Financial (*see Cox v Microsoft Corp.*, 8 AD3d 39, 40 [2004]; *Manufacturers Hanover Trust Co. v Chemical Bank*, 160 AD2d 113, 117 [1990], *lv denied* 77 NY2d 803 [1991]).

The complaint, however, does not state a cause of action for fraud, aiding and abetting fraud or negligent misrepresentation as against UBS Securities, since there are no specific allegations that Securities knew of the alleged misrepresentations or made any representations itself with the intent to deceive; bare allegations of "access" to financial

records do not raise an inference of scienter (*see Teamsters Local 445 Freight Div. Pension Fund v Dynex Capital Inc.*, 531 F3d 190, 196 [2d Cir 2008]; *Steinberg v Ericsson LM Tel. Co.*, 2008 WL 5170640, *13, 2008 US Dist LEXIS 29836, *38-41 [SD NY 2008]). As the motion court observed, even the most thorough due diligence would have been unlikely to discover "the actual situation," i.e., the actual capitalization of the company invested in, and plaintiffs allege no facts that could have alerted Securities to that situation.

Plaintiffs' allegations concerning UBS AG, the Swiss parent of Securities and Financial, are insufficient to raise the inference that AG exercised the direct intervention in the management of its subsidiaries required for the imposition of liability under an agency theory (*see Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 163 [1980]; *A.W. Fiur Co. v Ataka & Co.*, 71 AD2d 370, 373-374 [1979]).

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 31, 2011

CLERK

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

4673	The People of the State of New York, Respondent, -against- Michael Legg, Defendant-Appellant.	Ind. 1903/09 SCI 4812/09 4813/09 4814/09

Richard M. Greenberg, Office of the Appellate Defender, New York (Matthew I. Fleischman of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Allen J. Vickey 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 (Lewis Bart Stone, J.), rendered on or about November 17, 2009,

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

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

ENTERED: MARCH 31, 2011

CLERK

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

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

4674 Mile Grgurovic, et al., Index 6539/98
Plaintiffs-Appellants,

-against-

Controlled Combustion Company, et al.,
Defendants-Respondents,

Forty Central Park South Inc., et al.,
Defendants.

[And A Third-Party Action]

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Bisogno & Meyerson, Brooklyn (Elizabeth Mark Meyerson of counsel), for appellants.

Hardin, Kundla, McKeon & Poletto, P.A., New York (Stephen J. Donahue of counsel), for Controlled Combustion Company, respondent.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for Robert L. Teitelbaum, respondent.

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Judgment, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered December 30, 2009, which, pursuant to an order, same court and Justice, entered November 2, 2009, dismissed the complaint, with prejudice, as against defendants-respondents, unanimously affirmed, without costs.

Because the judgment sought to be appealed did not result from an order deciding a motion "made upon notice" as contemplated by CPLR 5701(a)(2), it is not appealable as of right (*see Jun-Yong Kim v A&J Produce Corp.*, 15 AD3d 251, 252 [2005]).

However, we deem the notice of appeal a motion for leave to appeal pursuant to CPLR 5701(c), and we grant the motion (*see id.*).

On the merits, the court providently exercised its discretion by dismissing the complaint as against defendants. Plaintiffs repeatedly failed to comply with the court's discovery orders. Their wilfulness can be inferred from the surrounding circumstances (*see Youni Gems Corp. v Bassco Creations Inc.*, 70 AD3d 454, 455 [2010], *lv dismissed* 15 NY3d 863 [2010]).

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

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

ENTERED: MARCH 31, 2011

CLERK

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

4678 Juan Lebron, Index 25033/04
Plaintiff-Appellant, 85008/05

-against-

Loco Noche, LLC, etc.,
Defendant-Respondent,

Sweetheart Theatres, et al.,
Defendants.

[And A Third-Party Action]

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Peña & Kahn, PLLC, Bronx (Diane Welch Bando of counsel), for appellant.

