SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 27, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Catterson, Moskowitz, Freedman, Abdus-Salaam, JJ.

5884 The People of the State of New York, Ind. 5548/05
Respondent,

-against-

Conica Campbell,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Jonathan M. Kirshbaum of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered June 2, 2006, convicting defendant, after a nonjury trial, of endangering the welfare of a child, and sentencing her to a term of 60 days and 3 years' probation, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9

NY3d 342, 348-349 [2007]). There is an insufficient basis for disturbing the court's credibility determinations, including its resolution of inconsistencies in testimony concerning the child's injuries.

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

ENTERED: MARCH 27, 2012

CLERK

Mazzarelli, J.P., Saxe, Acosta, DeGrasse, Manzanet-Daniels, JJ.

5938 In re Jonnevin B.,

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

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

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

Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about December 14, 2010, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of possession of an imitation firearm, and placed him on probation for a period of 12 months, unanimously reversed, as an exercise of discretion in the interest of justice, without costs, the delinquency finding and dispositional order vacated, and the matter remanded to Family Court with the direction to order a supervised adjournment in contemplation of dismissal pursuant to Family Court Act § 315.3(1) nunc pro tunc to December 14, 2010.

The court improvidently exercised its discretion when it

imposed a juvenile delinquency adjudication with probation. This was not "the least restrictive available alternative" (Family Ct Act § 352.2[2][a]). Instead, a supervised adjournment in contemplation of dismissal would adequately serve the needs of appellant and society (*see e.g. Matter of Tyvan B.*, 84 AD3d 462 [2011]).

The underlying offense was simple possession of a toy or imitation revolver. There is no evidence of unlawful use or threatened use. Appellant was 14 years old at the time of the adjudication, and this was his first offense.

The court promised appellant at the time of his admission that if he did not commit any further offenses and the probation report did not reveal any negative history not previously disclosed, it would grant an ACD. The report did not disclose any significant negative history. On the contrary, it appeared that appellant was living in an unstable home at the time of the offense and had subsequently been placed in a stable foster home, where he posed no behavioral problems and had been attending school without any absences or further disciplinary issues. In light of the progress made and absence of aggravating factors, an ACD should have been granted. There is no reason to believe appellant needs any court-imposed supervision beyond the

supervision that can be provided under an ACD, which is limited to a maximum period of six months with a view to ultimate dismissal of the petition in furtherance of justice (see Family Ct Act § 315.3[1]).

The decision and order of this Court entered herein on November 3, 2011 is hereby recalled and vacated (see M-5503 decided simultaneously herewith).

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

ENTERED: MARCH 27, 2012

CLERK

Tom, J.P., Andrias, Catterson, Richter, Abdus-Salaam, JJ.

6810 & M-5874 2914 Third Sportswear Realty Corp., Plaintiff-Appellant-Respondent, Index 304000/11

-against-

Acadia 2914 Third Avenue, LLC, Defendant-Respondent-Appellant.

Mishaan Dayon & Lieblich, New York (Matthew A. Bondy of counsel), for appellant-respondent.

Greenberg, Trager & Herbst, LLP, New York (Stuart Rosen of counsel), for respondent-appellant.

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered August 18, 2011, which, to the extent appealed from, upon granting plaintiff's motion for a *Yellowstone* injunction, directed plaintiff tenant to provide access to allow defendant landlord to perform construction work, and granted an abatement of rent until the end of the lease term, unanimously reversed, on the law, without costs, and the matter remanded for further proceedings.

In this declaratory judgment action, tenant obtained a *Yellowstone* injunction to stay the proceedings in response to landlord's notice to cure, which claimed that tenant had breached the amended lease by refusing access to its premises to enable landlord to comply with a notice issued by the New York City

Department of Buildings. However, the notice directs landlord only to "verify" that the space conforms to the requirements of the Americans with Disabilities Act (Administrative Code of City of NY § 27-292.1). Moreover, it is unclear whether the proposed construction of a new elevator in tenant's space is required to comply with the law's provisions or merely to accommodate an incoming tenant's proposed use of the adjoining space.

The injunction directing tenant to allow access for the purpose of constructing the elevator shaft exceeded the scope of interlocutory injunctive relief. A *Yellowstone* injunction is a provisional remedy, and the purpose of interlocutory relief is not to determine the ultimate rights of the parties but to maintain the status quo until a full hearing on the merits can be held (*see Gambar Enters. v Kelly Servs.*, 69 AD2d 297, 306 [1979]). Directing that the elevator construction proceed does not merely restrain, but rather directs action absent any hearing to determine whether such extraordinary relief is essential to maintain the status quo (*Times Sq. Stores Corp. v Bernice Realty Co.*, 107 AD2d 677, 682 [1985]). Moreover, the order prematurely decides the disputed factual issue of whether renovation is required to comply with the Department of Buildings' notice so as

to afford landlord a right of access under the lease (*see Tucker v Toia*, 54 AD2d 322, 327 [1976]).

M-5874 - *2914 Third Sportswear Realty Corp., v Acadia 2914 Third Avenue, LLC,*

Motion, insofar as it seeks to supplement the record, denied; motion, insofar as it seeks to vacate the stay previously granted by this court, denied as academic.

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

ENTERED: MARCH 27, 2012

CLERK

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

7022N- Index 602825/08
7022NA MBIA Insurance Corporation,
Plaintiff-Respondent,

-against-

Countrywide Home Loans, Inc., et al.,
Defendants-Appellants.

Goodwin Procter LLP, New York (Mark Holland of counsel), for appellants.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Philippe Z. Selendy of counsel), for respondent.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about January 28, 2011, which denied defendants' motion to, among other things, compel disclosure of documents and information concerning plaintiff's "remediation efforts," unanimously affirmed, without costs. Order, same court and Justice, entered July 1, 2011, which, to the extent appealed from, granted plaintiff's motion to, among other things, compel disclosure of documents and information concerning defendants' repurchase review, and denied defendants' cross motion for a protective order preventing such disclosure, unanimously affirmed, without costs.

Plaintiff met its burden of establishing that the documents

concerning its remediation efforts were primarily prepared in anticipation of litigation and are, thus, privileged matter (*see JP Foodservice Distribs. v Sorrento, Inc.*, 305 AD2d 266, 266 [2003]; CPLR 3101[d][2]). Indeed, plaintiff submitted evidence, including retainer agreements, showing that its counsel retained consultants to help provide legal advice to plaintiff with respect to potential legal claims against defendants. That plaintiff used the facts revealed by the consultants' work to avail itself of its contractual right to demand repurchases does not render the consultants' materials of "mixed purpose," especially since plaintiff had already paid, and was continuing to pay, the claims that were being investigated by the consultants (*compare Landmark Ins. Co. v Beau Rivage Rest.*, 121 AD2d 98, 102 [1986], *and Chemical Bank v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 70 AD2d 837, 838 [1979]).

Plaintiff also established that the materials are protected by the attorney-client privilege and the attorney work product privilege (*see* CPLR 4503; 3101[c]), both of which extend to documents generated by consultants retained by counsel "to assist in analyzing or preparing" for anticipated litigation (*Hudson Ins. Co. v Oppenheim*, 72 AD3d 489, 489-490 [2010]).

Plaintiff has not waived any privilege by referencing its

repurchase review in its amended complaint. Indeed, plaintiff does not need the privileged materials concerning the review to sustain its causes of action (*Manufacturers & Traders Trust Co. v Servotronics, Inc.*, 132 AD2d 392, 397 [1987]; *see Deutsche Bank Trust Co. of Ams. v Tri-Links Inv. Trust*, 43 AD3d 56, 64 [2007]).

The motion court properly held that documents and information concerning defendants' repurchase review, generated in response to plaintiff's repurchase requests, are discoverable. Plaintiff proved that its repurchase analysis was not a part of its ordinary business. By contrast, the record shows that processing repurchase requests was an inherent and long-standing part of defendants' business (*see Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190, 191 [2005]). That a new division was created to respond to plaintiff's repurchase requests, or that litigation appeared imminent, is of no moment; defendants were, and always had been, contractually obligated to conduct repurchase reviews and such reviews were, and always had

been, conducted by defendants' own staff of underwriters and auditors (*see e.g. 148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486, 487 [2009]; *Rosario v North Gen. Hosp.*, 40 AD3d 323 [2007]).

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

ENTERED: MARCH 27, 2012

CLERK

Saxe, J.P., Sweeny, Catterson, Renwick, Manzanet-Daniels, JJ.

7184 The People of the State of New York, Ind. 4338/07
Respondent,

-against-

Tracy Galloway,
Defendant-Appellant.

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

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

Order, Supreme Court, New York County (Richard D. Carruthers, J.), entered on or about January 20, 2010, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court correctly applied the presumptive override for a prior felony sex crime conviction. Additionally, the court providently exercised its discretion in declining to grant a downward departure. We note that defendant was arrested for fondling his most recent victim while he was on parole for a prior conviction for sexual abuse in the first degree. Additionally, defendant was on his way to his sex offender treatment when he assaulted this victim. As in *People v Corian*

(77 AD3d 590 [2010], *lv denied* 16 NY3d 705 [2011]), this defendant "has demonstrated an extremely high risk of recidivism, and his argument that the type of misconduct in which he habitually engages is not of a type to warrant a level three designation is unpersuasive."

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

ENTERED: MARCH 27, 2012

CLERK

Saxe, J.P., Sweeny, Catterson, Renwick, Manzanet-Daniels, JJ.

7185 In re Crystal P.,

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

Andrea L., etc.,
Respondent-Appellant,

Episcopal Social Services,
Petitioner-Respondent.

Frederic P. Schneider, New York, for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

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

Order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about January 27, 2011, which, insofar as appealed from, upon a finding of mental retardation, terminated respondent mother's parental rights to the subject child, and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence, including various reports, respondent's IQ scores, and the testimony of a psychologist, established that respondent is unable, at present and for the

foreseeable future, to provide proper and adequate care for the child by reason of her mental retardation (*see* Social Services Law § 384-b[4][c], [6][b]; *Matter of Erica D. [Maria D.]*, 80 AD3d 423 [2011], *lv denied* 16 NY3d 708 [2011]). There exists no basis to disturb the credibility determinations of the Family Court (*see Matter of Nathaniel T.*, 67 NY2d 838, 842 [1986]).

Respondent's claim that the court erred in not holding a dispositional hearing is unpreserved (*see Matter of Aaron Tyrell W.*, 58 AD3d 419 [2009]), and we decline to review it in the interest of justice. Were we to review this claim, we would find that a dispositional hearing was not necessary to find that the termination of respondent's parental rights was in the best interests of the child, in light of her inability to provide care for the child (*see Matter of Joyce T.*, 65 NY2d 39 [1985]).

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

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

ENTERED: MARCH 27, 2012

CLERK

Saxe, J.P., Sweeny, Catterson, Renwick, Manzanet-Daniels, JJ.

7186-
7187 Valiantsina Filatava, et al., Index 106544/07
Plaintiffs-Respondents,

-against-

Rome Realty Group LLC,
Defendant-Appellant,

John Doe, et al.,
Defendants.

Callan, Koster, Brady & Brennan, LLP, New York (Michael P. Kandler of counsel), for appellant.

Palant & Shapiro, P.C., New York (Alexander T. Shapiro of counsel), for respondents.

Order, Supreme Court, New York County (Martin Shulman, J.), entered March 22, 2011, which, insofar as appealed from as limited by the briefs, granted plaintiffs' motion to strike defendants' answer, and order, same court and Justice, entered September 28, 2011, which denied defendant Rome Realty Group's motion to renew and granted said defendant's motion to reargue, but adhered to its prior decision, unanimously affirmed, with costs.

Defendant appeals from the striking of its answer as a discovery sanction pursuant to CPLR 3126. It is undisputed that defendant violated three express orders to produce documents

responsive to plaintiffs' requests. More egregiously, defendant knew it had no business records of the subject premises, as it failed to retain any records when it sold the premises two months after the instant complaint was filed. Yet, it concealed this information from the court and plaintiffs for some two years. As such, there was ample evidence to support the IAS court's finding that defendant had wilfully delayed and failed to fulfill its obligations in discovery (*cf. Banner v New York City Hous. Auth.*, 73 AD3d 502, 503 [2010]).

