SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 10, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Andrias, Renwick, DeGrasse, Abdus-Salaam, JJ.

7654 Adwoa Gyabaah, Index 307081/10
Plaintiff-Appellant-Respondent.

-against-

Rivlab Transportation Corp.,
Defendant-Respondent-Appellant,

John Doe,
Defendant,

Jeffrey A. Aronsky, P.C.
Non-Party Respondent-Appellant.

Law Offices of Kenneth A. Wilhelm, New York (Barry Liebman of counsel), for appellant-respondent.

Kral, Clerkin, Redmond, Ryan, Perry & Van Etten, LLP, Melville (Elizabeth Gelfand Kastner of counsel), for Rivlab Transportation Corp., respondent-appellant.

Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for Jeffrey A. Aronsky, P.C., respondent-appellant.

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered March 14, 2011, which, granted nonparty law firm Jeffrey A. Aronsky, P.C.'s (Aronsky) motion to the extent of granting Aronsky leave to place a lien against the action, and denied the

motion insofar as it sought an order enforcing a purported settlement and setting Aronsky's fee accordingly, affirmed, without costs.

The issue that divides this panel is whether this action has been settled. Aronsky, plaintiff's outgoing attorney, commenced this personal injury action on plaintiff's behalf on August 25, 2010. By letter to Aronsky dated October 1, 2010, defendant's carrier tendered its $1 million policy limits for purposes of settlement. Aronsky explained the proposal to plaintiff who, at that time, chose to accept the settlement. Accordingly, plaintiff executed a general release on October 5, 2010 and a hold harmless agreement on October 12, 2010. Aronsky advised plaintiff that he would hold the release pending receipt of defendant's affidavit of no excess insurance and advice from plaintiff as to whether she preferred to have the settlement structured.

By December 9, 2010, plaintiff had retained new counsel, Kenneth A. Wilhelm, Esq. On that date, Wilhelm advised Aronsky that plaintiff did not wish to settle the case or have the release sent to defendant. Aronsky moved the court below for an order enforcing what he contended was a $1 million settlement and setting his firm's contingency fee at one-third of the recovery

pursuant to plaintiff's retainer agreement. In making his motion, Aronsky did not allege that acceptance of the offer was ever communicated to defendant or its carrier. This omission is fatal to Aronsky's claim of a settlement for reasons that follow. Aronsky maintained that "plaintiff's signing of the General Release constituted a binding legal contract." The court denied the motion and vacated the release in what it perceived to be the interest of justice.

Although the motion court incorrectly invoked the interest of justice, the application of contract law nevertheless required the denial of Aronsky's motion. "[A] general release is governed by principles of contract law" (*Mangini v McClurg,* 24 NY2d 556, 562 [1969]). Citing *White v Corlies* (46 NY 467, 469-470 [1871]), this Court has held that "it is essential in any bilateral contract that the fact of acceptance be communicated to the offeror" (*Agricultural Ins. Co. v Matthews,* 301 AD2d 257, 259 [1st Dept 2002]; *see also D'Agostino Gen. Contrs. v Steve Gen. Contr.,* 267 AD2d 1059 [4th Dept 1999]; *Church of God of Prospect Plaza v Fourth Church of Christ, Scientist of Brooklyn,* 76 AD2d 712, 714 [2nd Dept 1980], affd 54 NY2d 742 [1981]). Therefore, this action was not settled because the executed release was never forwarded to defendant nor was acceptance of the offer

otherwise communicated to defendant or its carrier. This record does not contain a single affidavit by anyone asserting that either occurred. Although the dissent posits that a settlement was effected despite the lack of delivery or filing of the release, it avoids discussion of the critical absence of any claim that plaintiff's acceptance of the offer was ever communicated to defendant (*see id.*). We do not share the dissent's view that an October 6, 2010 letter from defendant's counsel to Aronsky "evidenced" an agreement to settle.[1] Defense counsel's statement in the letter that he was "advised" of a settlement does not suffice as evidence that such a settlement was effected. Moreover, the letter is devoid of probative value

---

[1]The full text of the letter reads as follows:

"This firm has been retained by National Casualty company to represent the interests of its insured with regard to the above matter. We have been advised that National Casualty Company, on behalf of its insured, has offered the limits of its liability policy ($1 million) for the settlement of this action. We have been advised that plaintiff has accepted the offer.

"We request that you provide the undersigned with a Stipulation of Discontinuance with prejudice, General Release and a copy of your law firm's W-9 Statement. Additionally, we have drafted a Hold Harmless Agreement for signature of the plaintiff. Please review the document and contact the undersigned if you feel changes are required.

"In conclusion, kindly advise the undersigned of instructions regarding payees on the settlement draft. We are in the process of obtaining the affidavit of no excess coverage from the insured. We will forward this to you as soon as possible."

because it is unsworn (*see e.g. Yonkers Ave. Dodge, Inc. v BZ Results, LLC,* 95 AD3d 774, 775 [1st Dept 2012]). The dissent misplaces its reliance on *Calavano v New York City Health & Hosps. Corp.* (246 AD2d 317 [1st Dept 1998]) which it cites for the proposition that plaintiff was bound by the release despite the fact that it was never delivered or filed. *Calavano* lends no support to the dissent's conclusion because in that case the plaintiff was held to be bound by a stipulation of settlement and a general release which he signed and which "were then sent to defendants for a mutual release" (*id.* at 318). Because there has been no settlement, the amount of Aronsky's fee should be determined upon the disposition of this action in the manner prescribed by *Matter of Cohen v Grainger, Tesoriero & Bell* (81 NY2d 655 [1993]).

Like the dissent, we see no need for a hearing to determine whether Aronsky was discharged for cause. The record discloses that plaintiff has not made a prima facie showing of any cause for Aronsky's discharge. Plaintiff stated in her affidavit that she signed the release and hold harmless affidavit because she felt "pressured" to do so. Plaintiff made no mention of what the pressure consisted of or, more importantly, what professional misconduct, if any, brought it about. To be sure, a hearing was

not warranted by plaintiff's untenable argument that Aronsky disobeyed her instructions by making the instant motion albeit after he had already been discharged as her attorney. Also, we do not disturb the motion court's determination that Aronsky is entitled to a lien on plaintiff's recovery inasmuch as his charging lien automatically came into existence upon the commencement of this action (*see Resnick v Resnick*, 24 AD3d 238 [1st Dept 2005]).

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

ANDRIAS, J. (dissenting)

Because I believe that there was a binding settlement of plaintiff's claims against defendant Rivlab Transportation Corp. (Rivlab), which plaintiff sought to avoid simply because she changed her mind after she was told that she could get more money, I respectfully dissent and would reverse the order which denied the motion of nonparty appellant law firm Jeffrey A. Aronsky, P.C. (Aronsky) for an order enforcing the settlement and setting the legal fees to which Aronsky is entitled.

On August 11, 2010, plaintiff was hit by a bus owned by Rivlab. She retained Aronsky to represent her on a one-third contingency fee basis, and Aronsky filed this action that month. On October 1, 2010, after reviewing the medical records, a representative of Rivlab's insurance carrier sent Aronsky a letter confirming a conversation in which the carrier offered to tender the policy limit of $1 million in full settlement of plaintiff's claims.

On October 5, 2010, Aronsky and a structured settlement attorney visited plaintiff, who signed a general release in favor of Rivlab and its carrier, which released them from all causes of action and claims she had or may have against them, "[i]n particular for injuries sustained on August 11, 2009 [*sic*]."

Plaintiff now claims that she felt pressured to sign the release and another unidentified document by Aronsky's insistence that she settle and because the structured settlement attorney told her that his proposals would only be good for a week. Plaintiff alleges that the next day, after she was told by "people" that she should not be pressured into settling, she called Aronsky and told him that she had changed her mind and that he should not mail out the settlement documents without confirmation from her.

Nevertheless, on October 12, 2010, plaintiff signed a hold harmless agreement prepared by the carrier. On or about November 18, 2010, in furtherance of the settlement, the carrier sent Aronsky affidavits of no further insurance, which Aronsky reviewed with plaintiff. Plaintiff maintains that she advised Aronsky at that meeting that she still had not decided whether to settle, and that she needed to do her own research. Aronsky maintains that the only reason he did not forward the settlement documents to the carrier at that point was because plaintiff had told him that "she needed time until after the Thanksgiving holidays to decide if she would structure the settlement."

