SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 7, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

524-
524A Elissa Abreu, Index 603992/06
Plaintiff-Respondent-Appellant,

-against-

Barkin and Associates Realty, Inc., et al.,
Defendants-Appellants-Respondents.

Michael C. Marcus, Long Beach, for appellants-respondents.

Morris Duffy Alonso & Faley, New York (Barry M. Viuker of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Herman Cahn, J.), entered August 18, 2008, which, to the extent appealed from, as limited by the briefs, in an action by a real estate broker against her former employers for conversion of a customer list and contact information, conversion of personal effects, and breach of contract for unpaid commissions, denied defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to dismiss plaintiff's cause of action for conversion of the customer list and contact information, and otherwise affirmed, without costs. Order, same court and

Justice, entered August 21, 2008, which, to the extent appealed from, denied the branch of defendants' motion for an adjournment of the trial and granted the branch to strike plaintiff's notice of expert disclosure, unanimously affirmed, without costs, insofar as it struck plaintiff's notice of expert disclosure, and the appeal otherwise dismissed, without costs, as rendered moot by the parties' stipulation staying all proceedings pending this appeal.

Plaintiff's claim alleging defendants' conversion of a customer list and contact information upon their termination of her employment should have been dismissed for lack of any evidence supporting her claim that she could have earned $750,000 in commissions were she in possession of these items. Summary judgment was appropriately denied with respect to the remainder of the complaint. Concerning the alleged conversion of plaintiff's personal effects, an issue of fact exists as to whether defendants gave plaintiff a reasonable opportunity to retrieve her effects after the termination. Regarding plaintiff's claim for unpaid commissions and defendants' assertion that the commissions were forfeited under the faithless servant doctrine, there is an issue of fact as to whether defendants knew that plaintiff's husband had established a competing business (using marital assets to do so) and was

soliciting defendants' clients. If defendants had no such knowledge, and plaintiff failed to divulge this information, she omitted "to disclose any interest which would naturally influence [her] conduct in dealing with the subject of the employment" and would thereby forfeit her right to compensation (*Murray v Beard*, 102 NY 505, 508 [1886]).

The denial of defendants' request to adjourn the trial has been rendered moot by the stay of the trial that has been in effect pending this appeal. Plaintiff's notice of expert disclosure was properly stricken. The subject of the disclosure -- how much work plaintiff needed to do to be entitled to commissions -- is an issue that turns on the terms of the alleged oral contract between the parties, and does not otherwise appear to be an appropriate subject of expert opinion.

We reject defendants' argument that plaintiff's failure to provide a fully supported counterstatement of disputed facts in opposition to defendants' motion for summary judgment, in accordance with Rule 19-a of the Commercial Division of the Supreme Court (22 NYCRR 202.70), required the court to deem defendants' statement of material facts admitted. While the rule gives a motion court the discretion to deem facts admitted, the court is not required to do so. There was sufficient evidence in the record to raise triable issues of fact and the court was not

compelled to grant summary judgment solely on the basis of blind adherence to the procedure set forth in Rule 19-a. *Moonstone Judge, LLC v Shainwald* (38 AD3d 215 [2007]) is not to the contrary. In *Moonstone*, we affirmed the lower court's grant of summary judgment where the defendant, in opposition to the motion, had failed to serve and file a responsive statement as required by Rule 19-a, concluding that there was no reason to disturb the court's exercise of discretion in deeming the unopposed statements admitted. We did not hold that Rule 19-a must be applied in the absolute and that the court does not have discretion to excuse noncompliance, but simply that there was no basis to disturb the court's application of the rule in that instance.

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

ENTERED: JANUARY 7, 2010

DEPUTY CLERK

Gonzalez, P.J., Mazzarelli, Buckley, Renwick, Abdus-Salaam, JJ.

671 In re Nikeerah S.,

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

Barbara S.,
Respondent-Appellant,

Hale House Center, Inc.,
Petitioner-Respondent.

Steven N. Feinman, White Plains, for appellant.

Law Office of Alayne Katz, P.C., Irvington (Dana Forster-Navins of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Dawn O'Brien-Gans of counsel), and Proskauer Rose LLP, New York (William H. Weisman of counsel), Law Guardian.

Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about October 2, 2007, which, upon a fact-finding of permanent neglect, terminated respondent mother's parental rights and transferred custody and guardianship of the subject child to petitioner for the purpose of adoption, unanimously affirmed, without costs.

Any failure to assign counsel for the fact-finding hearing was occasioned solely by the mother's persistent decision to absent herself from the proceedings, despite being given several opportunities to appear and despite actual knowledge of every

scheduled court date (*see Matter of Starasia C.*, 18 AD3d 213 [2005], *appeal dismissed* 5 NY3d 824 [2005]; *Matter of Joshua K.*, 272 AD2d 160 [2000], *appeal dismissed* 95 NY2d 959 [2000]; *Matter of Amy Lee P.*, 245 AD2d 1136 [1997]).

When the mother subsequently appeared for the dispositional hearing, counsel was appointed; the decision not to seek vacatur of the fact-finding determination did not constitute ineffective assistance of counsel, since the mother lacked either a reasonable excuse for her default or a meritorious defense (*see Matter of "Male" Jones*, 128 AD2d 403 [1987]).

Family Court properly determined that the best interests of the child would be served by termination of parental rights, rather than a suspended judgment (*see Matter of Albert E.*, 259 AD2d 315 [1999]).

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

ENTERED: JANUARY 7, 2010

Gonzalez, P.J., Friedman, McGuire, DeGrasse, Manzanet-Daniels, JJ.

1726N Marjorie Lang, Index 104544/05
Plaintiff-Respondent,

-against-

Noble Parking, LLC, et al.,
Defendants-Appellants.

An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Milton A. Tingling, J.), entered on or about April 22, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated December 17, 2009,

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

ENTERED: JANUARY 7, 2010

DEPUTY CLERK

Andrias, J.P., Sweeny, Nardelli, Catterson, DeGrasse JJ.

1527 Jose Ricardo Aguaiza, et al., Index 105197/08
Plaintiffs-Respondents-Appellants,

-against-

Vantage Properties, LLC, et al.,
Defendants-Appellants-Respondents,

Neil Rubler, et al.,
Defendants.

Gibson, Dunn & Crutcher LLP, New York (Mitchell A. Karlan of counsel), for appellants-respondents.

Robert McCreanor, Sunnyside, for respondents-appellants.

Order, Supreme Court, New York County (Martin Shulman, J.), entered on May 26, 2009, granting defendants' motion to dismiss the amended complaint to the extent of dismissing the first cause of action against all defendants and the second cause of action only with respect to the individual defendants, unanimously modified, on the law, the local statute governing the second cause of action held to have only prospective application, the matter remanded for reconsideration as to which claims, if any, fall within the effective date of that statute with respect to the corporate defendants, and otherwise affirmed, without costs.

Plaintiff's allegations of unlawfully deceptive acts and practices under General Business Law § 349 presented only private disputes between landlords and tenants, and not consumer-oriented

conduct aimed at the public at large, as required by the statute (*see City of New York v Smokes-Spirits.Com, Inc.*, 12 NY3d 616, 621 [2009]). Accordingly, this claim was properly dismissed and it is unnecessary to address the parties' other contentions with respect thereto.

The second cause of action alleged violation of Local Law 7 of 2008, which protects residential tenants from harassment by building owners (NYC Administrative Code § 27-2005[d]). This enactment created a new cause of action (see § 27-2115[h]) to address a perceived effort by landlords to empty rent-regulated apartments by harassing tenants into giving up their occupancy rights, using such tactics as "commencing repeated baseless or frivolous court proceedings" against those tenants (§ 27-2004[a][48][d]). Although the statute is remedial in nature, it specifically provides that its terms are to take effect "immediately" (i.e., March 13, 2008, the date of its enactment). No provision was made in the statute for retroactive application of its terms.

The motion court improperly applied the provisions of Local Law 7 retroactively with respect to the corporate defendants. As a matter of statutory interpretation, "[w]here a statute by its terms directs that it is to take effect immediately, it does not

have any retroactive operation or effect" (McKinney's Cons Laws of NY, Book 1, Statutes § 51[b]; *State of New York v Daicel Chem. Indus., Ltd.*, 42 AD3d 301, 302 [2007]; *Morales v Gross*, 230 AD2d 7, 10 [1997]; *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577 [1998]). Indeed, it has long been a primary rule of statutory construction that a new statute is to be applied prospectively, and will not be given retroactive construction unless an intention to make it so can be deduced from its wording. As Judge Cardozo put it, "It takes a clear expression of the legislative purpose to justify a retroactive application" (*Jacobus v Colgate*, 217 NY 235, 240 [1916]).

Although remedial statutes such as Local Law 7 generally constitute an exception to the general rule that statutes are not to be given retroactive construction, this exception is limited to the extent that any retroactive application must not impair vested rights (McKinney's Cons Laws of NY, Book 1, Statutes § 54[a]; *Dorfman v Leidner*, 150 AD2d 935, 936 [1989], *affd* 76 NY2d 956 [1990]). Stated differently, "every statute pertaining to a remedy is retroactive in that it operates upon all pending actions unless they are expressly excepted, but this does not apply to a statute whereby a new right is established even though

it be remedial" (§ 54[a]; *see Matter of Duell v Condon*, 84 NY2d 773, 783 [1995]). For example, a remedial statute is applied to procedural steps in pending actions, and is given retroactive effect only insofar as the statute provides for a change in the form of the remedy or a new remedy or cause of action for an existing wrong (*Shielcrawt v Moffett*, 294 NY 180, 188 [1945]).

Here, the wording of the statute is clear with respect to the timing of its effective date. "Immediately" is a term in statutory construction with a precise meaning. Moreover, as Local Law 7 specifically created a new right of action that did not exist prior to its enactment, it should be applied prospectively only (*see Matter of Hays v Ward*, 179 AD2d 427, 428-429 [1992], *lv denied* 80 NY2d 754 [1992]).