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

ENTERED: MARCH 27, 2012

CLERK

Saxe, J.P., Sweeny, Catterson, Renwick, Manzanet-Daniels, JJ.

7188-
7188A Index 402522/09

John L. Peterec-Tolino,
Plaintiff-Appellant,

-against-

Edward Harap, et al.,
Defendants-Respondents.

John L. Peterec-Tolino, appellant pro se.

Kasowitz, Benson, Torres & Friedman LLP, New York (Parisis G. Filippatos of counsel), for respondents.

Orders, Supreme Court, New York County (Debra A. James, J.), entered March 23, 2011, which denied plaintiff's motions for a default judgment against defendants, and granted defendants' cross motion to dismiss the complaint as barred by the statute of limitations, unanimously modified, on the law, to deny defendants' cross motion, and otherwise affirmed, without costs.

Defendants made a sufficient showing of excusable default and a meritorious defense to warrant denial of plaintiff's motions for a default judgment (*see Zwicker v Emigrant Mtge. Co., Inc.*, 91 AD3d 443 [2012]). The record shows, among other things, that at the time plaintiff moved for a default judgment, he was aware that defendants intended to move to dismiss the complaint (*see id.*).

Defendants, however, have not shown that plaintiff's state and city employment discrimination claims are time-barred. Crediting the allegations in plaintiff's verified complaint, his claims accrued on July 7, 2006, when he was terminated (*see Pinder v City of New York*, 49 AD3d 280, 281 [2008]; *Cordone v Wilens & Baker*, 286 AD2d 597, 598 [2001]). Although plaintiff commenced this action more than three years later, after the expiration of the applicable statute of limitations (*see* CPLR 214[2]), it is timely pursuant to CPLR 205(a), since it was commenced within six months after termination of a timely commenced federal action. In that action, the Federal District Court dismissed without prejudice plaintiff's state and city employment discrimination claims against the individual defendants because of insubstantial federal claims (*see Jordan v Bates Adv. Holdings*, 292 AD2d 205, 206 [2002]; *Kleinberger v Town of Sharon*, 116 AD2d 367, 370 [1986]). Defendants' arguments to the contrary are of no avail.

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

ENTERED: MARCH 27, 2012

CLERK

Saxe, J.P., Sweeny, Catterson, Renwick, Manzanet-Daniels, JJ.

7189 Blanca Soltero, Index 305833/09
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant.

Wallace D. Gossett, Brooklyn (Lawrence A. Heisler of counsel), for appellant.

Lisa M. Comeau, Garden City, for respondent.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered October 19, 2010, which granted plaintiff's motion for summary judgment on her cause of action pursuant to Labor Law § 240(1), unanimously affirmed, without costs.

Plaintiff established her entitlement to judgment as a matter of law by demonstrating that her fall from a two foot high ledge in a subway tunnel while she was working as part of a team of New York City Transit Authority employees who were replacing old tracks arose from the application of the force of gravity and the lack of an appropriate safety device (*Runner v New York Stock Exchange*, 13 NY3d 599, 604 [2009]). In opposition, defendant did not dispute that plaintiff fell from the elevated ledge or "toe wall" or that the task she was performing required her to be at

an elevated level. It is uncontested that the toe wall, which had been soaked with water by the Transit Authority to control the dust, was slippery and no safety device was provided to prevent plaintiff from falling (*see e.g. Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339-340 [2011]). On appeal, defendant argues that there is a question of fact that the wall from which plaintiff fell may have been less than two feet high. However, this argument is belied by the record. Both plaintiff and her supervisor clearly testified that at the location plaintiff fell, the wall as approximately two feet high.

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: MARCH 27, 2012

CLERK

Saxe, J.P., Sweeny, Catterson, Renwick, Manzanet-Daniels, JJ.

7190 Desmond Phillip, Index 309371/08
Plaintiff-Appellant,

-against-

525 East 80th Street Condominium,
Defendant-Respondent.

Arnold E. DiJoseph, New York, for appellant.

Lewis, Brisbois, Bisgaard & Smith, LLP, New York (Kelly A. McGee of counsel), for respondent.

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered February 28, 2011, which granted defendant's motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for summary judgment on the issue of liability under Labor Law § 240(1), unanimously modified, on the law, to the extent of denying summary judgment dismissing the Labor Law § 240(1) claim and granting plaintiff's cross motion, and otherwise affirmed, with costs.

Plaintiff, an employee of nonparty Rockledge Scaffolding, was working at defendant's building constructing a sidewalk bridge when he fell from atop a load of scaffolding material on a flatbed truck. Plaintiff was engaged in unloading materials at the time that he fell. The court improperly dismissed

plaintiff's Labor Law § 240(1) claim because plaintiff's injury was caused by his falling from a height while performing an activity covered by the statute. Plaintiff was standing on top of the scaffolding material, about nine feet above the platform, handing the material to his coworkers who were on top of the sidewalk bridge. It is uncontroverted that although plaintiff was provided with a safety harness, there was no location on the truck where the harness could be secured (*see Naughton v City of New York*, 2012 WL 573166, *2, 2012 LEXIS 1345, *5-8 [2012]*; Ford v HRH Constr. Corp.*, 41 AD3d 639 [2007]; *Curley v Gateway Communications*, 250 AD2d 888 [1998]; *cf. Toefer v Long Island R. R.*, 4 NY3d 399, 406-409 [2005]). Because the evidence shows that such manner of work was the only way to unload the materials, and that a safety device enumerated in Labor Law § 240(1) could have prevented the fall, plaintiff is entitled to summary judgment on this claim (*cf. Ortiz v Varsity Holdings, LLC*, 18 NY3d 335 [2011]).

Contrary to defendant's contention, plaintiff's inability to recall how he fell is irrelevant, since the evidence establishes that plaintiff fell off the truck and it is undisputed that no

safety devices were provided (*see Heer v North Moore St. Devs.*, LLC, 61 AD3d 617 [2009]; *cf. Berg v Albany Ladder Co., Inc.*, 10 NY3d 902 [2008]).

The court properly dismissed plaintiff's Labor Law § 241(6) claim. Plaintiff contends that defendant violated Industrial Code Rule 23-1.16 by failing to provide him with a safety belt, harness, tail line, or lifeline. However, that Rule sets forth only the standards for the use of such devices (*see* 12 NYCRR § 23-1.16) and is inapplicable where, as here, defendant did not provide plaintiff with any such devices (*see Dzieran v 1800 Boston Rd., LLC*, 25 AD3d 336, 337–338 [2006]; *D'Acunti v New York City School Constr. Auth.*, 300 AD2d 107, 108 [2002]). Industrial Code Rule 23-8.1, which sets forth standards for "Mobile Cranes, Tower Cranes and Derricks" (12 NYCRR 23-8.1) and Rule 23-8.2(c)(3), which governs how mobile cranes are to lift or hoist loads (12 NYCRR 23-8.2[c][3]) are similarly inapplicable, as no hoist or cranes were used on the job (*see Toefer*, 4 NY3d at 410).

Plaintiff's Labor Law § 200 and common-law negligence claims were properly dismissed. There is no evidence that defendant supervised or controlled plaintiff's work activities, or that defendant had notice of the hazardous condition before the

accident. Defendant's general oversight of the timing and quality of the work does not rise to the level of supervision or control (*see Gonzalez v United Parcel Serv.*, 249 AD2d 210, 210-211 [1998]). We also find that the accident was not caused by a hazardous condition, but rather, by the manner in which the unloading of the materials was undertaken (*see Comes v New York State Elec. and Gas Corp.*, 82 NY2d 876, 877 [1993]).

We have reviewed the parties' remaining contentions and find them unavailing.

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

ENTERED: MARCH 27, 2012

CLERK

Saxe, J.P., Sweeny, Catterson, Renwick, Manzanet-Daniels, JJ.

7191-
7192 Index 602577/09

Americon Construction Inc.,
Plaintiff-Respondent,

-against-

Radu Physical Culture, LLC, et al.,
Defendants,

Plaza Accessory Owner LP,
Defendant-Appellant.

Westermann Sheehy Keenan Samaan & Aydelott, LLP, Uniondale (Stephen J. Gillespie of counsel), for appellant.

Jaffe, Ross & Light LLP, New York (Bill S. Light of counsel), for respondent.

Judgment, Supreme Court, New York County (Jane S. Solomon, J.), entered March 4, 2011, which, inter alia, awarded plaintiff the principal sum of $795,016.00, and bringing up for review an order, same court and Justice, entered on or about November 19, 2010, which granted plaintiff's motion for summary judgment on its cause of action seeking to foreclose on its mechanic's lien, unanimously affirmed, with costs. Appeal from the foregoing order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff established that it was entitled to foreclose on its mechanic's lien against appellant owner of the real property

located within the Plaza Hotel, based on evidence that it had performed its contract and that it had not been paid for all of the work. Plaintiff also established that the work was done with Plaza's consent because it established that: 1) Plaza's lease with tenant Radu specifically contemplated the improvements; 2) Plaza specifically approved the hiring of plaintiff and the construction plans; 3) Plaza obtained work permits for the work; 4) Plaza was actively involved in the project and attended numerous job site meetings; 5) Plaza's employee e-mailed plaintiff inquiring as to what it could do to start the construction process; 6) Plaza received the benefits of the improvements since it re-entered the space (*see Curtis Partitions Corp. v Halpern Constr., Inc.*, 43 AD3d 744 [2007]; *M & B Plumbing & Heating Co. v Cammarota*, 103 AD2d 879 [1984]). Appellant failed to raise any triable issues of fact to defeat plaintiff's

entitlement to summary judgment.

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

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

ENTERED: MARCH 27, 2012

CLERK

Saxe, J.P., Sweeny, Catterson, Renwick, Manzanet-Daniels, JJ.

7193 The People of the State of New York, Ind. 482/10
Respondent,

-against-

Brian Brown,
Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Lewis Bart Stone, J.), rendered on or about September 2, 2010,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

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

ENTERED: MARCH 27, 2012

CLERK

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

Saxe, J.P., Sweeny, Catterson, Renwick, Manzanet-Daniels, JJ.

7195 The People of the State of New York, Ind. 242/08
Respondent,

-against-

Kenny Campos,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J. at suppression hearing; Bruce Allen, J. at jury trial waiver; Daniel P. FitzGerald, J., at nonjury trial and sentencing), rendered July 20, 2009, as amended August 10, 2009, convicting defendant of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of three to six years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant argues that the evidence did not establish the element of unlawful intent.

Late at night, defendant was screaming angrily in Spanish, a language the sole eyewitness was unable to understand. A man in

the building occupied by the eyewitness spoke to defendant in Spanish, and defendant directed his angry shouting at this man. Defendant waved a machete in the air, and waved it at a building across the street. Defendant crossed the street and banged the machete on the gate of a closed store in the building at which he had been gesturing with the machete.

Some weapons are illegal per se, regardless of intent, but a machete is not one of those weapons (*see* Penal Law § 265.01[1]). Possession of a machete is only criminal when the possessor intends to use it unlawfully against another (*see* Penal Law § 265.01[2]). However, "[t]he possession by any person of any dagger, dirk, stiletto, dangerous knife or any other weapon, instrument, appliance or substance designed, made or adapted for use primarily as a weapon, is presumptive evidence of intent to use the same unlawfully against another" (Penal Law § 265.15[4]).

The statute does not define the term "dangerous knife," but in context a dangerous knife is a knife that may be "characterized as a weapon" (*Matter of Jamie D.*, 59 NY2d 589, 592 [1983]). A knife, such as a machete, that has nonviolent uses "may nonetheless be determined to fall within the statutory prescription when the circumstances of its possession including the behavior of its possessor demonstrate that the possessor

himself considered it a weapon" (*id*. at 591).