Billig Law, P.C., New York (Darin Billig of counsel), for Loco Noche, respondent.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Lesley C. Siskind of counsel), for Mike Zimet Enterprises, Inc., respondent.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered February 2, 2010, which granted the motions of defendant third-party plaintiff Loco Noche, LLC d/b/a Noche (Noche) and defendant third-party defendant Mike Zimet Enterprises, Inc. (MZE) for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

In this personal injury action, plaintiff alleges that, while he was observing a fight at premises operated by Noche, an unknown assailant unexpectedly struck him with a bottle.

Pursuant to a contract with Noche, MZE provided security services at the premises. The court properly determined that the complaint against Noche should be dismissed because plaintiff failed to raise a triable issue of fact as to whether the assault was foreseeable (*see Zamore v Bar None Holding Co., LLC*, 73 AD3d 601, 601 [2010]).

The court also properly determined that plaintiff failed to raise a triable issue of fact as to whether MZE owed him a duty of care. The record does not provide any basis for finding that plaintiff detrimentally relied on MZE's continued performance of its duties under its contract with Noche. Indeed, plaintiff testified that he remained near the altercation because he did not want to lose sight of those with whom he had arrived. Accordingly, as a matter of law, plaintiff will not be able to show that, as a result of MZE's prior provision of security services, "he was lulled into a false sense of security that led him to fail to take steps himself to ensure that" he was not assaulted (*Rahim v Sottile Sec. Co.*, 32 AD3d 77, 81 [2006][internal quotes and citation omitted]).

The record also fails to provide any basis for finding that MZE entirely displaced Noche's duty to maintain the premises safely. Indeed, although the contract does not describe MZE's duties in detail, it specifically provides that MZE should

"immediately" notify Noche of any incidents, and that "a mutual decision will be reached as to any possible action" (*see Rahim*, 32 AD3d at 82).

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

ENTERED: MARCH 31, 2011

CLERK

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

4679 Gad Demry, Index 150457/07
Plaintiff-Respondent,

-against-

Susan Wind,
Defendant-Appellant,

Marc J. Mishaan, et al.,
Defendants.

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Law Offices of Edward Weissman, New York (Edward Weissman of counsel), for appellant.

Law Offices of Marc E. Bengualid, PLLC, New York (Ariella M. Colman of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered September 21, 2010, which, insofar as appealed from, denied defendant Susan Wind's motion for summary judgment dismissing the complaint as asserted against her, and granted plaintiff's cross motion for leave to amend the complaint to assert a cause of action for aiding and abetting fraud against her, unanimously affirmed, without costs.

In June and July 2006, plaintiff Gad Demry and defendant Marc Mishaan entered into two transactions whereby Demry agreed to invest in purported bridge mortgage loans with high rates of return. Pursuant to Mishaan's instructions, Demry wired money

into the personal bank account of defendant Susan Wind, with whom Mishaan had a "social relationship." Mishaan told Demry that he and Wind had a "working relationship," and that the funds would be invested through the account. In August 2006, Demry requested the return of his money because of financial difficulties. As of August 2007, Demry still had not received $155,500 of the $275,000 that he deposited into the account.

A conversion occurs when one "intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). Wind's bank records showing disbursement of substantial amounts of money to third parties immediately after receipt of Demry's wires, and withdrawal of substantial amounts of cash, raise triable issues of fact as to whether she intentionally exercised dominion over and interfered with Demry's right to his monies. Although she claims in her affidavits that she thought the monies were Mishaan's personal income and had removed the funds from her account upon discovering that they belonged to Demry, the bank records do reflect any transaction suggesting such removal of funds.

To sustain a claim for fraud, a plaintiff must allege "material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Demry's fraud claim is predicated on Wind's misrepresentation that Mishaan was in Baltimore visiting his sick father, and her delivery of letters, purportedly on Mishaan's behalf, when Mishaan was in fact incarcerated in upstate New York for fraud not related to this case. Contrary to Wind's contentions that these occurrences do not suggest anything untoward, and that she was merely acting as a messenger for Mishaan in delivering the letters, which she claims were dictated by Mishaan over the phone from prison, the evidence raises triable issues of fact as to whether she drafted the letters herself, and the extent of her knowledge of, and participation in, the fraud.

