SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 24, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Saxe, Catterson, Moskowitz, Manzanet-Daniels, JJ.

5100 Ayodele Sandiford, Index 104190/06
Plaintiff-Appellant-Respondent,

-against-

City of New York Department
of Education, et al.,
Defendants-Respondents-Appellants,

The Research Foundation, et al.,
Defendants.

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Meenan & Associates, LLC, New York (Colleen M. Meenan of counsel), for appellant-respondent.

Michael A. Cardozo, Corporation Counsel, New York (Mordecai Newman of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered on or about February 18, 2010, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment insofar as it sought dismissal of plaintiff's retaliation claim under the New York City and the New York State Human Rights Law and denied the motion insofar as it sought dismissal of her discrimination claims, modified, on the law, to

deny the motion as to plaintiff's retaliation claim, and otherwise affirmed, without costs.

In this action alleging discrimination based on sexual orientation, plaintiff is a lesbian and has been employed as a school aide by defendant Department of Education (DOE) since May 2001. During the 2004/2005 school year, plaintiff was assigned to P.S. 181, in Brooklyn, where defendant Coleman was principal. According to plaintiff, Coleman repeatedly made derogatory remarks regarding gays and lesbians in front of plaintiff, the students and the teachers. Plaintiff stated that Coleman had commented that "two men should not be behind closed doors," "whatever two men is [*sic*] doing behind closed door[s], God would judge them for himself." Plaintiff also stated that Coleman had said that "his church can change people like us for the better" and, while acting out an obscene walk, "this is how faggots walk." On another occasion, Coleman allegedly admonished students for using the word "lesbian." Plaintiff claimed that she complained about certain staff members who had teased her, taunted her with notes in her locker and made lewd comments to her.

In March 2005, plaintiff was advised that she was being suspended without pay pending an investigation by defendant DOE's

Office of Special Investigation (OSI) regarding an allegation of sexual misconduct pertaining to an incident which occurred on or about February 11, 2005 involving two coworkers at P.S. 181, a college student, age 18, and a DOE student, age 16. Plaintiff allegedly asked the DOE student to "hook her up" with the college student. When the DOE student refused and advised plaintiff to "leave it alone," plaintiff allegedly persisted and contacted the college student directly. Her alleged attempts to establish a personal relationship were purportedly rejected. Plaintiff denies the incident occurred.

Thereafter, plaintiff allegedly complained about Coleman's conduct to various DOE offices to no avail. In late June 2005, plaintiff again met with Coleman and was allegedly "berated, belittled and reprimanded" for complaining about his treatment of her. Plaintiff was then advised that, an investigation by OSI had substantiated the allegations of misconduct and recommended termination of her employment, and that Coleman had decided to terminate plaintiff's employment.

Plaintiff filed a grievance with the DOE challenging her termination and was reinstated with back pay, less two weeks, and a letter placed in her file warning her not to engage in inappropriate conduct or conversation with any DOE student.

Thereafter, plaintiff commenced the instant action alleging claims for discrimination and retaliation under the New York State and New York City Human Rights Laws.

Defendants' argument that the claims are precluded by the doctrine of collateral estoppel based on implicit findings by the DOE is improperly raised for the first time on appeal (*see Gavin v Catron*, 35 AD3d 354 [2006]). In any event, the argument is without merit. The record shows that plaintiff did not have a full and fair opportunity to litigate her claims of discrimination in the grievance process. Indeed, her testimony suggests that she had little involvement in the proceedings. Thus, the record does not allow us to conclude that the facts asserted were "adequately tested, and that the issue was fully aired" (*Jeffreys v Griffin*, 1 NY3d 34, 40-41 [2003] [internal quotation marks omitted]). Here, the record merely reflects plaintiff's request for a review by the Grievance Panel, and the panel's subsequent decision. Moreover, plaintiff did not have an opportunity to appeal the grievance decision, as it was the Union's decision whether to proceed further (*cf. Hickey v Hempstead Union Free School Dist.*, 36 AD3d 760 [2007]).

Plaintiff's testimony regarding Coleman's repeated derogatory remarks regarding gays and lesbians was sufficient to raise a question of fact as to plaintiff's claim alleging unlawful discriminatory practices under the New York City Human Rights Law (Administrative Code of City of NY § 8-101; § 8-107 [13][a] and [b]), the uniquely broad and remedial provisions of which are liberally construed to provide expansive protections not afforded by their state and federal counterparts (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 [2009], *lv denied* 13 NY3d 702 [2009]; Administrative Code § 8-130). This Court has made clear that where a plaintiff "responds with some evidence that at least one of the reasons proffered by defendant is false, misleading or incomplete, a host of determinations properly made only by a jury come into play, *and thus such evidence of pretext should in almost every case indicate to the court that a motion for summary judgment must be denied" (Bennett v Health Mgmt. Sys., Inc.*, 92 AD3d 29 [2011] [emphasis added]).

Moreover, in light of plaintiff's testimony regarding Coleman's comments and conduct, the record did not conclusively establish that defendants would have made the same decision to terminate plaintiff's employment had they not considered plaintiff's sexual orientation. Thus, there being triable issues

of fact, summary judgment was precluded insofar as the complaint alleged unlawful discrimination under the New York State Human Rights Law (Executive Law § 296[1][a]; *see McKennon v Nashville Banner Publ. Co.*, 513 US 352, 360 [1995]; *Chertkova v Connecticut Gen. Life Ins. Co.*, 92 F3d 81, 91 [2d Cir 1996]).

Regarding plaintiff's claim of retaliation, to the extent the claim is based upon the New York City Human Rights Law (Administrative Code § 8-107[7]), summary judgment is precluded by triable issues of fact as to whether, within the context of this matter and the workplace realities as demonstrated by the record, plaintiff's termination from employment would be reasonably likely to deter other persons in defendants' employ from engaging in protected activity (*see Williams*, 61 AD3d at 70-71).

To the extent the claim is based upon the New York State Human Rights Law (Executive Law § 296[1][e]), summary judgment is precluded by triable issues of fact as to whether, in response to plaintiff's prima facie showing that her termination was the direct result of retaliatory animus, defendants offered a

pretextual explanation (*see Sukram v Anjost Corp.*, 72 AD3d 491 [2010]; *Pace v Ogden Servs. Corp.*, 257 AD2d 101, 104-05 [1999]; *Gordon v New York City Bd. of Educ.*, 232 F3d 111, 117 [2d Cir 2000]).

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

All concur except Saxe and Catterson, JJ. who dissent in a memorandum by Catterson, J. as follows:

CATTERSON, J. (dissenting)

I must respectfully dissent. The plaintiff school aide did not challenge a grievance decision which concluded that she had engaged in inappropriate conduct with a 16-year-old female student, yet now argues that her termination was based on her sexual orientation and so was discriminatory and retaliatory. In my opinion, the plaintiff's attempt to inoculate herself against the consequences of her inappropriate conduct must be rejected: as set forth more fully below, well-established precedent upholds termination of educators for sexually inappropriate behavior towards a student -- regardless of their sexual orientation.

In focusing on the principal's alleged derogatory remarks, the majority gives no weight to the fact that the misconduct charges against the plaintiff were *investigated and substantiated* by the New York City Department of Education (hereinafter referred to as "DOE"), and that the DOE then recommended that the principal terminate plaintiff. Regardless of any remarks made by the principal, it was the plaintiff's burden to "respond[] with some evidence that *at least one of the reasons* proffered by defendant is false, misleading or incomplete," and the plaintiff entirely failed to do so. The substantiated charges were affirmed by the DOE at the conclusion of her appeal, and she

failed to challenge them.

The record reflects the following: The plaintiff, a lesbian, is an employee of the DOE working as a school aide in a Brooklyn public school. The plaintiff also worked at an after-school program at the public school operated by a private not-for-profit corporation.

On February 10, 2005, a 16-year-old student employee and an 18-year-old coworker complained to the defendant principal of the public school where the plaintiff worked that plaintiff had engaged in inappropriate behavior. In written statements, they explained that the plaintiff called the student on a classroom telephone and asked the student to "hook her up" with the coworker. Although the student told her the coworker was not gay, the plaintiff "didn't want to get off the phone." The student explained to the coworker why the plaintiff was calling, but the coworker refused to speak with the plaintiff. When the plaintiff called back, the coworker answered the phone and the plaintiff asked the coworker for a date.

The principal reported the allegations to the DOE on February 11, 2005, and on March 16, 2005, suspended the plaintiff without pay pending the outcome of an investigation by the DOE's Office of Special Investigation (hereinafter referred to as

"OSI"). The plaintiff was advised that she was not permitted to return to the building until the investigation was completed, and that she could not continue her job with the after-school program. At a meeting with her union representative and the OSI investigator on March 30, 2005, the plaintiff complained that the principal's treatment of her was discriminatory. The plaintiff also complained to a DOE representative at the Chancellor's office on April 20, 2005.

The OSI investigation included interviews with the student, the coworker, the plaintiff with her union representative, and another 16-year-old student who also worked in the after-school program. The OSI substantiated the allegations and the Chancellor's office prepared a report dated June 20, 2005, concluding that:

> "[The plaintiff] used her position as an employee of the New York City Department of Education in an attempt to engage in a personal relationship. [The plaintiff] utilized a sixteen year old Department of Education student to assist her in doing so. [The plaintiff] engaged a sixteen year old Department of Education Student in inappropriate conversation."

The report further recommended that the principal review the report, that the plaintiff's employment be terminated, and that her name be placed on the DOE's "Invalid/Inquiry List." The principal met with the plaintiff on June 22, 2005, and gave her a

letter stating that the OSI had substantiated the allegations against her and that after reviewing the findings, he had decided to terminate her employment.

On December 13, 2005, the plaintiff appealed her termination, and on September 15, 2006, the Chancellor issued a grievance decision. The decision begins by describing the plaintiff's position, including her denial that she asked the coworker out or that she asked the student to speak to the coworker on her behalf. The decision then presents the DOE's position, including details of the student and coworker's complaints to the principal, his report of the incident, and the OSI interviews. The decision states that the OSI found "that the grievant used a sixteen year old student to assist her in engaging in a personal relationship with the college student, which included inappropriate conversation with the sixteen year old student," and that "[]i]n view of the investigator's findings and conclusions, the principal discharged the grievant." The decision then concludes that "the following [sic] happened" and that "[a]lthough inappropriate, the grievant's conduct in this matter did not warrant discharge."

The DOE reinstated the plaintiff with all but two weeks back pay and placed a warning letter in her file. The grievance

decision was not appealed, and the plaintiff commenced the instant action on March 28, 2006.

On May 23, 2006, the plaintiff filed an amended complaint against the DOE, the principal, the corporation that operates the after-school program, and its director.[1] The complaint alleges that the plaintiff was defamed and that pursuant to the Administrative Code of the City of New York § 8-107 et seq. (NYS HRL), the New York State Executive Law § 296 et seq. (NYS HRL), and the New York State Constitution, her employment was unlawfully terminated because of her sexual orientation and in retaliation for complaining about the principal's conduct. The plaintiff claims $2 million in damages.

At deposition, the student testified that the plaintiff telephoned her in a classroom and told her that although the plaintiff wanted to take her out, the student was "too young." Plaintiff then asked the student to "hook [the plaintiff] up" with the coworker. The student told the plaintiff that the coworker was not gay and that the plaintiff should "leave it alone." According to the student, the plaintiff said she

[1]The causes of action against the corporation that operates the after-school program and its director were dismissed on May 29, 2008 and they are not parties to this appeal.

"[didn't] care" and still wanted to take out the coworker and wouldn't "take no for an answer." The student attempted to pass the telephone to the coworker, who refused to speak with the plaintiff. Although she felt "uncomfortable," the student related the plaintiff's intentions to the coworker.

In her deposition testimony, the coworker stated that the plaintiff then called back to speak with her directly, told the coworker she was "very attractive," and asked her "did [the student] tell you." The coworker told the plaintiff "yes" but that she was not a lesbian. The coworker turned down the plaintiff's proposition to "go out one night" and reported the incident to the principal.

The plaintiff testified at deposition that the principal had made derogatory remarks about homosexuals. She described an incident where the principal imitated what he characterized as a "faggot's" walk, and stated that he did this several times in front of different people and looked at her. She also claimed that he commented to her and her nephew and niece that "two men should not be behind closed doors," "whatever two men [sic] is doing behind closed door, God would judge them for himself," and that "his church can change [homosexuals] for the better." On another occasion, the principal allegedly admonished a student

for calling another student a "lesbian."

The plaintiff further testified that when the principal gave her the termination letter, he told her that she "caused this upon [her]self" for complaining to the Chancellor's office and Regents about him. The plaintiff also denied that she did anything inappropriate with the student or the coworker.

In his deposition, the principal explained that pursuant to the Chancellor's guidelines, he reported the incident to the DOE on February 11, 2005. He further explained that the plaintiff's supervisor told him that the plaintiff told her that she knew her actions were wrong, but that she "could not help [her]self." The principal confirmed that he is a minister in a Pentecostal church. When questioned about his views on homosexuality, the principal stated that his church's view is that "it is not permissible under the ordinances of what we believe the Bible speaks of." He further stated that even were he not a church member, homosexuality is against his "moral fabric." The principal conceded that the plaintiff's complaints to the Chancellor's office may have been "mentioned [to him] in some conversation," but denied saying anything to the plaintiff about her complaints when he terminated her.

By notice of motion dated April 27, 2009, the DOE and the

principal moved for summary judgment dismissing all causes of action against them. The defendants argued, inter alia, that the plaintiff had been terminated for her inappropriate conduct, a legitimate, non-discriminatory reason, and therefore any purported discrimination was not causally related to her termination. In opposition, the plaintiff asserted that she was treated disparately, and denied engaging the student in a conversation about the coworker or having any inappropriate conversations with either the student or coworker.

By decision and order dated February 9, 2010, the court granted the defendants' motion to the extent of dismissing the claims for retaliation and libel, but denied summary judgment as to the plaintiff's discrimination claims. The plaintiff appeals from the dismissal of her retaliation cause of action and the defendants cross-appeal denial of their summary judgment motion to dismiss the plaintiff's discrimination cause of action.

For the reasons set forth below, I would modify the decision of the trial court to dismiss the plaintiff's discrimination claim and otherwise affirm. As a threshold matter, the plaintiff's claims should be viewed in the context of overriding public policy that seeks to protect children from predatory teachers regardless of whether the teacher is heterosexual or

homosexual. See e.g. Matter of Douglas v. New York City Bd./Dept. of Educ., 87 A.D.3d 856, 857, 929 N.Y.S.2d 127, 128 (1st Dept. 2011) (termination was appropriate where "petitioner's unacceptable behavior [of making sexual comments to students] compromised his ability to function as a teacher"); Lackow v. Department of Educ. of City of N.Y., 51 A.D.3d 563, 859 N.Y.S.2d 52 (1st Dept. 2008) (the penalty of termination was not disproportionate to the defendant's offense of making inappropriate remarks to students); Matter of Katz v. Ambach, 99 A.D.2d 897, 897, 472 N.Y.S.2d 492, 494 (3rd Dept. 1984) (terminating teacher for making sexual comments and putting his arm around students is an appropriate penalty "in view of the potentially harmful effect upon the young minds entrusted to a teacher's care"); City School Dist. of City of N.Y. v. Hershkowitz, 7 Misc.3d 1012(A), 2005 NY Slip Op 50569[u] (Sup. Ct., N.Y. County 2005) (respondent should have been terminated rather than suspended for one year for sending sexually explicit e-mails). This policy was recently reaffirmed in the Court of Appeals decision in City School Dist. of City of N.Y. v. McGraham, 17 N.Y.3d 917, 934 N.Y.S.2d 768, 958 N.E.2d 897 (2011). In that decision, the Court upheld the 90-day suspension of a teacher for engaging in an "inappropriate communication" with a

15-year-old student in her class. The Court acknowledged that the state has a broad public policy of protecting children.

In any event, the plaintiff fails to establish a prima facie claim of discrimination. The standards relating to burden and order of proof in employment discrimination cases brought under the State HRL are the same as those established by the United States Supreme Court in McDonnell Douglas Corp. v. Green. 411 U.S. 792, 802-804, 93 S.Ct. 1817, 1824-1825 (1973); Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 305 n.3, 786 N.Y.S.2d 382, 390, 819 N.E.2d 998, 1006 (2004). To establish a prima facie claim of discrimination, a plaintiff must initially show: (1) that the employee is a member of protected class, (2) that she was discharged, (3) that she was qualified for the position, and (4) that the discharge occurred under circumstances giving rise to an inference of discrimination. McDonnell Douglas Corp., 411 U.S. at 802, 93 S.Ct. at 1824; Forrest, 3 N.Y.3d at 305, 786 N.Y.S.2d at 390.

Further, discrimination cases may be characterized as "pretext" cases or "mixed-motive" cases. See Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1180 (2d Cir.1992), cert. denied 506 U.S. 826, 113 S.Ct. 82 (1992). In "pretext" cases, the burden-shifting framework articulated in McDonnell Douglas Corp.

(411 U.S. at 802, 93 S.Ct. at 1824) is applied. Upon the plaintiff's prima facie showing of discriminatory animus, the burden then shifts to the defendant to provide a legitimate non-discriminatory reason for the adverse employment action. Brennan v. Metropolitan Opera Assn., 284 A.D.2d 66, 729 N.Y.S.2d 77 (1st Dept. 2001). If the defendant provides a legitimate non-discriminatory reason, the burden then shifts back to the plaintiff to produce evidence demonstrating that it is more likely than not that the defendants' stated reasons were false and thus a pretext for another non-legitimate reason. McDonnell Douglas Corp., 411 US at 804, 93 S.Ct. at 1825; Weinstock v. Columbia Univ., 224 F.3d 33, 42 (2d Cir. 2000), cert. denied 540 U.S. 811, 124 S.Ct. 53 (2003).

In this case, the plaintiff claims that the principal's alleged disparaging remarks about homosexuality raise an inference of discrimination. In response, the principal relies on the OSI report substantiating the plaintiff's inappropriate conduct towards a female student and coworker. The plaintiff contends, as she did before the motion court, that she did not engage in any inappropriate conduct and that the principal's anti-gay animus is sufficient to raise a triable issue of fact that his reason for terminating her is false.

