SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 6, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Sweeny, Manzanet-Daniels, Clark, JJ.

12386-
12387 The People of the State of New York, Respondent,

Ind. 6001/09

-against-

Timothy Coleman,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of The Appellate Defender, New York (Scott McAbee and Kerry S. Jamieson of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Manu K. Balachandran of counsel), for respondent.

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Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered September 20, 2010, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third and fifth degrees, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to an aggregate term of eight years, unanimously affirmed.

By failing to object, or by making generalized objections and an equally generalized mistrial motion, defendant failed to preserve his challenges to the prosecutor's summation (*see People v Romero*, 7 NY3d 911, 912 [2006]), and we decline to review them in the interest of justice. As an alternative holding, we find

no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). The challenged remarks were generally permissible comment on the evidence in a case turning on whether the jury should believe police testimony or that of defendant, and the remarks did not improperly shift the burden of proof. The court's curative actions were sufficient to prevent anything in the summation from causing prejudice. To the extent defendant's postsummations mistrial motion could be viewed as preserving any issues, we find that the court properly exercised its discretion in denying the motion.

The court also properly exercised its discretion in determining that the jury foreperson's expressed anxiety about announcing the verdict, about members of the courtroom audience "looking at her," and about leaving the courthouse after the verdict, did not impair her ability to deliberate fairly and so did not require an inquiry pursuant to *People v Buford* (69 NY2d 290 [1987]). When viewed in the context of the court's colloquy with the foreperson earlier in the trial, it is reasonable to infer that all of the foreperson's concerns related to her discomfort about being the particular juror designated to announce the verdict, and that these concerns had nothing to do

with her ability to reach an impartial verdict.

Defendant did not preserve his claim that his right of confrontation was violated by a police chemist's testimony regarding tests made by a nontestifying chemist, and we decline to review it in the interest of justice. Defendant's argument that defense counsel's failure to object to the testimony constituted ineffective assistance of counsel is unreviewable on direct appeal because it involves matters of strategy not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record 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]; *Strickland v Washington*, 466 US 668 [1984]). Counsel could have reasonably concluded that insisting on production of the temporarily unavailable chemist would accomplish nothing, other than delay, because the absent chemist would most likely provide the standard description of the testing procedure, and that it would be more advantageous to exploit the chemist's absence on cross-examination and summation. In any event, defendant has not shown

that counsel's actions deprived defendant of a fair trial or affected the outcome of the case.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 6, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Manzanet-Daniels, Clark, JJ.

12388-
12389 Sabharwal & Finkel, LLC, et al., Index 155808/12
Plaintiffs-Appellants,

-against-

Sir Martin Sorrell,
Defendant-Respondent.

_____

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellants.

Davis & Gilbert, LLP, New York (Howard J. Rubin of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Cynthia S. Kern, J.), entered July 22, 2013, dismissing the action, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered May 13, 2013, which granted defendant's motion to dismiss the amended complaint in its entirety, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In this action for defamation, plaintiffs, a law firm and its two members, allege that defendant, the chief executive of a party named as a defendant in a law suit brought by plaintiffs on behalf of their client, NDTV, defamed them in an interview conducted by a journalist in India and published in an online Indian financial publication. Among the allegedly false and defamatory statements made by defendant were that the plaintiff firm is a two-lawyer, Florida-based law firm specializing in

restaurant law, that it accepted cases on a contingency basis, and that it broached the topic of settlement with their client's adversaries in an attempt to "extort" money from them.

The motion Court properly found that plaintiffs failed to state a valid cause of action for defamation. Given the overall context in which the statements were made, a reasonable reader would conclude that they constitute hyperbole and convey non-actionable opinions about the merits of the lawsuit and the motivation of NDTV's attorneys, rather than statements of fact (*see Mann v Abel*, 10 NY3d 271, 276 [2008], *cert. denied* 555 US 1170 [2009]; *Steinhilber v Alphonse*, 68 NY2d 283, 294 [1986]; *Ava v NYP Holdings, Inc.*, 64 AD3d 407, 412-413 [1st Dept 2009], 14 NY3d 702 [2009]).

Dismissal of the defamation claim also requires dismissal of the tortious interference claim, since that is the basis for the allegation that defendant's conduct was "otherwise unlawful" (*see Phillips v Carter*, 58 AD3d 528, 528 [1st Dept 2009]).

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

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

ENTERED: MAY 6, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Manzanet-Daniels, Clark, JJ.

12390 In re Yecllyne P.-H. and Another,

Children Under the Age
of Eighteen Years, etc.,

Jose P. V.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Anne Reiniger, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Victoria Scalzo of counsel), for respondent.

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

_____

Order, Family Court, Bronx County (Carol R. Sherman, J.), entered on or about April 22, 2013, which denied respondent father's motion to vacate the orders of fact-finding and disposition, same court and Judge, entered upon his default on or about April 9, 2012, unanimously affirmed, without costs.

The Family Court providently exercised its discretion in denying respondent's motion since the record shows that he willfully refused to appear at the April 9, 2012 fact-finding and dispositional hearings (*see* Family Ct Act § 1042). Respondent did not deny receiving notice of the hearings, and instead merely claimed in his motion papers that he did not have an attorney

assigned to him to "follow up with [him] about th[e] date [of the hearings]," did not know he was required to appear on that date, and that if he had been informed, he had "forgotten." The court properly determined that respondent's excuse was invalid, especially given his failure to appear or contact the court until nearly a year after the petition was filed. Moreover, the respondent's several prior unexplained absences from court proceedings supports a finding of willful default (*see Matter of Rozelle Tyrone Lee P.*, 19 AD3d 237 [1st Dept 2005], *lv dismissed* 5 NY3d 839 [2005]).

While respondent's willful default alone warranted denial of the motion, we further note that respondent failed to establish any meritorious defense to the allegations of neglect based on the children's exposure to acts of domestic violence between the parents (*see* Family Ct Act §§ 1012[f][i][B], 1042; *Matter of Lonell J.*, 242 AD2d 58, 60-61 [1st Dept 1998]). Respondent failed to dispute or address at least two incidents described in the petition, in domestic incident reports, and by the mother at the hearing.

Respondent failed to preserve his arguments regarding a due process violation and his right to a hearing on the motion (*see Matter of Kleevuort C. [Fredlyn V.]*, 84 AD3d 1371, 1371 [2d Dept 2011]). In any event, the arguments are unavailing (*see Matter of Taylor C. [Christin C.]*, 89 AD3d 405, 406 [1st Dept 2011]).

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

ENTERED: MAY 6, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Manzanet-Daniels, Clark, JJ.

12391 Rafael Braun, etc., et al., Index 112408/09
Plaintiffs-Respondents,

-against

Blair S. Lewis, etc., et al.,
Defendants-Appellants.

_____

Martin Clearwater & Bell LLP, New York (Barbara D. Goldberg of counsel), for appellants.

Duffy & Duffy PLLC, Uniondale (Melissa L. Eggers of counsel), for respondents.

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered August 20, 2013, 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.

"A defendant may be held liable for ordinary negligence upon his or her failure to communicate significant medical findings to a patient or her treating physician" (*Mosezhnik v Berenstein*, 33 AD3d 895, 898 [2d Dept 2006]; *see Yaniv v Taub*, 256 AD2d 273, 274 [1st Dept 1998]). Here, on a prior appeal, plaintiff's medical malpractice claims were dismissed as barred by the statute of limitations, but we declined to dismiss plaintiff's common-law negligence claim since nothing in the record indicated that defendant doctor forwarded the pathology reports of decedent's

colonoscopies to her primary gastroenterologist (99 AD3d 574 [1st Dept 2012]). Discovery has since taken place and the record is clear that the reports were indeed forwarded.

Accordingly, there is no viable negligence claim against defendants.

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

ENTERED: MAY 6, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Manzanet-Daniels, Clark, JJ.

12392 Nzingha Ewadi, Index 8337/05
Plaintiff-Appellant,

-against-

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

Camila Lopez,
Defendant.

_____

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

Jeffrey D. Friedlander, Acting Corporation Counsel, New York (Susan P. Greenberg of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered August 19, 2013, which, to the extent appealed from as limited by the briefs, granted the municipal defendants' motion for summary judgment dismissing the complaint as against the City of New York and Fire Department of the City of New York, unanimously affirmed, without costs.

