SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 31, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

7219 Lidia Sanchez, etc., et al., Index 20728/05
Plaintiff-Appellant,

-against-

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

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Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Scott Shorr of counsel), for respondents.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered on or about November 9, 2010, which denied plaintiff's motion to set aside the jury verdict, apportioning fault 30% as against defendants and 70% as against plaintiff's decedent, and awarding plaintiff no damages for past pain and suffering, $245,000 for past medical expenses, no damages for past lost earnings, $150,000 for future loss of earnings over a 13-year period, $150,000 for future loss of household services over a 13-year period, and $325,000 for future loss of parental guidance over a 13-year period, unanimously modified, on the facts, to the extent of vacating the award for

past lost earnings of $0 and directing a new trial on that issue unless defendants stipulate, within 30 days of service of a copy of this order, to increase the award for past lost earnings to $76,597; vacating the award for future loss of household services of $150,000 and directing a new trial on that issue unless defendants stipulate, within 30 days of service of a copy of this order, to increase the award for future loss of household services to $300,000; vacating the award for conscious pain and suffering of $0 and directing a new trial on that issue unless defendants stipulate, within 30 days of service of a copy of this order, to increase the award for conscious pain and suffering to $400,000, and otherwise affirmed, without costs.

In this wrongful death action, plaintiff-adminstratrix Lidia Sanchez is the natural mother of the 28-year-old decedent Luisa Sanchez, who died approximately 10 months after being struck by a sanitation truck operated by defendant Noel Betancourt. Betancourt testified that he never saw decedent before the accident. An accident reconstruction expert called by plaintiff testified that Betancourt had a clear view for 250 to 300 feet ahead of him as he proceeded into the intersection where the accident occurred. He further concluded, based on sketches prepared by the police accident investigation squad and the location of a blood spot, that Betancourt illegally crossed over

a double yellow line. Other evidence indicated that decedent was attempting to cross the intersection in an area clearly marked with signs warning pedestrians not to cross there.

Betancourt testified that, immediately after he realized he had struck a pedestrian, he ran to the back of the truck and saw that decedent was bleeding from her ears and nose, but that she was breathing and had her eyes open. The police officer who prepared the accident report noted that decedent was "semi-conscious" when he arrived at the scene and testified that he possibly made the notation because decedent opened her eyes at one point. A police sergeant wrote in his own report that decedent was "conscious and alert and not likely to die." He also testified that he observed decedent breathing and with her eyes opened, although she was not communicating. An emergency medical technician who arrived on the scene wrote in her report that decedent was "in and out of consciousness," which she testified was based on noises, such as moans or gurgling sounds, coming from decedent. Finally, a witness to the aftermath of the accident testified that decedent was "practically dead"; however, he was not able to observe her face.

Plaintiff designated Dr. Ronald Simon, a trauma surgeon, as an expert witness on the issue of conscious pain and suffering. Dr. Simon's initial disclosure stated that he would testify that

the decedent experienced conscious pain and suffering for 10 minutes following her accident. Nearly 3 years later, and 12 days before trial, plaintiff served an amended expert exchange stating that Dr. Simon would testify that decedent experienced some level of awareness, and thus consciously suffered for 15 days following the accident. This opinion would be based, the statement disclosed, on notes in decedent's hospital chart indicating that, inter alia, she had purposeful withdrawal to painful stimuli, response to tactile stimuli and localized pain.

Defendants moved *in limine* to preclude testimony consistent with the more recent disclosure, claiming prejudicially late notice. The court granted the motion. Immediately prior to Dr. Simon's testimony, plaintiff sought to reargue the motion to the extent that Dr. Simon be permitted to testify that decedent suffered for 15 days, or alternatively, conforming the pleadings to the proof, that she experienced 23 minutes of pain and suffering. This was based on the EMT's testimony that she observed decedent "in and out of consciousness" during the 23 minute period that she was at the scene. The court denied the application on the ground that the EMT did not explicitly testify that she observed decedent semi-conscious during the entirety of those 23 minutes.

Dr. Simon testified that, in light of the first responders'

reports which described decedent as "alert and conscious," "semi-conscious," or "in and out of consciousness", "then there is no question that she can feel, and would be able to feel pain and suffering. And in the period that she was in consciousness, that she would have that sensation of both pain and suffering ...". He also stated that he would "have trouble believing that she was unconscious" if her eyes were open. Defendants did not call a medical expert.

At the time of her death, decedent was employed as a dental assistant and was the mother of a five-year-old daughter. She lived with her daughter and her daughter's father, her companion, whom she considered her husband. Because both parents worked, decedent's daughter lived primarily with her maternal grandparents for the first two years of her life. Nevertheless, the companion testified that decedent was a very loving and good mother who spent all of her free time with her daughter. She took care of the household, did the laundry, cooking and food shopping, and bought her daughter clothes. She taught her daughter to be a good person and to be honest. The companion did testify, over objection, that when decedent was 27 years old, she was arrested for shoplifting and pleaded guilty to attempted petit larceny.

Decedent earned $19,197.69 annually. Plaintiff called Dr.

Alan Leiken, an economist, who testified that, based on data from the United States Department of Labor Statistics, wages rose at an average of 3.3% over the previous 20 years. Using that factor, and a 20% discount to account for decedent's personal consumption, Dr. Leiken calculated decedent's past earnings as $76,579, and future earnings as $245,315. He also calculated decedent's daughter's loss of her mother's services to age 21 as $345,936. This figure was based on 20 hours of services per week, and a loss of $19,000 per year. Defendants did not call their own economic expert.

The jury returned a liability verdict finding that both the defendants and decedent were negligent and that such negligence was a substantial factor in causing the accident. The jury apportioned 30% fault against defendants and 70% against decedent. The jury awarded plaintiff nothing for conscious pain and suffering, $245,000 for past medical expenses, and nothing for past lost earnings. It awarded plaintiff $150,000 for future lost earnings, $325,000 for loss of parental guidance and $150,000 for loss of household services, each for a 13-year period.