Defendant did not preserve his claim that the court should not have applied the presumption of intent, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. There was ample evidence that, at the time of the incident, defendant possessed the machete as a weapon. Defendant carried the machete at a time and place where its use for a lawful purpose such as agriculture was highly unlikely, he brandished it as a weapon, he tried to conceal it from the police, and he told the police he carried it as a weapon, albeit for defensive purposes. Similarly, there is no merit to defendant's assertion that his trial counsel rendered ineffective assistance by conceding the applicability of the presumption.

Even without the presumption, the circumstances support an inference of unlawful intent. Defendant argues that there was no one on the street for defendant to attack. However, the trier of fact could have reasonably concluded that defendant intended to use the machete to assault or menace someone in either or both of the two buildings at which he directed his angry shouting and actions.

The hearing court properly denied defendant's suppression

motion. The combination of a radio run, a statement from an unidentified man in a parked car at the scene, and the officers' own observations provided more than enough information to warrant a common-law inquiry (*see e.g. Matter of Jamaal C.*, 19 AD3d 144, 145 [2005]). When defendant admitted that the object he had been trying to hide was a machete, the police lawfully arrested him. To the extent defendant is arguing that the police needed proof of unlawful intent in order to arrest defendant for possession of a knife that is not a per se weapon, we note that the unidentified man told the police that defendant had been waving a machete at people.

Defendant's challenge to the voluntariness of his duly executed, open-court jury waiver is unpreserved *(see People v Johnson*, 51 NY2d 986 [1980]), and we decline to review it in the interest of justice. As an alternative holding, we find that defendant made a knowing, intelligent and voluntary waiver after an appropriate inquiry (*see People v Smith*, 6 NY3d 827, 828 [2006], *cert denied* 548 US 905 [2006]). Defendant's mental competency had been established by way of a CPL article 730 examination, and there is no reason to doubt his capacity to

waive a jury trial. Although there was a delay between the waiver and the trial, there was no change in circumstances that would require the trial court to inquire whether defendant wished his waiver to stand.

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

ENTERED: MARCH 27, 2012

CLERK

Saxe, J.P., Sweeny, Catterson, Renwick, Manzanet-Daniels, JJ.

7196 In re Joseph B.,

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

Tennille M. Tatum-Evans, New York, for appellant.

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

Appeal from order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about February 11, 2011, which adjudicated appellant a juvenile delinquent upon his admission that he had committed an act that, if committed by an adult, would constitute the crime of resisting arrest, and placed him with the Office of Children and Family Services for a period of up to 12 months, unanimously dismissed, without costs, as moot.

Appellant's challenge to his placement with the Office of Children and Family Services is moot because he has fully completed that placement (*see e.g. Matter of Rene A.*, 34 AD3d 223

[2006]). Were we to consider the propriety of the placement, we would find that the placement was a proper exercise of the court's discretion (*see* Family Ct Act § 352.2[2][a]).

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

ENTERED: MARCH 27, 2012

CLERK

Saxe, J.P., Sweeny, Catterson, Renwick, Manzanet-Daniels, JJ.

7199 Bokara Rug Co., Inc., et al., Index 652079/10
Plaintiffs-Appellants-Respondents,

-against-

Vikram Kapoor, et al.,
Defendants-Respondents-Appellants.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Scott Smedresman of counsel), for appellants-respondents.

Scott A. Korenbaum, New York, for respondents-appellants.

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered September 7, 2011, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss as to plaintiffs' first, fifth, and sixth causes of action, and denied defendants' motion to dismiss on the grounds of lack of personal jurisdiction and forum non conveniens, unanimously modified, on the law, to deny the motion as to the first, fifth and sixth causes of action to the extent they are based on transactions or representations that occurred within the applicable limitations periods, and otherwise affirmed, without costs.

The motion court improperly treated the motion to dismiss pursuant to CPLR 3211 as a motion for summary judgment dismissing

the complaint without providing adequate notice to plaintiffs (*see Mihlovan v Grozavu*, 72 NY2d 506, 508 [1988]). Plaintiffs did not deliberately chart a summary judgment course, even though they submitted some evidence in opposition to defendants' motion (*see Wiesen v New York Univ.*, 304 AD2d 459, 460 [2003]). Thus, the motion will be reviewed under the standard applicable on a motion to dismiss (*see Velez v Captain Luna's Mar.*, 74 AD3d 1191, 1191 [2010]).

The IAS court erred by dismissing the first, fifth, and sixth causes of actions (alleging fraud, negligent misrepresentation, and breach of contract, respectively) as time-barred. We agree with the motion court that to the extent that these claims are based on transactions or representations that occurred outside the applicable limitations periods, they are barred. However, in support of their motion to dismiss, defendants submitted an ambiguous affidavit and a sampling of invoices, and referred to documents submitted in another case. Defendants did not meet their initial burden of demonstrating that no sales of the type complained of by plaintiff were made by Kapoor Exports or related entities during the four-year limitations period applicable to the breach of contract claim (UCC 2-725; *see Benn v Benn*, 82 AD3d 548, 548 [2011]; *Uniflex,*

Inc. v Olivetti Corp. of Am., 86 AD2d 538, 539 [1982]), or that none of the alleged misrepresentations in connection with such sales occurred within the six-year limitations period applicable to the fraud and negligent misrepresentation claims (CPLR 203[g], 213[1], [8]).

The IAS court properly denied so much of defendants' motion as sought dismissal on the ground of lack of personal jurisdiction over Vikram Kapoor. It is undisputed that there were other means of acquiring jurisdiction over his person other than personal service in New York. Thus, Kapoor cannot establish an essential element of the immunity defense to personal jurisdiction (*see Olbi USA v Agapov*, 294 AD2d 139 [2002]; *Brause 59 Co. v Bridgemarket Assoc.*, 216 AD2d 200, 201 [1995]).

Defendants failed to meet their burden to establish that New York is an inconvenient forum for this action (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-479 [1984], *cert*

denied 469 US 1108 [1985]; *Bank Hapoalim [Switzerland] Ltd. v Banca Intesa S.p.A.*, 26 AD3d 286, 287 [2006]). There is nothing in the record to suggest that the court did not properly consider the relevant factors (*see Pahlavi* at 479).

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

ENTERED: MARCH 27, 2012

CLERK

Saxe, J.P., Sweeny, Catterson, Renwick, Manzanet-Daniels, JJ.

7200 In re The City of New York, et al., Petitioners, OATH Index 464/10

-against-

John Liu, etc., et al., Respondents.

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

Ricardo E. Morales, New York (Constantine P. Kokkoris of counsel), for John C. Liu, respondent.

Mary J. O'Connell, New York (Steven E. Sykes and Aaron S. Amaral of counsel), for Union respondents.

Determination of respondent Comptroller of the City of New York, dated October 13, 2010, establishing the prevailing wage rate for the titles of "laborers" and "city laborers," unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (commenced in this Court pursuant to Labor Law § 220[8]), dismissed, without costs.

The Comptroller's finding that mason tenders in Local 79 perform comparable duties to laborers and city laborers is supported by substantial evidence. The Comptroller conducted a thorough investigation that included a comparison of the civil service job specification and collective bargaining agreements, a

survey of private sector interviewees, discussions with management, and four site visits (*see Matter of Hanley v Thompson*, 41 AD3d 207, 208 [2007]).

The evidence adduced at the 10-day hearing established that, regardless of agency assignment, city laborers predominantly perform unskilled labor in connection with building construction and renovation projects. This includes loading, unloading and delivery of construction materials, demolition, assisting skilled construction trades, and clean-up of work sites. Further, the evidence established that city laborers engage in these tasks a "majority" of the time.

The record of the hearing compels us to reject petitioner's contention that the Comptroller made arbitrary distinctions between "in-title" work, i.e., demolition and assisting the trades, as opposed to "out-of-title" work, i.e., landscaping, digging trenches, erecting fences, and patching asphalt. The fact that city laborers might perform some landscaping was not fatal to a determination that these workers were primarily construction-related laborers.

Further, classifying both city laborers and mason helpers as mason tenders does not run afoul of the rule concerning the impropriety of paying workers for out-of-title labor (*see Matter*

of Kelly v Beame, 15 NY2d 103, 109 [1965]; *Matter of Flannery v Joseph*, 300 NY 149, 155 [1949]). Although there may be some overlap between titles, this argument fails to consider the nature of these laboring positions and the broad list of duties assigned to them largely because of the general character of their job descriptions.

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

ENTERED: MARCH 27, 2012

CLERK

Saxe, J.P., Sweeny, Catterson, Renwick, Manzanet-Daniels, JJ.

7201 Beato Novas, Index 101518/05
Plaintiff-Appellant,

-against-

Joseph D. Zuckerman, M.D.,
Defendant-Respondent,

Dr. Ahn, et al.,
Defendants.

Kenneth J. Gorman, New York, for appellant.

McAloon & Friedman, P.C., New York (Gina Bernardi Di Folco of counsel), for respondent.

Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered April 16, 2010, after a jury trial, in an action alleging medical malpractice, dismissing the complaint as against defendant Joseph D. Zuckerman, M.D., unanimously affirmed, without costs.

CPLR 3117(a)(2) provides that "so far as admissible under the rules of evidence," a party's deposition "may be used for any purpose by any party who was adversely affected when the deposition testimony was given or who is adversely interested when the deposition testimony is offered in evidence." However, although deposition testimony is generally admissible under CPLR 3117(a)(2), that section does not constitute an "absolute and

unqualified right to use the deposition at any time during the course of trial" (*Feldsberg v Nitschke,* 49 NY2d 636, 643 [1980]). The trial court retains discretion concerning the admissibility of such evidence and its exercise of discretion "is not reviewable save for a clear abuse of discretion" *id*.

Here, the trial court providently exercised its discretion in denying plaintiff's application to introduce into evidence portions of Dr. Zuckerman's deposition testimony. The testimony at issue concerned the necessity of full-length and/or standing leg X rays to measure plaintiff's joint-line on his knee. Contrary to plaintiff's contention, the proffered testimony would not have rebutted the testimony of defendant's expert, who only testified as to the amount of femoral bone removed. The expert did not testify as to measuring the joint line, nor the type of X rays needed to measure the joint line. Moreover, the preclusion of the testimony was not prejudicial to plaintiff's case, since the testimony of defendant's expert was based on X rays that were already in evidence (*see e.g. Gogatz v New York City Tr. Auth.*, 288 AD2d 115, 116 [2001]).

The jury's verdict was based upon a fair interpretation of the evidence (*see generally McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [2004]). The evidence supported the jury's finding

that defendant was not negligent in removing the amount of femoral bone during plaintiff's knee replacement surgery, so as not to alter the joint line.

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

ENTERED: MARCH 27, 2012

CLERK

Saxe, J.P., Sweeny, Catterson, Renwick, Manzanet-Daniels, JJ.

7202 Jennifer Sendor, Index 350470/07
Plaintiff-Respondent,

-against-

Steven Sendor,
Defendant-Appellant.

Burger Yagerman & Green LLP, New York (Nancy M. Green of counsel), for appellant.

Jennifer Sendor, respondent pro se.

Order, Supreme Court, New York County (Ellen Gesmer, J.), entered May 11, 2011, which, inter alia, after a nonjury trial, granted the motion of plaintiff mother to set aside the parties' Parenting Agreement and awarded her sole legal custody of the parties' child, modified the parenting schedule, and denied the cross motion of defendant father for temporary legal custody of the child, unanimously affirmed, without costs.

The trial court properly set aside the parties' Parenting Agreement since joint custody is not appropriate where, as here, the parties' relationship is characterized by "acrimony and mistrust" (*Lubit v Lubit*, 65 AD3d 954, 955 [2009], *lv denied* 13 NY3d 716 [2010], *cert denied* US , 130 S Ct 3362 [2010]). The totality of the circumstances demonstrates that the award of

sole legal custody to the mother was in the best interests of the child (*see Eschbach v Eschbach*, 56 NY2d 167, 172-173 [1982]). The evidence supports the court's view of the mother's superior ability to meet the emotional and intellectual needs of the child. Moreover, the father repeatedly failed to foster the child's relationship with her mother (*see Bliss v Ach*, 56 NY2d 995, 998 [1982]). Numerous e-mails from the father to the mother showed that he bullied and derided the mother and spoke negatively about her to the child.