Plaintiff testified at his deposition that the only words spoken to her by firefighters arriving to extinguish the fire at the building in which she was trapped were, "Hold on." These words are too vague to manifest an assumption by firefighters of a voluntary duty to plaintiff beyond that owed to the general public *(see Coleson v City of New York*, 106 AD3d 474, 474-475

[1st Dept 2013]). The balance of plaintiff's assertions are insufficient to raise an issue that the fire department assumed direction and control in the face of a "known[] blatant" danger, and affirmatively placed plaintiff in harm's way (*see Abraham v City of New York*, 39 AD3d 21, 28 [2d Dept 2007], *lv denied* 10 NY3d 707 [2008]; *see also e.g. Garrett v Holiday Inns*, 58 NY2d 253, 262 [1983]).

Plaintiff's argument that misfeasance does not require a special relationship to create a duty is unavailing (*Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 426 n 1 [2013]).

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

ENTERED: MAY 6, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Clark, JJ.

12393 JPMorgan Chase Bank, N.A., et al., Index 600319/10
Plaintiffs,

-against-

Judith F. Loutit, et al.,
Defendants.
- - - - -
Judith F. Loutit, etc., et al.,
Counterclaim Plaintiffs-Appellants,

-against-

JPMorgan Chase Bank, N.A.,
Counterclaim Defendant-Respondent.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Eileen Bransten, J.), entered on or about January 22, 2013,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated April 14 2014,

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

ENTERED: MAY 6, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Saxe, Manzanet-Daniels, Clark, JJ.

12394 The People of the State of New York, Ind. 5169/00
Respondent,

-against-

John Cosscroft,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ryan Gee 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 (Jill Konviser, J.), rendered on or about February 5, 2013,

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: MAY 6, 2014

CLERK

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

Gonzalez, P.J., Mazzarelli, Sweeny, Manzanet-Daniels, Clark, JJ.

12395 Hector Mena, Index 308925/10
Plaintiff-Appellant,

-against-

White City Car & Limo Inc., et al.,
Defendants-Respondents.

_____

Silvia M. Surdez, P.C., Astoria (Kevin J. Perez of counsel), for appellant.

Marjorie E. Bornes, Brooklyn, for respondents.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about December 24, 2012, which granted defendants' motion for summary judgment dismissing the complaint based on the failure to establish a serious injury pursuant to Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants made a prima facie showing with respect to plaintiff's claims of injury to his neck, back and shoulder by submitting a radiologist's affirmed reports asserting that plaintiff's injuries were degenerative in nature (*see Arroyo v Morris*, 85 AD3d 679, 680 [1st Dept 2011]). Defendants' experts were not required to review plaintiff's medical records before forming their opinions (*see Levinson v Mollah*, 105 AD3d 644, 644 [1st Dept 2013]).

In opposition, plaintiff failed to refute, or address,

defendants' evidence of preexisting degenerative conditions of his cervical and lumbar spine and left shoulder. Further, plaintiff's own radiologists noted degenerative conditions in their MRI reports, but failed to explain why this was not the cause of plaintiff's injuries (*see Paduani v Rodriguez*, 101 AD3d 470, 471 [1st Dept 2012]).

Defendants met their burden as to the 90/180-day claim by relying on plaintiff's bill of particulars alleging that he was confined to bed for about one week, and his testimony that he was home from work for only five days (*see Williams v Baldor Specialty Foods, Inc.*, 70 AD3d 522, 522-523 [1st Dept 2010]). In opposition, plaintiff failed to submit evidence sufficient to raise an issue of fact.

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

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

ENTERED: MAY 6, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Manzanet-Daniels, Clark, JJ.

12396 In re Raymond Heinichen, Index 102737/12
Petitioner-Appellant,

-against-

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

_____

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

Jeffrey D. Friedlander, Acting Corporation Counsel, New York (Keith M. Snow of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Louis B. York, J.), entered May 7, 2013, denying the petition to annul respondent Board of Trustees' denial of petitioner's application for accident disability retirement benefits, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The determination that petitioner's line of duty injury was not sustained in an accident had a rational basis (*see* Administrative Code § 13-252; *Matter of Canfora v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II*, 60 NY2d 347 [1983]). Petitioner was injured when, while working behind a desk, he forcibly attempted to close a stuck drawer, the drawer abruptly gave way, and he slammed his right thumb on the face of the drawer. The closing of the drawer, a

routine task, was not an accident, namely, a "sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact" (*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] [internal quotation marks omitted]). Rather, it was the foreseeable and intended result of petitioner's own conduct (*see e.g. Matter of Hopp v Kelly*, 4 AD3d 176 [1st Dept 2004]; *Matter of Bottino v Murphy*, 209 AD2d 335 [1st Dept 1994]; *compare Matter of Flannelly v Board of Trustees of N.Y. City Police Pension Fund,* 278 AD2d 113 [1st Dept 2000]).

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

ENTERED: MAY 6, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Manzanet-Daniels, Clark, JJ.

12397-
12398 The Board of Managers of the South Star,
Plaintiff-Respondent,

-against-

Sophie Grishanova,
Defendant-Appellant.

Index 159101/12

_____

Law Offices of Edward C. Kramer, P.C., New York (Edward C. Kramer of counsel), for appellant.

Wolf Haldenstein Adler Freeman & Herz, LLP, New York (Jared E. Paioff and Steven D. Sladkus of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered February 8, 2013, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion to hold defendant in civil contempt of court for violation of a temporary restraining order (TRO), unanimously affirmed, with costs. Appeal from order, same court and Justice, entered March 8, 2013, to the extent that it granted defendant's motion to reargue and, upon reargument, adhered to the original determination, unanimously dismissed, without costs, as academic.

Supreme Court properly held defendant in contempt where she violated the TRO, which unequivocally prohibited her from having guests reside in her apartment for more than five days if she

were not residing there (*see Matter of McCormick v Axelrod*, 59 NY2d 574, 583 [1983]). The evidence, including video footage, a logbook, and affidavits, established that defendant was not residing in the unit and that she had guests residing there for more than five days. Defendant's knowledge of the TRO was established both by her attorney's acceptance of service of the TRO and her attempt, the day after the TRO was issued, to transfer the unit to herself and to one of the guests residing in the unit, which plaintiff properly voided for noncompliance with its bylaw provision granting it a right of first refusal. Furthermore, plaintiff showed that its rights had been prejudiced since the transient occupancy of defendant's apartment potentially posed a threat to other residents of the building.

After hearing oral argument and based on the overwhelming evidence in the papers before the court, a further hearing on the

motion was unnecessary (*see Farkas v Farkas*, 209 AD2d 316, 317-318 [1st Dept 1994]; *Jaffe v Jaffe*, 44 AD3d 825 [2d Dept 2007]).

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

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

ENTERED: MAY 6, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Manzanet-Daniels, Clark, JJ.

12399 The People of the State of New York, Respondent, Ind. 4274/12

-against-

Stanley Love, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Carol Berkman, J., at plea; Luara A. Ward, J.), rendered on or about November 28, 2012, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: MAY 6, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Manzanet-Daniels, Clark, JJ.

12402 Omnex Group, Inc., Index 651793/10
Plaintiff-Respondent,

-against-

United States Fire Insurance Company,
Defendant-Appellant.

_____

Strasburger & Price, LLP, Dallas, TX (Michael Keeley, of the bar of the State of New Mexico and the State of Texas, admitted pro hac vice, of counsel), for appellant.

Weg and Myers, P.C., New York (Dennis T. D'Antonio of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered March 7, 2013, in plaintiff's favor, unanimously affirmed, with costs.

Plaintiff, a provider of money transfer services, contracted with nonparty Armored Money Services (AMS) in March 2009 for AMS to pick up money held by plaintiff's agents in various locations for delivery to its account at Wells Fargo Bank. On February 5, 6, 7, 8 and 9, 2010, AMS picked up more than $2 million from plaintiff, but, in contravention of the parties' established practice, failed to wire it into plaintiff's account by the next business day. On February 8, 2010, two officers of AMS and an affiliated company were arrested by the FBI and subsequently admitted to engaging in a practice known as "playing the float,"

i.e., using the continual influx of cash to cover the operating expenses of AMS and the affiliated company, repay prior obligations to other customers, and make officer loans. On February 11, 2010, the FBI seized approximately $19 million from the vaults of AMS and the affiliated company, but approximately $68 million owed to customers remained unaccounted for.