The principal argues that the doctrine of collateral estoppel precludes the plaintiff from relitigating the issue of whether she engaged in "inappropriate" conduct. I agree. The doctrine of collateral estoppel is applicable where the issue in the current litigation is identical to a material issue decided in a prior proceeding, and the issue was fully and fairly litigated. Ryan v. New York Tel. Co., 62 N.Y.2d 494, 500-501, 478 N.Y.S.2d 823, 826-27, 467 N.E.2d 487, 490-91 (1984). Further, it is well settled that a final determination by a quasi-judicial administrative agency may be accorded preclusive effect. Ryan, 62 N.Y.2d at 499, 478 N.Y.S.2d at 825-826. This is particularly true when the party to be precluded solicited resolution of the issue by that agency, and fully participated with the expectation that the parties are bound by the decision. Allied Chem. v. Niagara Mohawk Power Corp., 72 N.Y.2d 271, 532 N.Y.S.2d 230, 528 N.E.2d 153 (1988), cert. denied 488 U.S. 1005, 109 S. Ct. 785 (1989).

In its rejection of the principal's collateral estoppel argument, the majority contends that the plaintiff did not have a full and fair opportunity to litigate her discrimination claim. This entirely misconstrues the issue that was determined in the grievance process and which the plaintiff is barred from

relitigating. The grievance decision, crediting the OSI report, plainly finds that the plaintiff *engaged in "inappropriate" conduct*. The record is devoid of any evidence indicating that she was deprived of an opportunity to defend herself against *the charge of inappropriate conduct with a minor student*. Furthermore, the grievance process was initiated by the plaintiff, who was represented by her union. Whether she had the right under her collective bargaining agreement or not, it is undisputed that the plaintiff did not request that the union appeal on her behalf or otherwise challenge the findings in the decision.

As such, the plaintiff cannot argue that the principal's reason for terminating her, her inappropriate conduct with a 16-year-old student, is false. Therefore, under a "pretext" analysis, her discrimination claim must fail.[2] Forrest v. Jewish

[2] The plaintiff's contention that the doctrine of collateral estoppel cannot be raised for the first time on appeal is unavailing. Whether a collateral estoppel argument may be raised on appeal depends upon whether the argument was apparent on the face of the record and whether the record on appeal is sufficient. See Chateau D'If Corp. v. City of New York, 219 A.D.2d 205, 209, 641 N.Y.S.2d 252, 255 (1st Dept. 1996), lv. denied 88 N.Y.2d 811, 649 N.Y.S.2d 379, 672 N.E.2d 605 (1996); Gerdowsky v. Crain's N.Y. Bus., 188 A.D.2d 93, 97, 593 N.Y.S.2d 514, 516-517 (1st Dept. 1993); see also Szigyarto v. Szigyarto, 64 N.Y.2d 275, 280, 486 N.Y.S.2d 164, 167-168, 475 N.E.2d 777, 780-781 (1985). Because the grievance decision is in the record

Guild for the Blind, 3 N.Y.3d 295, 786 N.Y.S.2d 382, 819 N.E.2d 998 (2004), supra (plaintiff's prima facie case, without any evidence that the defendant's justification is false, does not permit the trier of fact to conclude that the employer unlawfully discriminated).

The majority's reliance on this Court's decision in Bennett v. Health Mgt. Sys. (92 AD3d 29, 936 N.Y.S.2d 112 (2011)) is misplaced. Indeed, Bennett supports dismissal of her claims. In Bennett, the plaintiff claimed that his termination was "motivated by hostility to his age and race." 92 A.D.3d at 33, 936 N.Y.S.2d at 115. In opposition, the defendant offered credible evidence of the plaintiff's poor attendance, inability to master his job, and sleeping and drinking on the job. The defendant was granted summary judgment because the plaintiff failed to show that the evidence was false, misleading, or incomplete. Similarly, in this case the plaintiff cannot show that the charge of inappropriate conduct, which was the *only* reason proffered by the principal for terminating her, is false.

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and it is undisputed that it was not appealed, there are no evidentiary issues which would prevent the Court from considering the applicability of collateral estoppel at this time. The cases cited by the plaintiff that hold otherwise are either factually distinguishable or there is no reasoning supporting the decision.

Even if the plaintiff were permitted to relitigate the issue of whether she engaged in inappropriate conduct, in my opinion it would not help her. While the majority makes much of the principal's purported anti-gay religious views and conduct, the record reflects that the principal followed DOE policy in reporting the allegations. More significantly, at the time the principal made his decision to terminate the plaintiff, he was in receipt of a DOE report that substantiated her misconduct and recommended her termination. In my view, it is clear that this documentation induced the principal to terminate the plaintiff, and that he would have done so no matter what her sexual orientation. For this reason, her claim also fails under a "mixed-motive" analysis.

In order to defeat a motion for summary judgment under a "mixed-motive" analysis, the plaintiff must raise a triable issue of fact that unlawful bias was the "motivating" or "substantial" factor for termination. De la Cruz v. New York City Human Resources Admin. Dept. of Social Servs., 82 F.3d 16, 23 (2d Cir. 1996). The initial burden on the plaintiff under the mixed-motive analysis is greater than in the pretext analysis. Id. The plaintiff may meet her initial burden by showing "evidence of statements or actions by decisionmakers that may be viewed as

directly reflecting the alleged discriminatory attitude." Raskin v. The Wyatt Co., 125 F.3d 55, 60 (2d Cir. 1997) (internal quotation marks omitted); see Price Waterhouse v. Hopkins, 490 U.S. 228, 258, 109 S.Ct. 1775, 1794-1795 (1989) (plurality opinion). Once the plaintiff offers such evidence, the burden shifts to the defendant to demonstrate that she would have been terminated even in the absence of alleged discriminatory bias. De la Cruz, 82 F.3d at 23; Price Waterhouse, 490 U.S. at 252, 109 S.Ct. at 1792 ("the employer . . . must show that its legitimate reason, standing alone, would have induced it to make the same decision"); Sista v. CDC Ixis N. Am., Inc., 445 F.3d 161, 173 (2d Cir. 2006).

Verbal comments serve as evidence of discriminatory motivation when a nexus exists between the defendant's allegedly discriminatory remarks and the decision to terminate the plaintiff. Schreiber v. Worldco, LLC, 324 F.Supp.2d 512 (S.D.N.Y. 2004)(citations omitted). In determining whether a comment is a probative of discrimination, the following factors are considered: (1) whether the comment was made by a decisionmaker, a supervisor, or a low-level coworker; (2) whether the remark was made close in time to the adverse employment decision; (3) whether a reasonable juror could view the remark as

discriminatory; and (4) the context of the remark - that is, whether the remark related to the decision making process. Id. at 519.

Here, even if the principal could be viewed as a "decisionmaker" demonstrating an anti-gay animus, his remarks do not relate in any way to his decision to terminate the plaintiff. See e.g. Equal Empl. Opportunity Commn. v. National Broadcasting Co., Inc., 753 F.Supp. 452 (S.D.N.Y. 1990), affd. 940 F2d 648 (1991) (plaintiff presented no evidence to connect the alleged stereotyped remarks to the decision-making process); cf. St. Louis v. New York City Health & Hosp. Corp., 682 F.Supp.2d 216, 230 (E.D.N.Y. 2010) (supervisor's repeated statements that she "did not like working with females" and that plaintiff was "out of here" suggests a relationship between gender bias and the decision to terminate); Bookman v. Merrill Lynch, 2009 WL 1360673, *14, 2009 US Dist. LEXIS 40766, *37 (S.D.N.Y. 2009) (employer's comment that "the future of the office lay with young [w]hite brokers" related directly to the plaintiff's prospects at the company). Here, there is no indication that the principal's explanation of his religious views and those of his church had anything to do with the plaintiff's termination. Similarly, his parody of a walk bears no relation to the plaintiff's employment.

There is also no indication that the comments were close in time to the plaintiff's termination.

The plaintiff argues that under the "broad and remedial provisions" of the NYC HRL, evidence of the principal's anti-gay beliefs and her testimony describing his behavior meets her initial burden. However, even if she does meet her burden, I would find that the substantiation of her misconduct in the OSI report and the recommendation of the Chancellor's office to terminate the plaintiff, standing alone, would have induced the principal to make the same decision. See e.g. St. Louis v. New York City Health & Hosp. Corp., 682 F.Supp.2d at 231-232 (defendants met their burden by producing negative performance evaluations); Cramer v. Pyzowski, 2007 WL 1541393, 2007 US Dist. LEXIS 38375 (E.D.N.Y. 2007) (defendants' detailed record of plaintiff's performance deficiencies met their burden); Bellom v. Neiman Marcus Group, Inc., 975 F.Supp. 527 (S.D.N.Y. 1997) (defendant produced evidence that the plaintiff failed to meet sales quotas for three consecutive months).

In light of the sexual nature of the allegations, the defendant principal's decision to follow the Chancellor's recommendation was not unwarranted. See New York City Board of Education Chancellor's Regulation A-830, Attachment 1, p. 2

(prohibiting sexual harassment by teachers toward students). As the United States Supreme Court has observed, judicial review of a school administrator's action is "by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." Board of Education v. Rowley, 458 U.S. 176, 206, 102 S.Ct. 3034, 3051 (1982).

With regard to the plaintiff's retaliation claim, I agree with the motion court that the plaintiff fails to raise a triable issue of fact as to causation. In order to make out a prima facie case of retaliation under the City HRL, the plaintiff must show that (1) she is engaged in a "protected activity," (2) the protected activity was known to defendant, (3) defendant took an adverse employment action and, (4) there is a causal connection between the protected activity and the adverse employment action. See Forrest, 3 N.Y.3d at 312-313, 786 N.Y.S.2d at 396. If plaintiff meets this initial burden, the burden shifts to the defendant to show that it had legitimate, non-retaliatory reasons for the adverse employment action. See Williams v. The City of New York, 38 A.D.3d 238, 831 N.Y.S.2d 156 (1st Dept. 2007), lv. denied 9 N.Y.3d 809, 844 N.Y.S.2d 785, 876 N.E.2d 514 (2007). Upon defendant's proffer of a legitimate reason, the plaintiff

must then show that the reason provided is pretextual. See id. In this case, the plaintiff engaged in protected activity when she complained to the OSI investigator and the Chancellor's office, and the principal conceded in deposition that he knew of her complaints. She points to the temporal proximity of her complaints to her termination and the principal's comments at the time of her termination to meet her initial burden and to show pretext.

The plaintiff asserts that her termination took place three months after her complaints to the OSI investigator on March 30 and Chancellor's office on April 20. However, the principal reported her misconduct on February 11 and suspended her on March 11, prior to her complaints. Causation cannot be established where the complaints are made after the adverse job action began. Slattery v. Swiss Reins. Am. Corp., 248 F.3d 87, 94-95 (2d Cir. N.Y. 2001), cert. denied 534 U.S. 951, 122 S.Ct. 348 (2001); see e.g. Hernandez v. Bankers Trust Co., 5 A.D.3d 146, 773 N.Y.S.2d 35 (1st Dept. 2004) (no causation where the complaint was made after plaintiff was notified that his use of a racially offensive password was a terminable offense). Even considering her termination in June as the beginning of the adverse employment action, the plaintiff's claim nevertheless fails. As with her

discrimination claim, she does not raise a triable issue of fact that the reasons for her termination were false and or that the principal would not have made the same decision regardless of her complaints.

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

ENTERED: APRIL 24, 2012

CLERK

Saxe, J.P., Friedman, Moskowitz, Freedman, Richter, JJ.

5747 In re Commissioner of Social Services,
on behalf of Elizabeth S.,
Petitioner-Respondent,

-against-

Julio J.,
Respondent-Appellant.

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

Michael A. Cardozo, Corporation Counsel, New York (Deborah A. Brenner of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Brenda Soloff of counsel), attorney for the child.

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Order of filiation, Family Court, New York County (Mary E. Bednar, J.), entered on or about November 8, 2010, declaring respondent to be the father of the subject child, reversed, on the law, without costs, and the matter remanded for further proceedings to include the performance of a biological paternity test.

In this paternity proceeding under article 5 of the Family Court Act, petitioner agency failed to establish by evidence that was clear, convincing and entirely satisfactory (*see Matter of Commr. of Social Servs. v Philip De G.*, 59 NY2d 137, 141-142 [1983]; *Matter of Tanesha H. v Phillip C.*, 57 AD3d 403 [2008];

Sobie, Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Court Act § 531, at 105 [2009]) that respondent acted as the child's father to such an extent as to give rise to equitable estoppel barring him from denying paternity and rendering a biological paternity test inappropriate (*see* Family Court Act § 532). There was no evidence that respondent has played a significant role in raising, nurturing or caring for the child, much less that he has ever had an operative parent-child relationship with her (*see Matter of Gutierrez v Gutierrez-Delgado*, 33 AD3d 1133, 1135 [2006] [holding that it was error to apply equitable estoppel where "an established and significant parent-child relationship" was absent]; *cf. Matter of Juanita A. v Kenneth Mark N.*, 15 NY3d 1, 5 [2010] [equitable estoppel "protects the status interests of a child in an already recognized and operative parent-child relationship"] [internal quotation marks omitted]; *Matter of Enrique G. v Lisbet E.*, 2 AD3d 288, 289 [2003] [applying equitable estoppel to avoid "disruption of (the child's) close relationship" with the putative father]).

While respondent did not deny that he has maintained an intermittent and essentially avuncular relationship with the child, petitioner made no showing that respondent has

affirmatively fostered such a strong bond with the child as to estop him from denying paternity. Although respondent admitted that he visited the mother in the hospital when the child was born, he declined to sign an acknowledgment of paternity at that time. As to his interactions with the child herself, the evidence shows, at most, that he did not object when the child called him "Daddy" during their sporadic encounters; that he gave her one- or five-dollar bills when she asked him for money; that he occasionally gave her gifts or took her shopping; and that, on at least one occasion, he took her to a park. Petitioner made no showing that respondent's contacts with the child occurred with any degree of regularity or were sufficient to render him a significant presence in her life (*cf. Matter of Sarah S. v James T.*, 299 AD2d 785, 785-786 [2002] [although the "respondent played a limited role" in the child's life, equitable estoppel was applied where, inter alia, he "spent meaningful time with the child" and had weekly telephone calls with him]). During respondent's two years of military service, it is undisputed that he had no interaction with the child at all, even by telephone. Moreover, the child did not testify at the hearing, nor did the court interview her in camera. It is true that the child (who remained ignorant of the nature of the proceeding) identified

respondent as her father and talked positively about him in an out-of-court interview with her court-appointed attorney. Nonetheless, her responses to the attorney's leading questions are consistent with a warm but distant relationship and do not suffice to demonstrate by clear and convincing evidence that conducting a biological test would be contrary to her best interests. In sum, on this record, petitioner has not demonstrated that a finding that respondent is not her father would cause the child to suffer "irreparable loss of status, destruction of her family image, or other harm to her physical or emotional well-being" (*Matter of Derrick H. v Martha J.*, 82 AD3d 1236, 1239 [2011] [internal quotation marks omitted]) so as to warrant imposition of equitable estoppel under Family Court Act § 532.

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

RICHTER, J. (dissenting)

Following a hearing, the Family Court Judge, who had an opportunity to observe the witnesses and assess their demeanor, made fact-findings that are consistent with the mother's testimony. The majority, in reversing, largely adopts respondent's testimony, which Family Court discredited to a great extent, and fails to recognize controlling law, which dictates that the best interests of the child are the exclusive consideration in determining whether equitable estoppel applies; therefore, I dissent.

By the time of the hearing on the paternity proceeding, the child was eight years old. In March 2002, about two months before the child's birth, the mother informed respondent that she was pregnant. Respondent, accompanied by his own mother, came to the hospital when the child was born and visited for approximately two hours. The mother testified that respondent brought a stroller and three outfits for the child, and held the child while he was there.

Shortly after the child was born, respondent joined the military and was stationed in Colorado for approximately two years. He did not have any contact with the mother and child during this time. It is unclear, based on the hearing testimony,

when respondent reentered the child's life. The mother agreed at the hearing that during the first four years of her daughter's life, they had "bumped into" respondent in the neighborhood a number of times and he would identify himself as the child's dad. Further, the mother stated that respondent was the only man the child had called "Daddy" and the only man she, the mother, had ever introduced to the child as "Dad." Respondent would even ask the child, "Who am I?" and the child would respond, "Daddy."

Respondent also gave the child money on various occasions, anywhere from one dollar to ten dollars, in addition to buying her candy when she asked for it or if she was hungry. The mother testified that respondent would call her cell phone to get in touch with the child, to ask how the child was doing, and to speak with her. The child also had met a few members of respondent's family and had visited his sister at her house. Indeed, the mother stated, that when the child saw respondent around the neighborhood, she would openly call him "Daddy" and he would not attempt to correct her otherwise. Moreover, both the mother and the Attorney for the Child informed the court that the child had expressed a desire to spend as much time as possible with respondent.

In addition to allowing and even encouraging the child to

call him "Dad," respondent also showered her with gifts. Shortly before the paternity proceedings began, he took the child on a "shopping spree" at a local store, buying her summer clothes, pants, shirts, underwear, and a bookbag. Respondent also gave the child birthday presents, including clothes and an educational game. Further, respondent and his current girlfriend gave the child a coat and boots as an Easter present, and respondent's girlfriend bought the child gifts on another occasion as well.

At the hearing, respondent explained that he had given these gifts to the child as a "friendly gesture," and that he had treated other needy children in a similar fashion. Family Court found respondent's explanation to be unpersuasive, and noted that many of the contacts respondent had made with the child appeared to be fatherly. Family Court also rejected respondent's testimony that he had let the child call him "Daddy" because he had not wanted to correct her and confuse her, or respond to her in a "negative reaction."

After hearing from the mother, respondent, and the Attorney for the Child, the court determined that it would be to the child's detriment to direct a DNA test. The court found that the child knew respondent as her father and that she had expressed to both her attorney and her mother a desire to spend more time with

him. Furthermore, the court noted that respondent had done nothing to dissuade the child of this view, and in fact, had encouraged the development of a parent-child relationship in the child's eyes. The court had an opportunity to view the witnesses and make credibility determinations, and its findings should be accorded great deference on appeal (*Matter of Celenia M. v Faustino M.*, 77 AD3d 486 [2010], *lv denied* 16 NY3d 702 [2011]).

The seminal case involving paternity and equitable estoppel is *Matter of Shondel J. v Mark D.* (7 NY3d 320 [2006]). The *Shondel* Court stated that "the only issue for the court is how the interests of the child are best served" (*id.* at 331). The critical factors to be considered are whether respondent held himself out to be the father; if the child justifiably relied on this representation; and if the child will be harmed by the denial of paternity (*id.* at 327). Equitable estoppel, a remedy based in fairness, protects "the status interests of a child in an already recognized and operative parent-child relationship" (*Matter of Juanita A. v Kenneth Mark N.*, 15 NY3d 1, 5 [2010] [internal quotation marks omitted]). Indeed, in such proceedings "the issue does not involve the equities between the two adults; the case turns exclusively on the best interests of the child" (*Shondel*, 7 NY3d at 330).

