SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 17, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Sweeny, Moskowitz, Clark, JJ.

11055 Vital Realty, LLC, Index 651064/12
Plaintiff-Respondent,

-against-

Greenwich Insurance Company, et al.,
Defendants-Appellants.

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Gennet, Kallmann, Antin & Robinson, New York (Donald G. Sweetman of counsel), for appellants.

Doyle & Broumand, LLP, Bronx (Michael B. Doyle of counsel), for respondent.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered November 13, 2012, which denied defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(3) and (7), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

In December 2008, a fire broke out at 1745 Amsterdam Avenue, in Manhattan, and allegedly damaged the adjacent apartment building located at 1741-1743 Amsterdam Avenue (the Premises). The Premises was owned by Vintage Realty, LLC (Vintage) and insured under a commercial property policy issued by defendant

Greenwich Insurance Company, which policy included "Vital Equities" as a named insured. The policy also insured other properties owned by entities managed by the same person, including 1461 Amsterdam Avenue, a property then owned by plaintiff Vital Realty, LLC.

After the fire, Greenwich paid a property damage claim made by "Vintage Realty Llc [*sic*]-(Vital Equities)." In the ensuing subrogation action, defendants named "Vital Equities, LLC," a non-existent entity, as the plaintiff and admitted ownership of the Premises on behalf of that entity. Plaintiff alleges that defendants' negligent naming of non-entity Vital Equities, LLC, as the plaintiff and admission of ownership in the subrogation action, resulted in it being named as a defendant in an action relating to the fire. Notably, a motion to dismiss the complaint in that action was denied on the ground that the plaintiff in that action averred that plaintiff herein (Vital Realty, LLC) asserted that it owns the Premises. Thus, plaintiff alleges that it has had to defend itself against a meritless action due to defendants' negligence.

Although plaintiff, as an existing entity, has the capacity and standing to sue on any viable claim it might have, its complaint should be dismissed on the ground that it fails to state a cause of action against defendants. As a matter of law,

defendants owed no duty of care to plaintiff in framing the subrogation complaint, nor could they reasonably have foreseen that the use in the subrogation action of an erroneous name (Vital Equities, LLC) similar but not identical to plaintiff's (Vital Realty, LLC) would prompt a third party to sue plaintiff for an incident in which it had no involvement.

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

ENTERED: DECEMBER 17, 2013

CLERK

Mazzarelli, J.P., Andrias, Freedman, Gische, JJ.

10757 Jane Wilson, as Administratrix of the Goods and Chattels and Credits which were of Tracy A. Allen, Deceased, Plaintiff-Respondent, Index 116085/07

-against-

Southampton Urgent Medical Care, P.C., et al., Defendants-Appellants,

24/7 Emergency Care, P.C., et al., Defendants.

Law Office of Anthony P. Vardaro, P.C., Smithtown (Frank Schiralli, Jr. of counsel), for Southampton Urgent Medical Care, P.C., and Mark R. Kot, appellants.

Keller, O'Reilly & Watson, P.C., Woodbury (Scott C. Watson of counsel), for Andrea Libutti, appellant.

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

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered August 15, 2012, which denied defendants Southampton Urgent Medical Care, P.C. (Urgent Care), Mark Kot, and Andrea Libutti's motion for summary judgment dismissing as against them any claims arising before June 4, 2005, as time-barred, unanimously affirmed, without costs.

Plaintiff's decedent received treatment at Urgent Care, a walk-in clinic, on 11 occasions between September 1, 2003 and July 21, 2005. Defendant Kot was the sole shareholder and main physician at Urgent Care. Defendant Libutti was a part-time independent physician-contractor who saw the decedent on three occasions.

The decedent passed away on December 20, 2005. On December 4, 2007, plaintiff commenced this action for medical malpractice, lack of informed consent and wrongful death based on allegations that Kot and Urgent Care failed to timely diagnose and treat the decedent's lung cancer. By supplemental summons and amended verified complaint filed March 31, 2008, plaintiff added Libutti as a defendant. Defendants moved to dismiss all claims for treatment that occurred before June 4, 2005 as barred by the statute of limitations.

Defendants made a prima facie showing that so much of the complaint as was based upon alleged acts of medical malpractice and lack of informed consent committed before June 4, 2005, was barred by the governing 2½ year statute of limitations (*see* CPLR 214-a). They submitted the original summons and complaint, which named Urgent Care and Kot as defendants, demonstrating that the

action was not commenced by filing until December 4, 2007 (*see Baptiste v Harding-Marin*, 88 AD3d 752 [2d Dept 2011], *lv denied* 19 NY3d 808 [2012]; *Guglich v Schwartz*, 305 AD2d 134 [1st Dept 2003]). This shifted the burden to plaintiff to raise an issue of fact as to whether the statute of limitations was tolled or otherwise inapplicable as to each defendant (*see Cox v Kingsboro Med. Group*, 88 NY2d 904, 906 [1996]; *Peykarian v Yin Chu Chien*, 109 AD3d 806 [2d Dept 2013]).

Pursuant to the continuous treatment doctrine, the commencement of the limitations period is tolled until the end of a course of treatment "when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint" (*McDermott v Torre*, 56 NY2d 399, 405 [1982] [internal quotation marks omitted]; *see also Prinz-Schwartz v Levitan*, 17 AD3d 175 [1st Dept 2005]). Where the malpractice claim is based on an alleged failure to properly diagnose a condition, "the continuous treatment doctrine may apply as long as the symptoms being treated indicate the presence of that condition" (*Simons v Bassett Health Care*, 73 AD3d 1252, 1254 [3d Dept 2010]; *see also Hein v Cornwall Hosp.*, 302 AD2d 170 [1st Dept 2003]). Thus, the issue is whether before June 5, 2004 defendants "were consistently treating and/or monitoring the decedent for specific

symptoms related to lung cancer" (*Chestnut v Bobb-McKoy*, 94 AD3d 659, 661 [1st Dept 2012]).

