SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 21, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Friedman, Catterson, Manzanet-Daniels, Román, JJ.

5229 In re Scott Liden, Index 400532/09
Petitioner-Appellant,

-against-

Elizabeth Devane, etc., et al.,
Respondents-Respondents.

Steven Banks, The Legal Aid Society, New York (Robert C. Newman of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Alison J. Nathan of counsel), for respondents.

Appeal from order and judgment (one paper), Supreme Court, New York County (Marilyn Shafer, J.), entered September 25, 2009, which denied as untimely the petition seeking, among other things, annulment of the Board of Examiners of Sex Offenders' determination, dated July 17, 2007, that, pursuant to the Sex Offender Registration Act (Correction Law, article 6-C), petitioner is required to register as a sex offender based on an out-of-state conviction, and granted respondents' cross motion to

dismiss this CPLR article 78 proceeding, unanimously dismissed, without costs, as academic (*see People v Liden*, __ NY3d __, 2012 NY Slip Op 03473 [2012]).

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

ENTERED: JUNE 21, 2012

DEPUTY CLERK

Andrias, J.P., Friedman, Sweeny, Renwick, Roman, JJ.

5363-
5364 Admiral Insurance Company, Index 600848/09
Plaintiff-Appellant-Respondent,

-against-

American Empire Surplus Lines
Insurance Company,
Defendant-Respondent-Appellant,

Scottsdale Insurance Company,
Defendant-Respondent.

Coughlin Duffy LLP, New York (Justin N. Kinney of counsel), for appellant-respondent.

L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City (Richard P. Byrne of counsel), for respondent-appellant.

Keidel, Weldon & Cunningham LLP, White Plains (Debra M. Krebs of counsel), for respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered on or about December 29, 2009, which, to the extent appealed from as limited by the briefs, granted the motion by defendant Scottsdale Insurance Company (Scottsdale) for summary judgment declaring that Scottsdale is not obligated to reimburse plaintiff Admiral Insurance Company (Admiral) for any portion of Admiral's contribution to the settlement of the underlying action, granted the cross motion of defendant American Empire Surplus Lines Insurance Company (AEI) to the extent of declaring

that AEI is not obligated to reimburse Admiral for any portion of Admiral's contribution to the settlement of the underlying action, implicitly denied AEI's cross motion to the extent it sought summary judgment declaring it entitled to be reimbursed by Admiral for $433,333 of AEI's contribution to the settlement of the underlying action, and denied Admiral's cross motion for summary judgment declaring it entitled to be reimbursed by AEI for $566,667 of Admiral's contribution to the settlement of the underlying action and to be reimbursed by Scottsdale for $300,000 of Admiral's contribution to the settlement of the underlying action, unanimously modified, on the law, to deny Scottsdale's motion and AEI's cross motion in their entirety and to grant Admiral summary judgment declaring that Admiral's insured, Cross Country Contracting, LLC (Cross Country), was entitled to coverage with respect to the underlying action as an additional insured under the primary policy issued by AEI to B&R Rebar Consultants, Inc. (B&R) and under the excess policy issued by Scottsdale to B&R, and further declaring that Admiral is entitled to reimbursement for its contribution to the settlement of the underlying action in the amount of $566,667, plus interest, from AEI, and in the amount of $150,000, plus interest, from Scottsdale, and otherwise affirmed, with costs to Admiral against

AEI and Scottsdale, each of which shall pay half of the costs.

Nonparty Cross Country, the concrete superstructure contractor on a Manhattan construction project, subcontracted the steel reinforcing work to nonparty B&R. On October 19, 2005, a B&R employee named Li Xiong Yang was working on the project, following the B&R foreman's instructions to straighten rebar dowel rods extending from the concrete flooring to enable the attachment of pre-formed concrete to the rods to create a wall. While engaged in this work for B&R, Yang was struck by falling plywood, sustaining serious injuries. Yang and his wife subsequently commenced the underlying personal injury action against Cross Country and others in Supreme Court, Kings County. B&R was not brought into the underlying action as a third-party defendant or otherwise. The underlying action resulted in a jury verdict holding Cross Country solely liable for Yang's injuries. During the damages phase of the trial, the primary insurer of both B&R and Cross Country, defendant AEI, and the excess insurer of Cross Country, plaintiff Admiral, settled the case for $2.3 million. AEI contributed $1,433,333 to the settlement, and Admiral, while reserving all of its rights, contributed the remaining $866,667.

After the settlement, Admiral commenced this action against

AEI and defendant Scottsdale, B&R's excess insurer, for declaratory relief and equitable contribution among co-insurers. Admiral argues that AEI should have contributed to the settlement the full $2 million of aggregate primary coverage under both the policy AEI issued to Cross Country and the policy AEI issued to B&R, under which Cross Country is an additional insured.[1] Admiral further argues that, because Cross Country was an additional insured under the excess policy Scottsdale issued to B&R, Scottsdale should bear all or half (depending on the effect of the relevant policies' "Other Insurance" clauses) of the $300,000 of the settlement remaining after exhaustion of AEI's primary coverage. Scottsdale moved for summary judgment declaring that it had no obligation to contribute to the settlement, Admiral cross-moved for summary judgment on its claims, and AEI cross-moved for summary judgment requiring Admiral to reimburse AEI for the $433,333 it contributed to the settlement in excess of the applicable coverage limit of the policy it issued to Cross Country. The motion court granted Scottsdale's motion, denied Admiral's cross motion, and granted AEI's cross motion to the extent of ruling that AEI did not owe

[1]The primary coverage policies AEI issued to B&R and Cross Country both have limits of $1 million per occurrence.

Admiral any reimbursement, although the court did not grant AEI's request for reimbursement. We modify to deny Scottsdale's motion and AEI's cross motion in their entirety, and to grant Admiral's motion to the extent of holding it entitled to reimbursement of $566,667 from AEI and to reimbursement of $150,000 from Scottsdale.[2]

It is undisputed that Cross Country is an additional insured under the primary policy and excess policy issued to B&R by AEI and Scottsdale, respectively. In this regard, the primary policy AEI issued to B&R provides in pertinent part that it "include[s] as an insured the person or organization shown in the Schedule as an insured but only with respect to liability arising out of your [i.e., B&R's] operations[.]"[3] The primary issue on this appeal is whether Cross Country's liability for the injuries at issue in the underlying action constitutes "liability arising out of [B&R's] operations" under the B&R policies. Although it is undisputed that the plaintiff in the underlying action was

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[2]Admiral's appellate brief states that the principal amount it seeks to recover from AEI is "$567,667," which appears to be a typographical error.

[3]B&R's Scottsdale policy provides that "[a]ny additional insured under policy of 'underlying insurance' [including the AEI policy] will automatically be an insured under this insurance."

injured while performing his duties as an employee of B&R in the course of the work for which B&R was hired by Cross Country, AEI and Scottsdale argue that Cross Country's liability did not "aris[e] out of [B&R's] operations" because B&R (which was not a party to the underlying action) was not found to be responsible for those injuries in any way, and because there is no evidence that those injuries resulted from any fault on B&R's part.

In construing a similar provision for additional insured coverage, the Court of Appeals specifically rejected the argument made by AEI and Scottsdale. In *Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA* (15 NY3d 34 [2010]), a construction manager (URS) for a project was sued by an employee of the prime construction contractor (Regal), who was injured while engaged in his duties at the project. URS sought coverage as an additional insured under Regal's policy, which afforded such coverage to URS "only with respect to liability arising out of [Regal's] ongoing operations" (*id.* at 38 [internal quotation marks omitted]). The Court of Appeals held that URS was entitled to coverage under this provision, explaining:

> "We have interpreted the phrase 'arising out of' in an additional insured clause to mean 'originating from, incident to, or having connection with.' It requires only that there be some causal relationship between the injury and the risk for which coverage is provided.

> "Here, Regal's employee, LeClair, was walking through the work site to indicate additional walls that needed to be demolished by Regal's subcontractor when he slipped on a recently-painted metal joist. Although Regal and [its insurer] contend that LeClair's injury did not arise from Regal's demolition and renovation operations performed for URS, but that it was URS employees who painted the joist on which LeClair slipped, the focus of the inquiry is not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained. Accordingly, the injury "ar[ose] out of' Regal's operations notwithstanding URS's alleged negligence, and fell within the scope of the additional insured clause of the insurance policy" (*id.* at 38 [internal citations and some internal quotation marks omitted).

In *Regal*, the Court of Appeals distinguished its earlier decision in *Worth Constr. Co., Inc. v Admiral Ins. Co.* (10 NY3d 411 [2008]) on the ground that the general contractor in *Worth* was denied additional insured coverage under a policy issued to one of its subcontractors (Pacific) because Pacific was neither the employer of the injured worker nor responsible for the accident, which occurred while Pacific was not even present at the job site (*see* 15 NY3d at 38-39).[4] The Court of Appeals

[4]*Bovis Lend Lease LMB Inc. v Garito Contr., Inc.* (65 AD3d 872 [2009]), on which AEI and Scottsdale also rely, is similarly distinguishable, in that there, as in *Worth*, the injured worker was not an employee of the named insured (*see id.* at 877 [the injured worker was "a union carpenter working for another subcontractor," i.e., not the named insured] [Andrias, J.P., dissenting]).

elaborated in *Regal*:

> "Here, there was a connection between the accident and Regal's work, *as the injury was sustained by Regal's own employee* while he supervised and gave instructions to a subcontractor regarding work to be performed. *That the underlying complaint alleges negligence on the part of URS and not Regal is of no consequence*, as URS's potential liability for LeClair's injury 'ar[ose] out of' Regal's operation and, thus, URS is entitled to a defense and indemnification according to the terms of the CGL policy" (*id.* at 39 [emphasis added]).

Less than a month after *Regal* was issued, we followed it, holding: "Where . . . the loss involves an employee of the named insured, who is injured while performing the named insured's work under the subcontract, there is a sufficient connection to trigger the additional insured 'arising out of' operations' endorsement and fault is immaterial to this determination" (*Hunter Roberts Constr. Group, LLC v Arch Ins. Co.*, 75 AD3d 404, 408 [2010]). More recently, we held that a clause covering "liability caused by [the subcontractor's] ongoing operations performed for" the additional insured — language arguably narrower than the "arising out of" language at issue in *Regal*, *Hunter Roberts* and the instant case — also covered a "loss involv[ing] an employee of . . . the named insured, who was injured while performing the named insured's work under the

subcontract" (*W & W Glass Sys., Inc. v Admiral Ins. Co.*, 91 AD3d 530, 531 [2012]).[5]

Cross Country's coverage as an additional insured under the policies issued to B&R having been established, it follows that AEI should have contributed to the $2.3 million settlement (to which AEI was a party) $2 million, the sum of the applicable limits under the primary policies AEI issued to B&R and Cross Country. Hence, Admiral, as an excess insurer, is entitled to equitable contribution from AEI in the amount of the difference between $2 million and $1,433,333 (the amount AEI actually contributed), which is $566,667. In addition, Admiral is entitled to recover half of the remaining $300,000 of its contribution to the settlement from Scottsdale pursuant to Cross

[5]Notably, Scottsdale's appellate brief does not even cite *Regal* or *Hunter Roberts*. AEI's attempt to distinguish *Regal* and *Hunter Roberts* on the ground that those cases involved the duty to defend (which is not at issue here) is without merit. In each of those decisions, the holding that the additional insured was covered in the underlying action was based on allegations that the plaintiff therein had been injured while doing his job as an employee of the named insured on work the named insured was performing as a contractor of the additional insured. The same is true here; indeed, the matter is not even in dispute. Given that the liability at issue thus arises from the named insured's (B&R's) operations on behalf of the additional insured (Cross Country), it is immaterial both that there was apparently no fault on the part of the former and that there was (as determined in the underlying action) fault on the part of the latter.

Country's additional insured coverage under the excess policy Scottsdale issued to B&R. Contrary to Admiral's argument, the substantially identical "Other Insurance" clauses of the Admiral and Scottsdale policies cancel each other out, with the result that the two excess insurers must share ratably the cost of the settlement in excess of the available primary coverage.[6]

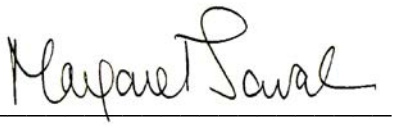
Scottsdale makes various arguments in support of its contention that, even if Cross Country were its additional insured for purposes of this loss, it should not be required to reimburse Admiral for any portion of the settlement. None of these arguments has merit. In particular, because Admiral is entitled to equitable contribution in its own right, without regard to being subrogated to any rights of its insured, the "voluntary payments" clause of the Scottsdale policy does not bar Admiral's recovery. Nor was Admiral's participation in the settlement voluntary so as to preclude it from seeking contribution. The loss plainly fell within the scope of Admiral's coverage of Cross Country, and Admiral was obligated to indemnify Cross Country for the portion of the settlement amount for which it now seeks reimbursement from Scottsdale, i.e., the

[6]Each of the Admiral and Scottsdale policies has a limit of $10 million per occurrence.

amount in excess of AEI's primary coverage. In addition, the existing record, on which there are no material factual disputes, establishes as a matter of law that the settlement of the underlying action was reasonable.