The policy issued by defendant to plaintiff provides for coverage for loss of money "outside the 'premises' in the care and custody of ... an armored motor vehicle company resulting directly from 'theft,' disappearance or destruction." The motion court correctly found that plaintiff's loss resulted from disappearance. Although the policy does not define the term "disappearance," that term has been defined in the context of a theft policy to mean a disappearance that is not only unexplained, but also raises the inference of theft (*see Casey v London & Lancashire Indem. Co. of Am.*, 204 Misc 1106, 1112 [Albany City Ct 1953], *affd* 5 AD2d 724 [3d Dept 1957]; *see also* Black's Law Dictionary 1118 [9th ed 2009], quoting 43 Am Jur 2d Insurance § 501, at 575-576 [1982]). In any event, the policy definition of theft includes "the unlawful conversion of 'covered property' to the involuntary deprivation of the rightful owners ... and [t]o the 'illicit gain' of the perpetrators." The undisputed evidence establishes that AMS did not deposit the

funds into plaintiff's account the day after picking them up, but retained them for its own purposes.

We reject defendant's argument that the loss comes under the policy exclusion for governmental seizure of property, since the theft occurred several days before the FBI's seizure of the money in the vaults, when AMS failed to deposit plaintiff's funds into its account (*see Throgs Neck Bagels v GA Ins. Co. of N.Y.*, 241 AD2d 66, 69-70 [1st Dept 1998]; *Jamaica Pub. Serv. Co. v La Interamericana Compania de Seguros Generales S.A.*, 1 AD3d 130, 130-131 [1st Dept 2003], *lv dismissed in part, denied in part* 2 NY3d 819 [2004]; *Home Ins. Co. v American Ins. Co.*, 147 AD2d 353, 354-355 [1st Dept 1989]).

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

ENTERED: MAY 6, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Manzanet-Daniels, Clark, JJ.

12403 The People of the State of New York, Respondent, Ind. 3818/11

-against-

Kenyaitta Foreman, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Nicolas Schuman-Ortega 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 (Carol Berkman, J.), rendered November 20, 2012, convicting defendant, upon his plea of guilty, of robbery in the third degree, and sentencing him, as a second felony offender, to a term of three to six years, unanimously affirmed.

The court properly exercised its discretion when it relieved assigned counsel. Under the totality of the circumstances, the court's action did not interfere with an established attorney-client relationship, and the replacement of counsel was in any event "justified by overriding concerns of fairness or efficiency" (*People v Knowles*, 88 NY2d 763, 769 [1996]).

The attorney whose removal is at issue only represented defendant at the early stages of the case. After defendant was found unfit to proceed pursuant to CPL article 730, the attorney,

who was admittedly preoccupied with other matters, repeatedly and unnecessarily delayed performance of the simple task of confirming the report. This delay resulted in defendant being detained in a correctional facility rather than in a psychiatric institution, and assignment of new counsel was in defendant's best interests.

Moreover, shortly after defendant was returned from Kirby Forensic Psychiatric Center as competent, the replacement counsel negotiated a disposition. In the course of taking defendant's guilty plea, the court offered to reinstate the original assigned counsel. However, defendant expressed satisfaction with his new attorney and declined the offer of reinstatement.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 6, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Manzanet-Daniels, Clark, JJ.

12404 The Pawn Shop LLC, et al., Index 112563/10
Plaintiffs-Respondents,

-against-

Gary Esterman,
Defendant,

Modell Financial Inc., doing
business as Modell's,
Defendant-Appellant.

_____

Law Office of Mitchell J. Devack, PLLC, East Meadow (Nicholas P. Otis of counsel), for appellant.

Friedlander Laifer and Robbins, New York (Spencer B. Robbins of counsel), for respondents.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered August 20, 2013, which, to the extent appealed from, denied the motion by defendant Modell Financial Inc. d/b/a Modell's for summary judgment dismissing the complaint as against it, unanimously affirmed, with costs.

Modell's showed that it complied with General Business Law article 5 and that it paid a collateral loan to defendant Esterman, thereby establishing prima facie that it obtained possession lawfully of jewelry that plaintiffs claim Esterman stole from them. However, plaintiff Krutoyarsky's affidavits,

though sparse, raise the inference that the collateral identified on the pawn ticket is the jewelry stolen from plaintiffs by Esterman (*see Solomon R. Guggenheim Found. v Lubell*, 77 NY2d 311, 317 [1991]).

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

ENTERED: MAY 6, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Manzanet-Daniels, Clark, JJ.

12405 The People of the State of New York, Ind. 3507/01
Respondent,

-against-

Jason Walker,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Ronald Zweibel, J.), rendered August 2, 2012, resentencing defendant to an aggregate term of 25 years to life, and imposing an aggregate term of five years' postrelease supervision as to certain convictions, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: MAY 6, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Sweeny, Manzanet-Daniels, Clark, JJ.

12406 In re Naomi Davies, Index 100349/11
Petitioner-Respondent,

-against-

The New York City Department
of Education,
Respondent-Appellant.

_____

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

Glass Krakower LLP, New York (Brian D. Glass of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Manuel J. Mendez, J.), entered July 3, 2012, which granted the petition to vacate the determination to terminate petitioner's employment with respondent Department of Education as a tenured school teacher, denied respondent's cross motion to dismiss the petition and remanded the matter for a determination of a lesser penalty, unanimously reversed, on the law, without costs, the petition denied and the cross motion granted.

The Hearing Officer upheld many of the charges and specifications lodged against petitioner, which findings are not challenged on appeal. Such charges alleged professional misconduct, neglect of duty, failure to follow procedures and carry out duties, and incompetent and inefficient service during

two school years. Furthermore, the evidence showed that notwithstanding petitioner's prior unblemished record of service, she continued to blame others and refused to accept responsibility for her failure to effectively manage her classroom and deliver effective instruction. In particular, petitioner exhibited an unwillingness to employ the "workshop method" in her classroom, or implement any of the school administration's suggestions for improvement (*see Matter of Benjamin v New York City Bd./Dept. of Educ.*, 105 AD3d 677 [1st Dept 2013]).

Accordingly, under the circumstances presented, the penalty of termination does not shock one's sense of fairness (*see id.*).

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

ENTERED: MAY 6, 2014

CLERK

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

11411 Saivest Empreendimentos Imobiliarios E. Participacoes, Ltda,
Plaintiff-Appellant,

-against-

Elman Investors, Inc., et al.,
Defendants-Respondents.

Index 652291/10

Christelle Clement, New York, for appellant.

The Law Firm of Borstein & Sheinbaum, New York (James Sheinbaum of counsel), for respondents.

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered September 7, 2011, which granted defendants' motion to dismiss the complaint pursuant to CPLR 3211, unanimously modified, on the law, to deny the motion as to the breach of contract claim against defendant Elman Investors, Inc., and otherwise affirmed, without costs.

Plaintiff is a Brazilian real estate development company whose business is to identify and structure sale-leaseback transactions. In July 2009, it commenced negotiations with defendant Elman Investors, Inc. (Elman Inc.) and other potential investors in connection with a transaction in which the investor would purchase a refrigerated warehouse built for Fresh Del Monte in Cabreuva, Brazil, and lease it to Frialto, a Brazilian company, on a long-term basis.

On August 19, 2009, Lee Elman, as Elman Inc.'s president, sent plaintiff a non-binding offer that outlined the terms under which Elman Inc. would be willing to enter into the transaction. The price stated at that time was 6.5 million Brazilian reais. Thereafter, the parties continued to negotiate the terms of the investment.

On October 15, 2009, Mr. Elman asked plaintiff to renegotiate the purchase price to a maximum of 5,300,000 reais. Plaintiff alleges that its principal, Reginald Nierynck, informed Mr. Elman that plaintiff would only reopen negotiations if Elman Inc. irrevocably committed to closing the transaction if plaintiff was able to secure the reduced price. In response, on October 16, 2009, Elman Inc. sent plaintiff a letter, signed by Mr. Elman, which stated that "Elman Investors LLC is willing to go forward and close the Transaction, subject to a positive outcome of a due diligence on the underlying documentation, based on the following assumptions:" a purchase price of 5,300,000; plaintiff's fee in the amount of 600,000; 500,000 for "refurbishments/cooling installation"; and closing costs of 200,000 (all amounts in Brazilian reais). The projected closing date was no later than December 31, 2009.