The court properly granted Demry's cross motion for leave to amend the complaint to add a cause of action for aiding and abetting fraud against Wind. The facts noted above demonstrate a meritorious cause of action (*see Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 [2009], *lv denied* 13 NY3d 709 [2009]), and Wind does not allege

that any prejudice or surprise would result from the amendment (*see* CPLR 3025[b]; *Thomas Crimmins Contr. Co. v City of New York*, 74 NY2d 166 [1989]).

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

ENTERED: MARCH 31, 2011

CLERK

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

4680 The People of the State of New York, Respondent, Ind. 5002/05

-against-

George Nunez,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered on or about October 22, 2008, 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 31, 2011

CLERK

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

4681 Dana Bailey, Index 105257/07
Plaintiff-Appellant,

-against-

Benta's Funeral Home, Inc.,
Defendant-Respondent.

_____

Bernard H. Fishman, New York, for appellant.

Law Office of Crisci, Weiser & Huenke, New York (David Weiser of counsel), for respondent.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered on or about February 25, 2010, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleges that her mother died on February 3, 2007 and was supposed to be cremated a few days thereafter. The mother's ashes were to be placed by defendant in an urn in preparation for a memorial service that was held on February 9, 2007. However, on or about February 27, 2007, plaintiff discovered that there were no ashes in the urn. When she notified defendant of this, defendant told plaintiff that "it had mislaid the ashes," but that the ashes would now be delivered to

her. Plaintiff would not accept delivery because she was unsure they were her mother's remains. According to the complaint, defendant "carelessly lost the ashes" and was now attempting to deliver "any ashes to plaintiffs in an attempt to cure its negligence."

Losing, or improperly dealing with, the remains of a deceased person gives rise to a cause of action by the deceased's next of kin (*see Shipley v City of New York*, 80 AD3d 171, 177 [2010]; *Melfi v Mount Sinai Hosp.*, 64 AD3d 26, 31 [2009]). However, merely causing doubt in the plaintiff's mind regarding whether particular ashes are those of her loved one, without more, is not actionable (*see Stahl v William Necker, Inc.*, 184 App Div 85, 91-92 [1918]).

Defendant established its prima facie entitlement to judgment as a matter of law by demonstrating that the subject ashes were not lost and that, upon learning of the mistake, it attempted to deliver the ashes to plaintiff who refused to accept such delivery. In opposition, plaintiff failed to raise a

triable issue of fact, and her assertion that further discovery is necessary, is not sufficient to defeat the summary judgment motion (*see e.g. Oates v Marino*, 106 AD2d 289, 291-292 [1984]).

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

ENTERED: MARCH 31, 2011

CLERK

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

4682 TAG 380, LLC, Index 118730/02
Plaintiff-Appellant,

-against-

ComMet 380, Inc.,
Defendant-Respondent.

_____

Rosenberg & Estis, P.C., New York (Michael E. Feinstein of counsel), for appellant.

Seward & Kissel LLP, New York (Bruce G. Paulsen of counsel), for respondent.

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Judgment, Supreme Court, New York County (Louis Crespo, Special Referee) entered February 8, 2010, awarding defendant $1,093,471.15, consisting of $156,851 for reimbursement of the insurance premium, $614,851.80 in attorneys' fees, and interest on the sums, unanimously modified, on the law and facts, to reduce the award by the $156,851 premium payment, the matter remanded for a recalculation of interest, and otherwise affirmed, without costs.

Defendant produced no documentary evidence showing that the terrorism premium payment was actually made. Defendant's managing agent's director of risk management was not involved in the payment of the premium and had no direct personal knowledge of whether it was paid. Her testimony that, had the premium not been paid, she would have been informed of that fact or the

policy's cancellation, was insufficient to prove that defendant actually paid the terrorism insurance premium (*see Wells Fargo Bank, N.A. v Zurich Am. Ins. Co.*, 59 AD3d 333, 335-336 [2009], *lv denied* 12 NY3d 713 [2009]).

The special referee did not abuse his discretion in his award of attorneys' fees, including fifty percent of the fees in connection with time entries that reflected both legal work in this matter and a related matter for which fees were not recoverable. This split allocation was reasonable and the entries were supported by adequate documentation.