Plaintiff states that because of her dissatisfaction with Aronsky and her feeling that she was entitled to more than the $1 million offer, she hired new attorneys to represent her. By

letter dated December 6, 2010, plaintiff's new counsel provided Aronsky with a letter from plaintiff, which advised Aronsky not to do any further work and to forward the file to them. The letter also asked that Aronsky execute a Consent to Change Attorneys. By fax dated December 9, 2010, plaintiff's new counsel advised Aronsky that plaintiff was not accepting the $1 million offer and that he should not send in the release. Aronsky then moved for an order enforcing the settlement and fixing his fee.

New York has a strong public policy of encouraging the resolution of disputes. Stipulations of settlement "are favored by the courts and not lightly cast aside" (*Hallock v State of New York*, 64 NY2d 224, 230 [1984]). "[A] change of heart is insufficient" (*Sontag v Sontag*, 114 AD2d 892, 893 [2nd Dept 1985] [internal quotation marks omitted], *lv dismissed* 66 NY2d 554 [1986]), and a settlement agreement will not be set aside merely because the plaintiff, upon reevaluation, has decided that the claim is worth more (*see Muller v City of New York*, 113 AD2d 877 [2d Dept 1985]).

General releases are interpreted and upheld by the courts

consistent with this policy (*Calavano v New York City Health & Hosps. Corp.*, 246 AD2d 317, 318 [1st Dept 1998]). Accordingly, in the absence of cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, it was an improvident exercise of discretion for the motion court to vacate a valid release just to allow plaintiff to have her day in court after she was told that she could get more money (*see generally McCoy v Feinman*, 99 NY2d 295 [2002]).

Plaintiff's general contention that she felt pressured to sign the release is insufficient. Her claim that she withdrew her consent to the settlement the day after she executed the release is unsubstantiated and inconsistent with her execution, a week later, of the carrier's hold harmless agreement, which states, in relevant part:

> "Releasor hereby declares that the terms of this Release have been completely read and are fully understood and voluntarily accepted for the purpose of making a full and final settlement of any and all claims, disputed or otherwise, on account of injuries and/or damages related to Claims set forth herein, and for the express purpose of precluding forever any further additional claims against the Release (sic) arising out of the aforesaid incident, accident or occurrence . . ."

I am not persuaded by plaintiff's argument that the release is not a binding agreement. CPLR 2104 states in relevant part

that "[a]n agreement between parties or their attorneys relating to any matter in an action . . . is not binding upon a party unless it is in a writing subscribed by him or his attorney." In order for a writing to be enforceable as a settlement agreement under CPLR 2104, it must "incorporate all the material terms of the settlement" (*Bonnette v Long Is. Coll. Hosp.*, 3 NY3d 281, 285 [2004]; *Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 482 [1989], *cert denied* 498 US 816 [1990]). Here, plaintiff signed two documents, on two separate occasions, a week apart, that unambiguously release her claims against defendant in exchange for $1 million. The release makes clear that payment in the amount of $1 million would be from Rivlab and its insurer, and that those entities would be jointly and severally responsible for the payment

The majority believes that there was no binding settlement because the release was not delivered to Rivlab or its carrier, who were not informed that the offer had been accepted. However, under the circumstances before us, once plaintiff signed the release and the hold harmless agreement, she was bound by the settlement terms, pursuant to CPLR 2104, without the need for delivery or filing of the settlement documents (*see Calavano*, 246 AD2d at 318-320).

Releases, like stipulations, are contracts and are construed according to the same general principles of contract law (see *Shklovskiy v Khan*, 273 AD2d 371 [2d Dept 2000]). Where the parties have not agreed that delivery is essential, "[a] binding contract . . . may be made without a physical delivery of the instrument evidencing the contract" and "any evidence that shows that the parties to a written instrument intend that the same should be operative and binding upon them is sufficient in an action to enforce its provisions" (*Morgan Servs., Inc. v Abrams*, 21 AD3d 1284, 1285 [4th Dept 2005] [internal quotation marks omitted]). Here, there was no requirement in the release or hold harmless agreement obligating plaintiff to physically deliver them to Rivlab or its carrier in order to enforce them (*see Florimon v Xianglin Xu*, 97 AD3d 532 [2d Dept 2012]). The agreement to settle is evidenced by the carrier's letter confirming the conversation with Aronsky in which it agreed to tender the policy, by plaintiff's execution of the release and, a week later, of the hold harmless agreement prepared by the carrier, and by the carrier's submission to Aronsky of the affidavits of no further insurance.

The failure to complete the steps required to consummate the settlement was the result of the motion practice which is the

subject of this appeal. Rivlab continues to stand ready to proffer the policy limits of $1 million to plaintiff and to take the necessary steps to fully comply with all of the requisites enumerated in CPLR 5003-a.

Given that there was a binding settlement of the action, Aronsky is entitled to a charging lien for the agreed upon one-third contingency fee (see *Calabro v Board of Educ of City of N.Y.*, 39 AD3d 680, 681 [2d Dept 2007]; *McAvoy v Schramme*, 238 AD 225 [1st Dept 1933], *affd* 263 NY 548 [1933]). I agree with the majority that there is no need for a hearing because plaintiff did not make a prima facie showing that Aronsky was discharged for cause (*see Friedman v Park Cake, Inc.*, 34 AD3d 286 [1st Dept 2006]). Evidence of a general dissatisfaction with an attorney's performance or a difference of opinion between attorney and client does not establish that the attorney was discharged for cause absent some evidence that the attorney failed to properly represent the client's interest (*see Costello v Kiaer*, 278 AD2d 50, 50 [1st Dept 2000]). Neither the December 6th nor December 9th letter states that Aronsky was being discharged for cause and plaintiff's self-serving allegations that she was misled by Aronsky as to the ramifications of signing the release are not supported by the record. Nor is it unethical for Aronsky to seek

to enforce his fee arrangement with plaintiff.

Accordingly, the settlement should be reinstated and Aronsky granted a charging lien fixed at 33 1/3% of the proceeds of the litigation.

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

ENTERED: JANUARY 10, 2013

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

8636 The People of the State of New York, Ind. 2143/79
Respondent,

-against-

Julio Rodriguez,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Lisa A. Packard of counsel), for appellant.

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

Order, Supreme Court, New York County (Cassandra Mullen, J.), entered on or about June 22, 2011, which adjudicated defendant a level three sex offender and a sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), affirmed, without costs.

Defendant argues that the court's notice, in writing, of the date of the hearing, was late by one day. However, defendant never argued at the hearing that he had not been provided the 20-day notice required by Correction Law § 168-n(3). In any event, defendant cannot establish that the court did not afford him an opportunity to respond to the People's application.

Defendant's adjudication satisfied the requirements of due process and Correction Law § 168-n(3). In that regard, the court

properly exercised its discretion in denying defendant's request for a lengthy adjournment to obtain additional information about his prison record. A court has considerable discretion to control its calendar (*see e.g. People v Coppez*, 93 NY2d 249, 252 [1999]; *People v Sherard*, 73 AD3d 537 [1st Dept 2010], *lv denied* 15 NY3d 707 [2010]), and "defendant failed to demonstrate how delaying the hearing would permit him to obtain documents relevant to the determination of his sex offender level" (*People v Sherard*, 73 AD3d at 537). In any event, given the remarkably strong case for adjudication as a level three offender, defendant was not prejudiced by the court's denial of an adjournment or by any other alleged procedural defects (*see Sherard*, 73 AD3d at 537). Significantly, there was ample basis for the court's upward departure, regardless of defendant's prison record (*id*).

We have considered and rejected defendant's remaining arguments.

All concur except Moskowitz and Freedman, JJ. who dissent in a memorandum by Freedman, J. as follows.

FREEDMAN, J. (dissenting)

I respectfully dissent because I believe that the People failed to comply with the statutory notice requirement in the Sex Offender Registration Act (SORA), and I would remand the matter back to Supreme Court for a new risk level assessment hearing and determination, preceded by notice to both defendant and counsel in accordance with the statute.

New York Correction Law § 168-n(3) specifically states:

> "At least twenty days prior to the determination proceeding, the sentencing court shall notify the district attorney, the sex offender and the sex offender's counsel, in writing, of the date of the determination proceeding and shall also provide the district attorney, the sex offender and the sex offender's counsel with a copy of the recommendation received from the board and any statement of the reasons for the recommendation received from the board."

In this case, the statutory requirements were not met and thus due process was not satisfied. The parties agree that a letter dated June 3, 2011 was sent to defense counsel, notifying her that Supreme Court had sent defendant a copy of the board's recommendation and scheduled a SORA proceeding on June 22, 2011. This letter, however, falls short of the 20-day notice required in the statute.