The record shows that the mental health of the mother was fully explored by the trial court. The court noted the mother's past and found that her decision to seek mental health treatment for herself exhibited a concern and ability to take appropriate efforts to address mental health issues. Moreover, there was no indication that her depression affected her parenting abilities (*compare Moor v Moor*, 75 AD3d 675, 678 [2010]).

An appointment of an attorney for the child was not necessary for the trial court to resolve the custody issue in the best interests of the child. "There is no requirement that the court invariably appoint a Law Guardian for the child in every case where parents who are unmarried, divorced or separated, seek a judicial determination of child custody and there is no

indication that the child's interests were prejudiced in any way" (*Richard D. v Wendy P.*, 47 NY2d 943, 944-945 [1979]; *see Avolio v Fontecchio*, 84 AD3d 611 [2011]).

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

ENTERED: MARCH 27, 2012

CLERK

Saxe, J.P., Sweeny, Catterson, Renwick, Manzanet-Daniels, JJ.

7203 The People of the State of New York, Ind. 6586/01
Respondent,

-against-

Roger Reid,
Defendant-Appellant.

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

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

Judgment of resentence, Supreme Court, New York County (Carol Berkman, J.), rendered January 20, 2009, resentencing defendant, as a second violent felony offender, to an aggregate term of 15 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision did not violate due process, and it was not otherwise

unlawful (*see People v Lingle*, 16 NY3d 621 [2011]). We have no authority to revisit defendant's prison sentence on this appeal (*see id*. at 635).

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

ENTERED: MARCH 27, 2012

CLERK

Saxe, J.P., Sweeny, Catterson, Renwick, Manzanet-Daniels, JJ.

7204 In re Robin Simpson, Index 116606/10
Petitioner,

-against-

New York State Office of Children
and Family Services, etc.,
Respondent.

Kevin P. Sheerin, Mineola, for petitioner.

Eric T. Schneiderman, Attorney General, New York (Matthew William Grieco of counsel), for respondent.

Determination of respondent New York State Office of Children and Family Services, dated August 26, 2010, which, after a hearing, revoked petitioner's license to operate a group family day care home, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR Article 78 (transferred to this Court by order of Supreme Court, New York County [Cynthia Kern, J.], entered on or about April 6, 2011), dismissed, without costs.

Substantial evidence supports respondent's findings that petitioner violated relevant regulations regarding the management and administration of group family day care homes, including leaving the children without competent supervision (18 NYCRR 416.8[a]), exceeding the authorized capacity (18 NYCRR

416.15[a][4]), failing to have the requisite number of care givers for the amount of children present (18 NYCRR 416.8[d][1]), failing to have the proper number of care givers for each child under the age of two years (18 NYCRR § 416.8[d][2]); and employing a care giver who did not submit an application to respondent and undergo a criminal background check (18 NYCRR 416.15[a][11][ii]), all of which placed the children's health, safety and welfare in imminent danger (*see Clarke v New York State Off. of Children & Family Servs.*, 91 AD3d 489 [2012]; *Matter of Seemangal v New York State Off. of Children & Family Servs.*, 49 AD3d 460 [2008]).

The determination to revoke petitioner's license does not shock our sense of fairness (*see Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]); *cf. Matter of Grady v New York State Off. of Children & Family Servs.*, 39 AD3d 1157, 1158 [2007]).

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

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

ENTERED: MARCH 27, 2012

CLERK

Saxe, J.P., Sweeny, Catterson, Renwick, Manzanet-Daniels, JJ.

7205N 444 East 86th Owners Corp., Index 106047/09
Plaintiff-Appellant,

-against-

435 East 85th Street Tenants Corp.,
Defendant-Respondent.

Dunnington Bartholow & Miller, LLP, New York (Carol A. Sigmond of counsel), for appellant.

Gallet Dreyer & Berkey, LLP, New York (Joseph V. Aulicino of counsel), for respondent.

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered July 18, 2011, which denied plaintiff's motion for a preliminary injunction to enjoin defendant from continuing to damage its garage roof, and continued and extended an earlier order, same court and Justice, entered on or about May 27, 2010, to the extent of directing that plaintiff commence the probes of the garage roof on August 1, 2011, unanimously affirmed, with costs.

As the court properly found, because there remained a difference of expert opinion regarding the cause and location of the water infiltration to the garage roof, the prior probe order must be continued to determine the party responsible for correcting the continuing water damage. In addition, as the

court properly found, even if plaintiff could show that it was likely to succeed on the merits of its claim, it failed to demonstrate irreparable injury in the absence of an injunction and a balance of equities in its favor (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *see also* CPLR 6301). Indeed, the record shows that plaintiff failed to comply with the court's prior probe order and that any injury could be compensated by monetary damages (*see Famo, Inc. v Green 521 Fifth Ave. LLC*, 51 AD3d 578 [2008]).

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

ENTERED: MARCH 27, 2012

CLERK

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

4676-
4677 Index 600562/08

HSH Nordbank AG,
Plaintiff-Respondent-Appellant,

-against-

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

Paul, Hastings, Janofsky & Walker LLP, New York (Barry G. Sher of counsel), for appellants-respondents.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Philippe Z. Selendy of counsel), for respondent-appellant.

Orders, Supreme Court, New York County (Richard B. Lowe III, J.), entered October 1, 2009 and October 15, 2009, modified, on the law, to grant the motion to dismiss the fraud cause of action, and otherwise affirmed, with costs to defendants.

Opinion by Friedman, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
David Friedman
Karla Moskowitz
Helen E. Freedman
Nelson S. Román, JJ.

4676-4677
Index 600562/08

x

HSH Nordbank AG,
Plaintiff-Respondent-Appellant,

-against-

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

x

Cross appeals from the orders of the Supreme Court, New York County (Richard B. Lowe III, J.), entered October 1, 2009 and October 15, 2009, which, to the extent appealed from, denied defendants' motion to dismiss the cause of action for fraud and granted defendants' motion to dismiss the cause of action for negligent misrepresentation and the demand for punitive damages.

Paul, Hastings, Janofsky & Walker LLP, New York (Barry G. Sher, James R. Bliss, James B. Worthington and Kevin P. Broughel of counsel), for appellants-respondents.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Philippe Z. Selendy, Peter E. Calamari, Sandford I. Weisburst and Isaac Nesser of counsel), for respondent-appellant.

FRIEDMAN, J.

The primary question on this appeal is whether plaintiff HSH Nordbank AG (HSH), a German commercial bank, has stated a cause of action for fraud against defendants UBS AG and UBS Securities LLC (collectively, UBS), an investment bank. The dispute arises from what was essentially a credit default swap transaction, in which, to simplify, HSH, in exchange for a stream of premium payments, assumed the risk of the first half billion dollars of losses on a $3 billion portfolio of securities related to the United States real estate market (the reference pool). In sum and substance, HSH alleges that UBS induced it to enter into the transaction by misrepresenting the risk involved and the manner in which UBS intended to manage the composition of the reference pool.

For a number of reasons, we find that the fraud claim must be dismissed as legally insufficient pursuant to CPLR 3211(a)(1) and (7). First, HSH — a sophisticated commercial entity — cannot satisfy the element of justifiable reliance, inasmuch as the undisputed documentary evidence establishes that HSH agreed that it was not relying on any advice from UBS; assented to the inherent conflicts of interest that would result from UBS's multiple roles with regard to the reference pool; and was explicitly warned of the risks it was undertaking in this highly

leveraged and complex transaction. Moreover, the allegations of the amended complaint itself establish that HSH could have uncovered any misrepresentation of the risk of the transaction through the exercise of reasonable due diligence within the means of a financial institution of its size and sophistication. Finally, the fraud claim is duplicative of HSH's claim for breach of contract (which is not at issue on this appeal) to the extent it is based on allegations that UBS misrepresented how it intended to manage the reference pool. Accordingly, we modify the orders under review to dismiss the fraud claim, and, upon HSH's cross appeal, affirm the dismissal of the cause of action for negligent misrepresentation and the demand for punitive damages.

The relevant facts are alleged in the amended complaint and established by the undisputed documentary evidence. In March 2002, UBS entered into a financial transaction known as a collateralized debt obligation (CDO) with HSH's predecessor-in-interest, Landesbank Schleswig-Holstein, a German bank with reported assets of €140 billion as of December 31, 2001.[1] As a

[1]Landesbank Schleswig-Holstein was absorbed into HSH Landesbank AG in a merger with another German bank that was effected in 2003. For ease of reference, we use the term "HSH" to refer to both HSH Nordbank AG and Landesbank Schleswig-Holstein.

result of this highly complex transaction, HSH was to receive (indirectly) a stream of premium payments from UBS and, in exchange, to assume a portion of the risk of defaults in the reference pool, a $3 billion securities portfolio assembled by UBS, comprised predominantly of assets linked to the United States real estate market (for example, mortgage-backed securities and instruments issued by real estate investment trusts).

The CDO was structured around a special-purpose entity formed by UBS, North Street Referenced Linked Notes, 2002-4 Limited (NS4), which entered into a credit default swap with UBS on the closing date. In a credit default swap, the "protection buyer" pays a periodic fee (resembling an insurance premium) to the "protection seller" to cover the credit risk on an underlying security or group of securities. The protection seller becomes obligated to compensate the protection buyer if a "credit event," usually defined as a payment default, a credit rating downgrade, or other credit-related loss of value, occurs with respect to an underlying security. While a credit default swap is in some respects analogous to an insurance policy (with the protection seller corresponding to the insurer and the protection buyer to the insured), it differs from conventional insurance in that the protection buyer need not own the underlying security or

securities or otherwise have any insurable interest therein. Concomitantly, the protection buyer need not suffer an actual loss to be entitled to a payment in the event of a credit event.

Under the credit default swap at issue here, NS4, as protection seller, in exchange for UBS's agreement to pay premiums, agreed to make certain payments to UBS, as protection buyer, upon the occurrence of defined adverse "credit events" affecting securities in the aforementioned reference pool. While the securities in the reference pool were required to meet certain ratings specifications, UBS selected the initial securities for the pool, and also had the right to substitute assets in and out of the pool during the life of the credit default swap, within defined parameters and through the use of internal procedures specified in a reference pool side agreement between UBS and HSH.[2] The governing documents required that by March 2004, 70% of the reference pool would be comprised of

[2]The reference pool side agreement between UBS and HSH provided that UBS would establish a six-member committee of UBS employees that would "monitor the credit quality of the [r]eference [p]ool." UBS further agreed to provide monthly reports about the reference pool to the committee and HSH and to give advance written notice of proposed substitutions in the reference pool. In certain situations, HSH was afforded veto power over substitutions. Whether UBS complied with these requirements in managing the reference pool is at issue in HSH's cause of action for breach of contract, which, as previously noted, is not before us.

asset-backed securities, real estate investment trust assets, and commercial mortgage-backed securities.

At the same time that UBS and NS4 entered into the credit default swap, HSH purchased $500 million of notes (divided into four classes) issued by NS4 (the NS4 notes).[3] Two classes of NS4 notes subordinate to HSH's notes, with aggregate face value of $74 million, were purchased by UBS. This use of multiple classes of debt obligations, or "credit tranches," is a standard feature of CDOs, with senior classes afforded greater security, but lower interest rates, than junior classes. In the NS4 transaction, the interest payments on the notes issued by NS4 were to be funded by the cash flows from UBS's premium payments under the credit default swap. At the same time, the proceeds of the notes were held to secure NS4's potential obligations to UBS under the credit default swap. In the event of NS4's becoming obligated to make payments to UBS under the swap, there would be corresponding reductions in the principal balance of each class of NS4 notes, in reverse order of seniority. HSH's exposure to the risk of

[3]The classes of NS4 notes that HSH purchased were as follows (in descending order of seniority): $353 million of Class A Notes, with an interest rate of LIBOR plus 0.8%, rated AAA by Fitch; $40 million of Class B Notes, with an interest rate of LIBOR plus 1.25%, rated AA by Fitch; $46 million of Class C Notes, with an interest rate of LIBOR plus 1.85%, rated A by Fitch; and $61 million of Class D Notes, with an interest rate of LIBOR plus 3.35%, rated BBB by Fitch.

credit events in the reference pool was cushioned by the junior notes purchased by UBS, which were to bear losses first. Because of the leveraged nature of the transaction — which provided $574 million of protection against credit events in a $3 billion portfolio — the entire investment in the NS4 notes would be wiped out by a decline of approximately 19% in the value of the reference pool.