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

ENTERED: MARCH 31, 2011

CLERK

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

4683 Manhattan Telecommunications Corporation, Plaintiff-Respondent, Index 100970/08

-against-

H & A Locksmith, Inc., etc., et al., Defendants,

Ariq Vanunu, Defendant-Appellant.

_____

Ofeck & Heinze, LLP, New York (Mark F. Heinze of counsel), for appellant.

Jonathan David Bachrach, New York, for respondent.

_____

Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered December 28, 2009, which denied defendant-appellant's motion to vacate the default judgment entered against him, unanimously reversed, on the law, without costs, and the motion granted.

The verified complaint alleged a contract to perform telephone services by plaintiff for defendants for a stated fee, and defendants' failure to pay. However, the complaint does not allege that appellant was a party to the contract individually, so as to bind him its terms. "Some proof of liability is . . . required to satisfy the court as to the prima facie validity of . . . uncontested causes of action (*Feffer v Malpeso*, 210 AD2d

60, 61 [1994] [internal quotation marks and citation omitted]; *see Giordano v Berisha*, 45 AD3d 416 [2007]; CPLR 3215[f]), and here plaintiff failed to provide the motion court with evidence that appellant was personally liable for the stated claims. Accordingly, the default judgment was a nullity (*see Natradeze v Rubin*, 33 AD3d 535 [2006]).

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

ENTERED: MARCH 31, 2011

CLERK

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

4684 The People of the State of New York, Dkt. 9932/09
Respondent,

-against-

Quennel Mayes,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Robert R. Sandusky, III of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (John W. Carter, J.), rendered March 31, 2009, convicting defendant, after a nonjury trial, of attempted assault in the third degree and harassment in the second degree, and sentencing him to an aggregate term of 60 days, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations.

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

ENTERED: MARCH 31, 2011

CLERK

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

4685-
4686 In re Jayden C. also
known as Jayden R.,

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

Michelle R., et al.,
Respondents-Appellants,

Community Counseling & Mediation,
Petitioner-Respondent.

_____

Andrew J. Baer, New York, for Michelle R., appellant.

Kenneth M. Tuccillo, Hastings on Hudson, for Edwin C., appellant.

Law Offices of James M. Abramson, PLLC, New York (Dawn M. Orsatti of counsel), for respondent.

Cozen O'Connor, New York (Jill L. Mandell of counsel), attorney for the child.

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Order of disposition, Family Court, New York County (Jody Adams, J.), entered on or about November 30, 2009, upon findings that respondent father's consent for the adoption of the subject child was not required and that respondent mother permanently neglected the child, terminated the mother's parental rights and transferred custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The father's constitutional challenges to the statutes

providing for notice and consent of an unwed father are unpreserved and we decline to consider them (*see Matter of Kimberly Carolyn J.*, 37 AD3d 174, 175 [2007], *lv dismissed* 8 NY3d 968 [2007]). In any event, the record establishes that the father appeared and did not object to his notice status and, further, that he did not maintain a substantial and continuing relationship with the child that would give rise to a protected interest (*see Matter of Raquel Marie X.*, 76 NY2d 387, 401 [1990], *cert denied* 498 US 984 [1990]; *Matter of Pedro Jason William M.*, 45 AD3d 431 [2007], *appeal dismissed and lv denied* 10 NY3d 804 [2008]; Domestic Relations Law § 111[d]).

The determination that it would be in the child's best interests to be freed for adoption is supported by a preponderance of the evidence (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). There is no indication that the mother is capable of financially or emotionally caring for her son, and the record shows that the child has thrived in his preadoptive home, which he shares with his sibling, and where he has developed a strong bond with the foster mother (*see Matter of Octavia Lorraine O.*, 34 AD3d 258 [2006]). Furthermore, the mother did not ask the court to consult with the three-year-old child concerning guardianship, and the statute does not require such consultation (*see* Social Services Law § 384-b[3][k]).

A suspended judgment is not warranted under the circumstances because it is not in the best interests of the child to wait any longer for the mother to gain the ability to fulfill her parental obligations (*see Matter of Michael B.*, 80 NY2d 299, 311 [1992]; *Matter of Juan A. [Nhaima D.R.]*, 72 AD3d 542 [2010]).