Here, despite the majority's attempt to minimize the contact between respondent and the child, the Family Court properly determined that respondent held himself out as the child's father and that the child justifiably relied on this representation to her detriment (*id.* at 327). The mother testified that respondent was the only man she had ever introduced into the child's life as the father and the only man the child called "Daddy." Respondent confirmed that the child did indeed call him "Daddy" and that he had made no effort to disavow her of that notion. He even acknowledged that when the child saw him in the courthouse for one of the proceedings, she ran towards him and hugged him.

The majority describes respondent's role in the child's life as intermittent and sporadic, and therefore determines that respondent did not affirmatively foster a strong bond with the child. However, during the child's entire life, respondent has led her to believe he is her father. Indeed, respondent testified that he had seen the child five times in 2010 alone, which was the same amount as during all the previous years combined. Respondent had increased the amount of time he was spending with her and had bought her gifts, thereby solidifying his bond with her.

Even if "the relationship between respondent and the child

was somewhat limited, the Family Court properly concluded that the best interests of the child required that respondent be estopped from denying paternity" (*Matter of Commissioner of Social Servs. v Victor C.*, 91 AD3d 417, 418 [2012]). The Attorney for the Child, after interviewing the child, reported to the court that she had expressed a desire to spend more time with her dad. The child even told her attorney that when she was born respondent had visited her and her mother in the hospital and that he had held her, a fact that was important to the child. The child has developed a bond with respondent, one that he has encouraged and actively developed in the past year. She knows him as her dad, and desires to spend "24 hours a day with him" according to the mother. At the time of the hearing the child was eight years old. To now, at this stage in her life, order a DNA test and let her know that respondent questions his bond with her would be detrimental to her and would cause her to suffer irreparable loss of status (*compare Matter of Derrick H. v Martha J.*, 82 AD3d 1236, 1239 [2011]).[1]

[1]The majority, in pointing out that the child did not testify at the hearing and that the court did not conduct an in camera interview, fails to recognize that had the child been subjected to either she would have realized that respondent was contesting his parental relationship. This would have defeated the purpose of the equitable estoppel hearing.

In the eight years since the child's birth, respondent has not sought a paternity test, despite his claims that he raised the issue with the mother on various occasions. Respondent had a choice to make; he could "either put the doubts aside and initiate a parental relationship with the child, or insist on a scientific test of paternity *before* initiating a parental relationship" (*Shondel*, 7 NY3d at 331). Respondent here chose the former and should not now be able to insist on a paternity test.

The cases cited by the majority do not mandate a reversal of Family Court. In *Matter of Gutierrez v Gutierrez-Delgado* (33 AD3d 1133 [2006]) it was undisputed that there was a lack of an established parent-child relationship, and the mother had told the respondent he was not the father of either child. Such is not the case here, where the mother testified that respondent is the only man the child has ever known as her dad, that she has developed a bond with him and wishes to spend even more time with him. Further, respondent here engaged in contacts that were fatherly in nature - namely, purchasing the child clothes, underwear, a bookbag, coat, and boots. These are items that a parent, and not a stranger or acquaintance, typically buys for his or her child.

Matter of Derrick H. v Martha J. (82 AD3d 1236 [2011], *supra*), also is distinguishable. In that case, the hearing evidence established that no parent-child relationship existed between the alleged father and the three-year-old child, because the two had only limited contact during the first 18 months of the child's life and virtually no contact thereafter; thus, there was no evidence that the child "would suffer irreparable loss of status . . . if [the paternity proceeding] were permitted to go forward" (*id.* at 1239 [internal quotation marks omitted]). By contrast, here, respondent has had contact with the child since birth, with a temporary hiatus for two years while he was in the military, and significantly increased his time with her during 2010. She calls him, and only him, "Daddy" and she has continually expressed a desire to spend as much time with him as possible. Accordingly, petitioner agency established that it was

in the best interests of the child that respondent be estopped from denying his paternity and Family Court's ruling should be affirmed.

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

ENTERED: APRIL 24, 2012

CLERK

Saxe, J.P., Sweeny, Renwick, Degrasse, Richter, JJ.

7006 Milagros Espinal, Index 303696/07
Plaintiff-Respondent,

-against-

Trezechahn 1065 Avenue of
the Americas, LLC,
Defendant-Respondent,

New York Elevator &
Electrical Corporation,
Defendant-Appellant.

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Geringer & Dolan LLP, New York (John T. McNamara of counsel), for appellant.

Jesse Barab, White Plains (Jeremy S. Ribakove of counsel), for Milagros Espinal, respondent.

Cartafalsa, Slattery, Turpin & Lenoff, New York (Paul Loumeau of counsel), for Trezechahn 1065 Avenue of the Americas, LLC, respondent.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered September 9, 2011, which, to the extent appealed from as limited by the briefs, denied defendant New York Elevator & Electrical Corporation's (NYE) motion for summary judgment dismissing the complaint and cross claims against it, and granted defendant Trezechahn 1065 Avenue Of The Americas, LLC's (Trezechahn) cross motion for summary judgment on its cross claims for contractual indemnification and breach of contract,

unanimously reversed, on the law, without costs, and NYE's motion granted, and, upon a search of the record, Trezechahn's motion for summary judgment dismissing the complaint as against it granted, and Trezechahn's motion for summary judgment on its claims for contractual indemnification and breach of contract denied as academic. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiff testified that she and a coworker, Luz Ojeda, entered the elevator on the sixth floor of defendant Trezechahn's building and pushed the button for the lobby. The elevator made an upward movement and then continued moving up and down the elevator shaftway at twice its normal speed for approximately one hour before stopping in the lobby without further incident. Plaintiff repeated this claim in multiple verified bills of particulars.

While plaintiff and Ojeda were trapped in the elevator, the building's fire safety director, Earl Wheatle, spoke to them over the intercom. He told them to stay calm and that mechanics were on the way. Neither woman told Wheatle the elevator was going up and down. Wheatle stated that he had two monitors at his desk that tracked the operation of the elevators in the building, that he had no recollection of plaintiff's incident but would have

remembered an elevator acting as plaintiff alleged. There were no previous reports of this particular elevator trapping passengers and the report on this incident indicated that plaintiff and Ojeda were trapped in the elevator on the fourth floor.

Ojeda testified that the elevator made a brief upward movement, moved downward, shook a little, and then stopped. After speaking with Wheatle over the intercom, she and plaintiff sat on the floor of the elevator and waited. Once released, plaintiff spoke to Luis Hidalgo, the lobby security officer. Hidalgo testified that plaintiff made no mention of the elevator going up and down, and that she stated only that she was stuck in the elevator and was afraid.

Defendant NYE's expert, Bernard Hughes, submitted an affidavit in support of NYE's motion for summary judgment. Hughes opined that plaintiff's version of the incident was "mechanically, scientifically and physically impossible" because of multiple redundant safety features that would have stopped the elevator instantly in a case of excessive speed. He stated further that all the reasons for elevator shut-down implicated safety features, not improper maintenance.

In opposition, plaintiff argued that a question of fact

arose from the conflict between her version of the incident and those of the other witnesses involved. Although she did not submit expert evidence to refute Hughes's affidavit, she argued that res ipsa loquitur applied because the incident could not have happened without defendants' negligence.

Defendants established prima facie, through deposition testimony, witness affidavits and expert evidence, that the elevator could not have acted in the manner described by plaintiff. They also showed, through expert testimony, that it could have shut down for a myriad of reasons unrelated to any negligence on the part of defendants. Viewing the evidence in a light most favorable to plaintiff, we find that plaintiff failed to meet her burden to produce evidence establishing the existence of a material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). While generally credibility determinations are left to the trier of the facts, where testimony is "physically impossible or contrary to experience," it has no evidentiary value (*see Loughlin v City of New* York, 186 AD2d 176, 177 [1992], *lv denied* 81 NY2d 704 [1993]; *see Cruz v Port Auth. of N.Y. & N.J.*, 243 AD2d 251, 252 [1997]). We find plaintiff's version of the incident incredible as a matter of law. It is not supported by the other witnesses or evidence

submitted on this motion. Plaintiff did not produce an expert to contradict Hughes's opinion that the incident was mechanically impossible, and that other reasons for the elevator's shut down involved the safety features incorporated into the elevator itself, and not improper maintenance as she claims. Plaintiff's contention that the unlikelihood of an occurrence does not mean it is impossible rests on mere speculation, which is insufficient to defeat a motion for summary judgment (*see Corcoran Group v Morris*, 107 AD2d 622, 624 [1985], *affd* 64 NY2d 1034 [1985]).

The motion court incorrectly concluded that defendants had notice of the defect through previous incidents. Those incidents involved the stopping of an elevator, not the rapid up and down movement that plaintiff alleges (*see Gjonaj v Otis El. Co.*, 38 AD3d 384 [2007]. There was also no evidence that any of those incidents involved this particular elevator or that defendants failed to correct conditions of which they had knowledge or failed to use reasonable care to discover and correct a condition they ought to have found (*see Isaac v 1515 Macombs, LLC*, 84 AD3d 457, 459 [2011], *lv denied* 17 NY3d 708 [2011]; *Johnson v Nouveau El. Indus., Inc.*, 38 AD3d 611 [2007]).

Plaintiff's reliance on the doctrine of res ipsa loquitur is misplaced. For a case to fall within that doctrine, "(1) the

event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff" (*Ebanks v New York City Tr. Auth.*, 70 NY2d 621, 623 [1987]). Although the motion court impermissibly converted plaintiff's theory of liability from a runaway elevator to a mere entrapment, as indicated there was no evidence of prior entrapments involving this particular elevator. In any event, NYE's expert's uncontroverted litany of reasons unrelated to negligence that an elevator might stop in a shaftway negates the first element of the doctrine (*see Forde v Vornado Realty Trust*, 89 AD3d 678, 680 [2011]).

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

ENTERED: APRIL 24, 2012

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

7173 In re Ali C.,

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

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

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

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Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.; David Klein, J. [Westchester County], at fact-finding), entered on or about March 7, 2011, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of attempted assault in the third degree, and placed him with the Office of Children and Family Services for a period of 12 months, unanimously reversed, on the law, without costs, and the petition dismissed.

As the presentment agency concedes, there is no indication in the record that a "reasonable and substantial effort" was made to notify appellant's mother of the juvenile delinquency proceeding and thus, the fact-finding court erred in conducting

the hearing in her absence (*see* Family Ct Act §§ 320.3, 341.2[3]; *Matter of Myacutta A.*, 75 AD2d 774, 774 [1980]). Because appellant's placement has expired, the proper remedy is to dismiss the petition (*see Matter of James T.*, 304 AD2d 864 [2003]; *Matter of Felicia C.*, 178 AD2d 530 [1991]).

The Decision and Order of this Court entered herein on March 22, 2012 is hereby recalled and vacated.

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

ENTERED: APRIL 24, 2012

CLERK

Tom, J.P., DeGrasse, Freedman, Richter, Román, JJ.

7228 Eitan Ventures, LLC, Index 603151/09
Plaintiff-Appellant,

-against-

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

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Foote Law Firm, P.C., New York (Amy R. Foote of counsel), for appellant.

Epstein Becker & Green, P.C., New York (Barry A. Cozier of counsel), for respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered January 13, 2011, which insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the causes of action for breach of contract and fraud, unanimously affirmed, without costs.

In May 2007, plaintiff, a venture capital firm, invested $150,000 in defendant Peeled, Inc. In consideration of the payment, Peeled executed and delivered an interest-bearing promissory note and the parties entered into a related convertible debt agreement. The note provided that "all principal and accrued interest" was to become due and payable in a lump sum on December 31, 2009 "[u]nless converted prior thereto as provided in the [agreement]." Both the note and the agreement

provided that Peeled could prepay part or all of its debt if plaintiff agreed to it.

The agreement contained two conversion provisions. Under the first, plaintiff had, "at any time after the [note's] date of issuance," the right to convert "[t]he principal and interest payable under the [n]ote" into shares of Peeled's common stock at a fixed price per share. Under the second conversion provision, the principal and interest payable under the note would "automatically" be converted upon the earliest of December 31, 2009 or a contemplated transaction which undisputedly never occurred.

The agreement contained other terms that are relevant here. It provided that, in the event of a conversion, plaintiff would deliver the note to Peeled for cancellation, and that the note would immediately become null and void regardless of its delivery by plaintiff. Under another provision, if there were any inconsistencies between the terms of the agreement and the note, the note's terms would control.

About two weeks before the note's due date, plaintiff notified Peeled that it wanted to convert about 26% of the total principal and accrued interest. Peeled refused to effect the partial conversion on the ground that the agreement only

permitted the complete conversion of plaintiff's rights under the note. Instead, Peeled paid plaintiff the full amount of principal and interest owing under the note on the due date of December 31, 2009. Plaintiff accepted the payment under protest and then commenced this action.

The cause of action for breach of contract was properly dismissed. Plaintiff first claims that Peeled breached the terms of the agreement by refusing to convert only a portion of the amount due under the note. However, the agreement cannot be read to provide for partial conversions. When construing a contract, the most important consideration is to give effect to the parties' intentions (*Federal Ins. Co v Americas Ins. Co.*, 258 AD2d 39, 44 [1999]). To ascertain those intentions, a court should examine the contract as a whole and interpret its parts with reference to the whole (*see Kass v Kass*, 91 NY2d 554, 566-567 [1998]). Applying those basic principles, we find it evident that the parties did not intend that plaintiff could choose to convert less than all of its rights under the note. Otherwise, the contract would not have provided for the note's cancellation upon a conversion. If, as plaintiff claims, the contract permitted it to convert only a portion of the amounts due under the note, that partial conversion would have nullified the

remainder of Peeled's debt to plaintiff, and there is no evidence that plaintiff intended to forego repayment of the remainder.

As further proof that the contract does not provide for partial conversion, we note the disparate treatment of Peeled's prepayment rights and plaintiff's conversion rights. While the instruments explicitly provided that Peeled could make partial prepayments upon the parties' agreement, the contract makes no mention of partial conversions.

With respect to the breach of contract claim, plaintiff also claims that Peeled violated the agreement by paying off the note on December 31, 2009. Although the agreement also provided for automatic conversion on that date, the agreement specifically provided that the note's terms controlled in the event of inconsistency. Thus, it appears that the conversion was to occur only if the note was not paid off.

Finally, the fraud cause of action fails because Peeled fully repaid plaintiff's investment, with interest, and accordingly, plaintiff sustained no out-of-pocket loss (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]).

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

ENTERED: APRIL 24, 2012

CLERK

CORRECTED ORDER - April 30, 2012

Friedman, J.P., DeGrasse, Freedman, Abdus-Salaam, JJ.

7260 David P. Kaplan, et al., Index 650136/10
Plaintiffs-Respondents-Appellants,

-against-

Madison Park Group
Owners, LLC, et al.,
Defendants,

David Lipman,
Defendant-Appellant-Respondent.

Judd Burstein, P.C., New York (Judd Burstein of counsel), for appellant-respondent.

Braunstein Turkish LLP, Woodbury (William J. Turkish of counsel), for respondents-appellants.

Order, Supreme Court, New York County (James A. Yates, J.), entered January 12, 2011, which, to the extent appealed from, denied plaintiffs' motion for partial summary judgment on their cause of action for a declaratory judgment and for dismissal of defendant David Lipman's counterclaims for a declaratory judgment and breach of contract, and denied Lipman's cross motion for partial summary judgment on his counterclaim for a declaratory judgment and for dismissal of plaintiffs' causes of action for breach of contract, rescission of the parties' agreements, unjust enrichment, and ancillary damages, unanimously modified, on the

law, to the extent of granting plaintiffs' motion and declaring that they are entitled to the return of their contract deposit in the sum of $622,500, plus interest, and otherwise affirmed, without costs.

Defendant David Lipman is the contract vendee of two condominium units that were being sold by defendant Madison Park Group Owner, LLC (MPGO). By written agreement dated October 30, 2008, Lipman assigned his rights under the twin November 2007 purchase agreements to plaintiffs. Pursuant to the assignment, plaintiffs agreed to be bound by and assume Lipman's obligations under the purchase agreements including the obligation to close on the purchase of the premises and pay the purchase price. As required by the agreements, plaintiffs deposited $622,500 with an escrow agent. By letter dated June 19, 2009, the sponsor duly advised plaintiffs of a July 27, 2009 closing date. Plaintiffs, however, did not appear for the closing. Paragraph 13 of each purchase agreement defined "[p]urchaser's failure to close title on the date, hour and place specified by the Sponsor pursuant to Section 5 hereof" as a default. Paragraph 13 also provided that "[s]ponsor shall notify purchaser in writing of such default and advise Purchaser that he has thirty (30) days after Sponsor gives written notice to the Purchaser to cure such default." Paragraph

13 further gave the sponsor the right to retain the purchaser's deposit as liquidated damages if the default was not timely cured. Similarly, the assignment agreement gave Lipman the right to keep plaintiffs' deposit as liquidated damages in the event of the seller's failure to close title because of plaintiffs' uncured default. By letter dated July 29, 2009, plaintiffs also advised MPGO of their decision to purportedly terminate the agreement and requested a return of their deposit. The import of this letter is determinative.

On or about March 12, 2010, the Department of Law accepted for filing the 17th amendment to the condominium's offering plan. Pursuant to that amendment, the sponsor offered all purchasers under executed purchase agreements the right to rescind their agreements and obtain refunds of their contract deposits. This measure was taken because of the disclosure of a foreclosure action that had been brought against the sponsor. Invoking a provision of the assignment agreement, plaintiffs, on March 22, 2010, notified Lipman of their decision to rescind the purchase agreements pursuant to the 17th amendment and demanded that he instruct the escrow agent to refund their deposit.

Plaintiffs moved for summary judgment on their sixth cause of action for a judgment declaring that they are entitled to a

return of their deposit plus a dismissal of Lipman's counterclaims. Lipman cross-moved for summary judgment on his first counterclaim for a declaration that he is entitled to keep plaintiffs' deposit as liquidated damages. Both motions were denied.