Plaintiff moved pursuant to CPLR 4404 for judgment notwithstanding the verdict, arguing that the jury's verdict was inadequate and against the weight of the evidence, and that the

court incorrectly precluded plaintiff's expert from testifying to 15 days of pain and suffering and incorrectly permitted evidence of decedent's plea to petit larceny. The trial court denied plaintiff's motion, finding that it could not be said that the jury's apportionment of liability was not based on a fair interpretation of the evidence. This was based on a finding that defendant Betancourt's testimony that he did not see Sanchez until after the accident was not incredible as a matter of law. The court noted that the exchange of expert reports, which was served 12 days before trial, newly alleging 15 days of pain and suffering, without any explanation for the lateness, prejudiced defendants. The court found that, based upon plaintiff's prior exchange, which stated that she was only claiming 10 minutes of pain and suffering at the scene, defendants had lost the opportunity to speak with the hospital employees who made the notes or to hire an expert to defend against such a claim.

As for permitting evidence concerning decedent's plea to a charge of shoplifting, the court observed that the jury charge concerning loss of parental guidance provides that moral assistance is to be considered in assessing the value of the claim. Moreover, the court noted that plaintiff's counsel conceded in his opening that the jury would need to hear evidence of "character, habits and ability." Thus, the court held, the

prior guilty plea was relevant on that point.

The court found that the damages to decedent's daughter for loss of services did not deviate materially from what would be reasonable compensation under the circumstances. It further held that, since none of the witnesses could testify as to how long decedent was conscious, the jury could have rationally concluded that she was never conscious, supporting their award of no damages for past pain and suffering. As for the economic damages, the court noted that the jury was not required to accept the opinion of plaintiff's economist wholesale. For example, it found that some of the facts upon which the economist's opinion rested, such as that decedent's daughter would not perform any household tasks and that decedent's personal consumption rate was only 20%, were suspect and would have provided a reasonable basis for a jury to discount the economist's proposed losses.

Plaintiff's argument that the jury's verdict on liability was against the weight of evidence is unavailing. It is uncontested that decedent was crossing the road at a sharp curve where two roads converged, and where signs warned that crossing at that location was prohibited. Defendant Betancourt was proceeding with the right of way and there is no evidence that he was speeding or otherwise operating the garbage truck in an unsafe manner. The jury's verdict indicates that it determined

that decedent was more culpable for crossing at a dangerous intersection, despite the warning sign, and failing to see the truck, than the driver was for failing to see decedent. As plaintiff's own accident reconstructionist testified, if Betancourt had a clear view of decedent, then decedent had a clear view of him. Thus, plaintiff has failed to show that "there [was] simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]).

We also agree with the court's evidentiary rulings. It was not an improvident exercise of the court's discretion to preclude plaintiff's expert from testifying to 15 days of alleged pain and suffering where, until the eve of trial, and without any explanation for lateness, plaintiff led defendants to believe that he would opine that she experienced 10 minutes of pain and suffering (*see Birch Wathen Lenox School v Butler Rogers Baskett, P.C.*, 25 AD3d 440 [2006]; *Lissak v Cerabona*, 10 AD3d 308, 309-310 [2004]). Nor did the court err in allowing defendants to introduce evidence of decedent's character, including a prior guilty plea to a shoplifting offense. Plaintiff sought to recover damages for loss of the "intellectual, moral, and

physical guidance" incurred due to the loss of Sanchez as a parent to her daughter (*see* PJI 2:320.2; *see also Tilley v Hudson Riv. R.R. Co.*, 29 NY 252, 286-289 [1864]). This evidence is relevant to such a claim. In any event, plaintiff's counsel opened the door to evidence of decedent's shoplifting by affirmatively placing her character in issue in his opening statement (*see generally People v Andrade*, 87 AD3d 160 [2011], *lv denied* 17 NY3d 951 [2011]).

In considering whether a jury's damages award is inconsistent with the evidence, we are, again, guided by the notion that the jury's conclusions should be overturned only where they are, essentially, irrational (*see Freeman v Kirkland*, 184 AD2d 331, 332 [1992], citing *Cohen v Hallmark Cards*, 45 NY2d 493 [1978], *supra*). To the extent that a plea for damages depends on expert testimony, a jury's determination not to accept such testimony and opinion must not be arbitrary (*Williams v New York*, 71 AD3d 1135, 1138 [2010]). It must be supported by other testimony or by the cross-examination of the expert (*id.*). With regard to conscious pain and suffering, such a claim "requires proof that the injured party experienced *some level* of cognitive awareness following the injury" (*id.* [emphasis added]). Further, there is no requirement that "the fact finder . . . sort out varying degrees of cognition and determine at what level a

particular deprivation can be fully appreciated" (*McDougald v Garber*, 73 NY2d 246, 255).

Bearing these principles in mind, we find that the jury had no reasonable basis to deprive plaintiff of an award for decedent's conscious pain and suffering. The weight of the evidence concerning decedent's condition at the scene of the accident was that she showed some signs of consciousness, if not awareness (*Williams*, 71 AD3d at 1138). Further, while there is no direct evidence of the length of time that decedent was conscious, there is no question, based on the collective testimony of at least 3 witnesses who observed her, that she was conscious for a measurable amount of time. Dr. Simon testified, without expert contradiction, that the testimony of the on-scene witnesses established that decedent experienced some level of pain and suffering during her interludes of consciousness. Finally, no concession extracted from him during his cross-examination could reasonably have led the jury to believe that his expert conclusions were lacking in weight.

While the awards for loss of parental guidance and future lost earnings were supported by the evidence, we see no rational basis on which the jury could have completely deprived plaintiff of her claim for past lost earnings. Even assuming, arguendo, that the figures Dr. Leiken used to calculate future increases to

decedent's salary and the discount factor for personal consumption were questionable, the record reflects that plaintiff is entitled to something more than zero for the period her granddaughter lost the benefit of decedent's salary between the accident and the trial (*see McGorry v Madison Sq. Garden Corp.*, 4 AD3d 264 [2004]).

We also find that the jury did not act rationally in making its award for loss of household services. Defendants object to the fact that Dr. Leiken, in calculating this element of plaintiff's damages, assumed that decedent would have supplied the same number of hours of services each week, 20, until her daughter turned 21 years old. However, that assumption was not his own, but was based on governmental statistics. Defendants did not present their own expert to call those statistics into question.

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

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

ENTERED: JULY 31, 2012

CLERK

Mazzarelli, J.P., Acosta, Renwick, Richter, JJ.

7522 Calogero Candela, et al., Index 117686/00
Plaintiffs-Appellants,

-against-

New York City School
Construction Authority, et al.,
Defendants-Respondents.

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Kenneth J. Ready & Associates, Mineola (Kenneth J. Ready of counsel), for appellants.