The contractual documents governing this heavily negotiated transaction, and the offering circular (i.e., prospectus) for the NS4 notes, are replete with detailed disclosures of the considerable risks involved and of the conflicts of interest arising from UBS's multiple roles (to be more fully discussed below). In addition, the documents contain disclaimers establishing that, not only were UBS and HSH dealing with each other at arm's length, but that HSH was not entering into the deal in reliance on any advice from UBS. In particular, section 2.06(i)(x) of the indenture pursuant to which the notes were issued provides that each holder of notes, "by its purchase thereof, will be deemed to have represented and agreed" to terms including the following:

> "[The noteholder] acknowledges and agrees that: (A) none of [UBS] or [its] affiliates is acting as a fiduciary or financial or investment advisor for it; (B) it is not relying (for purposes of making any investment decision or otherwise) upon any advice,

> counsel or representations (whether written or oral) of [UBS] or any of [its] affiliates; and (C) it has consulted with its own legal, regulatory, tax, business, investment, financial, accounting and other advisors to the extent it has deemed necessary and has made its own investment decisions based upon its own judgment and upon any advice from such advisors as it has deemed necessary and not upon any view expressed by [UBS]."

Similarly, the offering circular for the notes contained the following warning (among many others) in capitalized letters: "IN MAKING AN INVESTMENT DECISION, INVESTORS MUST RELY ON THEIR OWN EXAMINATION OF . . . THE TERMS OF THE OFFERING, INCLUDING THE MERITS AND RISKS INVOLVED."

In addition, as one would expect in a transaction of this kind, the offering circular warned: "No dealer, salesman or other person has been authorized to give any information or to make any representations other than those contained in this Offering Circular and if given or made such other information or representations must not be relied upon as having been authorized by [NS4] or [UBS]."

It is undisputed that, for the first six years of the NS4 structure's operation, no credit events occurred in the reference pool, and that HSH therefore collected the full amount of interest due on its notes, without diminution, during that period. In 2008, however, with the collapse of the United States real estate market and the onset of the global financial crisis,

credit events in the reference pool began to occur in abundance. The amended complaint alleges that credit events in the reference pool have accumulated to such an extent that "HSH has experienced a near-total loss of its $500 million investment." This change of fortune led HSH to commence this action.

In lieu of answering, UBS moved to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7). Ultimately, Supreme Court granted the motion as to the cause of action for negligent misrepresentation and the demand for punitive damages, but denied it as to the causes of action for fraud and breach of contract. UBS has appealed the denial of its motion as to the fraud claim only; HSH cross-appeals from the dismissal of the negligent misrepresentation claim and the demand for punitive damages. We turn first to the fraud cause of action.

All of the misrepresentations alleged in the amended complaint in support of the fraud claim ultimately relate to the level of risk attached to the securities in the reference pool, on which hinged the likelihood of credit events occurring that would reduce or eliminate the return on HSH's notes. As previously noted, the governing documents required UBS to select securities for the reference pool that met specified credit rating standards (for example, the minimum rating for a security in the reference pool was BBB, and the reference pool as a whole

was required to have an average rating exceeding BBB+). Notably, the fraud claim is *not* based on an allegation that UBS did not intend to abide by the contractual standards for ratings of securities to be included in the reference pool.[4] Rather, the claim is that UBS knew that the published ratings of securities of the kinds to be used in the reference pool were not entirely reliable guides to the risk of these assets. The amended complaint alleges that UBS harbored the undisclosed intent to engage in "ratings arbitrage" in managing the reference pool. HSH explains "ratings arbitrage" as

> "[t]he systematic selection and substitution of credits which had the requisite credit rating, but *traded at wide spreads* (i.e., were higher risk) for that rating. This 'ratings lag' reflects *the market's understanding, evidenced by the lower value of the security*, of a deterioration in credit quality in advance of ratings agency downgrades" (emphasis added).

As shown by the phrases emphasized in the above quotation from the amended complaint, by HSH's own account, the potential for a discrepancy between a security's credit rating and its actual risk was understood in the relevant marketplace at the time. In other words, the unreliability of credit ratings was sufficiently well known that securities often traded at a

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[4]Of course, in litigating its breach of contract cause of action, HSH may seek recovery for a breach of the ratings standards for the reference pool, if it is able prove that such a breach occurred.

discount to the price their credit rating (if accurate) would have warranted. At bottom, HSH is complaining that UBS — which HSH agreed was not acting as its advisor or fiduciary in this matter — induced it to enter into a deal that would enable UBS to exploit, at HSH's expense, a feature of the relevant securities market that was common knowledge among participants in that market. This does not constitute a legally sufficient cause of action for fraud, certainly not when pleaded by a sophisticated business entity that disclaimed reliance on the party it now accuses of fraud.

It may be that HSH was poorly advised to purchase the NS4 notes, given that the standards for securities in the reference pool were stated in terms of often unreliable credit ratings. Under the disclaimers set forth in the extensively negotiated governing documents, however, HSH had no right to look to UBS for advice concerning the suitability of the deal for HSH.[5] Hence,

[5]Again, in purchasing the notes, HSH expressly agreed (in the words of the indenture) that it was "not relying . . . upon any advice, counsel or representations (whether written or oral) of [UBS]"; that it had received whatever advice it deemed necessary from "its own legal, regulatory, tax, business, investment, financial, accounting and other advisors"; and that it had "made its own investment decisions based upon its own judgment and upon any advice from such advisors as it has deemed necessary and not upon any views expressed by [UBS]." In addition, the offering circular warned HSH that, as an investor in the notes, it "must rely on [its] own examination of . . . the terms of the offering, including the merits and risks involved."

HSH cannot predicate a fraud claim upon the allegation that UBS disingenuously recommended that HSH enter into a transaction that, while favorable to UBS, was disadvantageous to HSH (*see MBIA Ins. Corp. v Merrill Lynch*, 81 AD3d 419, 419 [2011] [dismissing fraud claim by a "sophisticated business entit(y)" that had agreed to disclaimers "providing that (it) would not rely on defendants' advice, that it had the capacity to evaluate the transactions, and that it understood and accepted the risks"]; *Chase Manhattan Bank v New Hampshire Ins. Co.*, 304 AD2d 423, 424 [2003], *lv denied* 100 NY2d 509 [2003] [fraud claim was barred by plaintiff's disclaimer "indicat(ing) that it would make its own investigation of the risks involved"]; *Longo v Butler Equities II*, 278 AD2d 97, 97 [2000] [plaintiff could not claim reliance where documentary evidence established that "he had accepted the risk of a speculative investment based on his independent investigation and without reliance on any representations" by defendants]).

As HSH stipulated that it was dealing with UBS at arm's length, the applicable rule, stated by the Court of Appeals, is as follows:

> "If the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use

> of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations" (*Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 278-279 [2011] [internal quotation marks and brackets omitted]; *see also Danann Realty Corp. v Harris*, 5 NY2d 317, 322 [1959] [same]; *Schumaker v Mather*, 133 NY 590, 596 [1892] [same]).

Consistent with the foregoing, this Court has held that, "'[a]s a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it'" (*Ventur Group, LLC v Finnerty*, 68 AD3d 638, 639 [2009], quoting *UST Private Equity Invs. Fund v Salomon Smith Barney*, 288 AD2d 87, 88 [2001]; *see also Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 100 [2006], *lv denied* 8 NY3d 804 [2007] ["New York law imposes an affirmative duty on sophisticated investors to protect themselves from misrepresentations . . . by investigating the details of the transactions"]; *Stuart Silver Assoc. v Baco Dev. Corp.*, 245 AD2d 96, 98-99 [1997] [justifiable reliance cannot be shown "(w)here a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means"]; *Lampert v Mahoney, Cohen & Co.*, 218 AD2d 580, 582-583 [1995] [dismissing fraud claim where "plaintiff failed to undertake an independent appraisal of the

risk he was assuming," and thereby "assumed the risk of loss that a proper investigation would have been likely to disclose"]).

The principle that sophisticated parties have "a duty to exercise ordinary diligence and conduct an independent appraisal of the risk they [are] assuming" (*Abrahami v UPC Constr. Co.*, 224 AD2d 231, 234 [1996]; *see also Granite Partners, L.P. v Bear, Stearns & Co.*, 58 F Supp 2d 228, 259 [SD NY 1999]) has particular application where, as here, the true nature of the risk being assumed could have been ascertained from reviewing market data or other publicly available information (*see Havell Capital Enhanced Mun. Income Fund, L.P. v Citibank, N.A.*, 84 AD3d 588, 589 [2011] ["(t)he fraudulent inducement claim was deficient for lack of justifiable reliance, since (the sophisticated) plaintiff . . . had access to the relevant market information"]; *Alpha GmbH & Co. Schiffsbesitz KG v BIP Indus. Co.*, 25 AD3d 344, 345 [2006], *lv dismissed* 7 NY3d 741 [2006] [fraud claim could not be predicated on concealment of "matters of public record that . . . could have (been) discovered by the exercise of ordinary diligence"]; *National Union Fire Ins. Co. of Pittsburgh, Pa. v Red Apple Group*, 273 AD2d 140, 141 [2000] [to same effect as *Alpha GmbH*]; *see also Granite Partners*, 58 F Supp 2d at 260 [under New York law, investment funds' reliance on brokers' alleged misrepresentations concerning the value of the funds' holdings

was unjustifiable as a matter of law where the pleadings established that the funds failed to discharge "their obligations to independently value their portfolios" and "to conduct their own due diligence"]).

Here, the core subject of the complained-of representations was the reliability of the credit ratings used to define the permissible composition of the reference pool. The reliability of those ratings was the premise on which the entire deal was sold to HSH.[6] Far from being peculiarly within UBS's knowledge, the reliability of the credit ratings could be tested against the public market's valuation of rated securities. According to the allegations of the amended complaint itself, a study of the market for the relevant kinds of securities would have revealed that the credit rating conferred on a security by a rating agency did not necessarily correspond to the security's risk level as perceived by the market. In particular, the amended complaint alleges that UBS's internal analyses of its own risk, profit and loss from the transaction was based on models using "market-

[6]For example, the amended complaint alleges that UBS "encourag[ed] HSH to evaluate the risk of loss [from the NS4 notes] on the basis of the ratings agency's historical default probabilities[.]" The rating of the NS4 notes was based on the ratings of the securities in the reference pool, whose performance would determine HSH's profit or loss from the NS4 notes.

implied default probabilities" — in other words, probabilities of default that were derived from publicly available market information. Nowhere in the amended complaint does HSH identify any kind of factual data UBS used in its internal analyses of the NS4 deal that was not readily accessible to finance professionals worldwide. Indeed, the amended complaint does not even allege that the models used in UBS's internal analyses — the economic assumptions and mathematical methods employed — were so unique to UBS that an independent appraisal of the risks of the transaction would not have revealed them.