Lipman correctly asserts that there was no lawful excuse or legitimate basis for plaintiffs' failure to attend the July 27, 2009 closing. Plaintiffs therefore defaulted under the purchase agreements and the assignment agreement. However, plaintiffs contended, and the motion court correctly found, that Lipman's contractual right to retain the deposit was never triggered because neither Lipman nor the sponsor sent plaintiffs the default notices required by paragraph 13 of each purchase agreement. The next question is whether plaintiffs' July 29, 2009 letter gave rise to an anticipatory breach of the purchase agreements.

The motion court found that plaintiffs repudiated the agreements by issuing the July 29, 2009 letter but also found issues of fact as to whether certain alleged design changes in the common elements of the premises relieved plaintiffs of their obligation to close on the law date. That issue is irrelevant because the July 29, 2009 letter was not a repudiation of the

agreements. The letter added nothing to plaintiffs' July 27 default and merely confirmed the default, if it did anything at all.

By definition an anticipatory breach cannot be committed by a party already in material breach of an executory contract. It is well settled that an anticipatory breach of a contract is one that occurs before performance by the breaching party is due. For example, in *Norcon Power Partners v Niagara Mohawk Power Corp.* (92 NY2d 458 [1998]) the Court of Appeals defined an anticipatory repudiation as one that occurs "prior to the time designated for performance" (*id.* at 462-463). Consistently, in *American List Corp. v U.S. News & World Report* (75 NY2d 38 [1989]) the Court defined an anticipatory breach in terms of "a wrongful repudiation of the contract by one party before the time for performance" (*id.* at 44). Applying New York law, the United States Court of Appeals for the Second Circuit held that "[a]nticipatory repudiation occurs when, before the time for performance has arisen, a party to a contract declares his intention not to fulfill a contractual duty" (*Lucente v International Bus. Machs. Corp.*, 310 F3d 243, 258 [2d Cir 2002] [citations omitted]). The rationale behind the doctrine of anticipatory breach is that it gives the non-repudiating party an

opportunity to treat a repudiation as an anticipatory breach without having to futilely tender performance or wait for the other party's time for performance to arrive (*see Cooper v Bosse*, 85 AD2d 616, 618 [1981]). As noted above, plaintiffs were in default as of July 27, 2009, two days before the letter was sent. Once plaintiffs defaulted on July 27, Lipman did not have to tender performance or wait for a law date because he could have resorted to the contractual remedies for plaintiffs' breach set forth under paragraph 13. Accordingly, the July 29, 2009 letter did not give rise to an anticipatory repudiation because it was not issued "prior to the time designated for performance" within the meaning of *Norcon* and the other cases cited above.

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

ENTERED: APRIL 24, 2012

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

7442 The People of the State of New York, Ind. 3805/00
Respondent,

-against-

Morris Natal,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Allen H. Saperstein of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (John S. Moore, J.), rendered January 8, 2003, convicting defendant, after a jury trial, of murder in the second degree and attempted murder in the second degree, and sentencing him to concurrent terms of 25 years to life and 25 years, respectively, unanimously affirmed.

The court properly exercised its discretion when it precluded defendant from testifying that the murder victim had requested that defendant accompany him to court shortly before the homicide. This testimony's potential for prejudice substantially outweighed any probative value (*see People v Mateo*, 2 NY3d 383, 424-425 [2004], *cert denied* 524 US 946 [2004]). At most, this evidence tended to show that the murder victim did not consider defendant an enemy. However, this did little to

contradict the People's theory that the murder and attempted murder were primarily motivated by gang politics rather than animosity toward the victims. Moreover, the precluded testimony was irrelevant to anything other than the victim's state of mind and cumulative to other evidence that the court received. The unexplained reference to a court case carried the potential for speculation and prejudice.

Defendant did not preserve his claim that the court erred in precluding him from testifying about another statement by the murder victim (*see People v George*, 67 NY2d 817, 819 [1986]), or any constitutional arguments regarding either of the precluded statements (*see People v Lane*, 7 NY3d 888, 889 [2006]), and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]). We also reject

defendant's related claim of ineffective assistance of counsel (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 24, 2012

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

7443 Rosemary Atwell, Index 300726/09
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant,

Anastassis Athanastos, etc.,
Defendant.

_____

Wallace D. Gossett, Brooklyn (Lawrence A. Silver of counsel), for appellant.

Scott Baron & Associates, P.C., Howard Beach (John Burnett of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered February 17, 2011, which denied defendant New York City Transit Authority's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

While defendant initially established its entitlement to judgment as a matter of law, plaintiff's evidence raises an issue

of fact as to whether she appeared to be capable of negotiating the height differential, and thus, whether defendants owed her a duty to kneel the bus (*see Trainer v City of New York*, 41 AD3d 202 [2007]).

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

ENTERED: APRIL 24, 2012

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

7444 Lei Chen Fan, et al., Index 110483/06
Plaintiffs-Appellants,

-against-

New York SMSA Limited Partnership
doing business as Verizon Wireless,
Defendant-Respondent,

Posto Inc., etc., et al.,
Defendants.

_____

Avrom R. Vann, P.C., New York (Avrom R. Vann of counsel), for appellants.

Snyder & Snyder LLP, Tarrytown (Leslie J. Snyder of counsel), for respondent.

_____

Order, Supreme Court, New York County (Martin Shulman, J.), entered January 3, 2011, which granted defendant New York SMSA Limited Partnership d/b/a Verizon Wireless's (Verizon) motion for summary judgment dismissing the complaint as to it, unanimously affirmed, with costs.

Defendant Verizon has tendered sufficient evidence to establish its prima facie entitlement to summary judgment. Verizon submitted the affidavit of engineer John C. Ferrante, who averred that after he had examined the party wall at issue and the lessor's deed, he found that no portion of Verizon's equipment rested on plaintiffs' property. Instead, Ferrante

stated that Verizon was utilizing "a small portion" of the party wall by placing steel support beams on the wall, but that such use was de minimis. Ferrante also asserted that Verizon's support beams did extend beyond the centerline of the party wall by approximately two inches and that the beams supporting Verizon's equipment are not detrimental to the party wall's structural integrity. The engineer asserted that the beams do not interfere with plaintiffs' use of the wall for support and would not impede their ability to extend the wall upward in the future. Verizon also submitted the certification of land surveyor Saeid Jalilvand, stating that he surveyed Verizon's equipment and determined that the installation did not extend beyond the party wall onto plaintiffs' property.

Although an owner may not weaken a party wall or encroach onto the property of the adjoining property owner, commercial use of a party wall that is on the owner's property is permissible (*see Sakele Bros. v Safdie*, 302 AD2d 20, 26 [2002]; *Mileage Gas Corp. v Kushner*, 245 App Div 836 [1935]; *Herrman v Hartwood Holding Co., Inc.*, 193 App Div 115, 119-120 [1920]; *see also* 9-61 Powell on Real Property § 61.04 [3]).

The complaint fails to set forth a cause of action for trespass, even though Verizon acknowledges that its steel support

beams are on top of the party wall and extend two inches beyond the party wall's centerline, because there is no allegation that the structural integrity of the wall or plaintiff's property has been affected by the beams or that there is a possibility that the beams will prevent plaintiffs from using the party wall (*see Varriale v Brooklyn Edison Co.*, 252 NY 222, 224 [1929]; *5 E. 73rd, Inc. v 11 E. 73rd St. Corp.*, 16 Misc 2d 49, 56-57 [1959], *affd* 13 AD2d 764 [1961]; *American Ry. Express Co. v Lassen Realty Co.*, 205 App Div 238, 240-241 [1923]; *Batt v Kelly*, 75 App Div 321, 322 [1902]).

The affidavit of plaintiffs' property manager fails to raise a question of fact because it fails to set forth the expertise upon which she bases her determination that the weight being placed upon the party wall would affect its structural integrity (*see Karasik v Bird*, 98 AD2d 359, 362 [1984]).

Contrary to plaintiffs' contention, the court was not required to deny Verizon summary judgment for failing to annex a

complete version of the lease agreement from which it had obtained the right to place its equipment on co-defendant's roof, because the deficiency was not an impediment to deciding the merits of the motion.

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

ENTERED: APRIL 24, 2012

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

7445 Pamela B. Tishman, Index 311980/05
Plaintiff-Respondent,

-against-

Marc Bogatin,
Defendant-Appellant.

_____

Marc Bogatin, New York, appellant pro se.

Pamela Tishman, New York, respondent pro se.

_____

Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered October 14, 2011, which, insofar as appealed from as limited by the briefs, upon plaintiff's motion, directed defendant to pay 40% of the cost of the parties' older child's college education, unanimously affirmed, without costs.

The motion court properly rejected defendant's contention that a so-called SUNY cap should be imposed on his obligation to contribute to the costs of the child's college education — that is, that his contribution should be based on the cost of an education at a college in the State University of New York system, because plaintiff failed to show that the child's needs cannot be met adequately at a SUNY college. Whether to impose a SUNY cap is determined on a case-by-case basis, considering the parties' means and the child's educational needs (*see e.g. Powers*

v Wilson, 56 AD3d 642 [2008]; *Matter of Holliday v Holliday*, 35 AD3d 468 [2006]; *see also Berliner v Berliner*, 33 AD3d 745, 748 [2006], *lv denied* 10 NY3d 702 [2006]). A rule that, absent unusual circumstances, a parent's obligation is limited to the maximum SUNY tuition would be inconsistent with Domestic Relations Law § 240(1-b)(c)(7), which provides that a court may award educational expenses where it determines, "having regard for the circumstances of the case and of the respective parties and in the best interests of the child, and as justice requires," that the education sought to be paid for is appropriate (*see Chan v Chan*, 267 AD2d 413, 414 [1999]).

The record supports the court's direction that defendant pay 40% of the costs of the parties' older child's education at a private college. The child attended an elite public high school, his reasons for preferring the private college over SUNY schools were sound, both parties attended private college and private law school, and both parties have the resources to pay the tuition at the private college where the child is enrolled (Domestic

Relations Law § 240[1-b][c][7]; *see Otero v Otero*, 222 AD2d 328, 329 [1995]; *see also Rosado v Hughes*, 23 AD3d 318 [2005]).

We have considered defendant's remaining contention and find it unavailing.

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

ENTERED: APRIL 24, 2012

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

7446 The People of the State of New York, Ind. 7034/04
Respondent,

-against-

Eddie Badia,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Arthur H. Hopkirk of counsel), for appellant.

Eddie Badia, appellant pro se.

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J. at first jury trial; Edwin Torres, J. at second jury trial and sentencing), rendered November 2, 2006, convicting defendant of criminal possession of a controlled substance in the first and third degrees, and sentencing him to an aggregate term of 25 years to life, unanimously reversed, on the law, and the matter remanded for a new trial.

The court unduly restricted defendant's cross-examination of a People's witness concerning the police investigation into a participant in the crime. Initially, we note that the court erred in concluding that it was "bound by the strictures" of the ruling on this issue made by the court that presided over

defendant's first trial, in which the jury failed to reach a verdict. On retrial, the court had full discretion to make its own determination (*see People v Evans*, 94 NY2d 499 [2000]).

In any event, regardless of whether the prior court's ruling limiting defendant's cross examination was law of the case on the retrial, that ruling was error, and defendant is entitled to a new trial. In light of the defense theory that defendant had unwittingly agreed to aid in the drug enterprise at the other participant's behest, the defense should have been given the opportunity to explore what the police investigation of the other participant had revealed (*see e.g. People v Terry*, 209 AD2d 257 [1994], *lv denied* 85 NY2d 914 [1995]; *People v Garriga*, 189 AD2d 236, 242 [1993], *lv denied* 82 NY2d 718 [1993]).

The limitations on cross-examination were serious enough to impact defendant's constitutional rights to present a defense and to confront the witnesses against him (*see Chambers v Mississippi*, 410 US 284, 294 [1973]). While defendant did receive some opportunity to pursue his line of defense, the additional information defendant sought to elicit was critical to that defense, and the error was not harmless. We have considered and rejected the People's preservation arguments.

In light of our remand for a new trial, we do not address defendant's remaining contentions, except that we find that defendant's pro se suppression claims are without merit.

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

ENTERED: APRIL 24, 2012

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

7449-
7450 Index 406411/07

Robert Retta, et al.,
Plaintiffs-Respondents,

-against-

160 Water Street Associates, L.P., et al.,
Defendants-Appellants,

OneSource N.Y., Inc., et al.,
Defendants-Respondents.

_____

Law Offices of Charles J. Siegel, New York (Peter E. Vairo of counsel), for appellants.

Diamond and Diamond, LLC, New York (Stuart Diamond of counsel), for Robert Retta and Enis Retta, respondents.

Gallo Vitucci & Klar, LLP, New York (Kimberly A. Ricciardi of counsel), for OneSource N.Y., Inc., respondent.

Michael A. Cardozo, Corporation Counsel, New York (Scott Shorr of counsel), for New York City Health and Hospitals Corportion, respondent.

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Judgment, Supreme Court, New York County, (Barbara Jaffe, J.), entered June 16, 2011, and corrected July 18, 2011, dismissing plaintiff's complaint and all cross claims as against defendant One Source, and bringing up for review that portion of an order, same court and Justice, entered April 12, 2011, that dismissed the complaint and all cross claims against OneSource, unanimously affirmed, with costs. Appeal from the remainder of

the April 12, 2011 order, unanimously dismissed, without costs, as untimely.

An appeal must be taken "within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry" (CPLR 5513[a]). The time period for filing a notice of appeal is nonwaivable and jurisdictional (*see Matter of Haverstraw Park v Runcible Props. Corp.*, 33 NY2d 637 [1973]; *Jones Sledzik Garneau & Nardone, LLP v Schloss*, 37 AD3d 417 [2007]).

Pursuant to CPLR 5501(a)(1), "[a]n appeal from a final judgment brings up for review . . . any non-final judgment or order which necessarily affects the final judgment" *(see also Siegmund Strauss, Inc. v East 149th Realty Corp.*, 81 AD3d 260, 267 [2010], *lv granted in part, dismissed in part* 17 NY3d 936 [2011]). "[W]hen an appeal from an intermediate order is perfected together with an appeal from a final judgment, the appeal from the intermediate order must be dismissed and any error alleged, to the extent that it affects the final judgment, may be reviewed upon the appeal from the final judgment" *(Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567 [1978]).

Here, defendants 160 Water Street and Oestreicher Properties

(160 Water Street) timely appealed from the judgment granting defendant OneSource summary judgment, bringing up for review that portion of the prior order which granted that relief. However, the remainder of the order was not brought up for review, and 160 Water Street's notice of appeal from that order was untimely.

As for the timely appeal, the provision at issue in the contract states that OneSource agreed to indemnify 160 Water Street "from and against any loss, damage or expense arising out of or from any injury to person or persons, or damage . . . arising out of or from any wrongful act or omission on the part of [OneSource], its agents, servants, employees *and the like*" (emphasis added). Plaintiff, an employee of a subcontractor of OneSource, does not qualify under the category "and the like," which follows the terms "agent, employee, or servant."

Agents, employees, and servants are all in relationships where they consent to act on behalf of another, i.e. principals, employers and masters, respectively, and remain subject to the other's control. Independent contractors differ in that important respect from agents, employees or servants (*see Kleeman v Rheingold*, 81 NY2d 270 [1993]; *Art Fin. Partners, LLC v Christie's Inc.*, 58 AD3d 469, 471 [2009]). Since an independent

contractor does not bear those important hallmarks shared by employees, servants and agents, they cannot be said to be included in the contract as "the like" and indemnity does not follow.

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

ENTERED: APRIL 24, 2012

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

7451-
7451A-
7451B In re Laqua'sha Renee G.,
etc., and Others,

Dependent Children Under the
Age of Eighteen Years, etc.,

Sheila Renee M., etc.,
Respondent-Appellant,

Little Flower Children and Family Services,
Petitioner-Respondent.

_____

Joseph V. Moliterno, Scarsdale, for appellant.

Carrieri & Carrieri, P.C., Mineola (Ralph R. Carrieri of counsel), for respondent.

Jessica I. Cuadrado, New York, attorney for the children.

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Orders of disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about April 4, 2011, which, upon fact-finding determinations of permanent neglect and abandonment, terminated respondent mother's parental rights to the subject children and committed the children's guardianship and custody to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence established that the children were permanently neglected within the meaning of Social Services

Law § 384-b(7)(a). Despite petitioner's diligent efforts to strengthen and encourage the parent-child relationship by, among other things, formulating a service plan, scheduling visits with the children, and referring respondent to various programs and courses, respondent failed to complete drug treatment and parenting skills programs or to attend individual counseling, failed to follow through with any of the referrals made, and continually failed to attend meetings and scheduled visitation at the agency (*see Matter of Fernando Alexander B. [Simone Anita W.]*, 85 AD3d 658, 659 [2011]). Moreover, notwithstanding the fact that respondent spoke with the children via telephone on a regular basis, her failure, during the six months immediately prior to the filing of the petitions, to visit the children or maintain contact with the agency, although she was able to do so and was not prevented or discouraged from doing so by the agency, gave rise to a presumption of abandonment that respondent did not rebut (*see Social Services Law* § 384-b[5][a]; *Matter of Chaka F.*, 220 AD2d 310 [1995]).

A preponderance of the evidence showed that the best interests of the children would be served by terminating respondent's parental rights so as to facilitate their adoption (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-48 [1984]).

Respondent's frequency of contact with the children has decreased and she still has not completed any of the remedial programs required by the service plan. Meanwhile, the eldest child has since aged out of foster care, and the younger children, now in their teens, have been in a loving and stable home for nearly four years, and they and their foster mother share the mutual desire that they be adopted.

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

ENTERED: APRIL 24, 2012

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

7453 The People of the State of New York, Dkt. 34843C/10
Respondent,

-against-

Michael Dinardo,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Jenetha G. Philbert of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Ralph A. Fabrizio, J.), rendered July 19, 2010, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the seventh degree, and sentencing him to a term of 90 days, unanimously affirmed.

The accusatory instrument was not jurisdictionally defective. The misdemeanor complaint, which in this case was required to meet the standards that apply to an information, sufficiently alleged constructive possession of drugs. Giving the complaint "a fair and not overly restrictive or technical reading" (*People v Casey*, 95 NY2d 354, 360 [2000]), we find "as a matter of common sense and reasonable pleading" (*People v Davis*, 13 NY3d 17, 32 [2009]) that it alleged that defendant was in a

hotel room where the arresting officer found drugs on a night table and in a dresser drawer. This supports an inference that that defendant was in constructive possession of the drugs (*see People v Reisman*, 29 NY2d 278, 285-286 [1971], *cert denied* 405 US 1041 [1972]; *People v Hyde*, 302 AD2d 101, 105 [2003], *lv denied* 99 NY2d 655 [2003]), even without any allegation concerning defendant's relationship to the hotel room.

