SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 7, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Saxe, Manzanet-Daniels, Gische, JJ.

10813 In re Denny E.,

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

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

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

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Appeal from order of disposition, Family Court, Bronx County (Jeanette Ruiz, J.), entered on or about September 7, 2012, 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 grand larceny in the fourth degree and criminal possession of stolen property in the fifth degree, and placed him on probation for a period of nine months, held in abeyance, and the matter remanded to Family Court, Bronx County, for further proceedings on defendant's motion to suppress evidence.

Defendant's motion papers were sufficient to raise a question of fact as to whether his identification was the product of an unlawful seizure (*Dunaway v New York*, 442 US 200 [1979]).

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

ENTERED: JANUARY 7, 2014

CLERK

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

10797 Elma Vivas, Index 305949/10
Plaintiff-Respondent,

-against-

VNO Bruckner Plaza LLC,
Defendant-Respondent,

Payless Shoesource, Inc.,
Defendant-Appellant.

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Lester Schwab Katz & Dwyer, LLP, New York (Harry Steinberg of counsel), for appellant.

Jesse Young, New York, for Elma Vivas, respondent.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Gregory Dell of counsel), for VNO Bruckner Plaza LLC, respondent.

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Order, Supreme Court, Bronx County (John A. Barone, J.), entered December 27, 2012, which, insofar as appealed from, denied the motion of defendant Payless Shoesource, Inc. (Payless) for summary judgment dismissing the complaint and all cross claims as against it, or, alternatively, on its cross claim against defendant VNO Bruckner Plaza LLC (VNO) for common-law indemnification, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint and all cross claims asserted against Payless.

The private sidewalk upon which plaintiff fell was not part of the premises demised under a store lease between Payless, the tenant, and defendant VNO, the landlord. The lease described the demised premises as ground floor space "in the building" depicted in an annexed diagram. In fact, the lease provided that the sidewalk was part of common facilities that were subject to VNO's "exclusive control and management." This case is controlled by *Rothstein v 400 E. 54th St. Co.* (51 AD3d 431 [1st Dept 2008]), in which we held that the lessee of a condominium's commercial unit had no duty to maintain stairs that were part of the common elements but not part of its leased premises. Accordingly, Payless was not under any contractual, statutory or common-law duty to maintain VNO's sidewalk. *Shkreli v Boston Props., Inc.* (102 AD3d 613 [1st Dept 2013]), which plaintiff cites, is distinguishable because it involves an accident that occurred "in the commercial premises leased by" one of the moving defendants (*id.* at 614). *Zito v 241 Church St. Corp.* (223 AD2d 353 [1st Dept 1996]), also cited by plaintiff, is equally distinguishable as it speaks to a tenant's "common-law duty to remove dangerous defects *from its premises* . . ." (*id.* at 355 [emphasis added]). As noted above, the sidewalk where the accident

occurred was not part of the premises leased to Payless. As Payless had no duty to maintain the sidewalk, there is no need to address the issue of whether it had constructive notice of a dangerous condition.

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

ENTERED: JANUARY 7, 2014

CLERK

Friedman, J.P., Acosta, Andrias, DeGrasse, Freedman, JJ.

10843 Michele Trezza, Index 310237/08
Plaintiff-Respondent,

Susan Giddes,
Plaintiff,

-against-

Metropolitan Transportation
Authority, et al.,
Defendants-Appellants,

Angeleasa Olsen,
Defendant.

_____

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Harriet Wong of counsel), for appellants.

Ogen & Sedaghati, P.C., New York (Eitan A. Ogen of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (John Barone, J.), entered March 22, 2012, upon a jury verdict awarding plaintiff damages in the amounts of $500,000 for past pain and suffering, $1,500,000 for future pain and suffering, and $500,000 for future medical expenses, modified, on the law and the facts, to vacate the award, and to remand the matter for a new trial on the issue of damages, unless plaintiff stipulates, within 30 days after service of a copy of this order with notice of entry, to reduce the award for past pain and suffering to $300,000, and vacate the awards for future pain and suffering and future medical expenses,

and to entry of an amended judgment in accordance therewith, and otherwise affirmed, without costs.

On June 8, 2008, plaintiff was injured while riding in a car that collided with a Metropolitan Transit Authority bus in the Bronx. In November 2008, she commenced this action claiming, among other things, that the accident caused "serious injury," within the meaning of Insurance Law § 5102(d), to her right shoulder and cervical spine.

After plaintiff was granted summary judgment as to liability, a trial on damages commenced, in November 2011. The jury found that the accident caused "a significant limitation of use of a body function or system" and "a permanent consequential limitation of use of a body organ or member," two definitions of "serious injury" under the statute. Plaintiff was awarded damages in the amount of $500,000 for past pain and suffering, $1,500,000 for future pain and suffering, and $500,000 for future medical expenses. Defendants moved for an order setting aside the verdict as against the weight of the evidence or, in the alternative, reducing the damages award to an amount commensurate with plaintiff's injuries. The court denied the motion in a March 2012 order from which defendants now appeal.

Defendants contend that plaintiff failed to establish that she sustained a "serious injury" under Insurance Law § 5102(d) to

either her shoulder or her spine. With respect to the shoulder, we agree that the medical evidence at trial failed to establish that the accident caused a "permanent consequential limitation of use" because plaintiff failed to submit objective evidence of permanent limitations based on a recent examination (*see Vasquez v Almanzar*, 107 AD3d 538 [1st Dept 2013]).

However, plaintiff established through quantitative assessments that, for a significant period, the accident seriously limited her use of her right shoulder by causing tendinitis, ongoing nerve impingement, and pain. As proof of significant limitation, plaintiff presented corroborative MRI results. After the accident, plaintiff received regular physical therapy and treatment by a number of orthopedists, and in November 2009 underwent arthroscopic surgery for her shoulder injury, during which an anterior spur was detected. Other medical records indicated that range of motion in the shoulder was limited. The trial court charged, without objection, that in order for there to be a "significant limitation" under Insurance Law § 5102(d) "[i]t is not necessary . . . to find that there has been a total loss of the body function or system or that the limitation [of] use is permanent" (PJI 2:88F; *see also Vasquez*, 107 AD3d at 539).

Defendants point out that, shortly after the operation, plaintiff stopped therapy for her shoulder until October 2011. However, she sufficiently explained the gap in treatment by testifying that her medical insurance did not cover physical therapy and that she could not afford to pay for it out of pocket (*see Ramkumar v Grand Style Transp. Enters. Inc.*, __NY3d__, 2013 NY Slip Op 06638 [2013]).

While the other injuries of which plaintiff complained did not constitute "serious injury" under Insurance Law § 5102(d), the jury, having determined that plaintiff suffered a serious injury to her right shoulder, was permitted to award damages for all injuries caused by her accident (*see Rubin v SMS Taxi* Corp., 71 AD3d 548 [1st Dept 2010]).

However, the jury's award for future pain and suffering is unsupported by the evidence adduced at trial. It is notable that, 1½ years after the surgery on plaintiff's shoulder, she returned to the operating surgeon seeking treatment of unrelated injuries, and did not report any problems with her shoulder. Moreover, as indicated, plaintiff's records do not indicate any objective signs of limitation resulting from her herniated disc before she was examined by her own expert, on the eve of trial and about 3½ years after the accident.

Finally, plaintiff's future medical expenses are too speculative to be compensable. Her expert expressed no opinion as to whether additional surgery or significant treatment was medically necessary or even likely, and the only treatment following the shoulder surgery in November 2009 was some physical therapy the same month, an epidural injection about two years later, and two further injections that plaintiff claims she had scheduled for after the trial.