The matter must thus be remanded to determine which aspects of the second cause of action, if any, remain active under this analysis.

The motion court correctly noted that nothing in Local Law 7 prohibits "joint" claims by a group of tenants, as an alternative to pleading repeated wrongful conduct against an individual (*see* Administrative Code § 27-2120[b]).

Plaintiffs' claimed need for discovery with respect to the individual defendants is unavailing in the absence of allegations that those defendants were de facto owners of the corporate

landlord entities (*see Matias v Mondo Props. LLC*, 43 AD3d 367 [2007]) or participated in tortious conduct (*see Peguero v 601 Realty Corp.*, 58 AD3d 556, 559 [2009]). The Local Law 7 claims against them were properly dismissed.

M-4759 ***Jose Ricardo Aguaiza, et al. v Vantage Properties, LLC, et al.***

Motion seeking leave to reargue and for other related relief denied.

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

ENTERED: JANUARY 7, 2010

DEPUTY CLERK

Friedman, J.P., McGuire, Renwick, Richter, Manzanet-Daniels, JJ.

1542 Brown Harris Stevens on Site Marketing and Sales, LLC,
Plaintiff-Appellant,

-against-

One York Property, LLC,
Defendant-Respondent.

Index 108648/08

Penn Proefriedt Schwarzfeld & Schwartz, New York (Neal Schwarzfeld of counsel), for appellant.

Ganfer & Shore, LLP, New York (Steven J. Shore of counsel), for respondent.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered July 17, 2009, which, to the extent appealed from, denied plaintiff's motion for summary judgment with respect to the measure of damages to be awarded on its claim for the balance of an unpaid brokerage commission, unanimously affirmed, without costs.

Plaintiff established its entitlement to the commission from the sale of apartment 6G at 1 York Street in Manhattan because the parties' sales agency agreement is a divisible contract consisting of several distinct and separate items (*see Chiarizia v Xtreme Rydz Custom Cycles*, 43 AD3d 1353, 1354 [2007]). Although there is no legitimate question as to the amount of the commission plaintiff should be paid for the apartment sale,

plaintiff should be denied summary judgment because defendants have counterclaims for an amount equal to or greater than the amount demanded in the complaint *(see Stack Elec. v DiNardi Constr. Corp.*, 161 AD2d 416, 417-418 [1990]; *see also Pronti v Grigoriou*, 49 AD3d 1135 [2008], *quoting Illinois McGraw Elec. Co. v John J. Walters, Inc.*, 7 NY2d 874, 876-877 [1959]).

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

ENTERED: JANUARY 7, 2010

Mazzarelli, J.P., Friedman, Nardelli, Renwick, Román, JJ.

1938 The People of the State of New York, Ind. 5454/07
Respondent,

-against-

Robert Birch,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (David P. Stromes of counsel), for respondent.

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J), rendered August 7, 2008, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony offender, to a term of 4 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. The evidence provided a satisfactory explanation for the fact that two officers made different observations, and defendant's arguments to the contrary are without merit.

The court properly exercised its discretion in admitting evidence that, earlier in the evening of the charged sale, the observing officer saw defendant make what appeared to be a drug

sale to an unapprehended buyer. This evidence completed the narrative and its probative value outweighed its prejudicial effect (*see e.g. People v Urena*, 306 AD2d 137 [2003]), *lv denied* 100 NY2d 625 [2003]). While the court should have provided a limiting instruction regarding the uncharged crime, we find, to the extent the claim is preserved, that any error is harmless.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 7, 2010

Mazzarelli, J.P., Friedman, Nardelli, Renwick, Román, JJ.

1939 Billy Blake, Index 18697/07
Plaintiff-Respondent,

-against-

Portexit Corp., et al.,
Defendants-Appellants.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for appellants.

Stillman & Stillman, P.C., Bronx (Robert A. Birnbaum of counsel), for respondent.

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered May 19, 2009, which denied defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to grant the motion as to plaintiff's knee injury and 90/180-day claim, and otherwise affirmed, without costs.

Defendants satisfied their initial burden on summary judgment by establishing, prima facie, with the submission of the medical reports of their expert neurologist, orthopedist and radiologist, that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d). Defendants set forth objective tests supporting their claim that plaintiff suffered no limitation in range of motion.

Plaintiff, in response, raised a triable issue of fact as to whether he suffered a significant or permanent consequential

limitation of use of his spine. His chiropractor "identified measurements of loss of range of motion in plaintiff's cervical and lumbar spine, and on that predicate opined that plaintiff suffered severe and permanent injuries as a result of the accident" (*Pommells v Perez*, 4 NY3d 566, 577 [2005]. The chiropractor adequately related plaintiff's spinal injuries to the accident.

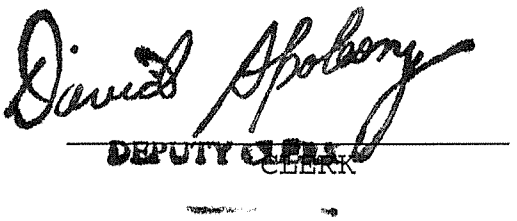
However, plaintiff failed to raise a triable issue of fact as to whether his knee injury constituted a serious injury pursuant to Insurance Law 5102(d) (*see Antonio v Gear Trans Corp.*, 65 AD3d 869, 870 [2009]; *see also DeJesus v Paulino*, 61 AD3d 605, 608 [2009]).

Plaintiff also failed to raise a triable issue of fact as to his 90/180-day claim. The fact that he missed more than 90 days of work is not determinative (*see e.g. Ortiz v Ash Leasing, Inc.*, 63 AD3d 556, 557 [2009]); the statute requires plaintiff to be prevented "from performing *substantially all* of the material acts which constitute [his] usual and customary daily activities" (Insurance Law § 5102[d] [emphasis added]). Plaintiff's chiropractor's affidavit, which said that plaintiff was "totally disabled," was too general to raise an issue of fact (*see Valentin v Pomilla*, 59 AD3d 184, 186-187 [2009]; *see also Antonio*, 65 AD3d at 869-870), and the chiropractor's advice not

to lift anything heavy, also fails to create an issue of fact (*see Onishi v N & B Taxi, Inc.*, 51 AD3d 594, 595 [2008]; *Gorden v Tribulcio*, 50 AD3d 460, 463 [2008]). Even if one reads plaintiff's affidavit to say that for the first six months after the accident, he could not play sports with his children and had difficulty walking, going up stairs, and getting into cars, it does not raise a triable issue of fact because plaintiff's statement is unsupported by medical evidence (*see e.g. Pinkhasov v Weaver*, 57 AD3d 334, 335 [2008]) and because the activities listed therein do not constitute substantially all of his activities (*see Gibbs v Hee Hong*, 63 AD3d 559, 560 [2009]).

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

ENTERED: JANUARY 7, 2010



Mazzarelli, J.P., Friedman, Nardelli, Renwick, Román, JJ.

1941 Fron Nahzi, etc., Index 112000/06
Plaintiff-Respondent,

-against-

Gerald Lieblich, et al.,
Defendants-Appellants.

Peter J. Pruzan, New York, for appellants.

Roy A. McKenzie, New York, for respondent.

Appeal from order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered January 7, 2009, which, in an action by a minority shareholder against the majority shareholder and the corporation to recover a share of the proceeds realized on the sale of the corporation's real property, after the granting of summary judgment in plaintiff's favor on the issue of liability, inter alia, confirmed a Special Referee's report recommending an award in the principal amount of $466,982.89, with interest from April 14, 2005, deemed an appeal from the judgment entered January 27, 2009, and, so considered, unanimously affirmed, with costs.

Plaintiff made a prima facie showing of entitlement to judgment with proof of the sale of the corporation's real property, and a stock certificate showing his 25% interest in the corporation and bearing no endorsements that might indicate a

transfer of the shares to another person or back to the corporation. Defendants acknowledged that they sold the real property in April 2005 without compensating plaintiff, but asserted that they purchased a cooperative apartment for plaintiff in full consideration of his interest in the corporation. Defendants, however, produced no evidence, such as corporate books and records or a cancelled stock certificate, tending to show that plaintiff's interest in the corporation had been transferred or that the apartment purchase was in consideration of plaintiff's interest in the corporation. Defendants also asserted that they were continuing to search for records concerning the apartment transaction and needed further disclosure, and that plaintiff should be required to produce his own records. Plaintiff acknowledged that he purchased the apartment with borrowed money, but that the loan was made by a third person and had no connection with his interest in the corporation. We hold that it was not plaintiff's burden to show that there was no such connection, but rather defendants' burden to adduce evidentiary facts in admissible form showing that there was such a connection (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and find that defendants failed to offer anything other than mere hope that evidence favorable to their claim of such a connection might be obtained if additional

disclosure were had (*see Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [2009]).

With respect to the calculation of damages, assuming, as defendants argue, that the calculation should have included the expenses of operating the property, as well as the expenses of the sale itself that the Special Referee was directed to consider, nevertheless, as the court correctly found in confirming the Special Referee's report, defendants' did not provide any evidence of the claimed operating expenses. Their unsworn list of expenses does not qualify as evidentiary material.

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

ENTERED: JANUARY 7, 2010

Mazzarelli, J.P., Friedman, Nardelli, Renwick, Román, JJ.

1942 Denise Karas-Abraham, Index 30661/03
Plaintiff-Respondent,

-against-

Gideon Abraham,
Defendant-Appellant.

The Penichet Firm, P.C., White Plains (Fred L. Shapiro of counsel), for appellant.

Berkman Bottger & Rodd, LLP, New York (Walter F. Bottger of counsel), for respondent.