On November 5, 2009, plaintiff advised Mr. Elman that the seller had agreed to reduce the price to 5,200,000 reais. On

November 11, 2009, Mr. Elman advised plaintiff that he could not go forward, despite the price reduction, because he was in poor health, did not have final approval from his partners in Brazil, and had "pledged a substantial amount of capital here in the U.S. [ ] (over 8 million)." On November 16, 2009, plaintiff forwarded Mr. Elman certain documents provided by the seller to start due diligence. On November 17, 2009, Mr. Elman replied that Elman Inc. would not go forward with the transaction because its "partners in Brazil have not been able to give me a 'thumbs up' on this deal because competing alternative investments, with immediate higher yields are available," he was in poor health, and "we have committed to a large transaction in this country which must close in early December." Plaintiff now seeks to recover its finder's fee from Elman Inc. under theories of breach of contract, based on the October 16, 2009 letter, or promissory estoppel. Plaintiff also seeks to pierce the corporate veil and hold Mr. Elman individually liable.

At this procedural stage, the breach of contract claim against Elman Inc. should not have been dismissed.

General Obligations Law § 5-701(a)(10) requires that the agreement be subscribed by the party to be charged, and that it contain the material terms of the agreement (*see Allied Sheet Metal Works v Kerby Saunders, Inc.*, 206 AD2d 166 [1st Dept

1994]). The motion court found that the breach of contract action must be dismissed against Elman Inc. because the October 16, 2009 letter would only bind Elman Investors, LLC, which is not named as a party. However, as defendants concede in their brief, Elman signed the letter on behalf of Elman Inc., the named corporate defendant. While the letter states that "Elman Investors LLC is willing to go forward and close the Transaction," it references the parties' ongoing negotiations, and the August 19, 2009 non-binding offer expressly provided that the purchaser would be Elman Inc. or its "nominee," possibly "a Delaware limited liability company of which [Elman Inc.] will serve as the Managing Member." Read in this light, the October 16 letter may reasonably be understood as a commitment by Elman Inc. to have its nominee enter into the transaction.

Furthermore, taken together, the parties' various writings contained the material terms necessary to satisfy the statute of frauds for a finder's fee agreement (*see Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 482 [1989], *cert denied* 498 US 816 [1990]; *Chan v Shew Foo Chin*, 62 AD3d 471 [1st Dept 2009]; *Sorge v Nott*, 22 AD2d 768 [1st Dept 1964]). To the extent it is not clear when plaintiff's fee would be paid, where a contract does not set forth a time for payment, the law implies that payment is due within a reasonable time after performance (*see*

Boone Assoc., L.P. v Leibovitz, 13 AD3d 267 [1st Dept 2004]). Plaintiff alleges that he obtained the reduced price, and at this procedural stage Elman Inc. cannot rely on its own failure to conduct due diligence or to perform a condition necessary for completion to avoid its obligations to plaintiff (*see Trylon Realty Corp. v Di Martini*, 34 NY2d 899 [1974]; *Prime City Real Estate Co. v Hardy*, 256 AD2d 80 [1st Dept 1998]; *see also Nuvest, S.A. v Gulf & Western Indus., Inc.*, 649 F2d 943, 947 [2d Cir 1981]).

Plaintiff's promissory estoppel claim fails because it does not allege "a duty independent of the [contract]" (*CARI, LLC v 415 Greenwich Fee Owner, LLC*, 91 AD3d 583, 583 [1st Dept 2012] [internal quotation marks omitted], *lv dismissed* 19 NY3d 845 [2012]; *see also Susman v Commerzbank Capital Mkts. Corp.*, 95 AD3d 589, 590 [1st Dept 2012] ["to the extent the second cause of action was for promissory estoppel, such a claim cannot stand when there is a contract between the parties"], *lv denied* 19 NY3d 810 [2012]). Furthermore, even if the contract were barred by the statute of frauds, the claim would fail because the allegations in the complaint do not rise to the requisite level of unconscionability (*see Steele v Delverde S.R.L.*, 242 AD2d 414, 415 [1st Dept 1997]; *Dunn v B&H Assoc.*, 295 AD2d 396, 397 [2d Dept 2002]).

Plaintiff failed to state a cause of action against Mr. Elman personally (*see 20 Pine St. Homeowners Assn. v 20 Pine St. LLC*, 109 AD3d 733, 735-736 [1st Dept 2013]). The conclusory allegations against Mr. Elman do not assert that any actions he took were outside the scope of his role as president of Elman Inc., and they describe ordinary negotiations between parties to a potential acquisition. Nor does plaintiff allege that Mr. Elman's actions in this transaction were made for his personal gain, as distinguished from gain for Elman Inc. (*see Courageous Syndicate v People-To-People Sports Comm.*, 141 AD2d 599, 600 [2d Dept 1988]). Conclusory allegations of Elman Inc.'s undercapitalization and intermingling of assets, and that Mr. Elman dominated the corporation, without additional facts, are insufficient to pierce the corporate veil (*see Andejo Corp. v South St. Seaport Ltd. Partnership*, 40 AD3d 407 [1st Dept 2007]).

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

ENTERED: MAY 6, 2014

CLERK

Tom, J.P., Saxe, Moskowitz, Gische, Clark, JJ.

11512 Assured Guaranty Municipal Corp., formerly known as Financial Security Assurance Inc., et al., Plaintiffs-Appellants, Index 652837/11

-against-

DLJ Mortgage Capital, Inc., Defendant-Respondent,

Credit Suisse Securities (USA) LLC, Defendant.

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

Orrick, Herrington & Sutcliffe LLP, New York (John Ansbro of counsel), for respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered October 12, 2012, which, to the extent appealed from as limited by the briefs, granted defendant DLJ Mortgage Capital, Inc.'s motion to dismiss so much of the complaint's first and second causes of action as demand rescissory damages, consequential damages and fees, based on its determination that plaintiffs' remedies are limited by the pooling and servicing agreement's "sole remedy" clause, unanimously reversed, on the law, without costs, and the first and second causes of action reinstated to the extent they seek consequential damages.

The motion court erred in holding that, as a matter of law, the remedy available to plaintiff monoline insurers for breach of defendant's representations and warranties under the pooling and servicing agreement is limited to cure of the breach or the substitution or repurchase of the particular securitized loan. While their remedy, as certificate insurer, for breach of other provisions of the agreement is so limited (*e.g.* section 2.02[b] governing mortgage documentation), the certificate insurer is not one of the parties affected by the "sole remedy" clause of the representations and warranties provision (section 2.03[c]).

As the Court of Appeals has observed, "The best evidence of what parties to a written agreement intend is what they say in their writing" (*Slamow v Del Col*, 79 NY2d 1016, 1018 [1992]). Where, as here, a contract is the result of negotiations between sophisticated business entities assisted by experienced counsel, failure to include a particular party, here the certificate insurer, among those governed by a contract provision can only be construed as the intentional exclusion of that party from its application (*see Matter of New York City Asbestos Litig.*, 41 AD3d 299, 302 [1st Dept 2007]). Nor are plaintiffs' remedies restricted by section 13.01 of the agreement, merely comprising acknowledgment of the certificate insurer's right to exercise the rights of the certificate holders without their further consent.

In view of this disposition, it is unnecessary to reach plaintiffs alternative argument that the sole remedy clause does not apply to their claim for breach of defendant's obligation to repurchase certain mortgages.

The Decision and Order of this Court entered herein on February 27, 2014 is hereby recalled and vacated (*see* M-1562 decided simultaneously herewith).

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

ENTERED: MAY 6, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Clark, JJ.

11766 757 3rd Avenue Associates, LLC, Index 654032/12
Plaintiff-Appellant,

-against-

Ramesh M. Patel,
Defendant-Respondent.

_____

Charles E. Boulbol, P.C., New York (Charles E. Boulbol of counsel), for appellant.

Gail M. Blaise, Garden City, respondent.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered August 21, 2013, which denied the motion of plaintiff landlord for summary judgment on its first and second causes of action, granted the cross motion of defendant tenant for summary judgment dismissing the complaint, severed and continued tenant's counterclaim, and directed the parties to appear at a preliminary conference, unanimously affirmed, without costs.