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

ACOSTA, J. (dissenting in part)

I disagree with the majority's conclusion that plaintiff is not entitled to an award for future pain and suffering as well as future medical expenses (*see Gallagher v Samples*, 6 AD3d 659 [2nd Dept 2004]; *see also Vasquez v Almanzar*, 107 AD3d 538, 539 [1st Dept 2013]). With respect to future medical expenses, plaintiff's medical expert's testimony, which the jury obviously credited, indicated that plaintiff should see an orthopedic surgeon four to six times a year at approximately $150 a visit. Assuming for the sake of argument that she is seen by the surgeon only five times a year, her yearly cost is $750. In addition, there was testimony that she should see a physiatrist 12 times a year for medicine prescription refills, physical therapy prescription refills, and trigger-point injections, at a cost of $150 per visit. The injections were an additional $107.65 per set. This comes to $1,800 for the office visits, plus an additional $1,291.80 for the shots, for a total of $3,091.80 per year. Forty sessions of physical therapy were recommended on a yearly basis. Using the actual cost of $64.65 per session that plaintiff was charged, this expense totals $2,586 per year. There was also testimony credited by the jury that plaintiff needed MRIs and EMGs every two to three years at $2,000 per procedure. This comes to an average of $1,333 a year, assuming

she has these procedures performed every three years. Using these figures, her yearly total for medical expenses will be approximately $7,844 a year. Over a period of 50 years, this figure balloons to $388,040 without taking into consideration rising medical costs. Thus, the jury award for $500,000 is reasonable.

Moreover, since future medical expenses may include expenses for any injury caused by the accident (*Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1st Dept 2010]), I think it is best for our system of justice to allow the jury to make the determination as to what each case is worth. We should reduce a jury's damages award only in that rare case where the award deviates materially from what would be reasonable compensation (*see Harvey v Mazal Am. Partners*, 79 NY2d 218, 225 [1992]). It appears to me that, rather than reviewing for material deviations, this Court is moving in the direction of simply substituting its judgment for that of juries, and in the process making jury determinations on damages meaningless and a waste of judicial resources.

For the same reason, I disagree with the majority's conclusion that plaintiff is not entitled to any damages for future pain and suffering. I would, however, reduce the award to $500,000, which is within the range of what plaintiff requested

during summations, since, in my opinion, an award of $1,500,000 deviates materially from what is reasonable compensation. Vacating the award altogether, however, is unjustifiable

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

ENTERED: JANUARY 7, 2014

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Gische, JJ.

11283 Charles Cummo, et al., Index 114166/06
Plaintiffs-Appellants,

-against-

Children's Hospital of
New York, et al.,
Defendants-Respondents,

Bovis Lend Lease, Inc., et al.,
Defendants.

[And a Third-Party Action]

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Bailly and McMillan, LLP, White Plains (John J. Bailly of counsel), for appellants.

Bartlett, McDonough & Monaghan, LLP, Mineola (Robert G. Vizza of counsel), for respondents.

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Judgment, Supreme Court, New York County (Marcy Friedman, J.), entered June 21, 2012, bringing up for review an order, same court and Justice, entered June 7, 2012, which granted defendant New York Presbyterian Children's Hospital's motion for summary judgment dismissing the complaint and denied plaintiffs' cross motion for summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiffs claim that their 14-year-old daughter's tragic death resulted from a fungal infection acquired at defendant hospital and that the hospital is liable for negligently failing to correct, maintain or clean an unsafe or unclean or otherwise

dangerous condition, which in turn caused her demise. Defendants deny both the presence of an unclean or unsafe condition and that any such condition caused Erin Cummo's death and seek dismissal of the claims.

Based on our review of the record, which supports the trial court's findings, we find that there was no basis for Dr. Grant to conclude that Erin was improperly exposed to Penicillium mold, particularly in the period prior to her death and after the transplant procedures commenced.

While a qualified expert's opinion may be sufficient to defeat a motion for summary judgment, where the expert's opinion lacks an adequate foundation in the record, or is purely conclusory, summary judgment is appropriate (*Romano v Stanley*, 90 NY2d 444, 451-452 [1997]; *Bustos v Lenox Hill Hosp.*, 105 AD3d 541 [2013]; *Curry v Dr. Elena Vezza Physician, P.C.*, 106 AD3d 413 [1st Dept 2013]). Dr. Grant's conclusions as to both the inadequacy of defendant's safety measures and the cause of plaintiff's decedent's death lacked any foundation in the record, and warranted dismissal of plaintiff's claims.

Finally, we note the motion court properly denied plaintiffs' cross motion for summary judgment on the issue of liability based on the theory of res ipsa loquitur. None of the evidence, circumstantial or other, established exclusive control

sufficient to draw an inference of negligence (*Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 [2006]). Thus, we find, as stated in the well reasoned decision of the motion court, that plaintiffs have failed to establish any basis for liability.

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

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

ENTERED: JANUARY 7, 2014

CLERK

Tom, J.P., Friedman, Acosta, Moskowitz, Gische, JJ.

11299 In re Andre Lissone, Index 101433/12
Petitioner-Appellant-Respondent,

-against-

Dennis M. Walcott, etc., et al.,
Respondents-Respondents-Appellants.

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Wolin & Wolin, Jericho (Alen E. Wolin of counsel), for appellant-respondent.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for respondents-appellants.

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Appeal from order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered August 28, 2012, which granted the petition brought pursuant to CPLR article 78, seeking to annul respondents' determination, dated October 11, 2011, discontinuing petitioner's probationary service as an assistant principal, only to the extent of remanding the matter to respondents to conduct a more thorough investigation, unanimously dismissed as moot, without costs.

The appeal and cross appeal are from a limited order "remanding the matter for Respondents to conduct a thorough and proper investigation" (*see Flinker v State Div. of Human Rights*, 123 AD2d 578 [1st Dept 1986]). The parties inform this Court that such investigation has now been concluded and that Supreme Court has indicated its satisfaction that respondents have

complied with the order appealed from. Since Supreme Court has yet to dispose of the matter on the merits, it would be premature to address the propriety of respondent's dismissal of petitioner from his probationary position as interim acting assistant principal, and there is nothing for this Court to review.

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

ENTERED: JANUARY 7, 2014

CLERK

Sweeny, J.P., Acosta, Saxe, Moskowitz, Clark, JJ.

11429 Douglas Elliman LLC, Index 112636/11
Plaintiff-Respondent,

-against-

21-45 44th Drive LLC, et al.,
Defendants-Appellants.

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Nathan M. Ferst, New York, for appellants.

Cole Hansen Chester LLP, New York (Michael S. Cole of counsel), for respondent.

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Order, Supreme Court, New York County (Debra A. James, J.), entered May 2, 2013, which denied defendants' motion for summary judgment, and declared that pursuant to the agreement between plaintiff and defendant 21-45 44th Drive LLC, defendants are entitled to reimbursement for the subject advances at a rate of 20% of the commissions payable to plaintiff but are not entitled to otherwise withhold commissions due under the agreement, unanimously affirmed, with costs.

The provision of the agreement at issue states, "[A]dvances shall be fully reimbursed by [plaintiff] from the Commissions paid by [defendant] ... at a rate of twenty percent ... of [plaintiff]'s portion ... of each Commission ... until [defendant] is fully reimbursed." The motion court properly found that the requirement that defendants be "fully reimbursed"

was qualified by the clause "from the Commissions ... at a rate of twenty percent ... of [plaintiff]'s portion of each Commission" (*see Goldstein v Frances Emblems, Inc.*, 269 App Div 345, 347 [1st Dept 1945]). Although 20% of plaintiff's commissions may be insufficient to fully reimburse defendants for the advances made, defendants could have been protected by negotiating a clause addressing what would happen if 20% of plaintiff's commissions was insufficient to fully reimburse defendants (*see Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 72 [1978]; *see also Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001]).