Judgment, Supreme Court, New York County (Marilyn B. Dershowitz, Special Referee), entered April 17, 2008, inter alia, distributing the parties' marital assets and awarding maintenance, support and counsel fees, unanimously modified, on the law and the facts, to vacate the award to plaintiff of the amount of appreciation of the marital residence and remand that issue for determination by the Special Referee in accordance herewith, and to insert, in the fourth decretal paragraph, after the words "the additional amount specified below," a comma and the following: "and that plaintiff is responsible for the capital gains taxes on her share of the proceeds," and otherwise affirmed, without costs.

The award of four years' maintenance and the amount of child support were properly premised on the imputation of income to

defendant based on the report of the neutral forensic accountants and the referee's credibility findings (*see Gering v Tavano*, 50 AD3d 299, 300 [2008], *lv denied* 11 NY3d 707 [2008]). It is clear that defendant was the monied spouse who had been hiding income through his family's companies, his own business in which he was the sole shareholder, and illusory undocumented loans that he used to support a standard of living that would have been impossible to maintain on the income he claimed in the divorce proceeding and on his personal income tax returns (*see Fabrikant v Fabrikant*, 62 AD3d 585 [2009]). The referee properly considered plaintiff's ability to be self-supporting and the parties' standard of living in determining the duration and amount of maintenance (*see Costa v Costa*, 46 AD3d 495, 497 [2007]), which was further justified by defendant's lack of candor with respect to his income (*see Acosta v Acosta*, 301 AD2d 467 [2003], *lv denied* 100 NY2d 504 [2003]). The amount of support was also properly based on the parties' life style, the custodial parent's financial resources and the needs of the children (*see Winter v Winter*, 50 AD3d 431, 432 [2008]).

Plaintiff was properly awarded half the proceeds from the sale of the cooperative apartment upstairs from the marital residence, which amounted to more than $600,000, rather than solely her contribution of about $43,000 to its purchase. Upon

our review of the record, we reject defendant's contention that this marriage was not an economic partnership, certain deviations from the norm notwithstanding. However, plaintiff is not absolved of her responsibility for capital gains taxes on her share of the proceeds merely because the stipulation with respect to the sale proceeds did not provide for the allocation between the parties of capital gains taxes and the court had declined to direct her to pay such taxes pendente lite, especially since defendant was held responsible for all of the other expenses paid out of the escrowed proceeds. Notably, plaintiff's objection is based only on these procedural grounds, not on any claim of substantive fairness because of the disparate economic status of the parties.

Plaintiff was properly awarded expenses for the New Jersey residence to which she and the children had moved. The only reasons that the court had denied her earlier request to have defendant pay these housing costs were that the trial was imminent and that plaintiff had failed to document her claim that her mother had paid for the house with the understanding that plaintiff would pay the carrying charges until she was able to buy it. Neither of these reasons remained viable after plaintiff documented her claim at trial. Defendant had been previously obligated to pay carrying charges on the marital residence, and

the New Jersey home was functioning as the marital residence. We reject defendant's procedural claim that, by including the New Jersey housing costs in the judgment, the referee improperly modified her decision since it did not mention such costs; procedure is more flexible in nonjury matters.

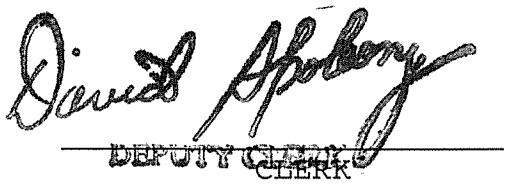
The counsel fee award was proper (*see Johnson v Chapin*, 12 NY3d 461, 467 [2009]). Defendant failed to object to any specific charge, and, in any event, upon our own review, we find the amount appropriate under the circumstances (*see Costa v Costa*, 46 AD3d 495, 497-498 [2007], *supra*).

The referee should not have awarded plaintiff all of the appreciation of the marital residence, since she failed to carry her burden to demonstrate the amount of the increase in value that was the result of her contributions to the renovations and not of market forces (*see Warner v Houghton*, 43 AD3d 376, 380-381 [2007], *affd on other grounds* 10 NY3d 913 [2008]; *Naimollah v De Ugarte*, 18 AD3d 268, 271 [2005]). Contrary to plaintiff's contention, *Ritz v Ritz* (21 AD3d 267 [2005]) does not shift the burden to the party asserting that the property is separate to show the effect of market forces.

We have considered defendant's other contentions, including those regarding the conduct of the special referee, and find them unavailing.

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

ENTERED: JANUARY 7, 2010



DEPUTY CLERK

Mazzarelli, J.P., Friedman, Nardelli, Renwick, Román, JJ.

1943 The People of the State of New York, Ind. 761/07
Respondent,

-against-

Darryl Coleman,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered May 2, 2008, convicting defendant, after a jury trial, of manslaughter in the second degree, and sentencing him to a term of 5 to 15 years, unanimously affirmed.

The court properly excluded hearsay evidence offered by defendant, since it was not admissible either as a declaration against penal interest or pursuant to defendant's right to present a defense. Shortly after the crime, defendant's then-girlfriend made a videotaped statement to the police and the prosecutor. This statement initially tended to support defendant's justification defense, but the later portion of the statement expressly contradicted the earlier portion and tended to disprove such a defense. The declarant also admitted that she kicked the victim during the incident.

The declarant was arrested for murder but never indicted, and at the time of defendant's trial, more than a year later, the felony complaint against the declarant was still pending. Defendant sought to introduce the videotaped statement at trial, claiming that the declarant was unavailable both because he could not locate her, and because the attorney representing her in her own case had stated that she would invoke her right against self-incrimination.

The court properly concluded that defendant had not established the declarant's unavailability. Defendant did not make sufficient efforts to locate the declarant, given that she had been regularly making court appearances on her own case, and that defendant declined the court's offer to sign a subpoena or material witness order. With regard to the declarant's Fifth Amendment privilege, the prosecutor suggested that questioning be structured to avoid any self-incrimination problem, but conceded that if the declarant appeared in court and the Fifth Amendment problem could not be avoided, he would dismiss the case against her. Therefore, the declarant's attorney's statement that the declarant would invoke her privilege was not dispositive, because it was made before the prosecutor offered to dismiss the complaint; under the circumstances, the declarant's availability

could not be determined unless she appeared (*cf. People v Savinon*, 100 NY2d 192, 199, n 7 [2003]).

The court also correctly concluded that the statement was highly unreliable, for a number of reasons. Among other things, the declarant contradicted herself, her statement was contradicted by other evidence including medical evidence relating to the victim's injuries, she appeared on the videotape to be under the influence of drugs, and she admitted that critical portions of her statement supporting defendant's justification defense were not based on personal knowledge.

Accordingly, the declarant was not unavailable, and her statement was not reliable. For each of these reasons, the statement failed to qualify for admission as a declaration against penal interest (*see People v Settles*, 46 NY2d 154, 167-170 [1978]), and there was also no violation of defendant's constitutional right to present a defense (*see Chambers v Mississippi*, 410 US 284 [1973]; *People v Robinson*, 89 NY2d 648, 654 [1997]; *People v Burns*, 18 AD3d 397 [2005], *affd* 6 NY3d 793 [2006]).

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 7, 2010

Mazzarelli, J.P., Friedman, Nardelli, Renwick, Román, JJ.

1945 Maxine B. Sanders, Index 13400/06
Plaintiff-Respondent,

-against-

Morris Heights Mews Associates, et al.,
Defendants-Appellants.

Gannon, Rosenfarb & Moskowitz, New York (Jennifer B. Ettenger of counsel), for appellants.

Kelner and Kelner, New York (Gail S. Kelner of counsel), for respondent.

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered October 16, 2008, which denied defendants' motion for summary judgment, unanimously affirmed, without costs.

Plaintiff was injured in a stairway slip and fall in defendants' building after the handrail gave way. Defendants met their burden with respect to the alleged slipperiness of the steps. Plaintiff testified that her right foot slipped, but did not indicate any substance that might have caused the slip. This is no more specific than alleging the stairs were slippery due to smoothness, which is not an actionable defect (*Sarmiento v C & E Assoc.*, 40 AD3d 524, 527 [2007]).

Plaintiff's argument that defendants created the condition by painting the stairs with enamel paint was made for the first time in opposition to the motion, and was based solely on the

affidavit of her expert who surmised that this was the cause of her slip and fall. That affidavit was insufficient to raise an issue of fact, as it indicated the expert examined "the stairway" without addressing the particular step on which plaintiff slipped (*see Murphy v Conner*, 84 NY2d 969 [1994]; *Sarmiento*, 40 AD3d at 526-527). It also failed to reference a specific standard by asserting a minimum acceptable coefficient of friction (*see id.* at 526; *Jenkins v New York City Hous. Auth.*, 11 AD3d 358, 360 [2004]). For these reasons, plaintiff also failed to raise an issue of fact as to whether defendants violated New York City Administrative Code § 27-375(h) in applying enamel over the rubber treads.

Nevertheless, defendants failed to meet their burden of eliminating the factual issue as to whether they breached their duty to inspect the handrail, which was designed to be fastened with screws underneath to wall brackets, thus constituting "an object capable of deteriorating [that] is concealed from view" (*Hayes v Riverbend Hous. Co., Inc.*, 40 AD3d 500, 501 [2007], *lv denied* 9 NY3d 809 [2007]). Their witness admitted that defendants had no regular program for inspecting the handrail (*see Peters v Trammell Crow Co.*, 47 AD3d 419, 420 [2008]), and that the only inspection was conducted by the U.S. Department of Housing and Urban Development every two years. Even assuming

defendants can rely on this biennial inspection, this creates an issue of fact as to whether inspecting the handrail once every two years is reasonable (*see Hayes*, 40 AD3d at 501).

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

ENTERED: JANUARY 7, 2010

Mazzarelli, J.P., Friedman, Nardelli, Renwick, Román, JJ.