Pursuant to a lease, tenant operates a newsstand on the premises owned by landlord. A "Sixth Amendment" to the lease, dated September 1, 2008, extended the lease to August 31, 2013. Paragraph 4 of the Sixth Amendment provides:

> Landlord shall have the right, at any time, upon not less than thirty (30) days' prior written notice to Tenant, to terminate this Lease. In the event that Landlord shall exercise such termination right, this Lease shall come to an end and expire on the

> termination date set forth in such termination notice, with the same force and effect as though said date were the Expiration Date.

In or about the first half of 2011, landlord expressed to tenant its desire to perform extensive renovations to the building's lobby, where the newsstand was located. Because the renovations would require tenant to vacate the premises, he proposed, in a note to landlord, adding language to the lease which would provide that the "lease shall be extended beyond the expiration date of Aug. 31, 2013 [for the] number of months Tenant could not conduct the business due to substantial renovation and alteration to the lobby of the Building." Landlord's realtor then sent tenant an email stating, in pertinent part: "We would like to take this opportunity to thank you for your continued cooperation and we look forward to a long relationship together at 757 Third Avenue. We addressed your concerns in paragraphs 3 + 4."

The email attached a proposed "Seventh Amendment" to the lease, and requested that tenant execute it and return it, which he did. The Seventh Amendment granted landlord a license to access the leased premises for a period commencing on June 3, 2011, and ending on a date to be determined by landlord and communicated to tenant in a written notice to him at least five

days prior. The Seventh Amendment further required tenant to remove all of his inventory and personal belongings from the premises during the license period. Consistent with tenant's proposal to landlord, paragraph 4 of the Seventh Amendment provided:

> Landlord and Tenant acknowledge and agree that the term of this Lease shall be extended past the current Expiration Date of August 31, 2013 for a period of time equal to the License Period (the 'Extension Term'), unless this Lease is sooner terminated in accordance with the terms and conditions contained in the Lease or this Seventh Amendment.

Tenant vacated the premises as required under the Seventh Amendment, and landlord declared the license period over as of April 1, 2012, approximately 10 months later, at which time tenant resumed occupancy of his newsstand. Then, by letter dated October 5, 2012, landlord notified tenant that it was "exercising its option to terminate the Lease pursuant to the provision of Section 4 of the Sixth Amendment." The letter informed tenant that "[t]he lease shall be deemed terminated as of November 8, 2012," adding that he "must vacate and surrender possession of the Premises on or before the Termination Date as if such date were the Expiration Date of the Lease."

Tenant refused to vacate the premises, and landlord commenced this action for ejectment, damages for use and

occupancy and attorney's fees and costs. Tenant interposed an answer asserting several affirmative defenses, including that the termination clause in the Sixth Amendment was not invoked in good faith, and that landlord was equitably estopped from terminating the tenancy. He also counterclaimed for damages based on landlord's allegedly wrongful early termination of the lease.

Landlord moved for summary judgment, and tenant cross moved for the same relief. In support of his cross motion, tenant stated in an affidavit that he had been "induced to temporarily vacate the [p]remises in good faith for the ten (10) months, based on the representations contained in the lease that the term ... was to be extended through June 30, 2014 and that the termination clause would not be enforced until said date."

The motion court denied landlord's motion for summary judgment and granted tenant's cross motion. The court construed the Seventh Amendment as reflecting the parties' understanding that tenant had agreed to vacate the premises during the license period in exchange for landlord's promise not to terminate the lease any sooner than the expiration of a period of time equal to the license period, measured from the previously agreed to expiration date of August 31, 2013. It stated that landlord was estopped from arguing otherwise, because

"[a]ny other conclusion would render illusory

> [tenant]'s subsequently bargained for benefit of a lease extension, if after actually giving up his right to occupy the premises and operate his business for ten months, plaintiff retained an unconditional and unfettered right to terminate his lease at any time on 30 days' notice."

The party invoking a defense of equitable estoppel must establish:

> "(1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than and inconsistent with, those which the party subsequently seeks to assert; (2) intention, or at least expectation, that such conduct will be acted upon by the other party; (3) and, in some situations, knowledge, actual or constructive, of the real facts" (*BWA Corp. v Alltrans Express U.S.A.*, 112 AD2d 850, 853 [1st Dept 1985] [internal quotation marks omitted]). The Court of Appeals has explained that:
>
> "The purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted .... Its purpose is to prevent someone from enforcing rights that would work injustice on the person against whom enforcement is sought and who, while justifiably relying on the opposing party's actions, has been misled into a detrimental change of position" (*Matter of Shondell J. v Mark D.*, 7 NY3d 320, 326 [2006]).

Tenant argues that equitable estoppel applies because, when landlord agreed to extend the lease term for a period of time

equivalent to the license period, it led tenant to reasonably believe that it would not invoke the early termination provision in the Sixth Amendment, and that it otherwise would not have gratuitously given up 10 months of revenue. Landlord counters that the Seventh Amendment confirmed its right to terminate the lease before the expiration date, by including in paragraph 4 the phrase "unless this Lease is sooner terminated in accordance with the terms and conditions contained in the Lease or this Seventh Amendment." It claims that tenant cannot object to its exercise of a right that is explicitly permitted by the lease.

We reject landlord's interpretation of the lease, because it renders the benefit to tenant illusory (*see Zurakov v Register.Com, Inc.*, 304 AD2d 176, 179 [1st Dept 2003]). It simply makes no sense that tenant would have agreed to vacate the premises for an indeterminate period of time, only to be subjected to permanent eviction upon its return. To the extent that paragraph four of the Seventh Amendment still permits early termination by landlord, we note that the lease provides several avenues for early termination based on, for example, tenant's bankruptcy or other default. Thus, contrary to its position, it is not necessary to read any material out of the lease to arrive at our result. Because landlord induced tenant to vacate the premises by offering an extended term, and then deprived tenant

of that benefit, it is equitably estopped from terminating the lease.

Eujoy Realty Corp. v Van Wagner Communications, LLC (22 NY3d 413 [2013]), relied on by landlord, does not dictate a different result. In that case, the lease required the tenant, which rented space on an outdoor billboard, to pay the annual rent in a lump sum on January 1. On January 8, after paying the entire annual rent, the tenant exercised its right, pursuant to the lease, to terminate based on the fact that the public's view of the billboard had become obstructed. It stopped payment on the rent check and substituted a check representing the much smaller, prorated amount for the year. The Court of Appeals held that the tenant was liable for the entire annual rent. In doing so, it rejected the tenant's assertion, disputed by the landlord, that the parties orally modified the payment terms of the lease, stating that "'no sensible person' would neglect to reduce a lease modification to writing" (22 NY3d at 427).

Here, tenant is not relying on an oral modification of the lease. Rather, it is relying on an arrangement to which there is

no dispute the parties agreed. More importantly, unlike in *Eujoy*, the arrangement was reduced to writing in paragraph 4 of the Seventh Amendment. Accordingly, tenant is entitled to enforce the express language of the Seventh Amendment.

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

ENTERED: MAY 6, 2014

CLERK

Sweeny, J.P., Renwick, Freedman, Gische, JJ.

11881 Eileen Bransten, etc., et al., Index 159160/12
Plaintiffs-Respondents,

-against-

The State of New York,
Defendant-Appellant.

_____

Eric T. Schneiderman, Attorney General, New York (Brian A. Sutherland of counsel), for appellant.

Stroock & Stroock & Lavan LLP, New York (Alan M. Klinger of counsel), for respondents.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered May 21, 2013, which denied defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiffs, who are sitting and retired members of the New York State Judiciary, seek a declaratory judgment and injunctive relief stating that the State's recent decrease in its contribution to the cost of judges' health care insurance premiums violates the Compensation Clause of the New York State Constitution (NY Const. art VI, § 25[a]) which provides "compensation [of a judge] shall be established by law and shall not be diminished during the term of office for which he or she was elected or appointed."

Defendants move to dismiss the complaint pursuant to CPLR 3211 for failure to state a claim. We hold that the reduced

contribution, which in turn increased the amounts withheld from judicial salaries, constitutes an unconstitutional diminution of judicial compensation and deny the motion to dismiss.

