



Defendant was arrested in a "buy and bust" operation. According to the trial testimony of an undercover police officer, defendant approached him on 114th Street near Seventh Avenue and offered him drugs. The officer handed defendant pre-recorded buy money, and defendant gave him a purple bag containing what was later determined to be crack cocaine. The undercover officer radioed his team that there had been a "positive buy," and gave a description of the suspect. Shortly thereafter, a detective saw defendant, who matched the description of the seller, on 114th Street and detained him. When the undercover officer saw defendant in police custody, he radioed confirmation that defendant was the seller.

The detective who detained defendant testified at trial that upon a search, he recovered from defendant's right pant's pocket five Ziploc bags, each containing what appeared to be drugs that matched the drugs purchased by the undercover officer. He gave the seized Ziploc bags to another detective present at the scene who testified that the pre-recorded buy money was not recovered from defendant.

Defense counsel asked the two detectives to explain how they generally determine that drugs purchased in an undercover operation match the drugs subsequently recovered from the

suspect. One of the detectives testified that the determination is made when a "supply ... resembles ... exactly that which was allegedly sold." The other explained that it is when the drugs possessed by the defendant are "similar to what the undercover had purchased." Defense counsel then asked him to clarify that it is not merely "similar" but "exactly the same" packaging. Defense counsel suggested, and the detective confirmed, that "[i]f they were blue top, hard plastic vials with a picture of a cartoon character on it, a matching stash would have ... the same color cap, the same cartoon character."

Defendant testified in his own defense. He stated, among other things, that "[the police] said . . . they found three vials of crack," and that he saw a "paper that they claim that it was in, and I didn't understand that because when my lawyer showed it to me and said they was purple but the one they allegedly tested was white, so ... I don't even know what's really going on." Defendant denied possessing or selling any drugs on West 114th Street on the day in question.

Defense counsel opened his summation by reminding the jury that in his opening arguments he predicted three issues that would be borne out by the testimony and would throw a shadow of reasonable doubt on defendant's guilt: (1) whether defendant had

a female accomplice; (2) whether the undercover officer radioed his colleagues to report that defendant and his alleged accomplice had crossed the street to join a group of people; and (3) the failure of the police to recover the pre-recorded buy money. With respect to the first issue, defense counsel noted that his cross-examination of the undercover officer raised a question as to whether the officer had omitted any mention of a female accomplice in his testimony to the grand jury. With respect to the second, counsel noted the arresting detective's testimony that he never received information from the undercover that defendant and his accomplice crossed the street where they joined a group of people, and that the second detective confirmed the communication with great equivocation. Addressing the third issue, defense counsel called it the "single most important piece of evidence that a case such as this could possibly have."

In addition, defense counsel argued that the purple Ziploc bag of crack sold to the undercover did not match the Ziplocs recovered from defendant. Counsel asked for permission to open the bags containing the drugs to display to the jury, but the court denied the request. Counsel then urged the jurors to examine the evidence themselves, arguing that if the jury compared the purchased Ziploc to the ones found on defendant at

the time of his arrest, it would find that they are "vastly different." He stated that the purchased Ziploc "doesn't even look purple and I am not sure there is a zip on it. You see how big it is .... You take a good close look at it." Counsel also urged the jury to "take a good, close look at the ... supposed matching stash .... [T]ake a look at ... the size of these glassine envelopes. Not even remotely close to the same size. Not even remotely close to the same color. This one is clear and even though they keep calling these purple, in fact, this looks like pink to me." Counsel again emphasized the relative difference in the sizes of the bags and asserted that "[t]he five bags that were supposedly taken out of the change pocket of [defendant] don't look anything at all like the bag that [defendant] is alleged to have sold[,] yet from the witness stand the police proudly proclaim we got the drugs; we got the matching stash; we got him."

During deliberations, the jurors sent out a note stating, with regard to the Ziplocs, that "[t]he sale bag is folded in such a manner that makes it difficult for us to determine whether it's the same as the other five bags. In order to make that determination, which seems important to us, we need to see the sale zip unfolded with the other five zips unfolded, too,

arranged so that we can make a reliable comparison." The court accommodated the jury's request, and while the jurors were in the courtroom, a court officer cut open the previously heat-sealed bags containing the Ziplocs, and, in accordance with defense counsel's request, unfolded the bags.

After the jury returned to the jury room, defense counsel acknowledged that, contrary to his summation argument, all the bags did match. He stated, "I now see for, frankly, the very first time that a bag, a very small plastic bag, that does indeed appear to be the same color as ... the five bags in People's exhibit 6." Counsel noted that he had asked to open the bags during his summation, and "at the time this outside bag was folded so many times as to virtually secrete and hide the smaller [Ziploc] bag ... that's about fingernail sized." Counsel further stated that his inability to see the stash clearly caused him to argue a point that was "at least somewhat inaccurate .... I made a major point of saying that this bag did not match the other five. And part of that argument was based on the fact that the way the bag was folded over ... it seemed to hide or secrete the fact that the purple or pink bag was, indeed, under two or more layers of folded plastic. Now that I see that it was open ... indeed, this bag that's alleged to be the sale bag does match the

bags that were alleged to have been recovered from [defendant].” Counsel noted that if he had been able to open the bags during summation, “I might not have made the argument I did make.”

The court responded that defense counsel was an experienced attorney in drug cases and “certainly could have requested inspection of those items at any time during the past eight or nine months or however long this case is pending,” and, for safety reasons, the court could not, without any advance notice, allow him to open the bags in the middle of his summation. The court added that the People’s theory had always been that the purchased drugs matched the drugs found with defendants, and that when the court looked at the evidence, “the Ziplocs match was clear to me.” Defense counsel noted that, even if he had asked to view the evidence earlier, it would have been shown in the unopened bags in which they were initially brought into court. The court responded, “I don’t know if that’s so.”

The following morning, in response to a request from the jury, the court read the arresting officer’s testimony regarding his observations of the alleged female accomplice at the time of the arrest. The jury subsequently sent another note stating that it had reached a verdict on one count but was deadlocked on the remaining two counts. The court instructed the jury to continue

deliberating. Thereafter, the jury requested and heard all of the undercover officer's testimony, as well as the definition of "reasonable doubt." At the end of the day, the jury sent a note stating that it still could not reach a unanimous verdict on at least one count. The court delivered a charge pursuant to *Allen v United States* (164 US 492 [1896]). After deliberating throughout the next morning, the jury found defendant guilty of criminal sale of a controlled substance in or near school grounds and criminal possession of a controlled substance in the third degree.

Defendant argues that he was deprived of his right to the effective assistance of counsel under state and federal constitutional law because his attorney erroneously argued to the jury that the Ziploc bags recovered from him did not match the Ziploc bag purchased by the undercover officer. Defendant contends that, apart from counsel's challenge to the credibility of the police witnesses and his arguments concerning the absence of buy money, this was the heart of his defense. He further contends that he testified that defense counsel had advised him that the Ziplocs did not match, and that had he known the truth, he may not have testified. Defendant notes that, by raising such an untenable argument regarding the stashes, defense counsel

undermined his own credibility with respect to other arguments he made.

As a preliminary matter, we recognize that a challenge to a conviction based upon ineffective assistance of counsel must ordinarily be made in the context of a motion to vacate the conviction pursuant to CPL 440.10. This is because the factors that motivate counsel to try a case in a particular manner are usually not evident from the face of the record (see *People v Rivera*, 71 NY2d 705, 709 [1988]). Nevertheless, “[i]n the rare case, it might be possible from the trial record alone to reject all legitimate explanations for counsel’s” allegedly ineffective tactics (*id.*). This is such a rare case. Counsel made clear on the record that the only reason he argued on summation that the purchased drugs differed from those recovered from defendant was because he never had the opportunity to compare the two sets of Ziploc bags, and that had he known the true situation he would not have made the argument. Under such circumstances, where counsel’s thought process needs no further elucidation, it is appropriate to consider the ineffective assistance claim on direct appeal.

To establish ineffective assistance of counsel under New York law, a defendant must prove that counsel’s performance,

viewed in its totality, did not amount to meaningful representation (see *People v Benevento*, 91 NY2d 708, 711-712 [1998]). Mere losing tactics do not suffice to establish ineffective assistance (*id.* at 712). Rather, the defendant must demonstrate the absence of any legitimate or strategic explanation for defense counsel's action (*People v Rivera*, 71 NY2d at 709). However, "[w]here a single, substantial error by counsel so seriously compromises a defendant's right to a fair trial, it will qualify as ineffective representation" (*People v Hobot*, 84 NY2d 1021, 1022 [1995]). At bottom, the analysis turns not on whether the defendant would have been acquitted but for counsel's error, but rather on whether defendant was deprived of a fair trial (*Benevento*, 91 NY2d at 714 [stating that "[w]hile the inquiry focuses on the quality of the representation provided to the accused, the claim of ineffectiveness is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case"]).

Pursuant to federal law, to vacate a conviction based on ineffective representation a defendant must show that his attorney's performance was professionally unreasonable, and that there was a reasonable probability that, but for counsel's unprofessional conduct, the result of the proceedings would have

been different (*Strickland v Washington*, 466 US 668, 689-692 [1984]). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" (*id.* at 694).

Defendant's counsel's strategy for securing an acquittal was twofold; attacking the credibility of the People's witnesses and focusing the jury on the lack of sufficient physical evidence tying defendant to the drug sale. Counsel created a credible issue on the first prong of his theory by eliciting evidence suggesting that the undercover may have given conflicting testimony about the presence of a female accomplice, and may have fabricated part of his testimony regarding what he told his colleagues immediately after he purchased the drugs at issue. Counsel also created a material question for the jury by establishing for them that the pre-recorded money, which the undercover testified he gave to defendant, was never recovered.

There is no question that by drawing out this evidence and bringing it to the jury's attention during his summation, counsel acted reasonably. However, counsel acted unreasonably when arguing during his summation that the evidence bags containing the drugs which the People alleged were purchased from defendant were not the same or similar to those recovered from him.

Without having taken any steps to confirm his theory, counsel cavalierly declared that the purchased drugs and the recovered drugs did not match. So confident in his position was counsel that he then urged the jury to compare the bags for themselves. When the jurors took his advice, they and counsel discovered together that, indeed, the People were correct in arguing that the drugs purchased by the undercover matched the drugs found on defendant.