The record, read in a light most favorable to plaintiff, presents a triable question of fact as to whether the decedent's visits to defendants from September 1, 2003 and July 21, 2005 were part of a continuous treatment for symptoms (headaches) that were ultimately traced to her metastasized lung cancer (*see* CPLR 214-a; *Chestnut v Bobb-McKoy*, 94 AD3d at 660-661). Kot and Libutti, and defendant physician Michael Ameres testified at their depositions that a brain tumor from metastasized lung cancer would cause headaches. Ameres stated that, based on the decedent's history of headaches, he had considered the possibility of a brain tumor in the differential diagnosis, and, on that basis, had recommended an MRI and neurological consult. Accordingly, the motion for summary judgment must be denied (*see Simons v Bassett Health Care*, 73 AD3d at 1254 ["Although there is no question that certain of the visits relied on by Napolitana focused primarily on other intermittent or discrete conditions, such as plaintiff's reaction to a bee sting or her foot fracture, which could not constitute continuous treatment for a condition suggestive of a meningioma, significantly, the medical records for many of these visits make express additional references to complaints or ongoing treatment of migraines, headaches,

dizziness, pain on the right side of her face and blurred vision. These records also reflect the scheduling of regular follow-up visits to address these complaints, thus presenting a factual question as to whether further treatment of conditions suggestive of meningioma were contemplated"][internal citations omitted]).

Defendant Libutti argues that the action should nevertheless be dismissed as against her because she was not added as an additional defendant until March 31, 2008, more than 2½ years after the decedent was last treated at Urgent Care on July 21, 2005. This statute of limitations defense may ultimately prove to be meritorious (*see Lopez v Wyckoff Hgts. Med. Ctr.*, 78 AD3d 664 [2d Dept 2010]; *Boodoo v Albee Dental Care*, 67 AD3d 717, 718 [2d Dept 2009]), but it is improperly raised for the first time on appeal (*Choudhary v First Option Tit. Agency,* 107 AD3d 657 [2d Dept 2013]). However, since defendant Libutti was not represented by separate counsel on the original motion, under the

particular circumstances of this case we direct that she be afforded the opportunity to renew her motion for summary judgment to raise the defense, which does not apply to the other defendants.

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

ENTERED: DECEMBER 17, 2013

CLERK

Sweeny, J.P., Moskowitz, Richter, DeGrasse, Gische, JJ.

10943 The People of the State of New York, Respondent, Ind. 30092/10

-against-

Robert Watson, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

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Order, Supreme Court, New York County (Cassandra M. Mullen, J.), entered on or about November 15, 2010, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art. 6-C), unanimously affirmed, without costs.

Defendant, who seeks to have his sex offender status under SORA reduced from a level three to a level two, argues that 15 points were improperly assessed against him for "a history of drug or alcohol abuse" on the ground that he abstained from alcohol use while incarcerated for a crime he admittedly committed while he was drunk. Alternatively, he argues that the SORA court failed to take into consideration his unblemished record while incarcerated and other positive attributes which warranted a downward departure classifying him as only a moderate

risk of re-offense or threat to the public.

This appeal was brought before the recent Court of Appeals decision in *People v Palmer* (20 NY3d 373 [2013]) which held that "only alcohol abusers should be...assessed a higher point level under the SORA guidelines, as opposed to occasional moderate social drinkers." Defendant, however, makes it clear that the distinctions regarding alcohol use and abuse in that decision have no bearing in this case, nor do they apply to reduce his SORA assessment.

In assessing a sex offender's danger to the community, and therefore, its recommendation to the court hearing a SORA application, the Board of Examiners of Sex Offenders (BOSE) must consider 15 statutory factors, applying them in accordance with the Risk Assessment Guidelines developed to assess an individual applicant's risk of a repeat offense (Correction Law § 168-l[5]; Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 3 [2006]). The evaluation is made using a Risk Assessment Instrument (RAI), identifying each factor which, if applicable, is assigned a numerical value. If a particular factor is not applicable, it is assessed at zero. The values are then tallied, resulting in a recommended risk assessment which is considered as presumptively correct at the SORA hearing before the court (*see People v Ratcliff*, 107 AD3d 476 [1st Dept 2009]).

One of the factors BOSE considers is "whether the sex offender's conduct was found to be characterized by repetitive and compulsive behavior, associated with drugs or alcohol" (Correction Law § 168-1[5][a][ii]). The guidelines clarify that if the individual has a history of drug or alcohol abuse "or was abusing drugs and or alcohol at the time of the offense," 15 points will be assessed in that category (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 15). Pursuant to the guidelines, BOSE or the court may choose to score zero points in this category, if the drug and/or alcohol abuse is "in the distant past, but [the defendant's] more recent history is one of prolonged abstinence" (*id.*).

Since defendant admittedly committed his crime while intoxicated, this alone supports the 15 point assessment made against him in this category (*see People v Birch,* 99 AD3d 422 [1st Dept 2012]). Thus the issue turns on whether his prolonged abstinence from alcohol use, while incarcerated, provides a basis for a 15 point reduction in this category. We find that it does not.

We have consistently held that even when alcohol use in the commission of the crime is remote in time, and the defendant has abstained from alcohol use for a prolonged period while incarcerated, such remoteness and abstinence are unreliable

predictors of the risk for re-offense post-release, or to the threat posed by the sex offender to public safety (*see Birch*, 99 AD3d at 423, *citing People v Gonzalez,* 48 AD3d 284, 285 [1st Dept 2008], *lv denied* 10 NY3d 711 [2008]). Here, defendant, who was incarcerated for 22 years and has been at liberty only for a relatively short period of time, has not shown that his adherence to the regimen, routine and requirements of prison life have any bearing on what his behavior will be now that he is no longer under such supervision *(see People v Gonzalez,* 48 AD3d at 285). Accordingly, the points for alcohol abuse were properly assessed and the SORA court correctly rejected defendant's argument that his abstinence shows he is at a lowered risk for a repeat offense.

The SORA court also providently exercised its discretion in denying defendant's application for a discretionary downward departure to a level 2 based upon claims that he had an exemplary record while incarcerated, has shown remorse for his crime, and is now a productive member of society (*see People v Cintron*, 12 NY3d 60, 70 [2009], *cert denied* 558 US 1011 [2009]; *People v Johnson*, 11 NY3d 416, 418, 421 [2008]). The record shows that defendant's good behavior was accounted for under the RAI. Factors which otherwise would have required the assignment of numerical values had he engaged in unsatisfactory conduct while

incarcerated, were assessed at "zero" (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, p.16; *compare People v Perez*, 14 AD3d 403 [1st Dept 2013], *lv denied* 21 NY3d 858 [2013]). In other words, because of defendant's good behavior in prison, there were no additional points imposed for an increased "potential for sexual recidivism" (*People v Salley*, 67 AD3d 525, 526 [1st Dept 2009], *lv denied* 14 NY3d 703 [2010]).