Given that Supreme Court failed to fulfill the statutory requirements, defendant should have been granted the adjournment

requested by counsel (*see People v Brooksvasquez*, 24 AD3d 644, 644 [2d Dept 2005] [defendant was entitled to a new assessment hearing when the due process requirements of Correction Law § 168-n(3) were not satisfied]). An adjournment could have easily remedied the failure to provide the minimum notice required by the statute and would have adequately protected defendant's rights (*see People v Warren*, 42 AD3d 593, 594 [3d Dept 2007] [adjournment remedied a failure to provide the defendant with the required risk level recommendation prior to the hearing], *lv denied* 9 NY3d 810 [2007]).

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

ENTERED: JANUARY 10, 2013

CLERK

Andrias, J.P., Friedman, DeGrasse, Roman, Gische, JJ.

8673 Victor I. Rosenberg, M.D., Index 105650/10
Plaintiff-Respondent,

-against-

David Cangello, M.D.,
Defendant-Appellant.

Samuel B. Mayer, Pleasantville, for appellant.

Meltzer & Pravetz, New Rochelle (Michael A. Meltzer of counsel), for respondent.

Judgment, Supreme Court, New York County (Debra A. James, J.), entered May 18, 2012, in favor of plaintiff in the amount of $51,940.19 brings up for review an order, same court and Justice, entered February 15, 2012, which granted plaintiff's motion for summary judgment, unanimously affirmed, with costs.

In this action for rent due under the parties' written lease for office space situated in plaintiff's medical office and described as "Office E," it is undisputed that plaintiff made a prima facie showing of entitlement to judgment as a matter of law on the basis of his affidavit and the lease. In opposition, defendant failed to raise a triable issue of fact. In his answering affidavit, defendant asserts that he could not practice medicine in what he described as "filth and disorder." However, the lease requires defendant to clean and maintain his portion of

the building. Defendant also asserts that "the unavailability of one consultation room and exam room was unacceptable." This argument is refuted by the lease which did not provide for shared facilities or use of any part of plaintiff's premises other than Office E.

We are not persuaded by defendant's argument that the lease was rendered ambiguous by three of its provisions: (1) the typical "as is" clause, (2) a provision that "Lessor will not make any repairs or improvements prior to the start of the lease term" and (3) a handwritten notation that improvements and alterations were to have been "shared equally by lessor and lessee." These provisions are congruous because neither the handwritten notation nor any other part of the lease required plaintiff to undertake any specified repairs or alterations. Defendant's proffer of an undated and unsigned wish list of items that included paint, upholstery, carpet and cleaning does not withstand scrutiny in light of the lease's "entire agreement" provision (*see Guthartz v City of New York,* 66 AD2d 707 [1st Dept 1978]). Therefore, the motion court correctly rejected defendant's argument that the handwritten notation was a modification of the "as is" provision. The absence of a triable

issue of fact is underscored by defendant's self-contradictory assertion that "[o]ur understanding was that the condition of the office was in dire need of improvement, and that we would share the cost, *but plaintiff never agreed to anything* [emphasis added]."

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

ENTERED: JANUARY 10, 2013

CLERK

Tom, J.P., Sweeny, Moskowitz, Renwick, Clark, JJ.

8799 In re Elizabeth Clayborne, Index 251252/10
Petitioner,

-against-

The City of New York Department
of Housing Preservation
and Development,
Respondent.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (Diane A. Lebedeff, J.), entered on or about November 15, 2010,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated November 27, 2012,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

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

ENTERED: JANUARY 10, 2013

CLERK

Friedman, J.P., Sweeny, Acosta, Abdus-Salaam, Manzanet-Daniels, JJ.

8970 The People of the State of New York, Ind. 1350/09
Respondent,

-against-

Jermaine Eleby,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of Appellate Defender, New York (Risa Gerson of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered April 9, 2010, convicting defendant, after a jury trial, of robbery in the third degree and burglary in the third degree, and sentencing him, as a second felony offender, to concurrent terms of 3½ to 7 years, unanimously affirmed.

We reject defendant's claim that the robbery verdict was against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the

jury's credibility determinations. The evidence supported the conclusion that defendant was still in possession of stolen merchandise at the time he violently struggled with two store security guards, and that he used force to retain that property.

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

ENTERED: JANUARY 10, 2013

CLERK

Friedman, J.P., Sweeny, Acosta, Abdus-Salaam, Manzanet-Daniels, JJ.

8971 In re Brandon R.,

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

_____

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Jane L. Gordon of counsel), for presentment agency.

_____

Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about December 2, 2011, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of sexual abuse in the first and third degrees, and placed him on probation for a period of 18 months, unanimously modified, on the law, to the extent of vacating the finding as to sexual abuse in the third degree and dismissing that count of the petition, and otherwise affirmed, without costs.

The court's finding was supported by sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-49 [2007]). There is no basis for

disturbing the court's credibility determinations, including its finding that there was nothing on a surveillance videotape that would render the victim's testimony incredible. To the extent appellant is arguing that the court erred in admitting certain hearsay testimony under the excited utterance exception, that claim is unavailing. In its decision, the court expressly disclaimed any reliance on the excited utterance. In any event, it was properly admitted.

As the presentment agency concedes, the third-degree sexual abuse count should have been dismissed as a lesser included offense).

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

ENTERED: JANUARY 10, 2013

CLERK

Friedman, J.P., Sweeny, Acosta, Abdus-Salaam, Manzanet-Daniels, JJ.

8973 Lavern Sanders, et al., Index 309099/09
Plaintiffs-Appellants,

-against-

Grenadier Realty, Inc., et al.,
Defendants-Respondents,

Does 1 Through 10, etc.,
Defendants.

_____

Umoh Law Firm, PLLC, Brooklyn (Nkereuwem Umoh of counsel), for appellants.

Brody, Benard & Branch, LLP, New York (Mary Ellen O'Brien of counsel), for Grenadier Realty, Inc., respondent.

Landman Corisi Ballaine & Ford P.C., New York (Sophia Ree of counsel), for Stevenson Commons, Inc., respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered December 23, 2010, which dismissed the complaint on the grounds that it was barred by res judicata, and declined to permit plaintiffs leave to amend the complaint, unanimously affirmed, Without costs.

Plaintiffs have abandoned their federal law claims on appeal (*see Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 308 [1st Dept 2003]). Even had plaintiffs not abandoned those claims, they were properly barred on res judicata grounds, as the Federal District Court, the first forum in which plaintiffs

pursued their action against defendants, dismissed their claims for failure to state a cause of action. This dismissal constitutes a dismissal on the merits (*see McKinney v City of New York*, 78 AD2d 884, 885 [2d Dept 1980]; *see also Schneider v David*, 197 AD2d 363 [1st Dept 1993]).

Plaintiffs' state law claims were properly dismissed, but not for the reason stated by the motion court, i.e., res judicata. Here, those claims were barred by the principle of collateral estoppel, since in dismissing plaintiffs' federal claims, the Federal District Court addressed issues identical to those raised by plaintiffs' state claims, despite having declined to exercise jurisdiction over the state claims (*see Browning Ave. Realty Corp. v Rubin*, 207 AD2d 263, 266 [1st Dept 1994], *lv denied* 85 NY2d 804 [1995]; *Pinnacle Consultants v Leucadia Natl. Corp.*, 94 NY2d 426, 432 [2000]). Further, even had these claims not been barred by either of the foregoing principles, they would have been properly dismissed under CPLR 3211(a)(7), as none of them stated a claim upon which relief could be granted.

The IAS court properly declined to permit plaintiffs to amend their complaint, as any amendment would have been futile (*see Rappaport v VV Publ. Corp.*, 223 AD2d 515, 516 [1st Dept 1996]).

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

ENTERED: JANUARY 10, 2013

CLERK

Friedman, J.P., Sweeny, Acosta, Abdus-Salaam, Manzanet-Daniels, JJ.

8974-
8975 Aon Risk Services, et al., Index 651673/11
Plaintiffs-Respondents,

-against-

Michael Cusack, et al.,
Defendants,

Peter Arkley, etc.,
Defendant-Appellant.

Frankfurt Kurnit Klein & Selz P.C., New York (Ronald C. Minkoff of counsel), for appellant.