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

ENTERED: JUNE 21, 2012



DEPUTY CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Freedman, JJ.

6429 The People of the State of New York, Ind. 204/08
Respondent,

-against-

Suwei Chuang,
Defendant-Appellant.

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White & White, New York (Diarmuid White of counsel), and Michael C. Marcus, New York, for appellant.

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered February 24, 2009, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree and 26 counts of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 18½ to 22 years, modified, as a matter of discretion in the interest of justice, to the extent of directing that all sentences be served concurrently, resulting in a new aggregate term of 15 years, and otherwise affirmed.

Defendant was convicted of possessing a loaded Bushmaster AR-15 assault rifle, a weapon so deadly that the .223 caliber bullets it is capable of firing would penetrate the vests worn by

New York City police officers. He was also convicted of possessing 22 high-capacity magazines, each of which held 30 rounds of such ammunition. In addition to the rifle and the ammunition feeders for it, defendant was convicted of possessing a Glock 9mm automatic pistol and a knife.

The evidence at trial established that defendant kept the AR-15 assault rifle in a black bag and that when he went out of his apartment, he often brought the rifle with him, keeping it in the black bag and placing it on the floor of his car, between the front and back seats. Defendant also usually carried the Glock pistol, which he concealed in his waistband, along with two extra magazines. One of defendant's friends testified that he once saw defendant with the pistol in Penn Station. Defendant also carried a knife in his pocket.

The main witness at trial was defendant's girlfriend. She testified that, on one occasion, she found defendant in the living room of the apartment they lived in holding her sister's dog, which was not moving. When she said she wanted to take the dog to a veterinarian, defendant pointed the loaded AR-15 rifle at her, and threatened to shoot her and the dog. After a struggle over the gun, defendant calmed down. When the girlfriend went to call a veterinarian, defendant opened the

freezer, removed the frozen body of the girlfriend's own dog, slammed it on the counter, and told her to take it to the veterinarian for an autopsy. When the girlfriend tried to leave the apartment, defendant pointed the rifle at her and said that he would shoot her if she left.

On another occasion, defendant met his girlfriend, who was pregnant, at 34th Street and Lexington Avenue in Manhattan. When the girlfriend told defendant that she was going to look at an apartment because she did not want her child to live in a home with weapons, defendant yelled at her. She walked away, and defendant positioned himself in front of her, screaming and insisting that she give him her set of keys to his apartment. Furious, defendant said he was going to "shoot" or "kill" her, and that he did not care that they were in a public place. When the girlfriend refused to give him the keys, defendant put his hand on his hip, as if he were about to draw a gun. The girlfriend knew he had a gun there because she had felt it earlier when they hugged. She then gave defendant the keys, and stayed elsewhere that night.

The girlfriend further testified that she had an abortion because defendant refused to get rid of the guns. On the day of the procedure, she told defendant she was not coming back to live

with him, and he told her that she would “pay for that.” They met for dinner that evening in Manhattan, and after dinner, the girlfriend went back to defendant’s apartment, and they reconciled. But when she told defendant about the abortion, he grabbed a rifle and threatened to kill her. She begged him to put the gun down, and he eventually calmed down. Shortly thereafter, the couple spent Thanksgiving weekend in Vermont with the girlfriend’s sister and her sister’s boyfriend. Defendant brought the Glock and the assault rifle to Vermont.

Later that fall, defendant and his girlfriend attended couples counseling. At one of the sessions, defendant arrived carrying a handgun in his waistband and the rifle in a tennis bag. When the subject of defendant’s threats to kill his girlfriend arose, defendant reached into his coat, pulled out the handgun, and placed it within his grasp. The therapist saw what looked like an ammunition clip on the table between the couch and the chair. At trial, the therapist testified that the Glock recovered from defendant’s apartment “resembled” the black handgun that defendant displayed at the therapy session.

A few weeks later, defendant’s girlfriend’s sister came to stay with them after she had an argument with her boyfriend. At around 3:00 a.m., defendant drove the sister to her boyfriend’s

apartment so that she could retrieve her belongings. Defendant brought the Glock pistol and the rifle. Defendant and the boyfriend argued outside the building. The boyfriend's brother was also present. The boyfriend frisked defendant for weapons and would not allow him to come upstairs. When defendant told his girlfriend that he was going to pull out his gun and shoot the sister's boyfriend, she intervened and stood between them. Defendant got in his car and said he was leaving alone. When his girlfriend and her sister came back from collecting the sister's belongings, defendant returned and was holding the Glock. The rifle was next to his car. Defendant picked up the rifle and gave it to his girlfriend. She put the rifle down and asked defendant to get rid of it. The sister also asked defendant to put the Glock away, and defendant told her to "shut up." During the drive back, defendant mentioned he had almost shot the boyfriend's brother, and when they got home, defendant started loading his weapons, concerned that the boyfriend would call the police. Subsequently, defendant sent one of his friends an instant message stating that he had almost shot the boyfriend, and that he carried his assault rifle "locked and loaded." Defendant added that his girlfriend "saved" him by throwing herself in front of him. Otherwise, he stated, they "would have

found out what a frangible does to a human body."[1] The boyfriend later denied that defendant had threatened to shoot him.

On New Year's Eve, defendant's girlfriend returned to their apartment after a fight. She heard a noise that sounded like a weapon being fired, and a few minutes later, defendant entered the apartment carrying the assault rifle. Defendant asked if she had heard the noise made by the rifle being fired. When she responded that it was "really loud," defendant said that he would never shoot it downstairs again. The following day, defendant told his girlfriend that he was going to shoot her sister for bringing her boyfriend into their lives.

The day after New Year's Day, defendant's girlfriend met with the Assistant District Attorney who was handling an unrelated case in which she was a cooperating witness. She later met with several detectives and told them that defendant had an AR-15 assault rifle and a handgun, and that he frequently carried the guns on his person or in his car. She added that defendant pointed the handgun at her frequently, had pointed a gun at her head on one occasion and threatened to kill her, and had

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[1] Frangible bullets are designed to break up into smaller pieces upon contact with harder objects or surfaces.

threatened to kill her sister and her sister's boyfriend.

The detectives formulated a plan to apprehend defendant. At their suggestion, the girlfriend called defendant and said that she was sick and receiving treatment at the New York Downtown Hospital. She asked defendant to pick her up. She went to the location with detectives and a team of police officers. Defendant arrived in a car and when he exited it he was apprehended by the police. One of the detectives entered the passenger side of defendant's car after obtaining the keys, and saw, in plain view, what appeared to be a rifle and scope, sticking out of a black bag located between the front and back seats. He also saw two large backpacks, one of which appeared to contain magazines with ammunition. Another detective saw a backpack in the back seat. At the precinct, the police searched defendant and recovered from his pocket three rounds of .22 caliber ammunition and a switchblade knife. That night, warrants were obtained to search defendant's vehicle and his apartment. Officers searched defendant's apartment and recovered a loaded, operable Glock pistol with a high-capacity magazine, as well as gun parts, including parts for an AR-15 rifle, a .22 caliber conversion kit for the Glock, an extra gun barrel, an "extremely large amount of ammunition," magazine holders, and knife cases.

In addition, they found targets with bull's-eyes, a bulletproof vest, and two bullet-resistant Kevlar helmets. In defendant's vehicle detectives found an operable Bushmaster AR-15 assault rifle in a black bag on the floor behind the passenger seat with a fully-loaded .223 caliber magazine, and a round in the chamber. They also found two green backpacks in the back seat containing, among other things, 26 fully-loaded 30-round magazines with .223 caliber ammunition (780 rounds total), a .22 caliber conversion kit, another bulletproof vest, two .45 caliber magazines, one .22 caliber magazine, fifty-seven .45 caliber rounds, and seven .22 caliber rounds.

On the conviction for criminal possession of a weapon in the second degree, defendant was sentenced, as a second felony offender, to a determinate term of 15 years for possession of the loaded assault rifle. On the conviction for criminal possession of a weapon in the third degree in connection with the Glock pistol, defendant was sentenced to two indeterminate sentences of 3½ to 7 years, concurrent to each other but consecutive to the 15 year term. The 22 counts of the same crime that stemmed from defendant's possession of large capacity ammunition feeding devices resulted in 22 concurrent terms of 7 years, and the count relating to the knife brought defendant an indeterminate term of

2 to 4 years, also to run concurrently. Pursuant to Penal Law 70.30(1)(e)(ii), the entire aggregate sentence of 18½ to 22 years imprisonment was reduced to a determinate sentence of 20 years.

The court properly denied defendant's motion to suppress evidence recovered from his car pursuant to a search warrant. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). Further, the court properly exercised its discretion in precluding cross-examination that went beyond the scope of the hearing.

The court also properly denied defendant's motion to suppress evidence recovered from his computers pursuant to another search warrant. The warrant application established probable cause to believe that defendant was engaged in a pattern of firearms transactions, and supported an inference that evidence of such transactions could be found on his computers (*see generally People v Gramson*, 50 AD3d 294, 295 [2008], *lv denied* 11 NY3d 832 [2008]). In any event, the computer evidence introduced at trial added little or nothing to the People's case, and any error in receiving that evidence was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant challenges the legal sufficiency of the evidence

supporting his convictions of possessing a pistol during two incidents that took place before the police recovered the pistol from defendant's apartment. However, the totality of the circumstantial evidence warranted the conclusion that the pistol, which was determined to be operable when recovered after defendant's arrest, was also operable when defendant displayed it on the occasions in question. As in *People v Temple*, "[u]nder the circumstances of this case it defies logic to conclude that the gun was inoperable," (165 AD2d 748, 749 [1990], *lv denied* 76 NY2d 944 [1990]), or that operability on those occasions was not established beyond a reasonable doubt.

The witnesses were unable to specify the dates on which these two incidents occurred. Accordingly, the corresponding counts of the indictment set forth approximate time frames. Under the circumstances, the People were unable to allege more specific time periods, and defendant received reasonable notice (*see People v Morris*, 61 NY2d 290, 296 [1984]; *People v Latouche*, 303 AD2d 246 [2003], *lv denied* 100 NY2d 595 [2003]).

Defendant also challenges the legal sufficiency of the evidence supporting his convictions relating to possession of large capacity ammunition feeding devices (Penal Law § 265.02[8]). However, the evidence established that the 30-round

magazines met the statutory definition (Penal Law § 265.00[23]).

The court properly received evidence of defendant's abusive conduct. One of the main issues at trial was the credibility of defendant's former girlfriend, particularly with regard to certain charges of which defendant was ultimately acquitted. The challenged evidence completed the narrative and provided necessary background information to place the ex-girlfriend's testimony in a believable context (*see People v Leeson*, 12 NY3d 823, 827 [2009]; *People v Dorm*, 12 NY3d 16, 19 [2009]; *People v Steinberg*, 170 AD2d 50, 72-74 [1991], *affd* 79 NY2d 673 [1992]). The evidence was also relevant to defendant's intent to use one of the weapons unlawfully against another person, which was an element of one of the charges.

The probative value of the challenged evidence outweighed any prejudicial effect. While some of the evidence involved cruelty to animals, it was not so inflammatory as to deprive defendant of a fair trial. The court minimized any prejudice by means of careful limiting instructions, and it took sufficient curative action regarding inadmissible testimony that was inadvertently elicited. In any event, given the overwhelming evidence against defendant, there is no significant probability that the admission of the challenged evidence affected the

verdict (*see People v Gillyard*, 13 NY3d 351, 356 [2009]).

"It is our duty in reviewing the defendant's sentence to examine the record in the light of the objectives of the penal system and to make a decision based on the particular facts of the case. Generally, four principles have been accepted as objectives of criminal punishment: deterrence; rehabilitation; retribution; and isolation. The primary responsibility for imposing a condign sentence rests on the [t]rial [j]udge, and the determination of the kind and limits of punishment made by the [t]rial [j]udge should be afforded high respect" (*People v Notey*, 72 AD2d 279, 282 [1980] [internal citations omitted]).