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

ENTERED: MARCH 31, 2011

CLERK

Gonzalez, P.J., Friedman, Freedman, Román, JJ.

4687N The Roth Law Firm, PLLC, Index 602323/07
Plaintiff-Respondent,

-against-

Steven Brett Sands, et al.,
Defendants-Appellants.

_____

Gusrae, Kaplan, Bruno & Nusbaum PLLC, New York (Brian D. Graifman of counsel), for appellants.

The Roth Law Firm, PLLC, New York (Richard A. Roth of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered September 21, 2010, which, insofar as appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the causes of action for services rendered, account stated, and quantum meruit, unanimously modified, on the law, to grant the motion as to the cause of action for an account stated and to grant the motion as to the causes of action for services rendered and quantum meruit as against each defendant to the extent those causes of action are asserted in connection with any matter in which that defendant was not personally named a defendant or respondent, and otherwise affirmed, without costs.

Plaintiff's failure to comply with the letter of engagement rule (22 NYCRR 1215.1) does not preclude it from seeking recovery of legal fees under such theories as services rendered, quantum

meruit, and account stated (*see Miller v Nadler*, 60 AD3d 499 [2009]).

Plaintiff failed to establish its entitlement to recovery based on an account stated. Its invoices were addressed to a variety of entities and individuals; in many cases, the addressees in a given matter changed from month to month. Plaintiff asserts that the invoices were addressed thus at the direction of defendants. Notwithstanding, the statements lack the regularity that is critical to establishing an account stated (*see Berkman Bottger & Rodd, LLP v Moriarty*, 58 AD3d 539, 539 [2009]). Moreover, plaintiff did not address its invoices to defendants regularly until two months after the termination of representation, and then the invoices were addressed to "Mr. Steven S. Sands & Mr. Martin B. Sands, c/o Laidlaw & Co., Ltd.," i.e., as corporate officers, rather than as individuals outside of their brokerage firm who may have agreed to be personally responsible for all legal fees (*see Brown Rudnick Berlack Israels LLP v Zelmanovitch*, 11 Misc 3d 1090[A], 2006 NY Slip Op 50800[U], *5-6 [2006]).

Viewing the evidence in a light most favorable to plaintiff, we find that issues of fact exist whether each defendant agreed to be jointly and severally liable for all legal fees generated in any matter in which he was personally named as a defendant

(*see Fulbright & Jaworski, LLP v Carucci*, 63 AD3d 487, 488-489 [2009]). Since any such agreement was not a guaranty or promise to answer for another's debt but a primary obligation, the statute of frauds does not avail defendants (*see Lederer v King*, 214 AD2d 354 [1995]; *Paribas Props. v Benson*, 146 AD2d 522, 524-525 [1989]).

We have considered defendants' argument that the complaint should be dismissed on account of plaintiff's unclean hands and find it without merit.

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

ENTERED: MARCH 31, 2011

CLERK

Tom, J.P., Saxe, Catterson, Renwick, DeGrasse, JJ.

3442 Seneca Insurance Company, Inc., Index 601817/05
Plaintiff-Appellant-Respondent, 590698/08

-against-

Certified Moving & Storage Co, LLC, et al.,
Defendants-Respondents-Appellants.

[And A Third-Party Action]

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D'Amato & Lynch, LLP, New York (Peter A. Stroili of counsel), for appellant-respondent.

Lazare Potter & Giacovas LLP, New York (David Potter of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered January 25, 2010, which denied plaintiff's motion to conform the pleadings to the proof and for partial summary judgment and dismissal of certain affirmative defenses, and denied defendants' motion for summary judgment dismissing the complaint, modified, on the law, so as to grant the branch of plaintiff's motion seeking to amend the ad damnum clause, and otherwise affirmed, without costs.

This action arose out of plaintiff's claim that it was entitled to recover premiums due under a commercial general liability insurance policy issued to defendants. We reject plaintiff's argument that the documentary evidence, including the

affidavits of its senior officers explaining the methodology used in calculating premiums, and all of the applicable ISO rules adopted by plaintiff regarding premium computation, as well as its filed rates, was sufficient to make out a prima facie showing of entitlement to judgment as a matter of law (*see Commissioners of State Ins. Fund v Beyer Farms, Inc.*, 15 AD3d 273, 274 [2005], *lv denied* 5 NY3d 707 [2005]), as the extrinsic evidence failed to address the rating classification issue at the heart of this matter - how defendants' installers were to be classified in the context of the moving and storage industry.