DLA Piper LLP (US), New York (Shand S. Stephens of counsel), for respondents.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered July 2, 2012, which, to the extent appealed from as limited by the briefs, denied defendant Peter Arkley's motion to dismiss a third amended complaint brought by an affiliate of his former employer and its corporate parent (collectively, Aon) on the grounds of a prior action pending and forum non conveniens, unanimously affirmed, with costs. Order, same court (Marcy S. Friedman, J.), entered September 21, 2012, which granted Aon's motion for a preliminary injunction insofar as it enjoined Arkley, his agents, servants, employees and all other persons acting under his supervision and/or direction from soliciting

business from, or entering into any business relationship with, on behalf of the corporate defendant (Alliant), any of Aon's clients or customers whom he either procured or whose accounts he worked on in the 24 months prior to his departure from Aon on June 13, 2011; enjoined Arkley and his agents, etc. from soliciting any Aon employees to work for Alliant; and directed that Aon post a $1 million bond, unanimously affirmed, with costs.

The court properly exercised its discretion in declining to dismiss or stay this action in light of a prior pending action, commenced by Arkley and his new employer Alliant in California against Aon, seeking primarily a declaration that restrictive covenants in Arkley's employment agreement, and certain incentive agreements he entered into with Aon, were unenforceable under California law and public policy (*see generally* CPLR 3211[a][4]). The California action was commenced only a few days before the instant action, and on the very same date that Arkley and nearly 40 other co-workers departed Aon's employ to work for Alliant. Arkley simultaneously transferred a significant client base from his former employer over to Alliant, and additional employees of Aon migrated to Alliant's employ over the next few days. The timing of the commencement of the California action, the

declaratory relief sought therein, and the evident disfavor California law holds for restrictive covenants, supports the motion court's finding that the California action was a preemptive measure undertaken to gain a tactical advantage so as to negate the force and effect of the restrictive covenants, which the parties had freely agreed upon (*see generally L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1 [1st Dept 2007]; *White Light Prods. v On the Scene Prods.*, 231 AD2d 90, 96-97 [1st Dept 1997]). While Arkley was not made a party to the instant action until he was impleaded as a defendant nine months after the action's commencement, in the interim, he was named as a defendant in an Illinois action commenced by Aon, and he was subject to a broad-scoped temporary restraining order in the instant action. Arkley had also participated in the instant action prior to being impleaded.

While Arkley was a long-time resident of California and worked for an Aon subsidiary principally based in California for over 15 years prior to taking a position with Alliant (also located in California), we find the motion court properly exercised its discretion in denying that branch of his motion which sought dismissal of this action on forum non conveniens grounds (CPLR 327). The fact that another forum may have a

substantial interest in adjudicating an action is but one factor to be weighed on a CPLR 327 dismissal motion (*see generally Shin-Etsu Chem. Co., Ltd. v ICICI Bank Ltd.*, 9 AD3d 171 [1st Dept 2004]). "The rule [forum non conveniens] rests upon justice, fairness and convenience" (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985]). Aon commenced this action in New York, where it has a sizeable corporate presence, to enforce the restrictive covenants to which Arkley agreed at the time he accepted the advancement and economic incentives offered by Aon. Arkley has demonstrated his availability to this forum by his prior business activities here, as well as by his initial, nonparty participation in this action. Arkley's apparent purpose in seeking dismissal of this action on forum non conveniens grounds is to avoid his contractual obligations.

With regard to the choice of law issue, "[a] basic precept of contract interpretation is that agreements should be construed to effectuate the parties' intent" (*Welsbach v Elec. Corp. v MasTec N. Am., Inc.*, 7 NY3d 624, 629 [2006]). New York courts are willing to enforce parties' choice of law provisions (*see Koob v IDS Fin. Servs.*, 213 AD2d 26, 33 [1st Dept 1995]; *see also Union Banicaire Privee v Nasser*, 300 AD2d 49 [1st Dept 2002]).

Here, the parties' agreements selected Illinois law to govern their disputes, and the IAS court sought to uphold this choice of law provision. By contrast, the California courts ignored the parties' choice of law provision in favor of its own public policy. No cogent argument has been offered as to why New York courts should not enforce the parties' contractual choice of Illinois law to govern their dispute.

The motion court correctly concluded that Aon satisfied the criteria for preliminary injunctive relief, inasmuch as it demonstrated a likelihood of success on the merits, irreparable harm in the absence of an injunction, and a balancing of the equities in its favor (*see W.T. Grant Co. v Srogi*, 52 NY2d 496, 517 [1981]). The record amply demonstrates that Arkley, when not subject to formal judicial restraint, has been inclined to solicit Aon's employees and customers, in addition to making apparent use of its proprietary and confidential information (*see e.g. Clarion Assoc. v Colby Co.*, 276 AD2d 461 [2d Dept 2000]; *Laro Maintenance Corp. v Culkin*, 255 AD2d 560 [2d Dept 1998]).

Arkley ’s contention that the scope of the preliminary injunction is overly broad is unavailing (*see e.g. id.* at 560).

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

ENTERED: JANUARY 10, 2013

CLERK

Friedman, J.P., Sweeny, Acosta, Abdus-Salaam, Manzanet-Daniels, JJ.

8976 The People of the State of New York, Respondent,

-against-

Herbert Deas, Defendant-Appellant.

Ind. 1492/09

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

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

Judgment, Supreme Court, New York County (Marcy L. Kahn, J., at suppression hearing; Ronald A. Zweibel, J., at nonjury trial and sentencing), rendered March 3, 2011, convicting defendant of burglary in the second degree and two counts of attempted robbery in the second degree, and sentencing him, as a persistent violent felony offender, to concurrent terms of 16 years to life, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility. The evidence supported the conclusion that a bank employee sustained physical injury during this incident. Relatively minor injuries (*see*

People v Chiddick, 8 NY3d 445, 447 [2007]), including injuries not requiring medical treatment (*see People v Guidice*, 83 NY2d 630, 636 [1994]) may meet the statutory threshold for physical injury. Here, the victim sustained injuries to his shin and elbow that interfered with his walking, writing and sleeping for several days.

The hearing court properly denied defendant's motion to suppress his statements to police. When the evidence of the conversation between defendant and a detective is viewed in its entirety, it supports the court's finding that defendant did not unequivocally invoke his right to remain silent or notify the police that he wished to cease the interview (*see People v Cole*, 59 AD3d 302 [1st Dept 2009], *lv denied* 12 NY3d 924 [2009]). In any event, in light of the overwhelming evidence of defendant's guilt, any error in admitting the challenged statement was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters outside the record concerning counsel's strategic choices (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find that defendant received effective assistance

under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). The record does not establish that counsel should have pursued an intoxication defense, that such a defense was likely to have succeeded, or that any comments defense counsel made in colloquies with the trial court undermined defendant's case or affected the outcome of the trial.

The sentencing record fails to support defendant's assertion that the sentences on the attempted robbery convictions did not reflect the court's true intent. We perceive no basis for any reduction of sentence.

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

ENTERED: JANUARY 10, 2013

CLERK

Friedman, J.P., Sweeny, Acosta, Abdus-Salaam, Manzanet-Daniels, JJ.

8977 New Century Mortgage Corporation, Index 14859/06
Plaintiff-Respondent, 6274/07

-against-

Nicola McDonald,
Defendant-Respondent,

Gregory Pinnock, et al.,
Defendants,

Rolda V. Furlonge, et al.,
Defendant-Appellants.

- - - - -

[And Another Action]

_____

McMillian, Constabile, Maker & Perone, LLP, Larchmont (Gary Kyme of counsel), for appellants.

DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, White Plains (Jacob E. Amir of counsel), for New Century Mortgage Corporation, respondent.

Law Offices of Joseph A. Altman, P.C., Bronx (Joseph A. Altman of counsel), for Nicola McDonald, respondent.

_____

Judgment, Supreme Court, Bronx County (Kenneth L. Thompson, J.), entered August 30, 2011, inter alia, adjudging defendant Nicola McDonald the rightful owner of the subject property, unanimously affirmed, with costs.

Defendants Rolda V. Furlonge and First Franklin failed to establish prima facie that Furlonge paid valuable consideration for the property and therefore was a bona fide purchaser entitled

to the protection of Real Property Law § 291 or § 266 (*see Commandment Keepers Ethiopian Hebrew Congregation of the Living God, Pillar & Ground of Truth, Inc. v 31 Mount Morris Park, LLC*, 76 AD3d 465 [1st Dept 2010]; *HSBC Mtge. Servs., Inc. v Alphonso*, 58 AD3d 598, 600 [2d Dept 2009]).