The reduction in contribution to health insurance premiums occurred in 2011, when the State, faced with a serious budget shortfall, threatened to lay off thousands of workers unless unionized employees made wage and benefit concessions that included bearing more of the cost of their health care insurance. While negotiations with unionized employees were underway, the Legislature in August 2011 amended Civil Service Law § 167.8 (Section 167.8) to authorize the Civil Service Department, with the State Budget Director's approval, to reduce the State's contribution to health care insurance premiums not only for unionized employees who had agreed to the reductions through collective bargaining, but also for some nonunionized employees.

Section 167.8, as amended, separated State employees into three categories. First, the State's decreased contribution was imposed on unionized employees who, through collective bargaining, had agreed to the reduction in exchange for immunity from layoffs. Second, State premium contributions remained unchanged for unionized employees who had rejected the reductions, but those employees remained vulnerable to layoffs. Third, reductions were imposed on nonunionized employees without

their consent in exchange for which those employees were also promised immunity from layoffs.

The statute was silent as to whether the reductions applied to judges. However, in September 2011, the Civil Service Department promulgated rules reducing State contributions for healthcare insurance premiums for individuals designated as managerial or confidential or otherwise excluded from collective bargaining within the meaning of the Taylor Law (Civil Service Law article 14). Members of the judiciary fell within this category. In accordance with the new rules, in September 2011 the State notified judges that it would reduce its contribution to sitting judges' premiums by 6% and reduce its contributions to retired judges' premiums by 2%.

Plaintiffs now seek a permanent injunction against the reductions based on a declaration that the amendment to Section 167.8, as applied to them, violates the Compensation Clause of the New York State Constitution, which prohibits diminution.

In its motion to dismiss for failure to state a claim, the State argues that the Compensation Clause does not prohibit the State from decreasing its contributions to the insurance premiums because any reduction to judicial compensation was "indirect" and nondiscriminatory. Denying the motion, Supreme Court found that the State's reduced contribution amounted to a direct diminution

of judicial compensation because it increased the amount withheld from judicial salaries. The court further held that the amendment to Section 167.8 was discriminatory as applied to judges because they were differently situated from other state employees.

On appeal, defendant does not argue that reducing its contribution to insurance premiums did not directly diminish judges' compensation. Instead, the State first argues that its contribution to judges' health insurance premiums are not "compensation" within the meaning of the Compensation Clause.[1] However, it is settled law that employees' compensation includes all things of value received from their employers, including wages, bonuses, and benefits. This Court has recognized that judicial "compensation" under the Compensation Clause includes both "the pay scale and benefits" (*Larabee v Governor of State of N.Y.*, 65 AD3d 74, 85-86 [1st Dept 2009], *mod on other grounds sub nom Matter of Maron v Silver*, 14 NY3d 230 [2010]), and the Second Department has expressly found that health insurance benefits are a component of a judge's compensation (*see Roe v Board of Trustees of the Vil. Of Bellport*, 65 AD3d 1211 [2d Dept 2009]

[1]Defendant did not make this argument below, but this Court can consider new arguments on appeal that present pure questions of law (*DiFigola v Horatio Arms*, 189 AD2d 724 [1st Dept 1993]).

[striking down legislation terminating health insurance provided to a village justice during his term of office]).

As applied to New York judges, the amended Section 167.8 subjects them to discriminatory treatment also in violation of the state Compensation Clause. In its implementation, the amended statute affects judges differently from virtually all other State employees, who either consented to the State's reduced contribution in exchange for immunity from layoffs or were otherwise compensated by the State's promise of job security. Unlike other State employees, judges were forced to make increased contributions to their health care insurance premiums, without receiving any benefits in exchange. The judiciary had no power to negotiate with the State with respect to the decrease in compensation, and received no benefit from the no-layoffs promise, because their terms of office were either statutorily or constitutionally mandated. Thus, Section 167.8 uniquely discriminates against judges because it imposes a financial burden on them for which they received no compensatory benefit.

New Jersey judges were recently faced with a similar situation. The New Jersey Constitution also prohibits diminution of judicial compensation although it uses the word "salary" instead of "compensation." In *DePascale v State* (211 NJ 40 [NJ

2012]), the New Jersey Supreme Court found that the term "salary" encompassed contributions to judges' health care insurance premiums and, accordingly, that New Jersey's reduced contribution to the premiums of sitting judges violated the state's Compensation Clause (*DePascale* at 43).

Defendant argues that, even if the State's reduced contribution to judges' insurance premiums constitutes a diminution of their compensation, the reduction is permissible under *United States v Hatter* (532 US 557 [2001]) because *Hatter* permitted imposition of a Federal Medicare tax on judges. We find to the contrary because *Hatter* also found that under the Compensation Clause of the United States Constitution, which prohibits reductions in compensation, judges could not be subject to a Social Security tax.

In *Hatter*, the question before the Supreme Court was whether the Compensation Clause precluded the federal government from imposing Medicare and Social Security taxes on already sitting federal judges when it extended imposition of those taxes to all federal employees. The Supreme Court found that applying the Social Security tax to sitting Federal judges violated the Federal Compensation Clause because it effectively singled out federal judges for unfavorable treatment in comparison to other government employees. The 1983 law at issue permitted about 96%

of all federal workers who were employed when the statute took effect to opt out of the Social Security system and avoid paying Social Security taxes. Of the remaining 4% of the then-current federal employees, all of whom were high-ranking employees and almost all of whom were paying into a pension system, the new federal law permitted that group to join the Social Security program without paying more than they had been contributing to their existing pension system (*id.* at 572-579).

But, the statutory scheme left a subset of employees, virtually all of whom were sitting federal judges, in an anomalous position. These employees were required to pay Social Security taxes even though previously they had participated in a noncontributory pension plan. Because the law imposed unique burdens on federal judges, the Supreme Court held, its application violated the Federal Compensation Clause (*id.*).

Defendant argues that the amendment to Section 167.8 is akin to that aspect of a 1982 law that extended the Medicare tax to all employees and was upheld in *Hatter*, (532 US at 561). But that argument is without merit because that tax is similar to an across the board income tax imposed upon all citizens, regardless of who employs them.

Like the 1983 law that was considered in *Hatter*, the effect of the amendment to Section 167.8 on New York's judges uniquely

and detrimentally affects the judiciary and diminishes its compensation. As has been discussed, the increased withholding sustained by judges was not imposed uniformly upon all state employees, much less upon all employees in general. The increased deduction here is therefore more akin to the Social Security tax which the Supreme Court struck down than it is to the Medicare tax which the Supreme Court upheld (*see Larabee*, 65 AD3d at 85-87).

Accordingly, defendant's motion to dismiss was properly denied.

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

ENTERED: MAY 6, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Feinman, Kapnick, JJ.

12163 Merisel, Inc., etc., et al., Index 650411/11
Plaintiffs-Appellants,

-against-

Edward Weinstock, et al.,
Defendants-Respondents.

_____

Law Offices of Jonathan M. Cooper, Cedarhurst (Jonathan M. Cooper of counsel), for appellants.

DLA Piper LLP (US), New York (Timothy E. Hoeffner of counsel), for Edward Weinstock, respondent.

Law Offices of Mitchell Troyetsky, New York (Mitchell Troyetsky of counsel), for Splash (New York) Inc., Splash (Northwest) Inc. and Domenick Propati, respondents.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered March 26, 2013, which granted the motion of defendants, Splash (New York), Inc., Splash (Northwest) Inc., and Domenick Propati (collectively, Splash defendants), for summary judgment dismissing the causes of action alleging trespass, tortious interference with contract, interference with prospective advantage, and seeking injunctive relief, and denied plaintiffs' cross motion to strike the Splash defendants' answer as moot, unanimously affirmed, without costs.

The court properly dismissed the tortious interference with contract claim because the evidence plainly shows no contracts exist between plaintiffs (Merisel) and the clients whom

plaintiffs claim the Splash defendants improperly solicited and persuaded to shift their business away from plaintiffs to Splash (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]; *Design Strategy Corp. v Citibank*, 252 AD2d 366, 366 [1st Dept 1998]). Merisel acknowledged through its CEO that it has no such contracts with its clients.

Contrary to Merisel's claims, the Asset Purchase Agreement, Weinstock's and Propati's employment contracts, and "at-will agreements" of nine "poached" employees, who left Merisel to work for Splash, cannot serve as the underlying contracts. The Asset Purchase Agreement contains no period of time for which those clients agreed to work with Merisel. To the extent that Merisel claims the Splash defendants' conduct violated defendant Weinstock's non-solicitation provision, the contract at issue must be with a third party, not with a defendant (*Lama Holding Co.*, 88 NY2d at 424). Defendant Propati's contract had long expired. Merisel cites no provision violated in the at-will employees' contracts.