We emphasize that a SORA risk-level determination is not an extended form of punishment for the sex crime committed, but a collateral consequence of the conviction intended to protect the public at large from the possibility of future crime (*People v Gravino*, 14 NY3d 546 [2010]). A departure from a sex offender's presumptive risk level is generally warranted only where "there exists an aggravating or mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4; *see People v Johnson*, 11 NY3d 416, 421 [2008]; *People v Martinez-Guzman*, 109 AD3d 462 [2d Dept 2013], *lv denied* __NY3d___, 2013 NY Slip Op 88896 [2013]). Although defendant's exemplary conduct in prison and his

cooperation with prison authorities during a crisis are commendable, there is no evidence that this conduct further reduces his risk of re-offense below what is otherwise identified by the RAI.

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

ENTERED: DECEMBER 17, 2013

CLERK

Friedman, J.P., Acosta, Renwick, Manzanet-Daniels, Gische, JJ.

11353 The People of the State of New York, Respondent, Ind. 4123/10

-against-

Liza Biscette James, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

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Judgment, Supreme Court, New York County (Patricia M. Nunez, J.), rendered September 9, 2011, as amended November 18, 2011, convicting defendant, after a jury trial, of grand larceny in the third degree, 2 counts of forgery in the second degree and 10 counts of falsifying business records in the first degree, and sentencing her, as a second felony offender, to an aggregate term of 7 to 14 years, unanimously affirmed.

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Smith*, 18 NY3d 588, 593-594 [2012]; *People v Hayes*, 97 NY2d 203 [2002]; *People v Pavao*, 59 NY2d 282, 292 [1983]). Although defendant's two prior theft-related convictions had similarities to the present case, the prior cases involved highly dishonest behavior and thus were particularly relevant to defendant's veracity.

Accordingly, there is no basis for disturbing the court's determination that the probative value of these convictions outweighed their prejudicial effect. Furthermore, the court made it clear that if defendant testified, these convictions would be admissible to impeach her credibility and for no other purpose.

We reject defendant's argument that she is entitled to concurrent sentences as a matter of law, and we find no basis for reducing the sentence.

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

ENTERED: DECEMBER 17, 2013

CLERK

Friedman, J.P., Acosta, Renwick, Manzanet-Daniels, Gische, JJ.

11354 Nicole Dillard, Index 308123/10
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent,

City of New York,
Defendant.

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Schwartzapfel Lawyers, P.C., New York (Alexander J. Wulwick of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered January 28, 2013, which granted the motion of defendant New York City Housing Authority (NYCHA) for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff, a resident of a housing development owned and maintained by NYCHA, alleges that she slipped and fell on exterior steps covered in snow and ice, which connect the plaza outside her building to a park area that leads to an adjacent public roadway. Defendant NYCHA does not dispute that it had constructive notice of the allegedly hazardous condition of the steps, which were an intended means of access between the

building plaza and the sidewalk by the roadway, but argues, relying on plaintiff's deposition testimony, that plaintiff was the sole proximate cause of the accident because it was not foreseeable that she would use those steps, when she knew that alternate paths clear of snow were available.

The issue of proximate cause may be decided "as a matter of law where only one conclusion may be drawn from the established facts," but "where there is any doubt, confusion, or difficulty in deciding whether the issue ought to be decided as a matter of law, the better course is to leave the point for the jury to decide" (*White v Diaz*, 49 AD3d 134, 139 [1st Dept 2008] [internal quotation marks and citation omitted]). In the circumstances presented, the evidence does not establish that plaintiff was the sole proximate cause of her injury, but raises an issue of fact as to her comparative negligence (*see Denardo v Ziatyk*, 95 AD3d 929 [2d Dept 2012]; *Ettari v 30 Rampasture Owners, Inc.*, 15 AD3d 611 [2d Dept 2005]; *see generally Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69 [1st Dept 2004]).

The instant case is distinguishable from *Quintana v New York City Hous. Auth.* (91 AD3d 578 [1st Dept 2012]), relied on by the motion court, because in that case NYCHA did clear snow from the public walkway, resulting in a mound of snow being piled along the curb, and the plaintiff unforeseeably walked over the mound

of snow, outside the crosswalk, rather than using an available cleared path. Here, plaintiff presents evidence that NYCHA did not clear an established pedestrian walkway at all, although it was foreseeable that residents and others would attempt to use it to exit the premises (*see Bergen v Carlin*, 297 AD2d 692, 692-693 [2d Dept 2002]). Indeed, another resident, walking with plaintiff, took the same route with her on the night of her accident, and NYCHA's employee testified that the stairs were supposed to be cleared of snow and ice after the storm.

Defendant's argument that plaintiff's conduct was a superseding or intervening cause of the accident is without merit since a pedestrian slip is exactly the risk that is expected when a landowner does not clear snow and ice from pedestrian pathways.

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

ENTERED: DECEMBER 17, 2013

CLERK

Friedman, J.P., Acosta, Renwick, Manzanet-Daniels, Gische, JJ.

11357 Structure Tone, Inc., Index 150735/12
Plaintiff-Appellant,

-against-

Thomas Niland, et al.,
Defendants-Respondents.

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Saxe Doernberger & Vita, P.C., New York (Tracy Alan Saxe of counsel), for appellant.

Keidel, Weldon & Cunningham, LLP, White Plains (Howard S. Kronberg of counsel), for respondents.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered October 24, 2012, which granted defendants Cook, Hall & Hyde, Inc. (CHH) and Thomas Niland's (Niland) motion to dismiss the complaint asserting claims for negligence and negligent and fraudulent misrepresentation under CPLR 3211(a)(1) and (7), unanimously affirmed, without costs.

Plaintiff Structure Tone, a construction company, alleges that insurance broker defendants misrepresented the existence of a surety bond program for nonparty Kullman Buildings Corp. (KBC), and that relying on such misrepresentations, it entered into a subcontract with KBC, which ultimately abandoned the construction project before its completion, causing economic damages.

Initially, plaintiff's claim sounding in simple negligence is essentially the same as the claim asserting negligent

misrepresentation. Plaintiff, however, does not have a claim for negligent misrepresentation, as it failed to allege facts showing a special relationship between itself and defendants such that reliance on the alleged misrepresentation was justified (*see Kimmel v Schaefer*, 89 NY2d 257, 263-264 [1996]). Defendants, as insurance brokers and not the parties that would be underwriting and issuing the bonds, do not hold unique or special expertise concerning KBC's bonding capacity. Further, the allegations demonstrate a business relationship only between CHH and KBC, and the communications between plaintiff and defendants, which were primarily for the purpose of requesting information concerning KBH's bonding program, are insufficient to give rise to a relationship of trust or confidence (*see id.*). Insofar as plaintiff relies on the misrepresentation in the December 3, 2009 letter concerning a bond program, the absence of evidence showing that defendants were aware that the letter, which was addressed and forwarded only to KBC, would be relied upon by plaintiff precludes a finding of a privity-like relationship (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180-181 [2011]; *Parrott v Coopers & Lybrand*, 95 NY2d 479, 484-485 [2000]; *Spitzer v Christie's Appraisals*, 235 AD2d 266 [1st Dept 1997]).