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

ENTERED: JANUARY 10, 2013

CLERK

Friedman, J.P., Sweeny, Acosta, Abdus-Salaam, Manzanet-Daniels, JJ.

8978 In re Elizabeth Seickel, Index 260476/11
Petitioner-Respondent,

-against-

State Insurance Fund, et al.,
Respondents-Appellants.

_____

Weiss, Wexler & Wornow, P.C., New York (Michael J. Reynolds of counsel), for appellants.

Grey & Grey, L.L.P., Farmingdale (Robert E. Grey of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered August 2, 2011, which, to the extent appealed from as limited by the briefs, granted the petition to extinguish respondents' lien pursuant to Workers' Compensation Law § 29, and determined respondents' equitable share of petitioner's litigation costs and directed respondents to reimburse petitioner in that amount, unanimously modified, on the law, to vacate the determination of respondents' equitable share of the litigation costs and the direction to reimburse petitioner in that amount, and remand the matter for recalculation of respondents' share of the litigation costs in accordance herewith, and otherwise affirmed, without costs.

Petitioner's projected future medical expenses are too

speculative to be considered in calculating the total benefit to respondents from her recovery in the litigation (*Matter of Bissell v Town of Amherst*, 18 NY3d 697 [2012]). Thus, respondents' equitable share of petitioner's litigation costs must be recalculated (*see Burns v Varriale*, 9 NY3d 207, 215 n 4 [2007]).

We reject respondents' contention that the court erred in employing the Life Expectancy and Present Value Tables set forth in Appendices A and C of the Pattern Jury Instructions to determine the present value of respondents' future indemnity liability. In light of respondents' failure to point to the mortality table it sought to employ or to proffer any calculations with respect thereto, and the detailed calculations set forth in the petition, the court properly deemed these tables pertinent (*see* Workers' Compensation Law § 29[2]; *Burns*, 9 NY3d at 215). Respondents' argument that the court erred in failing to consult the remarriage tables of the Dutch Royal Insurance Institution is unpreserved, and, in any event, unavailing, since those tables apply to the computation of death benefits payable

to a widow until widowhood terminates upon remarriage (*see Matter of Theresa M.C. v Utilities Mut. Ins. Co.*, 207 AD2d 481, 483 [2d Dept 1994]; *Matter of Iannone v Radory Constr. Corp.*, 285 App Div 751 [3d Dept 1955], *affd* 1 NY2d 671 [1956]).

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

ENTERED: JANUARY 10, 2013

CLERK

Friedman, J.P., Sweeny, Acosta, Abdus-Salaam, Manzanet-Daniels, JJ.

8979 The People of the State of New York, Ind. 357/11
Respondent,

-against-

Joe Yarbrough,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Nicole Coviello 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 (Renee White, J.), rendered on or about May 31, 2011,

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: JANUARY 10, 2013

CLERK

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

Friedman, J.P., Sweeny, Acosta, Abdus-Salaam, Manzanet-Daniels, JJ.

8980 Cadlerock Joint Venture, L.P., Index 604191/06
Plaintiff-Appellant-Respondent,

-against-

David S. Bersson, et al.,
Defendants.
- - - - -
Elaine Thompson,
Proposed Intervenor-Plaintiff,

Marc Benhuri, et al.,
Proposed Intervenors-Plaintiffs-Appellants,

–against–

Mel Cooper,
Proposed Defendant,

Imperial Capital, LLC,
Proposed Intervenor-Defendant-Respondent.

_____

Vlock & Associates, P.C., New York (Stephen Vlock of counsel), for appellant-respondent.

Law Offices of Nathaniel B. Smith, New York (Nathaniel B. Smith of counsel), for appellants.

_____

Order, Supreme Court, New York County (Barbara Kapnick, J.), entered June 15, 2011, which, to the extent appealed from as limited by the briefs, granted defendant David Cooper and intervenor Imperial's cross motion to stay a sheriff's sale of a condominium belonging to defendant-judgment debtor Mel Cooper, and denied intervenors-judgment creditors Benhuri, Kroitoro and

Epstein's motion to have a receiver appointed to conduct the sale, unanimously reversed, on the law, without costs, the stay vacated, and the sale directed to proceed under the auspices of a receivership, pursuant to the parties' stipulation.

Plaintiff and intervenors-appellants are correct that their judgments, entered in May 2007, have priority over the purported conveyance of the debtor's condominium via a deed dated and recorded in October 2007 (CPLR 5203). Moreover, the notation on the October 2007 deed that is "confirmatory" of a deed supposedly executed in April 2006 is insufficient to create or evidence a conveyance of real property at that early time (Real Property Law §§ 243, 291). The IAS court erred in staying the sale pending the outcome of a fraudulent conveyance action brought by a subsequent judgment debtor. Because the judgments of appellants were entered prior to October 2007, it does not matter whether the conveyance in October 2007 was bona fide; it is invalid as to

them. Finally, Plaintiff waived any right to a sale of the property by the sheriff when it entered into a valid stipulation with the other creditors that provided for a sale by designated co-receivers.

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

ENTERED: JANUARY 10, 2013

CLERK

Friedman, J.P., Sweeny, Acosta, Abdus-Salaam, Manzanet-Daniels, JJ.

8981 In re Stephanie Domenici Cabonargi, Index 108454/10
Petitioner-Respondent,

-against-

The City University of New York, et al.,
Respondents-Appellants.

_____

Eric T. Schneiderman, Attorney General, New York (Sudarsana Srinivasan of counsel), for appellants.

Joel Field, White Plains, for respondent.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered April 15, 2011, which granted the petition challenging respondent The City University of New York's determination to dismiss petitioner from the doctoral program in environmental psychology, and directed respondent to reconsider its dismissal of petitioner, unanimously reversed, on the law, without costs, the order vacated, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed.

The court, in making its decision, improperly considered an email from petitioner's academic advisor that was never presented at the administrative level (*see Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000]). Indeed, the email was issued after respondent's final determination. When considering the evidence

presented at the administrative level, respondent's determination concerning petitioner's academic qualifications was rational, and was made in good faith and in accordance with its own rules (*see Matter of Olsson v Board of Higher Educ. of City of N.Y.*, 49 NY2d 408, 413-414 [1980]; *see also Maas v Cornell Univ.*, 94 NY2d 87, 92 [1999]).

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

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

ENTERED: JANUARY 10, 2012

CLERK

Friedman, J.P., Sweeny, Acosta, Abdus-Salaam, Manzanet-Daniels, JJ.

8982-
8983 In re Diana Torres,
Petitioner-Respondent,

-against-

Raymond Kelly, etc., et al.,
Respondents-Appellants.

Index 108451/10

Michael A. Cardozo, Corporation Counsel, New York (Keith M. Snow of counsel), for appellants.

Ungaro & Cifuni, New York (Nicholas Cifuni of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Manuel J. Mendez, J.), entered April 13, 2011, which, to the extent appealed from as limited by the briefs, granted the petition to annul respondents' determination denying petitioner accident disability retirement (ADR) benefits and directed respondents to retire petitioner with ADR benefits retroactive to the date of petitioner's retirement, unanimously reversed, on the law, without costs, the order and judgment vacated, and the matter remanded to respondent Board of Trustees for further proceedings in accordance herewith. Appeal from order and judgment (one paper), same court and Justice, entered October 12, 2011, which, to the extent appealed from as limited by the

briefs, upon reargument, adhered to its original determination, unanimously dismissed, without costs, as academic.

Petitioner, a member of the New York City Police Department, applied for ADR benefits based on two incidents — one occurring on February 23, 2003, on her way to work, and the other occurring on October 10, 2003, while at the New York County District Attorney's Office for a court appearance. In February 2009, petitioner applied for ADR benefits.

The Board of Trustees, in a tie vote, denied petitioner ADR benefits based on the Medical Board's findings that the February 2003 incident was the sole cause of petitioner's injuries and the Board of Trustees' conclusion that petitioner was not in city service at the time of the incident (*see* Administrative Code of City of NY § 13-252).

Petitioner brought the instant CPLR article 78 proceeding seeking to set aside the Board of Trustees' determination. The court observed that the Medical Board's report concluded that petitioner was disabled because of her injuries from the February 2003 incident, without considering whether the October 2003 incident aggravated a preexisting condition, and that the report, therefore, lacked credible evidence of the cause of petitioner's disability. The court further concluded that the Board of

Trustees relied on the Medical Board's report and considered only the February 23, 2003 incident, thus failing to consider whether petitioners' disabilities "were caused by the line-of-duty incident of October 10, 2003."