The court also properly dismissed the cause of action for interference with prospective economic advantage because Merisel failed to demonstrate that the Splash defendants' conduct rose to the level of "wrongful means" required to sustain such a claim (*Snyder v Sony Music Entertainment*, 252 AD2d 294, 299-300 [1st

Dept 1999]). Moreover, Merisel failed to demonstrate that those lost clients would have entered into an economic relationship with plaintiffs but for the Splash defendants' wrongful conduct (*Vigoda v DCA Prods. Plus*, 293 AD2d 265, 266-267 [1st Dept 2002]).

Merisel's CEO acknowledged that the clients at issue did not work exclusively with Merisel, and that he did not know of any prospective agreements with which the Splash defendants had interfered. At a minimum, Lane Bryant's witness made clear that it shifted its business to Splash largely for business reasons, better quality and prices. Thus, Merisel failed to demonstrate how such clients would have remained with Merisel, rather than moving to Splash, but for the Splash defendants' conduct (*see Slatkin v Lancer Litho Packaging Corp.*, 33 AD3d 421, 421 [1st Dept 2006]).

The court properly dismissed the trespass claim in light of unrefuted testimony that the alleged "proprietary information" at issue, Lane Bryant's images, was not Merisel's but Lane Bryant's property.

The court also properly dismissed the claim seeking injunctive relief, as Merisel alleges monetary damages resulting from the lost business of the four transferred client accounts.

Finally, the court also properly declined to deny summary

judgment pursuant to CPLR 3212(f) since Merisel failed to identify facts essential to justify opposition to the motion which are exclusively within the Splash defendants' knowledge and control (*Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 102-103 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]). Merisel failed to come forward with more than a "mere hope" that they will uncover evidence that will prove their case (*Fulton v Allstate Ins. Co.*, 14 AD3d 380, 381 [1st Dept 2005]). In particular, Merisel argues that the Splash defendants relied heavily on affidavits of the nine "poached" Merisel employees who were not produced for deposition. Merisel does not specify what additional information those employees may have, nor do they raise any issues with regard to the veracity of the affidavits, including whether Merisel imposed the pay cuts those former employees cite as the primary reason for their departure.

The court properly dismissed Merisel's cross motion to strike the Splash defendants' answer as moot in light of the above. Further, Merisel failed to explain how the Splash defendants' responses to the court's discovery order prejudiced them or otherwise frustrated the purpose of that order. While Merisel notes that documents were provided only shortly after defendant Propati's deposition, they do not specify what additional questions they would have asked had they received the

documents sooner. They questioned Propati over two days and did not raise any complaints about the production until months later, when they filed their cross motion to strike in response to the Splash defendants' summary judgment motion.

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

ENTERED: MAY 6, 2014

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Gische, JJ.

11946 Healthcare I.Q., LLC, Index 108230/10
Plaintiff-Respondent,

-against-

Dr. Tsai Chung Chao, MD,
doing business as Naturo-Medical
Health Care, P.C.,
Defendant-Appellant.

_____

Moritt Hock & Hamroff LLP, Garden City (Robert M. Tils of counsel), for appellant.

Manuel & Associates, LLP, New York (Charles B. Manuel Jr. of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about September 9, 2013, reversed, on the law, without costs, defendant's motion granted, and plaintiff's cross motion denied. The Clerk is directed to enter judgment accordingly.

Opinion by Gische, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
John W. Sweeny, Jr.,
Leland G. DeGrasse,
Sallie Manzanet-Daniels,
Judith J. Gische, JJ.

11946
Index 108230/10

_____x

Healthcare I.Q., LLC,
Plaintiff-Respondent,

-against-

Dr. Tsai Chung Chao, MD,
doing business as Naturo-Medical
Health Care, P.C.,
Defendant-Appellant.

_____x

Defendant appeals from the order of the Supreme Court, New York County (Eileen Bransten, J.), entered on or about September 9, 2013, which denied its motion for summary judgment dismissing the amended complaint and granted plaintiff's cross motion for summary judgment and for sanctions.

Moritt Hock & Hamroff LLP, Garden City (Robert M. Tils of counsel), and Loanzon LLP, New York (Tristan C. Loanzon of counsel),for appellant.

Manuel & Associates, LLP, New York (Charles B. Manuel Jr., Daniel Goldstein and Robert Rosenberg of counsel), for respondent.

GISCHE, J.

This breach of contract action arises from a Practice Management and Licensing Agreement between the parties dated February 6, 2007 (agreement). Plaintiff Healthcare I.Q. (HCIQ), a health care services company, agreed to provide Dr. Tsai Chung Chao, M.D. and his medical practice (collectively Dr. Chao) with coding, billing, collection and other services aimed at improving the efficiency of Dr. Chao's office operations. The agreement, which provides for the licensing of HCIQ's office management program software to Dr. Chao, and was initially for a 36 month term commencing February 1, 2007, includes a "HIPAA Business Association Addendum" providing that all the information entrusted to HCIQ is regulated by the Federal Health Insurance Portability and Privacy Act of 1996 (45 CFR 164.501). It further provides that upon termination of the agreement, the "Business Associate [HCIQ] shall return or destroy all Protected Health Information received from Covered Entity [Dr. Chao], or created or received by the Business Associate on behalf of Covered Entity." The agreement's "Termination" identifies Dr. Chao's "unauthorized use" of the program as a qualifying, terminating event.

All of the records generated, prepared and maintained by Dr. Chao and his staff, including patients' confidential records and files, were scanned and uploaded into the program on an ongoing

basis and were used by HCIQ in coding, tabulating, reviewing and analyzing Dr. Chao's billables, reimbursements, and billing procedures. Under the agreement, HCIQ was responsible for "the Practice Staff, management and supervision of the medical billing, coding, collection of reimbursable insurance dollars, adherence to documentation guidelines, compliance issues, business issues, and for overall management of the medical facility." The program, which was to be installed on Dr. Chao's computers, is proprietary to HCIQ and is not available to the general community. HCIQ charged Dr. Chao a basic retainer fee of $14,000 per month for its program and services. Although Dr. Chao was also subject to a per use fee when accessing the records and files scanned or uploaded to the program, there was a $15,000 cap on the monthly retainer fee. The cap remained effective for the "term of this Agreement . . ."

In addition to the termination provisions, the agreement contained a "License" clause restricting Dr. Chao's use of the program in the following manner:

> "HCIQ grants the Practice a limited, non-exclusive, non-transferrable, non-assignable license to incorporate the Program(s) provided by HCIQ into licensee's desktop or network information system, as the case may be, for the term of this Agreement, subject to any early termination of this Agreement. Thereafter, this Agreement shall be automatically renewed for additional eighteen (18) month periods unless either party by written notice notifies the other at least ninety days before the end of any eighteen

> (18) month renewal period that it intends to terminate the services provided for hereunder, and such notification shall be effective one hundred and eighty (180) days thereafter."

Dr. Chao paid the monthly retainer throughout the initial 36 month term of the agreement from February 2007 to January 2010. He also made a $15,000 payment to HCIQ in February 2010. According to HCIQ, Dr. Chao and its principal informally discussed whether Dr. Chao would be renewing the agreement for an additional term and Dr. Chao said that he would renew it, a statement which Dr. Chao denies. It is undisputed that HCIQ did not provide Dr. Chao with any written notice that the agreement would be automatically renewed for another 18 month term, nor did Dr. Chao notify HCIQ in writing that he did not intend to renew the agreement at that time.

After February 2010, Dr. Chao and his staff continued to use the program to access patient records, although he stopped making payments to HCIQ. According to Dr. Chao, he had no choice but to use the program to access patient records and other files which had been scanned and uploaded. Dr. Chao and his staff last used the program in June 2010, at which time HCIQ commenced this action.

Although neither party provided written notice regarding the renewal or non-renewal of the agreement after the initial term ended, each side takes the position that it was under no

obligation to do so. Dr. Chao relies on the requirements in General Obligations Law § 5-903 and HCIQ relies on the automatic renewal provision of the agreement. The only written notice regarding the agreement was made by Dr. Chao in October 18, 2012, at which time he notified HCIQ that he was terminating the agreement effective March 2010, "consistent with my verbal termination of the agreement in early 2010." He sent the notice only after this action was commenced. HCIQ maintains that Dr. Chao never terminated the agreement, which automatically renewed twice for two consecutive 18 month terms, and that Dr. Chao owes $525,000.