Plaintiff also has not demonstrated justifiable reliance on the alleged misrepresentations -- whether made in the December 3,

2009 letter, the March 22, 2010 letter, or the oral communications in the interim -- as both letters expressly stated that bond issuance was still contingent on an underwriting, despite existence of a bond program (*see General Elec. Capital Corp. v United States Trust Co. of N.Y.*, 238 AD2d 144 [1st Dept 1997]). Justifiable reliance on these representations, as well as the alleged oral misrepresentations that a bond was forthcoming, is unfounded, given the evidence showing that plaintiff continued negotiating with KBC regarding the project as of July 2010, and ultimately signed a subcontract with KBC in December 2010, despite the allegation in the complaint that it was aware as early as April 2010 that KBC had no bonding capacity.

Plaintiff's claim for fraudulent misrepresentation fails, given the absence of a showing of justifiable reliance, and the absence of evidence raising an inference of fraudulent intent (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559-560 [2009]).

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

ENTERED: DECEMBER 17, 2013

CLERK

Friedman, J.P., Acosta, Renwick, Manzanet-Daniels, Gische, JJ.

11358-
11359 In re Andre L.,

A Child Under Eighteen Years
of Age, etc.,

Yolanda L.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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George E. Reed, Jr., White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Suzanne K. Colt of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), attorney for the child.

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Order of disposition, Family Court, Bronx County (Carol A. Stokinger, J.), entered on or about January 4, 2010, which, upon a fact-finding determination that respondent mother neglected her son by failing to provide him with adequate and appropriate education, placed the child with petitioner agency until the next permanency hearing, scheduled for June 21, 2010, unanimously affirmed, without costs, insofar as it brings up for review the fact-finding determination, and the appeal therefrom otherwise dismissed as moot. Order of fact-finding, same court and Judge, entered on or about December 8, 2009, unanimously affirmed, without costs.

A preponderance of the evidence established that respondent failed to exercise even a "minimum degree of care" in providing her son with an education (*see* Family Ct Act § 1012[f][i][A]; *Matter of Baum*, 61 AD2d 123, 130-131 [2d Dept 1978], *lv denied* 44 NY2d 647 [1978]).

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

ENTERED: DECEMBER 17, 2013

CLERK

Friedman, J.P., Acosta, Renwick, Manzanet-Daniels, Gische, JJ.

11360 The People of the State of New York, Respondent, Ind. 5014/10

-against-

Mohammed Khan,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jan Hoth of counsel), and White & Case LLP, New York (Louis O'Neill of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Analisa Torres, J.), rendered August 1, 2011, convicting defendant, after a jury trial, of sexual abuse in the first degree, forcible touching and endangering the welfare of a child, and sentencing him to an aggregate term of 3 years, unanimously affirmed.

Defendant did not preserve his contention that the court's jury instructions were deficient because they did not inform the jury that the People were required to prove the specific conduct alleged in the indictment. This is a claim requiring preservation (*see People v Whitecloud*, 110 AD3d 626 [1st Dept 2013]), and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Grega*, 72 NY2d 489, 496 [1988]). The court's

instructions included all the elements of the crimes charged. Given the trial evidence, there is no reasonable possibility that the jury convicted defendant on any factual theory other than the one alleged in the indictment. Defendant's arguments to the contrary are based on speculation.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 17, 2013

CLERK

Friedman, J.P., Acosta, Renwick, Manzanet-Daniels, Gische, JJ.

11361 Extell 601 West 137th Street LLC, Index 104871/10
Plaintiff-Respondent,

-against-

Vinegar Hill Baking Company
and Restaurant LLC,
Defendant,

Sven Christian Oehme, etc.,
Defendant-Appellant.

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Law Office of Peter G. Eikenberry, New York (Peter G. Eikenberry of counsel), for appellant.

Rivkin Radler LLP, New York (Evan R. Schieber of counsel), for respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered November 28, 2012, which granted plaintiff's summary judgment motion as to liability only on its 4th, 5th, 6th, 10th, 11th and 12th causes of action against defendant Sven Christian Oehme a/k/a Sven L. Oehme and directed an assessment of damages on those causes of action, unanimously affirmed, without costs.

The motion court properly determined that defendant Oehme did not present any viable affirmative defenses as to the issue of his liability as guarantor for the obligations of the lessee,

defendant Vinegar Hill Baking Company and Restaurant LLC. Contrary to Oehme's contentions, he was not relieved of his liability under the terms of the guaranty clauses. The amount owed will be determined at inquest.

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

ENTERED: DECEMBER 17, 2013

CLERK

Friedman, J.P., Acosta, Renwick, Manzanet-Daniels, Gische, JJ.

11362 Benjamin J. Ashmore, Sr., etc., Index 108248/11
Plaintiff-Appellant,

-against-

Dr. Wilma Cohen Lewis,
Defendant-Respondent.

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Benjamin J. Ashmore, Sr., National Family Civil Rights Center, New York (Benjamin J. Ashmore, Sr. of counsel), for appellant.

Martin Clearwater & Bell LLP, New York (Arjay G. Yao, Jeffrey A. Shor and Ryan M. Donihue of counsel), for respondent.

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Appeal from order, Supreme Court, New York County (Alice Schlesinger, J.), entered January 27, 2012, which granted defendant's motion pursuant to CPLR 3211(a) to dismiss the complaint, deemed an appeal from judgment, same court and Justice, entered February 7, 2012, dismissing the complaint (CPLR 5501[c]), and, so considered, unanimously affirmed, without costs.

The documentary evidence submitted by defendant, a psychologist appointed by the court as the neutral forensic evaluator with the consent of the parties' attorneys and the children's attorney in an underlying custody proceeding in Kings County Supreme Court, established conclusively that judicial immunity precludes plaintiff from recovering damages for

negligence or malpractice against her (*see Bridget M. v Billick*, 36 AD3d 489 [1st Dept 2007]).

While immunity is not absolute where a court-appointed expert acts beyond the scope of her authority (*see generally Della Pietra v State of New York*, 71 NY2d 792 [1988]), plaintiff failed to establish that defendant acted beyond the scope of her authority, or to show any exception that would warrant lifting the immunity.