Rather than remanding, the court concluded as a matter of law that the October 2003 incident precipitated and/or aggravated petitioner's disability and ordered that ADR benefits be granted.

On appeal, respondents do not challenge the court's finding that the October 2003 incident caused petitioner's disability. Accordingly, the sole issue on appeal is whether the court should have remanded the case to the Board of Trustees to determine whether the October 2003 incident was an "accident" pursuant to Administrative Code § 13-252 (*Matter of Lichtenstein v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II*, 57 NY2d 1010, 1012 [1982]; *see also Matter of Lang v Kelly*, __AD3d__, 2012 NY Slip Op 8788 [1st Dept 2011]; *Matter of Rosenthal v Board of Trustees of N.Y. City Police Pension Fund, Art. II*, 252 AD2d 388, 388-389 [1st Dept 1998], *lv denied* 93 NY2d 801 [1999]).

The Board of Trustees' determination was based solely on the February 2003 incident. The Board made no determination regarding the October 2003 incident, and it cannot be said that

there is a complete factual record regarding the circumstances of the October 2003 incident. Therefore, on this record, the reviewing court should not have determined, as a matter of law, that the October 2003 incident was an accident and that petitioner was thus entitled to ADR benefits (*see Matter of Furlong v Safir*, 295 AD2d 248 [1st Dept 2002] [a determination as a matter of law can be made "[o]nly where the circumstances allow but one inference"] [internal quotation marks omitted]).

Accordingly, the case is remanded to the Board of Trustees so that it may assess the available evidence and determine whether the October 2003 incident was an accident pursuant to Administrative Code § 13-252 (*see Matter of Agnelli v Kelly*, 96 AD3d 471, 472-473 [1st Dept 2012]; *Matter of Kelly v Board of Trustees of Police Pension Fund, Art. II*, 47 AD2d 892, 893 [1st Dept 1975]).

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

ENTERED: JANUARY 10, 2013

CLERK

Friedman, J.P., Sweeny, Acosta, Abdus-Salaam, Manzanet-Daniels JJ.

8984 In re Nhyashanti A., also known as Anton C.,

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

Evelyn B.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Ballon Stoll Bader & Nadler, P.C., New York (Frederic P. Schneider of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Selene D'Alessio of counsel), attorney for the child.

_____

Order of fact-finding, Family Court, Bronx County (Ilana Gruebel, J.), entered on or about September 20, 2011, which, following a fact-finding hearing, determined that respondent mother had derivatively neglected the subject child, unanimously affirmed, without costs.

Petitioner agency made a prima facie showing of derivative neglect as to the subject child based on the prior findings of neglect against respondent with respect to her older children, including a finding of neglect just 10 days before the subject

child's birth (*see Matter of Cruz*, 121 AD2d 901, 902-903 [1st Dept 1986]).

The derivative finding of neglect was supported by a preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]). The prior findings of neglect were sufficiently close in time to the derivative proceeding to support the conclusion that respondent's parental judgment remained impaired (*see Cruz*, 121 AD2d at 902-903). Further, respondent testified that she had not completed anger management services or a mental health evaluation, and that she had not been compliant with her mental health treatment for a year before the filing of the petition in the derivative proceeding.

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

ENTERED: JANUARY 10, 2013

CLERK

Friedman, J.P., Sweeny, Acosta, Abdus-Salaam, Manzanet-Daniels, JJ.

8986 The People of the State of New York, Ind. 807/09
Respondent,

-against-

Daniel Gonzalez,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of Appellate Defender, New York (Kevin Vanlandingham of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Allen J. Vickey of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Analisa Torres, J.), rendered June 7, 2010, convicting defendant, after a jury trial, of robbery in the third degree and criminal possession of stolen property in the fifth degree, and sentencing him, as a second felony offender, to an aggregate term of 3½ to 7 years, unanimously affirmed.

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

including its evaluation of inconsistencies between the victim's testimony and his prior statements, or the jury's finding that defendant intended to permanently deprive the victim of his property.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 10, 2013

CLERK

Friedman, J.P., Sweeny, Acosta, Abdus-Salaam, Manzanet-Daniels, JJ.

8987-
8988 Index 116541/06

Marlene Scher,
Plaintiff-Respondent,

-against-

Paramount Pictures Corp., et al.,
Defendants-Appellants.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for appellants.

Robert D. Rosen, Roslyn, for respondent.

Order, Supreme Court, New York County (Paul Wooten, J.), entered October 24, 2011, which, in this personal injury action, to the extent appealed from as limited by the briefs, granted plaintiff's motion to strike defendants' answers, unanimously reversed, on the law and the facts, without costs, the motion denied, and the matter remanded for consideration of a less drastic sanction, after affording the parties an opportunity to be heard on the issue. Appeal from order, same court and Justice, entered March 2, 2012, which, upon reargument, adhered to the original determination, unanimously dismissed, without costs, as academic.

It is undisputed that defendants failed to timely comply with court orders directing them to provide an affidavit

concerning the search for documents requested by plaintiff in discovery. However, plaintiff did not make a clear showing that defendants' failure to comply with the discovery orders was willful, contumacious or in bad faith (*see Ayala v Lincoln Med. & Mental Health Ctr.*, 92 AD3d 542, 542 [1st Dept 2012]). Indeed, the record indicates that defendants searched for the requested documents long before the court ordered production of an affidavit, that they offered to produce their entire file on the matter, and that no prejudice was demonstrated. Given the foregoing and the strong preference that matters be decided on the merits (*id.*), the court improvidently exercised its discretion in striking defendants' answers. A less drastic sanction, however, is warranted for defendants' tardiness.

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

ENTERED: JANUARY 10, 2013

CLERK

Friedman, J.P., Sweeny, Acosta, Abdus-Salaam, Manzanet-Daniels, JJ.

8989 David Glassberg, Index 100975/09
Plaintiff-Appellant,

-against-

Filco Carting Corp., et al.,
Defendants-Respondents.

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

Law Offices of Jeffrey Samel & Partners, New York (David M. Samel of counsel), for respondents.

Judgment, Supreme Court, New York County (Carol R. Edmead, J.), entered April 15, 2011, upon a jury verdict in defendants' favor in this action for personal injuries sustained when plaintiff bicyclist was struck by defendants' motor vehicle, unanimously affirmed, without costs.

The jury's finding that defendant truck driver was not negligent in coming into contact with plaintiff bicyclist was based upon a fair interpretation of the evidence (*see McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [1st Dept 2004]). The jury clearly resolved issues of credibility in defendants' favor and credited the testimony of two eyewitnesses that plaintiff had been riding against traffic, before turning onto the street where the accident occurred, and that the truck and bicycle were

traveling alongside each other, which determinations are entitled to deference (*see Lu v Spinelli*, 44 AD3d 546 [1st Dept 2007]). Based on the evidence, the jury could have inferred that defendant driver had no reason to observe plaintiff before the accident and thus, was not negligent (*see e.g. Hinkle v Trejo*, 89 AD3d 631, 631-632 [1st Dept 2011], *lv denied* 19 NY3d 807 [2012]).

Plaintiff's objections to the jury charges are, to some extent, unpreserved. In any event, any error in the charges was harmless since the objections involve charges relating to plaintiff's negligence, an issue not reached by the jury.

Finally, the Court did not deny plaintiff a right to impeach one of the eyewitnesses by sustaining an objection, during plaintiff's summation, to a discussion about the witness's deposition testimony, which purportedly contradicted his trial testimony. During the trial, plaintiff confronted the witness with his prior testimony and fully explored the inconsistency.

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

ENTERED: JANUARY 10, 2013

CLERK

Friedman, J.P., Sweeny, Acosta, Abdus-Salaam, Manzanet-Daniels, JJ.

8990 The People of the State of New York, Ind. 2533/09
Respondent,

-against-

Dwight Perry,
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 (David E.A. Crowley of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J. at suppression hearing; Ronald A. Zweibel, J. at plea and sentencing), rendered June 21, 2010, as amended July 21, 2010, convicting defendant of criminal impersonation in the second degree, and sentencing him to a term of one year, unanimously affirmed.