1946 The People of the State of New York, Ind. 5231/06
Respondent,

-against-

Ralph Santiago,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (David M. Cohn 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 (Rena K. Uviller, J.), rendered on or about January 23, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTERED: JANUARY 7, 2010

DEPUTY CLERK

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

Mazzarelli, J.P., Friedman, Nardelli, Renwick, Román, JJ.

1947 Patricia A. White, Index 8248/07
Plaintiff-Respondent,

-against-

Spectacular Limousine Service, Inc., et al.,
Defendants,

Marybeth Andrews,
Defendant-Appellant.

O'Connor, McGuinness, Conte, Doyle & Oleson, White Plains (Montgomery L. Effinger of counsel), for appellant.

Kerner & Kerner, New York (Kenneth T. Kerner of counsel), for respondent.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered on or about May 18, 2009, which denied defendant-appellant Andrews's motion for summary judgment dismissing the complaint as against her, unanimously reversed, on the law, without costs, the motion granted and the complaint dismissed as against Andrews. The Clerk is directed to enter judgment accordingly.

In support of her motion, Andrews showed that the vehicle in which plaintiff was a passenger first hit and bounced off the vehicle in front of it, and then hit and bounced off the highway's concrete barrier, before making contact with Andrews's vehicle, and that neither the driver of plaintiff's vehicle, nor

plaintiff herself, ever stated during their depositions that Andrews contributed to the accident in any way. This was sufficient to show, prima facie, that Andrews was faced with an emergency situation not of her own making, and was not at fault for the accident (*see Ward v Cox*, 38 AD3d 313, 314 [2007]). In opposition, plaintiff argued that Andrews was negligent in failing to signal prior to changing lanes, referring to the portion of Andrews's deposition in which she stated that when she observed plaintiff's vehicle in her rearview mirror swerving and fish-tailing down the ramp on her right at about 70 miles per hour, she immediately moved from the middle lane into the left lane, without signaling, in order to get out of the way. Plaintiff's driver, however, never stated at his deposition that he attempted to avoid striking Andrews but was unable to do so because she changed lanes without signaling. Thus, any failure to signal was not a proximate cause of the accident. We have considered plaintiff's other arguments and find them without merit.

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

ENTERED: JANUARY 7, 2010

CLERK

DEPUTY CLERK

Mazzarelli, J.P., Friedman, Nardelli, Renwick, Román, JJ.

1950 The People of the State of New York, Ind. 3509/07
Respondent,

-against-

Giovanny Sanchez,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (John B.F. Martin of counsel), for respondent.

Judgment, Supreme Court, New York County (John Cataldo, J.), rendered June 5, 2008, convicting defendant, after a jury trial, of rape in the second degree, and sentencing him to a term of 3 years, unanimously affirmed.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. The element of penetration was satisfied by the victim's testimony that she felt defendant's penis inside her vagina. The evidence that defendant claims to negate penetration is actually consistent with at least slight or partial penetration, which is all the law requires (*see* Penal Law § 130.00 [1]; *People v Williams*, 259 AD2d 509 [1999], *lv denied* 93 NY2d 1007 [1999]).

The court's refusal to read back cross-examination testimony impeaching certain direct testimony requested by the jury did not seriously prejudice defendant, and does not require reversal (*see People v Agosto*, 73 NY2d 963, 966 [1987]). The brief cross-examination at issue was cumulative to other information that the jury requested and received during deliberations.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 7, 2010

Friedman, J.P., Nardelli, Renwick, Román, JJ.

1951 D & L Associates, Inc., Index 102477/04
Plaintiff-Appellant,

-against-

New York City School Construction Authority,
Defendant-Respondent.

Peckar & Abramson, P.C., New York (Charles E. Williams, III of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Julie Steiner of counsel), for respondent.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered October 15, 2008, which, in an action for breach of contract, granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Certificates of Substantial Completion were executed more than three months prior to plaintiff contractor's filing its notice of claim for three of the four contracts on which it sought to recover. Such Certificates fixed the date on which damages were ascertainable, and therefore when plaintiff's claim accrued (*see C.S.A. Contr. Corp. v New York City School Constr. Auth.*, 5 NY3d 189, 192 [2005]; *Koren-DiResta Constr. Co., Inc. v New York City School Const. Auth.*, 293 AD2d 189, 191-192 [2002]). Accordingly, since three of plaintiff's contract claims accrued

more than three months before the notice of claim is dated, they are barred by the late filing of the notice of claim.

Plaintiff's fourth contract claim is also time-barred as beyond the one-year statute of limitations set forth in Public Authorities Law § 1744(2). Given that plaintiff's September 2002 notice of claim alleged that defendant breached the contract, it triggered the running of the one-year statute of limitations (*Koren-DiResta Constr. Co.*, 293 AD2d at 192), irrespective of whether or not plaintiff knew the precise amount of damages, or even if no damages occur until later (*see Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993]).

We decline to consider plaintiff's arguments relying on Lien Law article 3-A, which are improperly raised for the first time on appeal (*see D.A.G. Floors, Inc. v St. Paul Mercury Ins. Co.*, 35 AD3d 207 [2006]). Were we to consider these arguments, we would find them unavailing. The fact that defendant may have paid plaintiff's subcontractors after the dates of substantial completion and that plaintiff was acting as a statutory trustee for the benefit of the subcontractors did not create a

circumstance that made it impossible to ascertain the magnitude of the claim. The fact remains that damages were ascertainable when the work was substantially complete.

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

ENTERED: JANUARY 7, 2010

Mazzarelli, J.P., Friedman, Nardelli, Renwick, Román, JJ.

1953 Luis Alfaro, et al., Index 109673/05
Plaintiff-Respondents,

-against-

Vardaris Tech, Inc., etc., et al.,
Defendants-Appellants,

John Doe Bonding Company,
Defendant.

Thomas D. Czik, Roslyn, for Vardaris Tech, Inc. and Elias Rizo, appellants.

McElroy, Deutsch, Mullvaney & Carpenter, LLP, New York (Adam R. Schwartz of counsel), for National Grange Mutual Insurance Company, appellant.

Virginia & Ambinder, LLP, New York (James Emmet Murphy of counsel), for respondents.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered March 16, 2009, which, to the extent appealed from, denied the cross motions by defendants Vardaris Tech/Rizo and National Grange for partial summary judgment to enforce the opt-out letters of class members, vacated the opt-out letters and affidavits of workers, and made certain findings of unrefuted facts, unanimously modified, on the law, the factual findings vacated, and otherwise affirmed, without costs.

The court did not abuse its discretion in denying partial summary judgment seeking to enforce the opt-out letters and in

vacating the opt-out letters in light of the record evidence, which resulted in the inescapable inference that defendants drafted the letters and affidavits, and sent them to potential class members for the purpose of soliciting them to exclude themselves from the class (*see Kleiner v First Natl. Bank of Atlanta*, 751 F2d 1193, 1202-1203 [11th Cir 1985]; *Wang v Chinese Daily News*, 236 FRD 485, 487-489 [CD Cal 2006]; *Impervious Paint Indus. v Ashland Oil*, 508 F Supp 720 [WD Ky 1981], *appeal dismissed* 659 F2d 1081 [6th Cir 1981]).

In the section of the order entitled "Unrefuted Facts," the court made, among other things, the following factual findings: (1) the Quick Report for Guzman reflected the hours he worked; (2) the Payroll Reports under-reported the number of hours Guzman actually worked, and overstated the amount he was paid; (3) Vardaris never paid Guzman in cash or in any other manner to make up the difference between what they said they paid him on the Payroll Reports and what his paychecks and the Quick Reports reflected; and (4) the Payroll Reports, as compared to the Quick Reports, also demonstrated underpayments to some additional workers. These factual findings, made pursuant to CPLR 3212(g), aggrieved defendants and thus gave them standing to appeal (*cf. Buller v Giorno*, 40 AD3d 316 [2007]). The court erred in making

these factual findings because the record evidence reveals that issues of fact remain with respect to each of them.

M-5517 ***Luis Alfaro, et al. v Vardaris Tech, Inc., etc., et al.***

Motion seeking stay denied.

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

ENTERED: JANUARY 7, 2010

Mazzarelli, J.P., Friedman, Nardelli, Renwick, Román, JJ.

1954 In re Shaianna Mae F.,

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

Tsipora S.,
Respondent-Appellant,

The Salvation Army Social Services of
Greater New York,
Petitioner-Respondent.

Randall S. Carmel, Syosset, for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (John A. Newbery of counsel), Law Guardian.

Order, Family Court, New York County (Sara Schechter, J. at fact-finding; Karen Lupuloff, J. at disposition), entered on or about November 26, 2008, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child and committed custody and guardianship of the child to petitioner agency and the Commissioner of Administration for Children's 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]). The record demonstrates that the agency made diligent efforts to

encourage and strengthen the parental relationship, including, inter alia, the arrangement of frequent visitation with the child, the referral for individual and group domestic violence therapy sessions, consultation and cooperation with respondent in an attempt to develop a plan for appropriate services for the child, and the provision of counseling services (*see Matter of Imani Elizabeth W.*, 56 AD3d 318 [2008]). Despite these diligent efforts, respondent failed to adequately address the problems that led to the removal of her daughter (see *Matter of Wilfredo A.M.*, 56 AD3d 338 [2008]; *Matter of Tashona Sharmaine A.*, 24 AD3d 135 [2005], *lv denied* 6 NY3d 715 [2006]). Her sporadic and superficial attendance at therapy sessions aimed at addressing her problem with anger management and the dangers created by her relationship with the child's abusive father does not permit a finding that she planned for her child's return (see *Matter of Nathaniel T.*, 67 NY2d 838, 841-842 [1986]; *Matter of Violeta P.*, 45 AD3d 352 [2007]).

