SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 28, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Sweeny, Moskowitz, Kapnick, JJ.

14443 The People of the State of New York, Ind. 4855/07
Respondent,

-against-

Jairo Brito,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Anastasia Heeger of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Justin J. Braun of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Stephen W. Paynter, J.), rendered April 17, 2009, convicting defendant, after a jury trial, of burglary in the second degree, and sentencing him to a term of eight years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. Although in performing weight of evidence review, we may consider the jury's verdict on other counts (*see People v Rayam*, 94 NY2d

557, 563 n [2000]), we conclude that defendant's acquittals of other charges does not undermine the conviction. "Where a jury verdict is not repugnant, it is imprudent to speculate concerning the factual determinations that underlay the verdict . . .," (*People v Horne*, 97 NY2d 404, 413 [2002]; *see also People v Hemmings*, 2 NY3d 1, 5 n [2004]).

The court's handling of a note from the deliberating jury asking, without elaboration, to speak "privately" with the judge does not warrant reversal. Defendant did not preserve his claim that the court violated the procedures set forth in *People v O'Rama* (78 NY2d 270 [1991]), and there was no mode of proceedings error. We decline to review defendant's claim in the interest of justice. As an alternative holding, we reject it on the merits.

When the court received the jury's note on the third day of jury deliberations, it had no way of knowing the subject of the jury's concern, or why it had chosen not to reveal this in the note itself. At that point, the jury's concern could have been a ministerial matter such as scheduling, and was not necessarily a request for information covered by CPL 310.30. The court disclosed the note to counsel for both sides, who agreed that the judge could go into the jury room and ask the jurors what they meant by asking to speak to the judge "privately." Thus, while

not to be encouraged, the court's private conference with the jurors to find out what they wanted was itself essentially ministerial (*see People v Ochoa*, 14 NY3d 180, 187-188 [2010]; *People v Williams*, 38 AD3d 429, 431 [1st Dept 2007], *lv denied* 9 NY3d 965 [2007]). The court's statements on the record make it clear that as soon as the court learned that the jury was making a substantive inquiry, it made no response, and it conducted all subsequent proceedings in open court. Accordingly, the court did not violate defendant's right to be present when it undertook the ministerial task of seeking clarification of the jury's note. When the judge returned to the courtroom after speaking to the jury, he stated on the record in the presence of the defendant, his attorney and the prosecutor that "I went in with one of the officers and all they wanted to ask me . . . was whether they could hear the charges again on the burglary counts. So I intend to bring the jury out and read to them once again the burglary charges." The jury was then returned to the courtroom, and after confirming with the jury that it had "requested to hear what the burglary charges involved, the elements of the burglary charges again," the court reread its charge. At that point, defense counsel had notice of the jury's request and "knowledge of the substance of the court's intended response -- a verbatim

rereading of the [burglary] charge previously given" (*People v Starling*, 85 NY2d 509, 516 [1995]). Thus, counsel's silence and failure to object to this procedure "at a time when any error by the court could have been obviated by timely objection renders the claim unpreserved and unreviewable" (*id.*; *see also People v Williams*, 21 NY3d 932, 935 [2013]; *People v Alcide*, 21 NY3d 687, 694 [2013]; *People v Ramirez*, 15 NY3d 824, 826 [2010]).

We further find that the court provided defendant with "meaningful notice" both of the contents of the note requesting to speak to the judge privately and of the jury's oral request for reinstruction (*see People v Nealon*, 26 NY3d 152, 156 [2015]; *People v Kisoon*, 8 NY3d 129, 134 [2007]). The court told counsel what the jury had requested, and then reconfirmed this, in open court, in the jury's presence. While the better practice would have been for the court to direct the jury to put its request for reinstruction in a written note, under these circumstances, we

find that the court fulfilled its "core responsibility" under *Kisoon* (*id.* at 134) and *O'Rama*. Therefore, this was not a mode of proceedings error, and the preservation rule applies (*see e.g. People v Nealon*, 26 NY3d at 158).

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

ENTERED: JANUARY 28, 2016

CLERK

Tom, J.P., Sweeny, Andrias, Gische, JJ.

16279 Ellen Swain, as Executrix of the Estate of Arthur Brown, Plaintiff-Respondent, Index 158122/12

-against-

Delaine M. Brown, Defendant-Appellant.

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Kreisberg & Maitland LLP, New York (Gabriel Mendelberg of counsel), for appellant.

Newman & Newman, P.C., New Hartford (Anthony T. Panebianco of counsel), for respondent.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered August 1, 2014, which, to the extent appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing plaintiff's causes of action for replevin, conversion, and unjust enrichment, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendant, Delaine Brown, is the ex-wife of Arthur Brown, now deceased. By judgment entered June 7, 1988, which set out the details of the distribution of their property, Arthur and Delaine were each to retain his or her personal property, with articles designated as joint property to be sold, or, in the

alternative, at Delaine's option, retained by the party exercising dominion and control as a distribution in kind. By order entered March 23, 1989, this Court modified the judgment to the extent of "awarding [Arthur] ownership of those items of personalty [Delaine] admitted in the record were acquired from [his] father's apartment" (*Brown v Brown*, 148 AD2d 377, 378 [1st Dept 1989]).