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

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

ENTERED: DECEMBER 17, 2013

CLERK

Friedman, J.P., Acosta, Renwick, Manzanet-Daniels, Gische, JJ.

11363-
11364 BDCM Opportunity Fund II, LP, et al.,
Plaintiffs-Respondents,

-against-

Yucaipa American Alliance
Fund I, LP, et al.,
Defendants-Appellants.

Index 650150/12

Kasowitz Benson Torres & Friedman LLP, New York (David E. Ross of counsel), for appellants.

Schulte Roth & Zabel LLP, New York (Robert J. Ward of counsel), for respondents.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered July 27, 2012, which denied defendants' motion to dismiss the complaint, unanimously affirmed, without costs. Order, same court and Justice, entered March 29, 2013, which granted plaintiffs' motion for summary judgment, unanimously modified, on the law, to deny the motion of plaintiffs BDCM Opportunity Fund II, LP, and Black Diamond CLO 2005-1 Ltd. (collectively, Black Diamond), and otherwise affirmed, without costs.

The instant action is not barred by a previous Georgia action to which plaintiffs were not parties, since there is no identity of the parties or their privies in the two actions (*see Brown & Williamson Tobacco Corp. v Gault*, 280 Ga 420, 421, 627

SE2d 549, 551 [2006]).[1] Contrary to defendants' contention, plaintiffs and nonparty (to this action) The CIT Group/Business Credit, Inc. – the defendant and counterclaim plaintiff in the Georgia action – were not privies (*see Brown & Williamson*, 280 Ga at 421, 627 SE2d at 551; *see also Dennis v First Natl. Bank of the South*, 293 Ga App 890, 893, 668 SE2d 479, 483 [2008]). In the Georgia complaint, defendants – the plaintiffs in the Georgia action – alleged that CIT's interests were adverse to those of the other lenders, such as plaintiffs. Nor was CIT acting as plaintiffs' agent, which in general would make them privies (*see College Park Land Co. v Mayor of College Park*, 48 Ga App 528, 173 SE 239, 240 [1934]; *and see Brown & Williamson*, 280 Ga at 422, 627 SE2d at 552).[2] The settlement agreement between CIT and defendants makes it clear that CIT was acting only on its own behalf, not on plaintiffs' behalf.

Defendants contend that there is a triable issue of fact whether CIT acted as plaintiffs' agent in settling the Georgia action, and defendants need discovery on this issue. However, in

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[1] Under New York law, the preclusive effect of a Georgia judgment is governed by Georgia law (*see Matter of Luna v Dobson*, 97 NY2d 178, 183 [2001]).

[2] The parties have cited Georgia law on this issue, so we assume, without deciding, that Georgia law governs whether CIT was plaintiffs' agent.

light of the clear language of the settlement agreement, there is neither an issue of fact nor a need for discovery.

Defendants argue that the motion court erred in finding that the fourth amendment to the credit agreement required the consent of all lenders because section 10.5(b) of the credit agreement does not list an amendment to the definition of "Term Loan Exposure" as a change that requires the consent of all lenders. However, section 10.5(b) states, "Without the written consent of each Lender ... that would be affected thereby, no amendment ... shall be effective if the *effect* thereof would: ... (ix) amend the definition of 'Requisite Lenders' or 'Pro Rata Share'" (emphasis in original). We agree with the motion court that the fourth amendment's change to the definition of "Term Loan Exposure" had the effect of amending the definition of "Requisite Lenders."

Defendants contend that the motion court erroneously applied different standards to the third and fourth amendments to the credit agreement. The third amendment – like the fourth – changed the definition of "Term Loan Exposure," and plaintiffs have not taken the position that the third amendment required unanimous lender consent. However, the third amendment did not adversely affect the lenders because it prevented defendants' Term Loan Exposure from counting toward "any provisions of this

Agreement relating to the voting rights of Lenders (including the right of Lenders to consent or take any other action with respect to any amendment, modification, termination or waiver of any provision of this Agreement or the other Credit Documents ...)." By contrast, the fourth amendment removed this protection for the lenders.

Since section 10.5(b) says "affected," not "adversely affected," it may be, strictly speaking, that the third amendment required unanimous lender consent but that the lenders failed to insist on this requirement. However, given the no-waiver clause of the credit agreement, the lenders' failure to insist on unanimous consent for the third amendment does not prevent plaintiffs from insisting on unanimous lender consent for the fourth amendment.

Defendants contend that, if a change in the definition of "Term Loan Exposure" had the effect of amending the definition of "Requisite Lenders," it would have been unnecessary for section 10.5(b)(ix) to mention "Pro Rata Share," because "Pro Rata Share" is part of the definition of "LC Exposure," and "LC Exposure" is part of the definition of "Requisite Lenders." However, it was reasonable for the drafter(s) of section 10.5(b)(ix) to mention "Pro Rata Share" directly instead of relying on "Pro Rata Share"

being indirectly embedded in the definition of "Requisite Lenders."

Since plaintiffs allege that the fourth amendment is void ab initio, the motion court correctly declined to give effect to the fourth amendment's severability clause (*see DeSola Group v Coors Brewing Co.*, 199 AD2d 141, 142 [1st Dept 1993]; *see also Matter of Wilson*, 50 NY2d 59, 66 [1980]).

Defendants failed to raise a triable issue of fact whether plaintiffs are estopped to contest defendants' Requisite Lender status, since they did not show that plaintiffs misrepresented or concealed a material fact or that they detrimentally relied on plaintiffs (*see BWA Corp. v Alltrans Express U.S.A.*, 112 AD2d 850, 853 [1st Dept 1985]). Nor do defendants need discovery on estoppel, since they are obviously aware of their own conduct and plaintiffs' conduct toward them.