A preponderance of the evidence supports the determination that termination of parental rights to facilitate the adoptive process is in the best interests of the child, who is in a stable

and caring environment provided by a foster mother who wishes to adopt her (*see Violeta P.*, 45 AD3d at 353).

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

ENTERED: JANUARY 7, 2010

Mazzarelli, J.P., Friedman, Nardelli, Renwick, Román, JJ.

1955 Wade Cox, et al., Index 109681/07
Plaintiffs-Appellants,

-against-

Subway Surface Supervisors Association, et al.,
Defendants-Respondents.

Schwartz, Lichten & Bright, P.C., New York (Arthur Z. Schwartz of counsel), for appellants.

Stuart Salles, New York, for Subway Surface Supervisors Association, respondent.

Office of the General Counsel, Brooklyn (Francine E. Menaker of counsel), for New York City Transit Authority, respondent.

Order, Supreme Court, New York County (Donna M. Mills, J.), entered July 23, 2008, which granted defendants' motions to dismiss the complaint and directed the entry of judgment in their favor, unanimously affirmed, without costs.

Plaintiffs failed to state a claim for breach of the duty of fair representation against defendant Association. At the time defendants negotiated and ratified the collective bargaining agreement at issue, plaintiffs were employed as console dispatchers in defendant Transit Authority's Rail Command Center. It is uncontested that they were neither members of, nor represented by, the Association's bargaining unit, so the

Association owed them no duty of fair representation. Even were such a duty owed, the Association did not act arbitrarily, capriciously or in bad faith by protecting the "pick seniority" of its current members (*see Matter of Civil Serv. Bar Assn., Local 237, Intl. Brotherhood of Teamsters v City of New York*, 64 NY2d 188, 195-196 [1984]; *Matter of Higgins v La Paglia*, 281 AD2d 679, 681 [2001], *appeal dismissed* 96 NY2d 854 [2001]).

The claim against the Transit Authority, which is in the nature of mandamus, is untimely and fails to assert a clear legal right to the relief requested (*see Matter of Powers v City of New York*, 262 AD2d 246 [1999], *lv denied* 94 NY2d 751 [1999]). In any event, since there was no breach of duty by the Association, the claim that the Transit Authority was in complicity with that breach must fail.

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

ENTERED: JANUARY 7, 2010

Mazzarelli, J.P., Friedman, Nardelli, Renwick, Román, JJ.

1956 The People of the State of New York, Ind. 6869/06
Respondent,

-against-

Beverly Frazier,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Sylvia Wertheimer 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 (Laura Ward, J.), rendered on or about June 26, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTERED: JANUARY 7, 2010

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

Mazzarelli, J.P., Friedman, Nardelli, Renwick, Román, JJ.

1957N Edgewater Growth Capital Partners, L.P., et al., Plaintiffs-Appellants, Index 108641/08

-against-

Greenstar North America Holdings, Inc., Defendant-Respondent.

Sonnenschein Nath & Rosenthal LLP, New York (David R. Baum of counsel), for appellants.

Locke Lord Bissell & Liddell LLP, New York (Jay G. Safer of counsel), for respondent.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered April 16, 2009, which, in an action relating to the purchase and sale of capital stock, granted defendant's motion to compel arbitration and stay litigation, unanimously affirmed, with costs.

"In deciding an application to compel arbitration pursuant to CPLR 7503(a), the court is required to first make a determination whether the parties have entered into a valid arbitration agreement and, if so, whether the issue sought to be submitted to arbitration falls within the scope of that agreement" (*Koob v IDS Fin. Servs.*, 213 AD2d 26, 30 [1995] [internal quotation marks and citations omitted]). Here, the motion court properly found that the unambiguous language of

Section 2.6(d) of the Purchase Agreement constituted a broad arbitration clause and required arbitration if defendant "believe[d]" it was entitled to monies under the China Damages Claim because the Supply Agreement materially differed from the Letter of Intent or that the Supply Agreement was not entered into in a timely manner. The claims brought by defendant fit within the scope of the damages contemplated by Section 2.6(d) and thus, are enforceable. Furthermore, contrary to plaintiffs' contention, the existence of a general jurisdiction provision in the Purchase Agreement does not warrant a different determination (*see Isaacs v Westchester Wood Works*, 278 AD2d 184 [2000]).

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

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

ENTERED: JANUARY 7, 2010

Mazzarelli, J.P., Friedman, Nardelli, Renwick, Román, JJ.

1958N Jelica Tatalovic, Index 102297/06
Plaintiff-Respondent,

-against-

Nightlife Enterprises, L.P., et al.,
Defendants-Appellants,

The Estate of Michael N. Mathias, etc.,
Defendant.

Biancone & Wilinsky, LLP, New York (Thomas B. Wilinsky of counsel), for appellants.

Gleason & Koatz, LLP, New York (John P. Gleason of counsel), for respondent.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered August 12, 2009, which, insofar as appealed from, in this action seeking recovery on a promissory note, granted plaintiff's motion to disqualify the law firm representing defendants Nightlife Enterprises, L.P. and Late Night Management, Inc., unanimously affirmed, without costs.

Rule 3.7 of the Rules of Professional Conduct (22 NYCRR 1200.29) provides that "[a] lawyer may not act as an advocate before a tribunal in a matter if: (1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is

apparent that the testimony may be prejudicial to the client" (22 NYCRR 1200.29[b][1]). Here, plaintiff sufficiently established that a member of the subject firm would be a witness and provide testimony that "may be prejudicial to the client," inasmuch as defendants claim that the note in question is invalid and a forgery, and the member is the person who prepared the note in question, who would most likely have knowledge regarding its execution, and who is claimed to have delivered it to plaintiff. The member also represented defendant Nightlife in the transaction that resulted in the promissory note, as well as in negotiating a subsequent agreement regarding the note with the person whom defendants claim was its rightful owner (*see e.g. Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 74-76 [2002]; *compare Broadwhite Assoc. v Truong*, 237 AD2d 162 [1997]). Furthermore, any delay in bringing this motion was minimal, given that discovery is ongoing, and defendants have claimed no prejudice (*cf. Talvy v American Red Cross in Greater N.Y.*, 205 AD2d 143, 153-154 [1994], *affd* 87 NY2d 826 [1995]).

We have considered defendants' remaining contentions, and find them unavailing.

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

ENTERED: JANUARY 7, 2010

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
David Friedman
Karla Moskowitz
Dianne T. Renwick
Helen E. Freedman, JJ.

940
Index 110441/06

x

Robert A. Denenberg, etc.,
Plaintiff-Respondent,

-against-

Warren Rosen, et al.,
Defendants,

Bankers Life of New York, etc., et al.,
Defendants-Appellants.

x

Defendants appeals from an order of the Supreme Court, New York County (Walter B. Tolub, J.), entered February 21, 2008, that, to the extent appealed from, as limited by the briefs, denied the Bryan Cave defendants' motion to dismiss the legal malpractice cause of action, denied the Repetti defendants' motion to dismiss the claim for punitive damages, denied the motions of appellants to dismiss the General Business Law § 349 and § 350 causes of action, and denied the motions of the Bryan Cave defendants, the Hartstein defendants, Bankers Life and the Thornhill defendants to dismiss the unjust enrichment causes of action.

K&L Gates LLP, New York (Catherine R. Keenan of counsel), for Bankers Life of New York, appellant.

Calinoff & Katz, LLP, New York (Robert A. Calinoff of counsel), for Kenneth R. Harstein, ECI Pension Services, LLC, and Economic Concepts, Inc., appellants.

Robert P. Levine, P.C., Yorktown Heights, (Robert P. Levine of counsel), for Gary L. Thornhill and The Private Consulting Group, appellants.

McDermott Will & Emery, LLP, Chicago, IL (Joshua G. Herman and Douglas E. Whitney of the Bar of the State of Illinois, admitted pro hac vice, of counsel), and McDermott Will & Emery LLP, New York (Daniel N. Jocelyn of counsel), for Richard C. Smith and Bryan Cave, LLP, appellants.

Harrington, Ocko & Monk, LLP, White Plains (Michael W. Freudenberg and Kevin J. Harrington of counsel), for John Repetti and Graf Repetti & Co., LLP, appellants.

Schrier Fiscell & Sussman, LLC, Garden City (James B. Fiscella and Richard E. Schrier of counsel), for respondent.

MOSKOWITZ, J.

Plaintiff, a commodities trader, claims that all the defendants induced him to establish a pension plan that guaranteed tax benefits that the IRS later disallowed. The motion court dismissed claims against the moving defendants sounding in breach of contract, fraud and negligent misrepresentation. Plaintiff is not appealing the dismissal of these claims. Rather, the moving defendants appeal from the motion court's denial of their motions to dismiss the remaining claims against them in the 69-page complaint. We reverse the order of the motion court to the extent appealed from and dismiss the remaining causes of action against them, except for the accountant defendants, Repetti and Graf Repetti, who have abandoned that portion of their appeal challenging denial of their motion to dismiss plaintiff's claims for unjust enrichment and accounting malpractice.

Background

I. The Parties:

Plaintiff commodities trader operated as a sole proprietorship. On December 26, 2002, he adopted a pension plan and became its administrator (the Plan). The Plan was effective October 1, 2001 and involved the purchase of life insurance policies for plaintiff and for his wife from Bankers Life of New

York (Bankers).

Defendants Rosen and his company, Warren Rosen & Co., sell insurance and financial products. These defendants did not participate in the motions underlying this appeal.

Defendant Bankers advises and provides retirement services, employee benefits, life insurance and disability benefits.

Defendant Hartstein is an officer and controlling person of defendants ECI Pension Services LLC (ECI) and Economic Concepts Inc. (Concepts) that design and administer pension plans and sell insurance. One or both own the trademark to the "Pendulum Plan."