In focusing on the Ziploc bags, counsel eviscerated his entire strategy. No longer could the jury believe that no physical evidence tied defendant to the charges; to the contrary, counsel pointed them in the direction of strong physical evidence. Further, the jury could not be expected to acquit defendant on the theory that the People's case lacked credibility when his own counsel demonstrated a lack of believability on a critical issue at trial. In addition, defendant's own credibility was directly undermined by counsel's failure to conduct due diligence, since he testified about a discrepancy between the drugs purchased by the undercover and those recovered

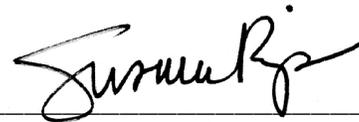
from him by the police. There was no sound strategy underlying counsel's decision to focus the jury on the evidence bags. By his own admission, it was a mistake, and he would not have highlighted the Ziploc bags had he known their actual contents. This self-sabotage of counsel's defense strategy, albeit inadvertent, was inherently unreasonable and prejudiced defendant's right to a fair trial under New York law (see *Hobot*, 84 NY2d 1021).

The People argue that the fact that the jury nearly deadlocked suggests that counsel met the relevant standards of effectiveness. As we see it, the opposite is true. Indeed, the jury's difficulty in reaching a guilty verdict permits us to reasonably conclude that, but for counsel's erroneous focus on the Ziplocs, defendant would have been acquitted based on the otherwise reasonable strategy employed by counsel. Thus, counsel also fell short of the federal standard for effectiveness outlined in *Strickland, supra*, since the jury's hesitance,

coupled with counsel's blunder regarding the Ziploc bags,  
"undermine[s our] confidence" that defendant would have been  
convicted no matter what (466 US at 694).

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

ENTERED: MAY 23, 2013

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Each warrant was supported by probable cause (see generally *People v Castillo*, 80 NY2d 578, 585 [1992], cert denied 507 US 1033 [1993]; *People v Griminger*, 71 NY2d 635, 639-640 [1988]).

The first search warrant was validly issued, since the details of six controlled buys made by a confidential informant, either in or near defendant's apartment, over a period of months demonstrated that defendant's narcotics business was an ongoing, continuous enterprise with a nexus to his apartment.

Accordingly, there was probable cause to believe that a search of the apartment would result in evidence of drug activity (see *People v Gramson*, 50 AD3d 294 [1st Dept 2008], lv denied 11 NY3d 832 [2008]). The second search warrant was likewise valid, as it included information on the drugs, drug paraphernalia and cash recovered in executing the first warrant, as well as the details of two additional buys made by the informant, in the vicinity of defendant's apartment, where he saw defendant either emerge from or enter his apartment.

The information was not stale, since the affidavit for each warrant described recent drug sales in the vicinity of the apartment. Although the only sales that occurred in the apartment itself took place in the earlier phase of the investigation, several months before the warrant applications, it

was reasonable, given the ongoing drug enterprise, for the court to find probable cause to believe that drugs would be found in the apartment in each instance.

Based on our review of the minutes of the hearing conducted pursuant to *People v Darden* (34 NY2d 177 [1974]), we find no basis for suppression. Defendant's remaining suppression arguments are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

The verdict was not against the weight of the evidence (see *People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant argues that the quantity of drugs recovered in each of the two searches was too small to establish his intent to sell those particular drugs. However, in each instance there was extensive evidence of intent to sell, including the presence of scales, small plastic bags, razors and other drug paraphernalia indicating that defendant was packaging drugs for sale, the presence of large amounts of cash, and evidence from which it could be inferred that upon the execution of each warrant defendant destroyed or attempted to destroy additional drugs by swallowing them or flushing them down a toilet.

Defendant's claim that the new attorney who represented him

at sentencing was insufficiently prepared to advocate for a more lenient sentence is unreviewable on direct appeal because it involves matters outside the record (*see People v Carver*, 234 AD2d 164, 165 [1st Dept 1996], *lv denied* 89 NY2d 1010 [1997]). On the existing record, to the extent it permits review, we find that defendant received effective assistance at sentencing under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

We perceive no basis for reducing the sentence.

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ENTERED: MAY 23, 2013

  
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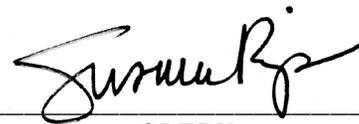


conduct and constructive discharge by defendants in that they humiliated, ostracized, and sexually harassed plaintiff, and told her that they would "make her life miserable until she quit," in response to her objections to the violations of the regulations by defendants (*see Koester v New York Blood Ctr.*, 55 AD3d 447, 448-449 [1st Dept 2008]).

However, the amended complaint fails to allege that defendant Green was plaintiff's employer within the meaning of Labor Law § 740(b)(1) since he is not alleged to have any economic interest in plaintiff's employer or in its parent company, unlike the other corporate and individual defendants (*see Patrowich v Chemical Bank*, 63 NY2d 541, 542 [1984]).

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ENTERED: MAY 23, 2013

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CLERK

Gonzalez, P.J., Friedman, Moskowitz, Feinman, JJ.

10160        In re Christie S.,  
                  Petitioner-Respondent,

-against-

              Marqueo S.,  
                  Respondent-Appellant.

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Carol Kahn, New York, for appellant.

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

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              Appeal from order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about May 16, 2012, which confirmed the Support Magistrate's finding that respondent-appellant father had willfully violated an order of support, dated August 23, 2006, and set an undertaking in the amount of \$6,000, unanimously dismissed, without costs.

              As appellant resides in New Jersey, beyond the scope of the arrest warrant issued by the Family Court in connection with this matter, and he has not been in contact with his appellate counsel, he is presently a fugitive who is unavailable to obey the Family Court's mandate in the event of an affirmance (*Matter of Skiff-Murray v Murray*, 305 AD2d 751, 752-753 [3d Dept 2003]).

Accordingly, his appeal may not be heard (*id.* at 753; see also *Wechsler v Wechsler*, 45 AD3d 470, 472 [1st Dept 2007]).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 23, 2013

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Gonzalez, P.J., Friedman, Moskowitz, Feinman, JJ.

10161-

Index 403252/10

10162-

10163 Ollie Allen,  
Plaintiff-Respondent,

-against-

Allison Ramos, Esq.,  
Defendant-Appellant.

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Appeals having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Joan M. Kenny, J.), entered on or about June 18, 2012, and from orders, same court (Jane S. Solomon, J.), entered on or about November 15, 2011 and November 16, 2011,

And said appeals having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated May 1, 2013,

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

ENTERED: MAY 23, 2013



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Gonzalez, P.J., Friedman, Moskowitz, Feinman, JJ.

10164 Milangel Raposo, Index 306777/11  
Plaintiff-Appellant,

-against-

Franz Robinson,  
Defendant-Respondent.

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The Sullivan Law Firm, New York (James A. Domini of counsel), for appellant.

Kay & Gray, Westbury (Katie A. Walsh of counsel), for respondent.

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Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about May 10, 2012, which denied plaintiff's motion for summary judgment on the issue of liability, unanimously affirmed, without costs.

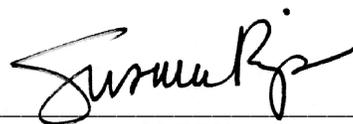
Plaintiff seeks damages for injuries she allegedly sustained in a collision between a minivan she was driving and a car owned and operated by defendant. Notwithstanding that defendant's approach into the intersection was regulated by a stop sign and no traffic control devices regulated plaintiff's approach, issues of fact preclude summary judgment, including which vehicle entered the intersection first, which driver had the right-of-way, and whether the driver with the right-of-way exercised

reasonable care to avoid the accident (see *Barnes v United Parcel Serv.*, 104 AD3d 562 [1st Dept 2013]).

We note that plaintiff moved for summary judgment at the beginning of the discovery process, and did not even possess a statement by defendant or any other evidence independent of her own assertions about the accident. Moreover, the police accident report upon which plaintiff partially relied was inadmissible because it was not certified (see *Coleman v MacLas*, 61 AD3d 569 [1st Dept 2009]), and the conclusions therein were based solely upon plaintiff's hearsay statements to the responding officer, who did not witness the accident (see *Fay v Vargas*, 67 AD3d 568 [1st Dept 2009]).

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

ENTERED: MAY 23, 2013

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Gonzalez, P.J., Friedman, Moskowitz, Feinman, JJ.

10166-

Index 6074/07

10166A Manuel Borbon,  
Plaintiff-Appellant,

-against-

Juan C. Pescoran, et al.,  
Defendants-Respondents.

[And A Third-Party Action]

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Manuel Borbon, appellant pro se.

Burke, Gordon & Conway, White Plains (Michael G. Conway of counsel), for White Rose Inc., Juan C. Pescoran, Rose Trucking Corp., Rose Trucking Inc., and Latin Trucking Inc., respondents.

Law Office of Lori D. Fishman, Tarrytown (Christopher C. Caiazzo of counsel), for Marvarino's, Inc., Cookies Childrens Togs, Inc., Sunshine Stores, Inc., and John Doe, respondents.

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Appeal from judgment, Supreme Court, Bronx County (Howard R. Silver, J.), entered February 9, 2011, after a jury trial, dismissing the complaint as against defendants Juan C. Pescoran, Latin Trucking Inc., White Rose Inc., Rose Trucking Inc., and Rose Trucking Corp., and bringing up for review an order, same court and Justice, entered January 19, 2011, which denied plaintiff's motion to set aside the jury verdict, unanimously dismissed, without costs, for failure to perfect the appeal in accordance with the CPLR and the rules of this Court. Appeal

from the order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The appeal from the judgment is dismissed because plaintiff failed to file a proper appellate record (see CPLR 5526; Rules of App Div, 1st Dept [22 NYCRR] § 600.10[b]; *Quezada v Mensch Mgt. Inc.*, 89 AD3d 647 [1st Dept 2011]). "Without the benefit of a proper record, this Court cannot render an informed decision on the merits" (*Lynch v Consolidated Edison, Inc.*, 82 AD3d 442 [1st Dept 2011] [internal quotation marks omitted]).