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

ENTERED: APRIL 24, 2012

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

7455 CPN Mechanical, Inc., et al., Index 601276/10
Plaintiffs-Respondents,

-against-

Madison Park Owner LLC,
Defendant-Appellant,

G Builders IV LLC, et al.,
Defendants.

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Zetlin & De Chiara LLP, New York (Lori Samet Schwarz of counsel), for appellant.

Farrell Fritz, P.C., Uniondale (Jason S. Samuels of counsel), for respondents.

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Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered January 20, 2011, which, to the extent appealed from, denied defendant Madison Park Owner LLC's motion for summary judgment dismissing the causes of action for mechanic's lien foreclosure, unjust enrichment, and quantum meruit as against it, and on its counterclaim, pursuant to New York Lien Law §§ 39 and 39-a, for wilful exaggeration of the lien, unanimously affirmed, without costs.

The e-mails noting that plaintiff CPN Mechanical, Inc. was doing work on the project within eight months of its filing of a mechanic's lien establish that the lien was filed timely (*see*

Lien Law § 10). Given the relationship among CPN, its newly created affiliates, and Madison Park Owner, factual issues exist whether CPN performed the work covered by the lien with the knowledge of defendant G Builders IV LLC, Madison Park Owner's construction manager, which entered into the contracts with CPN's affiliates. Moreover, change orders were issued to CPN for work covered by the contracts to its affiliates. If CPN did the work covered by its affiliates' contracts with G Builders' knowledge, it is entitled to file a lien for the amounts unpaid for that work (*see* Lien Law § 3; *A. Servidone, Inc. v Bridge Tech.*, 280 AD2d 827, 829-830 [2001], *lv denied* 96 NY2d 712 [2001] [successor corporation that performed no work on the property could not assert lien in its own name for work done by predecessor company).

Madison Park Owner contends that it cannot be held liable to plaintiffs under quasi-contract because there is no proof that it expressly undertook to pay for plaintiffs' work (*see Perma Pave Contr. Corp. v Paerdegat Boat & Racquet Club*, 156 AD2d 550, 551 [1989]). However, it paid each plaintiff directly with a two-party check showing G Builders as co-payee. Given the facts of this case, whether each of these checks constitutes an express promise by Madison Park Owner to pay the particular plaintiff

directly or merely to guarantee G Builders' payment is an issue of fact.

There are factual issues that preclude a determination on this record of the bona fides of the lien and its amount which also preclude summary judgment on Madison Park Owner's counterclaim for wilful exaggeration of the lien (*see* Lien Law §§ 39 and 39-a).

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

ENTERED: APRIL 24, 2012

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

7456 The People of the State of New York, Ind. 261/08
Respondent,

-against-

Olu Norwood,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered October 28, 2008, convicting defendant, upon his plea of guilty, of assault in the first degree, and sentencing him to a term of nine years, unanimously affirmed.

The court properly exercised its discretion in denying defendant's motion to withdraw his guilty plea (*see People v Frederick*, 45 NY2d 520 [1978]). Although defendant received a sufficient opportunity to do so, he failed to provide a legal basis for withdrawing his plea. The transcript of the plea proceeding demonstrates that defendant entered his guilty plea knowingly, intelligently and voluntarily (*see People v*

Fiumefreddo, 82 NY2d 536, 543 [1993]). Defendant expressly admitted his intent to cause serious physical injury, and there is no indication that he failed to understand that element.

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 24, 2012

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

7457 In re Jacob H., and Another,

Dependent Children Under the
Age of Eighteen Years, etc.,

Commissioner of Social Services
of the City of New York,
Petitioner-Appellant,

Logann K.,
Respondent-Respondent.

_____

Michael A. Cardozo, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for appellant.

Dora M. Lassinger, East Rockaway, for respondent.

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

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Order of fact-finding, Family Court, New York County (Jody Adams, J.), entered on or about August 16, 2011, which, to the extent appealed from as limited by the briefs, after a fact-finding hearing, dismissed the petition alleging that respondent mother had neglected the subject children, unanimously reversed, on the law and the facts, without costs, the petition reinstated as to those children, findings of derivative neglect entered as to them, and the matter remanded for dispositional hearings.

Family Court found that the mother had used inappropriate and excessive corporal punishment against her oldest son and six-

year-old daughter, and had derivatively neglected her youngest daughter. We find that the same evidence supporting those findings demonstrates, by a preponderance of the evidence, that the mother had derivatively neglected the subject children as well (*see* Family Ct Act § 1046[a][i]; *Matter of Ameena C. [Wykisha C.]*, 83 AD3d 606, 607 [2011]; *Matter of Joseph C. [Anthony C.]*, 88 AD3d 478, 479 [2011]).

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

ENTERED: APRIL 24, 2012

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

7458 DirecTV Latin America, LLC, et al., Index 601140/10
Plaintiffs-Appellants,

-against-

Carlos Pratola, et al.,
Defendants-Respondents.

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Mintz & Gold LLP, New York (Steven G. Mintz of counsel), for appellants.

Robinson Brog Leinwand Greene Genovese & Gluck, P.C., New York (David C. Burger of counsel), for respondents.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered April 12, 2011, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

The issue whether New York courts have personal jurisdiction over defendants Pratola and Clemente pursuant to CPLR 301 and 302 was determined in the prior federal action and, pursuant to the doctrine of collateral estoppel, may not be relitigated (*see Keeler v West Mtn. Corp.*, 105 AD2d 953, 955 [1984]). Although plaintiff Latin American Sports, LLC was not a party to the federal action, it may be collaterally estopped because it is a

limited liability company wholly owned by DirecTV, and its interests with respect to the claims against defendants are identical to those of DirecTV (*see D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990]).

No determination was made in the federal action as to personal jurisdiction over defendant Zunda, allegedly a citizen of the United States with a domicile in Argentina, who, until his termination, was employed as a senior officer at DirecTV Argentina, a subsidiary of DirecTV. Plaintiffs' sole allegation in support of their position is that defendants deposited funds into a New York bank account owned by Clemente, from which they funneled money to Pratola and Zunda. This is insufficient to invoke personal jurisdiction over Zunda pursuant to CPLR 302(a)(1), which authorizes exercise of personal jurisdiction over a non-domiciliary who "transacts any business within the

state" (*see Pramer S.C.A. v Abaplus Intl. Corp.*, 76 AD3d 89, 96 [2010]).

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: APRIL 24, 2012

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

7459 Wojciech Rzymski, Index 104591/07
Plaintiff-Respondent, 590892/09

-against-

Metropolitan Tower Life
Insurance Company, et al.,
Defendants-Appellants.

[And Another Action]

_____

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Louise M. Cherkis of counsel), for appellants.

Edelman & Edelman, P.C., New York (David M. Schuller of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered August 29, 2011, which granted plaintiff's motion for summary judgment as to liability on his cause of action pursuant to Labor Law § 240(1) and denied defendants' cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff, a steam fitter, was installing one end of a steel pipe that weighed approximately 250 pounds, and was 20 feet long and 4 inches wide, into a clevis hanger when the other side of the pipe that had previously been installed, came loose, causing the pipe to strike him in the head and knock him off the ladder

on which he was standing. Under these circumstances, the motion court correctly granted plaintiff's motion for partial summary judgment on his cause of action pursuant to Labor Law § 240(1). Plaintiff established his entitlement to judgment as a matter of law by demonstrating that his claims encompass both a falling object and a fall from an elevation due to inadequate safety devices (*see e.g. Kovasick v Tishman Constr. Corp.*, 50 AD3d 287, 288 [2008]). Defendants failed to raise an issue of fact in opposition to the motion.

The motion court also correctly denied defendants' cross motion to dismiss the cause of action pursuant to Labor Law § 241(6), which is predicated on a violation of 12 NYCRR 23-1.8(c). The record reflects an issue of fact concerning whether safety hats, i.e., hard hats, were available on site.

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

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

ENTERED: APRIL 24, 2012

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

7460 Jorge Bittar, et al., Index 111522/07
Plaintiffs-Appellants,

-against-

New Growing, Inc., et al.,
Defendants-Respondents.

_____

Kenneth J. Ready & Associates, Mineola (Kenneth J. Ready of counsel), for appellants.

Gannon, Rosenfarb, Balletti & Drossman, New York (Lisa L. Gokhulsingh of counsel), for respondents.

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Order, Supreme Court, New York County (Jane S. Solomon, J.), entered March 14, 2011, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established their entitlement to judgment as a matter of law in this action where plaintiff fell after exiting the restroom in defendants' restaurant. There was a single step that separated the dining area from where the restroom was located. Plaintiff was unable to identify what caused his fall, and he testified that the lighting conditions were adequate. Moreover, defendants demonstrated that the subject step was not inherently dangerous and there were several signs warning of the

drop (*see Remes v 513 W. 26th Realty, LLC*, 73 AD3d 665, 666 [2010]; *Broodie v Gibco Enters., Ltd.*, 67 AD3d 418 [2009]).

Plaintiff's opposition failed to raise a triable issue of fact. The record does not support plaintiff's argument that the step created "optical confusion" (*see Langer v 116 Lexington Ave., Inc.*, 92 AD3d 597, 599 [2012]; *compare Saretsky v 85 Kenmare Realty Corp.*, 85 AD3d 89 [1st Dept 2011]).

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

ENTERED: APRIL 24, 2012

CLERK

Mazzarelli J.P., Sweeny, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

7461-
7461A In re Friends of Kelly O'Neill Levy,
Petitioner,

-against-

The Environmental Control Board of
the City of New York, et al.,
Respondents.

Index 252342/09

Herbert Monte Levy, New York, for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Lisa A. Giunta of counsel), for respondents.

Determination of respondent The Environmental Control Board of the City of New York (ECB), dated May 7, 2009, which denied petitioner's request for a superseding appeal decision and ratified its determination dated January 22, 2009, finding that petitioner violated Administrative Code § 10-119 (the anti-posting law), unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, Bronx County [Robert E. Torres, J.], entered March 17, 2011), dismissed, without costs.

The court properly held that respondent, the Department of Sanitation, timely appealed from the ALJ's decision. Where, as here, an aggrieved party applies for a copy of the audio tape of

the hearing, within the allotted time to file exceptions, the time to file exceptions "shall be extended by 20 days from the date when such . . . audio tape is delivered or mailed to the party requesting same" (48 RCNY 3-72 [a]). Accordingly, the Department of Sanitation's August 31, 2007 letter requesting the audio tape of the hearing extended its time to appeal the ALJ's decision.

Petitioner's argument, that the anti-posting law (Administrative Code of City of NY § 10-119) is unconstitutional on its face, is unpreserved for appellate review (*see Matter of Berbenich v Schoenfeld*, 149 AD2d 505, 508 [1989]). In any event, the law is constitutional both on its face and as applied. "It is axiomatic that [anti-posting] ordinances are constitutional restrictions on First Amendment activity" (*Cotz v Mastroeni*, 476 F Supp 2d 332, 372 n 43 [2007]). Furthermore, the specific anti-posting law at issue is constitutional, because it is narrowly tailored to achieve the significant government interest of preservation of aesthetics and prevention of litter, and it "leaves open ample alternative means for communicating the information and is content neutral in its own terms" (*Herschaft v Bloomberg*, 70 Fed Appx 26, 27-28 [2003], *cert denied* 540 US 1073 [2003]).

ECB's determination that petitioner was responsible for the subject violations of the anti-posting law was supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-81 [1978]). Petitioner's name did not have to appear on the posters for the presumption, set forth at Administrative Code § 10-119(b), to arise, where, as here, there was "other identifying information" linking petitioner to the posters (§ 10-119(b); *see Cheong Mei Inc. v Environmental Control Bd. of the City of N.Y.*, 81 AD3d 452, 452 [2011]). The posters had a picture of candidate Kelly O'Neill Levy, the candidate's name in large print, and a sample ballot with an arrow pointing to the candidate's name, and petitioner was the only campaign committee registered for O'Neill Levy. Petitioner did not rebut the presumption.

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

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

ENTERED: APRIL 24, 2012

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

7462N- Index 103565/11
7462NA Mr. Ho Charter Service, Inc.,
Plaintiff-Respondent,

-against-

Edward G. Ho,
Defendant-Appellant.

_____

Law Office of Mark C. Fang, White Plains (Mark C. Fang of counsel), for appellant.

Schiller Law Group, P.C., New York (Ben Kinzler of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Joan M. Kenny, J.), entered on or about August 1, 2011, which, upon defendant's default, struck defendant's answer and directed an inquest, unanimously dismissed, without costs, as taken from a nonappealable order. Order, same court and Justice, entered August 17, 2011, which denied defendant's motion to vacate the order entered on or about August 1, 2011, unanimously reversed, on the law and the facts, without costs, the motion granted, the order entered on or about August 1, 2011 vacated, the answer reinstated, and the matter remanded for further proceedings.

The order entered on or about August 1, 2011 is nonappealable, as it was entered on default within the meaning of

CPLR 5511 (*see Armin A. Meizlik Co. Inc. v L&K Jewelry Inc.*, 68 AD3d 530, 531 [2009]).

The motion to vacate the order entered on or about August 1, 2011 should have been granted, as defendant demonstrated a meritorious defense and a reasonable excuse for failing to appear at a preliminary conference (*see Armin*, 68 AD3d at 531; CPLR 5015[a][1]). Defendant showed that his failure to appear was neither willful nor a pattern of dilatory behavior, but was simply the result of illness and inadvertent law office failure. Indeed, defendant submitted affirmations by his attorneys stating that they failed to note the scheduled preliminary conference date set forth in two prior orders, that the primary attorney assigned to the case was sick and unable to attend the scheduled conference, and that a substitute attorney from the same law office had advised the court that she would not be able to arrive to the conference by the scheduled time (*see Armin*, 68 AD3d at 531; *Chelli v Kelly Group, P.C.*, 63 AD3d 632 [2009]).

Plaintiff's corporate records and the affidavits based on personal knowledge submitted by the parties, together with prior orders of the court that evaluated the evidence and denied plaintiff injunctive relief, demonstrate merit to the defense.

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

ENTERED: APRIL 24, 2012

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

7463 In re Ronald A. Nimkoff, Index 350768/02
[M-1130] Petitioner,

-against-

Hon. Laura E. Drager, etc., et al.,
Respondents.

_____

Nimkoff Rosenfeld & Schechter, LLP, New York (Ronald A. Nimkoff of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Michael J. Siudzinski of counsel), for Hon. Laura E. Drager, respondent.

Katsky Korins LLP, New York (Sharon T. Hoskins of counsel), for Nancy Waldbaum Nimkoff, respondent.

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The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: APRIL 24, 2012

CLERK

Tom, J.P., Friedman, Catterson, Acosta, Freedman, JJ.

7464 The People of the State of New York, Dkt. 037989C/08
Respondent,

-against-

Jefferson Bonilla,
Defendant-Appellant.

_____

The Bronx Defenders, Bronx (V. Marika Meis of counsel), and DLA Piper LLP (US), New York (Michael P. McMahan of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Richard J. Ramsay of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Robert Torres, J. at first speedy trial motion; Raymond L. Bruce, J. at second speedy trial motion; Robert A. Neary, J. at nonjury trial and sentencing), rendered June 24, 2010, convicting defendant of attempted assault in the third degree and harassment in the second degree, and sentencing him to an aggregate term of one year of probation, unanimously reversed, on the law, and the accusatory instrument is dismissed.

Defendant's second speedy trial motion should have been granted. The People failed to be ready for trial within the 90-day limit for the prosecution of a class A misdemeanor.

The charges were reduced to a misdemeanor on September 10,

2008, at which time the People first answered ready. This initial statement of readiness proved to be illusory. When viewed in light of the surrounding circumstances, the People's October 24, 2008 and January 20, 2009 requests for adjournments, asserting a need for further investigation, effectively conceded that the prior statement of readiness was inaccurate. While a statement of readiness "is presumed to be accurate and truthful," (*People v Acosta*, 249 AD2d 161, 161 [1998], *lv denied* 92 NY2d 892 [1998]), the record rebuts that presumption. Likewise, the record does not support an inference that the People made an initial strategic decision to proceed, if necessary, with a minimal prima facie case (*compare People v Wright*, 50 AD3d 429 [2008], *lv denied* 10 NY3d 966 [2008]), but later determined to present additional evidence.

When the People file a statement of readiness, they must be presently ready to proceed; a prediction or expectation of future readiness is not acceptable (*see People v Kendzia*, 64 NY2d 331, 337 [1985]). We accordingly conclude, after deducting a period from October 24, 2008 to January 20, 2009 that was excludable for motion practice, that the People should have been charged 44 days (*see People v Smith*, 211 AD2d 586 [1995], *lv denied* 85 NY2d 936 [1995]).

Next, the 16 days from January 20 to February 5, 2009 should have been charged to the People. The People answered not ready on January 20, and, after the matter was adjourned, they filed an off-calendar statement of readiness the next day. However, they did not mail the notice to defense counsel until February 4, and it arrived the next day. For an off-calendar statement of readiness to be effective, the People must provide written notice to both the court and defense counsel (*see People v Kendzia*, 64 NY2d at 337).

The People concede that the four days between October 16 and 20, 2009 and the seven days between February 9 and 16, 2010 should be charged to them. The People also requested a one-week adjournment on January 5, 2010, which should be charged to them.

Finally, the People did not respond to defendant's second speedy trial motion until April 8, 2010 although the court had ordered them to do so by March 11, 2010. Thus, the People are charged with the 28-day delay in resolving the motion (*see People v Reid*, 245 AD2d 44 [1997], *lv denied* 91 NY2d 1012 [1998]).

The total time for which the People should have been charged

well exceeded the 90-day limit. In light of the foregoing, we do not reach defendant's remaining speedy trial arguments, or his claims regarding the sufficiency and weight of the evidence.

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

ENTERED: APRIL 24, 2012

CLERK

Tom, J.P., Friedman, Catterson, Acosta, Freedman, JJ.

7465 Ludnila Sulich, Index 18993/01
Plaintiff-Respondent,

-against-

The City of New York,
Defendant,

The New York City Transit
Authority, et al.,
Defendants-Appellants.

_____

Wallace D. Gossett, Brooklyn (Anita Isola of counsel), for appellants.