The court properly denied defendant's suppression motion. Defendant did not preserve his present suppression arguments, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits. A police officer saw a light flash on a turnstile after defendant swiped a MetroCard, indicating that defendant had used a reduced fare card that only a senior citizen or a person with a qualifying

disability would be authorized to use. Since the 28-year-old defendant appeared to be neither, the officer had, at least, a founded suspicion of criminality justifying a common-law inquiry, and the officer's conduct in asking defendant to show identification and the MetroCard he had just used did not exceed the bounds of such an inquiry (*see People v Francois*, 61 AD3d 524 [1st Dept 2009], *affd* 14 NY3d 732 [2010]; *see also United States v Gregg*, 463 F3d 160, 166 [2d Cir 2006] [finding reasonable suspicion for stop based on use of reduced fare MetroCard by person appearing neither elderly nor disabled]). When defendant produced a MetroCard in someone else's name and with someone else's picture, the officer had probable cause to arrest him and to conduct a search incident to arrest.

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

ENTERED: JANUARY 10, 2013

CLERK

Friedman, J.P., Sweeny, Acosta, Abdus-Salaam, Manzanet-Daniels, JJ.

8991N Allstate New Jersey Insurance Company, Petitioner-Appellant, -against- John Tse, et al., Respondents-Respondents. Index 101820/12

Sweetbaum & Sweetbaum, Lake Success (Marshall D. Sweetbaum of counsel), for appellant.

Order, Supreme Court, New York County (George J. Silver, J.), entered July 10, 2012, which denied the petition to stay arbitration of an underinsured motorist claim in the underlying personal injury action and dismissed the proceeding, unanimously reversed, on the law, without costs, and the petition granted.

Respondents' October 23, 2007 letter, which explicitly advised Allstate of a "potential claim under the Uninsured/Underinsured provision of the above-policy," and January 31, 2011 letter, which stated "[w]e will now be moving forward on our client's underinsured motorist claim," fail to include the requisite notice provision contained in CPLR § 7503(c) to constitute a sufficient notice to arbitrate (*see Matter of Blamowski [Munson Transp.]*, 91 NY2d 190, 195 [1997]); *Cooper v Bruckner*, 21 AD3d 758, 759-60 [1st Dept 2005]).

Accordingly, the 20 day limitation period terminating petitioner's right to contest the obligation to arbitrate did not start to run until a proper demand for arbitration, containing the requisite language, was served by mail on February 7, 2012. Petitioner's motion to stay the arbitration, served on February 24, 2012, was therefore timely.

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

ENTERED: JANUARY 10, 2013

CLERK

Andrias, J.P., Saxe, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

8409 Devash LLC, Index 651839/10
Plaintiff-Appellant,

-against-

German American Capital Corporation, et al.,
Defendants,

CWCapital Asset Management LLC, et al.,
Defendants-Respondents.

Meister Seelig & Fein LLP, New York (Stephen B. Meister of counsel), for appellant.

Friedman Kaplan Seiler & Adelman LLP, New York (Robert J. Lack of counsel), for respondents.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered August 1, 2011, affirmed, without costs.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David B. Saxe
Karla Moskowitz
Sheila Abdus-Salaam
Sallie Manzanet-Daniels, JJ.

8409
Index 651839/10

_____x

Devash LLC,
Plaintiff-Appellant,

-against-

German American Capital Corporation, et al.,
Defendants,

CWCapital Asset Management LLC, et al.,
Defendants-Respondents.

_____x

Plaintiff appeals from an order of the Supreme Court, New York County (Charles E. Ramos, J.), entered August 1, 2011, which granted defendants CWCapital Asset Management LLC and Bank of America, N.A.'s motion to dismiss the third, fourth and fifth causes of action.

Meister Seelig & Fein LLP, New York (Stephen B. Meister, David E. Ross, Randi L. Maidman and Remy Stocks of counsel), for appellant.

Friedman Kaplan Seiler & Adelman LLP, New York (Robert J. Lack, Richardo Solano Jr., and Jeffrey R. Wang of counsel), for respondents.

Scott D. Spelfogel, New York, for CWCapital Asset Management LLC, respondent.

SAXE, J.

Plaintiff Devash LLC claims that Bank of America, N.A. (BOA), as trustee for the holder of its securitized $250 million mortgage loan, and CWCapital Asset Management LLC, the appointed special servicer of plaintiff's loan, entered into what plaintiff terms a "predatory lending scheme," not in regard to the terms of the mortgage loan itself, but due to the manner in which defendants engaged in selling plaintiff's loan to a third party that planned to foreclose and take possession of the property. Plaintiff seeks money damages against BOA and CWCapital based on claims of breach of contract and tortious interference.

According to the complaint, in 1999 plaintiff purchased a 26 story office and retail building located at 1775 Broadway, also known as Three Columbus Circle, and then embarked on a multi-million dollar comprehensive renovation. On January 9, 2006, plaintiff refinanced the mortgage debt on the property by obtaining the $250 million loan at issue here from Wachovia Bank, N.A. On June 26, 2006, Wachovia assigned the Loan to Wells Fargo Bank, N.A., as trustee for the Registered Holders of Wachovia Bank Commercial Mortgage Trust, Commercial Mortgage Pass-Through Certificates, Series 2006-C-23 (CMT-C23). On or about March 31, 2009, defendant BOA replaced Wells Fargo as trustee for CMT-C23.

The loan required interest payments through January 2010,

with payments of principal scheduled to begin in February 2010, at which time the monthly payment obligation would increase substantially. With an occupancy rate in the building of approximately 23%, plaintiff approached BOA in January 2010 seeking to negotiate a restructuring of the loan, to include either forbearance from collecting principal payments or acceptance of smaller principal payments, while plaintiff found tenants for the building. BOA agreed to engage in these restructuring negotiations, and transferred the loan to defendant CWCapital as special servicer. Although BOA issued a notice of default on January 21, 2010, and on March 24, 2010 it declared the loan accelerated, CWCapital assured plaintiff that these steps were simply standard operating procedures, and that its restructuring proposal was under active consideration. Because CWCapital indicated that BOA would only consider restructuring the loan if plaintiff kept up its interest payments to BOA, plaintiff continued to pay millions of dollars in interest, real estate taxes, and construction costs, while restructuring negotiations were purportedly proceeding. During this period, plaintiff alleges, it invested more than $22 million in fresh funds.

Plaintiff alleges that in May 2010 BOA and plaintiff reached a restructuring agreement in principle, and that in early June

2010 the final terms of the agreement were set, pursuant to which plaintiff would continue making payments of interest only while it found tenants for the building. However, although plaintiff executed and delivered the prepared loan modification documents on June 11, 2010, BOA never countersigned the documents. According to the complaint, BOA did not enter into the restructuring agreement because defendant The Related Companies, L.P. (Related), a well-known developer that was developing the nearby Time Warner Center at Columbus Circle, had offered to purchase the loan from BOA. Plaintiff asserts that it was Related's plan to obtain the property through foreclosure, demolish the newly-renovated office building and construct a new mixed use tower to house a Nordstrom department store and luxury condominiums. It contends that beyond simply selling plaintiff's loan to Related, BOA and CWCapital took affirmative steps, damaging to plaintiff, to assist Related in its goal of foreclosing on the property after purchasing the loan. Specifically, plaintiff complains that CWCapital assisted Related by (1) inducing plaintiff to remain current on interest and other required payments under the loan, (2) making false representations that restructuring negotiations were proceeding in good faith, and (3) withholding consent to new leases in violation of the terms of the loan. Plaintiff alleges that these

actions were undertaken to make foreclosure inevitable and ensure that the property had as few tenants as possible when Related took possession.

One of those proposed leases was with HQ Global Workplaces LLC (HQ), for a full floor of the building totaling approximately 33,000 rentable square feet with a competitive market rent per square foot. Plaintiff alleges that CWCapital granted conditional approval of a proposed lease to HQ five months earlier, but that on July 20, 2010, after Related raised the prospect of purchasing the loan, the special servicer sent plaintiff a memorandum incorrectly claiming that the terms of the HQ lease had been changed since it granted approval, and that it would not consent to the lease without the inclusion of a demolition clause permitting the landlord to terminate the lease on six months' notice in the event it elected to demolish the building, without compensation to the tenant. As a result, plaintiff claims, HQ ceased its lease negotiations with plaintiff, and prompted the brokerage community to refrain from bringing prospective tenants to the property.

Another proposed lease was with William Morris Endeavor Entertainment LLC, a prestigious global entertainment agency, for three full floors, amounting to nearly 77,000 square feet of rentable space, the aggregate rental income of which, including

escalations, would allegedly exceed $100 million. Plaintiff submitted for review a term sheet containing the material economic terms of the proposed lease, but defendants refused to review it, and instead insisted that plaintiff deliver a fully negotiated lease for review. As a result, negotiations with William Morris were terminated.