In light of these principles, we find only that it was excessive to run the indeterminate sentences consecutive to the determinate sentence of 15 years. However, the dissent's argument for a further reduction is entirely unfounded and rings hollow. First, while defendant may not have engaged in any behavior towards humans which would fit the dictionary definition of "violent," many of his actions involving the weapons he possessed were unquestionably sinister and menacing, such as pointing them at people and otherwise displaying them in his encounters with people he perceived as hostile. It is mystifying that the dissent does not consider defendant's numerous

statements to his girlfriend that he was going to kill her as "threatening." Further, defendant's brazen and cavalier decisions to carry a Glock pistol in as public a place as Penn Station and to brandish that same weapon in a therapy session demonstrate that this is not a garden variety weapons possession case.

In any event, the dissent's position is inconsistent with the Penal Law. Taken to its logical conclusion, the dissent's argument would preclude a court from ever sentencing a defendant convicted of weapons possession to the maximum prison term, in the absence of aggravating factors such as the actual use of a weapon to harm somebody. However, this plainly contravenes the intent of the Legislature. Had the Legislature meant to limit the sentence for strict possession to the prison terms preferred by the dissent, it presumably would have so provided in the statute.

Further, contrary to the dissent's view, nothing in our precedent mandates that the maximum sentence in a weapons possession case may not be imposed where no one was harmed. The sentences handed down in each of the cases cited by the dissent were based on the unique facts presented by each case. Further, the dissent's analysis ignores the different goals of sentencing.

For example, one of the four widely recognized goals of sentencing is isolation, which "is required when the individual is a continuing threat to the community" (*People v Notey*, 72 AD2d 282 n 2). The cases cited by the dissent do not suggest that the defendant in those cases represented a continuing threat, so the sentencing courts in those cases may have seen no great need to "isolate" the defendant, notwithstanding the harm caused to the victims in those cases. Here, defendant displayed extreme anti-social behavior and recklessness, which calls for isolation from the community, notwithstanding that he was not found to have intended to use the weapons. Indeed, the probation department concluded in its presentence report that defendant "appears to be a threat to the community," and that his prognosis for "future adjustment towards society appears to be poor."

By adopting trial counsel's statement that defendant was merely a gun hobbyist, the dissent virtually ignores all of the evidence in the case. To this defendant guns are clearly more than a pastime. They are a means of intimidation, menace and exerting power. His use of them, repeatedly, in such a manner, fully justifies the sentence imposed herein. Indeed, if this strict possession case does not call for the maximum sentence, one is hard pressed to imagine one that would.

Defendant's remaining contentions are unpreserved or abandoned, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

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

CATTERSON, J. (dissenting in part)

I must respectfully dissent in part. The sentence proposed by the majority, even though reduced from 20 years to 15 years, is, in my opinion, still excessive. As defense counsel argued at sentencing, this is a "straight possession case." The 30-year-old defendant did not fire any of the weapons, injure anyone, or commit any acts of violence during the incidents of weapons possession. The majority justifies the 15-year sentence by relying entirely on the testimony of the defendant's girlfriend. However, the testimony that the defendant threatened to shoot her and other people which the majority reiterates for five pages was soundly rejected by the triers of fact. Had the jury credited that testimony, they would not have acquitted the defendant of all counts that included intent to cause harm to another person.

Clearly, the jury agreed instead with the defense's characterization of the girlfriend as a "sophisticated and callous criminal" who decided to "get rid of" the defendant "once and for all." Indeed, as adduced at trial, the defendant's girlfriend was arrested in 2006 for prostitution, promoting prostitution, and money laundering. Subsequently, she entered into a cooperation agreement with the Manhattan District

Attorney's Office. On January 2, 2008, she met with the detectives handling her prostitution case to formulate a plan to apprehend the defendant. The girlfriend lured the defendant to New York Downtown Hospital with a lie that she was sick and receiving treatment there. When the defendant arrived, he was arrested by the police.

Furthermore, the girlfriend's testimony of threats against her sister's boyfriend was controverted by the boyfriend himself who denied that the defendant ever said he would shoot him. Hence, it should not mystify the majority that I do not consider the defendant's alleged numerous statements to his girlfriend as "threatening." Quite simply, in my opinion, those statements cannot be viewed as credible evidence.

During the defendant's arrest, a search of his automobile turned up a Bushmaster AR-15 rifle and large-capacity ammunition feeding devices, and the defendant was carrying a switchblade. In a subsequent search of his apartment, the police discovered, among other things, a Glock 9 mm pistol and seized three computers. At trial, the prosecution presented evidence taken from the computers that the defendant used internet forums to comment on carrying and shooting guns, and that the defendant sent an instant message on his computer stating that he had

almost shot someone. Witnesses testified to the defendant's possession of firearms outside of his apartment, including that he stowed the rifle and ammunition in his vehicle, and on two occasions took the Glock to Penn Station and a therapist appointment. However, there was no testimony that the defendant was violent or threatening, or that he fired the weapons on these occasions.

After a jury trial, the defendant was acquitted of possessing the assault rifle with intent to use it against another person, and both counts of first-degree robbery. He was convicted of one count of second-degree criminal possession of a weapon (the rifle) and multiple counts of third-degree criminal possession of a weapon (the Glock, the rifle, ammunition feeding devices, and the switchblade). Having been previously convicted of a felony,[1] the defendant was sentenced, as a second felony offender, to a determinate sentence of 15 years for possession of the loaded assault rifle; to indeterminate sentences of 3½-to-7 years for each of the two counts of possession of the Glock,

[1] The defendant was convicted in 1998 of conspiracy to commit arson in furtherance of an insurance scam wherein the defendant aided and abetted a friend who wanted to burn his own truck. Conspiracy to commit arson is not a violent felony as defined in Penal Law § 70.02.

concurrent with each other and consecutive to the 15-year sentence; to determinate sentences of seven years for possessing an assault weapon and large capacity ammunition feeding devices, concurrent with each other and the above sentences; and to an indeterminate sentence of 2-to-4 years for possession of a switchblade knife, concurrent with the above sentences. The aggregate sentence of 18½-to-22 years imprisonment was reduced by operation of Penal Law 70.30(1)(e)(ii) to a determinate sentence of 20 years.

On appeal, the defendant argues, inter alia, that because there was no evidence that he ever shot at, or injured anyone with any of the weapons, the 20-year determinate sentence is excessive. The majority agrees to the extent of reducing the sentence to 15 years. For the following reasons, I would further reduce the sentence to seven years aggregate.

While a sentencing court possesses broad discretionary power with respect to the imposition of a sentence, this Court has broad, plenary power pursuant to CPL 470.15(6)(b) to modify a sentence that is unduly harsh or severe. Thus, even where the sentence is within the permissible statutory range, this Court may review a sentence in the interest of justice without deference to the sentencing court and regardless of whether the

trial court abused its discretion in the imposition of a sentence. See People v. Delgado, 80 N.Y.2d 780, 783, 587 N.Y.S.2d 271, 272, 599 N.E.2d 675, 676 (1992).

The defendant was convicted of second-degree criminal possession of a weapon for possessing a loaded rifle outside of his home or business pursuant to Penal Law § 265.03(3), which is a class C violent felony (see Penal Law § 70.02(1)(b)). Under Penal Law § 70.06(6)(b), governing second felony offenders, the sentencing court was required to impose a determinate sentence of imprisonment for a term of at least five years and not exceeding 15 years. The defendant was given the maximum term of 15 years.

In my view, imposition of the maximum sentence for weapons possession where no one was harmed ignores the precedent of this court. We have found a sentence of that length appropriate in weapons possession cases where a homicide has occurred. In People v. Guzman (266 A.D.2d 37, 697 N.Y.S.2d 623 (1st Dept. 1999), lv. denied, 94 N.Y.2d 920, 708 N.Y.S.2d 359, 729 N.E.2d 1158 [2000]), this Court affirmed a sentence of 7½-to-15 years for criminal possession of a weapon in the second degree in a case where the defendant, a second *violent* felony offender, *fatally shot* an individual. In People v. Banner (61 A.D.3d 592, 877 N.Y.S.2d 312 (1st Dept. 2009), lv. denied, 13 N.Y.3d 741, 886

N.Y.S.2d 95, 914 N.E.2d 1013 (2009)), the defendant was convicted by a jury of *manslaughter* and criminal possession of a weapon in the second degree and we affirmed concurrent sentences of 8 and 15 years respectively. Fifteen years is the sentence for manslaughter. See e.g. People v. Calderon, 66 A.D.3d 314, 884 N.Y.S.2d 29 (1st Dept. 2009)(5 to 15 years for second-degree manslaughter), lv. denied, 13 N.Y.3d 858, 891 N.Y.S.2d 693, 920 N.E.2d 98 (2009); People v. Abreu-Guzman, 39 A.D.3d 413, 835 N.Y.S.2d 90 (1st Dept. 2007) (5 to 15 years for second-degree manslaughter), lv. denied, 9 N.Y.3d 872, 842 N.Y.S.2d 784, 874 N.E.2d 751 (2007); People v. Oliveri, 29 A.D.3d 330, 813 N.Y.S.2d 435 (1st Dept. 2006) (15 years for first-degree manslaughter), lv. denied 7 N.Y.2d 760, 819 N.Y.S.2d 886, 853 N.E.2d 257 (2006).

The majority appears to agree with the People that a longer sentence is justified because the defendant is "a homicide waiting to happen." Again, relying entirely on the testimony of the defendant's girlfriend that he threatened to shoot her and others, the majority concludes that the defendant's behavior, if not violent, was "unquestionably sinister and menacing." However, it bears repeating that the jury *specifically rejected* the People's claims that the defendant intended to use the

weapons. On the contrary, the credible evidence showed that while the defendant had an avid interest in guns, which he used for target practice or sharpshooting, he did *not* use or intend to use the weapons against another person.

At sentencing, defense counsel described the defendant's collection of weapons and ammunition and his activity on various internet gun forums as his "gun hobby." Since it is undisputed that no one was injured, or even that the defendant displayed or brandished the rifle, I recommend five years determinate.

I would also recommend reducing the two sentences for third-degree criminal possession of the Glock to 2-to-4 years indeterminate for the following reasons: The defendant was convicted of third-degree criminal possession of a weapon pursuant to Penal Law § 265.02(1), which was a conviction for fourth-degree possession, elevated to third degree by dint of a prior 1998 felony conviction. As a second felony offender, where the current crime is a nonviolent class D felony (see Penal Law § 70.06(6), and § 70.02(1)(c) (excluding subdivision one of section 265.02 from the definition of violent felony)), the maximum term for third-degree weapons possession is at least four years and must not exceed seven years. See Penal Law § 70.06(3)(d). "[T]he minimum period of imprisonment under an indeterminate

sentence for a second felony offender must be fixed by the court at one-half of the maximum term imposed and must be specified in the sentence." Penal Law § 70.06(4)(b). Pursuant to Penal Law § 70.06(2), the term is indeterminate.

Choosing the maximum of seven years, the court sentenced the defendant to 3½-to-7 years indeterminate for third-degree weapons possession, concurrent with each other and consecutive to the sentence for possession of the rifle. The defendant persuasively argues that this amounts to a double-counting of his prior conviction. His 1998 conviction is counted once to raise the fourth-degree possession charge, a class A misdemeanor, to the third degree, a class D felony; and then a second time in his sentence as a second felony offender.

In my view, this double-counting, together with the undisputed fact that no one was injured, requires reduction of the sentence imposed by the sentencing court. Thus, I would recommend an indeterminate sentence of 2-to-4 years for each of the two Glock possession convictions. See Penal Law §§ 70.02(1)(c), 70.06(2), (3)(d), (4)(b), and § 265.02(1). Pursuant to Penal Law § 70.30(1)(d), "[i]f the defendant is serving one or more indeterminate sentences of imprisonment and one or more determinate sentences of imprisonment which run consecutively,

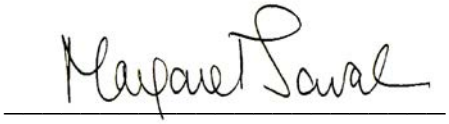
the minimum [...] terms of the indeterminate [...] sentences and the term [...] of the determinate sentence [...] are added to arrive at an aggregate maximum term of imprisonment."