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

ENTERED: MAY 23, 2013

  
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Gonzalez, P.J., Friedman, Moskowitz, Feinman, JJ.

10168- Index 602509/08  
10169 Horizon Asset Management, LLC, etc.,  
Plaintiff-Respondent-Appellant,

-against-

Raymond V. Duffy, etc.,  
Defendant/Counterclaim  
Plaintiff-Appellant-Respondent,

-against-

Murray Stahl, et al.,  
Counterclaim Defendants-Respondents-Appellants.

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Collier, Halpern, Newberg, Nolletti & Bock, LLP, White Plains  
(Philip M. Halpern of counsel), for appellant-respondent.

Schulte Roth & Zabel LLP, New York (Robert M. Abrahams of  
counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Bernard J. Fried,  
J.), entered October 14, 2011, which, to the extent appealed from  
as limited by the briefs, granted defendant-counterclaim  
plaintiff summary judgment as to liability on its counterclaims  
for breach of contract and conversion, limited damages for breach  
of contract and conversion to revenue generated from August 2008  
to the present, and ordered an immediate damages trial before the  
special referee on the first and sixth counterclaims and severed  
the remainder of the action, unanimously modified, on the law and

the facts, to direct the special referee to calculate damages for breach of contract and conversion from January 2005, and otherwise affirmed, without costs. Appeal and cross appeal from order, same court and Justice, entered July 5, 2012, unanimously dismissed, without costs, as academic.

The court properly found that the defendant-counterclaim plaintiff Raymond V. Duffy, individually and in a derivative capacity on behalf of Horizon Asset Management Services, LLC, who asserted nine counterclaims, including breach of contract, conversion, accounting, and reformation, waived his right to a jury trial by joining legal and equitable claims (*Willis Re Inc. v Hudson*, 29 AD3d 489, 489-90 [1st Dept 2006]; *Zimmer-Masiello, Inc. v Zimmer, Inc.*, 164 AD2d 845, 846-847 [1st Dept 1990]). We reject Duffy's argument that his counterclaims for books and records, accounting, declaratory judgment, and reformation are only "incidental" equitable claims that does not preclude him from demanding a jury trial (see *Trepuk v Frank*, 104 AD2d 780, 781 [1st Dept 1984]). In any event, contrary to Duffy's contention, the counterclaims for breach of contract and conversion, which he asserted derivatively, are not legal claims, since derivative actions have long been recognized in New York as equitable proceedings (see *Sakow v 633 Seafood Rest., Inc.*, 25

AD3d 418, 419 [1st Dept 2006], *lv denied* 7 NY3d 701 [2006]).

We find that the court did not abuse its discretion under CPLR 3212(c) by ordering an immediate damages trial on the breach of contract and conversion counterclaims, since the record demonstrates that Duffy acquiesced to an immediate trial.

Duffy's claim that the court improperly severed the remaining counterclaims from the breach of contract and conversion counterclaims, for which he was granted summary judgment on the issue of liability, reflects his apparent misunderstanding of the court's order. The court merely severed the surviving counterclaims from those that were dismissed, and ordered that the surviving claims should continue.

However, the Supreme Court erred in directing the special referee to calculate Duffy's damages on his contract claim from September 2007, rather than January 2005, since there is no evidence that he had been paid all of the compensation due him from this date forward. We note that counterclaim defendant Murray Stahl, plaintiff Horizon Asset Management, LLC 's (Horizon) CEO and majority shareholder, testified at his deposition that, although Horizon had relieved Duffy of all job responsibilities, he actually remained on the employee roster until any "arrearages" could be made up because he "might have

been owed some money.”

To the extent that plaintiffs-counterclaim-defendants argue that the minutes of the annual meetings constituted a waiver by Duffy of the more than \$7.8 million of arrearages reflected in the reconciliations, we decline to consider this argument, raised for the first time on appeal (see *Juvenex Ltd. v Burlington Ins. Co.*, 63 AD3d 554 [1st Dept 2009]). We also find that the court properly granted Duffy’s motion for summary judgment on the issue of liability on his conversion claim, finding that 1100 customer accounts were brought into Horizon by Duffy on behalf of Horizon Asset Management Services, and Duffy was entitled to 50% of the revenues from these accounts under the parties’ operating agreement.

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

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him to lose control and strike defendant's blue van (an assertion which defendant and its witnesses deny), Zecca's owner unequivocally testified that Zecca did not own a white van, and that all of Zecca's vans were the same as the blue van struck by plaintiff. In response, plaintiff failed to present any evidence connecting the alleged white van to Zecca, sufficient to impose liability (see *Pulka v Edelman*, 40 NY2d 781 [1976]).

Plaintiff's spoliation argument, as well as several other arguments, are improperly raised for the first time on appeal and do not present pure questions of law.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 23, 2013

  
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Gonzalez, P.J., Friedman, Moskowitz, Feinman, JJ.

10172      BDCM Fund Adviser, L.L.C., formerly      Index 602116/08  
            known as Black Diamond Capital  
            Management, L.L.C., et al.,  
            Plaintiffs-Appellants,

-against-

James J. Zenni, Jr., et al.,  
Defendants/Counterclaim-  
Plaintiffs-Respondents,

-against-

BDCM Fund Adviser, L.L.C., etc., et al.,  
Counterclaim-Defendants-Appellants.

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Covington & Burling LLP, New York (C. William Phillips of  
counsel), for appellants.

Storch Amini & Munves P.C., New York (Bijan Amini of counsel),  
for respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.),  
entered November 26, 2012, which granted defendant-counterclaim  
plaintiffs James J. Zenni, Jr., Zenni Holdings, LLC, Z Capital  
Partners, LLC, Z Capital Special Situations Fund, LP and Z  
Capital Special Situations Fund-A, LP and James J. Zenni, Jr.,  
Zenni Holdings, LLC, Z Capital Partners, LLC, Z Capital Special  
Situations Fund, LP's motion for partial summary judgment on  
their counterclaim for carried interest payments and related  
pre-judgment interest, and denied plaintiffs-counterclaim-

defendants BDCM Fund Adviser, LLC, f/k/a Black Diamond Capital Management, LLC; Black Diamond Capital Holdings; LLC and Stephen H. Deckoff's motion for set-offs for certain taxes paid by plaintiffs, unanimously affirmed, with costs.

The motion court properly determined that defendants' counterclaim for carried interest was ripe for review following the dismissal of plaintiffs' 2008 lawsuit, affirmed by this Court (see *BDCM Fund Adviser, L.L.C. v Zenni*, 103 AD3d 475 [1st Dept 2013]). The fact that this Court left extant one breach of contract claim in plaintiffs' later, 2011 lawsuit, does not preclude the motion court's grant of summary judgment to defendants on their counterclaims in the 2008 lawsuit. Moreover, the law of the case doctrine, which "addresses the potentially preclusive effect of judicial determinations made in the course of a single litigation before final judgment" (*People v Evans*, 94 NY2d 499, 502 [2000]), is inapplicable because the 2011 lawsuit was a separate action.

The motion court properly interpreted the provision of the parties' contract used to calculate defendants' carried interest payments. Because that clause is unambiguous, the motion court properly declined to entertain plaintiffs' presentation of extrinsic evidence (*Banco Espírito Santo, S.A. v Concessionária*

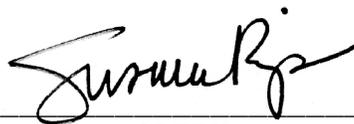
*Do Rodoanel Oeste S.A.*, 100 AD3d 100, 106 [1st Dept 2012]).

Finally, the motion court properly declined to entertain plaintiffs' 11th hour tax set-off claims where, as here, the set-offs were never previously requested; were not quantified; and were never proven to have actually been paid.

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

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

ENTERED: MAY 23, 2013

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Gonzalez, P.J., Friedman, Moskowitz, Feinman, JJ.

10176- Index 102357/11

10177-

10178-

10179N-

10180N Theodore Bohn,  
Plaintiff-Respondent,

-against-

176 W. 87th St. Owners Corp., etc., et al.,  
Defendants-Appellants,

Paul Gottsegen, et al.,  
Defendants.

- - - - -

Theodore Bohn,  
Plaintiff-Respondent,

-against-

176 W. 87th St. Owners Corp., etc., et al.,  
Defendants,

Steinhardt Management, Inc.,  
Defendant-Appellant.

- - - - -

Theodore Bohn,  
Plaintiff-Respondent,

-against-

176 W. 87th St. Owners Corp., etc., et al.,  
Defendants,

Seth Friedland, et al.,  
Defendants-Appellants.

- - - - -

Theodore Bohn,  
Plaintiff-Appellant,

-against-

176 W. 87th St. Owners Corp., etc., et al.,  
Defendants-Respondents,

Mark Rudd, Esq., et al.,  
Defendants.

- - - - -

Robert Cantor, Esq., et al.,  
Nonparty Respondents.

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Cantor, Epstein & Mazzola LLP, New York (Robert I. Cantor of  
counsel), for 176 W. 87th Street Owners Corp., Richard Feldman  
and Sonnenschein, Sherman & Deutsch, LLP, appellants.

Jaroslawicz & Jaros LLC, New York (Michelle Holman of counsel),  
for Steinhardt Management, Inc., appellant.

Friedland Laifer & Robbins, LLP, New York (Eugene P. Hanson of  
counsel), for Seth Friedland and Friedland Laifer & Robbins,  
appellants.

Theodore Bohn, New York, appellant pro se/respondent pro se.

Cantor, Epstein & Mazzola LLP, New York (Robert I. Cantor of  
counsel), for 176 W. 87th Street Owners Corp., Paul Gottsegen,  
Insignia Management, Halstead Management, Richard Feldman,  
Sonnenschein, Sherman & Deutsch, LLP, Robert Cantor and Cantor,  
Epstein & Mazzola LLP, respondents.