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

ENTERED: JANUARY 7, 2014

CLERK

Sweeny, J.P., Acosta, Saxe, Moskowitz, Clark, JJ.

11431 Lorraine M. Colarossi, etc., Index 105865/10
Plaintiff-Respondent,

-against-

C.R. Bard, Inc.,
Defendant-Appellant,

Michael F. Kerin, M.D.,
Defendant-Respondent,

New York-Presbyterian
Healthcare System, et al.,
Defendants.

_____

Segal McCambridge Singer & Mahoney, LTD., New York (Annette G. Hasapidis of counsel), for appellant.

Gurfein Douglas LLP, New York (Amy Ngai of counsel), for Lorraine M. Colarossi, respondent.

Vouté, Lohrfink, Magro & McAndrew, LLP, White Plain (Brian D. Meisner of counsel), for Michael F. Kerin, M.D., respondent.

_____

Order, Supreme Court, New York County (Joan B. Lobis, J.), entered September 6, 2012, to the extent it denied defendant C.R. Bard, Inc.'s motion for summary judgment dismissing the negligence, strict products liability, and breach of implied warranty causes of action premised on a failure to warn, unanimously modified, on the law, to grant the motion to the extent the claims are premised on a failure to warn anyone other than the surgeon, and otherwise affirmed, without costs.

Plaintiff's decedent was injured when a piece of a port/catheter manufactured by Bard and implanted in her chest broke off and traveled to her heart, where it became lodged. Defendant Michael F. Kerin implanted the port/catheter under the skin of the upper right side of the decedent's chest on November 5, 2007, to provide vascular access for chemotherapy, and the port/catheter was used to infuse the decedent with chemotherapy on two occasions. On January 7, 2008, after the decedent complained that she felt the port flipping, and a nurse observed that the area above the port was swollen or bulged and that fluid was collecting around the area of the port, Dr. Kerin removed the port/catheter.

Bard failed to establish the adequacy of its warnings and the lack of any causal connection between any warning inadequacy and the decedent's injuries (*see e.g. Mulhall v Hannafin*, 45 AD3d 55, 58 [1st Dept 2007]). Bard maintains that the catheter fractured due to compression or "pinch-off," also referred to as "kinking," a complication of which Bard warned in its Instructions for Use (IFU) and Dr. Kerin admittedly was aware. However, Bard's assumption that pinch-off was the cause of the fracture and that Dr. Kerin was negligent in his placement of the port/catheter both is unsupported by any expert testimony and ignores the testimony of its own Director of Quality Assurance

identifying other possible causes of fracture, such as a flipping or rotating port, of which Dr. Kerin was unaware. Bard's reliance on a November 5, 2007 X-ray report is misplaced since Dr. Kerin testified that he viewed the underlying films and found that they did not reflect any pinching, and there is no evidence in the record that the degree of pinch-off allegedly reflected in those films or in subsequent diagnostic tests was sufficient to cause fracture or require intervention.

In light of the foregoing, we need not address the qualifications of plaintiff's electrical engineering expert to render an opinion on the adequacy of Bard's warnings and the potential of the catheter to fracture. Were we to reach this issue, we would find that the motion court properly considered the expert's opinions, to the extent it accepted them, based upon his stated background, experience, and familiarity with Bard venous access ports such as the one at issue here (*see Melo v Morm Mgt. Co.*, 93 AD3d 499 [1st Dept 2012]; *Sumowicz v Gimbel Bros.*, 161 AD2d 314 [1st Dept 1990]).

The court erred in finding, sua sponte, after the note of issue had been filed, that Bard had a duty to warn anyone other than Dr. Kerin (*see Matter of Merritt v Rhea*, 107 AD3d 456 [1st Dept 2013]; *Lombardo v Mastec N. Am., Inc.*, 68 AD3d 935 [2d Dept 2009]). Plaintiff never pleaded or argued that the duty to warn

extended beyond the prescribing surgeon, nor did her expert address such a theory in opposition to Bard's motion.

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

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

ENTERED: JANUARY 7, 2014

CLERK

Sweeny, J.P., Acosta, Saxe, Moskowitz, Clark, JJ.

11432 The Reverend Jane Butterfield Presler, Index 108389/06
Plaintiff-Respondent,

-against-

The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, et al.,
Defendants-Appellants.

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Murphy & McGonigle, P.C., New York (Theodore R. Snyder of counsel), for appellants.

Steven A. Rosen, New York, for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered October 4, 2012, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendants' motion for summary judgment should have been granted. As plaintiff's contract for employment was expressly at will, and she could be fired at any time with or without cause, her claim for breach of contract should have been dismissed (*Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304-305 [1983]). Nor was a claim of promissory estoppel available to avoid the at will doctrine (*Dalton v Union Bank of Switzerland*, 134 AD2d 174, 176-177 [1st Dept 1987]). This is particularly

true where, as here, the express, written acknowledgment by plaintiff that she was an at will employee precluded any reasonable reliance on alleged oral assurances that her job was "secure" (*see New York City Health & Hosps. Corp. v St. Barnabas Hosp.*, 10 AD3d 489, 491 [1st Dept 2004]). Moreover, given that the defendants were in charge of plaintiff's duties, and they were charged with deciding or recommending her termination, they were acting in the scope of their employment. As such, neither the employer nor its employees could be liable for tortiously interfering with plaintiff's employment contract (*Marino v Vunk*, 39 AD3d 339, 340-341 [1st Dept 2007]). Similarly, because the undisputed facts show that defendant Larom made the allegedly defamatory statement only to other church employees also charged with supervision of plaintiff, it was subject to a qualified privilege (*Dillon v City of New York*, 261 AD2d 34, 38, 40 [1st Dept 1999]). Nor did plaintiff raise a fact issue that Larom made the statement, which was in large measure correct, and related directly to the work, purely out of malice (*Present v Avon Prods.*, 253 AD2d 183, 189 [1st Dept 1999], *lv dismissed* 93 NY2d 1032 [1999]). Plaintiff's claim under Religious Corporations Law § 25 should also have been dismissed. As its terms make clear, it applies to the removal of a minister from a position as pastor of a church, not from an administrative post.

Moreover, the sole "practices" plaintiff claims that defendants violated were in the employment guide that expressly states it creates no rights or entitlements for employees, and that they are subject to termination at any time with or without cause.

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

ENTERED: JANUARY 7, 2014

CLERK

Sweeny, J.P., Acosta, Saxe, Moskowitz, Clark, JJ.

11433 TSL (USA) Inc., et al., Index 600976/10
Plaintiffs-Appellants,

-against-

OppenheimerFunds, Inc., et al.,
Defendants-Respondents.

_____

Kasowitz, Benson, Torres & Friedman LLP, New York (Aaron H. Marks of counsel), for TSL (USA) Inc., appellant.

Phillips Lytle LLP, New York (Paul K. Stecker of counsel), for Bryant Park Funding LLC and The Bank of Nova Scotia, New York Agency, appellants.