HSH alleges that, as a German regional bank, it had "little relevant experience in synthetic CDOs based upon U.S. real estate assets." Assuming this allegation is true, a relative lack of expertise in transactions of this kind would not have given HSH any right to expect UBS to act as its advisor in the deal or to bring to HSH's attention relevant information that HSH could have obtained through its own efforts (*see Societe Nationale D'Exploitation Industrielle Des Tabacs Et Allumettes v Salomon Bros. Intl.*, 268 AD2d 373, 374 [2000], *lv denied* 95 NY2d 762 [2000] [no duty to disclose arose "by reason of a claimed disparity in (the) parties' knowledge respecting the risks of the subject transaction," where plaintiff was "a sophisticated institutional investor"]). Again, it cannot be overemphasized

that HSH agreed that it was purchasing the NS4 notes based on its own judgment, informed by the views of any third-party advisors it saw fit to consult, and *not* in reliance upon any views expressed by UBS. As contemplated by this contractual provision, if HSH believed that it lacked sufficient expertise to evaluate the NS4 transaction unassisted, it was free to retain qualified outside consultants to render independent advice concerning the risks of the deal and, in particular, whether HSH would be afforded sufficient protection from credit events by the ratings standards applicable to the reference pool. Beyond question, as a financial institution with assets of €140 billion, HSH had the means to obtain such advice concerning a contemplated $500 million investment. Given its representation that it was not relying on any recommendation by UBS in purchasing the NS4 notes, HSH's failure to undertake (either directly or through an advisor) an independent appraisal of the risks of the transaction necessarily leads to the conclusion that HSH was "so lax in protecting [itself] that [it] cannot fairly ask for the law's protection" (*Centro Empresarial*, 17 NY3d at 279 [internal quotation marks omitted]).[7]

[7]The conflict between the theory of HSH's fraud claim and its agreement that it was not buying the notes in reliance on UBS's advice is highlighted by HSH's allegations that UBS is being sued precisely for failing to give HSH good and accurate

Moreover, nowhere does the amended complaint allege that HSH, in the course of the "several months of due diligence" it allegedly conducted, ever asked UBS — which, after all, was acting as a *salesman*, not as HSH's advisor — to produce any alternative analysis of the transaction in its possession. A response to such a request falsely denying that UBS possessed any analysis materially different from those already disclosed arguably would have been fraudulent (*cf. Littman v Magee*, 54 AD3d 14, 18-19 [2008]; *but see Centro Empresarial*, 17 NY3d at 278 [noting that *Littman* "misapprehend[ed] our case law" in certain respects]). But no such false denial is alleged; HSH simply assumes that, in the absence of a request, UBS was obligated to disclose its internal analyses of the deal.[8] In the context of arm's length dealing between sophisticated parties, however, UBS had no obligation to disclose internal analyses for which HSH made no request (*see Ventur Group*, 68 AD3d at 639 [dismissing

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advice about the deal. For example, the amended complaint alleges that UBS failed to provide "the expertise and *advice* HSH expected" (emphasis added); that UBS "induced HSH to *rely* upon its greater knowledge and expertise in the[] [relevant] areas" (emphasis added); and that "HSH *relied* on UBS for truthful and accurate *advice*, *guidance* and representations" (emphasis added).

[8]Of course, whether HSH requested the production of any alternative analysis in UBS's possession is a matter within HSH's direct knowledge, so there is no reason to excuse the failure to allege that such a request was made.

fraud claim where, after plaintiff acquired a company "without asking to see any employment contracts or speaking to . . . a 'key employee,'" the employee resigned, taking clients with him; "(h)aving failed to make any effort to verify (defendant's) representations concerning her client relationships and (the employee's) role in the business, plaintiff cannot demonstrate justifiable reliance on the misrepresentations"]; *Graham Packaging Co., L.P. v Owens-Illinois, Inc.*, 67 AD3d 465 [2009] [affirming the dismissal of a fraud counterclaim based on the alleged concealment of plaintiff's "own valuation of its anticipated claim against defendants" because "defendants, sophisticated entities represented by counsel, should have at least inquired about such valuation" in negotiating the settlement agreement they sought to avoid]; *Permasteelisa, S.p.A. v Lincolnshire Mgt., Inc.*, 16 AD3d 352 [2005] [affirming dismissal of fraud claim where "plaintiff neglected to seek examination of the books and records of the company it was acquiring, relying on an unaudited financial statement that allegedly proved inaccurate"]; *Stuart Lipsky, P.C. v Price*, 215 AD2d 102, 103 [1995] [affirming dismissal of fraud claim where plaintiff purchased law practice "rely(ing) solely upon the alleged oral representations without any effort to verify that information *via* financial statements"]; *Rodas v Manitaras*, 159

AD2d 341, 342 [1990] ["In entering into the contract, with the assistance of counsel and without conducting an examination of the books and records, plaintiffs clearly assumed the risk that the documentation might not support the $20,000 weekly income that was represented to them"]).[9]

Given that the amended complaint itself makes plain that an examination of the relevant securities market would have revealed the fallibility of the credit ratings, HSH's fraud claim would be legally insufficient even in the absence of the disclaimers and disclosures set forth in the transactional documents. The presence of those disclaimers and disclosures only reinforces the conclusion that the fraud claim should be dismissed. A comparison of the disclaimers and disclosures with the various particular misrepresentations alleged by HSH — all of which, to

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[9]Readily distinguishable is *DDJ Mgt., LLC v Rhone Group L.L.C.* (15 NY3d 147 [2010]), and not only on the ground that the matters misrepresented therein (concerning a borrower's financial condition) were matters of existing fact peculiarly within the knowledge of the defendants (the borrower's management and controlling entities). It was crucial to the decision sustaining the fraud claim in *DDJ* that the plaintiff lenders "made a significant effort to protect themselves against the possibility of false financial statements . . . [by] obtain[ing] [written] representations and warranties to the effect that nothing in the financials was materially misleading" (*id.* at 156). Needless to say, in this case, UBS never issued any warranty concerning any of the matters HSH claims were misrepresented but, at the time, failed to investigate for itself. On the contrary, it was HSH that warranted in writing that it was not relying on UBS for advice.

reiterate, relate directly or indirectly to the reliability of credit ratings in the relevant market — show that the disclaimers and disclosures in these documents relate to "the very matter as to which [HSH] now claims it was defrauded" and therefore "destroy[] the allegations . . . that the agreement was executed in reliance upon . . . contrary oral representations" (*Danann*, 5 NY2d at 320-321).

HSH alleges that UBS represented that the NS4 notes would be a relatively low-risk investment.[10] As a matter of law, however, HSH could not justifiably rely on UBS's alleged characterizations of the risk level of the notes, none of which are found in the offering circular or in the operative contractual documents. As previously noted, HSH expressly disclaimed any reliance upon representations by UBS, whether written or oral, to assess the risk of the transaction, and represented that, in purchasing the notes, it was relying only on its own judgment and on the views of any advisors of its own choosing whom it had seen fit to consult. In addition, the offering circular for the notes

[10]For example, the amended complaint alleges that "UBS specifically represented to HSH that HSH's interest would be in very high credit quality paper issued by [NS4]"; that "UBS marketed the [NS4] Notes as being worth par [full face amount] and as warranting their investment grade ratings"; and that it was HSH's "expectation that, as UBS represented, [the NS4 notes] were low-risk investments consistent with [HSH's] conservative investment objectives."

cautioned HSH that it "must rely on [its] own examination of . . . the terms of the offering, including the merits and risks involved," and that "any information or . . . representations other than those contained in this Offering Circular . . . must not be relied upon as having been authorized by [NS4] or [UBS]."

Moreover, the offering circular contained extensive disclosures about the highly-leveraged — and hence inherently risky — nature of the investment. For example, the circular contained the following warnings, among others:

- "[T]he obligation of [NS4] to make payments to [UBS] under the Credit Swap [in the event of credit events in the reference pool] creates *significantly leveraged exposure* to the credit of a number of Reference Entities [i.e., issuers of securities in the reference pool]" (emphasis added).

- "If [NS4] is obligated to make any Credit Protection Payments to [UBS], . . . the Principal Balance of each Class of Notes will be reduced by the amount of such Credit Protection Payment . . . Accordingly, Noteholders *may lose amounts invested in the Notes* . . . or fail to realize expected returns. [UBS] shall owe no fiduciary duties to [NS4], the Noteholders or any other party" (emphasis added).

- "Under the Credit Swap, [NS4] may be obliged to make Credit Protection Payments to [UBS] as a result of Credit Events occurring in respect of the Reference Entities in the Reference Pool. While [NS4's] (and therefore the Noteholders') credit exposure is equal to the Maximum Amount [$574 million], the aggregate Notional Amount of the Reference

> Pool will initially be U.S.$3 billion. *This leverage increases the risk of loss to [NS4] and, therefore, to the Noteholders*" (emphasis added).
>
> - "[H]olders of the Notes will be *exposed to the credit of the Reference Entities to the full extent of their investment in the Notes* and must rely solely on the proceeds of the Collateral pledged to secure, *inter alia*, each Class of Notes for the payment of the Principal Balance thereof and interest thereon" (emphasis added).
>
> - "There is currently no market for the Notes. There can be no assurance that a secondary market for any of the Notes will develop, or, if a secondary market does develop, that it will provide the holders of the Notes with liquidity or that it will continue for the life of the Notes . . . Consequently, *any purchaser of the Notes must be prepared to hold such Notes for an indefinite period of time*" (emphasis added).

As previously discussed, the risk profile of the NS4 notes depended entirely upon the risk profile of the reference pool, the composition of which was determined by reference to credit ratings. HSH — by its own account — could have discovered the infirmity of those ratings in the relevant security classes had it examined the market pricing of rated securities. Hence, to reiterate, the facts allegedly misrepresented were not peculiarly within UBS's knowledge (*cf. Steinhardt Group v CitiCorp*, 272 AD2d 255, 257 [2000]). And the high degree of leverage in the position HSH assumed as holder of the NS4 notes, while obvious on

the face of the terms of the transaction, was expressly disclosed in the offering circular, which also warned HSH that it "*must* rely on [its] *own examination* of . . . the merits and *risks*" of the transaction (emphasis added). HSH should be held to its representation in the heavily negotiated transactional documents that it was not purchasing its notes based on any "advice" from UBS, and should be charged with knowledge of the offering circular's risk disclosures and warning to examine for itself the extent of those risks.

To permit HSH to sue UBS for fraud based on extracontractual representations concerning the risk level of the notes would "in effect condone [HSH's] own fraud in 'deliberately misrepresenting [its] true intention'" when it disclaimed reliance on any such representations at the time of contracting (*Citibank v Plapinger*, 66 NY2d 90, 95 [1985], quoting *Danann*, 5 NY2d at 323). Further, the substance of the relevant disclaimers and disclosures, far from being merely a "generalized boilerplate exclusion" of reliance on statements outside the transactional documents (*id.*), covers the subject matter of the alleged misrepresentation with sufficient specificity to bar the fraud claim. "Since the plaintiff stipulated in the contract that it was not relying upon any representations 'as to the very matter as to which it now claims it was defrauded,' such specific disclaimer destroys the

allegations in the plaintiff's complaint that the agreement was executed in reliance upon the defendant's . . . representations" (*Mahn Real Estate Corp. v Shapolsky*, 178 AD2d 383, 385-386 [1991], quoting *Danann*, 5 NY2d at 320).[11]

HSH also alleges, in vague and conclusory terms, that it was misled as to the "pricing, valuation and subordination" of the NS4 notes. In other words, HSH claims that, given the actual likelihood of credit events in the reference pool, it paid too much for its notes and, in the long run, was unlikely to be protected from loss of principal by UBS's $74 million layer of subordinated notes (which bore losses first). This is just another way of saying that the credit ratings used as parameters for the composition of the reference pool were not reliable indicators of credit quality and understated the likelihood of

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[11] *See also MBIA*, 81 AD3d at 419 (fraud claim was barred by "specific disclaimers in the contracts . . . providing that plaintiff . . . would not rely on defendants' advice, that it had the capacity to evaluate the transactions, and that it understood and accepted the risks"); *Chase Manhattan Bank*, 304 AD2d at 424 ("fraud claims cannot be brought by a contracting party who specifically disclaimed reliance on extracontractual representations and indicated that it would make its own investigation of the risks involved"); *Societe Nationale*, 268 AD2d at 375 ("plaintiff's claim of justifiable reliance is . . . conclusively refuted by the disclaimer of representations of value"); *O & M Gourmet Foods v Marino's 184 Foods*, 225 AD2d 340, 341 [1996] [dismissing fraud claim where plaintiffs "had expressly disclaimed reliance upon the types of misrepresentations alleged in the complaint under the parties' contract of sale"]).

credit events. Again, HSH disclaimed any right to rely on UBS for advice on these matters, as to which HSH could have conducted or obtained independent research, and the alleged misrepresentations are contradicted by the offering circular's risk disclosures and its warning that HSH "must rely on [its] own examination of . . . the merits and *risks* involved" (emphasis added). Moreover, in arm's length dealings between sophisticated parties, the seller is not obligated to disclose to the buyer its internal valuation of the item sold (*see Granite Partners*, 58 F Supp 2d at 261 [no claim for fraud was stated under New York law by allegations that brokers sold securities to investment funds "at prices well in excess of either the prices at which the (b)rokers had obtained those instruments or the values that the (b)rokers had themselves assigned to the securities"]).