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Orders, Supreme Court, New York County (Milton A. Tingling,  
J.), entered April 17, 2012 and April 18, 2012, which denied  
defendants-appellants' motions pursuant to CPLR 3211 and CPLR  
3212 and defendant Steinhardt Management's motion for sanctions

against plaintiff, unanimously reversed, on the law, without costs, the motions granted, and the matter remanded for a determination of the appropriate attorneys' fees. The Clerk is directed to enter judgment in favor of defendants-appellants dismissing the complaint as against them. Order, same court and Justice, entered May 16, 2012, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for sanctions against nonparty Robert Cantor Esq., and to disqualify Cantor and Cantor, Epstein, & Mazzola LLP from representing Feldman and Sonnenschein, Sherman & Deutsch, LLP, unanimously affirmed, without costs. Order, same court and Justice, entered April 17, 2012, which granted Cantor's motion to quash a subpoena, unanimously affirmed, without costs.

In 2003, plaintiff, a shareholder-tenant in the cooperative located at 176 West 87th Street in Manhattan, commenced an action (the 2003 action) against defendant 176 W. 87th Street Owners Corp., among others, alleging that in late 1999 he began complaining to defendant Paul Gottsegen, the managing agent, that his apartment was being made uninhabitable by odors entering it from a restaurant on the ground floor of the building. He alleged that his complaints were ignored and that although the Department of Environmental Protection issued several violations

based on the odors, defendants failed to ameliorate the problem, which forced him to sell his apartment.

The complaint in this action, commenced in July 2011, centers on the allegations that defendants provided false letters to the Environmental Control Board about who was authorized to represent the cooperative in defending against the violations, that the letters later disappeared, and that defendants acted to conceal the existence of the letters.

The prima facie tort cause of action fails to allege that defendants, or any of them, acted solely to injure plaintiff (see *WFB Telecom. v NYNEX Corp.*, 188 AD2d 257, 258 [1st Dept 1992], *lv denied* 81 NY2d 709 [1993]). It also fails to allege special damages that are specific and measurable (see *id.*; *Wehringer v Helmsley-Spear, Inc.*, 91 AD2d 585, 586 [1st Dept 1982], *affd* 59 NY2d 688 [1983]). In any event, the limitations period for a claim of prima facie tort is one year (*Havell v Islam*, 292 AD2d 210 [1st Dept 2002]). The complaint does not clearly set forth exactly when defendants engaged in the acts giving rise to the cause of action, but, whether it was in the years preceding the commencement of the 2003 action or during the pendency of that action, the limitations period had expired by July 2011, when plaintiff commenced this action.

The fraud cause of action is not pleaded with the requisite detail (see CPLR 3016[b]; *Small v Lorillard Tobacco Co.*, 252 AD2d 1, 15 [1st Dept 1998], *affd* 94 NY2d 43 [1999]). Plaintiff alleges that he relied to his detriment on defendants' false representations as to the authorization to defend, but he does not identify false representations of material facts on which he relied, the alleged representations were not all made to him, and he does not explain how he relied on them. As to defendants' representations about efforts undertaken to ameliorate the odors in his apartment, plaintiff does not allege what was said to him. Moreover, he could not have reasonably relied on those representations, given that he was litigating against defendants, and he could not have been harmed by them, given that the violations were sustained after an administrative hearing.

In any event, the fraud claim is barred by the statute of limitations, which is the greater of six years from the date the cause of action accrued or two years from the time the plaintiff discovered the fraud (CPLR 213[8]). Plaintiff's cause of action accrued some time before 2003, when he was involved in the various administrative proceedings and before he sold his apartment. To the extent he may later have discovered improprieties in connection with the authorization letters, that

discovery preceded the commencement of this action by more than two years.

Plaintiff concedes that his Judiciary Law § 487 cause of action is inapplicable to 176 W. 87th St Owners Corp. and Steinhardt Management, neither of which is an attorney. As to the attorney defendants, the cause of action fails to allege that plaintiff suffered any injury proximately caused by any deceit or collusion on their part, and no such injury can reasonably be inferred from the allegations in the complaint (*Seldon v Spinnell*, 95 AD3d 779 [1st Dept 2012], *lv denied* 20 NY3d 857 [2013]; *Rozen v Russ & Russ, P.C.*, 76 AD3d 965 [2nd Dept 2010]). To the extent the Judiciary Law § 487 cause of action is based on conduct that occurred before 2005, it is in any event barred by the six-year statute of limitations (see *Guardian Life Ins. Co. of Am. v Handel*, 190 AD2d 57, 62 [1st Dept 1993]).

We find that the complaint is without merit and apparently was undertaken to harass defendants (see *Great Am. Ins. Cos. v Bearcat Fin. Servs., Inc.*, 90 AD3d 533 [1st Dept 2011], *lv dismissed* 18 NY3d 951 [2012]). Accordingly, an award of attorneys' fees to Steinhardt is appropriate, and we remand the matter for a determination of the amount of fees incurred.

Contrary to his contention, plaintiff failed to establish

that Cantor made material factual statements that were false or in direct conflict with his client's testimony and should be sanctioned therefor. Nor did plaintiff establish any basis for disqualifying Cantor and his firm from representing Feldman and Sonnenschein, Sherman & Deutsch, LLP.

The court properly granted Cantor's motion to quash the subpoena served on him, since it sought documents and testimony protected by the attorney-client privilege.

We have considered plaintiff's other arguments and find them unavailing.

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

ENTERED: MAY 23, 2013

  
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Gonzalez, P.J., Friedman, Moskowitz, Feinman, JJ.

10181        In re Francisco De La Cruz,  
[M-1928]        Petitioner,

Ind. 1830/12

-against-

Hon. Ralph Fabrizio, et al.,  
Respondents.

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Francisco De La Cruz, petitioner pro se.

Robert T. Johnson, District Attorney, Bronx (Lindsey Ramistella  
of counsel), for Robert T. Johnson, 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:    MAY 23, 2013



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

8321-

File 175/82

8321A In re Sylvan Lawrence,  
Deceased.

- - - - -

Richard S. Lawrence, et al.,  
Plaintiffs-Appellants-Respondents,

-against-

Graubard Miller, et al.,  
Defendants-Respondents-Appellants.

- - - - -

Richard S. Lawrence, et al.,  
Intervenors-Appellants-Respondents.

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Kornstein Veisz Wexler & Pollard, LLP, New York (Daniel J. Kornstein of counsel), for Richard S. Lawrence and Peter A. Vlachos, appellants-respondents.

Greenfield Stein & Senior, LLP, New York (Norman A. Senior of counsel), for Richard S. Lawrence, appellant-respondent.

Berchem, Moses & Devlin, P.C., Milford, CT (Robert L. Berchem of the bar of the State of Connecticut, admitted pro hac vice, of counsel), for Suzanne Lawrence DeChamplain and Marta Jo Lawrence, appellants-respondents.

Sullivan Papain Block McGrath & Cannavo P.C., New York (Brian J. Shoot of counsel), for Graubard Miller, respondent-appellant.

Jones Day, Washington, DC (Michael A. Carvin of the bar of the District of Columbia, admitted pro hac vice, of counsel), for Daniel Chill, Elaine M. Reich and Steven Mallis, respondents-appellants.

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Amended decree, Surrogate's Court, New York County (Nora S. Anderson, S.), entered on or about October 14, 2011, which

granted the intervenor childrens' applications to intervene in this proceeding, awarded defendant law firm a fee of \$15,837,374.02, and directed the individual defendants to return to the plaintiff executors cash gifts in the amount of \$5.05 million, unanimously modified, on the law, to reduce the law firm's fee award to the hourly fees due under the original retainer agreement, remand for further proceedings to determine that amount, and award interest on the law firm's fees from July 29, 2005, the date of the breach of the revised retainer agreement, and otherwise affirmed, without costs. Order, Surrogate's Court, New York County (Troy K. Webber, S.), entered on or about October 1, 2009, which, to the extent appealed from, confirmed that portion of the Referee's report dated October 30, 2008 recommending as a discovery sanction the waiver of objections under the Dead Man's Statute (CPLR 4519) in lieu of the more severe sanction of striking the widow's pleadings in both the contract enforcement proceeding and the rescission action, unanimously affirmed, without costs.

Beginning in 1983, defendant law firm represented the family of Sylvan Lawrence in litigation concerning the administration of his estate. In 1998, Alice Lawrence, Sylvan's widow, paid three of the firm's partners, the individual defendants, a bonus or

gift totaling \$5.05 million and also paid the firm \$400,000 as a bonus or gift. By the end of 2004, the widow had paid, approximately \$22 million in legal fees on an hourly fee basis.

In the hope of reducing her anticipated legal fees in the ongoing litigation, the widow entered into a revised retainer agreement with the law firm in January 2005. The revised retainer agreement provided, inter alia, for a 40% contingency fee. In May 2005, the estate litigation settled with a payment to the estate of more than \$111 million and, in accordance with the revised retainer agreement, the firm sought a fee of 40% of that amount. When the widow refused to pay the 40% contingency fee, this litigation resulted, in which, among other relief, the return of the gifts the widow made in 1998 is sought.

The claims relating to the gifts the widow made to the three individual defendants are not time-barred. Rather, they were tolled under the doctrine of continuous representation (*Glamm v Allen*, 57 NY2d 87, 93-94 [1982]). Contrary to the individual defendants' contention, the doctrine applies where, as here, the claims involve self-dealing at the expense of a client in connection with a particular subject matter (*cf. Woyciesjes v Schering-Plough Corp.*, 151 AD2d 1014, 1014-1015 [4th Dept 1989], *appeal dismissed* 74 NY2d 894 [1989]). As to the merits, the

individual defendants failed to meet their burden of showing by clear and convincing evidence that the widow gave the gifts willingly and knowingly (*Matter of Clines*, 226 AD2d 269, 270 [1st Dept 1996], *lv dismissed* 88 NY2d 1016 [1996]). Indeed, the secrecy surrounding the gifts, and their extraordinary amounts, which the individual defendants accepted without advising the widow to seek independent counsel, preclude a finding in the individual defendants' favor (see Code of Professional Responsibility EC 5-5).

The revised retainer agreement is both procedurally and substantively unconscionable (*Lawrence v Graubard Miller*, 48 AD3d 1, 6 [1st Dept 2007], *affd* 11 NY3d 558 [2008]). The evidence shows that the widow believed that under the contingency arrangement, she would receive the "lion's share" of any recovery. In fact, as it operated, the law firm obtained over 50% of the widow's share of proceeds. Thus, the law firm failed to show that the widow fully knew and understood the terms of the retainer agreement – an agreement she entered into in an effort to reduce her legal fees (see *Shaw v Manufacturers Hanover Trust Co.*, 68 NY2d 172, 176 [1986]).