Bisogno & Meyerson, Brooklyn (Anthony M. Deliso of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Maryann Brigantti-Hughes, J.), entered April 8, 2011, upon a jury verdict, awarding plaintiff the principal amounts of $75,000 for past pain and suffering and $150,000 for future pain and suffering over 20 years as against defendants New York City Transit Authority and Samuel Davis, unanimously modified, on the facts, to vacate the award for future pain and suffering and order a new trial solely as to such damages, unless plaintiff, within 30 days of service of a copy of this order with notice of entry, stipulates to accept a reduced award for future pain and suffering of $100,000 and to entry of an amended judgment in accordance therewith, and

otherwise affirmed, without costs.

Plaintiff was injured in a motor vehicle accident in January 2001. Her injuries included two bulging discs in her neck, which severely restricted her range of motion. As of the time of trial, which was held almost 10 years after the accident, the 53-year-old plaintiff still suffered from pain on a daily basis, which varied in degree, and there was a continued need for cervical treatment. Under the circumstances, we find that the award of past pain and suffering was appropriate. However, the award for future pain and suffering deviated materially from what would be reasonable compensation (*see e.g. Elias v Linder*, 4 AD3d 136 [2004]; *Donatiello v City of New York*, 301 AD2d 436 [2003]).

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

ENTERED: APRIL 24, 2012

CLERK

Tom, J.P., Friedman, Catterson, Acosta, Freedman, JJ.

7466 Gloria Clark, Index 104820/09
Plaintiff-Respondent,

-against-

Jay Realty Corp.,
Defendant-Appellant,

Guiding Eyes for the Blind,
Inc., et al.,
Defendants-Respondents.

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

Law Offices Marius C. Wesser, P.C., New York (Marius C. Wesser of counsel), for Gloria Clark, respondent.

Malapero & Prisco, LLP, New York (Andrew L. Klauber of counsel), for Guiding Eyes for the Blind, Inc. and James Gardner, respondents.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered November 28, 2011, which, to the extent appealed from, denied defendant landlord's motion for summary judgment dismissing the complaint and all cross claims as against it, unanimously affirmed, without costs.

The landlord failed to establish its entitlement to judgment as a matter of law in this action where plaintiff, who is legally blind, alleged that she was injured when she tripped and fell over an elevated sidewalk flag as she walked in front of the

landlord's building. Although plaintiff could not state with certainty what caused her fall, she testified that she fell after her right foot hit "a raised area" and that the defect was "[a] curb-like raise." Moreover, defendant Gardner, who was walking with plaintiff at the time of the accident, testified that while he was not looking at plaintiff's feet when she tripped, he did see her fall and that she landed on the subject sidewalk flag (*see Narvaez v 2914 Third Ave. Bronx, LLC*, 88 AD3d 500 [2011]; *Tiles v City of New York*, 262 AD2d 174 [1999]).

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

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

ENTERED: APRIL 24, 2012

CLERK

Tom, J.P., Friedman, Catterson, Acosta, Freedman, JJ.

7467 Paul Turner, Index 260406/10
Petitioner-Respondent,

-against-

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

_____

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

Burns & Harris, New York (Blake G. Goldfarb of counsel), for respondent.

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Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered January 19, 2011, which granted petitioner's motion to deem the notice of claim timely filed nunc pro tunc, unanimously reversed, on the law and the facts, without costs, and the motion denied.

Petitioner was injured on April 14, 2009 while working in an elevator in defendants' building. Plaintiff believed that he could not sue because his claim was covered by the Workers' Compensation Law, and thus, he did not seek legal advice until July 13, 2010. On that day, he retained counsel who immediately served a notice of claim. The next day, July 14, 2010, counsel sought an order deeming the notice of claim to have been timely served.

A tort action against a municipality cannot be maintained unless a timely notice of claim is served, and the action is commenced within one year and 90 days after the "happening of the event upon which the claim is based" (General Municipal Law § 50-i[1]). The court is without power to consider an application to file a late notice of claim after expiration of that limitations period (*see Pierson v City of New York*, 56 NY2d 950, 954-955 [1982]).

In calculating the limitations period, the day of the accident is excluded, the one-year period is counted as 365 days, and then the 90-day period is counted (*see DeCicco v City of Syracuse*, 68 AD3d 1771 [2009]; *see also* General Construction Law §§ 20, 58). The one-year period leads to the anniversary date of the event, here April 14, 2010, not April 15, 2010, as calculated by petitioner (*see* 221 Siegel's Practice Review 4, *Year and 90 Days For Action Against Municipality Is Not Same As Year and 3 Months-And Difference Brings Dismissal* [May 2010]). The

limitations period expired 90 days later, on July 13, 2010, and thus, the application made on July 14, 2010 was untimely (*see Pietrowski v City of New York*, 166 AD2d 423, 425 [1990]; *Bacalokonstantis v Nichols*, 141 AD2d 482 [1988]).

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

ENTERED: APRIL 24, 2012

CLERK

Tom, J.P., Friedman, Catterson, Acosta, Freedman, JJ.

7468 Althea Gibbs, etc., et al., Index 350121/09
Plaintiffs-Respondents,

-against-

Andre O. Reid, et al.,
Defendants-Appellants.

_____

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for Andre O. Reid and Charleen Temple Express, Inc., appellants.

Picciano & Scahill, P.C., Westbury (Thomas R. Craven, Jr., of counsel), for Jermaine A. Davis and Stacey A. Bonner, appellants.

Andrew C. Laufer, New York, for respondents.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered March 24, 2011, which, insofar as appealed from as limited by the briefs, denied defendants' motions for summary judgment dismissing the complaint on the ground that plaintiffs did not suffer a serious injury within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motions granted. The Clerk is directed to enter judgment in defendants' favor dismissing the complaint.

Defendants established prima facie that the infant Monique Gibbs's alleged cervical spine injury and plaintiff Sabrina Stewart's alleged cervical and lumbar spine injuries did not constitute serious injuries within the meaning of Insurance Law § 5102(d), by submitting affirmations by multiple experts reporting a full range of motion in all planes (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350, 353 [2002]). Any discrepancies in the experts' stated normal values for certain ranges of motion are insignificant, especially since a full range of motion was demonstrated in every plane (*see Ovalles v Herrera*, 89 AD3d 636 [2011]; *Anderson v Zapata*, 88 AD3d 504 [2011]). Moreover, defendants also submitted the affirmations of a radiologist who opined that Gibbs's bulging lumbar disc was degenerative in origin and that Stewart's cervical spine showed no herniations or bulges.

Plaintiffs failed to raise any issue of fact because none of their evidence was submitted in admissible form. Their chiropractor affirmed his reports, but chiropractors are not

among those whose affirmations have the same force and effect as affidavits (*see* CPLR 2106).

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

ENTERED: APRIL 24, 2012

CLERK

Tom, J.P., Friedman, Catterson, Acosta, Freedman, JJ.

7469 The People of the State of New York, Ind. 3934/02
Respondent,

-against-

Michael Martin,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Barbara Zolot of counsel), and Chadbourne & Parke LLP, New York (Michael A. Samalin of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Nancy D. Killian of counsel), for respondent.

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Order, Supreme Court, Bronx County (John P. Collins, J.), entered May 3, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously reversed, on the law, and the matter remanded for de novo proceedings on the motion.

Defendant was eligible for consideration for resentencing even though he had been released from custody on his underlying drug conviction but reincarcerated for a parole violation (*see People v Paulin*, 17 NY3d 238 [2011]).

The court ruled in the alternative that substantial justice dictated that defendant's motion be denied. However, defendant was denied his right to be "brought before the court and given an opportunity to be heard" (*People v Soler*, 45 AD3d 499 [2007], *lv*

dismissed 9 NY3d 1009 [2007]). The court issued its order by mail several weeks in advance of defendant's first scheduled appearance before it. Therefore, defendant had no opportunity to be heard on the issue of whether substantial justice dictated denial of his motion (*see People v Scarborough*, 88 AD3d 585, 585 [2011]).

We have considered and rejected the People's arguments concerning preservation.

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

ENTERED: APRIL 24, 2012

CLERK

Tom, J.P., Friedman, Catterson, Acosta, Freedman, JJ.

7474 The People of the State of New York, Ind. 3549/05
Respondent,

-against-

Anonymous,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Laura A. Ward, J.), rendered on or about May 19, 2009,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

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

ENTERED: APRIL 24, 2012

CLERK

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

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

7478 Networks USA, LLC, Index 601619/08
Plaintiff-Appellant,

-against-

HSBC Bank USA, N.A.,
Defendant-Respondent.

[And A Third-Party Action]

_____

Balestriere Fariello, New York (John G. Balestriere of counsel), for appellant.

Phillips Lytle LLP, Buffalo (Paul K. Stecker of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 16, 2011, which granted defendant's motion for partial summary judgment dismissing the sixth cause of action (breach of contract), unanimously affirmed, with costs.

Defendant established its entitlement to judgment as a matter of law by submitting evidence demonstrating that, contrary to the Uniform Customs and Practice for Documentary Credits which provides that "[t]he Transferring Bank shall be under no obligation to effect [a] transfer except to the extent and in the manner expressly consented to by such bank" (Uniform Customs and Practice for Documentary Credits [1993 revision] Publication No. 500, art 48[c], issued by the International Chamber of Commerce

[now UCP Publication No. 600, art 38 (a)]), defendant did not expressly consent to transfer the letter of credit at issue. Although there is evidence that defendant approved of the transferee's bank, it is insufficient since it is undisputed that defendant has a "know your client" responsibility with respect to *both* the transferee (which was as yet unknown) and its bank. Thus, consenting to the transferee's bank without knowledge of the transferee does not establish defendant's express consent.

In addition, to the extent plaintiff sought lost profits from its second, proposed deal with City Centre, the breach of contract claim was properly dismissed on summary judgment, as those profits were not within the contemplation of the parties at the time the agreement was made (*see e.g. Awards.com v Kinko's, Inc.*, 42 AD3d 178, 183-184 [2007], *affd* 14 NY3d 791 [2010]).

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

ENTERED: APRIL 24, 2012

CLERK

Tom, J.P., Friedman, Catterson, Acosta, Freedman, JJ.

7479- Index 407020/07
7479A Dwayne Moore,
Plaintiff-Appellant,

-against-

Federated Department
Stores, Inc., et al.,
Defendants-Respondents.

_____

Sandra D. Frelix, New York, for appellant.

McCarter & English, LLP, New York (Richard P. O'Leary of counsel), for respondents.

_____

Appeal from order, Supreme Court, New York County (Martin Shulman, J.), entered July 16, 2010, which, to the extent appealed from as limited by the briefs, denied plaintiff's motions to strike defendants' answer and to compel responses to discovery, and granted defendants' cross motions for sanctions to the extent of directing plaintiff's counsel to, among other things, pay $2,000 to the Lawyer's Fund for Client Protection, unanimously dismissed, without costs. Appeal from order, same court and Justice, entered on or about September 27, 2010, which, to the extent appealed from, granted defendant Macy's motion to compel plaintiff's compliance with discovery, and denied plaintiff's motion to stay the order entered July 16, 2010

pending appeal, unanimously dismissed, without costs.

Any right of direct appeal from the intermediate orders terminated with entry of the final judgment dismissing this wrongful termination action for failure to prosecute (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). Plaintiff did not appeal from the final judgment, and there is no basis for deeming his appeals from the intermediate orders as having been taken from the subsequent judgment (*cf.* CPLR 5501[c]; 5520[c]).

Were we to consider plaintiff's arguments on appeal, we would nonetheless find them unavailing. The court properly denied plaintiff's motions to strike and compel, as there was no basis in the record to find defendants' conduct in the discovery process to be willful, contumacious, or in bad faith (*see Ayala v Lincoln Medical & Mental Health Center*, 92 AD3d 542 [2012]). With respect to the court's imposition of sanctions upon plaintiff's counsel, counsel did not appeal from the order or the subsequent judgment awarding sanctions, and plaintiff was not aggrieved by the award and lacks standing to challenge it (*see generally* CPLR 5511[a]; *Matter of Kyle v Lebovits*, 58 AD3d 521 [2009], *lv dismissed in part and denied in part* 13 NY3d 765 [2009], *cert denied* __ US __ , 130 S Ct 1524 [2010]). Plaintiff was also not aggrieved by the grant of defendant Macy's motion to

compel discovery, as plaintiff did not oppose the motion (*see Darras v Romans*, 85 AD3d 710, 711 [2011]). To the extent plaintiff challenges the denial of his motion for a stay of enforcement of the order entered July 16, 2010 pending his appeal from the order, his argument is moot (*see Diane v Ricale Taxi, Inc.*, 26 AD3d 232, 232 [2006]).

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

ENTERED: APRIL 24, 2012

CLERK

Tom, J.P., Friedman, Catterson, Acosta, Freedman, JJ.

7480 In re Cecil S.,
Petitioner-Respondent,

-against-

Dionne S.,
Respondent-Appellant.

_____

Andrew J. Baer, New York, for appellant.

Leslie S. Lowenstein, Woodmere, for respondent.

Anne Reiniger, New York, attorney for the child.

_____

Order, Family Court, New York County (George L. Jurow, J.H.O.), entered on or about June 2, 2011, which granted the petition to modify an order of custody to the extent of awarding sole physical and legal custody of the subject child to petitioner great-grandfather, unanimously affirmed, without costs.

Family Court properly found that a substantial change in circumstances had occurred since the entry of the 2005 ex parte order awarding custody of the subject child to respondent great-aunt, and that it was in the best interests of the child to modify the 2005 order by awarding custody to petitioner (*see generally Matter of Santiago v Halbal*, 88 AD3d 616, 617 [2011]). The record shows that petitioner has been the child's primary

caregiver since 2009, and has provided stable housing, medical care, and supervision for the child. The child calls petitioner "Grandpa" and has been doing well under his care. By contrast, in recent years, respondent has provided little or no direct care for the child, and it is not clear from the record whether respondent lives with petitioner and the child (*see Matter of Diffin v Towne*, 47 AD3d 988 [2008], *lv denied* 10 NY3d 710 [2008]).

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

ENTERED: APRIL 24, 2012

CLERK

Tom, J.P., Friedman, Catterson, Acosta, Freedman, JJ.

7482 Mario Aburto, Index 107783/08
Plaintiff-Appellant,

-against-

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

_____

Pollack, Pollack, Isaac & De Cicco, New York (Jillian Rosen of counsel), for appellant.

Fabiani Cohen & Hall, LLP, New York (Kevin B. Pollak of counsel), for respondents.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered June 27, 2011, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff made a prima facie showing that defendants violated Labor Law § 240(1) and that the violation proximately caused his injuries (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 286 [2003]; *Williams v 520 Madison Partnership*, 38 AD3d 464, 464-465 [2007]). Indeed, plaintiff's 50-h testimony and his coworker's affidavit showed that a scaffold suddenly collapsed under him while he was attempting to

dismantle it at his foreman's instructions. There were no harnesses, lanyards, safety lines, or similar safety devices available for use to prevent his fall (*see Romanczuk v Metropolitan Ins. & Annuity Co.*, 72 AD3d 592, 592-593 [2010]; *Pritchard v Murray Walter, Inc.*, 157 AD2d 1012, 1013 [1990]).

In opposition, defendants failed to raise a triable issue of fact. Defendants submitted an affidavit from a superintendent for plaintiff's employer who averred that he saw plaintiff "violently and forcefully shaking" one of the rails of the scaffold when dismantling it, and that such conduct caused the scaffold's side frame to give way, permitting the platform to fall through the frame. The superintendent also stated that the scaffold was equipped with toe boards and railings. The record reveals that although such safety devices could prevent workers from falling off the edge of a scaffold, they are insufficient to prevent workers from falling through a collapsing scaffold. Further, where, as here, it has been shown that inadequate devices proximately caused plaintiff's injuries, any negligence on plaintiff's part does not preclude partial summary judgment in his favor (*see Blake*, 1 NY3d at 286; *Romanczuk*, 72 AD3d at 592-593; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [2004]).

We also find that plaintiff's motion is not premature.

Defendants have not shown, or even argued, that other facts essential to justify opposition to the motion might exist but could not be stated without additional discovery (*see* CPLR 3212[f]; *Matter of East 51st St. Crane Collapse Litig.*, 89 AD3d 426, 428 [2011]; *Trainer v City of New York*, 41 AD3d 202 [2007]).

We have reviewed plaintiff's remaining contentions and find them unpreserved or unavailing.

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

ENTERED: APRIL 24, 2012

CLERK

Tom, J.P., Friedman, Catterson, Acosta, Freedman, JJ.

7483 The People of the State of New York, Ind. 2545/08
Respondent,

-against-

James P. Kinney,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Patricia M. Nunez, J.), rendered April 27, 2009, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the fourth degree, and sentencing him, as a second felony drug offender, to a term of 3 years, unanimously affirmed.

The court properly denied defendant's motion to withdraw his guilty plea (*see People v Frederick*, 45 NY2d 520 [1978]). "[T]he nature and extent of the fact-finding procedures on such motions rest largely in the discretion of the court" (*People v Fiumefreddo*, 82 NY2d 536, 544 [1993]). The court granted defendant a full opportunity to present his claims, and the circumstances did not warrant further inquiry. The record establishes the voluntariness of the plea.

In moving to withdraw his plea, defendant claimed he pleaded guilty, despite his innocence, because he expected his attorney's ineffectiveness would have resulted in a conviction after trial. Defendant cited some lines of investigation that he thought counsel should have pursued. However, the court was entitled to rely on its familiarity with the case, including both the plea allocution and prior proceedings, in rejecting defendant's claims. We find nothing in the record that casts doubt on the effectiveness of the attorney who represented defendant at the time of the plea, or a prior attorney who had been replaced at defendant's request (*see generally People v Ford*, 86 NY2d 397, 404 [1995])

Defendant also claims his plea allocution was insufficient because the court did not inquire about a possible agency defense, even though the court knew defendant had raised that defense before the grand jury. However, defendant did not move to withdraw his plea on that ground. Moreover, this case does not come within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662 [1988]), because there was nothing in the plea allocution that cast doubt on defendant's guilt or raised an agency defense. Accordingly, this claim is unpreserved and we decline to review it in the interest of

justice.

As an alternative holding, we also reject it on the merits. Nothing occurred during the plea allocution that would trigger a duty to inquire about a waiver of an agency defense (*see e.g. People v Fiallo*, 6 AD3d 176, 177 [2004], *lv denied* 3 NY3d 640 [2004]; *compare People v Mobley*, 68 AD3d 786 [2009]). "The court's duty to inquire [is] not triggered by statements [that a] defendant may have made at junctures other than the plea proceeding itself" (*People v Sands*, 45 AD3d 414, 415 [2007], *lv denied* 10 NY3d 816 [2008]).