Similarly, HSH complains that UBS marketed the NS4 notes to it based "on the basis of ratings agency models" that UBS internally rejected. Specifically, while UBS allegedly

> "encourage[d] HSH to evaluate the risk of loss on the basis of the ratings agency's historical default probabilities, UBS did not use that data to assess its own risk, calculate its profit and loss, or mark its books. Instead, UBS relied upon different internal models that used, among other data, *market-implied default probabilities*" (emphasis added).

As previously discussed, the reference to "market-implied default probabilities" highlights HSH's failure to allege the

misrepresentation of any existing fact that HSH could not have discovered through its own due diligence. Nonetheless, HSH predicates its fraud claim upon UBS's use of an analysis to sell the deal that was different from the analysis it used internally — without alleging that UBS, in the course of its marketing, uttered any falsehood or concealed any inaccessible information or analytic tools. If we were to allow a fraud claim to go forward on this basis, it would render meaningless HSH's agreement that it was not relying on UBS for "any advice, counsel or representations (whether written or oral)" and had "consulted with its own . . . *business, investment, financial, accounting* and other advisors to the extent it . . . deemed necessary" (emphasis added). Sustaining this claim would likewise nullify the offering circular's caution that HSH "*must* rely on [its] *own examination* of . . . the merits and *risks* involved" (emphasis added). In effect, the message to the corporate and financial world would be that "it is impossible for two businessmen dealing at arm's length to agree that the buyer is not buying in reliance on any representations of the seller as to a particular fact" (*Danann*, 5 NY2d at 323). This is a message we decline to send.

Other misrepresentations by UBS alleged in the amended complaint concerned the performance of UBS's four earlier transactions similar in structure to the NS4 transaction. Here

again, HSH does not allege that UBS misrepresented any existing fact or that it concealed any fact unavailable to HSH through the exercise of due diligence. Rather, HSH alleges that, as with the NS4 deal, UBS presented HSH with one analysis of the earlier transactions (one apparently based on the assumption of the reliability of credit ratings) while, internally, UBS used a different analysis of the deals under which the results were less favorable to the outside counterparties and more favorable to UBS. Notably, HSH does not allege that, as part of its due diligence, it made any request to examine UBS's records concerning the earlier transactions. Accordingly, for the reasons already discussed, the amended complaint's allegations of UBS's claims regarding the earlier transactions do not render the fraud claim viable.[12]

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[12]Nor is the fraud cause of action saved by the allegation that HSH was somehow misled by the pro forma statement in the credit swap confirmation agreement between UBS and NS4 (to which HSH was not a party) that the directors of NS4 had "determined . . . that the Transaction . . . is fully consistent with *its* [i.e., NS4's] financial needs, objectives and condition, . . . complies and is fully consistent with all investment policies, guidelines and restrictions *applicable to it* and . . . is a fit, proper and suitable investment *for it*, notwithstanding the clear and substantial risks inherent in entering into the Transaction" (emphasis added). On its face, this statement concerned the suitability of the transaction *for NS4 itself*, not for HSH. Moreover, NS4, a newly formed Cayman Islands entity, was nothing more than a pass-through special purpose vehicle for the transaction; it had no independent shareholders or real interests of its own, and its directors were all UBS employees (as

A substantial portion of the amended complaint is devoted to allegations that UBS misrepresented the manner in which it intended to carry out its role as manager of the reference pool, which involved selecting securities for the pool and substituting securities in and out of the pool. Although no such representations are set forth in the transactional documents, UBS allegedly told HSH that there would be an "alignment of interests" between the two parties, in that UBS's motivation was to establish a mechanism that would "allow it to hold stable assets for the long-term" while reducing its credit exposure to those assets for purposes of complying with internal guidelines. In fact, according to the amended complaint, UBS intended from the outset to use a number of trading strategies in managing the reference pool, and in otherwise dealing with securities in the pool, that would create a conflict of interest between itself and HSH.[13] For two reasons, none of these allegations can support a

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disclosed in the offering circular). Hence, HSH — which agreed that it was responsible for making its own assessment of the deal's suitability for itself — could not reasonably have relied on the boilerplate statement of the NS4 directors in entering into the transaction.

[13]Specifically, it is alleged that "UBS intended to trade against its position in the reference [pool]"; that the assets in the pool, rather than having been "purchased for UBS'[s] long-term portfolio," were specifically "acquired to hedge the [NS4] transaction"; that UBS used its substitution power to "worsen[] the overall credit profile of the reference pool"; that UBS took

cause of action for fraud as a matter of law.

First, the transactional documents expressly disclosed the potential for conflicts of interests between UBS and HSH to arise in the course of UBS's management of the reference pool and its other trading activities, and provided that HSH would have no claim against UBS arising from such conduct. For example, section 1.15 of the indenture provides:

> "*Conflicts of Interest.* [UBS] and certain of its Affiliates are acting in a number of capacities in connection with the transactions contemplated herein and in other Transaction Documents. [UBS] and each of its Affiliates providing services in connection with such transactions shall have only the duties and responsibilities expressly agreed to by such entity in the relevant capacity and shall not, by virtue of it or its Affiliate acting in any other capacity be deemed to have other duties or responsibilities or be deemed to be held to a standard of care other than as expressly provided with respect to each such capacity. [UBS] and its Affiliates in their various capacities in connection with the contemplated transactions may enter into business dealings, including the acquisition of investment securities as contemplated hereby and by the other Transaction Documents, from which they may derive revenues and profits in addition to the fees stated herein and in the various other Transaction Documents, without any duty to account therefor."

Likewise, the offering circular set forth the following warning to HSH:

> "Reference Entities may include entities to which [UBS]

"short positions" against securities in the reference pool, i.e., made bets in the market against the performance of those assets; and that UBS "churned the reference pool portfolio."

> has, or does not have, credit exposure . . . [UBS] and its affiliates *may deal in any Reference Obligation* [i.e., security in the reference pool] . . . and generally engage in any kind of commercial or investment banking or other business transactions with, any Reference Entity and *may act with respect to such transactions in the same manner as if . . . the Notes did not exist and without regard to whether any such action might have an adverse effect on the Reference Entity, [NS4] or the holders of the Notes*" (emphasis added).

On the next page, the offering circular makes explicit that UBS has the right to deal as it sees fit with reference entities, "regardless of whether any such action might have an adverse effect (*including, without limitation, any action which might constitute or give rise to a Credit Event*) on any Reference Entity, or the position of any other party to the Transaction Documents or otherwise" (emphasis added).

In view of the specific and detailed disclosures and disclaimers set forth above, it was unjustifiable and unreasonable as a matter of law for HSH to place any reliance on UBS's alleged extracontractual representations concerning a contemplated "alignment of interests" between the two parties, or concerning UBS's intended "trading strategy" and "motive and economic interest in the deal." Any limitations on UBS's discretion in managing the reference pool or in its other trading activities that HSH expected to be observed should have been incorporated into the heavily negotiated transactional documents,

such as the indenture and the reference pool side agreement between UBS and HSH. Again, HSH's claim that UBS breached certain of its contractual obligations under those documents is not at issue on this appeal, and is being litigated in Supreme Court. But to allow HSH to pursue a fraud claim on a theory that essentially writes into the agreements new protections against conflicts of interest is to nullify the foregoing disclaimers and disclosures. "If the language here used is not sufficient to estop [HSH] from claiming that [it] entered the contract because of [the alleged] fraudulent representations, then no language can accomplish that purpose" (*Danann*, 5 NY2d at 323).

Further, HSH's allegations about "alignment of interests," "trading strategy" and "motive and economic interest" concern, for the most part, UBS's alleged misrepresentation either of its intention to breach its contractual obligations as manager of the reference pool or of the manner in which it intended to perform those obligations.[14] As a matter of law, neither of these categories of alleged insincere promises can support a cause of action for fraud. A claim for fraudulent inducement of contract

[14]For example, the amended complaint alleges that, contrary to UBS's representation that it "would use the 'substitution' option to protect the credit quality of the portfolio," UBS actually intended to "deliberately substitut[e] riskier, higher spread credits that worsened the overall credit profile of the reference pool."

can be predicated upon an insincere promise of future performance only where the alleged false promise is *collateral* to the contract the parties executed; if the promise concerned the performance of the contract itself, the fraud claim is subject to dismissal as duplicative of the claim for breach of contract (*see Havell Capital*, 84 AD3d at 589 [affirming dismissal of fraud claim that "did not allege a breach of any duty collateral to or independent of the parties' agreements" on the ground that it "was redundant of the contract claim"]; *Mañas v VMS Assoc., LLC*, 53 AD3d 451, 453-454 [2008]; *cf. Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986] [sustaining fraud claim based on a "collateral" oral promise that was the inducement for the contract]).

This Court recently applied the foregoing principle in the context of a securities-related dispute not unlike this one. In *Financial Structures Ltd. v UBS AG* (77 AD3d 417 [2010]), while affirming the denial of a motion to dismiss as to the cause of action for breach of contract, we modified to dismiss the fraud cause of action, explaining:

> "The motion court erred . . . in failing to dismiss the fraud cause of action as duplicative of the breach-of-contract cause of action, inasmuch as it is based on the same facts that underlie the contract cause of action, is not collateral to the contract, and does not seek damages that would not be recoverable under a contract measure of damages. The essence of

> the fraudulent inducement cause of action is that *defendants allegedly misrepresented to plaintiffs their intentions with respect to the manner in which they would manage the underlying assets*, and thus plaintiffs allege a misrepresentation of future intent rather than a misrepresentation of present fact, which is not sustainable as a cause of action separate from breach of contract" (*id.* at 419 [emphasis added and citations omitted]).