Notwithstanding the no-waiver clause in the credit agreement, defendants contend that plaintiffs' conduct raises a triable issue of fact whether they waived their right to challenge defendants' status as Requisite Lender (*see Simon & Son Upholstery v 601 W. Assoc.*, 268 AD2d 359, 360 [1st Dept 2000]; *see also Excel Graphics Tech. v CFG/AGSCB 75 Ninth Ave.*, 1 AD3d 65, 70 [1st Dept 2003], *lv dismissed* 2 NY3d 794 [2004]). With respect to plaintiff Spectrum Investment Partners, L.P.,

defendants have shown only "passive acceptance" of their efforts to become Requisite Lender (*see Simon & Son*, 268 AD2d at 360). However, with respect to Black Diamond, defendants have shown "active involvement" sufficient to raise an issue of fact as to waiver (*see id.; see generally Alsens Am. Portland Cement Works v Degnon Contr. Co.*, 222 NY 34, 37 [1917]). In opposition to plaintiffs' motion, defendants submitted an affidavit saying that from March through May 2011, Black Diamond sent them "numerous proposals regarding [a] potential transaction [involving Black Diamond], *all of which relied on [defendants'] ability to ... exercise [their] Requisite Lender powers"* (emphasis added). Defendants' affidavit also said that Black Diamond "was fully aware throughout the summer of 2009[] that [defendants] intended to acquire ComVest's majority position in Allied's first-lien debt and become the Requisite Lender" and that "Black Diamond sought to sell its debt position to ComVest while Black

Diamondknew ComVest was seeking to sell all of its holdings to [defendants], including the debt ComVest might acquire from Black Diamond."

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

ENTERED: DECEMBER 17, 2013

CLERK

Friedman, J.P., Acosta, Renwick, Manzanet-Daniels, Gische, JJ.

11365-
11366 In re Harrhae Y., and Another,

Children Under Eighteen Years
of Age, etc.,

Shy-Macca Ernestine B.,
Respondent-Appellant,

Administration for Children's Services
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondent.

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

_____

Order of disposition, Family Court, Bronx County (Lillian Wan, J.), entered on or about January 3, 2013, which, upon a fact-finding of neglect, released the subject children to respondent mother with agency supervision until the next permanency hearing, unanimously affirmed, without costs, insofar as it brings up for review the fact-finding determination, and appeal therefrom otherwise dismissed, without costs, as moot, the terms of the order as to placement having expired. Appeal from fact-finding order, same court (Fernando H. Silva, J.), entered on or about September 10, 2012, unanimously dismissed, without costs, as superseded by the appeal from the order of disposition.

The finding of neglect is supported by a preponderance of the evidence, which shows that respondent inflicted excessive corporal punishment on the children by striking her older son in the mouth with her fist, causing a one-half inch cut to his lip and swelling to his face, and striking her younger son on the left side of his forehead with a wooden candlestick holder, causing a gash-like injury approximately one inch in length (*see* Family Court Act §§ 1012[f][i][B]; 1046[b][i]).

The children's out-of-court statements that respondent caused their injuries were sufficiently corroborated by the teacher's and caseworker's testimony as to their own observations of the children's injuries and by the photographs depicting the injuries, which were visible on the children two days after they were inflicted (*see Matter of Naomi J. [Damon R.]*, 84 AD3d 594 [1st Dept 2011).

Given the numerous conflicting explanations as to how the children's injuries occurred, the court's determination turned primarily on its credibility assessments and is entitled to great deference (*see Matter of Irene O.*, 38 NY2d 776 [1975]). The fact that the children recanted their initial out-of-court statements does not undermine their credibility; the record demonstrates that the children recanted their statements because they wanted to prevent their mother from having a second finding of neglect

entered against her (*see Matter of R./B. Children*, 256 AD2d 96 [1st Dept 1998]).

Contrary to the contention of the attorney for the children, the court did not improperly rely on the prior neglect finding entered against respondent, since it determined that respondent did not neglect the children medically in this case and had not allowed their father to have access to them in violation of the prior article 10 order of disposition. Moreover, we find that the two incidents at issue are not separate and isolated occurrences, but, rather, demonstrate a developing pattern in which respondent becomes angry and lashes out at the children, causing physical injuries.

The record does not support the attorney for the children's contention that the teacher and the caseworker grilled the children until they said that respondent had hurt them. The teacher testified that when she saw the older child's "fat lip," she was concerned that he was being bullied by other students and questioned him about his injury. Moreover, it cannot be inferred

from the caseworker's testimony that the younger child was "grilled" about his injury.

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

ENTERED: DECEMBER 17, 2013

CLERK

Friedman, J.P., Acosta, Renwick, Manzanet-Daniels, Gische, JJ.

11370 The People of the State of New York, Ind. 4445N/08
Respondent,

-against-

William Paulet,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Brian R. Pouliot 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 (Bruce Allen, J.), rendered on or about May 10, 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: DECEMBER 17, 2013

CLERK

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

Friedman, J.P., Acosta, Renwick, Manzanet-Daniels, Gische, JJ.

11371 In re Lynik Jomae E.,

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

Lynik Jomae E.,
Respondent-Appellant,

Harlem Dowling Children's Services,
Petitioner-Respondent.

_____

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

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

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), attorney for the child.

_____

Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about June 7, 2012, which, following a fact-finding hearing, inter alia, determined that respondent father was a notice father whose consent was not required for the adoption of the subject child, unanimously affirmed, without costs.

There exists no basis to disturb the court's determination that respondent's consent to the adoption of the child was not required. The record supports the findings that respondent had not provided a "fair and reasonable sum" toward the child's support, although he had the means, and that he did not

communicate with the child on a regular basis (Domestic Relations Law § 111[d]). Respondent's incarceration did not absolve him of these parental obligations *(see Matter of Jaden Christopher W.-McC. [Michael L. McC.],* 100 AD3d 486 [1st Dept 2012], *lv denied* 20 NY3d 858 [2013]), and his testimony concerning previous support provided to the child was not consistent (*see Matter of Aaron P.*, 61 AD3d 448 [1st Dept 2009]).

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: DECEMBER 17, 2013

CLERK

Acosta, J.P., Saxe, Moskowitz, Freedman, Manzanet-Daniels, JJ.

10272 Jeffrey Gural, et al., Index 103283/08
Plaintiffs-Respondents,

-against-

Fred Drasner,
Defendant-Appellant.

_____

Bracewell & Giuliani LLP, New York (Michael C. Hefter of counsel), for appellant.

Goldberg Weprin Finkel Goldstein LLP, New York (Matthew Hearle of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered August 3, 2012, reversed, on the law, without costs, and the motion for summary judgment granted. The Clerk is directed to enter judgment dismissing the complaint.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, J.P.
David B. Saxe
Karla Moskowitz
Helen E. Freedman
Sallie Manzanet-Daniels, JJ.

10272
Ind. 103283/08

_____x

Jeffrey Gural, et al.,
Plaintiffs-Respondents,

-against-

Fred Drasner,
Defendant-Appellant.

_____x

Defendant appeals from an order of the Supreme Court, New York County (Saliann Scarpulla, J.), entered August 3, 2012, which, in effect, granted defendant's motion to reargue his motion for summary judgment dismissing the complaint, and, upon reargument, adhered to the original determination denying the motion.