Thus, a five-year determinate sentence for second-degree criminal possession of a weapon and indeterminate concurrent sentences of 2-to-4 years for third-degree criminal possession of a weapon which run consecutive to the five-year sentence, result in an aggregate maximum sentence of seven years, which I believe is appropriate in this case and consistent with this Department's precedent. See e.g. People v. Brown, 92 A.D.3d 455, 937 N.Y.S.2d 230 (1st Dept. 2012) (unanimously affirming a term of seven years for the defendant, a second felony offender, who was convicted of criminal possession of a weapon in the second degree after a jury trial), lv. denied, __ N.Y.3d __ (2012); People v. Padilla, 89 A.D.3d 505, 932 N.Y.S.2d 71 (1st Dept. 2011) (unanimously affirming a seven-year sentence for the defendant, a second violent felony offender, who was convicted of criminal possession of a weapon in the second degree after a jury trial). To the extent that the defendant was also sentenced to the maximum terms for the remaining third-degree weapons possession convictions (i.e., seven years determinate for possession of an assault rifle and large capacity feeding devices pursuant to Penal Law §

70.06(6), § 265.02(7) and (8)), I would reduce those also, but do not make those calculations here, since those seven-year sentences run concurrent with the seven-year aggregate calculated above and do not impact that sentence.

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

ENTERED: JUNE 21, 2012



DEPUTY CLERK

Mazzarelli, J.P., Saxe, Catterson, Acosta, Román, JJ.

6624-6625 BGC Partners, Inc., Plaintiff-Respondent, Index 600692/07

-against-

Refco Securities, LLC, Defendant-Appellant.

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SNR Denton US LLP, New York (Arthur H. Ruegger of counsel), for appellant.

Saul Ewing LLP, New York (Francis X. Riley III of counsel), for respondent.

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Orders, Supreme Court, New York County (Bernard J. Fried, J.), entered June 28, 2011 and July 20, 2011, which, respectively, granted plaintiff's motion to confirm a Special Referee's report denying defendant's discovery requests and denied defendant's cross motion to reject the report, and denied defendant's motion for leave to amend its answer to include the affirmative defense of patent invalidity, unanimously affirmed, with costs.

Pursuant to the parties' "Master Software License, Maintenance and Service Agreement," defendant had the right to the use of certain software and equipment and to maintenance and support services, in exchange for the payment to plaintiff of an annual licensing fee and a monthly maintenance fee (the Fixed

Fees). Defendant also agreed to share with plaintiff portions of any commissions it received as a result of trading activity by its clients. The Fixed Fees were required to be paid through the six-year term of the agreement and could be declared due and payable immediately in the event of a default by defendant.

Approximately four years into the term of the agreement, defendant ceased doing business, and ceased paying the Fixed Fees. Plaintiff negotiated new commission contracts, which did not include payment of the Fixed Fees, with former clients of defendant. After plaintiff commenced this action to recover the remainder of the Fixed Fees, defendant sought discovery of the new commission contracts on the ground that plaintiff's ability to collect the full commissions reduced its claim. The court denied defendant's request, finding that the new commission contracts were irrelevant to plaintiff's right to the Fixed Fees and therefore not necessary in the defense of the action (*see* CPLR 3101). We agree.

The license agreement clearly and unambiguously entitled plaintiff to an annual license fee and a monthly maintenance fee for the entire term of the agreement and, upon defendant's default, to all fees owing through the remainder of the term. The agreement also provided that plaintiff's right to the Fixed

Fees was not tied to any other remedy available to it. Thus, according to the plain meaning of the agreement's terms, the Fixed Fees were not intended to act as "substitute revenues" for the commissions, as defendant claims (*see Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]).

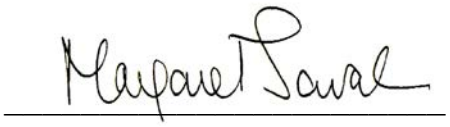
The court also properly denied defendant's motion to amend its answer to include the affirmative defense of patent invalidity. "The decision to allow or disallow the amendment is committed to the court's discretion" *(Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]). Furthermore, leave to amend should be denied when the proposed amendment is patently lacking in merit (*Board of Mgrs. of Alexandria Condominium v Broadway/72nd Assoc.*, 285 AD2d 422, 423 [2001]). The defense of patent invalidity was premised on the assertion that the agreement was actually a patent license. This position is frivolous. The claim was made for the first time nine years after the execution of the agreement, more than four years after the filing of the complaint in this action, and more than five years after the patent alleged to be a part of the agreement was declared invalid. The agreement contains no indicia whatsoever that it was intended to be a patent license. The word "patent" appears nowhere in the agreement, and, in fact, the disputed

patent was not issued until two years after the agreement was executed. Indeed, Refco admitted that it only learned of the "580 Patent" in 2010. Again, this was nine years after the original agreement was executed.

We have considered defendant's remaining arguments and find them unavailing.

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

ENTERED: JUNE 21, 2012



DEPUTY CLERK

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

7215 Nineteen Eighty-Nine, LLC, etc., Index 600424/08
Plaintiff-Appellant-Respondent,

-against-

Carl C. Icahn, et al.,
Defendants-Respondents-Appellants,

1879 Hall, LLC,
Nominal-Defendant-Respondent-Appellant.

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7216 Nineteen Eighty-Nine, LLC, etc., Index 601265/07
Plaintiff-Appellant-Respondent,

-against-

Carl C. Icahn, et al.
Defendants-Respondents-Appellants.

_____

Jeffrey I. Ross, New York, for Nineteen Eighty-Nine, LLC, appellant-respondent.

Robert R. Viducich, New York and Herbert Beigel & Associates LLC, Tucson, AZ (Herbert Beigel, of the bar of the State of Arizona, admitted pro hac vice, of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered June 29, 2010 (Index 601265/07), which denied the parties' motions for summary judgment, unanimously modified, on the law, to grant defendants' motion as to the causes of action for breach of fiduciary duty, fraud, negligent misrepresentation and aiding and abetting breach of fiduciary duty and fraud, and to grant plaintiff's motion for summary judgment on the causes of

action for breach of contract, and otherwise affirmed, without costs. Order, same court and Justice, entered March 9, 2011 (Index 600424/08), which to the extent appealed, denied plaintiff's motion for summary judgment on the complaint and dismissed the counterclaim, and granted plaintiff's motion to strike evidence, unanimously modified, on the law, to declare, upon the counterclaim, that nominal defendant 1879 Hall, LLC was not dissolved, and to deny plaintiff's motion to strike a portion of defendants' summary judgment evidence as inadmissible settlement communications, and otherwise affirmed, without costs.

In these two actions arising from a joint venture, the dispute between the parties is governed by a limited liability company (LLC) agreement which specifies that Delaware law applies. Accordingly, the motion court properly applied Delaware law.

In the action for breach of contract, breach of fiduciary duty and related business torts alleging that defendants usurped a joint venture opportunity by trading in securities for their own account (Index 601265/07), the tort causes of action should have been dismissed as duplicative of the breach of contract causes of action. Plaintiff's claim that Chelonian made false representations in its books of account by failing to disclose

purchases of $108,093,998 face amount of Federal Mogul Corporation (FMO) bonds which it had made without notifying plaintiff, are allegations of breach of the parties' agreement. Likewise, the fiduciary claims are based on breach of the agreement (*see Solow v Aspect Resources, LLC*, 2004 WL 2694916, *4, 2004 Del Ch LEXIS 151, *17-19 [Del Ch 2004] ["Because of the primacy of contract law over fiduciary law, if the duty sought to be enforced arises from the parties' contractual relationship, a contractual claim will preclude a fiduciary claim."]; *see also Gale v Bershad*, 1998 WL 118022, 1998 Del Ch LEXIS 37 [Del Ch 1998] [if the duty sought to be enforced arises out of the parties' contractual, as opposed to their fiduciary relationship, that would preclude any fiduciary claim based on the same conduct]). The remaining tort claims for negligent representation and fraud, under the facts alleged here, amount to an unjustified breach of contract, "and should be remedied through contract law and not through tort law" (*Tenneco Auto. Inc. v El Paso Corp.*, 2007 WL 92621, *6, 2007 Del Ch LEXIS 4, *27 [Del Ch 2007]; *see also CPM Indus., Inc. v ICI Americas, Inc.*, 1990 WL 28574, 1990 Del Super LEXIS 88 [Del. Super. Ct. 1990]).

Plaintiff's motion for summary judgment on the breach of contract claims should have been granted. The motion court found

an issue of fact as to whether the agreement, which required defendants to issue a capital call each time it intended to purchase the bonds, had been modified by the parties. We find that the record demonstrates that the agreement was, to some extent, modified by the course of conduct of the parties, and that there is no triable issue of fact regarding defendants' assertion that the agreement was modified by a course of conduct where business was conducted solely on a verbal basis.

In some instances, rather than using the written capital call as the form of advance notice, the parties exchanged e-mails that set forth an intention to purchase, and the other party's response as to whether it opted to participate (the LLC Agreement contained a clause requiring plaintiff to provide written notice to defendants when it initiated an FMO trade, so that the party initiating the trade was to notify the other in writing). In other instances, one party would memorialize in an e-mail a discussion that occurred regarding a purchase, and the other's decision on participation. This conduct took place in 41 trades that are not the subject of this litigation.

There are 18 trades for which plaintiff claims it received no notice from defendants, and for which defendants maintain they provided verbal notice and received a verbal response. Because

defendants assert that the agreement requiring notice by written capital call was modified by a course of conduct of mere verbal notice and response, it is their burden to prove this modification by clear and convincing evidence (*see Eureka VIII LLC, v Niagara Falls Holding LLC*, 899 A2d 95, 109 [Del Ch 2006]).

However, defendants have failed to meet even the lesser burden of a preponderance of the evidence. While defendants' representative Intrieri avers that he would either call or e-mail plaintiff's representatives, and that they would respond either verbally or by e-mail, defendants have provided no notations or other record that these conversations took place and that plaintiff provided a verbal notification as to whether it chose to participate. In contrast, in numerous instances not at issue here, when one party opted either to participate, or not to participate in a purchase initiated by the other, there are e-mails confirming that decision.[1]

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[1]For example, in an illuminating e-mail exchange, plaintiff's representative Pacholder sent an e-mail to Intrieri, with a copy to her supervisor, stating that pursuant to Section 8 of the LLC Agreement, plaintiff has chosen to not contribute its share of the Capital Call for a particular FMO. The supervisor's e-mail response was "this is very cold . . . make sure you talk to him and give him warm and cozy feeling," to which Pacholder responded "I did - spoke w/him in person first-just sent the e-mail *(per his request)* afterwards"(emphasis added).

Defendants argue that the agreement does not require them to keep any notations or records of verbal notification. This argument misses the point because Intrieri's conclusory statement that the parties agreed to conduct business verbally is insufficient to meet the burden of proof that the agreement was modified by this particular course of conduct. Notably, defendants do not point to any transaction in which plaintiff participated but for which there is no e-mail confirmation - i.e., that mere verbal notification of participation was given. Nor can Intrieri recall the specifics of any transaction, including any of the trades for which he claims he provided verbal notice but for which plaintiff verbally declined to participate. Thus, plaintiff has met its burden of proving that it did not receive notice required by either the agreement, or the modification of the agreement established by the parties' course of conduct, and is accordingly entitled to summary judgment on its breach of contract causes of action.

In the action alleging usurpation of the limited liability company's opportunity to participate in the exercise of an option to purchase the reorganized bankrupt's stock, and an individual claim alleging denial of that opportunity to the company's minority member (Index 600424/08), the motion court correctly

found issues of fact, including whether defendants failed to offer plaintiff the chance to participate in the options on the same terms as defendants and whether plaintiff was willing and able to pursue the options, including the $100 million loan provision.

Furthermore, the court properly rejected defendants' argument that the LLC had no interest or expectancy in the options in light of the December 2005 Consent Agreement. That agreement, while memorializing the parties' agreement that no additional trades in FMO securities and claims would be closed in the company, also provided that "all proceeds of any kind or character whatsoever received related to the ownership of FMO [s]ecurities and [c]laims . . . shall be deemed to have been received by 1879 Hall, LLC" and that the parties' rights and obligations "shall continue in full force and effect as if all FMO Securities and Claims were held by 1879 Hall, LLC." These provisions demonstrate that the parties' LLC had an economic interest in the options.

While the interpretation of the LLC Agreement is governed by Delaware law, the motion to strike evidence is subject to New York law (*see* CPLR 4547). The court erred in granting plaintiff's motion to strike from the record, as a settlement

communication, an exchange of e-mails between defendants' counsel and plaintiff's counsel regarding participation in the options and a draft agreement prepared by plaintiff. Neither the e-mail nor the draft presented any offer or acceptance of a "compromise."