Equally unavailing is defendants' argument that the opinion of its expert requires as a matter of law the conclusion that its installation payroll was "incidental" to the moving and storage industry, and that plaintiff's attempt to separately classify and retroactively calculate the installation payroll deviated from standard underwriting practices in connection with this industry. Because the expert's affidavit demonstrates no personal knowledge of defendants' installation operations, or how ISO Rules pertaining to "helpers" would preclude defendants' installers from its premium calculations (*see e.g. Santoni v Bertelsmann Prop., Inc.*, 21 AD3d 712, 714-15 [2005]), it merely creates a question of fact as to the proper manner of calculating Certified's premium. The absence of a competing expert's

affidavit does not require a grant of summary judgment under these circumstances. Similarly, the issue of how ISO rules and tables should be interpreted or applied is best left to trial.

Plaintiff's request to dismiss defendants' remaining affirmative defenses was properly denied, as the documentary evidence and deposition testimony presented issues of fact as to whether defendants intentionally concealed payroll, or whether plaintiff improperly calculated premium (*see Morgenstern v Cohon*, 2 NY2d 302, 307 [1957]).

Plaintiff's request to amend the ad damnum clause to reflect the proper amount of unpaid insurance premiums allegedly due on the basis of defendants' payroll records, although misdescribed as a request for an order "conforming the pleading to the proof," should have been granted, in view of the absence of prejudice to defendant (*see* CPLR 3025[b]; *Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981]).

We find the remaining arguments unavailing.

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

CATTERSON, J. (dissenting in part)

Because in my opinion the motion court erred in denying summary judgment to defendants, Certified Moving and Storage, and Certified Installation Services LLC (hereinafter referred to as "Certified"), I must respectfully dissent from that part of the majority opinion affirming the denial. This action arises from a claim by plaintiff insurer (hereinafter referred to as "Seneca") that Certified owes it more than $1 million in retroactive premiums on a commercial general liability policy it issued for three policy periods between 2002 and 2004. Resolution of the claim requires a determination as to how the premiums should have been calculated.

It is undisputed that payrolls are the basis for premium calculations in this case. Certified asserts that Seneca's initial underwriting decision, which remained in effect through two renewals as well as an inspection and audit, is correct. The initial premium calculation was based on a $1 million payroll for the sole classifications of truckers and warehousemen which, Certified claims, comported with certain rules and ratings classifications developed by the Insurance Services Office (hereinafter referred to as "ISO").

Seneca, however, now alleges that Certified misled it as to the work conducted by employees of Certified Installations, and that the Installations payroll should have been included for use in the premium calculations. Certified denies any misrepresentation, and points to its policy application which shows, inter alia, that in the section titled "schedule of hazards" Certified very clearly and legibly entered in bold print: MOVING OPERATIONS INCLUDING INSTALLATIONS. [2]

Certified further asserts that installers were correctly omitted from the calculation of premiums because in the moving and storage industry installations are part of loading and unloading; that these are tasks performed by drivers and their helpers; and that these classifications are excluded from CGL policies to the extent that the policy itself excludes "any loss related to the use of a vehicle which includes operation and loading or unloading."

[2] It appears that Seneca is the party that misleads here, stating instead that under schedule of hazards Certified "*only* listed receipts." Likewise, Seneca states in its preliminary statement that it had to commence this action in 2005 "[in] order to obtain any payroll records" of Installation. In fact, the record reflects that Certified provided those records in July 2004.

Certified's assertion is supported by the affidavit of an expert on insurance coverage for moving and storage companies. The expert states he has underwritten insurance coverage for more than 250 moving and storage companies including current coverage for Certified, and that he has specialized in insurance for the industry since 1957.[3] He states that in Certified's case, the payrolls for Moving and Storage and Installations are segregated because of union rules, but that the work done by employees in both companies is essentially the same. He further states that installations are part of moving operations and are generally performed by the same persons who drive, load and unload the moving trucks (that is, drivers and helpers). He attests that these are classifications and payrolls that Seneca correctly omitted from its initial calculations. Significantly, Seneca does not seek to retroactively include these.