Defendant Thornhill controls defendant The Private Consulting Group (TPCG), a pension, insurance, consulting and brokerage firm.

Defendant Repetti is an accountant with defendant accounting firm Graf Repetti.

Defendant Bryan Cave LLP is a law firm (Bryan Cave or the firm).

Defendant Smith is a partner with Bryan Cave.

II. The Allegations

Plaintiff alleges that defendants ECI, Concepts, Bankers and Bryan Cave promoted a tax shelter scheme they dubbed the Pendulum Plan. The strategy behind the Pendulum Plan was to fund a pension plan with life insurance policies. Plaintiff claims

defendants benefitted from the sale of these life insurance policies. Some would receive commissions while others would receive indirect benefits, such as free trips and volume bonuses that they concealed from their customers.

Plaintiff claims that Repetti allegedly introduced Thornhill and Hartstein to Rosen to obtain introductions to Rosen's clients and that Repetti, Rosen, Hartstein, Thornhill and Concepts agreed to share fees on commissions Bankers paid on the sale of its insurance to Rosen's clients, including plaintiff.

Plaintiff alleges that Thornhill, Hartstein and Rosen induced him to adopt the Plan by making false promises of its tax benefits and by preparing misleading illustrations showing an 8% return on policy investments. Plaintiff claims he reasonably relied on the advice of Rosen, Hartstein, Thornhill and Repetti in deciding to implement the Plan.

The Pendulum Plan was exclusively available through ECI that marketed the plan through a brochure and other materials. The Pendulum Plan claimed the "highest tax deductible contributions" and a high rate of return. ECI targeted it at business owners. Plaintiff claims the marketing materials he received emphasized large tax deductions, but downplayed or omitted that the deductions did not increase plan benefits and failed to disclose the "enormous" level of commissions, fees and profits that

defendants received.

The marketing materials included an opinion letter that Smith and Bryan Cave had issued, on September 10, 1999, to Hartstein/ECI expressing that the Pendulum Plan was legal. The opinion letter contained the caveat that it was solely for ECI:

> "This opinion is solely for the information of ECI Pension Services, LLC and its professional advisors. We have not considered whether adoption of the Plan would be appropriate for any particular employer. . . The deductibility of all, a portion, or none of each employer's contribution made to the Plan will depend upon facts and circumstances surrounding each such employer's participation in a Plan. Thus, while we believe that our opinions are likely to be applicable to the majority of the employers that consider participating in the Plan, such opinions may not apply to every employer that actually participates or considers participating in the Plan. Therefore, we recommend that all employers and covered employees consult with their own tax advisors with respect to obtaining appropriate advice relating to federal, state and local income, estate and gift tax planning with respect to the benefits under the Plan."

Plaintiff claims that in 2001, he "retained the services of defendant, Bryan Cave to represent me before the Internal Revenue Service" particularly with respect to "IRS Form 5307." However, the "Power of Attorney" that plaintiff claims appointed Bryan Cave as his attorney is unsigned and undated. In April 2002, the IRS advised Bryan Cave that the form of the Pendulum Plan was acceptable for tax purposes.

Plaintiff claims that all defendants (except Bankers) gave

the Pendulum Plan an air of credibility when they informed plaintiff that the reputable law firm Bryan Cave would represent plaintiff in connection with the design and drafting of his own Plan and would aid in the submission of his Plan to the IRS for approval.

On or about May 29, 2002, plaintiff signed a "Disclosure and Acknowledgment" in connection with his adoption of the Plan. He acknowledged his responsibility to seek the advice of his own tax or legal advisor regarding the application of the tax laws to the transaction and disclaimed reliance on any tax information received from ECI or its employees, agents or representatives in adopting the Plan.

On December 26, 2002, plaintiff adopted the Plan and became its administrator. The Plan was effective as of October 1, 2001 and involved the purchase of life insurance policies from defendant Bankers.

Unfortunately, the operation of plaintiff's specific plan was not acceptable to the IRS because it utilized excessive amounts of whole life insurance. Plaintiff claims that defendants knew their representation that 100% of contributions to the Plan would be deductible was false, because they knew or should have known that 100% funding of the Plan with life insurance would disqualify the Plan for tax purposes and result

in the loss of deductions and the imposition of excise taxes. Plaintiff also claims that defendants' action caused him to incur fees to defend an IRS audit.

III. The Motion Court Ruling

The motion court dismissed the contract cause of action as against all defendants because none had an obligation to guarantee that the premiums would be deductible. The court also dismissed the fraudulent concealment claims against Bryan Cave and Repetti because the allegations that they knew or should have known of the 2004 IRS revenue ruling, but concealed it, sounded in malpractice rather than fraud. The court also dismissed the "professional negligence" claims. As against Bryan Cave and Repetti, the court dismissed this claim as duplicative of the malpractice claims and untimely under the 3 year statute of limitations (CPLR 214[6]) because the claim accrued when plaintiff adopted the Plan on December 26, 2002.

With respect to the legal malpractice claim against Bryan Cave and Smith, the court noted that plaintiff did not allege that he had consulted with the attorneys prior to retaining them in 2004, and that the 2001 or 2002 power of attorney was for a limited purpose and therefore, did not, standing alone, support an attorney-client relationship. The court found that the 1999 opinion letter, addressed to Hartstein and for the sole benefit

of ECI, did not make Bryan Cave plaintiff's attorneys.

Nevertheless, the court denied dismissal of the legal malpractice claim. The court found it unclear whether "[p]laintiff's statement that he 'retained' Bryan Cave in 2001 is merely a conclusory statement or whether [p]laintiff paid a fee for his legal representation." Then, the court reasoned that, if plaintiff could prove an attorney-client relationship existed with Bryan Cave as of 2002, the allegation that the firm failed to advise him concerning the propriety of the funding of his pension plan was sufficient to state a malpractice claim.

The court also denied appellants' motion to dismiss the General Business Law (GBL) §§ 349 and 350 claims because plaintiff alleged defendants all played a part in the marketing and selling of the Pendulum Plan.

The court found that the brochures and other printed materials showed a marketing campaign designed to sell the pension plans not only to plaintiff but also to others, so the conduct was sufficiently "consumer-oriented" to fall within GBL § 349 and § 350.

The court ruled that the claims were not time-barred under the three-year statute of limitations (CPLR 214[2]), because the claims accrued in March 2007 when the IRS disallowed the deductions for premiums plaintiff paid.

Finally, the court denied dismissal of plaintiff's unjust enrichment claims against all defendants except for Indianapolis Life Insurance Co.

IV. This Appeal

Defendants appealed. Plaintiff initially cross-appealed but then abandoned that appeal, choosing instead to rely on the causes of action that remained.

Defendants Bryan Cave and Smith appeal to the extent the court denied their motion to dismiss the malpractice, GBL § 349 and § 350 and unjust enrichment claims as untimely and for failure to state a cause of action.

Defendants Hartstein, ECI and Concepts (collectively Hartstein) appeal from the order to the extent that the court denied their motion to dismiss the GBL and unjust enrichment claims for failure to state a cause of action.

Defendants Repetti and Graf Repetti (collectively Repetti) appeal to the extent the court denied their motion to dismiss the GBL claims and the demand for punitive damages, for failure to state a cause of action. As noted earlier, Repetti has abandoned that portion of its appeal challenging denial of Repetti's motion to dismiss plaintiff's claims for unjust enrichment as against it and accounting malpractice.

Defendants Bankers, Thornhill and TCPG (collectively

Thornhill) appeal to the extent the court denied their motions to dismiss the GBL and unjust enrichment claims for failure to state a cause of action.

Discussion

I. The GBL Claims

The motion court should have dismissed plaintiff's claims for violations of GBL 349 and 350. Article 22-A of New York's General Business Law provides consumer protection from deceptive acts and practices. GBL 349 declares deceptive acts and practices unlawful and section 350 declares false advertising unlawful. "The standard for recovery under General Business Law § 350, while specific to false advertising, is otherwise identical to Section 349" (*Goshen v Mut. Life Ins. Co. of New York*, 98 N.Y.2d 314, 324 n 1 [2002]). The elements of a cause of action under these statutes are that: (1) the challenged transaction was "consumer-oriented"; (2) defendant engaged in deceptive or materially misleading acts or practices; and (3) plaintiff was injured by reason of defendant's deceptive or misleading conduct (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, NA*, 85 NY2d 20, 25 [1995]). Thus, a plaintiff claiming the benefit of these statutes must allege conduct that is consumer oriented (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 321 [1995]).

This case involves professional services surrounding the design and implementation of a tax driven, sophisticated, individual private pension plan costing millions of dollars. The parties had various professionals in the form of accountants and lawyers representing them. Plaintiff describes himself, not as a member of the consuming public, but as a sophisticated entity, to wit: "a commodities trader on the New York Mercantile Exchange" who "operated [his] business as a sole proprietor." Therefore, this transaction was "not the 'modest' type of transaction the statute was primarily intended to reach" (*id.* [internal citations omitted]). Plaintiff also recognizes that "the target market of the 'Pendulum Plan' was for businesses, (such as mine) with a stable cash flow and minimal number of ancillary employees" rather than the consuming public in general.

Moreover, as plaintiff admits in his affidavit, it was not the form of the Pendulum Plan in general that ran afoul of IRS regulations, but rather the operation of plaintiff's particular plan that used life insurance as a tax shelter "in amounts that greatly exceeded both IRS imposed limits and the terms of the plan document prepared by Bryan Cave and approved by the IRS." As it was the operation of plaintiff's particular plan that caused the problems with the IRS, this is essentially a private dispute among the parties relating to advice that plaintiff

received and his particular plan structure, rather than conduct affecting the consuming public at large (*id*; *see also Flax v Lincoln Natl. Life Ins Co.*, 54 AD3d 992, 995 [2008]).