Shaub Ahmuty Citrin & Spratt, Lake Success (Christopher Simone of counsel), for respondents.

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Judgment, Supreme Court, New York County (Karen S. Smith, J.), entered November 18, 2010, after a jury trial in an action alleging, inter alia, violation of Labor Law § 200, dismissing the complaint, unanimously reversed, on the facts, without costs, the judgment vacated, and the matter remanded for a new trial.

Plaintiff Calogero Candela alleges that he was injured on August 6, 1999, when a 70-pound window sash crashed down on his back while he was leaning through the window to scrape hardened concrete residue from the outside window ledge. Plaintiff was employed by the subcontractor responsible for debris removal in connection with the construction of West Side High School in Manhattan. The project owner was defendant New York City School Construction Authority, and the general contractor was defendant

Spacemaster Building Systems, LLC. Spacemaster fabricated the major structural components off-site and then trucked them to the school location. Defendant TDX-Becom was brought in to act as construction manager approximately one or two months before the accident. The windows were installed by nonparty Window Associates pursuant to a contract with Spacemaster. The factory-assembled double-hung windows consisted of two window sashes in vertical alignment within a frame. The bottom sash opened by sliding up within the frame and the top sash opened by sliding down within the frame.

Franklin Bradley, who was plaintiff's coworker on the day of the accident, testified that during the two weeks he worked at the building before the accident, the weather was particularly hot, and the building was not air-conditioned. Because of this, Bradley stated, workers had opened about 50% of the windows in the building. He explained that about 50% of the open windows would not stay up on their own, and that workers had resorted to propping them up with sheetrock, bottles, and sticks. Bradley testified that workers commonly referred to the windows that had to be propped up as "free fallers." According to Bradley, the window through which plaintiff was leaning had been propped up three feet, the windows' maximum opening capacity, and secured with a piece of sheetrock. He testified that after he lifted the

window off of plaintiff's back, he noticed that the sheetrock that had been holding the window open was in pieces on the floor. He stated further that when he told site manager Ivan Badinsky, an employee of TDX-Becom, what happened, Badinsky responded, "Those God damn windows are falling shut all over the job site," and said that he had "to get the window people in there before somebody else gets hurt or killed."

Other than the window that injured him, plaintiff himself did not observe any windows propped open during the two weeks he worked at the building before the accident. However, he testified that when he informed Badinsky of the accident, Badinsky responded that he was not surprised because he had almost gotten his hand or his finger "chopped off" on an occasion when a window had collapsed. Badinsky denied making the statements attributed to him by plaintiff and Bradley, and testified that he was never made aware of a problem with the windows before the accident, nor did he ever notice windows being propped up. He also testified that "limit stops," which are devices that prevent windows from being lifted above a desired height, were not installed until after the work was complete.

Charles Roberts, the owner of Window Associates, testified that he received a call from Spacemaster, while the project was still ongoing, informing him that there was a problem with the

"balance" system, which was designed to keep the windows from falling when opened. The caller stated that the windows could not be lifted up without falling back down. Roberts testified that during his walkthrough of the job site, he observed that almost all of the windows in the building were open, and that half of the open windows were propped open with objects such as two-by-fours, soda cans, and dry wall. Roberts explained that, upon observing the windows, he discovered that they were falling because the balances were broken. He also observed that most of the windows did not have limit stops in them, although some could be found on window sills or on tables inside the building. He explained that by taking out the limit stops, which he testified, in contrast to Badinsky's testimony, were installed at the factory, the workers were able to push the windows up to their maximum height. Doing so, however, would place inordinate stress on a spring inside the balance system, breaking the balance. Roberts stated that he reported his observations to Spacemaster, which, five weeks later, authorized him to order 36 new limit stops, as well as replacement parts for the balance system.

While Roberts had no independent recollection of the precise date on which he came to the site to perform the inspection, he testified that it was during a blackout in Washington Heights, where he went after the inspection. He described the environment

in upper Manhattan that day and evening in vivid detail. For example, he recalled that "[t]he streetlights were out. Most everybody was out on the street. It was a very hot day. You could see that all the windows were open in the buildings because there was no air-conditioning going on . . . The traffic lights were blinking. They were all out. The traffic was – it wasn't like rush hour, but it was kind of a mess . . . It was a mass of people out on their stoops and sidewalks and the streets, hanging out of the windows."

An engineer from Consolidated Edison testified that a "consistent blackout, which is a complete system outage" occurred in Washington Heights on July 6-7, 1999. The engineer testified that there were no other blackouts or brownouts (localized blackouts) in the area from June 1, 1999 through August 6, 1999, the day before the accident. He also testified that on July 8, 1999, there was a "dip" in power, which lasted 15 seconds. There were no other dips lasting more than two seconds. There were some "feeder" outages which occurred during the two days *after* the accident, but the engineer explained that such outages do not necessarily cause customer interruption of service, nor did he have any evidence that the feeder outages on those two days did in fact cause any interruption.

The jury returned a verdict in favor of defendants. The

verdict sheet did not ask the jury to determine whether plaintiff satisfied the various elements of his claim as to each defendant. Rather, it merely asked the jury to state whether each of the defendants violated Labor Law § 200. The court denied plaintiff's motion to set aside the verdict as against the weight of the credible evidence.

As this Court has noted, "[T]he question of whether a jury verdict is against the weight of the evidence . . . is essentially a discretionary and factual determination" (*Yalkut v City of New York*, 162 AD2d 185, 188 [1990]), and "great respect must be accorded to the trial court's professional judgment," which is informed by its observation of the witnesses (*id.*). "Only where the jury's resolution of a factual issue is clearly at variance with the proffered testimony does the failure to set aside the verdict and direct a new trial constitute an abuse of discretion" (*Fisk v City of New York*, 74 AD3d 658, 659 [2010] [internal citation and quotation marks omitted]).

As noted, the jury was not asked to state on the verdict sheet whether plaintiff satisfied the various elements of a claim under Labor Law § 200 as to each defendant. Accordingly, it is impossible to determine conclusively whether the jury believed that plaintiff met any of the elements. However, Badinsky testified that he filled out an incident report that described

the accident in a manner consistent with plaintiff's own version. Badinsky further acknowledged that the condition that caused the accident was unreasonably dangerous. In light of those admissions, and the fact that the vast majority of the questioning during direct and cross examinations at trial concerned whether defendants knew or should have known about the condition before the accident, it is reasonable to assume that the jury's verdict was based exclusively on a finding that defendants did not have actual or constructive notice of the defective window. Moreover, plaintiff's motion to set aside the verdict as against the weight of the evidence, and his appeal of its denial, are based solely on the notice issue.