On September 1, 2010, BOA assigned the loan to Three Columbus Assignee, LLC, an entity formed by Related. Three Columbus then immediately reassigned the loan to German American Capital Corporation (GACC), a subsidiary of Deutsche Bank, and two days later, GACC filed a foreclosure action against plaintiff. GACC also demanded payment of a $54 million prepayment charge from plaintiff in the event it sought to repay the loan.

Plaintiff responded by commencing this action against BOA, CWCapital, GACC, Related, and Three Columbus. As against GACC, Related, and Three Columbus, the complaint sought a declaration that GACC was not entitled to collect any prepayment charge, and injunctive relief against the foreclosure action. These causes of action were resolved in a settlement in which plaintiff repaid the principal of the loan along with interest, legal fees, and a $5 million prepayment charge.

The three causes of action that remain are for breach of

contract, tortious interference with contract and tortious interference with prospective economic advantage against BOA and CWCapital, for which plaintiff seeks damages representing lost rents, funds unnecessarily spent, and lost value to the property. Plaintiff alleges that BOA breached its contractual obligations under the mortgage loan agreement by wrongfully withholding consent to the proposed leases with HQ and William Morris for vacant space in its building; that CWCapital tortiously interfered with plaintiff's contract with BOA by causing BOA to unreasonably reject lease proposals; and that both defendants tortiously interfered with plaintiff's prospective economic relations with its proposed tenants and in its operation of the building. Plaintiff asserts that it unnecessarily expended more than $22,000,000 in 2010 in reliance on CWCapital's instructions during the fruitless loan restructuring negotiations, lost rents the proposed tenants would have paid, and was forced to take on an equity partner in order to pay off the loan, losing a portion of the property's value.

CWCapital and BOA moved to dismiss the remaining causes of action pursuant to CPLR 3211(a)(1) and (7). On such a motion we are required to accept all of the allegations in the complaint as true, and to draw all inferences from those allegations in the light most favorable to the plaintiff, unless the documentary

evidence conclusively disproves an alleged fact (*see generally Leon v Martinez*, 84 NY2d 83, 87 [1994]).

Even accepting the allegations as true, the third cause of action for breach of contract was properly dismissed. The claim against BOA rests largely on the assertion that the lender violated the contractual prohibition against unreasonably withholding its consent to proposed leases. Plaintiff particularly relies on the allegation that CWCapital improperly insisted on the insertion of a demolition clause, both because such a provision is unheard of in the present market, and because a proposed lease that did not contain such a clause had already been approved by the special servicer. However, plaintiff seeks money damages and thus, the claim was properly dismissed, not because plaintiff failed to plead that the lender's consent was unreasonably withheld, but because the contractual limitation contained in the subject mortgage loan agreement limits plaintiff's remedies for unreasonably withheld consent to injunctive relief or declaratory judgment.

Plaintiff's reliance on *Banc of Am. Sec. LLC v Solow Bldg. Co. II, L.L.C.*, 47 AD3d 239 [1st Dept 2007]) is misplaced. The *Solow* decision, which declined to dismiss the plaintiff tenant's claim against its landlord for damages based on an alleged breach of contract, was based on the landlord's pattern of refusing to

either approve or disapprove proposed alterations while at the same time demanding that the tenant pay it $6 million -- despite the lack of any lease provision even arguably justifying such a payment. Although the lease in that case contained a provision limiting to specific performance the tenant's remedy for loss caused by delay in the approval of alterations, this Court declined to apply that limitation, observing that "[e]nforcement of such a provision is precluded when 'the misconduct for which it would grant immunity smacks of intentional wrongdoing, ... as when it is fraudulent, malicious or prompted by the sinister intention of one acting in bad faith'" (*id.* at 244 [citations omitted]). However, as we explained in *Meridian Capital Partners, Inc. v Fifth Ave. 58/59 Acquisition Co. LP* (60 AD3d 434, 434 [1st Dept 2009]), the type of intentional wrongdoing that could render a limitation in the lease unenforceable is that which is "unrelated to any legitimate economic self-interest," as was the case in *Solow*.

Simply put, plaintiff's allegations do not establish the "type of intentional wrongdoing, unrelated to any legitimate economic self-interest" that would render the limitation of remedies provision unenforceable. As the complaint itself acknowledges, CWCapital's failure to approve the proposed leases was intended to maximize the lender's available options and the

value of the property and the loan. Consequently, CWCapital's alleged conduct advanced a legitimate economic self-interest. Even assuming for purposes of this motion that the withholding of consent to the leases was not supported by the terms of the lease, plaintiff's only remedy was to obtain injunctive or declaratory relief; money damages are not available. The parties' dispute regarding the form of the HQ lease the lender preliminarily approved, and whether it contained a demolition clause, is irrelevant to our analysis; either way, plaintiff's available remedy is still limited to injunctive or declaratory relief.

Nor does BOA's asserted right to a prepayment penalty, stated in its March 24, 2010 acceleration notice and its July 8, 2010 letter setting forth a "corrected" payoff balance, amount to grounds for a claim of breach of contract. BOA took no actions to advance the position that it was entitled to such a payment. By the time the action was commenced, BOA was no longer in a position to even attempt collecting such a payment. There is no support in the alleged facts for the claim that BOA's assertion in the notice and letter, whether correct or incorrect, that it had a right to collect a prepayment charge, somehow damaged plaintiff's position or standing in the marketplace.

Nor is a breach of defendants' contractual obligation of

good faith and fair dealing properly alleged, based on the failure to approve the leases, the failure to restructure plaintiff's loan, or the failure to inform plaintiff that the lender was considering selling the loan. Any assertion that the entire January - June 2010 negotiation for restructuring was a sham is contradicted by the allegations of the complaint, which asserts that Related's interest in purchasing the loan was expressed in May or June. Moreover, defendants had no contractual obligation either to enter into the negotiated modification or to inform plaintiff that it was negotiating with a potential purchaser of the loan. Indeed, the express language of the parties' Pre-Negotiation Agreement expressly protected the lender from liability if it decided not to enter into a restructuring agreement providing that "no agreement reached with respect to any matter . . . shall have any effect whatsoever unless such agreement is reduced to writing, signed and delivered by all parties' authorized representatives."

Plaintiff's fourth cause of action against CWCapital, for tortious interference with plaintiff's contract with BOA, was also properly dismissed. CWCapital was acting as BOA's agent, and "[i]t is well settled that an agent cannot be held liable for inducing [its] principal to breach a contract with a third person, at least where [it] is acting on behalf of [its]

principal and within the scope of [its] authority" (*Nu-Life Const. Corp. v Board of Educ. of City of N.Y.*, 204 AD2d 106, 107 [1st Dept 1994][internal quotation marks omitted], *lv dismissed* 84 NY2d 850 [1994]). Plaintiff's allegation that CWCapital was acting "at the behest" of a third party developer who desired to acquire the property at issue, rather than as BOA's agent, is conclusory and therefore insufficient to support the cause of action.

The fifth cause of action, for tortious interference with prospective economic relations, is also fatally flawed. "Where there has been no breach of an existing contract, but only interference with prospective contract rights, ... plaintiff must show more culpable conduct on the part of the defendant" (*NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 621 [1996], citing *Guard-Life Corp. v Parker Hardware Mfg. Corp*., 50 NY2d 183, 193-194). Notably, the complaint recognizes that CWCapital's actions were intended to provide BOA with more options and greater flexibility to maximize the value of the loan and because it considered a potential acquisition of the loan as a means to obtain a windfall through early repayment. These assertions serve to establish that CWCapital's alleged

interference "was neither wrongful nor motivated solely by malice, as opposed to its normal economic interest" (*Advanced Global Tech., LLC v Sirius Satellite Radio, Inc.*, 44 AD3d 317, 318 [1st Dept 2007]). Nor does the complaint allege that any tortious activity was directed at the prospective lessees, rather than directly against plaintiff (*see Carvel Corp. v Noonan*, 3 NY3d 182, 192 [2004]). Thus, plaintiff has failed to plead the elements of this claim.

Accordingly, the order of the Supreme Court, New York County (Charles E. Ramos, J.), entered August 1, 2011, which granted defendants CWCapital Asset Management LLC and Bank of America, N.A.'s motion to dismiss the third, fourth and fifth causes of action, should be affirmed, without costs.

All Concur.

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

ENTERED: JANUARY 10, 2013

CLERK