By no means do we suggest that UBS, if it engaged in the sharp dealing alleged by HSH, is to be commended; such practices are indeed troubling. Still, however much UBS's alleged conduct leaves to be desired as a matter of business ethics, the undisputed documentary evidence and HSH's own allegations eliminate, as a matter of law, any reasonable inference that HSH justifiably relied on the representations of which it now complains. To sustain HSH's fraud cause of action, we would have to ignore the fact that the amended complaint — assuming the truth of its allegations — does not allege that UBS misrepresented any material existing fact as to which HSH could not have learned the truth had it conducted (or hired a consultant to conduct on its behalf) an independent appraisal of the risks of the NS4 transaction. We would also have to close our eyes to HSH's sophistication; to HSH's disclaimer of reliance on UBS for advice or on any extracontractual representations; to the detailed and specific disclosures of risk and conflict of interest in the transactional documents; to HSH's ability to

protect itself through the exercise of due diligence; and to the availability to HSH of appropriate relief (if any) under the rubric of its claim for breach of contract. Indeed, if we were to affirm the denial of the motion to dismiss this fraud claim, we would be judging the sufficiency of a claim asserted by a €140 billion commercial bank by a standard more lenient than the one by which this Court has judged similar claims made by individual investors against their retail brokers (*see e.g. Matter of Dean Witter Managed Futures Ltd. Partnership Litig.*, 282 AD2d 271 [2001]). Such a result would put in question whether any set of disclaimers and disclosures, no matter how detailed and specific, affords protection against a fraud claim — even a claim by a commercial entity of a high degree of sophistication, and with the resources to hire any outside help it needs — concerning matters subject to discovery through due diligence, and as to which the claimant agreed that it was not relying on the party sitting across the table.[15]

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[15]HSH brings to our attention two decisions of this Court that have been issued since the argument of this appeal. We find those decisions to be inapposite. In *China Dev. Indus. Bank v Morgan Stanley & Co. Inc.* (86 AD3d 435 [2011]), the denial of the motion to dismiss fraud causes of action was affirmed because we found, based on the allegations of that complaint, that the plaintiff had "sufficiently alleged that [the defendant] possessed peculiar knowledge of the facts underlying the fraud, and the circumstances present would preclude any investigation by [the plaintiff] conducted with due diligence" (*id.* at 436). Such

Finally, we turn to HSH's cross appeal. As should be evident from the foregoing discussion, the cause of action for negligent misrepresentation was correctly dismissed. The parties expressly agreed that they were dealing with each other at arm's length, that UBS was not acting as HSH's financial or investment advisor," and that HSH was "not relying (for purposes of making any investment decisions or otherwise) upon any advice, counsel or representations . . . of [UBS]." As a matter of law, therefore, HSH cannot allege that it had a "special relationship" with UBS upon which a negligent misrepresentation claim may be predicated (*see ESE Funding SPC Ltd. v Morgan Stanley*, 68 AD3d 676, 677 [2009]). The demand for punitive damages was also

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is not the case here. In *MBIA Ins. Corp. v Countrywide Home Loans, Inc.* (87 AD3d 287 [2011]), we sustained the sufficiency of a fraud claim based on alleged misrepresentations "concerning the origination and quality of the mortgage loans underlying" mortgage-backed securities, in that the defendants allegedly "falsely represented that the loans [underlying the mortgage-backed securities] were made in strict compliance with [their] underwriting standards and guidelines, as well as industry standards" (*id.* at 291-292). The decision does not discuss any argument by the defendants in that case that the fraud claim was barred by contractual disclosures or disclaimers (as is the case here) or that the plaintiff could have protected itself through the exercise of due diligence (as is also the case here). Moreover, although not stated in the decision, it appears that the matter allegedly misrepresented — whether the mortgage loans backing the securities that the plaintiff insured were made in compliance with applicable standards — was a matter peculiarly within the knowledge of the defendants, the entities that originated, serviced, and securitized the underlying loans and sold the resulting securities.

properly dismissed as HSH does not allege that UBS engaged in egregious conduct that was "part of a pattern of similar conduct directed at the public generally" (*Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613 [1994]).

Accordingly, the orders of the Supreme Court, New York County (Richard B. Lowe, III, J.), entered October 1, 2009, and October 15, 2009, which, to the extent appealed from, denied defendants' motion to dismiss the cause of action for fraud and granted defendants' motion to dismiss the cause of action for negligent misrepresentation and the demand for punitive damages, should be modified, on the law, to grant the motion to dismiss the fraud cause of action, and otherwise affirmed, with costs to defendants.

All concur

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

ENTERED: MARCH 27, 2012

CLERK

Gonzalez, P.J., Tom, Catterson, Richter, Román, JJ.

6055 The People of the State of New York, SCI. 20905C/09
Appellant,

-against-

Keith R.,
Defendant-Respondent.

Robert T. Johnson, District Attorney, Bronx (Stanley R. Kaplan of counsel), for appellant.

Steven Banks, The Legal Aid Society, New York (Svetlana M. Kornfeind of counsel), for respondent.

Order, Supreme Court, Bronx County (Colleen D. Duffy, J.), entered October 28, 2010, reversed, on the law, the motion denied, the record unsealed, the criminal information reinstated, and the matter remanded for further proceedings. The Clerk is directed to unseal the record.

Opinion by Tom, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
Peter Tom
James M. Catterson
Rosalyn H. Richter
Nelson S. Román, JJ.

6055
SCI 20905C/09

x

The People of the State of New York,
Appellant,

-against-

Keith R.,
Defendant-Respondent.

x

The People appeal from the order of the Supreme Court, Bronx County (Colleen D. Duffy, J.), entered October 28, 2010, which granted defendant's CPL 170.40(1) motion to dismiss the accusatory instrument in the interest of justice.

Robert T. Johnson, District Attorney, Bronx (Stanley R. Kaplan and Joseph N. Ferdenzi of counsel), for appellant.

Steven Banks, The Legal Aid Society, New York (Svetlana M. Kornfeind of counsel), for respondent.

TOM, J.

While incarcerated on Rikers Island under a sentence imposed for an unspecified offense, defendant assaulted and injured a female correction officer who was attempting to remove contraband from his jail cell. A male correction officer who came to her assistance was also punched and assaulted. Under a misdemeanor information, defendant was initially charged with two counts of third-degree assault, obstructing governmental administration, and two counts of second-degree harassment. The information was later amended to specify a single count of attempted assault in the third degree. At the close of a *Wade*/*Dunaway* hearing, defendant made an oral motion to dismiss the amended information in the interest of justice. Supreme Court granted the motion, stating, among other reasons, that as of the date of trial, "Defendant already had served more than two months beyond the maximum period he would have had to serve if convicted" (29 Misc 3d 1213[A], 2010 NY Slip Op 51808[U], *2). Under these circumstances and in consideration of the budgetary constraints and increasing caseloads confronting the judicial system, the court regarded the expenditure of judicial, prosecutorial and defense resources to try the misdemeanor offense as "unduly wasteful" (*id.* at *5).

We disagree with the motion court's assessment. The record

does not support the court's conclusion that defendant was being detained on the charge arising out of his assault on the correction officers. Nor does the record reflect compelling circumstances demonstrating that prosecution of the attempted assault charge would result in injustice (*see* CPL 170.40; *People v Rickert*, 58 NY2d 122 [1983]).[1]

It is the District Attorney's prerogative to prosecute those who commit crimes, to bring charges or discontinue criminal proceedings, and to determine the nature of the charges preferred against a defendant (*People v Zimmer*, 51 NY2d 390, 394 [1980]). That prerogative should not be lightly abrogated by a court's

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[1] CPL 170.40 applicable to misdemeanors, like CPL 210.40, applicable to felonies, requires that a court consider:

> "(a) the seriousness and circumstances of the offense;
> (b) the extent of harm caused by the offense;
> (c) the evidence of guilt, whether admissible or inadmissible at trial;
> (d) the history, character and condition of the defendant;
> (e) any exceptionally serious misconduct of law enforcement personnel in the investigation, arrest and prosecution of the defendant;
> (f) the purpose and effect of imposing upon the defendant a sentence authorized for the offense;
> (g) the impact of a dismissal on the safety and welfare of the community;
> (h) the impact of a dismissal upon the confidence of the public in the criminal justice system;
> (i) where the court deems it appropriate, the attitude of the complainant or victim with respect to the motion;
> (j) any other relevant fact indicating that a judgment of conviction would serve no useful purpose."

exercise of its interest of justice power, which we have cautioned "should be exercised sparingly" (*People v Insignares*, 109 AD2d 221, 234 [1985], *lv denied* 65 NY2d 928 [1985] [internal quotation marks omitted]). Such discretion is appropriately reserved for "the unusual case that cries out for fundamental justice beyond the confines of conventional considerations of 'legal or factual merits of the charge or even on the guilt or innocence of the defendant'" (*People v Belge*, 41 NY2d 60, 62-63 [1976] [Fuchsberg, J., concurring], quoting *People v Clayton*, 41 AD2d 204, 206 [1973]). The statute requires the court to determine the existence of some "compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such accusatory instrument or count would constitute or result in injustice" (170.40[1]).

None of the criteria listed in CPL 170.40(1) affords support for dismissal of the criminal information in this matter. Defendant's acts on January 28, 2009 of assaulting two correction officers with resulting injuries was a serious incident without any justification. During a search of defendant's property in the housing area of Rikers Island, Correction Officer Kelly Gonzalez removed a Tupperware bowl, a listed contraband, in defendant's presence. As a result, defendant pushed Gonzalez in the chest and struck her mouth with his elbow. From the force of

the blow, Gonzalez fell and struck a gate with her right hand before landing on the floor. Correction Officer Carlos Vasquez observed the incident and attempted to aid Gonzalez. As he approached, defendant punched him in the chest, and a physical alteration ensued. After Gonzalez got back up from the floor, she warned defendant that she was going to "spray" him. She then sprayed defendant with a chemical agent as defendant kept punching Vasquez. Defendant told Gonzalez, "Bitch, you sprayed me. I'm going to kill you. I'm going to get you." Defendant then charged at Gonzalez but was grabbed by Vasquez from behind and thrown to the ground, where he was restrained until back-up officers arrived. As a result of the incident, Gonzalez suffered a swollen mouth and injury to her arm, which required surgery to repair torn ligaments in her right wrist. She was out of work for six months as a result of her injuries and still feels the effects in her hand and trigger finger. Vasquez developed a severe carpal tunnel condition in his right hand and a slight tear in his right shoulder. He received 50% disability benefits for the injury to his right arm.

Defendant was charged with third degree assault and, as the motion court noted, those charges were reduced in order to permit trial without a jury, thereby reducing the severity of the potential penalty. Unlike the cases cited by way of example in

Rickert (58 NY2d at 132) and relied on by the motion court, this was a serious crime resulting in substantial injury to two correction officers. No misconduct is alleged in connection with the prosecution of the offense, nor is any reflected in the record, and the court did not deem it appropriate to consider "the attitude of the . . . victim[s]" with respect to the dismissal motion (CPL 170.40[i]). Furthermore, defendant has an extensive criminal history, which includes 4 felony convictions and 10 misdemeanor convictions at the time the criminal information was dismissed. In addition, there were 13 open charges, 5 of which were felonies, 4 misdemeanors and 4 unspecified offenses. Four warrants were issued due to defendant's failure to appear in court, and parole was revoked on four occasions. Defendant has provided seven different aliases and five different dates of birth in the course of some 31 arrests.

As to the effect of dismissal on either public safety and welfare or public confidence in the criminal justice system, neither objective will be advanced by permitting defendant to elude prosecution. Defendant asserts that he was incarcerated on this matter in March 2009, released in June 2009, rearrested on May 17, 2010 and has been "continually incarcerated on this case since that time," but the record suggests otherwise. While the

transcript reflects that the People did nothing to dispel the motion court's misconception that defendant had been continuously detained in connection with the subject assault, the court's notes for the calendar appearance of May 17, 2010 state that defendant "now has a Queens case," and the People have advised this Court that, according to the website maintained by the New York City Department of Corrections, "defendant was incarcerated on the Queens County case from May 16, 2010 until February 24, 2011, the date he pleaded guilty."

While the motion court cannot be faulted for relying on the uncontroverted assertions advanced by defense counsel, it remains that the record, as clarified by the People, does not support the court's expressed concern that prosecution of this matter will erode public confidence because the criminal justice system could then be perceived to "regularly incarcerate defendants awaiting trial for periods longer that the potential sentences those defendants would face after a conviction." That defendant was detained in connection with an unrelated offense while awaiting trial on this matter hardly supports dismissal in the interest of justice. As the People rightly argue, defendant is not entitled to a windfall because he is a career criminal. By the same token, public safety and confidence in the criminal justice system will not be promoted by permitting an offense to go

unpunished because it was committed while defendant was serving a sentence on an unrelated crime. Further, a conviction will put the Corrections Department on notice of defendant's utter disregard and contempt for institutional rules and regulations, and the safety and welfare of prison staff. In addition, while the conservation of increasingly scarce judicial resources is a commendable goal, it is insufficient alone to warrant supplanting the prosecutor's discretion to decide how to proceed with a case.

Accordingly, the order of the Supreme Court, Bronx County (Colleen D. Duffy, J.), entered October 28, 2010, which granted defendant's CPL 170.40(1) motion to dismiss the accusatory instrument in the interest of justice, should be reversed, on the law, the motion denied, the record unsealed, the criminal information reinstated, and the matter remanded for further proceedings. The Clerk is directed to unseal the record.

All concur.

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

ENTERED: MARCH 27, 2012

CLERK