Notice is necessary for a plaintiff to prevail on a Labor Law § 200 claim (*Mitchell v New York Univ.*, 12 AD3d 200, 201 [2004]). The evidence is uncontradicted that Charles Roberts discovered the problem with the windows and reported the problem to Spacemaster, on July 6 and 7, 1999, weeks before the accident. Roberts described conditions on the day of his visit to the site that are consistent with his recollection that a major power outage occurred that day. The testimony of the Con Edison engineer supported this recollection by establishing that there was a blackout that day.

We reject defendants' supposition that the loss of power

observed by Roberts was actually caused by one of the feeder outages described by the engineer as having occurred during the days immediately following the accident. First, there is no evidence that those outages resulted in an appreciable loss of power. Further, there is nothing in the engineer's testimony that would support the idea that, even if a feeder outage had resulted in lost power, it would have created the dramatic scenes described by Roberts. While defendants now question how the traffic lights could have blinked on and off during a blackout, they failed to present any evidence that it would have been impossible for the lights to blink during a power outage. Defendants attempt to cast further doubt on Roberts's testimony that he identified the problem before the accident by pointing to the "expedited order form" by which Window Associates ordered 36 limit stops on August 11, 1999, four days after the accident. However, Roberts testified, without contradiction, that he reported the need to order those parts to Spacemaster immediately after his inspection and that he had no control over the length of time they waited to authorize him to place the order.

Because the jury had no reasonable basis for rejecting Roberts's testimony that he identified a problem with the windows before the accident, it did not act rationally in determining that defendants did not have, at the very least, constructive

notice of the defective windows. Obviously, Spacemaster had actual notice, since according to Roberts's uncontroverted testimony, Spacemaster ordered the inspection. It can also readily be inferred, however, that the other defendants had notice. The problem identified by Roberts existed throughout the building, and Badinsky's testimony that he did not notice it is simply not credible, given that he walked the site on a frequent basis. We note that it is irrelevant whether defendants were aware that the particular window that injured plaintiff was broken. Once they knew that an appreciable number of the windows required attention, defendants had an obligation to inspect all of them (*see Rodriguez v Amigo*, 244 AD2d 323, 325 [1997]).

In view of this determination, we need not address plaintiffs' argument that the trial court's failure to issue a missing witness charge constituted reversible error.

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

ENTERED: JULY 31, 2012

CLERK

Tom, J.P., Andrias, Moskowitz, Acosta, Abdus-Salaam, JJ.

7881 Pasquale A. Picaro, Index 113352/08
Plaintiff-Respondent-Appellant,

-against-

New York Convention Center
Development Corporation, et al.,
Defendants-Appellants-Respondents,

United Rentals, Inc.,
Defendant.

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McGaw Alventosa & Zajac, Jericho (Ross P. Masler of counsel), for appellants-respondents.

The Feld Law Firm P.C., New York (John G. Korman of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Paul G. Feinman, J.), entered November 15, 2011, which, to the extent appealed from as limited by the briefs, denied the motion of defendants New York Convention Center Development Corporation (CDC) and New York State Urban Development Corporation d/b/a Empire State Development Corporation (UDC) insofar as they sought summary judgment dismissing plaintiff's Labor Law § 240(1) claim, and denied plaintiff's motion for partial summary judgment on the issue of liability on that claim, unanimously modified, on the law, to grant defendants' motion, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint against defendants CDC and UDC.

Plaintiff house electrician was engaged in routine maintenance work when he fell from a ladder affixed to a scissor lift after fixing a light fixture (*see Monaghan v 540 Inv. Land Co. LLC*, 66 AD3d 605 [2009]). Indeed, plaintiff testified that he fixed light fixtures about twice weekly, that "nine out of ten times" the house electricians would change the whole fixture when performing such work, and that he retrieved sockets and bulbs from the building's storage area in order to perform his work. Further, his subforeman stated in an affidavit that the high-voltage nature of the lights caused the sockets to deteriorate, requiring them to be replaced on a regular basis, which necessitated keeping a large volume of sockets in stock on the premises. Accordingly, plaintiff's work clearly involved "replacing components that require replacement in the course of normal wear and tear" (*Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003]).

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

ENTERED: JULY 31, 2012

CLERK

Mazzarelli, J.P., Saxe, DeGrasse, Richter, Abdus-Salaam, JJ.

7964- Index 603336/08
7964A Anthony R. Daniele,
Plaintiff-Respondent,

-against-

Kimi C. Puntillo,
Defendant-Appellant.

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Marlo J. Hittman, New York, for appellant.

The Dweck Law Firm LLP, New York (Jack S. Dweck and Corey Stark of counsel), for respondent.

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Judgment, Supreme Court, New York County (George J. Silver, J.), entered November 14, 2011, after a nonjury trial, awarding plaintiff the sum of $104,918.46, plus interest, costs and disbursements, and bringing up for review an order, same court and Justice, entered October 5, 2011, which, found in plaintiff's favor on his causes of action, unanimously affirmed, without costs. Appeal from the order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In this action, plaintiff attorney seeks fees for services rendered in a matrimonial proceeding. Plaintiff was retained by defendant in March 2004, replacing defendant's prior counsel in her divorce proceeding. It is undisputed that plaintiff and defendant executed a retainer agreement in March 2004. The agreement specified the nature of representation, a $25,000

retainer fee, billing arrangements and payments, and billing rates, among other details. Attached to the retainer agreement was a Statement of Client's Rights and Responsibilities, also executed by both parties in March 2004. Plaintiff contends that on May 14, 2004, he filed a copy of the executed retainer agreement with the court as well as defendant's updated statement of net worth, as mandated by 22 NYCRR 1400.3.

Shortly after executing both documents, defendant paid the $25,000 retainer fee. Plaintiff represented defendant from March 2004 through December 2004, when defendant's divorce proceedings ended in a stipulation of settlement. During that time, plaintiff sent defendant detailed billing statements, which were in "block billing" form, meaning that each timekeeper would enter a description of his or her work for a particular day, along with the total amount of time spent on those tasks for that day. Defendant made intermittent payments up until December 2004. When plaintiff commenced this suit, there was an outstanding balance of $104,918.46.