Susman Godfrey L.L.P., New York (Stephen D. Susman of counsel), for respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered April 11, 2013, which granted defendants OppenheimerFunds, Inc. (Oppenheimer), Harbourview Asset Management Corporation (Harbourview), and AAArdvark IV Funding Limited's (AAArdvark) motion for summary judgment to the extent of dismissing, with prejudice, the fraud claims and dismissing, without prejudice, the breach of contract claims as premature, unanimously affirmed, with costs.

The motion court properly dismissed, without prejudice, the breach of contract claims as premature. Plaintiff's alleged damages -- the difference between the unpaid balance of the post-Amortization Event loans and the present value of the

securities that AAArdvark purchased with those loans, which do not mature until 2018 -- are too speculative to determine at this juncture (*see Kenford Co., Inc. v Erie County*, 67 NY2d 257 [1986]; *Lloyd v Town of Wheatfield*, 67 NY2d 809 [1986]; *Fruition, Inc. v Rhoda Lee, Inc.*, 1 AD3d 124 [1st Dept 2003]).

The motion court also properly dismissed the fraud claim as duplicative of the breach of contract claim. The fraud claim essentially alleges that Oppenheimer and Harbourview failed to carry out their contractual duties of apprising plaintiffs of an Amortization Event (*see Sebastian Holdings, Inc. v Deutsche Bank AG.*, 78 AD3d 446, 447 [1st Dept 2010]).

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: JANUARY 7, 2014

CLERK

Sweeny, J.P., Acosta, Saxe, Moskowitz, Clark, JJ.

11434 The People of the State of New York, Respondent, Ind. 2755/11

-against-

Bernardo Hurtado, Defendant-Appellant.

_____

Thomas Theophilos, Buffalo, for appellant.

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

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Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered February 9, 2012, as amended February 16, 2012, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the first degree, and sentencing him, as a second felony drug offender, to a term of 12 years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the hearing court's credibility determinations. The police had the authority to stop defendant's van for a traffic violation, regardless of whether they had other motives for making the stop (*see People v Robinson*, 97 NY2d 341 [2001]). The police saw a bag of marijuana in plain view and also detected a strong odor of marijuana. Accordingly, the police had probable cause to arrest defendant, as well as

probable cause to believe that the van contained additional marijuana (*see People v Belton*, 55 NY2d 49, 55 [1982]). This contemporaneous probable cause justified a search of the vehicle under the automobile exception, including closed containers (*see United States v Ross*, 456 US 798, 825 [1982]; *People v Langen*, 60 NY2d 170, 180-182 [1983], *cert denied* 465 US 1028 [1984]), notwithstanding that the police waited until they returned to the precinct before conducting a full search (*see People v Milerson*, 51 NY2d 919, 921 [1980]). Therefore, the police lawfully searched the van, and this search properly included lifting a removable panel in the van's rear hatch.

Defendant concedes that if this Court does not grant suppression of the drugs found in the hatch, it should affirm his conviction regardless of the arguments he makes regarding additional contraband and his statements to the police. In any event, we reject those arguments.

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

ENTERED: JANUARY 7, 2014

CLERK

Sweeny, J.P., Acosta, Saxe, Moskowitz, Clark JJ.

11435 In re Jaelyn Hennesy F.,

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

Jose F.,
Respondent-Appellant,

Good Shepard Services,
Petitioner-Respondent.

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Geoffrey P. Berman, Larchmont, for appellant.

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

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

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Order, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about December 18, 2012, which, upon a finding of permanent neglect, terminated respondent father's parental rights to the subject child and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect was supported by clear and convincing evidence (*see* Social Services Law § 384-b[7][a]). Petitioner agency exercised diligent efforts to encourage and strengthen the parental relationship by, among other things,

assisting respondent in filling out applications for housing, reminding him of the importance of submitting the additional documents required to complete the applications, referring him for parenting skills and anger management programs, and scheduling visitation. Despite these efforts, respondent failed to plan for the child's future during the relevant time period. Indeed, respondent failed to obtain suitable housing, tested positive for opiates, and was arrested for selling narcotics shortly after the agency planned a trial release of the child to his care (*see Matter of Natasha Denise B. [Montricia Denise C.]*, 104 AD3d 457 [1st Dept 2013]).

A preponderance of the evidence shows that termination of respondent's parental rights was in the best interest of the child, who had been in foster care nearly her entire life, where she was well cared for (*see generally Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). A suspended judgment is not

warranted, since respondent significantly delayed addressing the problems that remained unresolved at the time of disposition, including the failure to obtain suitable housing (*see Matter of Shaqualle Khalif W. [Denise W.]*, 96 AD3d 698 [1st Dept 2012]).

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

ENTERED: JANUARY 7, 2014

CLERK

Sweeny, J.P., Acosta, Saxe, Moskowitz, Clark, JJ.

11436 Professional Advertising, Inc., doing business as Mail Wholesale,
Plaintiff-Respondent,

-against-

Intercontinental Capital Group, Inc.,
Defendant-Appellant.

Index 651904/11

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Marion & Allen, P.C., New York (Roger Marion and Brad Allen of counsel), for appellant.

Stein & Stein, LLP, Haverstraw (Ari J. Stein of counsel), for respondent.

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Order, Supreme Court, New York County (Melvin Schweitzer, J.), entered June 6, 2012, which granted plaintiff's motion for summary judgment on its complaint and defendant's counterclaims, deemed appeal from judgment, same court and Justice, entered August 13, 2011, awarding plaintiff $186,939.92 and dismissing the counterclaims, and so considered, said judgment is unanimously affirmed, without costs.

In this action for an account stated, the motion court properly granted plaintiff's motion for summary judgment based on the documentary evidence showing that defendant "'received, retained without objection, and partially paid invoices without protest'" (*see Scheichet & Davis, P.C. v Nohavicka*, 93 AD3d 478 [1st Dept 2012], *Gamiel v Curtis & Reiss-Curtis, P.C.*, 60 AD3d

473, 474 [1st Dept 2009], *lv dismissed* 13 NY3d 763 [2009]). Defendant's challenges to the documentary evidence are without merit since they are "mere conclusions, expressions of hope or unsubstantiated" (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]; *see Scheichet & Davis, P.C.*, 60 AD3d at 474). The motion court also properly dismissed defendant's counterclaims, which are based on the same conclusory assertions.

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

ENTERED: JANUARY 7, 2014

CLERK

Sweeny, J.P., Acosta, Saxe, Moskowitz, Clark, JJ.

11438 The People of the State of New York, Respondent, Ind. 5600N/06 4376N/04

-against-

Jeffrey Lewis, Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Laura A. Ward, J.), rendered on or about July 11, 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 7, 2014

CLERK

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

Sweeny, J.P., Acosta, Saxe, Moskowitz, JJ.

11440 The People of the State of New York, Respondent, Ind. 3156/10

-against-

Bobby Wallace, Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Lawrence T. Hausman of counsel), and Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (David K. Kessler of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ellen S. Friedman of counsel), for respondent.

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Judgment, Supreme Court, New York County (Patricia M. Nunez, J.), rendered June 2, 2011, convicting defendant, after a jury trial, of assault in the second degree as a hate crime, and sentencing him to a term of 3½ years, unanimously affirmed.

The court properly denied defendant's challenge for cause to a prospective juror. The mere making of a challenge for cause, which asserted other grounds, did not preserve defendant's specific claim that the panelist's experience as a crime victim may have affected her impartiality (*see e.g. People v Deschamps*, 256 AD2d 13 [1st Dept 1998], *lv denied* 93 NY2d 923 [1999]), and we decline to review it in the interest of justice. As an alternative holding, we find that when the panelist's responses are viewed as a whole, they provide the requisite assurance of

impartiality, which was sufficient to cover any concern about the effect of her background as a crime victim (*see People v Shulman*, 6 NY3d 1, 27 [2005]).