Plaintiff's counsel's inclusion of language in the draft that it is "in the context of settlement" does not make it a settlement document. Rather, the draft was an expression of plaintiff's position that defendants were obligated to allow plaintiff to participate in the options; defendants' responsive e-mail set forth defendants' position that plaintiff's draft agreement was only preserving plaintiff's rights but not defendants', and that in order to go forward, plaintiff would have to acknowledge its willingness to put up its share of the $100 million loan (*see Alternatives Fed. Credit Union v Olbios, LLC*, 14 AD3d 779, 781 [2005] [letters stating defendant's position without any proffer of settlement are admissible]; *see also Java Enters., Inc. v Loeb, Block & Partners LLP*, 48 AD3d 383, 384 [2008] ["e-mail is not inadmissible under CPLR 4547, which applies only to offers 'to compromise a claim which is disputed'"]).

It is undisputed that the conditions for dissolution in §

18.1.4 of the LLC agreement were not satisfied. However, rather than dismiss defendants' counterclaim for a declaration that 1879 Hall LLC was dissolved, we grant plaintiff summary judgment on this issue and declare in its favor (*see Lanza v Wagner*, 11 NY2d 317, 334 [1962], *appeal dismissed* 317 US 74 [1962], *cert denied* 371 US 901 [1962][error to dismiss complaint for declaratory judgment where one party not entitled to declaration; judgment declaring in favor of other party directed]).

We have considered the parties' remaining contentions in support of affirmative relief and find them unavailing.

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

ENTERED: JUNE 21, 2012

DEPUTY CLERK

Tom, J.P., Andrias, DeGrasse, Richter, Román, JJ.

7550 The People of the State of New York, ex rel. Ronald L. Kuby, on behalf of Gigi Jordan,
Petitioner-Appellant,

-against-

Darlene Merritt, etc.,
Respondent-Respondent.

Index 110374/11

Ronald L. Kuby, New York (Alan M. Dershowitz, of the bar of the State of Massachusetts, admitted pro hac vice, of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Larry Stephen, J.), entered September 21, 2011, denying the writ of habeas corpus and dismissing the petition, unanimously affirmed, without costs.

In February 2010, petitioner, Gigi Jordan, was charged with second-degree murder stemming from allegations that she intentionally caused the death of her eight-year-old autistic son by giving him an overdose of prescription medication. Petitioner also ingested a number of pills and left a suicide note stating that her son's death was the only way to protect him from his allegedly abusive father and that she did not wish to live

without him.

Following arraignment, petitioner asked the court to set bail in the amount of $5 million, with a specific condition that she be released to a psychiatric facility. Supreme Court (Daniel FitzGerald J.) denied the request and remanded petitioner with the understanding that the application could be renewed before the assigned judge. On renewal, petitioner offered to post a $5 million bond fully secured by her New York City properties, and to freeze her assets, allegedly totaling approximately $40 million, by placing them in an escrow account to be managed by two named attorneys. She also proposed that her release be conditioned on a security package providing that she would be confined to her Manhattan brownstone and monitored round the clock by on-premises armed security guards and an electronic G.P.S. system, at her own expense, and on her continued psychiatric treatment.

By order dated April 23, 2010, Supreme Court (Charles Solomon, J.), considering the factors enumerated in CPL 510.30(2)(a), denied the application. Petitioner, by new counsel, moved for reconsideration of bail "under the same conditions and restrictions that apply to Dominique Strauss-Kahn." By order dated August 11, 2010, Justice Solomon denied

the application. After hearing argument, Justice Stephen denied the writ of habeas corpus and dismissed the petition on the ground that it "[could] not say based on the seriousness of this case and all of the other factors laid out at these bail hearings that [Justice Solomon] did abuse his discretion."[1]

"The action of the bail-fixing court is nonappealable, but may be reviewed in a habeas corpus proceeding if it appears that the constitutional or statutory standards inhibiting excessive bail or the arbitrary refusal of bail are violated" (*People ex rel. Rosenthal v Wolfson*, 48 NY2d 230, 231-233 [1979] [internal quotation marks omitted]). It is not the function of the habeas court to "examine the bail question afresh or to make a de novo determination of bail" (*id.* [internal quotation marks omitted]). The scope of inquiry is whether or not the bail court abused its discretion by denying bail without reason or for reasons insufficient in law (*id.*; *People ex rel. Hunt v Warden of Rikers Is. Correctional Facility*, 161 AD2d 475 [1990], *lv denied* 76 NY2d 703 [1990]). Where the record shows that the bail court considered the factors enumerated in CPL 510.30(2)(a), and the

[1]On September 22, 2011, a Justice of this Court denied petitioner's request for bail on an interim basis pending appeal. On November 10, 2011, this Court denied petitioner's motion for bail pending appeal (2011 NY Slip Op 89516 [2011]).

"denial is supported by the record, it is an exercise of discretion resting on a rational basis and thus beyond correction in habeas corpus" (*People ex rel. Parker v Hasenauer*, 62 NY2d 777, 778-779 [1984]; *see also People ex rel. Lazer v Warden, N.Y. County Men's House of Detention*, 79 NY2d 839 [1992]).

Applying these principles, Justice Stephen properly found that Justice Solomon's determination denying the bail application was "an exercise of discretion resting on a rational basis" (*People ex rel. Parone v Phimister*, 29 NY2d 580, 581 [1971]). "The record supports the bail court's determination, based upon the factors enumerated in CPL 510.30(2)(a), that petitioner is a flight risk, given the severity of the crime charged, . . . the likelihood of a conviction and lengthy sentence, [the lack of strong ties to this community] and the financial resources petitioner could use to facilitate flight, including [the possibility of] property outside the jurisdiction" (*People ex rel. Litman v Warden of Manhattan House of Detention*, 23 AD3d 258 [2005], *lv denied* 6 NY3d 708 [2006]; *People ex rel. Schreiber v Warden of Queens House of Detention for Men*, 282 AD2d 555 [2001]). This is not an appropriate case for granting bail under special conditions, particularly in light of petitioner's mental instability (*see People ex rel. Hunt*, 161 AD2d at 475). There is

a sufficient basis in the record for concern that petitioner may not be capable of consistently controlling her fears and impulses, which in the past have led to flight.

Nor are we persuaded by petitioner's argument that the bail court's determination was arbitrary because the court failed to expressly rule on the adequacy of her security package. In its April 23, 2010 decision, the bail court discussed the security package in detail, but nonetheless concluded that "no amount of bail, even when coupled with the very stringent conditions proposed by the defense, can adequately assure defendant's return to court." On renewal, the security package proposed was essentially the same, and in its August 11, 2011 decision, the bail court stated that it "reconsidered its prior decision in light of the new arguments made and still feels that the setting of bail is inappropriate."

The bail court also explained why it rejected petitioner's contention that the bail conditions granted for Dominique Strauss-Kahn compelled the grant of bail here. The court rationally observed that the only similarity between the cases was that both defendants had the financial means to post significant bail and pay for a private security team to monitor them. However, unlike Strauss-Kahn's case, this case involves

the murder of a child, a more serious charge than the charge against Strauss-Kahn, and a greater possibility of conviction, given that petitioner's defense of "altruistic filicide" has not been successfully advanced in any court in this country, which together provide a greater incentive to flee. Further, Strauss-Kahn's mental condition was not at issue in his case. Petitioner's compromised mental state bears directly on her judgment, making her more willing to undertake extreme and even dangerous measures in an effort to abscond.

Petitioner's position, if accepted, would mandate that bail be granted in every case in which the accused has the financial resources to offer private security and monitoring, thereby depriving the court of its discretion to grant or deny bail on consideration of the factors enumerated in CPL 510.30(2)(a). While petitioner claims that her security package is foolproof and trumps all other factors, the fact remains that no ad hoc arrangement based on keeping a defendant in her private home under the watch of a security firm that she hired could be as secure as remand. Indeed, petitioner is an accomplished woman who accumulated vast financial resources. She has moved around repeatedly, and on previous occasions endeavored to conceal her tracks in doing so. While petitioner contends that she provided

an explanation for a $14.5 million transfer from a Swiss bank to the United States, the concern that the bail court expressed that her disclosure was inadequate and that she might have other undisclosed assets was not eliminated. Thus, as the respondent argues, it is not inconceivable that petitioner could by stealth or promise manipulate her way to freedom.

Petitioner also argues that the court did not properly take into account the new evidence she submitted in her renewed bail application regarding her mental condition, her community ties, her financial circumstances, and the likelihood of conviction. However, while the reports indicate that petitioner's mental condition has stabilized, she still suffers from depression. Further, her mental condition was so extreme at the time of the initial application, and such extensive psychiatric treatment was required, that it is rational to conclude that her mental condition at the time of the renewed application remained questionable.

While petitioner presented additional facts intended to demonstrate community ties, the bail court accurately noted that she had resided in various states and did not have family in New York City. These facts support the court's conclusion that she was a flight risk. While the court made observations regarding

the overwhelming evidence against petitioner and the sentence she faces, it did not place undue weight on those factors or otherwise abuse its discretion.

We have considered and rejected petitioner's remaining claims, including all her procedural arguments.

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

ENTERED: JUNE 21, 2012

DEPUTY CLERK

Mazzarelli, J.P., Friedman, Catterson, Richter, Manzanet-Daniels, JJ.

7696 The People of the State of New York, Respondent, Ind. 5353/09

-against-

Richard Agudelo, Defendant-Appellant.

Patrick J. Brackley, New York, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sara M. Zausmer of counsel), for respondent.

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered October 15, 2010, convicting defendant, after a jury trial, of grand larceny in the third degree, and sentencing him, as a second felony offender, to a term of 2½ to 5 years, unanimously affirmed.

The victim's testimony was sufficient to authenticate the content of a set of cell phone instant messages exchanged between her and defendant. The detective testified that he viewed the messages on the victim's phone and thereafter read the printout of the messages, which the victim had cut and pasted into a single document. This printout was introduced in evidence after the victim testified that it accurately represented the exchange of messages she received on her cell phone. She testified that

she knew the messages were from defendant because his name appeared on her phone when she received the instant messages.

One of the numerous ways to authenticate a recorded conversation is through the "[t]estimony of a participant in the conversation that it is a complete and accurate reproduction of the conversation and has not been altered" (*People v Ely*, 68 NY2d 520, 527 [1986]). The credibility of the authenticating witness and any motive she may have had to alter the evidence go to the weight to be accorded this evidence, rather than its admissibility (*see Hansen v Coca-Cola Bottling Co. of N.Y.*, 78 AD2d 848 [1980]).

Relying on *People v Clevenstine* (68 AD3d 1448 [2009]), defendant argues that authentication requires testimony from the Internet service provider about the source of the messages. Yet, *Clevenstine* does not mandate this, nor did the case address the issue here, which is the accuracy of a copy-and-paste compilation of an electronic exchange. Rather, in *Clevenstine*, the identity of the sender was challenged and the provider's testimony was critical to that issue (*id*. at 1450-1451).

Other jurisdictions that have directly dealt with the issue of the admissibility of a transcript, or a copy-and-paste document of a text message conversation, have determined that

authenticity can be shown through the testimony of a participant to the conversation that the document is a fair and accurate representation of the conversation (*see e.g. United States v Gagliardi,* 506 F3d 140 [2d Cir 2007]; *United States v Tank*, 200 F3d 627 [9th Cir 2000] [a participant to the conversation testified that the print-out of the electronic communication was an accurate representation of the exchange and had not been altered in any significant manner]; *State v Roseberry*, _N.E.2d_, 2011 Ohio 5921 [Ohio Ct. App. 2011] [a handwritten transcript of text messages was properly authenticated through testimony from the recipient of the messages, who was also the creator of the transcript]; *Jackson v State*, 320 SW3d 13 [Ark. Ct. App. 2009] [testimony from a participant to the conversation was sufficient]). The testimony of a "witness with knowledge that a matter is what it is claimed to be is sufficient" to satisfy the standard for authentication (*Gagliardi*, 506 F3d at 151). Here, there is no dispute that the victim, who received these messages on her phone and who compiled them into a single document, had first-hand knowledge of their contents and was an appropriate witness to authenticate the compilation. Moreover, the victim's

testimony was corroborated by a detective who had seen the messages on the victim's phone. Any issues relating to the detective's credibility in this regard were likewise matters for the jury to consider.

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

ENTERED: JUNE 21, 2012

DEPUTY CLERK

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

7992 The People of the State of New York, Ind. 6407/82
Respondent,

-against-

David Lee,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Nicole A. Coviello of counsel), for respondent.