At the close of plaintiff's case, defendant moved for a directed verdict dismissing the complaint on the ground that plaintiff failed to comply with 22 NYCRR 1400.3, thereby barring his claim for fees. The trial court denied the motion on the ground that defendant had admitted compliance with 22 NYCRR

1400.3 in her answer. The trial continued to conclusion, and the court found an account stated in that defendant had not established that she objected to the bills. The court then granted judgment to plaintiff in the amount of $106,048.96.

"Where there has been 'substantial compliance' with the matrimonial rules, an attorney will be allowed to recover the fees owed for services rendered, but not yet paid for" (*Edelman v Poster*, 72 AD3d 182, 184 [2010], quoting *Flanagan v Flanagan*, 267 AD2d 80, 81 [1999]). The applicable rule, 22 NYCRR 1400.3, mandates that an attorney in a matrimonial matter file a copy of the signed retainer agreement with the court, along with the statement of net worth. Here, the record shows that a copy of the executed retainer was filed with the court on May 14, 2004, along with the updated statement of net worth. Even if plaintiff, as substituted counsel, should have filed the retainer within 10 days of its execution, he substantially complied with the requirements by filing the executed copy with the updated statement of net worth. Although it would have been better practice for plaintiff to have put proof of the filing in evidence on his direct case, his failure to do so does not change the fact that he substantially complied with the rule (*see Kurtz v Kurtz*, 1 AD3d 214, 215 [2003]).

Defendant also argues that plaintiff's billing practices and

willful spoliation of evidence should result in sanctions, and dismissal of his claims. Specifically, defendant argues that block billing was improper and that "task billing," which lists the time for each separate task and is an enhanced level of billing, should have been used. However, block billing is common practice among law firms and neither 22 NYCRR 1400.3 nor the retainer agreement calls for task based billing. Regarding the spoliation of evidence allegation, defendant contends that plaintiff intentionally destroyed a particular attorney's individual time sheets, thereby preventing her from using those records to impeach plaintiff. Plaintiff testified at trial that the information from that attorney's individual time sheets was entered into the firm's time entry system, then reviewed by him and incorporated into the firm's bills to defendant. In any event, the time sheets were not key evidence, and thus their alleged destruction did not deprive defendant of the ability to defend against plaintiff's claim for fees(*Coleman v Putman Hops. Center*, 74 AD3d 1009 [2010], *lv dismissed* 16 NY3d 884 [2011]). Accordingly, a spoliation sanction is not warranted.

Defendant also argues that she was improperly denied a commission to depose one of the attorneys from her divorce proceeding, who resided in New Jersey. However, the trial court providently exercised its discretion in denying defendant's

motion, as she had waited approximately two months before seeking the deposition, and had made the motion a week before the scheduled trial date (*see Miller v Metropolitan 810 7th Ave.*, 50 AD3d 474 [2008]).

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

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

ENTERED: JULY 31, 2012

CLERK

Saxe, J.P., Renwick, DeGrasse, Richter, JJ.

8044 Farid Metwaly, Index 600671/10
Plaintiff-Appellant,

-against-

International Business
Machines Corporation,
Defendant-Respondent.

_____

Anthony Motta, New York, for appellant.

Jackson Lewis LLP, New York (Kevin G. Lauri of counsel), for respondent.

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Order, Supreme Court, New York County (Jane S. Solomon, J.), entered August 29, 2011, which granted defendant's motion for leave to reargue that branch of its motion to dismiss the cause of action for breach of contract, and upon reargument, granted the motion and dismissed the complaint, unanimously affirmed, without costs.

Plaintiff, a Canadian citizen, was stationed in Dubai while employed by defendant from 2000 to 2002. This action stems from defendant's withholding of hypothetical taxes from plaintiff's wages for the purpose of covering potential domestic tax liability. In January 2009, defendant paid plaintiff the entire amount that had been withheld for the years involved. Without invoking any statutory authority, plaintiff brought this action in March 2010 to recover what he describes as "statutory

interest" for the period his wages had been partially withheld. Defendant moved to dismiss the complaint on grounds that included failure to state a cause of action and the expiration of the statute of limitations. The court initially denied the motion but granted it upon reargument.

The complaint does not state a cause of action because it sets forth no contractual or statutory basis upon which plaintiff can recover interest. The obligation to pay interest on a debt is not implied as a matter of law (*New York State Thruway Auth. v Hurd*, 25 NY2d 150, 158 [1969]). Consistently, this Court has held that "[a]s a general rule, interest is allowed only when provided for by contract, express or implied, or by statute, or when, as damages, it becomes due after a default by the person liable for payment" (*Rachlin & Co. v Tra-Mar, Inc.*, 33 AD2d 370, 373 [1970] [internal quotation marks omitted]). More recently, the Court of Appeals again addressed the subject of prejudgment or predecision interest, finding it to be "purely a creature of statute" (*Matter of Bello v Roswell Park Cancer Inst.*, 5 NY3d 170, 172 [2005]). Because plaintiff did not allege the existence of a statutory or contractual basis for defendant's payment of interest, the complaint was correctly dismissed.

Plaintiff's contract claim would have nevertheless been time-barred even assuming a basis for the recovery of interest

from 2002 existed (*see* CPLR 213 [2]). We are not persuaded by plaintiff's argument that pursuant to General Obligations Law § 17-101, the statute of limitations was revived by defendant's January 2009 written acknowledgment of its otherwise time-barred debt to plaintiff. The writing plaintiff relies upon makes no mention of interest or an obligation to pay interest. In order to constitute an acknowledgment under the statute, a writing must recognize an existing debt (*Lew Morris Demolition Co. v Board of Educ. of City of N.Y.*, 40 NY2d 516, 521 [1976]). We have considered plaintiff's remaining arguments and find them unavailing.

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

ENTERED: JULY 31, 2012

CLERK

Saxe, J.P., Sweeny, Renwick, DeGrasse, Richter, JJ.

7020 Wo Yee Hing Realty, Corp., Index 115517/07
Plaintiff-Appellant,

Chun Yee Yung, et al.,
Plaintiffs,

-against-

Howard Stern, Esq.,
Defendant-Respondent.

_____

Drabkin & Margulies, New York (Caitlin A. Robin of counsel), for appellant.