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

ENTERED: APRIL 24, 2012

CLERK

Tom, J.P., Friedman, Catterson, Acosta, Freedman, JJ.

7484N In re AIU Insurance Company, Index 260332/09
Petitioner-Respondent,

-against-

Jose M. Veras,
Respondent-Respondent,

State Farm Fire and Casualty Company,
Additional Respondent-Appellant,

Mahlik Richard, et al.,
Additional Respondents.

_____

Picciano & Scahill, P.C., Westbury (Albert J. Galatan of counsel), for appellant.

John C. Buratti & Associates, New York (Julie M. Sherwood of counsel), for AIU Insurance Company, respondent.

Linda T. Ziatz, Forest Hills, for Jose M. Veras, respondent.

_____

Order, Supreme Court, Bronx County (John A. Barone, J.), entered August 3, 2011, which, following a framed issue hearing, granted the petition to stay uninsured motorist arbitration between petitioner and respondent Veras, and directed that additional respondent State Farm Fire and Casualty Company provide Veras with coverage for his underlying claim, unanimously affirmed, with costs.

On June 4, 2005, respondent Veras and additional respondent Richard, who was driving a vehicle owned by additional respondent

Wynder-Ortiz and insured by State Farm, were involved in an automobile accident. State Farm was not notified and did not learn of the accident from its insured. Nearly four years later, it learned of the accident from Veras, who served it with the judgment entered in his favor in the action he had commenced against Richard and Wynder-Ortiz. Although it completed its internal investigation and prepared letters of disclaimer within two weeks, State Farm waited another 15 days before sending out the letters. It was not error for the court to find this largely unexplained delay unreasonable (*see* Insurance Law § 3420[d]; *First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 66 [2003]; *Travelers Ins. Co. v Volmar Constr. Co.*, 300 AD2d 40, 42-43 [2002]; *see also George Campbell Painting v National Union Fire Ins. Co. of Pittsburgh, PA*, 92 AD3d 104 [2012]).

We reject State Farm's argument that the delay was due to its investigation of other possible grounds for disclaiming. State Farm's witness testified that the investigation was completed in two weeks. In any event, however, "just as we would not permit the insured to delay giving the insurer notice of claim while investigating other possible sources of coverage, we should not permit the insurer to delay issuing a disclaimer on a known ground while investigating other possible grounds for

avoiding liability" (*George Campbell Painting*, 92 AD3d at 115).

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

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

ENTERED: APRIL 24, 2012

CLERK

Saxe, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Román, JJ.

6476 State of New York, ex rel. Tony Seiden, et al., Plaintiffs-Respondents, Index 114881/09

-against-

Utica First Insurance Company, Defendant-Appellant,

Kessler Management Inc., et al., Defendants.

_____

Satterlee Stephens Burke & Burke LLP, New York (Thomas J. Cahill of counsel), for appellant.

Balestriere Fariello, New York (John G. Balestriere of counsel), for respondents.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered on or about April 12, 2011, reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the amended complaint as against defendant Utica.

Opinion by Moskowitz, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
John W. Sweeny, Jr.
Karla Moskowitz
Sallie Manzanet-Daniels
Nelson S. Román, JJ.

6476
Index 114881/09

_____x

State of New York, ex rel.
Tony Seiden, et al.,
Plaintiffs-Respondents,

-against-

Utica First Insurance Company,
Defendant-Appellant,

Kessler Management Inc., et al.,
Defendants.

_____x

Defendant Utica First Insurance Company appeals from the order of the Supreme Court, New York County (Joan A. Madden, J.), entered on or about April 12, 2011, which denied its motion to dismiss the amended complaint as against it.

Satterlee Stephens Burke & Burke LLP, New York (Thomas J. Cahill, Glenn Edwards and Michael H. Gibson of counsel), for appellant.

Balestriere Fariello, New York (John G. Balestriere of counsel), for respondents.

MOSKOWITZ, J.

While we agree that reverse false claims are viable under the New York False Claims Act (State Finance Law § 187 *et seq.*) (NYFCA), we do not agree that plaintiff has stated one. We therefore reverse and dismiss the amended complaint as against defendant Utica First Insurance Company (Utica).

Defendant Utica is an insurance company that issued "artisan policies" to defendant contractors and others. It is undisputed that artisan policies provide coverage for small contractors, such as carpenters, plumbers and roofers. Artisan policies do not generally cover activities on commercial construction projects, such as excavation, underpinning, new concrete piers or additions. According to plaintiffs, artisan policies also do not cover the claims of third parties, such as plaintiffs, who are the owner and manager of two properties that sustained damage as the result of defendant contractors' work on adjacent buildings.

In New York City, general commercial construction activities require permits from the New York City Department of Buildings (DOB). It is undisputed that, as of February 2009, DOB required contractors performing this type of construction to have general liability insurance meeting specific coverage requirements. Artisan policies do not meet those requirements. DOB charges contractors a permit fee based on the total cost of a job. The

total cost of the job includes the premium for insurance coverage.

Because artisan policies are more limited in their coverage, they are significantly less expensive than insurance for general construction work. Thus, according to plaintiffs, "to reduce their insurance costs, Defendant Contractors preferred these Artisan Policies, even if they did not cover the claims of third parties." Because DOB calculated the price of the construction permit on the total cost for the job, including insurance premiums, the lower cost for the artisan policy had the added benefit of reducing the permit fee. Plaintiffs claim that Utica issued and renewed artisan policies to defendant contractors knowing that these contractors used Utica's policies to register with the DOB and receive permits to work. Specifically, plaintiffs claim, Utica issued Association for Cooperative Research and Development (ACORD) Form 25 certificates of insurance to defendant contractors. This form can accompany almost any insurance policy and has approval from the Department of Insurance. An ACORD form is quite limited. It only states the level and type of coverage. There is nothing on the form about compliance with DOB rules and plaintiffs do not allege that

the ACORD 25 form itself was false.[1] Instead, plaintiffs take issue with the way defendant contractors used the ACORD 25 form to obtain DOB permits. Because the form describes the artisan policy as providing "general liability" coverage, as opposed to automobile liability or workers' compensation coverage (the only two other types of coverage the ACORD form in the record lists), plaintiffs claim defendant contractors would use the ACORD form as part of their application to show proof of adequate general liability insurance. However, it is undisputed that artisan policies do provide a type of general liability coverage. Moreover, plaintiffs admit that "[t]hese ACORD 25 forms, issued by Utica to the Contractors, are all identical, do not reference the specific policy used by the insurer, nor do they state whether the Contractors are in compliance with all the Codes and Rules."[2]

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[1] The contention that there were misrepresentations within the four corners of the ACORD form was central to plaintiffs' opposition to Utica's motion to dismiss (*see* reply brief at 4-5) and was central to the trial court's ruling: "Utica . . . prepared ACORD 25 certificates that falsely represented that the Artisan policies complied with the Codes and the Rules." However, plaintiffs have disavowed this argument on appeal by stating that "[n]owhere in their Amended complaint do Plaintiffs assert that the ACORD 25 insurance certificates issued by Utica state that the Utica Artisan policies satisfy DOB insurance requirements.")

[2] Plaintiffs allege that Rules of City of New York Department of Buildings (1 RCNY) § 104-02(a) requires contractors

According to the amended complaint, plaintiff Seiden is the president of Rockwell Development Corp. Rockwell owns a residential building adjacent to a building where Oriental Construction, one of the defendant contractors, was performing general construction work. The building allegedly sustained damage as a result of Oriental's construction activities. Also, a building that Seiden's mother owned became damaged during defendant contractor Kessler's work on adjacent property. Both Kessler and Oriental maintained artisan policies with Utica and both had used those policies to obtain a DOB permit. Plaintiff Groppi is the property manager for Rockwell. Although he attempted to report to Utica about the damage that Oriental's activities had caused, he discovered that the artisan policy did not cover any earth moving work, including the excavation and underpinning work that had caused damage to Seiden's building. Groppi received a similar response with respect to the other property, but Utica nevertheless sent an inspector to investigate

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to provide the DOB with a certificate of insurance on an ACORD 25 form that expressly represents that the general commercial liability insurance the contractor maintains is in compliance with the Codes and Rules. However, it was not until February 20, 2009 that the City enacted 1 RCNY 104-02, while Utica developed its artisan policy in 1999 and issued the only artisan policy the record on appeal contains on September 24, 2008. It is unclear from the record whether contractors need to supply the actual policy to DOB when applying for a permit.

the site. Plaintiffs reported to DOB, as well as the District Attorney's Office and the Department of Insurance, that contractors were using Utica's artisan policies to obtain permits from DOB. As of February 15, 2010, DOB no longer accepts artisan policies when licensing the type of work that Oriental and Kessler performed.

Plaintiffs commenced this qui tam action under section 189(1)(g) of the NYFCA in 2009. As required under section 190, plaintiffs gave the State of New York notice and opportunity to intervene. However, on January 6, 2010, the Attorney General for the State of New York declined to intervene and plaintiffs proceeded with this action on their own.

The NYFCA was enacted as part of a federal incentive to limit Medicaid fraud. It is not restricted to Medicaid fraud, however, but applies to any sort of looting of the public purse (*see* De Santis and Froehlich, *False Claims Acts, City, State and Federal: Enlisting Citizens to Protect the Fisc*, New York State Bar Association Government, Law and Public Policy Journal, at 64 [Winter 2011]). The public funds that plaintiffs claim Utica looted were the fees that DOB would have received had the contractors paid the larger premium inherent in the purchase of general liability insurance that would have covered the construction job. Plaintiffs seek to recover these fees from

Utica on behalf of DOB and hope to receive a portion of the recovery pursuant to NYFCA § 190(6)(b). Plaintiffs also seek to recover attorneys' fees and expenses and "such other relief as the Court deems just and proper, or that is necessary to make Relators whole," but do not explain what they mean by "to make [r]elators whole" or whether the NYFCA provides for this recovery. There is nothing in the record to indicate whether plaintiffs have sued the owners of the neighboring properties for the property damage plaintiffs sustained.

The typical false claim involves the State paying out money because of a false claim. A "reverse false claim" occurs when someone uses a false record to avoid an obligation to pay the government (*U.S. v Q Intl. Courier, Inc.*, 131 F3d 770, 773 [8th Cir 1997]). The NYFCA expressly provides recovery for reverse false claims in section 189(1)(g) against any person who "knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay *or transmit* money or property to the state or local government" (emphasis added).

The NYFCA follows the federal False Claims Act (31 USC § 3729 *et seq.*) And therefore it is appropriate to look toward federal law when interpreting the New York act (*see State of N.Y. ex rel. Jamaica Hosp. Med. Ctr., Inc. v United Health Group,*

Inc., 84 AD3d 442, 443 [2011]). To allege a reverse false claim, a plaintiff must state facts tending to show: "(1) that the defendant made, used, or caused to be used a record or statement to conceal, avoid, or decrease an obligation to [the government]; (2) that the statement or record was false; (3) that the defendant knew that the statement or record was false; and (4) that [the state] suffered damages as a result" (*United States v Raymond & Whitcomb Co.*, 53 F Supp 2d 436, 444-445 [SDNY 1999] [internal quotation marks omitted]). Plaintiff must state a reverse false claim with particularity (*see U.S. ex rel. Piacentile v Sanofi Synthelabo*, Inc., 2010 WL 5466043, *8, 2010 US Dist LEXIS 137895, *21 [D NJ, Dec. 30, 2010, No. 05-2927(KSH)] ["a relator must provide particular details 'of a scheme to submit false claims'"]).

Given that the ACORD form does not contain anything false or misleading on its face, plaintiffs resort to the argument that Utica somehow deliberately marketed the artisan policy to contractors as a means of satisfying the NYC General Contractor licensing requirements. However, plaintiffs have provided no factual allegations to support this theory. The sole allegation in the complaint regarding a "marketing scheme" is the conclusory statement that "Utica's cooperative network of insurance brokers knowingly targeted and distributed their deficient Artisan policy

to Defendant Contractors within the City." This is insufficient for the purposes of stating a reverse false claim. There are no allegations that Utica or its representatives made statements to contractors that the artisan policies were sufficient to meet DOB licensing requirements. These omissions are "especially glaring" given that Utica is a secondary actor who not only did not submit the false claim directly, but also supplied a document to the primary actor that was perfectly legal (*see U.S. ex rel. Pervez v Beth Israel Med. Ctr.*, 736 F Supp 2d 804, 814-815 [SD NY 2010] [dismissing federal FCA claim against accountants and noting that the failure to plead facts with particularity was "especially glaring in the unusual context of FCA claims brought against a secondary actor–an outside auditor–rather than the provider that actually submitted the allegedly false claims"]).

As a fallback position, plaintiffs argue that Utica must have known that defendant contractors were misrepresenting its artisan policies to DOB because "Utica received claims against these Artisan policies that were in excess of the policies' coverage." This is a non sequitur. There is nothing improper about defendant contractors' possession of an artisan policy, provided that the artisan policy was not the only coverage on which they relied in applying for their license. Moreover, an insurance company's receipt of a notice of claim on an

inapplicable policy does not raise an inference that the insurance company knows that fraud is involved, much less that it intends the fraud, particularly where, as here, the insured could have easily maintained another insurance policy.

Plaintiffs also contend that the artisan policies were useless. This is incorrect. These policies covered the work of small contractors. When defendant contractors applied for their policies, they did not have to disclose to Utica what activities they needed the policy to cover. And, even if they did disclose, it was not Utica's responsibility to advise defendant contractors as to what insurance would be adequate for particular purposes (*see Garnerville Holding Co. v Kaye Ins. Assoc.,* 309 AD2d 541 [2003] [dismissing complaint against the defendant insurance broker because the broker had no duty to advise plaintiff "as to the amount of coverage it would be prudent to obtain"], *lv denied* 2 NY3d 705 [2004]). Thus, the allegations do not show that, even if Utica knew of the contractors' deceptions, Utica would have any obligation to do anything about those deceptions (*see also Piacentile*, 2010 WL 5466043, *9, 2010 US Dist LEXIS 137895, *25-26 [allegations concerning reverse false claim inadequate where the defendants did not submit the false claim directly and the plaintiff failed to allege "any existing obligation on the part of the defendants"]). Plaintiffs here in effect seek to require

Utica to become the risk manager for defendant contractors, a role Utica does not, and should not, have.

Plaintiffs claim that "Utica knowingly caused the submission of these false records by creating ACORD 25 forms that described the Artisan policies simply as providing 'commercial general liability' coverage." There are several problems with this statement. First, "[t]he creation of general circumstances leading to the submission of false claims are insufficient to state a FCA violation" (*see U.S. ex rel. Camillo v Ancilla Sys., Inc.*, 2005 WL 1669833, *4, 2005 US Dist LEXIS, *12 [SD Ill, July 18, 2005, No. 03-CV-0024-DRH]). Moreover, Utica did not create the ACORD 25 form. As plaintiffs admit in their brief, the ACORD, of which Utica is a member, issued the form for use in the insurance industry generally. In addition, the Department of Insurance approved the form. Finally, there is nothing false or misleading about describing the artisan policy as "commercial general liability" coverage. In fact, an artisan policy does provide this type of insurance and plaintiffs admit as much in their amended complaint.

United States ex rel. Schmidt v Zimmer, Inc. (386 F3d 235 [3d Cir 2004]) is not to the contrary. Defendant Zimmer was a manufacturer and distributor of orthopedic implants that allegedly gave rewards and bonuses if a customer (medical

providers) purchased a certain amount of product. When the providers submitted claims for Medicare reimbursement for these implants, they allegedly did not disclose the money they received back from defendant supplier (*id.* at 237-238). This arrangement allegedly violated the Federal Anti-Kickback Act (42 USC § 1320a-7b) and therefore provided the threshold for a claim under the federal FCA (*see id.* at 244-245; *U.S. ex rel. Westmoreland v Amgen, Inc.*, 812 F Supp 2d 39 [D Mass 2011] ["courts, without exception, agree that compliance with the Anti-Kickback Statute is a precondition of Medicare payment, such that liability under the False Claims Act can be predicated on a violation of the Anti-Kickback Statute"]; *In re Pharm. Indus. Average Wholesale Price Litig.*, 491 F Supp 2d 12, 18 [D Mass 2007] ["Medicare program requires providers to affirmatively certify that they have complied with the Anti-Kickback Statute; failure to comply with the kickback laws, therefore, is, in and of itself, a false statement to the government"]; *United States ex rel. Kneepkins v Gambro Healthcare, Inc.*, 115 F Supp 2d 35, 43 [D Mass 2000] [holding that alleged violations of the Anti-Kickback Statute were sufficient to state a claim under the False Claims Act, despite no express certification of compliance with applicable law]). Here, Utica's sale of policies to defendant contractors was legal, and nothing on the ACORD form from UTICA was false.

In contrast, the certification in Zimmer actually contained false information.

Simply put, selling artisan policies to defendant contractors and providing them with the ACORD form that listed the artisan policies as a "commercial general liability" type of policy is insufficient to allege liability under the NYFCA.

Accordingly, the order of the Supreme Court, New York County (Joan A. Madden, J.), entered on or about April 12, 2011, which denied defendant Utica's motion to dismiss the amended complaint as against it, should be reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the amended complaint as against defendant Utica.

All concur.

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

ENTERED: APRIL 24, 2012

CLERK

Tom, J.P., Sweeny, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

6661 The People of the State of New York, Ind. 319/09
Respondent,

-against-

Anonymous,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered May 18, 2011, modified, as a matter of discretion in the interest of justice, to the extent of reducing the conviction to criminal possession of a controlled substance in the seventh degree, and reducing the sentence to time served, and otherwise affirmed.

Opinion by Tom, J.P. All concur.

Order filed.

REVISED CORRECTED ORDER - MAY 9, 201**2**

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
John W. Sweeny, Jr.
Leland DeGrasse
Sheila Abdus-Salaam
Sallie Manzanet-Daniels, JJ.

6661
Ind. 319/09

_____x

The People of the State of New York,
Respondent,

-against-

Anonymous,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered May 18, 2011, convicting her, upon her plea of guilty, of criminal sale of a controlled substance in the third degree, and imposing sentence.

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

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

TOM, J.P.

Defendant appeals from a judgment convicting her, on her guilty plea, for her peripheral role in the sale of a small quantity of drugs to an undercover police officer. Defendant contends that she is entitled to specific performance of a negotiated plea agreement, having fulfilled her obligations thereunder, and notes that the three-year sentence imposed by the court is longer than that meted out to any direct participant in the sale. She seeks to replead to a class A misdemeanor and to be sentenced to a term of no more than one year.