Order, Supreme Court, New York County (Bruce Allen, J.), entered on or about October 11, 2011, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion in granting a downward departure to risk level two while declining to grant a further departure (*see People v Mingo*, 12 NY3d 563, 568 n 2 [2009]; *People v Johnson*, 11 NY3d 416, 421 [2008]). The court

properly determined, after balancing the evidence of defendant's rehabilitative efforts against the extreme seriousness of his criminal conduct, that a downward departure to the lowest risk level would not be warranted.

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

ENTERED: JUNE 21, 2012

DEPUTY CLERK

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

7993 Susan Capetola, Index 400846/10
Plaintiff-Respondent,

-against-

Anthony A. Capetola,
Defendant-Appellant.

- - - - -

Eliot F. Bloom,
Nonparty Appellant.

_____

Anthony R. Daniele, New York, for Anthony A. Capetola, appellant.

Mary Ellen O'Brien, Garden City, for Eliot F. Bloom, appellant.

_____

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered on or about June 7, 2011, which, after a hearing, imposed sanctions upon defendant Anthony A. Capetola and non-party Eliot F. Bloom, Esq., in the amount of $10,000 each to be paid to the Lawyers' Fund for Client Protection, unanimously affirmed, with costs.

Defendant, a lawyer involved in his divorce proceedings, submitted an affidavit to the court that was intentionally misleading in that he stated that he opposed renting out an apartment that was a disputed marital asset because he needed to use it at times for work purposes. He failed to disclose that, at that time, he was renting the apartment to the daughter of his

lawyer (Bloom) for an amount that was substantially below market rate. This deliberately misleading representation concerning marital assets was properly found to be sanctionable, as it related to material facts on a pending motion (*see Weisburst v Dreifus*, 89 AD3d 536 [2011]; 22 NYCRR 130-1.1[c][3]).

The court also properly found that Bloom had engaged in sanctionable conduct since he submitted the misleading affidavit, signing the certification on its back. The evidence also showed that Bloom proceeded to engage in frivolous conduct, including calling the police when plaintiff wife entered the apartment unaware that anyone might be there, and found Bloom's daughter there, and accusing plaintiff of trespass and violation of criminal laws. When plaintiff's counsel reminded Bloom that the apartment was held in plaintiff's name and that she was unaware of the secret rental arrangement, Bloom wrote letters to plaintiff's counsel that were insulting, legally incorrect, and characterized by the court as "shockingly unprofessional" and "unethical." Under the circumstances, the court properly found Bloom's conduct to be frivolous within the meaning of 22 NYCRR 130-1.1 (*see Weisburst*, 89 AD3d at 536; *Nachbaur v American Tr. Ins. Co.*, 300 AD2d 74, 75 [2002], *lv dismissed* 99 NY2d 576 [2003], *cert denied* 538 US 987 [2003]). Moreover, Bloom, who testified on his own behalf at the sanctions hearing, was

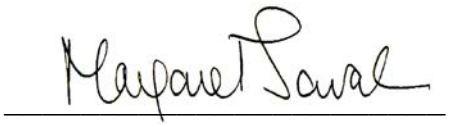
afforded a reasonable opportunity to be heard (*see* 22 NYCRR 130-1.1[d]; *compare Cangro v Cangro*, 272 AD2d 286, 287 [2000]).

The amount of the sanctions imposed was not an abuse of discretion (*see* 22 NYCRR 130-1.2).

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

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

ENTERED: JUNE 21, 2012



DEPUTY CLERK

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

7995 Maxine Grant, Index 8321/03
Plaintiff-Appellant,

-against-

Steve Mark, Inc., et al.,
Defendants-Respondents.

Melucci, Celauro & Sklar, LLP, New York (Daniel Melucci of counsel), for appellant.

Keidel, Weldon & Cunningham, LLP, White Plains (Robert J. Grande of counsel), for respondents.

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered June 29, 2011, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the Labor Law § 240(1) claim and denied plaintiff's cross motion for summary judgment on the issue of defendants' liability under Labor Law § 240(1), unanimously modified, on the law, defendants' motion denied, and otherwise affirmed, without costs.

Plaintiff testified that while cleaning the top shelves of a closet, in an apartment that was undergoing a gut renovation, the A-frame ladder that she was using to complete the task tipped over causing her to fall to the ground with the ladder falling on top of her. Under these circumstances, dismissal of the section 240(1) cause of action was improper. Where, as here, a plaintiff

has shown that the ladder on which she was standing was unstable and tipped over, a prima facie case of liability under Labor Law § 240(1) has been established *(see Harrison v V.R.H. Constr. Corp.*, 72 AD3d 547 [2010]; *Thompson v St. Charles Condominiums*, 303 AD2d 152, 154 [2003], *lv dismissed* 100 NY2d 556 [2003]).

However, plaintiff is not entitled to summary judgment on the issue of liability. The manner of the happening of the accident is within the exclusive knowledge of plaintiff, and the only evidence submitted in support of defendants' liability is plaintiff's account. Defendants should have the opportunity to subject plaintiff's testimony to cross-examination to explore whether she misused the ladder and was the sole proximate cause of the accident, and to have her credibility determined by a trier of fact (*see e.g. Manna v New York City Hous. Auth.*, 215 AD2d 335 [1995], *lv denied* 87 NY2d 801 [1995]).

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

ENTERED: JUNE 21, 2012

Margaret Sowal

DEPUTY CLERK

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

7997-
7998 Robert Eden, Index 114936/05
Plaintiff-Appellant-Respondent,

-against-

St. Luke’s-Roosevelt Hospital Center, et al.,
Defendants-Respondents-Appellants.

Kopff, Nardelli & Dopf LLP, New York (Martin B. Adams of counsel), for appellant-respondent.

Kornstein Veisz Wexler & Pollard, LLP, New York (Marvin Wexler of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Debra A. James, J.), entered January 25, 2010, which, to the extent appealed from as limited by the briefs, granted defendants’ motion to dismiss the breach of contract cause of action based on an oral promise as against defendant St. Luke’s-Roosevelt Hospital Center, the Labor Law §§ 191 and 198(1-a) cause of action as against the individual defendants, and the fraud, accounting, and breach of fiduciary duty causes of action as against St. Luke’s, and denied the motion as to the accounting and breach of fiduciary duty causes of action as against the individual defendants, unanimously modified, on the law, to grant the motion as to the accounting and breach of fiduciary duty causes of action as against the individual defendants, and otherwise affirmed, without costs.

Order, same court and Justice, entered October 22, 2010, which, upon reargument, granted the motion as to the fraud cause of action as against the individual defendants and the Labor Law §§ 191 and 198(1-a) cause of action as against St. Luke's, unanimously affirmed, without costs.

The cause of action for breach of an oral four-year contract as against St. Luke's is precluded by the written contract and by the Statute of Frauds (*see Foster v Kovner*, 44 AD3d 23, 26 [2007]).

The fraud cause of action is duplicative of the breach of contract cause of action (*see Financial Structures Ltd. v UBS AG*, 77 AD3d 417, 419 [2010]). It fails as against St. Luke's for the additional reason that plaintiff could not reasonably rely on the promise of a title and compensation that was at variance with the terms of the subsequent written contract (*see Daily News v Rockwell Intl. Corp.*, 256 AD2d 13, 14 [1998], *lv denied* 93 NY2d 803 [1999]).

As a professional earning more than $900 a week (Labor Law § 190[7]), plaintiff is "expressly excluded" from the protections of Labor Law § 191 (*see Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609, 616 [2008]).

The breach of fiduciary duty and accounting causes of action fail against all defendants, because there was no fiduciary

relationship between plaintiff and any of them. Neither an agreement by an employer to share profits with an employee as compensation for the latter's services nor a contract "of mere hiring and providing for compensation in a particular manner supposedly tending to induce greater energy and faithfulness on the part of the employee" creates a fiduciary relationship between the employer and employee (*Vitale v Steinberg*, 307 AD2d 107, 109-110 [2003] [internal quotation marks omitted]). Plaintiff's assertions of a joint venture between himself and the individual defendants were conclusory and, in any event, allege merely a profit-sharing arrangement.

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: JUNE 21, 2012

DEPUTY CLERK

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

7999-
7999A Index 600664/07

Nancy L. Donenfeld, et al.,
Plaintiffs-Respondents,

-against-

Brilliant Technologies Corporation, etc., et al.,
Defendants-Appellants,

Ethel Griffin, etc.,
Defendant.

Massoud & Pashkoff, LLP, New York (Lisa Pashkoff of counsel), for appellants.

Himmel & Bernstein, LLP, New York (Andrew D. Himmel of counsel), for respondents.

Judgment, Supreme Court, New York County (Debra A. James, J.), entered March 10, 2011, in the amount of $2,211,279.25 in favor of plaintiffs as against defendants-appellants (hereinafter defendants) Brilliant Technologies Corporation (BTC), Advanced Technology Industries, Inc. (ATI), and Allan Klepfisz, unanimously modified, on the law, to vacate the judgment as against Klepfisz, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered on or about February 28, 2011, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiffs moved for partial summary judgment only against BTC and ATI, not against Klepfisz. Therefore, the motion court should not have granted judgment against him (*see e.g. Asiatic Petroleum Corp. v Wolf*, 41 AD2d 617 [1973]). Plaintiffs' argument that summary judgment against Klepfisz was proper because – in addition to moving for summary judgment against BTC and ATI – they made a separate motion to strike defendants' answer, is without merit; the IAS court *denied* plaintiffs' motion to strike defendants' answer, and plaintiffs did not appeal from that denial.

The court should have applied German rather than New York law to the June 2001 loan agreement and its amendments. The loan agreement clearly chooses German law and "[a]s a general matter, the parties' manifested intentions to have an agreement governed by the law of a particular jurisdiction are honored" (*Freedman v Chemical Constr. Corp.*, 43 NY2d 260, 265 n * [1977]). There was a reasonable basis for choosing German law; the loan agreement shows that ATI's address was in Germany. Since German law – like New York law – prohibits usury, its application would not violate New York public policy.

In support of their cross motion to take judicial notice of German law and summary judgment dismissing the complaint, defendants submitted an unsigned, unsworn letter from their

German lawyer. This "was not evidentiary proof in admissible form" (*Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 384 [2004]). (Contrary to defendants' claim, plaintiffs are not raising this argument for the first time on appeal; they even cited *Banco Popular* below.) However, in opposition to defendants' cross motion and in further support of their own motion for partial summary judgment, plaintiffs submitted an affidavit from an attorney licensed to practice law in Germany. Defendants submitted nothing further in support of their cross motions. Thus, plaintiffs' German law expert's affidavit stands unrebutted.

Plaintiffs' German law expert opined that ATI would be considered so well informed in business matters that it would be impossible for plaintiffs to exploit its predicament, inexperience, lack of judgment or weakness of will; hence, the loan agreement between ATI and plaintiffs could not be usurious. Plaintiffs' German law expert also opined that neither the restricted shares given to plaintiffs nor the $500 per day late fee would be considered interest. Since the loan agreement and its amendments are not usurious under German law, it was proper to award summary judgment in favor of plaintiffs as against ATI and BTC (ATI changed its name to BTC in 2006) on plaintiffs' first and seventh causes of action (breach of contract and action

on a note, respectively). Plaintiffs did not waive their right to repayment; even after the October 2002 e-mail which, according to defendants, constitutes a waiver, defendants repeatedly acknowledged the loan as an outstanding obligation.

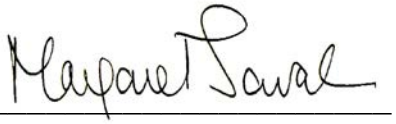
The court should have dismissed plaintiffs' restitution/ unjust enrichment claim (eighth cause of action) because such a claim can exist only when there is no contract, and there are contracts (the loan agreement and its amendments) in the case at bar (*see e.g. Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]). However, this does not affect the amount of the judgment.

The court properly granted summary judgment on plaintiffs' third cause of action, for account stated (*see e.g. Rosenman Colin Freund Lewis & Cohen v Neuman*, 93 AD2d 745, 746 [1983]).

We deny defendants' request for sanctions against plaintiffs.

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

ENTERED: JUNE 21, 2012



DEPUTY CLERK

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

8000 In re Isaiah C.,

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

Elisa Barnes, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for respondent.

Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about August 25, 2011, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of obstructing governmental administration in the second degree and resisting arrest, and placed him with the Office of Children and Family Services for a period of 12 months, unanimously affirmed, without costs.