Defendant's dismissal motion based on the general ground of legal insufficiency did not preserve his present arguments in that regard (*see People v Gray*, 86 NY2d 10, 19 [1995]), and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits. We also find that 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. In light of the unsolicited and inflammatory comments made by defendant before and after the assault, the evidence supports the inference that defendant intentionally committed the specified offense of second-degree assault at least "*in substantial part* because of a belief or perception regarding the race, color, national origin, [or] ancestry" of the victim (Penal Law § 485.05[1][b][emphasis added]).

The court properly denied defendant's suppression motion. Under the circumstances, the police were not required to provide *Miranda* warnings prior to making investigatory inquiries of defendant as they arrived at the scene of the incident. A reasonable innocent person in defendant's position would not have

thought he was in custody (*see Stansbury v California*, 511 US 318, 325 [1994]; *People v Yukl*, 25 NY2d 585 [1969], *cert denied* 400 US 851 [1970]; *People v Dillhunt*, 41 AD3d 216, 217 [2007], *lv denied* 10 NY3d 764 [2008]). In any event, to the extent there was an investigatory stop, it did not require *Miranda* warnings (*see Berkemer v McCarty*, 468 US 420, 439-440 [1984]; *People v Bennett*, 70 NY2d 891 [1987]). Furthermore, there was no interrogation requiring warnings because the officer's inquiries were made to clarify the situation (*see People v Johnson*, 59 NY2d 1014 [1983]), or were permissible efforts to locate a weapon in the interest of public safety (*see People v Johnson*, 46 AD3d 276, 277 [1st Dept 2007], *lv denied* 10 NY3d 865 [2008]).

The court properly directed a court officer to perform the ministerial act of informing the deliberating jury that the court had denied the jury's oral request to take notes during supplemental instructions (*see People v Jonson*, 27 AD3d 289 [1st Dept 2006], *lv denied* 6 NY3d 895 [2006]).

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

ENTERED: JANUARY 7, 2014

CLERK

Sweeny, J.P., Acosta, Saxe, Moskowitz, Clark, JJ.

11441 Janice Quintero, Index 115901/08
Plaintiff-Respondent,

-against-

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

Samuel B. Borger, et al.,
Defendants.

_____

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

David P. Kownacki, P.C., New York (Andrew D. Leftt of counsel), for respondent.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered August 20, 2012, which, to the extent appealed from as limited by the briefs, denied defendants-appellants' motion for summary judgment dismissing the General Municipal Law § 205-e claims predicated upon their alleged violation of the Vehicle and Traffic Law and the cross-claim alleging negligence, unanimously affirmed, without costs.

In this action brought by a police officer allegedly injured in a motor vehicle accident while she was a passenger in an unmarked police car, the municipal defendants failed to make a prima facie showing that the complaint's General Municipal Law § 205-e claims, predicated on violations of the Vehicle and

Traffic Law, and co-defendants' cross-claim for negligence are barred by Vehicle and Traffic Law § 1104. *Williams v City of New York* (240 AD2d 734 [2d Dept 1997]), relied on by defendants, is distinguishable. In *Williams*, there was evidence that the police vehicle had used its portable light and siren to get a suspected stolen car to pull over (*id.* at 735-736). Here, however, plaintiff testified that defendant Rohe, the officer driving the vehicle, had double-parked the police vehicle in order to observe two suspects and that they were sitting at the accident location approximately 15 to 20 minutes before they were struck from behind by codefendants' minivan.

Further, Rohe testified that he had double-parked the police vehicle in order to investigate a suspect, which is not an "emergency operation" as defined by Vehicle and Traffic Law § 1104(a) (*see Banks v City of New York*, 92 AD3d 591, 591 [1st Dept 2012]; *Rusho v State of New York*, 76 AD3d 783, 784 [4th Dept 2010]).

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

ENTERED: JANUARY 7, 2014

CLERK

Sweeny, J.P., Acosta, Saxe, Moskowitz, Clark, JJ.

11442 The People of the State of New York, Ind. 1204N/11
Respondent,

-against-

Marco Potts,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Robert Stolz, J.), rendered on or about November 2, 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 7, 2014

CLERK

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

Sweeny, J.P., Acosta, Saxe, Moskowitz, Clark, JJ.

11443- Index 150771/12
11444-
11445 John Harris, P.C.,
Plaintiff-Appellant,

-against-

FSA Main Street, LLC, et al.,
Defendants-Respondents.

_____

John Harris P.C., New York (John Harris of counsel), for appellant.

Law Offices of Bing Li, LLC, New York (Bing Li of counsel), for respondents.

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Orders, Supreme Court, New York County (Anil C. Singh, J.), entered April 9, 2013, which granted defendants' motion to vacate a default judgment entered against them, and denied plaintiff's cross motion for sanctions, unanimously affirmed, without costs.

The record shows that defendants did not default. This action to collect legal fees was initiated by the filing of a summons with notice. On or about April 9, 2012, defendants timely served a demand for a complaint pursuant to CPLR 3012(b), thus extending their time to appear and answer until 20 days after service of the complaint (*see Beltrez v Chambliss*, 68 AD3d 681, 682 [1st Dept 2009], *lv denied* 14 NY3d 707 [2010]). It is undisputed that plaintiff never served the complaint, but instead commenced proceedings to obtain a default judgment on April 17,

2012; the judgment was entered April 30, 2012.

Plaintiff argues that the demand was a nullity, because defendants served it via traditional mail, rather than through the electronic filing system. However, the e-filing rules provide that "all documents filed and served in Supreme Court shall be filed and served by electronic means" (*see* Uniform Rules for Trial Courts [22 NYCRR] § 202.5-bb[a][1]). Plaintiff does not contend that either rule or practice mandates that CPLR 3012(b) demands be filed in Supreme Court.

In any event, we find that defendants demonstrated a reasonable excuse and a meritorious defense. The mandatory e-filing rules went into effect on January 9, 2012; any confusion in implementing them was understandable under the circumstances, particularly the fact that plaintiff neither rejected defendants' CPLR 3012(b) demand nor informed opposing counsel that it would be disregarding the demand based upon its interpretation of the new rules. The affidavit by defendants' manager and officer, coupled with documentary evidence showing that defendants challenged plaintiff's chronically late fee invoices and disputed the amounts, sufficed to establish a meritorious defense (*see Goldman v Cotter*, 10 AD3d 289, 292 [1st Dept 2004]). Contrary to plaintiff's contention, the documentary evidence does not thoroughly refute defendants' claims; moreover, defendants were

not required to prove their defense at this juncture (*see Matter of De Sanchez*, 107 AD3d 409, 410 [1st Dept 2013]).

We see no reason to disturb the court's determination that sanctions against defendants were not warranted.

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

ENTERED: JANUARY 7, 2014

CLERK

Tom, J.P., Acosta, Saxe, Freedman, JJ.

10417 Jeffrey Sardis, et al., Index 115328/10
Plaintiffs-Respondents,

-against-

Sofia Frankel, et al.,
Defendants-Appellants.

_____

Michael L. Paikin, P.C., New York (Michael L. Paikin of counsel), for Sofia Frankel, appellant.

Law Offices of Gabriel Del Virginia, New York (Gabriel Del Virginia of counsel), for Michael Frankel, appellant.

Wollmuth Maher and Deutsch LLP, New York (Michael P. Burke of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Eileen A. Rakower, J.), entered November 9, 2012, affirmed, with costs.