In considering the substantive unconscionability of the revised retainer agreement, the Referee correctly considered such

factors as the proportionality of the fee to the value of the professional services rendered (see *King v Fox*, 7 NY3d 181, 191 [2006]; see also *Lawrence v Graubard Miller*, 48 AD3d 1 [2007], *affd* 11 NY3d 588 [2008], *supra*; *Gair v Peck*, 6 NY2d 97 [1959], *cert denied* 301 US 374 [1960]), the sheer amount of the fee (see *King* at 192; see also *Gair* at 106), and the risks and rewards to the attorney upon entering into the contingency agreement (see *Lawrence*, 48 AD3d at 7-8). With regard to the last factor, the law firm had internally assessed the estate's claims to be worth approximately \$47 million so that the contingency fee provision in the revised retainer would have meant a fee of about \$19 million. Contrary to the law firm's assertion, on this record it seems highly unlikely that the firm undertook a significant risk of losing a substantial amount of fees as a result of the revised retainer agreement's contingency provision. Rather, the Referee accurately characterized this attempt by the law firm to justify its action as "nothing but a self-serving afterthought."

The amount the law firm seeks (\$44 million) is also disproportionate to the value of the services rendered (approximately \$1.7 million) (see *Lawrence v Graubard Miller*, 11 NY3d at 596). The record shows that the law firm spent a total of 3,795 hours on the litigation after the revised retainer

agreement became effective, resulting in an hourly rate of \$11,000, which, as the Referee stated, is "an astounding rate of return for legal services."

However, the remedy recommended by the Referee and adopted by the Surrogate – namely, a new "reasonable" fee arrangement for the parties – was improper. Where, as here, there is a preexisting, valid retainer agreement, the proper remedy is to revert to the original agreement (*Matter of Smith [Raymond]*, 214 App Div 622 [1st Dept 1925], *appeal dismissed* 242 NY 534 [1926]; *Naiman v New York Univ. Hosps. Ctr.*, 351 F Supp 2d 257 [SD NY 2005]). For the reasons found by the Referee, we reject the firm's suggestion that it receive a reduced contingency fee. Accordingly, the matter is remanded for the determination of the fees due the law firm under the original retainer agreement. Given that the firm is entitled to fees under the original retainer agreement, it is also entitled to prejudgment interest from the date of the breach (see CPLR 5001).

Because the individual defendants acted alone, and in secret from the rest of the law firm, with respect to the gifts, we decline to rule that such conduct by the individual defendants results in the firm's forfeiture of its lawful fees from the date the individual defendants received the gifts.

The issue of the propriety of allowing the widow's children individually to intervene in the action is academic and need not be addressed. Even if we were to reach the merits of the underlying claims, we would find them without merit.

Finally, the record shows that the court providently exercised its discretion in imposing a discovery sanction for the widow's wilful and contumacious conduct in avoiding her deposition. The sanction imposed sufficiently mitigated the prejudice arising from this misconduct (see CPLR 3126; see generally *Sage Realty Corp. v Proskauer Rose*, 275 AD2d 11, 17-18 [1st Dept 2000], *lv dismissed* 96 NY2d 937 [2001]).

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

ENTERED: MAY 23, 2013

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obtained over tenant. The Appellate Term reversed to deny the motion and reinstate the default judgment on the ground that the tenant did not present an excuse for his calendar default or show a meritorious defense to the landlord's underlying claim.

Further, the Appellate Term determined that the tenant's bald assertion that he "never lived" at the subject premises, even if true, did not constitute a meritorious defense or provide a proper basis to set aside the so-ordered stipulations settling the underlying nonpayment "summary" proceeding.

The Civil Court improperly decided tenant's motion to vacate the default judgment entered in landlord's nonpayment proceeding without conducting a hearing to resolve the threshold issue of personal jurisdiction. The petition was purportedly resolved by so-ordered stipulations dated July 24, 2009 and August 26, 2009, which, if signed by the tenant, would constitute a waiver of his lack of personal jurisdiction defense (see *Option One Mtge. Corp. v Daddi*, 60 AD3d 920 [2d Dept 2009]; *34 Funding Assoc., Inc. v Pollak*, 26 AD3d 182 [1st Dept 2006]; *General Motors Acceptance Corp. v Gegzno*, 225 AD2d 828 [3d Dept 1996] *appeal dismissed* 88 NY2d 1017 [1996]). However, tenant, in a sworn affidavit,

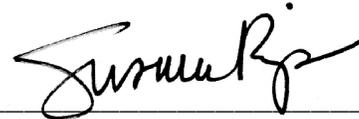
maintains that he did not sign the stipulations and that his son forged his signature. Contrary to landlord's claim, it is not "patently obvious" that the signatures on the lease, tenant's passport (which tenant claims was stolen), and the stipulations "are identical." Thus, on this particular record, as a threshold matter, a hearing is required to resolve this question of fact.

If the court determines that the tenant signed the stipulations, then it must deny his motion to vacate the default. If, however, the court finds that the tenant did not sign the stipulations, upon review of the tenant's affidavit, the facts are sufficient to warrant a traverse hearing. The tenant's motion for relief from the default judgment was supported by an affidavit stating that he was improperly served, that he was not the premises' tenant, and that he never lived at the address in dispute. He avers that "[i]t is either a different Bernard Jacobs or my so[n]". In light of this evidence, an issue of fact

exists as to whether the landlord validly served the tenant in accordance with RPAPL 735(1)(a). Accordingly, the Civil Court must conduct a hearing to determine whether the tenant is entitled to relief from the judgment under CPLR 5015(a)(4).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 23, 2013

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which caused plaintiff's fall (see *Roldan v City of New York*, 36 AD3d 484, 484 [1st Dept 2007] ["(t)he awareness of one defect in the area is insufficient to constitute notice of a different particular defect which caused the accident"]).

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

ENTERED: MAY 23, 2013

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Andrias, J.P., Acosta, Freedman, Richter, Gische, JJ.

9847 Kevin Pludeman, et al., Index 101059/04  
Plaintiffs-Appellants-Respondents,

-against-

Northern Leasing Systems, Inc., et al.,  
Defendants-Respondents-Appellants.

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Chittur & Associates, P.C., New York (Krishnan S. Chittur of  
counsel), for appellants-respondents.

Moses & Singer, LLP, New York (Robert D. Lillienstein of  
counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Martin Shulman, J.),  
entered on or about July 18, 2012, which granted defendants'  
motion to decertify the class, denied plaintiffs' cross motion  
for partial summary judgment with respect to the liability of  
defendant Northern Leasing Systems, Inc. (Northern Leasing) for  
breach of contract, and denied defendants' order to show cause to  
prevent plaintiffs from making a second summary judgment motion,  
unanimously modified, on the law, to the extent of denying  
defendants' motion to decertify the class, and otherwise  
affirmed, without costs.

In this class action for, among other things, breach of  
contract, plaintiffs are small business owners who leased various  
types of "point of sale" credit card terminals from Northern

Leasing. Plaintiffs allege that, without authorization, Northern Leasing charged them each \$4.95 per month as a "fee" for waiving its requirement that the lessees insure the equipment against loss or damage and provide Northern Leasing with proof of insurance (the LDW fee).

The main factual dispute for the breach of contract claims is whether the lease provisions are set forth in a single page or whether the terms found on three additional pages are also clearly part of the agreement. The printed form leases that each named plaintiff signed vary slightly, but they share the following characteristics: each lease is printed on one sheet of paper, 11 inches wide by 17 inches long that is folded in half to create a booklet of four pages, each 8½ by 11 inches long. The form's front page provides spaces for handwritten information about, among other things, the business's owner, address, telephone number, and bank account, the equipment being leased, and the lease payment schedule. The page also contains printed terms and signature lines under which the owner accepts the lease and personally guarantees the lease obligations, a signature line for Northern Leasing, and a printed merger clause stating that lease terms represent the final expression of the parties' agreement. The phrase "Page 1 of 4" is printed in small typeface

at the bottom, left-hand corner of the page, and a printed term refers to "paragraph 11 hereof," which is not on the first page.

The second, third, and fourth pages do not contain any place for handwritten information and are entirely printed except for the handwritten signature line of the vendor who sold the equipment to Northern Leasing. The third page contains the paragraph 11 that is referenced on the first page, and a paragraph entitled "I[nsurance]" which, according to Northern Leasing, authorizes the LDW fee.

In 2004, the four named plaintiffs commenced this lawsuit on behalf of themselves and approximately 300,000 small business merchants who had entered into leases with Northern Leasing. The relevant procedural history of this action is that in April 2009, the motion court granted plaintiffs' renewed motion for an order which, among other things, certified a class defined as all lessees and guarantors under the form lease who had paid LDW fees between certain dates (*Pludeman v Northern Leasing Sys., Inc.*, 24 Misc 3d 1206[A], 2009 NY Slip Op 51290[U] [Sup Ct, NY County 2009]). In June 2010, this Court unanimously modified the certification order by expanding the class, and rejected Northern Leasing's claim that certification was inappropriate because individual issues among the class members predominated over

common issues (*Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 420-423 [1st Dept 2010]). Specifically, we found that the commonality requirement under CPLR 901(a)(2) was satisfied because Northern Leasing's liability for breach of contract "could turn on a single issue" that does not require individualized proof, namely, "whether it is possible to construe the first page of the lease as a complete contract because of the merger clause, signature lines, and the space for the detailing of fees" (*id.* at 424).

While the appeal from the class certification order was pending, the motion court granted plaintiffs' motion for partial summary judgment as to Northern Leasing's liability for breach of contract (*Pludeman v Northern Leasing Sys., Inc.*, 27 Misc 3d 1203[A], 2010 NY Slip Op 50530[U][Sup Ct, NY County 2010]). Without the guidance provided in our June 2010 order, the motion court granted plaintiffs' motion based on page 1's lack of any reference to the LDW fee or the "Insurance" provision (*id.* at \*5). The court rejected Northern Leasing's argument that page 1's reference to paragraph 11, which is located on page 3, and the indication on the first page that it was "Page 1 of 4," at the minimum create ambiguity as to whether pages 2, 3, and 4 are incorporated into the lease (*id.*).