II. Unjust Enrichment

The allegations do not support the claims for unjust enrichment against Bryan Cave and Smith and Hartstein. Whatever benefits they may have received were too attenuated from the conduct alleged and from their relationships with plaintiff (*see Sperry v Crompton Corp.*, 8 NY3d 204, 216 [2007]). The claim is also not viable as against Bankers, and Thornhill as Banker's agent[1], because the express terms of plaintiff's valid insurance contracts govern Bankers' obligations to plaintiff (*see Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]).

III. Legal Malpractice

The motion court should have dismissed the legal malpractice claims against Bryan Cave and Smith because no attorney-client relationship existed in 2002. The motion court was correct that the tax opinion letter was insufficient to support an attorney-client relationship, considering the letter stated it was for ECI solely and contained disclaimers cautioning readers to procure

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[1] Plaintiff does not contest Thornhill's argument that, because plaintiff has alleged Thornhill was Banker's agent, Banker's contract with plaintiff obviates plaintiff's unjust enrichment claim against Thornhill as well.

tax advice tailored to their specific plan. The motion court was also correct that the limited power of attorney was insufficient to show an attorney-client relationship as that document could also have authorized nonattorneys to act on behalf of plaintiff. The limited power of attorney only authorized Bryan Cave to represent "Robert A. Dennenberg, a Sole Proprietorship Defined Benefit Pension Plan" before the IRS and only for "Form 5307," which was the application submitted to the IRS for it to determine whether to approve the Plan. Plaintiff does not contend that Bryan Cave was negligent in submitting the Form 5307.

However, the motion court improperly relied on plaintiff's entirely conclusory allegations that plaintiff retained the services of Bryan Cave in 2001 to support the legal malpractice claim. Plaintiff points to no communications with Bryan Cave for legal advice about implementation of the Plan. Plaintiff offers no objective facts or actions to show the existence of an attorney-client relationship or the parties' mutual agreement that Bryan Cave would perform ongoing legal services for plaintiff.

In a last ditch attempt to hold Bryan Cave responsible, plaintiff claims Bryan Cave was negligent in defending him during his 2004 audit before the IRS, until October 25, 2005 when

plaintiff retained new counsel. However, plaintiff points to no damage relating to Bryan Cave's alleged negligence during the audit period *(see Dweck v Oppenheimer & Co., Inc.*, 30 AD3d 163 [2006]). Rather, according to plaintiff's allegations, all of plaintiff's injury stems from the implementation of the Plan, not from any actions the attorneys took during the audit period. Accordingly, the court should have dismissed the cause of action for legal malpractice.

IV. Punitive Damages

The motion court should have stricken plaintiff's demand for punitive damages. The complaint lacks the requisite allegations of egregious conduct or moral turpitude necessary to support punitive damages (*see New York Univ. v Continental Ins. Co.*, 87 NY2d at 316; *Bothmer v Schooler, Weinstein, Minsky & Lester*, 266 AD2d 154 [1999]).

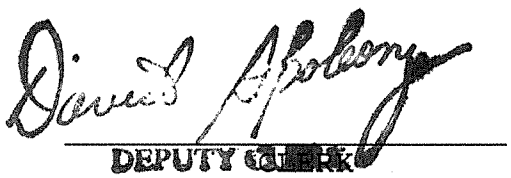
Accordingly, the order of Supreme Court, New York County (Walter B. Tolub, J.), entered February 21, 2008, that, to the extent appealed from, as limited by the briefs, denied the motion of the Bryan Cave defendants to dismiss the legal malpractice cause of action, denied the motions of appellants to dismiss the General Business Law § 349 and § 350 causes of action, and denied the motions of the Bryan Cave defendants, the Hartstein defendants, Bankers Life and the Thornhill defendants to dismiss

the unjust enrichment causes of action, should be reversed, on the law, and the motions to dismiss granted. The Clerk is directed to enter judgment dismissing the complaint as against the Bryan Cave defendants, the Hartstein defendants, Bankers Life and the Thornhill defendants. Plaintiff's appeal from the above order should be dismissed, without costs, as abandoned.

All concur.

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

ENTERED: JANUARY 7, 2010



SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
David Friedman
James M. Catterson
Dianne T. Renwick
Sheila Abdus-Salaam, JJ.

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Index 113393/07

In re New York Committee for Occupational Safety and Health,
Petitioner-Appellant,

-against-

Michael Bloomberg, as Mayor of the City of New York, et al.,
Respondents-Respondents.

Petitioner appeals from an order of the Supreme Court, New York County (Eileen A. Rakower, J.), entered February 28, 2008, which denied the petition brought pursuant to CPLR article 78 challenging the denial by respondents of petitioner's Freedom of Information Law request for certain documents, and granted respondents' cross motion to dismiss the proceeding.

Cary Kane, LLP, New York (Joshua S.C. Parkhurst and Larry Cary of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo and Stephen J. McGrath of counsel), for respondents.

MAZZARELLI, J.P.

Petitioner New York Committee for Occupational Safety and Health (NYCOSH) is a not-for-profit corporation comprised of, among others, 175 local trade unions and various health and safety activists. Its stated mission is to ensure workplace safety for all workers in the State. In May 2007, NYCOSH served a Freedom of Information Law (FOIL) request on the office of the New York City Mayor. It sought all records transmitted in 2006 to the Mayor by City agencies pursuant to Administrative Code of the City of New York section 12-127 (c)(1) and (2) (also known as Local Law 41 of 2004). Section 12-127 (c)(1) provides that:

> "Each agency shall keep a record of any workers' compensation claim filed by an employee, the subject of which concerns an injury sustained in the course of duty while such employee was employed at such agency. Such record shall include, but not be limited to, the following data: (i) the name of the agency where such employee worked; (ii) such employee's title; (iii) the date such employee or the city filed such claim with the appropriate office of the state of New York, if any; (iv) the date the city began to make payment for such claim, or the date such claim was established by the appropriate state office and the date the city began to make payment for such claim pursuant to such establishment, if any; (v) the date such injury occurred; (vi) the location at which such injury occurred; (vii) the nature of such injury, including, but not limited to, the circumstances of such injury, the type or diagnosis of such injury and a description of how such injury occurred; (viii) the length

> of time such employee is unable to work due to such injury, if any; and (ix) a list of any expenses paid as a result of such claim, including, but not limited to, expenses relating to wage replacement, medical costs, administrative costs and any penalties."

Section 12-127 (c)(2) requires each agency to transmit the workers' compensation records required to be maintained by section 12-127 (c)(1) to the Mayor.

Administrative Code section 12-127 (c)(3) requires that the Mayor create an annual report based on the records he receives pursuant to section 12-127 (c)(2). The section requires the annual report to analyze the expenses paid by each agency in connection with each workers' compensation claim; list the specific workers' compensation claims for each agency and the City as a whole; list the specific sites where injuries occurred for each agency and for the City as a whole; and provide year-to-year comparisons of the compiled information.

In response to NYCOSH's request, the Mayor's office provided its 2006 annual report prepared pursuant to Administrative Code section 12-127 (c)(3). The Mayor's office did not, however, produce the requested information; that is, the raw data which the Mayor was required to use to prepare the report. NYCOSH took an administrative appeal from the Mayor's response. In denying it, the appeal officer wrote that the Mayor's office was "not in

possession of any documents responsive to your request beyond" the annual report. However, the denial letter advised NYCOSH that the City's Law Department maintains records of workers' compensation claims on behalf of the Mayor and referred NYCOSH to the Law Department for additional information.

NYCOSH then served a FOIL request on the Law Department seeking the same documents as in the initial request to the Mayor's office. The Law Department denied the request, stating in a letter that it "does not maintain a comprehensive data base of the information described by the section of the Administrative Code cited in your letter nor is this agency otherwise in possession of such a record." NYCOSH appealed to the Law Department and was again denied relief. In the denial letter, the Law Department's appeals officer represented that the Department did not "receive or maintain a record that contains all of the information listed in [Administrative Code section 12-127 (c)(1)]" and that FOIL did not require it to "create a record that does not already exist." The letter further stated that it was the appeals officer's "understanding that there are fifteen thousand to sixteen thousand [workers compensation] claims filed each year" and that information regarding such claims "is gathered into a litigation case file for each individual claim."

NYCOSH commenced this article 78 proceeding to require the

Mayor's office and the Law Department to produce the documents requested in its two FOIL requests. It also sought its reasonable attorneys' fees.

Respondents moved to dismiss the petition. The Mayor's office asserted that it could not respond to the FOIL request beyond producing the annual report, because it had delegated the responsibility for collecting information and preparing the report to the Law Department. The Law Department submitted the affidavit of Youssef Sidhom, the Director of Administration for its Workers Compensation Division. Sidhom stated that he was "aware of all of the records maintained by the [Workers Compensation Division] and the current maintenance of its electronic filing system." He stated that he

> "conducted a thorough, reasonable and diligent agency-wide search for responsive paper and electronic records and there is no one responsive record which contains the information [NYCOSH] seeks. Rather, as described below, the requested information is stored electronically in a database, or is otherwise found within individual case files and would be overly burdensome to produce."

Sidhom then recounted how workers compensation claim information is received, stored and retrieved by the Law Department. He stated that of the approximately 16,000 claims received annually, 60% are submitted electronically. Those are "input in the City's workers' compensation system," which then

"interfaces with certain City-wide computer systems, extracts certain data from those systems, and then downloads the desired information into the New York City Law Department Workers' Compensation Division's internal computer system, known as 'GenIRIS.'" Sidhom explained that "[t]he GenIRIS system is comprised of a database which houses ten separate units. In order to compile the requested information, special programs need to be designed and run to extract the information from each unit separately and consolidated into one report." Of the claims which are submitted in paper form, Sidhom asserted that the forms are first placed in a file prepared for each claimant, and then the relevant information is entered into the GenIRIS database.