Opinion by Tom J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Rolando T. Acosta
David B. Saxe
Helen E. Freedman, JJ.

10417
Ind. 115328/10

_____x

Jeffrey Sardis, et al.,
Plaintiffs-Respondents,

-against-

Sofia Frankel, et al.,
Defendants-Appellants.

_____x

Defendants appeals from an order and judgment (one paper) of the Supreme Court, New York County (Eileen A. Rakower, J.), entered November 9, 2012, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion for summary judgment on their first cause of action to set aside the transfer of a condominium unit by debtor Sofia Frankel to her son Michael Frankel as a fraudulent conveyance under Debtor and Creditor Law §§ 273-a and 278, dismissed Sofia Frankel's fourth affirmative defense based on a 1999 oral agreement to convey the subject condominium to Michael Frankel, and dismissed Michael Frankel's first counterclaim based on the 1999 oral agreement for a declaration that he is the rightful owner of the condominium.

Michael L. Paikin, P.C., New York (Michael L. Paikin of counsel), for Sofia Frankel, appellant.

Law Offices of Gabriel Del Virginia, New York (Gabriel Del Virginia of counsel), for Michael Frankel, appellant.

Wollmuth Maher and Deutsch LLP, New York (Michael P. Burke and William F. Dahill of counsel), for respondents.

TOM, J.P.

At issue is whether defendant Sofia Frankel's conveyance of a Manhattan condominium apartment to her son, defendant Michael Frankel, was constructively fraudulent pursuant to Debtor and Creditor Law §§ 273-a and 278. This Court concludes that the transaction fails to comply with the good faith requirement of section 272 of the statute and was without fair consideration. Thus, the transfer was properly set aside.

During the time Sofia Frankel was employed as a broker for Goldman Sachs & Co., plaintiffs entrusted her with some $19 million to invest on their behalf, and they remained her clients when she later left Goldman to join Lehman Brothers, Inc. By 2004, however, plaintiffs alleged that they had sustained more than $9.6 million in losses as a result of Sofia's fraudulent churning of their account. They commenced arbitration proceedings before the Financial Industry Regulatory Authority (FINRA) in May of that year, naming Sofia and Lehman Brothers as respondents. On October 30, 2008, some two weeks before Lehman filed for bankruptcy protection, an arbitration panel rendered an award in the amount of $2.5 million, holding Sofia and Lehman jointly and severally liable for plaintiffs' losses. This Court affirmed Supreme Court's confirmation of the award, expressly rejecting Sofia's contention that the arbitrators had improperly

imposed joint and several liability (*Frankel v Sardis*, 76 AD3d 136 [1st Dept 2010]).

Within days after the October 2008 award was issued, Sofia met with David Pratt, a partner at the firm of Proskauer Rose LLP, to engage the firm's services. Proskauer's attorney time records for November 2008 describe a conversation of November 7 "with Sofia and Michael re: asset protection plan," followed two days later by a conversation "with Michael Frankel re: asset protection planning." The various items under consideration included the "sale/transfer of NY condos," "homestead waiver issues," the "option of filing claim in bankruptcy court to obtain indemnification for arbitration award" and "efforts to identify insurance coverage or indemnification for arbitration award."

At the time the award was rendered, Sofia's assets included (1) a beachfront condominium apartment in Miami Beach, Florida owned with her husband, Yan Frankel, as tenants in the entirety and claimed as a homestead; (2) a condominium apartment in Manhattan also owned with her husband as tenants in the entirety; (3) a condominium apartment in Manhattan owned by Sofia in fee simple (the subject apartment); (4) a 100% ownership interest in Applied Medicals LLC, a medical supply company headquartered in Florida; and (5) sole interest in a Fidelity Investment account

valued at $4,052,813.16.

The asset protection plan was put into action in early 2009. In January, Sofia withdrew $3,296,431.51 from her Fidelity account, depleting its value to $16,371.88. That same month, she paid $2.9 million in cash for another beachfront condominium apartment in Miami Beach, title to which is unencumbered and held solely in her name. This property, also claimed by Sofia as a homestead, is the subject of another action pending in Miami-Dade County, Florida.

At some time before August 25, 2009, Sofia's sole interest in Applied Medicals LLC was relinquished when Michael became a 10% member of the company. Florida law provides that a court may "order a judgment debtor to surrender all right, title, and interest in the debtor's single-member LLC to satisfy an outstanding judgment" (*Olmstead v Federal Trade Commn.*, 44 So3d 76, 78 [Fla 2010]), but limits the court to issuing a "charging order" against a debtor's ownership interest in a multi-member limited liability company (*id.* at 79).

Finally, on February 20, 2009, Sofia transferred fee simple title to the subject apartment, which had previously been appraised at $1.175 million, to Michael for one dollar and other valuable consideration. This action to set aside the conveyance ensued.

The complaint alleges five causes of action: (1) fraudulent conveyance in violation of Debtor and Creditor Law §§ 273-a and 278; (2) fraudulent conveyance in violation of Debtor and Creditor Law §§ 275 and 278; (3) fraudulent conveyance in violation of Debtor and Creditor Law §§ 276, 276-a and 278; (4) resulting trust under § 7-1.3 of the New York Estate Powers and Trusts Law; and (5) constructive trust. In their respective answers, defendants alleged that they had entered into an oral agreement in late 1999 under which Michael was to purchase the apartment and, thus, they assert that the conveyance of the premises in February 2009 was merely the culmination of defendants' existing obligations under this agreement.

Thereafter, plaintiffs moved for summary judgment on the record. Defendants submitted opposing affidavits outlining the terms of the 1999 oral agreement.[1] Michael was to take immediate possession of the apartment and assume the expenses for monthly mortgage payments, property taxes, water and sewer charges, the common charges of the condominium association and any renovations and improvements. A reasonable market value of the apartment was to be ascertained in 2009, when Michael attained 30 years of age, at which time the transfer of title to Michael was to be effected

[1] Plaintiffs' memoranda of law submitted in connection with their motion are not included in the record on appeal.

in exchange for his promise to pay the remainder of the purchase price. Also to be resolved were various credits for tax deductions taken by Sofia for interest and taxes paid by Michael over the past decade.[2]

In their opposing affidavits, defendants suggest that Michael's payment of the carrying charges over the last 10 years constitutes past consideration for their written 2009 agreement to transfer the premises and, as expressed by Sofia, that such amount is not "disproportionately small when viewed in the context of the entire transaction." Apart from their self-serving affidavits, the only evidence in connection with their purported 1999 agreement consists of the documents associated with the February 2009 transfer of title, which include a December 2008 appraisal report setting the value of the premises at $1.175 million as of November 26, 2008 and a bargain and sale deed dated February 23, 2009. Michael executed a contemporaneous promissory note and mortgage providing for a balloon payment in the amount of $969,265.56 due in February 2039 and monthly interest payments in the amount of $2,390.85 at a rate of 2.96% in the interim.

[2] Michael's affidavit in opposition to the motion states that these credits remain an unresolved matter between defendants.

Supreme Court granted summary judgment on plaintiffs' first cause of action. The court reasoned that while payment of the carrying expenses might constitute past consideration sufficient to make out a valid contract, such consideration must be expressed in a writing (General Obligations Law § 1105). Because the documentary evidence does not show that the past consideration "was bargained for in exchange for a promise to sell buyer the unit . . . expressed in writing as payments of a sum certain at a date certain and said to be consideration for the promise," the court held that defendants had failed to demonstrate that such payments comprise fair consideration under Debtor and Creditor Law § 272 (citing *Delacorte v Transcontinental Land & Cattle Corp.*, 127 Misc 2d 707, 709 Sup Ct, NY County [1985]).