The fact-finding determination was supported by legally sufficient evidence and was not against the weight of the evidence. When court officers attempted to subdue and arrest appellant's companion following a courtroom disruption, appellant aggressively confronted the officers, approaching them in a belligerent manner with raised hands despite their repeated

directives to stay away, and intentionally sought to interfere with the officers' performance of their duties. Appellant's interference was not merely verbal. Instead, his actions and words, taken together, constituted a sufficient intrusion into the police activity to establish obstructing governmental administration (*see Matter of Davan L.*, 91 NY2d 88 [1997]; *People v Romeo*, 9 AD3d 744, 745 [2004]). Appellant's struggle to avoid being lawfully arrested for obstructing governmental administration constituted resisting arrest.

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

ENTERED: JUNE 21, 2012

DEPUTY CLERK

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

8001-
8002 Firoozeh Farahmand, M.D., Ph.D., Index 117787/09
Plaintiff-Appellant,

-against-

Dalhousie University,
Defendant-Respondent.

_____

MacMillan Keck, New York (Jason Blechman of counsel), for appellant.

Patton Boggs LLP, New York (Daniel R. Murdock of counsel), for respondent.

_____

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered January 4, 2011, which granted defendant's motion to dismiss the complaint for lack of personal jurisdiction or, in the alternative, on the basis of forum non conveniens, unanimously affirmed, without costs. Order, same court and Justice, entered September 26, 2011, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for renewal, unanimously affirmed, without costs.

The court properly dismissed plaintiff's complaint for lack of personal jurisdiction over defendant, a publicly funded university that was incorporated in Nova Scotia, Canada. Contrary to plaintiff's contention, the evidence does not show that defendant engages in a "continuous and systematic course of

‘doing business’” in New York through the activities of Dalhousie University Foundation Inc., a not-for-profit charitable organization that was incorporated in New York and has its principal office in Manhattan (*see Landoil Resources Corp. v Alexander & Alexander Servs.*, 77 NY2d 28, 33-34 [1990] [internal quotation marks omitted]). Although it is undisputed that the Foundation is a vehicle through which tax-deductible donations can be made to defendant by United States residents, the evidence does not support plaintiff’s contention that defendant oversaw the Foundation’s incorporation or controls the Foundation’s activities. The evidence demonstrates that the Foundation was incorporated separately, is independently governed by New York residents on a volunteer basis, and functions independently of defendant.

The court properly found that, even if a basis for personal jurisdiction existed, dismissal would be warranted on the alternative ground of forum non conveniens. Plaintiff’s tort and breach of contract claims lack a substantial nexus with New York, since the incidents giving rise to the claims occurred in Nova Scotia, Nova Scotia law governs the claims, and the documentary evidence and witnesses are located in Nova Scotia (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-479 [1984], *cert denied* 469 US 1108 [1985]; *Martin v Mieth*, 35 NY2d 414, 418

[1974]). To the extent plaintiff contends that Nova Scotia is not a viable alternative forum because she cannot afford to retain counsel there, while her New York counsel is willing to represent her on a pro bono basis, the argument is unavailing. A claim of financial hardship is not relevant to a determination of the availability of an alternate forum; it is a factor to be considered in determining whether the alternate forum that has been identified is convenient (*Gross v British Broadcasting Corp.*, 386 F3d 224, 231 [2d Cir 2004]). Further, plaintiff does not dispute defendant's contention that Nova Scotia law permits attorneys to represent plaintiffs on a contingent fee basis (*cf. Waterways Ltd. v Barclays Bank PLC*, 174 AD2d 324, 328 [1991] [burden on plaintiff resulting from transfer to jurisdiction that bars contingency fees is factor in favor of retaining action in New York]).

On her motion for renewal, plaintiff failed to submit new facts "in existence at the time of the original motion" that were unknown to her and therefore not brought to the court's attention (*see William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1992], *lv dismissed in part, denied in part* 80 NY2d 1005 [1992];

CPLR 2221[e][2]). To the extent the facts she submitted were in existence at the time of the prior motion, plaintiff failed to proffer a reasonable justification for her failure to present them on that motion (*see* CPLR 2221[e][3]).

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

ENTERED: JUNE 21, 2012

DEPUTY CLERK

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

8003 Foundry Capital Sarl, Index 651168/11
Plaintiff-Appellant,

-against-

International Value Advisers, LLC,
Defendant-Respondent.

_____

Boies, Schiller & Flexner LLP, New York (Philip M. Bowman of counsel), for appellant.

Akin Gump Strauss Hauer & Feld LLP, New York (Douglas A. Rappaport of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered December 5, 2011, which granted defendant's motion to dismiss, unanimously affirmed, with costs.

Supreme Court properly granted defendant's motion to dismiss because the written release, which plaintiff executed on November 22, 2010, precludes plaintiff from making the claims set forth in the complaint (*see* CPLR 3211[a][1], [5]). It is clear that the entire purpose of the release was for plaintiff to waive its finder's fee in relation to the subject transaction between defendant and a non-party, as consideration to induce defendant to consummate the transaction at the higher price demanded by the non-party. Plaintiff's entire duress argument is premised on its assertion that it would not have waived that fee if it were not under duress. However, plaintiff asserts that a provision in the

release, which maintains in effect written agreements between the parties, meant that plaintiff was still entitled to its finders fee. Such a construction would render the entire purpose of the release a nullity (*see Credit Suisse First Boston v Utrecht-America Fin. Co.*, 80 AD3d 485, 488-489 [2011]; *Village of Hamburg v American Ref–Fuel Co. of Niagara*, 284 AD2d 85, 89 [2001], *lv denied* 97 NY2d 603 [2001]). Even assuming that the e-mail exchanges between plaintiff and defendant constitute a "written agreement," the only construction which gives effect to the release, the primary purpose of which was plaintiff's fee waiver, is that the written agreements being maintained between plaintiff and defendant referred to any such agreements *other than* the fee agreement relating to the subject transaction at the core of the release.

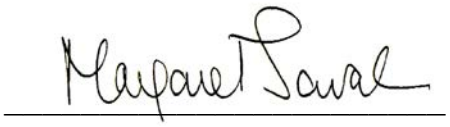
Also, contrary to plaintiff's contention, there was "no actionable duress" alleged by the complaint (*Madey v Carman*, 51 AD3d 985, 987 [2008], *lv denied* 11 NY3d 708 [2008]; *767 Third Ave. LLC v Orix Capital Mkts., LLC*, 26 AD3d 216 [2006], *lv denied* 8 NY3d 803 [2007]). Plaintiff's argument that the release was executed under duress is belied by the fact that nonparty Barclays paid it a commission for facilitating the transaction, and a party cannot claim that it was compelled to execute an agreement under duress while simultaneously accepting the

benefits of the agreement (*see Mendel v Henry Phipps Plaza W., Inc.*, 27 AD3d 375, 376 [2006]). Doing so is tantamount to ratification (*see Philips S. Beach, LLC v ZC Specialty Ins. Co.*, 55 AD3d 493 [2008], *lv denied* 12 NY3d 713 [2009]).

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: JUNE 21, 2012



DEPUTY CLERK

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

8004 Suzanne Nieves, Index 113632/08
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

_____

Arnold E. DiJoseph, New York, for appellant.

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

_____

Order, Supreme Court, New York County (Judith J. Gische, J.), entered June 10, 2011, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the complaint for failure to serve a timely notice of claim, unanimously affirmed, without costs.

Plaintiff's service of an admittedly late notice of claim "was a nullity" (*McGarty v City of New York*, 44 AD3d 447, 448 [2007]), and her failure to seek a court order excusing such lateness within one year and 90 days after the date of the accident requires dismissal of the action (*id.*; *see* General Municipal Law §§ 50-e[5], 50-i[1][c]). We reject plaintiff's argument that defendant verbally agreed to waive any defense

based upon her untimely notice of claim, and that such agreement was memorialized in the parties' stipulation.

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: JUNE 21, 2012

DEPUTY CLERK

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

8006-
8006A Vidalia Diaz-Mazariegos, et al., Index 800275/11
Plaintiffs-Appellants,

-against-

New York City Health & Hospitals Corporation, etc., et al.,
Defendants-Respondents.

_____

Landers & Cernigliaro, P.C., Carle Place (Stanley A. Landers of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Kathy H. Chang of counsel), for respondents.

_____

Order, Supreme Court, New York County (Judy Harris Kluger, J.), entered February 17, 2012, which denied plaintiffs' motion to deem their notice of claim timely, nunc pro tunc, and granted defendants' cross motion for dismissal of the complaint on the ground that plaintiffs failed to file a notice of claim within the statutory 90-day period, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered February 17, 2012, which denied plaintiffs' motion for expedited discovery and a trial preference, unanimously dismissed, without costs, as moot.

Plaintiffs allege that defendants committed medical malpractice in failing to earlier diagnose plaintiff Vidalia Diaz-Mazariegos's breast cancer. The subject claim arose on May

21, 2010, during a post-partum visit at Bellevue Hospital. Plaintiff claims that, during this visit, she made complaints about a lump in her left breast and was told that the condition was related to her pregnancy and milk production. In June 2010, plaintiff returned to Bellevue for an unrelated condition. Plaintiff next sought treatment at Bellevue for her left breast on June 16, 2011, at which time a mass was found. Plaintiff was subsequently diagnosed with breast cancer which had metastasized.

The court properly denied plaintiffs' motion for leave to extend their time to file a notice of claim against New York City Health & Hospitals Corporation (HHC), as the application was made beyond the time limit for the commencement of an action by plaintiffs against HHC, to wit, one year and 90 days (*see* Municipal General Law § 50–e[5]; *Croce v City of New York*, 69 AD3d 488 [2010]). Plaintiffs have not established that the June 16, 2011 visit was part of a continuous course of treatment for the left breast condition, for purposes of tolling the statute of limitations, as there was no contemplation of further treatment for the condition at the May 2010 visit, no appointments were scheduled for monitoring, and plaintiff made no interim

complaints concerning the condition (*see Clayton v Memorial Hosp. for Cancer & Allied Diseases*, 58 AD3d 548, 549 [2009]; *cf. Oksman v City of New York*, 271 AD2d 213, 215 [2000]).

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

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

ENTERED: JUNE 21, 2012

DEPUTY CLERK

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

8007 In re Jeaniya W.,

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

Jean W.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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Steven N. Feinman, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Lisa A. Giunta of counsel), for respondent.

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

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Order, Family Court, Bronx County (Monica Drinane, J.), entered on or about February 23, 2011, which, upon a fact-finding determination that respondent father neglected the subject child, ordered the child released to her mother's custody under twelve months of supervision by petitioner Administration for Children's Services, awarded respondent visitation, and ordered him to complete certain services and not to engage in any further acts of domestic violence in the presence of the child, unanimously affirmed, without costs.

The finding of neglect was supported by a preponderance of

the evidence (*see* Family Ct Act § 1046[b][I]; *Matter of Tammie Z.*, 66 NY2d 1, 3 [1985]). The record establishes that while in the presence of his then three-year-old daughter, respondent struck the mother in the face during a heated argument inside a van while the vehicle was parked in a garage. The parents later continued their argument outside the vehicle, and it was so loud that bystanders intervened, but not before respondent struck the mother in the face several more times, breaking her nose, bloodying her face and causing several bruises. A child protective specialist and a licensed clinical social worker both testified that the child consistently maintained that she saw respondent strike her mother in the face. The child was reportedly sad and upset when recounting the incident.

Under these circumstances, the court properly found that due to respondent's actions, the child was placed in imminent risk of physical, mental, and/or emotional harm, and had actually suffered emotional harm by what she had witnessed (*see* Family Ct Act § 1012[f][I]; *Matter of Jared S. (Monet S.)*, 78 AD3d 536 [2010], *lv denied* 16 NY3d 705 [2011]).

We see no reason to disturb the court's evaluation of the evidence, including its credibility determinations, as the findings were clearly supported by the record (*see Matter of Ilene M.*, 19 AD3d 106 [2005]).

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

ENTERED: JUNE 21, 2012

DEPUTY CLERK

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

8008 Binta Touray, Index 308381/09
Plaintiff-Respondent,

-against-

Manuel F. Munoz, et al.,
Defendants-Appellants.

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Morici & Morici, LLP, Garden City (David Smetana of counsel), for appellants.

Pollack Pollack Isaac & DeCicco, New York (Brian J. Isaac of counsel), for respondent.

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Order, Supreme Court, Bronx County (Laura Douglas, J.), entered on or about April 18, 2011, which granted plaintiff's motion to strike defendants' answer to the extent of striking defendant Jose Gonzalez's answer unless he appeared for deposition within 45 days of the date of the order, unanimously affirmed, without costs.