Sidhom next discussed how the annual report is created. He stated that "[the] report is prepared using a series of complex programs and formulas, and time-consuming reviews designed to retrieve the required information from each of the ten separate units that comprise GenIRIS. This data is then compiled (with like-information being combined), sorted and formatted."

Finally, Sidhom explained what would have to be done to comply with NYCOSH's FOIL request. He stated that:

> "[N]ew reports and commands would need to be designed with respect to each category of information. Indeed, as some of this information (such as length of time an employee misses from work and the date the

> City began to make payment for such claim) is stored in a different location other new formulas would likely have to be written to extract the required data from each of GenIRIS's ten units, and then compiled, sorted and formatted. The completion of such a project would be a time-consuming effort and disruptive of the Workers' Compensation Division's operations.
>
> "Thus, in order to comply with [NYCOSH]'S FOIL [r]equest, Respondents would be required to review and photocopy documents from some 16,000 files, or prepare special reports, as described above, to extract the required information. Moreover . . . as the requested information is contained within workers' compensation files, disclosure of such information would constitute an unwarranted invasion of personal privacy, and, thus, is exempt from disclosure under FOIL."

Supreme Court granted respondents' cross motion and dismissed the petition. In articulating the standard of review it was applying, the court stated that it was required to defer to the appeals officers' determinations as long as such determinations were not arbitrary and capricious. The court accepted respondents' submissions in support of their motion as providing a "rational basis" for their responses to NYCOSH's FOIL requests.

While typically an agency action is reviewed under an "arbitrary and capricious" standard, Supreme Court's application of that standard to the City's refusal to disclose the subject records was incorrect. When reviewing the denial of a FOIL

request, a court must apply a far different rule. It is to presume that all records of a public agency are open to public inspection and copying, and must require the agency to bear the burden of showing that the records fall squarely within an exemption to disclosure (*see* Public Officers Law § 89[5][e]; *Matter of Markowitz v Serio*, 11 NY3d 43, 50-51 [2008]; *Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566 [1986]; *Matter of Bahnken v New York City Fire Dept.*, 17 AD3d 228, 229-230 [2005], *lv denied* 6 NY3d 701 [2005]).

The City does not dispute that the court applied the wrong standard of review. However, it argues that dismissal of the petition was nonetheless correct, because its denial of NYCOSH's FOIL request fit squarely within the exemption found in Public Officers Law § 87(2)(a). That section permits an agency to "deny access to records or portions thereof that . . . are specifically exempted from disclosure by state or federal statute." The statute which the City argued in turn exempted it from disclosing the records sought by NYCOSH is Workers' Compensation Law § 110-a(1)(a). That provides that "no workers' compensation record shall be disclosed, redisclosed, released, disseminated or otherwise published by an officer, member, employee or agent of the board to any other person." Further, the City argued that Workers' Compensation Law § 110-a(4) makes it "unlawful for any

person who has obtained copies of board records or individually identifiable information from board records to disclose such information to any person who is not otherwise lawfully entitled to obtain these records."

NYCOSH claims that the City's reliance on Workers' Compensation Law § 110-a is misplaced. Its argument is based on the definition of the word "record" found in Workers' Compensation Law § 110-a(1)(b)(i), which provides that:

> "'record' means a claim file, a file regarding an injury or complaint for which no claim has been made, and/or any records *maintained by the board* in electronic databases in which individual claimants or workers are identifiable, or any other information relating to any person who has heretofore or hereafter reported an injury or filed a claim for workers' compensation benefits, including a copy or oral description of a record *which is or was in the possession or custody of the board, its officers, members, employees or agents*" (emphasis added).

Thus, NYCOSH argues that, because Workers' Compensation Law § 110-a(1)(b)(i) ascribes such a narrow definition to the term "records," the City was required to establish that what it sought pursuant to its FOIL request consisted exclusively of documents that were at some point in the possession of the Workers' Compensation Board. NYCOSH points out that, in contrast to this limited definition, FOIL broadly defines a "record" as

> "any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes" (Public Officers Law § 86[4]).

We agree that, because it did not demonstrate that the records sought by NYCOSH were at some point in the possession of the Workers' Compensation Board, the City failed to carry its burden of establishing that its decision to deny NYCOSH's FOIL request was supported by a specific statutory exemption, as Public Officers Law § 87(2)(a) requires (*see Matter of Konigsberg v Coughlin*, 68 NY2d 245, 251 [1986]). However, this does not mean that in responding to NYCOSH's request the City must divulge the personal information of workers' compensation claimants. Indeed, FOIL broadly protects the dissemination of records that "if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article" (Public Officers Law § 87[2][b]). FOIL expressly defines such records as including "information of a personal nature contained in a workers' compensation record" (Public Officers Law § 89[2][b][vi]).

The City does not rely on the "personal privacy" protection of Public Officers Law § 87(2)(b). However, for us to simply order the City to respond to NYCOSH's FOIL request without regard to the "personal privacy" provision embodied in FOIL would be to contravene the express intent of the Legislature that personal information related to workers compensation claimants not be disclosed to the public. Nevertheless, the shield provided by Public Officers Law § 87(2)(b) is not absolute, as is that provided by § 87(2)(a). In other words, were we to find that the records sought by NYCOSH were covered by Workers' Compensation Law § 110-a, the City would have no obligation to respond whatsoever. However, the "personal privacy" exemption is qualified by Public Officers Law § 89(2)(c)(i), which provides that "disclosure shall not be construed to constitute an unwarranted invasion of personal privacy . . . when identifying details are deleted." Accordingly, the City, in responding to the FOIL request, should redact the documents so as to preserve the privacy of any claimants who may be identified therein.

The City contends that, even if it is not statutorily exempt from responding to NYCOSH's FOIL request, it is nevertheless excused from doing so because identifying the records sought, and then reproducing and redacting them, would constitute an unreasonable burden. The City argues that NYCOSH has not

reasonably described the documents it seeks. However, Local Law 41 specifically delineates the material which City agencies are required to maintain and turn over to the Mayor's office. It is these documents, reflecting the data itemized in Local Law 41, which NYCOSH has requested.

The City also asserts that responding to the request is not feasible. First, it contends that to retrieve records which are stored electronically it must create new software. It claims that it is not required to do so, citing Public Officers Law § 89(3). That section provides, in pertinent part, that "[n]othing in [FOIL] shall be construed to require any entity to prepare any record not possessed or maintained by such entity . . ." NYCOSH counters by citing the amendment to that section enacted in August 2008. The amendment provides that "[a]ny programming necessary to retrieve a record maintained in a computer storage system and to transfer that record to the medium requested by a person . . . shall not be deemed to be the preparation or creation of a new record." The City argues that the amendment does not apply to this case, because it was enacted after NYCOSH made the FOIL request at issue. However, the amendment was intended to codify existing case law. Prior to the change, courts had for many years stressed that, in the absence of burden, agencies were required to honor requests to produce

responsive information in electronic media (*see e.g. Matter of Brownstone Publs. v New York City Dept. of Bldgs.*, 166 AD2d 294 [1990]). The legislative history of the amendment makes clear that the Legislature sought only to clarify and confirm such decisions. Accordingly, NYCOSH, to the extent it even needs to rely on the amendment, is entitled to do so.

The question then becomes whether the computer manipulation which the City claims is necessary to retrieve the documents constitutes "[a] simple manipulation of the computer necessary to transfer existing records" (*Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 465 [2007]), or whether it constitutes creation of a new document. *Data Tree*, the holding of which is reflected in the amendment to Public Officers Law section 89(3), instructs that the former does not excuse responding to a FOIL request, while the latter does (*id.*). On this record, it is not possible to conclude whether requiring the City to retrieve and produce the computerized records would be a "simple manipulation" or a creation of a new document. Mr. Sidhom, who does not purport to have any background in computer programming and does not explain the basis of his knowledge of how the computer system operates, ambiguously states in his affidavit that the City must create new "commands" and "formulas." However, it is unclear whether those things fall within the realm of running programs within the

existing software, or creating new software which would not otherwise exist but for the FOIL request. If the former, and the documents can be retrieved with "reasonable effort," the City is required to produce them (*Data Tree*, 9 NY3d at 464). A hearing is necessary to determine precisely what would be entailed were the City to attempt to retrieve the requested documents from electronic databases.

Further, the City claims that any effort to respond to NYCOSH's request will tax City resources. With respect to records which are maintained in hard copy, Mr. Sidhom maintains in his affidavit that the City would have to review each workers' compensation claimant's file and photocopy relevant documents. He never says that the City lacks the staff or resources to complete such a project; he merely states that it "would be a time-consuming effort and disruptive of the Workers' Compensation Division's operations." Such "naked" allegations of burdensomeness are normally insufficient to "evade the broad disclosure provisions" of FOIL (*Konigsberg*, 68 NY2d at 249). Nevertheless, this case presents a situation where the volume of records is undisputedly large, and those records not only need to be retrieved and reproduced from a wide variety of sources, but redacted as well. Accordingly, the hearing ordered herein should also encompass whether an undue burden would be created by

requiring the City to respond to NYCOSH's request.

We have considered petitioner's additional contentions, including its request for attorneys' fees, and find them unavailing.

Accordingly, the order of the Supreme Court, New York County (Eileen A. Rakower, J.), entered February 28, 2008, which denied the petition brought pursuant to CPLR article 78 challenging the denial by respondents of petitioner's Freedom of Information Law request for certain documents, and granted respondents' cross motion to dismiss the proceeding, should be modified, on the law, the proceeding reinstated, and the petition granted to the extent of remanding to Supreme Court for a hearing as to whether respondents must produce any records that are electronically stored, and as to whether producing responsive records that are maintained in hard copy would place an undue burden on respondents, and otherwise affirmed, without costs.

All concur.

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

ENTERED: JANUARY 7, 2010

DEPUTY CLERK