On appeal, defendants argue that summary judgment was improperly granted because genuine issues of fact preclude the finding that the transfer of the condominium apartment to Michael was constructively fraudulent. They contend that Michael took title to the premises in good faith as part of an executory contract with his mother to convey the property to him on his 30th birthday. Further, defendants assert that the motion court improperly applied the statute of frauds to void their 2009 agreement transferring title to Michael.

As this Court observed long ago, "It is difficult to see how the [s]tatute of [f]rauds can be availed of to set aside a completed transaction" (*De Heirapolis v Reilly*, 44 App Div 22, 24 [1st Dept 1899], *affd* 168 NY 585 [1901]). Any flaw in the motion court's reasoning notwithstanding, the record fails to support defendants' contention that the conveyance was made pursuant to a previous agreement rather than as part of an asset protection plan contrived to insulate property from the claims of judgment creditors.

Plaintiffs' first cause of action alleges that the subject conveyance was fraudulent under Debtor and Creditor Law § 273-a and § 278, particularly in that defendants cannot establish fair consideration for the transfer of title. The Debtor and Creditor Law identifies two indicia of "fair consideration" for conveyed property: the adequacy of what is given in exchange for it and "good faith." With regard to value, § 272(a), governing a conveyance made in exchange for the property, provides for the receipt of something that is "a fair equivalent therefor," and § 272(b), governing an antecedent debt or present advance, applicable herein, provides for an "amount not disproportionately small as compared with the value of the property." As to the adequacy of consideration, the parties each provide different calculations. Defendants argue, as they did below, that when

Michael's payment of expenses and the value of his improvements to the apartment, which was modest at most, during the period from 1999 to 2009 are included, fair consideration was received. Plaintiffs respond that a proper accounting of such past consideration reveals that a negative sum was received for the property on the date title was transferred.

Debtor and Creditor Law § 278 provides that a fraudulent conveyance may be set aside on behalf of a creditor whose claim has matured "as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase." Debtor and Creditor Law § 273-a provides:

> "Every conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment."

It is uncontested that arbitration proceedings before FINRA had been concluded and an award rendered against Sofia Frankel prior to the transfer of the condominium apartment to Michael. It is further uncontested that the ensuing judgment against Sofia has not been satisfied. An arbitration proceeding is "an action for money damages" under the statute (*Dixie Yarns, Inc. v Forman*, 906 F Supp 929, 936 [SD NY 1995]), and whether the conveyance

should be set aside turns on whether it was made for fair consideration (*see Cabrera v Ferranti*, 89 AD2d 546 [1st Dept 1982], *appeal dismissed* 67 NY2d 869 [1986]).

"Fair consideration" under Debtor and Creditor Law § 272 is not only a matter of whether the amount given for the transferred property was a "fair equivalent" or "not disproportionately small," which the parties vigorously dispute, but whether the transaction is made "in good faith," an obligation that is imposed on both the transferor and the transferee (*Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership*, 25 AD3d 301, 303 [1st Dept 2006] [construing Debtor and Creditor Law § 273]; *Julien J. Studley, Inc. v Lefrak*, 66 AD2d 208, 213 [2d Dept 1979], *affd* 48 NY2d 954 [1979] [same]).[3]

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[3] Debtor and Creditor Law § 272 provides:

> "Fair consideration is given for property, or obligation,
>
> > "a. When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or
> >
> > "b. When such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained."

The determination of whether such obligation has been met is one that rests on the circumstances of the individual matter (*Commodity Futures Trading Commn. v Walsh*, 17 NY3d 162, 175 [2011]).

To prevail on their claim that the conveyance of the subject condominium apartment meets the requirements of Debtor and Creditor Law § 273-a, defendants must demonstrate that Sofia was a good-faith seller of the property under section 272 or that Michael Frankel was a good-faith purchaser for fair consideration without knowledge of any fraud under section 278 (*see Gitlin v Chirinkin*, 98 AD3d 561, 562 [2d Dept 2012]). Where the transferor has knowledge of a judgment, the transfer of funds available to satisfy the judgment made at the judgment debtor's direction will be set aside as lacking in good faith (*see Berner Trucking v Brown*, 281 AD2d 924, 925 [4th Dept 2001]). Likewise, where the transferee is aware of an impending enforceable judgment against the transferor, the conveyance does not meet the statutory good faith requirement and generally will be set aside as constructively fraudulent (*see Matter of Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria v Upstate Bldg. Corp.*, 262 AD2d 981 [4th Dept 1999]).

By citing *In re Sharp Intl. Corp.* (403 F3d 43, 54 n 4 [2d Cir 2005], citing *HBE Leasing Corp. v Frank*, 61 F3d 1054, 1059 n

5 [2d Cir 1995]) for the proposition that, in a constructive fraudulent conveyance action, the requirement to exercise good faith is limited to the transferee, defendants do not accurately portray New York law (*see Matter of Bernasconi v Aeon, LLC*, 105 AD3d 1167, 1168 [3d Dept 2013]; *American Panel Tec v Hyrise, Inc.*, 31 AD3d 586, 587 [2d Dept 2006] ["(t)he good faith of both the transferor and transferee is an indispensable element of fair consideration"]). Good faith "is lacking where there is a failure to deal honestly, fairly, and openly" (*Berner Trucking*, 281 AD2d at 925). By statute, good faith on the part of the transferor under Debtor and Creditor Law §§ 272 and 273-a is immaterial only if it is established that the transferee received the property as a good-faith purchaser for value without knowledge of the fraud at the time of conveyance pursuant to Debtor and Creditor Law § 278. Under case law, the knowledge of the transferee may be immaterial where, as in *Sharp*, a transfer of property is made to satisfy a true antecedent debt (*compare Ultramar Energy v Chase Manhattan Bank*, 191 AD2d 86 [1st Dept 1993] *with Berner Trucking v Brown*, 281 AD2d 924 [4th Dept 2001], *supra*; *see also Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167 [1st Dept 2013] [distinguishing *Ultramar Energy*]). The transaction at issue in this matter was clearly not one made in exchange for the discharge of an antecedent debt, and *Ultramar*

Energy is inapposite.

It is apparent that Sofia's conveyance of the subject Manhattan condominium apartment to her son was but one of a series of transactions undertaken as part of an "asset protection plan" devised with the assistance of counsel immediately after the arbitration award was rendered against her. The emptying of a brokerage account, the purchase of Florida real estate claimed as a homestead and the transfer of the subject apartment held in fee simple demonstrate not merely a series of transactions coincidental to estate planning, as her affidavit intimates, but a concerted effort to place her assets beyond the reach of impending judgment creditors. Finally, the addition of Michael as a member of Applied Medicals LLC, of which Sofia was formerly the sole member, precludes plaintiffs from obtaining an order from a Florida court directing the surrender of her entire interest in the company to satisfy the award against her. Notably, defendants do not contend that Sofia acted in good faith, and the record before us affords no basis for such finding.[4]

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[4] In the attempt to construe the issue of her good faith as a "red herring," Sofia's opposing affidavit states, quite unintelligibly:

> "While the services and advice performed and rendered by [Proskauer Rose LLP] are