Bracewell & Giuliani LLP, New York (Michael C. Hefter and David A. Shargel of counsel), for appellant.

Goldberg Weprin Finkel Goldstein LLP, New York (Matthew Hearle of counsel), for respondent.

SAXE, J.

The question presented here is whether a part performance exception should be applied to contracts that are not capable of performance within one year of their making, which must be in writing pursuant to General Obligations Law § 5-701(a)(1). While this Court's decisions have been inconsistent on the issue, review of the statute and controlling case law compels us to conclude that no such exception is authorized, since unlike General Obligations Law § 5-703, which explicitly provides for a part performance exception for oral contracts for the conveyance of an interest in real estate, § 5-701 contains no such provision. We therefore hold that the complaint must be dismissed.

Facts

Plaintiff Jeffrey Gural and defendant Fred Drasner owned neighboring tracts of land in Stanfordville, Dutchess County, New York. Gural had a 135-acre tract of land containing a residence and a horse-breeding farm; Drasner owned a 100-acre property, of which one tax lot abutted Gural's property, with the remainder, named Ludlow Woods, located across the road from Gural's farm. On the latter, Drasner had a primary residence, and later built a secluded hunting lodge atop a hill. Gural alleges that in the fall of 2001, he and Drasner entered into an oral agreement in

which Gural agreed to clear some of Drasner's land at the foot of the hill where Drasner's hunting lodge was located, to re-seed it, fence it, and construct a "run-in" shed for horses, and to dig a well on Drasner's property and construct a road there. In return, Drasner allegedly agreed to allow Gural's horses to occupy the newly cleared grass pastures around the hunting lodge, at least until such time as he sold the property, and to reimburse Gural for his expenses from the sale proceeds.

Gural allegedly completed the improvements over a span of several years, at a cost of $181,551.89. Soon afterward, in early 2005, Drasner told Gural that he was selling Ludlow Woods, including the hunting lodge, and that Gural's horses would have to be removed. In 2006, Drasner sold Ludlow Woods for $3.5 million; the new owner began using the pastures and run-in shed constructed by Gural for her own horses. Gural then allegedly made several demands of Drasner for repayment, but was refused. This action for breach of contract and unjust enrichment followed.

Drasner moved for summary judgment dismissing the complaint, contending that the alleged oral agreement was unenforceable pursuant to General Obligations Law § 5-701(a)(1) because it was incapable of being performed within one year from its making. He pointed to Gural's deposition testimony that before horses can be

put on a field to graze, "the first thing you have to do is clear the land, get the rocks out of there, plant grass and wait two years." The motion court agreed, noting that Gural had conceded that "it took two years to clear and seed the fields and have the grass grow sufficiently high to use for horses to graze." As to gural's contention that part performance took the contract out of the statute, the motion court concluded that an issue of fact was presented as to whether Gural's activities were unequivocally referable to the alleged oral contract, and denied Drasner's motion. On Drasner's reargument motion, the court adhered to its previous decision.

Discussion

Before addressing the central issue of the applicability of a part performance exception for contracts that must be in writing under General Obligations Law § 5-701, I note that I am troubled by the reasoning by which the oral contract alleged here was categorized as a contract incapable of performance within one year of its making (General Obligations Law § 5-701[a][1]). The application of § 5-701(a)(1) is limited to contracts that "have *absolutely no possibility* in fact and law of full performance within one year" (*Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998] [emphasis added]). "[T]he statute does not include an agreement which is simply not likely to be performed, nor yet one which is

simply not expected to be performed within the space of a year. Neither does it include an agreement which, fairly and reasonably interpreted, admits of a valid execution within that time, although it may not be probable that it will be" (*Warren Chem. & Mfg. Co. v Holbrook*, 118 NY 586, 593 [1890]). So, the determination of whether an alleged oral contract can possibly be performed within one year of its making is not conducted by looking back at the actual performance; it requires analysis of what was possible, looking forward from the day the contract was entered into.

To illustrate the point: In *Freedman v Chemical Constr. Corp.* (43 NY2d 260 [1977]), the alleged oral contract called for the plaintiff to assist the defendant in procuring a construction contract. Although the plaintiff admitted that it took more than three years for his own performance and another six until the plant was built, the Court held that § 5-701(1) did not apply to bar the plaintiff's claim because the alleged agreement was, by its terms, capable of performance within one year; the test was whether "by its terms" the agreement could not be performed within a year (*id.* at 265).

Here, the motion court found that performance within one year was impossible based on Gural's deposition testimony that to create grazing land, "the first thing you have to do is clear the

land, get the rocks out of there, plant grass and wait two years." The motion court reasoned that this testimony constituted a concession that it necessarily takes two years before a field can be cleared and ready for grazing.

As an abstract matter, it is difficult to believe that it would be impossible to accomplish the creation of a grazing field within one year, at least if cost were not an issue. Indeed, Gural, in his respondent's brief, asserts that the court's conclusion was erroneous because "[w]hile it might well take a field two years to mature for grazing purposes, that does not mean that animals could not be placed on the fields before that time."

However, the record before this Court contains no other factual materials on this point -- no depositions, no affidavits -- and therefore no support for any factual conclusion other than the one at which the motion court arrived on this point. I am accordingly constrained to accept, for these purposes, the motion court's categorization of the oral contract as incapable of being performed within one year of its making, and therefore subject to General Obligations Law § 5-701(a)(1). I therefore turn to the issue briefed by the parties: whether part performance can take such a contract out of the statute.

Analysis of the part performance exception must begin by

emphasizing that General Obligations Law § 5-701 lacks any provision for a part performance exception such as that explicitly provided for by General Obligations Law § 5-703, which concerns contracts for the conveyance of an interest in real property. That is, while § 5-703(4) specifically provides, "Nothing contained in this section abridges the powers of courts of equity to compel the specific performance of agreements in cases of part performance," the broader statute of frauds provision of § 5-701 contains nothing of the sort -- although, notably, it contains other exceptions (*see e.g.* § 5-701[10] ["This provision ... shall not apply to a contract to pay compensation to an auctioneer, an attorney at law, or a duly licensed real estate broker or real estate salesman"]).

Two relevant principles of statutory construction apply here. The first is that "a court cannot amend a statute by inserting words that are not there, nor will a court read into a statute a provision which the Legislature did not see fit to enact" (*Matter of Chemical Specialties Mfrs. Assn. v Jorling*, 85 NY2d 382, 394 [1995], citing McKinney's Cons Laws of NY, Book 1, Statutes § 363, at 525). The second is that an "inference must be drawn that what is omitted or not included was intended to be omitted and excluded" (*id.*, quoting Statutes § 240, at 412). Inferring that the Legislature authorized a part performance

exception for an oral contract that is not capable of performance within one year violates these principles.