I am persuaded by Certified's assertion that the opinion of its expert supports a conclusion that its installations payroll is "incidental" to the moving and storage industry. Further, its expert's opinion supports a conclusion that Seneca's attempt to

[3] A breadth of experience that commenced a year before the author of this dissent was born.

add a separate classification for installers to retroactively calculate premiums based on the installation payroll deviates from standard underwriting practices in connection with the moving and storage industry.

Consequently, I believe the motion court erred in rejecting the affidavit of Certified's expert. The court's reliance on our decision in Jones v. City of New York, (32 A.D.3d 706, 821 N.Y.S.2d 548 (1st Dept. 2006)) is misplaced. As Certified correctly asserts, expert testimony relating to the custom and practice of an industry is distinguishable from engineering or scientific testimony requiring data.

In any event, the qualifications of Certified's expert were unchallenged, and his affidavit is uncontroverted by Seneca. Nor does Seneca proffer contrary expert testimony. More significantly, Seneca's documentary evidence, including ISO rules which purport to explain the methodology and application of the rules in the recalculation of Certified's premiums fails to raise a triable issue of fact: the ISO classification table submitted by Seneca shows that payroll is used as a basis for calculating general liability premiums for furniture installation. However, as the motion court correctly observed, this was not evidence

that a separate classification of installers comports with ISO rules as applied to the moving industry.

Accordingly I would grant summary judgment to defendant Certified, and otherwise affirm.

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

ENTERED: MARCH 31, 2011

CLERK

Tom, J.P., Saxe, Friedman, Sweeny, Abdus-Salaam, JJ.

3738 Fabian Obispo, Index 100761/08
Plaintiff-Appellant,

-against-

423 Madison Avenue L.L.C., et al.,
Defendants-Respondents.

_____

Fishman & Mallon, LLP, New York (James B. Fishman of counsel), for appellant.

Judith M. Brener, New York (Reena Malhotra of counsel), for respondents.

_____

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered March 18, 2009, which, to the extent appealed from as limited by the briefs, granted defendants' cross motion for summary judgment dismissing the complaint as time-barred, unanimously affirmed, with costs.

The motion court correctly found that this plenary action to enforce a fair market rent appeal (FMRA) order is barred by the six-year statute of limitations (*see* CPLR 213[1]; *see also Sciarra v 531 E. 83rd St. Owners Corp.*, 8 AD3d 159, 160 [2004]). Plaintiff's argument that the 20-year period in CPLR 211(b) should apply in this case because the court is essentially being asked to undertake a ministerial act by issuing a money judgment for a sum certain, is unavailing. Unlike a rent overcharge proceeding governed by Rent Stabilization Code (9 NYCRR) § 2526.1

(e), which authorizes entry of a judgment based upon a Division of Housing and Community Renewal order, there is no such provision in 9 NYCRR 2522.3(d), which governs FMRA orders. Accordingly, there can be no entry of a judgment based on such an order without commencement of a plenary action (*see 3410 Kingsbridge Partners v Atkinson*, 265 AD2d 204, 205 [1999]).

Nor has plaintiff demonstrated that the statute of limitations was tolled pursuant to CPLR 203(g) or by the doctrine of equitable estoppel. Defendants' failure to name the plaintiff in the article 78 proceeding, of which plaintiff was unaware, did not prevent plaintiff from discovering that he had a claim against defendants or from filing a timely action to enforce the FMRA order.

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

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

ENTERED: MARCH 31, 2011

CLERK

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

4475 191 Chrystie LLC, Index 104904/07
Plaintiff-Appellant-Respondent,

-against-

Barry Ledoux also known
as Barry Sonnier,
Defendant-Respondent-Appellant.

_____

Borah Goldstein Altschuler Nahins & Goidel, P.C., New York (Paul N. Gruber of counsel), for appellant-respondent.

Grimble & LoGuidice, LLC, New York (Robert Grimble of counsel), for respondent-appellant.