While the lack of good faith on the part of Sofia, as transferor, affords a sufficient basis to set aside this transfer as constructively fraudulent (*Berner Trucking*, 281 AD2d at 925), it should be noted that Michael likewise has not provided proof sufficient to raise a triable issue of fact concerning whether he took the property as a good-faith purchaser for value without knowledge of any fraud. It is apparent that Michael was a participant in the asset protection plan from its inception, having conferred with his mother and her counsel. He was clearly instrumental to its implementation, having been installed as a member of Applied Medicals LLC to frustrate seizure of its assets and having received title to the subject premises conveyed by Sofia. While Michael's affidavit piously recites, "I believe and submit that I have acted in good faith throughout," he does not deny knowledge of the arbitral award at the time the premises were conveyed. He merely states, "Many years before I had even heard about FINRA arbitration proceedings with the plaintiffs, I had made a serious agreement with my parents whereby upon

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> privileged, and without waiving said privilege[], it is fair to say that there [*sic*] services, in addition to tax and estate planning, limit [*sic*] liability company formation (Applied Medical), and an appreciation of my circumstances as a consequence of the demise of Lehman Brothers, my employer, at the end of 2008."

demonstration of financial ability, responsibility, and maturity, I would own the apartment." Finally, while financing that provides for the repayment of the entire principal amount at the end of the term of a loan, some 30 years later, may be common in commercial real estate transactions, it is virtually unknown in residential transactions. Thus, defendants' respective assertions that their 2009 transaction, which according to Sofia's affidavit was the result of matters negotiated "at arms length" as early as the summer of 1999, is not borne out by the record.

The attempt to represent the conveyance of the subject apartment as simply the culmination of an outstanding agreement between mother and son is unavailing. As an initial consideration, an agreement must be sufficiently definite so that a court can ascertain and apply its terms, and the burden of establishing the provisions of a purported contract rests on the proponent (*see Allied Sheet Metal Works v Kerby Saunders, Inc.*, 206 AD2d 166, 169 [1st Dept 1994]; *Paz v Singer Co.*, 151 AD2d 234, 235 [1st Dept 1989]). This Court has observed that "the primary purpose of a contract is not to serve as a vehicle for litigation but to document the respective rights and obligations of the parties to a particular transaction" (*Charles Hyman, Inc. v Olsen Indus.*, 227 AD2d 270, 275 [1st Dept 1996]) and that where

the agreement in question has not been reduced to a writing, "a formidable obstacle to its enforcement" is presented (*id.*). While, as defendants assert, the statute of frauds is a personal defense and their agreement (which amounts to a lease with an option to purchase) is not rendered voidable solely by the absence of a writing, the lack of corroboration of their purported contract remains material to the issue of fraud (*see Durack v Wilson*, 46 Misc 237, 241 [Sup Ct, Nassau County 1905]). A conveyance between family members is subject to enhanced scrutiny. As this Court has stated, "[A]n intra-family transaction places a heavier burden on defendant to demonstrate fairness" (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 528 [1st Dept 1999]; *see also Gasser v Infanti Intl., Inc.*, 353 F Supp 2d 342, 354 [ED NY 2005] ["in cases where a conveyance has been made from one family member to another and the facts relating to the type of consideration are within their exclusive control, the defendant has the burden of proving the adequacy of the consideration"]; *Gelbard v Esses*, 96 AD2d 573, 576 [2d Dept 1983]). Defendants have not met this burden.

Even accepting the terms of the purported 1999 agreement as related by Michael in his opposing affidavit, no contract was formed. He states that at the approach of his 30th birthday, the parties would "obtain an appraisal and opinions regarding the

fair rental values" and calculate a purchase price by subtracting from the arrived-at appraisal value various credits for payments made by Michael towards the mortgage, carrying charges, taxes and capital improvements less the estimated rental or use-and-occupancy value of the premises. No financing terms are set forth beyond the recital that "[t]he net balance owed would be reflected in a promissory note to my mother."

The lack of definite terms is fatal to defendants' contention that the transfer was made subject to an executory contract. What can be discerned from their description of their understanding is a failure to reach a binding agreement on material terms, that is, an agreement to enter into a future contract. As stated in *Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d 105, 109-110 [1981] [citations omitted]), "it is rightfully well settled in the common law of contracts in this State that a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable. This is especially true of the amount to be paid for the sale or lease of real property." It is equally true with respect to financing (*see Willmott v Giarraputo*, 5 NY2d 250, 253 [1959]). The rule is derived from the requirement of definiteness, necessary both to permit a proper remedy to be fashioned upon breach and, as here, to ensure that a contractual obligation is not implied where the

parties have not intended to be conclusively bound (*see Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 482 [1989], *cert denied* 498 US 816 [1990]). It is clear that the arrangement described by Michael left both the determination of the price to be paid for the property and the terms of the financing for the transaction to future negotiation. Nor do the circumstances suggest that material contract terms were to be objectively determined "by reference to an extrinsic event, commercial practice or trade usage," such as where the price term is to be fixed by a designated third party (*id.* at 483). Rather, formation of a contract depended on the parties' ability to reach agreement upon such matters as the fair appraised value of the apartment and the value of its occupancy.

That no dispute arose with regard to the contract terms is merely fortuitous. Had either party to the purported agreement chosen to ignore it, the other would have been without recourse. Nor are defendants aided by the doctrine of part performance. The amount ultimately agreed upon as the fair value for Michael's use and occupancy of the apartment between 1999 and 2009 ($322,300) is roughly the same as the amount he actually paid in expenses for the premises during that time period ($343,733.66). Therefore, his payments are not "unequivocally referable to the oral agreement" so as to constitute "'acts of part performance

which go along with, relate to, and confirm the agreement,. . . and thus with the parol evidence establish the existence of the agreement'" (*Bright Radio Labs. v Coastal Commercial Corp.*, 4 AD2d 491, 494 [1st Dept 1957], *affd* 4 NY2d 1021 [1958], quoting *Wheeler v Reynolds*, 66 NY 227, 231-232 [1876]). To the contrary, the facts conceded by defendants fail to demonstrate that, prior to the February 2009 conveyance of the apartment, Michael was anything more than a month-to-month tenant paying less than fair market rent for the premises. As to defendants' suggestion that the 2009 agreement to transfer title was supported by past consideration, the amounts previously paid by Michael exceed the use and occupancy value agreed upon by defendants by a mere $21,433.66, a little more than 2% of the purchase price. As plaintiffs point out, when the transfer tax and filing charge are taken into account, the amount of past consideration received by Sofia for the apartment at the time of its conveyance was a negative $11,835.09, which negates any alleged fair consideration for the purchase of the subject apartment.

In sum, the record amply demonstrates that Sofia's transfer of the apartment to her son was made in the absence of good faith. The purported oral agreement of 1999 does not constitute a binding agreement, and no other evidence has been provided sufficient to raise a question of fact as to the absence of good

faith or fair consideration. Finally, Michael has not alleged, let alone demonstrated, that he was a good-faith purchaser for value without knowledge of the fraud at the time of conveyance so as to render immaterial the lack of good faith in making the conveyance. Once again, this was clearly indicated by Michael's participation in the asset protection plan with his mother and Proskauer Rose before the 2009 alleged transfer.

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Eileen A. Rakower, J.), entered November 9, 2012, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion for summary judgment on their first cause of action to set aside the transfer of a condominium unit by debtor Sofia Frankel to her son Michael Frankel as a fraudulent conveyance under Debtor and Creditor Law §§ 273-a and 278, dismissed Sofia Frankel's fourth affirmative defense based on a 1999 oral agreement to convey the subject

condominium to Michael Frankel, and dismissed Michael Frankel's first counterclaim based on the 1999 oral agreement for a declaration that he is the rightful owner of the condominium, should be affirmed, with costs.

All concur.

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

ENTERED: JANUARY 7, 2014

CLERK