Braverman & Associates, P.C., New York (Tracy M. Peterson of counsel), for respondent.

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Order, Supreme Court, New York County (Debra A. James, J.), entered February 22, 2011, affirmed, without costs.

Opinion by Saxe, J.P. All concur except DeGrasse, J. who dissents in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
John W. Sweeny, Jr.
Dianne T. Renwick
Leland G. DeGrasse
Rosalyn H. Richter, JJ.

7020
Index 115517/07

_____x

Wo Yee Hing Realty, Corp.,
Plaintiff-Appellant,

Chun Yee Yung, et al.,
Plaintiffs,

-against-

Howard Stern, Esq.,
Defendant-Respondent.

_____x

Plaintiff Wo Yee Hing Realty, Corp. appeals from the order of the Supreme Court, New York County (Debra A. James, J.), entered February 22, 2011, which, insofar as appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the complaint.

Drabkin & Margulies, New York (Caitlin A. Robin of counsel), for appellant.

Braverman & Associates, P.C., New York (Tracy M. Peterson of counsel), for respondent.

SAXE, J.P.

The issue presented in this legal malpractice action is whether plaintiff has offered sufficient proof to create a triable issue of fact as to whether defendant's alleged malpractice proximately caused its claimed losses.

Plaintiff Wo Yee Hing Realty Corp. is a family-owned real estate holding corporation; its principals are brothers Chun Yee Yung, Chun Hing Yung, and Chun Wo Yung, who sued individually until they voluntarily discontinued their claims in June 2008, leaving the action to proceed in the name of the corporate plaintiff. Defendant Howard Stern is an attorney who serves as the administrator of a legal services plan offered to landlords by the Rent Stabilization Association since 1994. In 2006, one of plaintiff's principals contacted defendant seeking assistance on several landlord-tenant issues; he also asked defendant to represent plaintiff in the sale of a residential and commercial building it owned, located at 496 Broadway, in Manhattan.

The parties' claims as to the understanding that was reached regarding the corporation's retention of defendant are diametrically opposed. According to plaintiff's principals, defendant assured them that the anticipated sale could be structured as a "like-kind exchange" under Internal Revenue Code (26 USC) § 1031, which permits taxes on gains from the sale of

real property to be deferred if the seller purchases another property of like kind, within certain parameters (*see* 26 USC § 1031[a]). Plaintiff asserts that defendant "held himself out as knowledgeable in [1031 exchanges] and able to effectuate the sale and transfer of real property" to enable it to take advantage of the capital gains tax deferral.

Defendant, however, asserts that he informed plaintiff's principals that he "had no expertise or experience with structuring Section 1031 like-kind exchanges" and that responsibility for taking advantage of Section 1031 would fall to them, and that they assured him that they were familiar with 1031 exchanges and would take care of that aspect of the transaction.

In late October 2006, plaintiff provided defendant with a written offer from a third party to purchase 496 Broadway for $10.2 million, with a down payment of $1 million. In early November 2006, defendant drafted a contract of sale and forwarded it to one of plaintiff's principals and to the purchaser. On November 17, 2006, defendant met with plaintiff's representatives, the purchaser and the purchaser's attorney and real estate agent. On that date, Chun Wo Yung states, he and his brother Chun Hing Yung told defendant that the sale "must be a '1031 sale,'" although Chun Wo admits that he "did not really know what that meant." Chun Wo nonetheless avers that defendant

"said he would write a proper clause in the contract and make sure that the sale complied with all requirements."

Defendant agrees that he and the Yungs spoke on November 17, 2006, just before the meeting with the purchaser. Defendant asserts, however, that he advised the Yungs that he "did not have the requisite experience to handle [the 1031] aspect of the transaction," and suggested that they make a joint call to the Yungs' accountant to discuss the issue. Defendant contends that, between the November 17 meeting and the closing, he repeatedly asked Chun Wo whether things were in place for the 1031 exchange. According to defendant, Chun Wo assured him that he was working with his accountant to take care of the 1031 issue.

The closing on the sale was held on May 29, 2007. During the closing, the purchaser's bank asked if the checks should be made payable to plaintiff. Plaintiff alleges that defendant said that the checks should be made payable to the plaintiff corporation "for the purpose of the 1031 exchange." Defendant, by contrast, avers that he asked Chun Wo and Chun Hing if the checks should be made payable to plaintiff, and they said yes. Defendant adds that the purchaser's counsel "echoed" defendant's concerns about the checks being made payable to plaintiff, but Chun Wo and Chun Hing "were steadfast and insisted" that the checks be made out that way.

Immediately after the closing, according to defendant, the Yungs conversed in Chinese, and then handed the checks to him and told him to "process the 1031." Defendant maintains that he then told the Yungs that he had been doubtful that the 1031 exchange could be consummated if plaintiff received the funds directly, but he acknowledges that the Yungs told him to hold onto the checks and "see what could be done" about effecting the 1031 exchange.

Defendant then contacted an attorney who specialized in 1031 property exchanges, who informed defendant that, to effect the 1031 exchange, the closing would have to be undone, redone, and redated. He advised defendant that the purchaser would have to consent to this action, and would most likely want monetary compensation for doing so. Defendant conveyed this information to the Yungs. Chun Wo contacted the buyer, who replied that plaintiff would have to pay it $600,000 in order to redo the transaction. Plaintiff retained new counsel, and, several weeks later, retrieved the checks from defendant, but did not attempt to redo the transaction.

Chun Hing, the brother who took the lead in finding a replacement property, said that he considered three properties in the West 30s, at prices ranging from $22 million to about $40 million, that his bid of $22 million for 28 West 36th Street was

rejected, and that following negotiations on 35 West 36th Street, a "verbal[] ... understanding" was reached that plaintiff would buy that property for $31.5 million. He testified at his deposition that the broker gave him a contract; however, the record includes no contract of sale or other writing to reflect this "understanding." In fact, the owner of the property testified that plaintiff's original offer "wasn't a good offer and it never materialized."

Plaintiff contends that defendant's negligence caused it to be unable to effect the 1031 exchange, as a result of which it realized a large capital gain and was subject to an immediate $5.1 million in tax liability. Further, plaintiff maintains, this tax liability prevented it from using the full building sale proceeds to acquire another property, resulting in further economic opportunity loss. The parties cross-moved for summary judgment.