_____

Order and judgment (one paper), Supreme Court, New York County (Martin Shulman, J.), entered December 30, 2009, which, in this declaratory judgment action by plaintiff-owner to determine whether defendant is a protected tenant of the subject premises under Multiple Dwelling Law article 7-C (Loft Law), granted plaintiff's motion for summary judgment insofar as it sought dismissal of defendant's second counterclaim for attorney's fees, denied the motion insofar as it sought declarations that defendant was not a protected tenant of and not entitled to possession of unit 6B, and granted defendant's cross motion for summary judgment as to his first counterclaim and declared him a statutory tenant of unit 6B, unanimously modified, on the law, to

delete the reference to the status of defendant's spouse, Elina Cardet, as a statutory tenant, and otherwise affirmed, without costs.

The law of the case doctrine "is inapplicable where, as here, a summary judgment motion follows a motion to dismiss" (*see Riddick v City of New York*, 4 AD3d 242, 245 [2004]). Our holding in relation to the prior motion to dismiss was based on the facts and law presented by the parties in that procedural posture, and no more. Supreme Court correctly held that 29 RCNY 2-09(b)(3)(I) governs, as between prime tenant and landlord, the determination of "covered" status under the Loft Law (*see Matter of 97 Wooster Corp. v New York City Loft Bd.*, 56 AD3d 331, 332 [2008]). We agree that defendant met his prima facie burden of demonstrating that he satisfied the criteria set forth in such rule. In opposition, plaintiff failed to raise a triable issue of fact. Accordingly, the cross motion for summary judgment was properly granted on the first counterclaim.

Notwithstanding that defendant is entitled to covered occupant status, the motion's court granting of any declaratory relief to nonparty Ms. Cardet, albeit in a footnote, was improper and premature because defendant, in his answer, did not counterclaim for any relief with respect to Cardet. Moreover,

pursuant to 29 RCNY 2-08.1(c), succession rights arise after the protected tenant has permanently vacated.

Defendant's cross appeal seeking summary judgment on his second counterclaim for attorney's fees under Real Property Law (RPL) § 234 is rejected. RPL § 234 has no application in this declaratory judgment action, even if possession could have been awarded to the plaintiff, as plaintiff does not base its right on violation of a lease term by tenant (*see Jerulee Co. v Sanchez*, 43 AD3d 328, 329 [2007] ["it is not the ultimate relief that determines whether or not a dispute arises out of the lease within the meaning of section 234, as the tenant contends. Rather, it is determined by whether the litigation is based upon a breach of the terms of the lease, which was not the case here"], *lv denied* 9 NY3d 815 [2007]; *J.D. Realty Assoc. v Shanley*, 288 AD2d 27, 28 [2001]). In any event, the lease, which expired in 1983, was not included in the record of this appeal. Thus it was never established that the lease provided for an

award of attorney fees to the plaintiff thereby triggering the applicability of RPL § 234.

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 31, 2011

CLERK

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

4492 Sharde Harvey, Index 105665/09
Plaintiff-Appellant,

-against-

Laurence P. Greenberg,
Defendant-Respondent.

_____

Anthony L. Finley, New York, for appellant.

Furman Kornfeld & Brennan LLP, New York (Andrew S. Kowlowitz of counsel), for respondent.

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Order, Supreme Court, New York County (Carol Robinson Edmead, J.), entered November 10, 2009, which granted defendant's motion to dismiss the complaint and denied plaintiff's cross motion for leave to amend the complaint, unanimously affirmed, without costs.

Plaintiff's allegations in support of her legal malpractice claim were conclusory, speculative and contradicted by the documentary evidence submitted on the motion to dismiss. The trial judge in the underlying matrimonial action conducted a thorough allocution on the stipulation of settlement. Plaintiff acknowledged that she understood and agreed with the terms of the settlement and knew that it was a full and final agreement. She further stated that her attorney had answered her questions and that she was satisfied with the services he provided. Under

these circumstances, the motion court properly dismissed the complaint (*see Weissman v Kessler*, 78 AD3d 465 [2010]; *Katebi v Fink*, 51 AD3d 424 [2008]).

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

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

ENTERED: MARCH 31, 2011

CLERK