In September 2011, this Court reversed the grant of partial summary judgment, holding that the record raised issues of fact (*Pludeman v Northern Leasing Sys., Inc.*, 87 AD3d 881 [1st Dept 2011]). We specified that before granting summary judgment “a factfinder must determine (1) whether plaintiffs received only the first page of the form lease or all four pages, and (2) whether, if plaintiffs received all four pages, they could reasonably have believed that all terms were contained on page 1.”

Based on our September 2011 decision, defendants moved to decertify the class, arguing, among other things, that the questions of fact we had identified required individualized proof for determination, and therefore the commonality and typicality prerequisites for class certification (CPLR 901[a][2] and [3]) could not be satisfied.

Plaintiffs opposed and by cross motion again sought partial summary judgment with respect to Northern Leasing’s liability for breach of contract. Instead of claiming that the LDW fee was unauthorized because the “Insurance” provisions are not part of the leases, plaintiffs argued that the LDW program was a sham, that Northern Leasing lacked a good-faith basis for setting the charge at \$4.95 per month, and that the amount was unreasonable.

After plaintiffs cross-moved, Northern Leasing moved to deny the cross motion because there was no new evidence justifying a second summary judgment motion.

In July 2012, the motion court granted defendants' motion to decertify the class and denied both plaintiffs' and defendants' cross motions. With respect to the decertification motion, the court noted our statement, in modifying the class certification order, that liability "could turn on . . . whether it is possible to construe the first page of the lease as a complete contract" and that the issue could be determined "solely upon examination of the first page of the lease" (*Pludeman*, 74 AD3d at 424). However, the court thought that our September 2011 decision required individualized fact-finding and thus common issues no longer predominated.

The motion court misconstrued the September 2011 decision, which did not decertify the class. In the June 2010 decision, we affirmed that class certification was appropriate and identified the common issue that we thought predominated over individual issues, namely, whether plaintiffs were justified in assuming that the key contract terms were contained on the first page (74 AD3d at 424). By stating that this common issue "does not require individualized proof, and is capable of being determined

solely upon examination of the first page," we did not mean to suggest that the issue did not require factfinding and could be determined by summary judgment (*id.*).

Our September 2011 order, which elaborated upon the issues to be determined, did not require decertification and did not alter our prior ruling. Had we determined that decertification was appropriate, we could have ordered it on our own motion (see CPLR 902; *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 52-53 [1999]; *CLC/CFI Liquidating Trust v Bloomingdale's, Inc.*, 50 AD3d 446, 447 [1st Dept 2008]). We merely held that summary judgment was precluded because the record presented two issues of fact that are common to the class (*Pludeman*, 87 AD3d at 882). The first issue, whether plaintiffs received or saw only the first page of the form lease or all four pages, arose because the named plaintiffs each submitted affidavits stating that he or she signed what they understood to be a one-page form lease, but defendants claimed that all the form leases were composed of single sheets that were folded into four-page booklets (*id.*). If it were determined that plaintiffs received four-page booklets, then the factfinder would need to resolve the second common issue, namely, whether a reasonable person in the position of a plaintiff would have believed that the first page comprised the

entire lease or that no significant terms were contained on the other pages (see *Cutter v Peterson*, 203 AD2d 812, 814 [3d Dept 1994], *lv denied* 84 NY2d 806 [1994]; 2 Richard A. Lord, *Williston on Contracts* § 6:57 at 686 [4th ed 1990]). We specified that the second issue could not be resolved as a matter of law (*Pludeman*, 87 AD3d at 882).

Accordingly, the matter is remanded for a hearing at which evidence will be presented to the factfinder to determine whether a reasonable person would have believed that page 3 of the lease contained the additional charges and whether the fees were reasonable.

Turning to the remaining portions of the order on appeal, the motion court properly denied defendants' objection to plaintiffs' second motion for partial summary judgment on liability. Plaintiffs were entitled to make another summary judgment motion claiming that Northern Leasing lacked a good faith basis for charging \$4.95 per month as an LDW fee and the amount was unreasonable, because these allegations were based on new evidence (see *Varsity Tr. v Board of Educ. of City of N.Y.*, 300 AD2d 38, 39 [1st Dept 2002]). In addition, our previous decision (*Pludeman*, 87 AD3d 881 [2011]) constituted an intervening clarifying decision (see *Rosenbaum v City of New*

York, 5 AD3d 154 [1st Dept 2004]) with respect to the reasonableness of the LDW fee.

To the extent plaintiffs moved for summary judgment on the grounds that Northern Leasing's LDW program was a sham, that Northern Leasing lacked a good faith basis for setting the amount of the LDW charge, and that the amount was unreasonable, they were moving on an unpleaded claim. Hence, the motion court properly denied the cross motion for partial summary judgment (see *Weinstein v Handler*, 254 AD2d 165, 166 [1st Dept 1998] ["the general rule is that a party may not obtain summary judgment on an unpleaded cause of action"]). Since this case has been pending for nine years, we decline to deem the pleading amended on appeal. Plaintiffs' motion to amend the complaint is not before us on this appeal (see *Pludeman v Northern Leasing Sys., Inc.*, 2013 NY Slip Op 30428[U] [Sup Ct, NY County 2013]).

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

ENTERED: MAY 23, 2013



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650, 656 [1996])). Respondent New York City Fire Department's decision to alter the job requirements for the position of fire company chauffeur was within the sound exercise of its managerial discretion (see Administrative Code of City of NY § 12-307[b]; *Matter of Caruso v Anderson*, 138 Misc 2d 719 [Sup Ct, NY County 1987], *affd* 145 AD2d 1004 [1st Dept 1988], *lv denied* 73 NY2d 709 [1989])).

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

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

ENTERED: MAY 23, 2013

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CLERK

Friedman, J.P., Richter, Feinman, Gische, Clark, JJ.

10051 SecondMarket Holdings, Inc., Index 651490/12  
Plaintiff-Respondent,

-against-

Christopher Chakford, et al.,  
Defendants-Appellants.

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Wechsler & Cohen, LLP, New York (Davis B. Wechsler and Kim  
Lauren-Michael of counsel), for Christopher Chakford, appellant.

Law Offices of James A. Prestiano, P.C., Commack (James A.  
Prestiano of counsel), for Direct Access Partners, LLC,  
appellant.

Zukerman Gore Brandeis & Crossman, LLP, New York (Edward L.  
Powers of counsel), for respondent.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.),  
entered October 12, 2012, which, to the extent appealed from,  
denied defendants Christopher Chakford's and Direct Access  
Partners, LLC's motions to dismiss the complaint, unanimously  
affirmed, without costs.

Defendants failed to establish as a matter of law that the  
restrictive covenants contained in the separation agreement are  
invalid under *Post v Merrill Lynch, Pierce, Fenner & Smith* (48  
NY2d 84 [1979]) and its progeny. The separation agreement  
between Chakford and SecondMarket constituted a contract separate  
from, and independent of, Chakford's previous employment

agreement. Chakford entered into the separation agreement, with advice of counsel, a month after his employment had ended, and he makes no claim that the agreement was the product of any duress. Moreover, SecondMarket alleges that Chakford received additional benefits other than those he was entitled to under previous employment contracts, and Chakford concedes that the separation agreement provided him with six months of COBRA payments. Thus, the facts here are distinguishable from *Post*.

The court also properly determined that, on this record, at the pre-answer motion to dismiss stage, rejection of the covenants on the basis of reasonableness was premature.

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

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

ENTERED: MAY 23, 2013

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CLERK



SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

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

8418  
Ind. 1816/08

x

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The People of the State of New York,  
Respondent,

-against-

Horacio Blackwood,  
Defendant-Appellant.

x

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Defendant appeals from the judgment of the Supreme Court, New York County (Bonnie Wittner, J.), rendered April 22, 2009, as amended April 30, 2009, convicting him, after a jury trial, of rape in the second degree and facilitating a sex offense with a controlled substance, and imposing sentence.

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), Quinn Emanuel Urquhart & Sullivan LLP, New York (Robert Trisotto of counsel), and Cahill Gordon & Reindell LLP, New York (Will A. Page and Daniel C. Isaacs of counsel), for appellant.

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

Saxe, J.

Defendant's conviction of rape in the second degree and facilitating a sex offense with a controlled substance was not only supported by legally sufficient evidence, but the weight of the evidence was overwhelming, and the trial court's *Molineux* ruling does not justify reversal.

The charge of rape in the second degree (Penal Law § 130.30[2]) is based on defendant's having had sexual intercourse with the complainant while she was mentally incapacitated due to narcotic or intoxicating substances administered to her without her consent, and the charge of facilitating a sex offense with a controlled substance (Penal Law § 130.90[1]) is based specifically on defendant's administering MDMA (methylenedioxyamphetamine), commonly called Ecstasy, to the complainant without her knowledge or consent in order to facilitate the subsequent sex offense.

The trial evidence offered by the People included the testimony of the complainant and two other young women present for some of the events, along with the testimony of a police detective, a physician, and an expert toxicologist, as well as the results of forensic testing and recordings of statements made by defendant. The complainant testified that she met defendant, who identified himself as a Los Angeles-based talent agent, at a

"Talent Expo" in Texas in November 2006, when she was a high school senior, and that thereafter defendant called her numerous times about her plans for a career in entertainment. He repeatedly encouraged her to move to Los Angeles, where he said he would pitch her demo tape to a record label and introduce her to influential people in the entertainment industry. But, rather than move to Los Angeles after graduating from high school, in the fall of 2007, the complainant enrolled at the New York Conservatory of Dramatic Arts. On September 3, 2007, defendant called her and proposed that she meet with him while he was in Manhattan on September 11, 2007, suggesting that they go to a restaurant called Tao.

At about 5:00 p.m. the complainant arrived at the address defendant had given her, and he escorted her from her taxicab into his hotel room. There, she accepted defendant's offer of a drink. He prepared two blue-colored alcoholic drinks called "HpnotiQ," and served her one, which she drank. After the two read some scenes together, at defendant's suggestion they went to a clothing store near the hotel, where defendant suggested to the complainant that she choose clothing that would show her style. At approximately 7:30 p.m. defendant bought the complainant a dress of her choosing to wear for the evening.