The motion court granted defendant's motion and denied plaintiff's cross motion. It agreed with defendant that regardless of the triable issues of fact as to defendant's alleged malpractice, plaintiff had failed to offer evidence that such negligence was a proximate cause of any injury, by failing to produce any documentary evidence that it could have identified the replacement property within 45 days of the closing, or closed

on the acquisition of a replacement property within 180 days of the sale of the initial property, both of which are required for the tax benefits of section 1031 to take effect (*see* 26 USC § 1031[a][3][A], [B]). We now affirm.

To prevail on its claim of legal malpractice, plaintiff must prove not only that defendant was negligent, but also that defendant's negligence was a proximate cause of its losses (*Brooks v Lewin*, 21 AD3d 731, 734 [2005], *lv denied* 6 NY3d 713 [2006]; *see also Markowitz v Kurzman Eisenberg Corbin Lever & Goodman, LLP*, 82 AD3d 719 [2011]). Indeed, the failure to show proximate cause "mandates the dismissal of a legal malpractice action regardless of whether the attorney was negligent" (*Leder v Spiegel*, 31 AD3d 266, 268 [2006], *affd* 9 NY3d 836 [2007], *cert denied* 552 US 1257 [2008]).

Strong evidence that defendant acted negligently is presented by his admission that he told the Yungs that he was not qualified to handle a 1031 exchange, but nevertheless undertook the preparation of the contract of sale. "[A]n attorney is obligated to know the law relating to the matter for which he/she is representing a client and it is the attorney's duty, if he has not knowledge of the statutes, to inform himself, for, like any artisan, by undertaking the work, he represents that he is capable of performing it in a skillful manner" (*Fielding v*

Kupferman, 65 AD3d 437, 440 [2009] [internal quotations marks omitted]). Defendant's failure to have the checks made payable to a qualified intermediary similarly constitutes evidence of his negligence, since that failure would preclude plaintiff from taking advantage of the like-kind exchange option (*see* 26 CFR 1.1031[k]-1[f]).

In seeking summary judgment dismissing the case, defendant contends that plaintiff cannot show that his negligence, if any, caused plaintiff's alleged losses. He relies on the absence of evidence of a pending deal that plaintiff could have used to consummate a 1031 exchange. Plaintiff argues, citing *Suppiah v Kalish* (76 AD3d 829, 832 [2010]) that defendant was required to submit an expert affidavit establishing that even if he did commit malpractice, his actions were not the proximate cause of its losses. However, *Suppiah* concerned an allegation of attorney malpractice in an immigration matter that involved issues so "byzantine" that the issue of proximate cause could not be resolved without expert testimony (*id.* at 833). Here, by contrast, the mechanics of the governing legal framework are undisputed, and the issue of proximate cause turns on the discrete factual question of whether plaintiff took the requisite actions to identify and purchase a suitable replacement property in the required time frame. There is no need for expert

testimony on the point.

The question is therefore whether plaintiff raised an issue of fact as to whether negligence on defendant's part proximately caused its claimed losses.

To be eligible for the tax benefit, plaintiff, as the seller, would have had to designate a specific replacement property within 45 days of the sale of its building, in a written and signed document transmitted to the person obligated to transfer that property to plaintiff or to another person involved in the exchange; to have a qualified intermediary receive the proceeds of sale of the relinquished property; and to close on the purchase of the replacement property within 180 days of the initial sale (26 USC § 1031[a][3][A] and [B][i]; 26 CFR 1.1031[k]-1[c][2], [g]).

Unlike the dissent, we do not think that defendant's failure to have the checks made out to a qualified intermediary eliminates plaintiff's burden to offer evidence showing that but for defendant's negligence, it would have been able to complete a valid like-kind exchange. Although it is now clear that, as the dissent puts it, "the opportunity for a like-kind exchange was irretrievably lost once plaintiff received the proceeds of the sale," it is also clear that plaintiff had failed to satisfy all the other elements required for the successful completion of

other such an exchange, and that the failure to meet those requirements is not attributable to defendant's alleged negligence.

We do not suggest that plaintiff had to actually purchase a new property *without* the benefit of a like-kind exchange; nor do we impose a requirement that it make the futile gesture of identifying the definitive replacement property. We merely hold that plaintiff had the burden of presenting some evidence that it *could have* completed a like-kind exchange had defendant advised it properly. It needed only to identify the proposed replacement property and show that it would have been able to purchase that property using the like-kind exchange procedure if the matter had been properly handled. If the proposed replacement property were valued at more than the proceeds of the sale of its building -- $10.2 million -- then plaintiff would also have had to prove its ability to finance the additional cost. But, the mere fact that plaintiff had funds enough to purchase a replacement property for $10.2 million or less does not suffice to create an issue of fact. Plaintiff failed to present any evidence that it had identified any property that it was capable of buying within the statutory time frame. Nor did it present any evidence that it could have closed on its purchase within 180 days. As to the West 36th Street property, plaintiff's claim that it had an oral

understanding that it would purchase the property for $31.5 million is insufficient, as is its vague claim, unsupported by any documentation, that Chun Hing "received a contract" that he "deemed suitable for the purpose of the 1031 exchange." None of this is sufficient to show that plaintiff would have been able to timely designate a property and effectuate a section 1031 like-kind exchange.

Plaintiff also failed to show that it was capable of consummating the acquisition of the West 36th Street property. While the proceeds of the sale of its property were approximately $10.2 million, the purported agreed-on price to acquire West 36th Street as a replacement property was $31.5 million. Yet, plaintiff's sole evidence as to its financial ability to acquire the replacement property lies in the testimony of Terry Mang, an officer of United Commercial Bank who purportedly had "preliminary conversations" with plaintiff's representatives about financing. Mang testified that some time in 2007, he told Chun Hing that, if he put down 10%, the bank would be able to finance up to 65% of a purchase. But, Mang was not only unable to specify when this conversation took place; he also stated that Chun Hing never told him which building would be the subject of the financing, the intended purchase price, or the amount of the financing. Indeed, Mang clarified that the bank never opened a

file on the matter, but merely expressed general interest in financing a purchase. We do not suggest that plaintiff had to obtain a "virtual mortgage," as the dissent argues. However, lending institutions may give a preliminary indication of whether a loan applicant would be eligible for a loan.

Since the acquisition of a replacement property within 180 days is essential to the consummation of a 1031 exchange, and plaintiff's showing is insufficient to demonstrate that it was in a position to acquire the alleged replacement property, plaintiff has failed to demonstrate the existence of a material issue of fact as to a causal link between its inability to effect a 1031 exchange and defendant's alleged negligence.