Defendant was charged with third-degree criminal sale of a controlled substance arising from her role as a lookout for two co-defendants in a sale of four "zips" of crack cocaine to an undercover police officer. On July 16, 2009, defendant entered into a written plea and cooperation agreement with the District Attorney's office, which provided that defendant agreed to plead guilty to the class B felony charge contained in the indictment and to provide information concerning criminal activity in her neighborhood, particularly drug sales. If defendant complied with the provisions of the plea agreement, the People would recommend that she be permitted to replead to seventh-degree criminal possession of a controlled substance and receive a term ranging from a minimum, non-jail sentence, with probation, to a maximum sentence of one year imprisonment. The plea agreement

provided that the People have sole discretion to determine if defendant's cooperation satisfactory and whether she had complied with its terms.

The court expressed reservations about defendant entering into a cooperation agreement, noting that it had "suggested drug treatment for [defendant] from the beginning," and warned defendant that the "temptation is going to be very big" to resume using drugs once out on the streets. The court then took defendant's allocution pursuant to the terms of the plea agreement and released her on her own recognizance.

In October 2010, the People provided the court with a confidential status report, which stated that defendant's cooperation had been affected initially by illness, as revealed by hospital records. However, in February 2010, defendant "began providing good information" to the police, and also participated in "controlled drug buys," resulting in the issuance of search warrants and four arrests.

The People noted that defendant was "well known" in the neighborhood where she lived and was providing cooperation. Since entering into the agreement, a drug supplier refused to deal with her due to rumors that she was working with the police and defendant was "confronted by an individual who was arrested as a result of information given by her to police[.]" The People

also noted that defendant "has children who live in the neighborhood, and whose whereabouts are known to some of the individuals who have been arrested based upon [her] cooperation with the police." Noting her "diligent cooperation in the last seven months," the court was advised that the People were "considering whether to make a favorable recommendation to the Court at the time of sentencing."

At the next court appearance on December 1, 2010, the prosecutor had the courtroom sealed and requested that the court seal the minutes. The court responded that it had not been kept apprised of the progress of the case after asking on a number of occasions to be kept informed. The court then stated it had no idea why the courtroom should be closed and the minutes sealed.

The court further stated that the prosecution had put "[defendant] back to the street to hang out with the same people that she has been hanging out with all of her life, so that she could continue to supply you with, I don't know what[.]" The court added, "[N]ow in clear full fashion she's pregnant again with, what is it, five or six other children that she has none of, whom she is the mother to." The prosecutor again requested that the minutes be sealed, explaining that there were "things that [defendant] has been doing" pursuant to the plea agreement, which the People did not want to put "on the record if the

minutes are not sealed." When the court refused to seal the minutes, the prosecutor asked to be permitted to approach the bench to explain. The court refused to permit the parties to approach and refused to seal the minutes, concluding that "the People don't want to be heard." Defense counsel then stated that the People would be "requesting to dismiss the indictment." The court stated that it would not "dismiss the indictment or anything else" unless the prosecutor "persuades me to do it[.]" Defense counsel asserted that it would not be "wise" to proceed "unless there is a sealing of the record because her life is in danger."

The court refused to hear defense counsel and briefly left the courtroom. Upon returning, the court reiterated that it would not seal the minutes and would not permit counsel to approach the bench. The court concluded that it was "totally uninterested in this case or what you want done with it because there is nothing." The court added, "I can't even feel bad for [defendant] here, I don't think she is worthy of sympathy. I don't think she has shown the slightest sign of reforming her life. Nothing."

On January 6, 2011, the prosecutor and defendant's attorney appeared before the court without defendant. The prosecutor informed the court that defendant had given birth earlier that

week and had been discharged from the hospital on January 4. The prosecutor again asked permission to approach the bench, but the court refused, stating, "[A]fter your little detour and foul up, I have no idea what [defendant] has been doing the last couple of years, other than getting pregnant." The court added, "[F]rankly, she didn't look like she was about to give birth to me. I understand she is a small woman. That does indicate certain other things. I'm not a doctor or anything." The court stayed issuance of a bench warrant for one week pending the People's inquiry.

On January 13, 2011, the People and defendant appeared in court, without her attorney. The prosecutor noted that, after defendant gave birth, a Family Court Judge determined that in order for her to obtain custody of her baby, defendant would have to undergo inpatient drug treatment. Supreme Court ordered an "enhanced ISP," noting that "there is a condition that [defendant] participate in a residential treatment in the meantime."

In accordance with the agreement, the People recommended that defendant be permitted to plead to a misdemeanor and be sentenced to time served in view of her fulfillment of her obligations under the instrument. The presentence report recommended a sentence of probation, and a letter dated May 18,

2011 from the District Attorney's office attested to her full satisfaction of the cooperation agreement.[1]

The People detailed the extensive cooperation that defendant had provided through January 2011, noting that she had "participated in several street level operations with the [police] in July of 2009." Defendant's cooperation was thereafter hampered for several months by several hospital admissions due to gastrointestinal issues. The People asserted that defendant admitted to smoking marijuana during this period, "to ease nausea," and warned defendant that such activity "could result in a violation of the agreement." Defendant recovered and, beginning in February 2010, provided information which led to 13 arrests, recovery of "felony and misdemeanor quantities of narcotics," and "controlled drug buys that resulted in nine search warrants." Defendant "also provided information relating to thefts and trademark counterfeiting." The People provided details as to the significant amounts of contraband that was recovered through defendant's assistance, including over 90 "zips" of crack cocaine, at least 1/4 ounce of other cocaine, 7 glassines of heroin, over 50 zips of marijuana, 325 pills, and

[1] At the time sentence was imposed, defendant had already been incarcerated prior to trial for a period greater than the maximum sentence for the misdemeanor offense.

over 3,000 counterfeit sneakers and handbags.

The People noted that defendant's efforts had "adverse consequences" for her, as local drug dealers labeled her a "snitch." By the Fall of 2010, the People learned that defendant was pregnant. At that time, the People "determined" that, given the "length of [her] cooperation, the number of cases that resulted from [her] work, as well as the increasing number of members of [her] community who had become suspicious of her, particularly several higher level drug dealers," they were "prepared to ask the Court to terminate the cooperation agreement, and recommend that the defendant be permitted to re-plead to a misdemeanor."

The People further noted that on January 15, 2011, defendant was arrested in a "domestic violence incident" and charged with attempted third-degree robbery. However, the case was dismissed. Additionally, on April 22, 2011, defendant was arrested and charged with third-degree identity theft.

On May 11, 2011, the parties appeared for sentencing. The court indicated that it did not intend to follow the People's recommendation and berated the People for leaving defendant in a "toxic environment," where her need for treatment – both for drug addiction and mental health issues – went unmet. The court further chided the prosecutor for failing to keep it apprised of

defendant's status. Defense counsel asserted that although he too had not favored the plea agreement as reached, the fact remained that "the People have gotten the benefit of this particular bargain. They got everything they wanted of her." Counsel thus sought "specific performance of the plea agreement."

The court refused to follow the People's recommendation and sentenced defendant to a term of three years, plus three years' post-release supervision. The court also ordered that defendant be placed in a Comprehensive Alcohol and Substance Abuse Treatment (CASAT) program in an alcohol and substance abuse correctional annex (*see* Penal Law § 60.04[6]), with "[m]edical attention and psychiatric attention." The court further stated that it would "have no objection to early release" if defendant completed the CASAT program.

While a plea agreement is not a contract and the courts retain discretion to pronounce an appropriate sentence (*see People v McConnell*, 49 NY2d 340, 346 [1980]; *Matter of Randolph v Leff*, 220 AD2d 281, 281 [1995]), that discretion "is not absolute" (*Randolph*, 220 AD2d at 281-282). A defendant who has "performed services for the prosecutor, at risk to himself," absent "compelling reasons" is entitled to "receive the benefit of his bargain" through specific performance of the plea agreement (*People v Danny G.*, 61 NY2d 169, 175-76 [1984]). A

court in declining to honor a plea agreement, despite a defendant's performance thereunder, must provide "legitimate reasons on the record" (*People v Grimaldi*, 200 AD2d 687, 688 [1994]; *see Danny G.*, 61 NY2d at 174).

The court explained that it declined to abide by the plea agreement based on the People's failure to keep it apprised of defendant's status, and because defendant had engaged in drug use and been rearrested. The court's assertion that the People failed to keep it apprised of defendant's status is not supported by the record which indicates that the People supplied the court with a status report in October 2010. At the December 1, 2010 court appearance, the prosecutor reminded the court of the October status report when the court stated it had not "a clue as to what has been happening in this case." The court then concluded that the report "told me nothing, a little bit too little too late." The prosecutor offered to "fill in any blanks," to which the Court responded that it had no interest in an update. In any event, the plea agreement does not require the People to keep the court informed of defendant's status, and defendant should not be penalized for the People's purported shortcomings in this regard.

The court's decision to ignore the People's recommendation to sentence defendant to time served, based on her continuing

drug use, is not a legitimate reason, under the circumstances to refuse to honor the plea agreement. While noting that it did not have any drug test results before it, the court explained, "It's simply circumstantial, but there was plenty of drug use involved here."

There was evidence in the record that defendant engaged in drug use both before and after December 1, 2010, when the People determined that she had already complied with the terms of the plea agreement. The People's May 2011 letter states that defendant admitted to smoking marijuana during the second half of 2009, ostensibly to ease nausea related to documented gastrointestinal illness. The plea agreement vested the People with sole discretion to determine whether defendant complied with its terms, including determination of whether she had committed additional crimes. The People were aware of this alleged drug use and nonetheless determined that defendant had complied with the plea agreement. Accordingly, the alleged drug use occurring prior to December 1, 2010 could not constitute legitimate grounds for refusal to honor the plea agreement.

As to the period after December 1, 2010, the People's May 2011 letter asserts that, in January 2011, defendant failed to report to drug treatment mandated by the Family Court. The People also reported that, in April 2011, defendant admitted to a

police officer that she regularly used heroin. However, such reports of continued drug use, occurring after defendant had already completed the services required by the plea agreement, were not sufficiently "compelling" to deprive defendant of the agreement's benefits (*Danny G.*, 61 NY2d at 176).

On appeal, the People take a different position on the issue of specific performance from the position they took at sentencing. In support of their appellate contention that circumstantial evidence of defendant's use of drugs provided a legitimate basis for imposing a sentence at variance with the sentence she was promised, the People cite to *People v Figgins* (87 NY2d 840 [1995]) and this Court's decision in *People v Buglione* (11 AD3d 297 [2004]). These cases are distinguishable. In both, the defendant's violation involved an express condition of the negotiated plea agreement and did not, as here, involve conduct extraneous to the agreement. As to the People's reliance on *People v Jenkins* (11 NY3d 282 [2008]), the result in that case appears to rest on the fact that the People would not join in the defendant's motion to dismiss the indictment until documentary proof was received showing compliance with all the conditions of the agreement, and the matter was adjourned for the defendant to produce the documentation, leaving open the issue of the defendant's compliance. The defendant was rearrested and

violated other requirements of the plea agreement before his next court appearance and thus, the court was no longer bound by the plea promise. In the present case, the People, vested with sole discretion to determine defendant's compliance with the agreement, acknowledged defendant's compliance with and full satisfaction of the plea agreement at the time of sentence and recommended to the Court that defendant be permitted to replead to a misdemeanor.

The subject plea agreement does not require defendant to refrain from drug use. Rather, it provides that should the District Attorney's office determine that defendant "has committed any new or additional crimes," the benefits bestowed by the agreement will be forfeited. Significantly, the People did not advise the sentencing court that defendant had committed any crime warranting departure from the agreed-upon sentence; nor did the court make a finding that defendant violated any provision of the agreement. At the time sentence was imposed, the only charge outstanding was a misdemeanor that was not a drug-related offense. The court did not undertake any inquiry into the circumstances of the arrest and the ultimate disposition of the charge is not disclosed. Furthermore, the District Attorney's office took the position that any arrest or known drug use occurred after defendant had satisfied the terms of the

cooperation agreement.

While a defendant is not generally entitled to strict enforcement of a negotiated plea agreement (*see e.g. People v Selikoff*, 35 NY2d 227, 238 [1974], *cert denied* 419 US 1122 [1975]), it is acknowledged that circumstances may warrant granting a defendant the consideration promised at the time that a guilty plea was entered, particularly where the defendant has changed his or her position in reliance on that promise (*id.* at 239). Even where a plea is made contingent on the defendant's simply not being arrested during the term of the agreement (not, as here, on a determination by the District Attorney's office that the defendant has committed an additional crime), the mere fact of arrest is insufficient to warrant departure from the negotiated plea and sentence; rather, the court is required to conduct a sufficient inquiry to afford the defendant an opportunity to demonstrate that the arrest was without foundation (*People v Outley*, 80 NY2d 712, 713 [1993]), an inquiry not undertaken here.

In this case, defendant provided information concerning criminal activity, particularly drug dealing, at considerable risk to herself and her children in situations where the People acknowledge providing no protection and in an area controlled by a notorious street gang. As noted in *People v Danny G.* (61 NY2d

at 175), the paramount consideration in deciding whether the circumstances warrant specific performance of a plea agreement is the "concern that a defendant who has performed services for the prosecutor, at risk to himself, be treated fairly." Since "the State may hold the defendant to the precise terms of the plea agreement . . ., as a matter of fairness, defendant should be entitled to no less (*id.* at 174, citing *People v McConnell*, 49 NY2d 340, 349 [1980] ["a promise made by a State official authorized to do so and acted upon by a defendant in a criminal matter to his detriment is not lightly to be disregarded"]; *but see People v Jenkins*, 11 NY3d 282 [2008], *supra*). Here, in the course of her extensive cooperation with the police, defendant was identified by drug dealers in her neighborhood as a "snitch." The People report that defendant's children also live in the neighborhood, and their whereabouts are known to some of the persons who have been arrested as a result of defendant's efforts. Thus, in rendering services pursuant to the agreement, defendant has incurred "risk," both to herself and to her children, and cannot be restored to the status she maintained prior to entering into the agreement (*Danny G.*, 61 NY2d at 175).

The record reflects that the court was dissatisfied with defendant's decision not to abide by its advice to immediately seek substance abuse treatment rather than enter into the plea

agreement that would place her back into the “toxic” elements of the streets and, as a result, defendant became the target of the court’s dissatisfaction throughout the proceedings, including at her sentencing. While the court’s advice to initially seek drug treatment was sound, nevertheless, defendant made a conscious decision to enter into the cooperation agreement, which was approved by the Court. Her value as an informant, of course, arose from her reputation as a known drug user and her ability to associate with drug dealers in order to gather incriminating information about their activities. That role obviously exposed her to recurrent drug use. The courts’ discomfort with that risk, however, should not obscure that defendant undertook the risk in making her decision. Since the People received the full benefit of the plea agreement to defendant’s detriment, it would be grossly unjust under the circumstances of this case to permit them to divest defendant of the benefit of her bargain.

A further concern arising from the court’s exercise of discretion which seems to undercut the court’s professed regard for defendant’s well-being is manifest in this case. During the proceedings, the court exhibited hostility, even disdain, toward defendant and, more importantly, a total disregard for her safety and welfare relating to her role as a drug informant for the District Attorney’s office. Courts have established

precautionary protocols during court proceedings to protect the identity of undercover police officers working on drug related matters due to the inherent danger of the work (*see People v Alvarez*, 51 AD3d 167 [2008], *lv denied* 11 NY3d 785 [2008]; *People v Sanabria*, 301 AD2d 307 [2002], *lv denied* 99 NY2d 632 [2003]). This prophylactic safeguard should be extended to drug informants such as defendant who are in the same if not a more precarious position, and unlike officers, are completely unprotected on the streets. Here, the trial court, in refusing to close the courtroom and seal the minutes at the urging of both the prosecutor and the defense, and denying the parties an opportunity to make out a prima facie showing for the closure, demonstrated another clear abuse of discretion, especially in light of the above-noted information that neighborhood drug dealers had threatened defendant and called her a "snitch."

Our decision rests upon sound considerations of judicial policy. It has been consistently stated that plea negotiations are essential to the efficient functioning of the criminal justice system (*see e.g. People v Avery*, 85 NY2d 503, 506-507 [1995]; *Selikoff*, 35 NY2d at 233). While depriving a defendant of the benefit of a plea agreement might be justified on the ground that "the court and the People were entitled to insist on strict compliance with every term" (*Jenkins*, 11 NY3d at 287),

whether express or implied, the perception fostered by an unduly rigid adherence to this principle may undermine the very feasibility of negotiated pleas. Though sustainable as a matter of law under certain circumstances, strict construction of plea agreements may facilitate "'the detrimental effect on the criminal justice system that will result should it come to be believed that the State can renege on its plea bargains with impunity notwithstanding defendant's performance'" (*Danny G.*, 61 NY2d at 176, quoting *McConnell*, 49 NY2d at 349). Moreover, affording a court unfettered discretion in imposing sentence irrespective of the terms of a negotiated plea agreement or defendant's substantial compliance therewith, as the People contend is required under *Jenkins*, even in the face of the trial prosecutor's support for granting the defendant the benefit of the bargain, effectively renders illusory any promise they might have made to the defendant.

Under the circumstances presented here, the court improvidently exercised its discretion in declining to accept the People's recommendation for sentencing under the plea agreement. The manner in which the court exercised its discretion was especially jarring when it is considered that the three-year term to which defendant, who acted as a lookout, was sentenced was greater than the 30-month and one-year terms received by her

codefendants, who conducted the sales transaction. There is no record that those codefendants rendered the kind of extensive and dangerous services provided by defendant, and they, in fact, bore greater culpability for the underlying crime. Hence, for risking her life by providing the District Attorney's office with information of drug transactions in compliance with a court approved plea agreement, defendant is being penalized with a greater sentence of imprisonment than the direct participants of the underlying crime and was deprived of her bargained for benefits under the agreement. The picture, as a whole, portrays a gross miscarriage of justice.

Accordingly, the judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered May 18, 2011, convicting defendant, upon her plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing her to a term of three years, should be unanimously modified, as a matter of discretion in the interest of justice, to the extent of

reducing the conviction to criminal possession of a controlled substance in the seventh degree, and reducing the sentence to time served, and otherwise affirmed.

All concur.

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

ENTERED: APRIL 24, 2012

CLERK