They then walked back to defendant's hotel room, which took

no more than 10 minutes, and upon arriving at the hotel room, defendant provided the complainant with a glass of wine, which she drank between approximately 7:40 and 8:15 p.m. The two then left the hotel to go to Tao. The complainant testified that in the taxi on the way to the restaurant, she felt "a little bit light-headed," "a lot more relaxed," and "happy" from the drinks she had consumed.

At the restaurant, defendant ordered the complainant a drink from the bar. She testified that before drinking it, she noticed that her vision had become "slightly fuzzy," an effect she had not previously experienced as a result of drinking alcohol. She drank that drink between 8:15 and 8:30 p.m., although she could not recall how many sips she had. A short time later, the pair was joined by two young women who, it turned out, were classmates of the complainant at the Conservatory. Defendant ordered another round of drinks for all four of them while they waited to be seated at a table. According to the two young women, the complainant was behaving in an unusually "touchy-feely" manner with defendant, and while one of them testified that she did not seem to be drunk at this point, the other testified that she seemed intoxicated in that she was very talkative and very "loose." Defendant and the three women were soon seated for dinner at a table on the second floor of the restaurant.

It is at this point that the complainant's memory of the evening's events stops; she testified that she could not remember anything that happened from that point until she woke up in defendant's hotel room the next morning. However, the testimony of her two classmates described the complainant's conduct through much of the rest of that evening.

Defendant ordered another round of drinks after the group was seated at their table; during dinner, the complainant consumed three or four drinks. In the view of both young women, the complainant's conduct grew more unusual: she seemed "a lot less stable," was "rocking back and forth," "kept reaching out for" her friend's arm, and "kept on repeating her words" to the point where she "had the same conversation over and over again." She was "swaying back and forth," was "leaning all over [defendant]" and "rubbing his thighs and knees," and appeared to be "beyond just being intoxicated."

The group left the restaurant around 10:45 p.m. and took a limousine to a club called Marquee. In the limousine, the complainant seemed to be "in her own fantasy world," acting in a "very sensual" manner - singing to herself with her eyes closed, rocking back and forth, and rubbing her body, including her upper thighs, in an unusual way. Inside the club, she consumed more drinks, although she was stumbling and unstable, and was not

making sense. She danced with a friend of defendant's named Theo, who met the group at the club at approximately 11:30 p.m. Theo testified that he saw the complainant finish three drinks at the club.

The other two young women left Marquee at about 12:30 a.m. Defendant left the club with the complainant some time later, while Theo remained there. Video surveillance footage from the Parker Meridien Hotel showed that defendant and the complainant arrived back at the hotel shortly after 1:00 a.m. The video did not reflect any unsteadiness on the complainant's part.

The next thing the complainant remembered was waking up, naked, in the bed in defendant's hotel room the following morning at about 8:30. She testified that when she woke up, she initially could not feel or move any part of her body below her neck, but that after a few seconds, she was able to wiggle her fingers, and then began to get feeling back in the rest of her body. She put on the clothes she had been wearing when she arrived at the hotel room the previous day. Defendant was in the bathroom and the shower was running. When she told him that she had to leave to make a 9:00 a.m. class, he came out of the bathroom, gave her \$20 for cab fare, and told her he would call her later.

While sitting in class that morning, the complainant was

worried, afraid, and confused, because she could not remember anything that had happened after she sat down for dinner at the restaurant the night before. When she ran into one of the classmates who had been with her and defendant at the restaurant and club the previous night, she asked what had happened that night, confiding that she could not remember anything and had woken up naked in defendant's hotel room. Both women began to cry. Although the classmate described the events of the previous evening, the complainant still did not recall anything. The complainant ultimately decided to go to a hospital to find out "if anything had happened" to her.

At about 6:00 p.m. on September 12, 2007, the complainant went to Long Island College Hospital in Brooklyn. The examining physician, Dr. Bernadith Russell, concluded based on her examination of complainant and her account of the events -- including the gap in her memory -- that the complainant might have been the victim of a "drug facilitated" sexual assault. Dr. Russell prepared a "drug facilitated sexual assault kit," which included urine and blood samples, and a "sexual assault rape evidence kit," which included oral, anal, and vaginal swabs.

At approximately 11:15 p.m. on September 12, 2007, Detective Julia Collins responded to the hospital, interviewed the complainant, and took custody of the examination kits prepared by

Dr. Russell.

On the evening of September 13, 2007, in the police station and at the direction of the police, the complainant made a controlled phone call to defendant in which she told him that she did not know why she had awakened in his room with no clothes on and that she did not remember anything that happened after they began dinner the previous night. Defendant replied that after they returned to the hotel room, she expressed the desire to go out again, but he told her that they could "keep partying some more" in the room because Theo would be coming over with some friends, but she then fell asleep on the couch. Defendant said he called Theo "a couple of times" to see if he and his friends were still planning to come over, but they decided not to. Defendant then moved her to the bed and got in bed with her. Hd told her that although she later woke him up "being really frisky" with him, he did not have sex with her because he did not have a condom.

Laboratory tests on the evidence from the rape kits established the presence of Ecstasy in the complainant's blood, and semen in the vaginal and anal swabs, as well as on her underwear. The complainant's blood and urine samples were also tested for the presence of the drug GHB, but GHB was not detected in her system; however, because GHB is metabolized rapidly, it

would not be expected to be found in the blood after eight hours or in the urine after 12 hours.

The complainant denied knowingly taken Ecstasy on the night of September 11, 2007, or the morning of September 12, 2007, or at any other time. Further, she testified that she never consented to any kind of sexual contact with defendant.

At the direction of the police, the complainant arranged to meet defendant on December 17, 2007, but at the appointed time, Detective Collins arrived to meet defendant in place of the complainant. Defendant voluntarily accompanied the detective to the 13th Precinct for questioning.

In the statement defendant gave Detective Collins, he said he did not recall either the complainant or himself having any drinks when she came to his hotel room. He stated that when they returned to the hotel at the end of the night, the complainant transformed from "nice" to "wild" and "wanted to continue partying." He said he texted and called Theo several times and that Theo called him and asked him to go out again, but, while defendant was in the bathroom, the complainant fell asleep on the sofa, so he covered her up and went to bed. When he awoke in the middle of the night he found the complainant "trying to have sex with him." However, he said, he did not have sex with her because he did not have a condom. Defendant also denied using

drugs, and had no explanation of why the complainant had no memory of the night's events, although he speculated that "perhaps something happened" at the night club where "some guys at another table (were) trying to lure girls over there."

Defendant voluntarily provided an oral swab for purposes of DNA analysis. Based on results of that test, it was determined that defendant was the source of the semen found on the complainant's vaginal swab and underwear.

Two prosecution experts, Dr. Russell and forensic toxicologist Michael McGee, testified that much of the complainant's reported behavior, as described by the prosecutor, was consistent with her having ingested Ecstasy with the glass of wine she drank at approximately 7:45 p.m., and also that the evidence was consistent with her having ingested GHB later that night. Specifically, McGee testified that the evidence that the complainant had a glass of red wine at approximately 7:45 p.m. and was then observed "[l]aughing, being very tactile, touching and grabbing at both men and women, being very talkative, touching her own body" and "having somewhat blurred vision," at about 8:30 p.m., was consistent with her having ingested Ecstasy at about 7:45 p.m. Dr. Russell agreed that the evidence was consistent with the complainant's having ingested Ecstasy. While defendant correctly points out that the only testimony that the

complainant was observed "touching her own body" that night indicated that this conduct first occurred in the taxicab on the way to Marquee at around 10:45 p.m., and not earlier, the rest of the behavior as described to the experts accurately reflected the testimony.

McGee testified that Ecstasy usually starts to take effect within one half hour of ingestion, and its effects can last "an hour or several hours," depending upon the dose. Russell testified that the effects of Ecstasy can last "an hour and half, two hours." Dr. Russell stated that loss of consciousness is a potential effect of Ecstasy, while McGee testified that unconsciousness was not a "normal result" of consuming Ecstasy but was more typical of GHB.

McGee testified that GHB, a "date rape drug," has an "anesthetic or sedating effect on the nerves," and can cause impaired memory or total memory loss. Russell agreed that GHB can cause loss of consciousness and memory loss, and stated that the drug usually begins to act within 20 minutes of ingestion, and its effects can last "about an hour and a half, two hours," depending on the dosage. Both witnesses agreed that the evidence was consistent with the complainant's having ingested GHB at approximately 1:30 a.m., after returning to the hotel room.

In addition to the foregoing evidence, the trial court,

pursuant to its *Molineux* ruling, permitted the People to introduce the following testimony of the complainant's classmate, Christine C., one of the two women who joined defendant and the complainant on the night in question, as well as that of another young woman, Brittney E., regarding their own experiences with defendant *other than* on the night in question.

Christine C. testified that she met defendant through her roommate, in August 2007, that he later called her about a potential audition, and that, hoping that he would become her agent, she agreed to have dinner with him on September 10, 2007. When Christine met defendant at his hotel room at the Parker Meridien, he handed her a script to read and poured a glass of wine for each of them. She drank "not even half" of this glass of wine and did not become intoxicated. For about 20 minutes, she and defendant acted out scenes from short audition scripts. At approximately 6:30 p.m., they left for dinner at Tao, where they had several drinks. After dinner, they stopped at another bar, where they had a shot of liquor, and then returned to defendant's hotel room. There, defendant made a Hpnotiq for her, of which she took only one sip. He talked to her about her career prospects, and in response to her complaint about aching feet, began rubbing her feet and calves. After Christine pulled away, embarrassed that her legs were not shaved, defendant

brought in shaving cream and a razor and began shaving them, at which point she pulled away again. She said defendant told her that it wouldn't be a good idea "to be talking about what we're doing because no one would understand the relationship between a manager and a client." When defendant appeared to fall asleep while she was in the bathroom, she left the hotel room and went home.