Accordingly, the order of the Supreme Court, New York County (Debra A. James, J.), entered February 22, 2011, which, insofar as appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the complaint, should be affirmed, without costs.

All concur except DeGrasse, J. who dissents in an Opinion:

DeGRASSE, J. (dissenting)

I disagree with the majority's conclusion that defendant is entitled to summary judgment on the instant legal malpractice cause of action. I would therefore reverse Supreme Court's order and deny the motion.

According to the complaint, this action stems from a failed like-kind exchange of business property pursuant to Internal Revenue Code (26 USC) § 1031. Plaintiff claims to have incurred a substantial tax liability that could have been avoided or deferred but for defendant's negligence.

The main purpose of a like-kind or 1031 exchange is to defer the capital gains tax resulting from the sale of commercial or investment property (*see In re 1031 Tax Group, LLC*, 420 BR 178, 184 [SD NY 2009]). This tax advantage is gained through a "deferred exchange" by which "pursuant to an agreement, the taxpayer transfers property held for productive use in a trade or business or for investment (the 'relinquished property') and subsequently receives property to be held [similarly] (the 'replacement property')" (26 CFR 1.1031[k]-1[a]). 26 CFR 1.1031(k)-1(g)(4) enables a taxpayer to carry out a 1031 exchange by use of a "qualified intermediary."[1] For a 1031 exchange to be

[1]A qualified intermediary is a person, not the taxpayer or one closely related to the taxpayer, who "[e]nters into a written

effective, a taxpayer must (a) give written notice identifying the replacement property within 45 days after the transfer of the relinquished property (the "identification period") and (b) receive the identified replacement property within 180 days after the said transfer (the "exchange period") (26 CFR 1.1031[k]-1[b]).

Defendant, an attorney, was retained to represent plaintiff in connection with the sale of its building located at 496 Broadway. Plaintiff and defendant discussed a written offer from the eventual purchaser that referenced a proposed closing "upon 90 days notice by the seller to identify his 1031 tax exchange needs." Defendant states in his affidavit that he advised Chun Wo Yung and Chun Hing Yung, two of plaintiff's principals, that he lacked the requisite experience in structuring 1031 exchanges and that that aspect of the deal would have to be handled by the client. Chun Wo Yung states in his affidavit that defendant indicated that "handling the 1031 exchange would not be a problem, and that he [defendant] would take care of all the necessary paperwork to get it done." In any event, it is

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agreement with the taxpayer... and, as required by the exchange agreement, acquires the relinquished property from the taxpayer, transfers the relinquished property, acquires the replacement property, and transfers the replacement property to the taxpayer" (26 CFR 1.1031(k)-1[g][4][iii]).

undisputed that defendant prepared a contract of sale with a rider that cited Internal Revenue Code (26 USC) § 1031 and expressly provided for the assignment of the parties' rights to a qualified intermediary for purposes of a like-kind exchange.

At the May 29, 2007 closing, checks representing the $10.2 million purchase price were cut and made payable to plaintiff instead of to a qualified intermediary. Chung Hing Yung states in his affidavit that the proceeds were disbursed that way under defendant's advice. Defendant, on the other hand, states in his affidavit that the checks were made payable to plaintiff at the insistence of plaintiff's principals. 26 CFR 1.1031(k)-1(f) provides that

> "[i]f the taxpayer actually or constructively receives money or other property in the full amount of the consideration for the relinquished property before the taxpayer actually receives like-kind replacement property, the transaction will constitute a sale and not a deferred exchange, even though the taxpayer may ultimately receive like-kind replacement property."

Therefore, the direct payment of the purchase price to plaintiff foreclosed section 1031 treatment.

On this record, I share the majority's view that there is strong evidence that defendant acted negligently in undertaking to represent a client in a transaction that he was not qualified to handle. To say the least, there is an issue of fact as to whether defendant apprehended the section 1031 provision of the

contract he drafted. I disagree, however, that plaintiff failed to demonstrate the existence of a material issue of fact as to a causal link between its inability to effect a 1031 exchange and defendant's alleged negligence.

As the majority sees it, "the issue of proximate cause turns on . . . whether plaintiff took the requisite actions to identify and purchase a suitable replacement property in the required time frame." I disagree with this analysis because under 26 CFR 1.1031(k)-1(f), the opportunity for a like-kind exchange was irretrievably lost once plaintiff received the proceeds of the sale. Stated differently, there was no 1031 exchange, and the 45-day identification period and the 180-day exchange period were never triggered, because of plaintiff's actual receipt of the proceeds of the sale. Therefore, it would have been impossible for plaintiff to purchase or even identify anything that qualified as replacement property. It would also have been pointless for plaintiff to go through the motions of doing so once it received the proceeds of the sale. "[T]he law does not require futile gestures" (*Glauber v P.S.F.B. Assoc.*, 89 AD2d 576, 577 [1982]; *Lo Biondo v D'Auria*, 45 AD2d 735, 737 [1974]).

The majority dwells unnecessarily on whether plaintiff had the means of acquiring a replacement property. The record

provides no reason to assume that the $10.2 million realized from the sale would have been insufficient for the purchase of a replacement. Had a 1031 exchange been effected, a qualified intermediary would have acquired, paid for and transferred to plaintiff a replacement property priced at up to $10.2 million, at no cost to plaintiff save incidental expenses. This undeniable $10.2 million in purchasing power is, at least, sufficient to raise an issue of fact as to whether plaintiff had the means of completing the contemplated 1031 exchange. Although plaintiff discussed a deal for a more expensive property, nothing in the record suggests that it was required to identify a replacement property that was priced at more than the $10.2 million sale price of its building.

I also respectfully submit that the majority's holding is unrealistic because it essentially provides that in order to successfully oppose defendant's motion for summary judgment, plaintiff was required to demonstrate its financial ability by (a) purchasing a new property without the benefit of a tax-deferred exchange or (b) somehow obtaining a virtual mortgage commitment without showing a prospective lender an executed purchase agreement for a new property. Also, the "preliminary

indication of whether a loan applicant would be eligible for a loan" mentioned by the majority would have been inadmissible, speculative and unnecessary in the case of a replacement property priced at $10.2 million or less.

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

ENTERED: JULY 31, 2012

CLERK