Courts sometimes read missing language into a statute, concluding that the omissions were inadvertent and that the Legislature's intent to include the omitted provision was clear (*see Standard Acc. Ins. Co. v Newman*, 2 Misc 2d 348, 358-359 [Sup Ct, Bronx County 1944], *affd* 268 App Div 967 [1st Dept 1944]; *Matter of Beneficial Fin. Co. of N.Y. v Baker*, 43 Misc 2d 546 [Sup Ct, Monroe County 1964]). However, no such inadvertent error or omission may properly be found here.

The present form of the statutory provision, General Obligations Law § 5-701, was enacted in 1963 (L 1963, ch 576, § 1), and its predecessor statutes, have existed since the nineteenth century (*see* McKinney's Cons Laws of NY, Book 23A, General Obligations Law § 5-701, Historical and Statutory Notes, Derivation, at 7). Since the nineteenth century, the Court of Appeals has unequivocally rejected a part performance exception to the statute of frauds for contracts that cannot be performed within one year. In 1889, the Court held that "[a]n oral contract, invalid by the statute of frauds, because by its terms it is not to be performed within one year from the making thereof, is not validated by part performance" (*Wahl v Barnum*, 116 NY 87, 98 [1889]). In 1919, in *Tyler v Windels* (227 NY 589

[1919], *affg* 186 App Div 698 [1st Dept 1919]), the Court affirmed this Court's ruling that "nothing short of full performance by both parties will take the contract [that cannot be performed within one year] out of the operation of the statute [of frauds]" (186 App Div at 700). In *Meyers v Waverly Fabrics, Div. of Schumacher & Co.* (65 NY2d 75, 78-79 [1985]), it held that General Obligations Law § 5-701 barred the cause of action for breach of an alleged oral licensing agreement because it could not be performed within one year from its making; it explicitly "declined plaintiff's invitation" to hold part performance, namely, her unilateral performance, to be sufficient to take the oral contract out of the statute (*id.*).

Of course, the New York Court of Appeals has said more recently that it has *never* "recognized a parallel judicially-created part performance exception to § 5-701" (*Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group*, 93 NY2d 229, 234 n 1 [1999]). While, admittedly, that language alone is not an announcement that such an exception may never be applied, it is far from an affirmation of the applicability of such an exception in this context.

Gural suggests that applying the part performance exception to permit enforcement of an alleged oral agreement that cannot be performed within one year should be permissible because it does

not contravene the purpose of the statute of frauds, namely, to prevent perjured testimony or casual oral statements from fraudulently imposing a contract on a party that did not, in fact, enter into a binding agreement (*see Intercontinental Planning v Daystrom, Inc.*, 24 NY2d 372, 385 [1969]). However, the judiciary does not have the right or the authority to decide whether or not to apply a clearly on-point statute in any given case by determining whether the general purpose of the statute is furthered by its application in that particular case. Moreover, the most basic purpose of the statute of frauds provision regarding contracts that cannot be performed within one year *is* contravened by creating an exception to the statute: "[W]ith regard specifically to the requirement for a signed writing for a contract not to be performed within one year, 'the design of the statute was, not to trust to the memory of witnesses for a longer time than one year'" (*D & N Boening v Kirsch Beverages*, 63 NY2d 449, 453-454 [1984], quoting *Smith v Westfall*, 1 Lord Raymond 316, 317 [1697]).

The Legislature declined to include any part performance exception to the statute of frauds for oral contracts incapable of performance within one year, while it authorized such an exception for another type of oral contract. There is nothing new about this absence of such an exception in this context; the

Court of Appeals has declined to find or apply one for over 100 years. Accordingly, the absence cannot be treated as an inadvertent oversight.

It is true that in the past this Court has often accepted a part performance exception to General Obligations Law § 5-701 (*see Travis v Fallani & Cohn*, 292 AD2d 242, 244 [1st Dept 2002]),[1] albeit most often finding the claimed performance not unequivocally referable to the alleged contract (*see Hideyo Chow v Anew XCVIII, Inc.*, 30 AD3d 253 [1st Dept 2006]; *RTC Props. v Bio Resources*, 295 AD2d 285 [1st Dept 2002], *lv dismissed* 99 NY2d 531 [2001]). Nevertheless, we now reject the reasoning of those cases, and hold, as did this Court in *Stephen Pevner, Inc. v Ensler,* 309 AD2d 722 [1st Dept 2003]), that the law simply does not provide for or permit a part performance exception for oral contracts other than those to which General Obligations Law § 5-703 applies (*see also Bowman v Di Placidi*, 27 AD3d 259 [1st Dept

[1] In fact, members of this bench previously signed on to some of those decisions (*see e.g. Gelman v Buehler*, 91 AD3d 425 [1st Dept 2012], *revd on other grounds* 20 NY3d 534 [2013]). Notably, however, in *Gelman*, the part performance issue was not squarely raised. Rather, since the motion court had not reached the statute of frauds issue, the part performance issue was first mentioned, and only briefly, in plaintiff's reply brief (citing cases involving alleged oral contracts conveying interests in real estate). Based on those earlier cases, we accepted the validity of the part performance exception to contracts falling under § 5-701 -- which acceptance we now consider to be incorrect -- without having heard any challenge to that proposition.

2006]; *Brown v Brown*, 12 AD3d 176 [1st Dept 2004]; *Tradewinds Fin. Corp. v Repco Sec.*, 5 AD3d 229 [1st Dept 2004]). As this Court clearly explained in the *Stephen Pevner* case, which involved a claimed oral contract for the services of a literary agent, "The exception to the statute of frauds for part performance applies to General Obligations Law § 5-703, which deals with real estate transactions, but it has not been extended to General Obligations Law § 5-701" (309 AD2d at 722, citing *Messner Vetere*, 93 NY2d at 234 n 1).

Accordingly, the order of the Supreme Court, New York County (Saliann Scarpulla, J.), entered August 3, 2012, which, in effect, granted defendant's motion to reargue his motion for summary judgment dismissing the complaint, and, upon reargument, adhered to the original determination denying the motion, should be reversed, on the law, without costs, and the motion for summary judgment granted. The Clerk is directed to enter judgment dismissing the complaint.

All concur.

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

ENTERED: DECEMBER 17, 2013

CLERK