Brittney E. testified that she met defendant at a talent showcase in Atlanta on July 20, 2008. Defendant told Brittney that she was a "quintuple threat" because she could sing, act, dance, model, and play the guitar, and told her that she had a "very marketable look." Defendant called her several times in the week after the showcase, and when she informed him that she planned to attend the Musicians Institute in Hollywood in September 2008, he helped her arrange to rent an apartment in the complex where he lived. Defendant visited her in the apartment, had her do "runway walks" wearing a bathing suit, complimented her on her breasts and buttocks, and had her enact a scene with him in which he gave her an unwanted kiss.

Brittney then testified that on September 11, 2008 -- that is, one year *after* the events at issue here -- defendant invited her to meet him and a friend by the pool, and when she arrived there, he gave her two blue pills, which he said were Ecstasy,

and told her that they "could do them later." She put the pills in her pocket and later flushed them down the toilet.

Defendant now challenges the legal sufficiency and weight of the evidence, the trial court's *Molineux* ruling and the People's reliance on the contention that the complainant's mental incapacity could have been due to the surreptitious use of GHB, although the indictment contained no such accusation.

Initially, the evidence was legally sufficient to support the conviction of both counts. To establish defendant's guilt of rape in the second degree under Penal Law § 130.30(2), the People were required to prove beyond a reasonable doubt that defendant had sexual intercourse with the complainant when she was "rendered temporarily incapable of appraising or controlling [her] conduct owing to the influence of a narcotic or intoxicating substance administered to [her] without [her] consent" (Penal Law § 130.00[6]). To conclude that a jury verdict is supported by sufficient evidence, "the court must determine whether there is any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial" (*People v Bleakly*, 69 NY2d 490, 495 [1987]).

The complainant's testimony regarding her blackout alone provides a basis for a rational person to find beyond a

reasonable doubt that the complainant was incapable of appraising or controlling her conduct at the time she and defendant had sex. Moreover, the testimony of her classmates describing her unusual behavior that night, and the tests confirming the presence of Ecstasy in her bloodstream, combined with her denial of voluntarily ingesting the drug, was enough to permit the inference that her incapacitation throughout that night was involuntary, due to the administration to her of narcotic or intoxicating substances without her consent.

As to the sufficiency of the evidence establishing defendant's guilt of facilitating a sex offense with the controlled substance Ecstasy (Penal Law § 130.90), the People were required to prove beyond a reasonable doubt (1) that defendant administered Ecstasy to the complainant without her consent, (2) that he did so with the intent to commit a felony defined in Penal Law article 130, and (3) that he committed or attempted to commit such a felony. The first element was sufficiently established by the laboratory test showing the presence of Ecstasy in the complainant's blood, the complainant's denial that she took the drug voluntarily, the defendant's providing the complainant with wine at 7:45 p.m., and the expert testimony that the complainant's conduct starting at approximately 8:30 that night was consistent with the presence of

Ecstasy in the wine she drank at 7:45 p.m. The finding that defendant administered the Ecstasy with the necessary intent was sufficiently supported by testimony regarding defendant's conduct throughout the evening. Finally, the element that defendant committed or attempted to commit a felony under Penal Law article 130 has already been established by the earlier discussion upholding the sufficiency of the evidence supporting defendant's conviction of rape in the second degree under Penal Law § 130.30(2).

Turning to the weight of the evidence analysis, we are required to "weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions," and "decide[] whether the jury was justified in finding defendant guilty beyond a reasonable doubt" (see *People v Danielson*, 9 NY3d 342, 348 [2007]; *People v Cahill*, 2 NY3d 14, 58 [2003]).

The jury's determination was fully justified, since the evidence of defendant's guilt was overwhelming on both counts. That he surreptitiously gave the complainant a drink spiked with Ecstasy at 7:45 p.m., despite his denials to the police, comports with her reported conduct as well as the experts' description of the symptoms and effects of Ecstasy use. That he had sexual intercourse with her later that night is established by DNA

evidence and the vaginal swab.

That the complainant remained "incapable of appraising or controlling [her] conduct" after 1:00 a.m. due to involuntarily administered narcotic or intoxicating substances was established by the complainant's testimony that her blackout lasted all night, after she had been drugged with Ecstasy earlier in the evening. The expert testimony regarding the normal length of time Ecstasy continues to have an effect does not preclude a finding that the earlier administration of Ecstasy caused the complainant's mental incapacity. The large number of alcoholic drinks that the complainant consumed throughout the evening does not, in these circumstances, establish that her mental incapacity later that night was voluntary. This is not a case in which the complainant created her own incapacity by voluntarily consuming alcohol before the sex act that formed the basis for a rape charge (*see e.g. People v Shaw*, 115 AD2d 305 [4th Dept 1985]; *see also People v Johnson*, 99 AD3d 591, 593 [1st Dept 2012] [Abdus-Salaam, J., dissenting]). Rather, the evidence fully justified a finding that the complainant's excessive drinking that night occurred after her judgment was compromised by Ecstasy, so that her continued incapacity after 1:00 a.m. that night, whether caused by Ecstasy, alcohol, or a combination of the narcotic and intoxicating substances, could rationally be attributed to her

compromised judgment caused by the effects of the surreptitiously administered Ecstasy.

The proven falsity of defendant's exculpatory statement to the police, in which he claimed that he did not have sex with the complainant that night, undermines all his other protestations to the police. Moreover, his denial to the police of the use of drugs was undermined by the timing of the complainant's symptoms, and its falsity was further buttressed by the testimony that he subsequently provided Ecstasy tablets to another young woman he was purportedly trying to represent as a client.

Defendant also challenges the validity of the conviction based on the use of evidence to show that he also surreptitiously administered GHB to the complainant. He argues that since nothing in the indictment specifically accused him of surreptitiously administering GHB as well as Ecstasy, it was improper for the prosecution to offer and rely on expert testimony suggesting that the complainant could also have been incapacitated by GHB that night.

Initially, defendant's right to a fair trial was not violated by the expert testimony suggesting that GHB could have produced some of the complainant's symptoms. While the indictment specifically identified the controlled substance used for the crime of facilitating a sex offense with a controlled

substance, namely, Ecstasy, it did not name a specific substance as the cause of the incapacity claimed in the charge of rape in the second degree. Therefore, the People were not limited by the indictment to asserting that when defendant had sexual intercourse with the complainant, it was Ecstasy alone that had "rendered [her] temporarily incapable of appraising or controlling [her] conduct" (Penal Law § 130.00[6]).

Admittedly, the expert testimony regarding GHB was too weak to serve as a basis for the conviction. It was essentially limited to the suggestion that GHB *could have* caused the complainant's symptoms, and did not supply any basis for a finding that it *was* the cause. In comparison, in *People v Rogers* (8 AD3d 888, 892-893 [3d Dept 2004]), where the defendant was charged with rape while the victim was incapable of consent by virtue of being physically helpless, the Court approved of the admission of evidence connecting the defendant with the administration of GHB by showing that he had purchased and carried with him a product containing base ingredients similar to GHB, which the body can convert to GHB. Similarly, in *People v Puff* (283 AD2d 952, 953 [4th Dept 2001], *lv denied* 96 NY2d 923 [2001]), the charge of rape against the defendant arising from his participation in the gang rape and sexual abuse of a young woman who lost consciousness after she consumed Ecstasy was

supported by evidence that the defendant had provided the drug to her. Here, in contrast, there was nothing directly supporting the supposition that defendant had drugged the complainant with GHB, other than that some of her symptoms were consistent with the use of that substance.

However, the reference in the experts' testimony to GHB and its symptoms, and the People's reference to that evidence in support of their summation, did not impermissibly present the jury with a new, legally inadequate theory (see *People v Becoats*, 17 NY3d 643, 654 [2011], cert denied \_\_\_ US \_\_\_, 132 S Ct 1970 [2012], citing *Griffin v United States*, 502 US 46, 59 [1991]; *People v Martinez*, 83 NY2d 26, 36 [1993], cert denied 511 US 1137 [1994]). Rather, at worst, the suggestion that the complainant may have also been drugged with GHB was merely a "factually unsupported theory" (*Becoats*, 17 NY3d at 654). "[W]here jurors are given a choice between a factually supported and factually unsupported theory, it is assumed they have chosen the one with factual support" (*id.*). Here, we can assume that in determining whether the complainant was "rendered temporarily incapable of appraising or controlling [her] conduct owing to the influence of a narcotic or intoxicating substance administered to [her] without [her] consent," the jurors relied on those of the People's assertions that were supported by the evidence.

The weight of the evidence, even leaving aside the testimony regarding GHB, provided overwhelming justification for the jury's verdict of guilty of rape in the second degree.

Finally, while the trial court, in making its *Molineux* ruling, failed to recognize that evidence of "bad acts" that should be considered in a *Molineux* application can include evidence tending to establish the defendant's bad character as well as criminal acts (*see People v Agina*, 18 NY3d 600, 603 [2012]), the improperly admitted portions of this evidence to which defendant objected were not so prejudicial as to warrant reversal. As for portions to which defendant did not object, we decline to review his unpreserved claims in the interest of justice.

With regard to Christine C.'s testimony regarding the night before the events at issue, defendant objected only to her testifying that after defendant shaved her leg, he told her not to say anything to anybody because people wouldn't understand the nature of their relationship. However, the prejudicial impact of that statement is minor at best; it merely acknowledged his recognition that most people would likely disapprove of his conduct toward the young woman, *although she had permitted it*.

The trial court in its *Molineux* ruling properly allowed Brittney E. to testify regarding the incident in which defendant

gave her Ecstasy pills one year after the events at issue here. Although not relevant to the primary issue of whether defendant would *surreptitiously* drug someone with Ecstasy, that evidence had some relevance to the question of defendant's ability to obtain the drug and his willingness to provide it, despite his protests to the police. The relevance of the rest of Brittney's testimony was primarily to provide background and context for that event; the necessity of that context information outweighed the potential prejudicial impact of its echoing the complainant's portrayal of defendant as a sleazy predator who obtained intimacies from ambitious young women by purporting to offer them career assistance and connections.

Accordingly, the judgment of the Supreme Court, New York county (Bonnie Wittner, J.), rendered April 22, 2009, as amended April 30, 2009, convicting defendant, after a jury trial, of rape in the second degree and facilitating a sex offense with a

controlled substance, and sentencing him to concurrent terms of five years, should be affirmed.

All concur.

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

ENTERED:

  
CLERK