Plaintiff established that defendant Gonzalez's repeated failure to appear for a deposition, and his failure to comply with successive disclosure orders, were willful and contumacious (*see Fish & Richardson, P.C. v Schindler*, 75 AD3d 219, 220 [2010]). In opposition, defendants failed to meet their burden of demonstrating a reasonable excuse for Gonzalez's non-appearance, offering no excuse for his failure to appear for a deposition from April 20, 2010 to January 19, 2011 (*see id.*).

Defendants also failed to demonstrate good faith efforts to secure Gonzalez's appearance at a deposition. The record does not reveal any concerted attempt by his attorneys to retain an investigator to locate him until after he failed to appear several times (*see Mason v MTA N.Y. City Tr.*, 38 AD3d 258 [2007]; *Wong v Ki Il Kim*, 17 AD3d 128 [2005]). Moreover, the investigation performed shows that Gonzalez received correspondence from his attorney's office, and simply ignored it.

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

ENTERED: JUNE 21, 2012

DEPUTY CLERK

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

8009 The People of the State of New York, Ind. 207/10
Respondent,

-against-

Miguel Santos,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Lauren Stephens-Davidowitz of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (David E.A. Crowley of counsel), for respondent.

Judgment, Supreme Court, New York County (Juan M. Merchan, J. at hearing; Arlene Goldberg, J. at plea and sentencing), rendered July 22, 2010, as amended August 11, 2010, convicting defendant of attempted burglary in the second degree (four counts) and burglary in the third degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 15 years to life, unanimously affirmed.

At the suppression hearing, the People sustained their burden of showing that the police conduct at issue was legal (*see e.g. People v Boone*, 269 AD2d 459 [2000], *lv denied* 95 NY2d 961 [2000]). The hearing evidence sufficiently established that defendant was arrested on a parole violation warrant, and defendant never challenged the validity of the warrant. Defendant complains that testimony given by detectives who were

not present when defendant was arrested left questions unanswered about the circumstances of the arrest. However, none of these questions were material in this case, given that the basis of the arrest was an unchallenged arrest warrant.

The sentencing court properly adjudicated defendant a persistent violent felony offender under the relevant statute (*see People v Walker*, 81 NY2d 661, 664-66 [1993]), and defendant's arguments to the contrary are without merit.

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

ENTERED: JUNE 21, 2012

DEPUTY CLERK

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

8010N Frank Ravenna, Index 21170/11
Plaintiff-Respondent, 303777/11
30140/11

-against-

Entenmann's Sales Company, Inc., et al.,
Defendants-Appellants,

PAR Environmental Corporation, et al.,
Defendants.

- - - - - -

Arthur A. Urena,
Plaintiff-Respondent,

-against-

Entenmann's Sales Company, Inc., et al.,
Defendants-Appellants.

[And Another Action]

_____

McCabe, Collins, McGeough & Fowler, LLP, Carle Place (Patrick M. Murphy of counsel), for appellants.

Neimark & Neimark LLP, New City (Mark P. Cambareri of counsel), for Frank Ravenna, respondent.

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Order, Supreme Court, Bronx County (Laura Douglas, J.), entered March 6, 2012, which, to the extent appealed from, denied the defendants-appellants' motion for a change of venue to Rockland County, unanimously affirmed, without costs.

Two of the drivers involved in a multi-vehicle accident that occurred in Rockland County commenced actions in Bronx County, properly designating venue on the basis of the residence of one

of the parties in the Bronx (CPLR 503[a]). The motion to change venue of those actions to Rockland County was properly denied since the movants failed to show the nature and materiality of the anticipated testimony of the investigating police officer, or to provide adequate support for their assertion that she would be inconvenienced by having to testify in Bronx County rather than in Rockland County (*see Yavner v Toal*, 294 AD2d 244 [2002]; *Morrison v Lawler*, 290 AD2d 370, 370 [2002]). The affidavit of an out-of-state witness who did not indicate that he would provide material testimony also did not warrant a change of venue.

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

ENTERED: JUNE 21, 2012

DEPUTY CLERK

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

8011 [M-2062] Randy Rodriguez, Petitioner, Ind. 585/11

-against-

Hon. Charles H. Solomon, et al., Respondents.

Randy Rodriguez, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for respondents.

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: JUNE 21, 2012

CLERK

Mazzarelli, J.P., Catterson, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

6880 Anthony Martin, Index 303854/07
Plaintiff-Respondent,

-against-

Portexit Corp., et al.,
Defendants-Appellants,

Kenneth A. Moore,
Defendant.

_____

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

Harold Chetrick, P.C., New York (Harold Chetrick of counsel), for respondent.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered February 8, 2011, modified, on the law, to the extent of dismissing plaintiff's 90/180-day claim, and otherwise affirmed, without costs.

Opinion by Abdus-Salaam, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
James M. Catterson
Dianne T. Renwick
Sheila Abdus-Salaam
Sallie Manzanet-Daniels, JJ.

6880
Index 303854/07

_____x

Anthony Martin,
Plaintiff-Respondent,

-against-

Portexit Corp., et al.,
Defendants-Appellants,

Kenneth A. Moore,
Defendant.

_____x

Defendants Portexit Corp. and Ian Duke Hamilton appeal from an order of the Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered February 8, 2011, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion to reargue a prior order granting said defendants' motion for summary judgment dismissing the complaint as against them and, upon reargument, vacated the prior order, and denied their motion for summary judgment.

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

Harold Chetrick, P.C., New York (Harold Chetrick of counsel), for respondent.

ABDUS-SALAAM, J.

This case requires us to decide whether a physician's affirmation containing an electronic signature complies with CPLR 2106. We find that it does.

In this personal injury action, defendants moved for summary judgment, asserting that plaintiff had not sustained a serious injury. The affirmations of defendants' medical experts each bore the electronic signature of the physician. In opposition to the motion, plaintiff argued that the affirmations did not comply with CPLR 2106, and were thus inadmissible. The motion court decided the motion without addressing this issue, and considered the affirmations in determining that defendants had made a prima facie showing of entitlement to summary judgment and plaintiff had failed to raise an issue of fact. Plaintiff moved for reargument, asserting that the court had failed to address his contention that the affirmations of defendants' experts were inadmissible. The court granted reargument, and upon reargument, held that the affirmations were inadmissible and vacated the order granting summary judgment to defendants.

The motion for reargument was properly granted because the court overlooked the arguments plaintiff initially set forth in opposition to defendants' motion regarding the electronic signatures on the doctors' affirmations (*see* CPLR 2221[d][2]).

However, the court erred in vacating the order on the ground that the affirmations were inadmissable because they bore the electronic signatures of the doctors, and that accordingly, defendants had failed to make a prima facie showing of entitlement to summary judgment.

State Technology Law § 304(2) provides that "unless specifically provided otherwise by law, an electronic signature may be used by a person in lieu of a signature affixed by hand. The use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand" (*see Wen Zong Yu v Charles Schwab & Co., Inc.*, 34 Misc 3d 32 [2011]; *People v Johnson*, 31 Misc 3d 145[A][2011]; *Alpha Capital Anstalt v Qtrax, Inc.*, 26 Misc 3d 1234[A][2010]). CPLR 2106, which provides for affirmations by attorneys, physicians, osteopaths and dentists does not specifically provide that an electronic signature may not be used and that the signature may only be affixed by hand.

In *Naldi v Grunberg* (80 AD3d 1,12 [2010], *lv denied* 16 NY3d 711 [2011]), we held that the Legislature "appear[s] to have chosen to incorporate the substantive terms of E-SIGN [Electronic Signatures in Global and National Commerce Act, 15 USC § 7001 *et seq*.] into New York state law." Notably, E-SIGN provides that where a statute requires a signature to be notarized,

acknowledged, verified, or made under oath, "that requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included . . . is attached to or logically associated with the signature or record" (15 USC § 7001[g]). In *Naldi*, we concluded that "E-SIGN'S requirement that an electronically memorialized and subscribed contract be given the same legal effect as a contract memorialized and subscribed on paper" is New York law. We therefore held that the terms "writing" and "subscribed" in General Obligations Law § 5-703 should be construed to include, respectively, electronic communications and signatures (80 AD3d at 12).

There is no sound reason to treat the term "subscribed" as used in CPLR 2106 any differently than it is used in the statute of frauds. The Second Department's decision in *Vista Surgical Supplies, Inc. v Travelers Ins. Co.* (50 AD3d 778 [2008]), upon which the motion court relied in concluding that the doctors' reports were inadmissible, is unpersuasive, and we decline to follow it. In that case, the Court held that the reports containing the computerized, affixed or stamped facsimiles of the physician's signature failed to comply with CPLR 2106 in that there was no indication as to who placed them on the reports, or any indicia that the signatures were authorized (*see also Rogy*

Med. P.C. v Mercury Cas. Co., 23 Misc 3d 132[A][2009]). However, requiring such additional information imports a requirement not contemplated or included in either E-SIGN's provision for signatures made under oath (*see* 15 USC § 7001[g]), or State Technology Law § 304(2).[1] Additionally, State Technology Law § 306 provides that in any legal proceeding where the CPLR applies, an electronic record or signature may be admitted into evidence pursuant to article 45 of the CPLR. Based upon the foregoing, we conclude that the electronic signatures complied with CPLR 2106, that the affirmations of defendants' medical experts were admissible and that the affirmations should have been considered by the motion court.[2]

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[1]In opposition to plaintiff's motion for reargument, defendants submitted an affirmation by each physician stating, in substance, that the signature on the affirmed report is his signature which has been electronically signed in accordance with the Electronic Signatures & Records Act and State Technology Law § 304. We find that such additional submission was unnecessary and that the affirmations were admissible without this information (the motion court further erred when it held that even this information was insufficient because the physicians had not stated that they themselves had placed the electronic signature on the report).

[2]In *Williams v Tatham* (92 AD3d 472 [2012]), we held that defendants had established their prima facie entitlement to summary judgment through submission of an affirmed report from a radiologist. Although not expressly addressed in that order, the record shows that the radiologist's report in *Williams* had an electronic signature.

Upon our consideration of the affirmations, we find that defendants made a prima facie showing that plaintiff did not sustain a serious injury to his cervical spine, right shoulder, right knee, and neck. Defendants' examining orthopedist and neurologist found normal ranges of motion of the cervical spine, lumbar spine, shoulders and right knee. Their radiologist reported that MRIs of plaintiff's right knee and cervical spine were normal, and that the MRI of plaintiff's lumbar spine found degenerative changes at L5/S1, with no radiographic evidence of traumatic or casually related injury to the lumbar spine.

Plaintiff's opposition raised triable issues as to the extent of the injuries and causation. His chiropractor and physiatrist reported permanent limitations in range of motion of the cervical and lumbar spines, neck, and right knee, and that all range of motion data was objectively obtained through the use of a handheld goniometer. The report of the radiologist found evidence of bulging and herniated discs and a partial intrasubstance meniscal tear. The chiropractor opined that plaintiff's injuries and permanent limitations were causally related to the accident (*see Perl v Meher*, 18 NY3d 208, 218-219 [2011]; *Linton v Nawaz*, 62 AD3d 434 [2009], *affd* 14 NY3d 821 [2010]). He also disagreed with the finding of defendant's radiologist that there are degenerative changes at L5/S1 (*Seck v*

Balla, 92 AD3d 543 [2012]). The alleged gap in plaintiff's treatment was adequately explained in that plaintiff reached the maximum benefits for active physiotherapy in April 2006 (*see e.g. Bonilla v Abdullah*, 90 AD3d 466 [2011]).

Finally, plaintiff's claim under the 90/180 day category of serious injury was properly dismissed based on plaintiff's testimony that he returned to work on a part time/light duty schedule approximately three weeks after the accident (*Seck* at 544). Plaintiff's testimony that he was terminated during the relevant period due to his inability to perform his work without the assistance of a helper, unsupported by any documentation from his employer, is insufficient to support his claim (*Winters v Cruz*, 90 AD3d 412 [2011]; *Dembele v Cambisaca*, 59 AD3d 352 [2009]).

Accordingly, the order of the Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered February 8, 2011, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion to reargue a prior order granting defendants-appellants motion for summary judgment dismissing the complaint as against them on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102(d), and, upon reargument, vacated the prior order, and denied defendants' motion for summary judgment, should be modified, on the law, to

grant defendants-appellants' motion to the extent of dismissing plaintiff's 90/180-day claim, and otherwise affirmed, without costs.

All concur.

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

ENTERED: JUNE 21, 2012

DEPUTY CLERK