The parties' dispute centers on whether the agreement is a contract for "service . . . to or for . . . personal property"[1] under General Obligations Law § 5-903(2), which would render its

[1]In its entirety, General Obligations Law § 5-903(2) provides that:

> "No provision of a contract for service, maintenance or repair to or for any real or personal property which states that the term of the contract shall be deemed renewed for a specified additional period unless the person receiving the service, maintenance or repair gives notice to the person furnishing such contract service, maintenance or repair of his intention to terminate the contract at the expiration of such term, shall be enforceable against the person receiving the service, maintenance or repair, unless the person furnishing the service, maintenance or repair, at least fifteen days and not more than thirty days previous to the time specified for serving such notice upon him, shall give to the person receiving the service, maintenance or repair written notice, served personally or by certified mail, calling the attention of that person to the existence of such provision in the contract."

automatic renewal provision (evergreen clause) unenforceable unless HCIQ provided timely prior written notice calling Dr. Chao's attention to it. If § 5-903(2) does not apply to the parties' agreement then Dr. Chao had the affirmative obligation to cancel before the automatic renewal period.

Dr. Chao did not assert General Obligations Law § 5-903 as an affirmative defense in his original answer, but previously moved for summary judgment on this basis. The court denied his motion because it was based on an unpled defense and was, therefore, waived. It did not decide the merits of the argument. Dr. Chao filed a notice of appeal from the motion court's earlier decision, but did not perfect it. Thereafter, HCIQ moved for leave to amend its complaint to increase the ad damnum clause and its motion was granted, resulting in the filing and serving of an amended complaint. Dr. Chao served an answer to the amended complaint, this time asserting General Obligations Law § 5-903 as an affirmative defense and subsequently moved for summary judgment on this basis. The motion court denied the motion and sanctioned Dr. Chao for bringing a successive summary judgment motion on the same legal ground he had raised in the first motion.

We find that the second summary judgment motion, brought after the pleadings were amended on a substantive issue not previously decided by the court, was procedurally proper. "Once

plaintiff served the amended complaint, the original complaint was superseded, and the amended complaint became the only complaint in the action. The action was then required to proceed as though the original pleading had never been served" (*Plaza PH2001 LLC v Plaza Residential Owner LP,* 98 AD3d 89, 99 [1st Dept 2012] [internal quotation marks and citation omitted]). Thus, defendant's appeal from the prior order denying summary judgment became moot (*see Baker v 16 Sutton Place Apt. Corp.,* 2 AD3d 119, 120 [1st Dept 2003]), and "sufficient cause . . . exist[ed]" for his motion for summary judgment dismissing the amended complaint (*Varsity Tr. v Board of Educ. of City of N.Y.,* 300 AD2d 38, 39 [1st Dept 2002] [internal quotation marks omitted]). We therefore vacate the award of sanctions against Dr. Chao.

General Obligations Law § 5-903 does not define "personal property," although it broadly defines "person" as "an individual, firm, company, partnership or corporation" and also states that its restrictions apply unless "the person receiving the service" is served with advanced notice calling its attention to the renewal clause in the contract (General Obligations Law § 5-903[2]). The statute does not require that the person own the "personal property" being serviced, and section 5-903 has been analyzed by courts in a variety of circumstances to determine its applicability. Personal property has been interpreted to include intellectual property as well as tangible personal property

(*Ovitz v Bloomberg L.P.*, 77 AD3d 515 [1st Dept 2010], *affd* 18 NY3d 753 [2012] [terminal, software and other equipment to access real-time financial information services]; *NYDIC/Westchester Mobile MRI Assoc. v Lawrence Hosp.*, 242 AD2d 686 [2d Dept 1997], *lv denied* 91 NY3d 807 [1998] [mobile magnetic resonance image systems]; *Mount Vernon Amusement Co. v Georgian Restaurant Corp.*, 30 AD2d 823 [2d Dept 1968] [cigarette vending machines]; *Dime Laundry Serv. v 230 Apts Corp.*, 120 Misc 2d 399 [Sup Ct, NY County 1983] [coin operated laundry equipment]; *Telephone Secretarial Serv. v Sherman*, 49 Misc 2d 802 [Nassau Dist Ct 1966], *affd* 28 Ad2d 1010 [2d Dept 1967] [doctor's telephone answering service]). The purpose of the notice provision is to protect service recipients from the harm of unintended automatic renewals of contracts for consecutive periods (*see Ovitz,* 77 Ad3d 515; *Guerrero v West 23rd St. Realty, LLC*, 45 AD3d 403 [1st Dept 2007], lv denied 10 NY3d 707 [2008]). Since § 5-903 is remedial in nature it is construed broadly (*Peerless Towel Supply Co. v Triton Press,* 3 AD2d 249, 251 [1st Dept 1957]; *NYDIC/Westchester Mobile MRI Assoc.,* 242 AD2d at 687).

We find that the parties' agreement was "for service . . . to or for . . . personal property" within the meaning of the General Obligations Law. The services provided were directly and inextricably related to the billing and medical records of the practice, which are personal property. We reject HCIQ's

characterization of its services as being merely of a consulting, analytical or administrative nature rendering the statute inapplicable (*see Donald Rubin, Inc. v Schwartz*, 160 AD2d 53, 56-57 [1st Dept 1990] [administration of an employee benefits plan]; *Prial v Supreme Ct. Uniformed Officers Assn.*, 91 Misc 2d 115, 117 [App Term, 1st Dept 1977] [retainer for legal services]). Here the agreement provided for HCIQ to take dominion over the records, and to maintain and organize them on an ongoing basis for billing and reimbursement purposes. This was not merely incidental access to the records in the context of administrative or consulting services.

Under the agreement, HCIQ had use of and access to all of Dr. Chao's records and files, even his patients' protected health information subject to HIPAA (45 CFR 164.501). Dr. Chao was obligated to turn over "100% of [his] paper and electronic claims and Explanation of benefits to HCIQ" on a daily basis so that HCIQ could fulfill its contractual responsibilities. This level of unfettered use, access, physical possession and management of a service recipient's records and files, much of it containing protected patient information, exceeds the scope of incidental information provided for consulting and administrative services (*see Donald Rubin, Inc., 160 Ad2d at 56-57*). Although the records and files, whether the personal property of the practice or of his patients, were accessible in an electronic form through

a computer, these records had an existence, separate and apart from the program into which they were uploaded, processed or accessed (*see Wornow v Register.Com, Inc.*, 8 AD3d 59 [1st Dept 2004]). Thus, the records, files and other documents, regardless of who they belonged to are "personal property" that HCIQ serviced and maintained. The nature of some of these records is further underscored by the HIPAA addendum requiring the return or destruction of certain records in HCIQ's possession upon termination of the agreement.

Since the renewal clause was not timely brought to Dr. Chao's attention, the agreement did not automatically renew on February 1, 2010 (*see e.g. Protection Indus. Corp. v DDB Needham Worldwide,* 306 AD2d 175 [1st Dept 2003]). Dr. Chao had the right to cancel the agreement at any time thereafter (*see e.g. Concourse Nursing Home v Axiom Funding Group,* 279 AD2d 271 [1st Dept 2001]). Although Dr. Chao and his staff continued to access certain records through the program until June 2010, they did so to access patient information; Dr. Chao stopped sending files to HCIQ for processing in February 2010. It is unrefuted that Dr. Chao demanded the return of these files, as he had the right to do under the HIPAA addendum, but they were neither returned to him nor were they destroyed by HCIQ as required. Under these circumstances, Dr. Chao did not "knowingly and willingly . . . accept the benefit of the" licensed software beyond the term of

the agreement without compensating HCIQ (*id.* at 271).

Accordingly, the order of the Supreme Court, New York County (Eileen Bransten, J.), entered on or about September 9, 2013, which denied defendant's motion for summary judgment dismissing the amended complaint and granted plaintiff's cross motion for summary judgment and for sanctions, should be unanimously reversed, on the law, without costs, the motion granted, and plaintiff's cross motion denied. The Clerk is directed to enter judgment accordingly.

All concur.

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

ENTERED: MAY 6, 2014

CLERK