Thereafter, Arthur moved for an order seeking distribution and transfer of certain personal property. Supreme Court denied the motion. On March 18, 1993, this Court reversed to the extent of awarding Arthur seven Max Weber artworks and 32 Indian miniatures stored in a warehouse (the Artwork), and directing that the remaining items in the warehouse be distributed in kind, by Delaine and Arthur each choosing works in series, upon payment by Arthur of his share of the monies owed for storage (see *Brown v Brown*, 191 AD2d 301, 301 [1st Dept 1993] *lv dismissed* 82 NY2d 748 [1993]).

On December 2, 1993, Arthur's attorney demanded that the Artwork be turned over. The complaint alleges that Delaine initially refused but that she later entered into an agreement with Arthur to do so, evidenced by letters from Delaine's attorney to Arthur's attorney dated December 7, 1993 and January

27, 1995.

The December 7, 1993 letter advised Arthur's counsel that "[t]he Webers and Indian miniatures previously were set aside for [Arthur] and on presentation of the letter sent to you, he is at liberty to take possession without prejudice to any rights or claims that he may have." Although no conditions were imposed, there is no indication that Arthur ever attempted to pick up the Artwork. The January 27, 1995 letter enclosed an inventory of the warehouse divided into two categories, property to be delivered to Delaine and property to be delivered to Arthur, the latter of which included the Artwork. However, unlike the December 7, 1993 letter, it did not offer to return the Artwork to Arthur unconditionally. Rather, the letter stated as follows:

> "It is proposed that you and I meet (without our clients) . . . and[,] . . . in turn, alternatively designate the item[s] of joint property desired by our client. . .
>
> "Prior to our meeting, Arthur Brown will execute a general release to Delaine Brown, and Delaine Brown will execute a general release to Arthur Brown which shall be delivered by each client to their respective attorney. At the time of certification of the inventory lists by you and me, each of us will deliver our client's general release to the other.
>
> "Thereafter, Delaine Brown will effectuate segregation of the respective party's property at the New Yorker Warehouse for each party to remove within a reasonable time to be agreed on in writing in advance of our

meeting. . .

"Will you please advise."

The record does not contain any response to the proposal from Arthur's attorney. Nor is there any indication that Arthur made any attempt over the next 16 years to take possession of the Artwork or that he contributed to payment of the warehouse fees.

After Arthur died in 2011, plaintiff, his executrix, sent a letter to Delaine, dated June 29, 2012, demanding the immediate return of the Artwork. When Delaine did not respond, plaintiff commenced this action on November 19, 2012 for breach of agreement, civil contempt, replevin, conversion, fraud, and unjust enrichment. Delaine moved to dismiss the complaint based on CPLR 3211(a)(1), (5) and (7). Supreme Court granted Delaine's motion to the extent of dismissing the causes of action for breach of contract, civil contempt, and fraud. The remaining causes of actions were sustained.

Under CPLR 214(3), the statutory period of limitations for conversion and replevin claims is three years from the date of accrual. The date of accrual depends on whether the current possessor is a good faith purchaser or bad faith possessor. An action against a good faith purchaser accrues once the true owner makes a demand and is refused (*See Solomon R. Guggenheim Found. v*

Lubell, 77 NY2d 311, 317-318 [1991], *affg* 153 AD2d 143 [1st Dept 1990]). This is "because a good-faith purchaser of stolen property commits no wrong, as a matter of substantive law, until he has first been advised of the plaintiff's claim to possession and given an opportunity to return the chattel" (*id.*, 153 AD2d at 147). By contrast, an action against a bad faith possessor begins to run immediately from the time of wrongful possession, and does not require a demand and refusal (*see State of New York v Seventh Regiment Fund*, 98 NY2d 249 [2002]; *Davidson v Fasanella*, 269 AD2d 351 [1st Dept 2000]). Thus, "[w]here replevin is sought against the party who converted the property, the action accrues on the date of conversion" (*Matter of Peters v Sotheby's, Inc.*, 34 AD3d 29, 36 [1st Dept 2006], *lv denied* 8 NY3d 809 [2007]).

Here, plaintiff alleges that Delaine is a wrongful possessor of the Artwork by virtue of her retention thereof in defiance of this Court's 1993 order. Accordingly, since Delaine was holding the Artwork in bad faith, the demand and return rule does not apply and the three-year limitations period commenced as of the date of the wrongful taking, which occurred when Delaine retained the Artwork after the issuance of our March 18, 1993 order. Thus, plaintiff's conversion and replevin claims, filed in 2012,

are untimely (*see Close-Barzin v Christie's, Inc.*, 51 AD3d 444, 444 [1st Dept 2008] ["Plaintiff's conversion claim is time-barred, since she alleges bad faith and the action was commenced more than three years after the alleged taking of the property occurred"]; *Samuels v Greenberg*, 2015 WL 5657565, *1-10, 2015 US Dist LEXIS 128221, *21-27 [ED NY, September 23 2015, No, 14-CV-04401 (DLI)(VMS)][the plaintiffs' claims for conversion and replevin accrued, at the latest, on the date a default judgment was entered against defendants in a Rabbinical arbitration]).

Even if the demand and refusal rule applied, the action would still be untimely. A refusal of a demand "need not use the specific word 'refuse' so long as it clearly conveys an intent to interfere with the demander's possession or use of his property" (*Feld v Feld*, 279 AD2d 393, 395 [1st Dept 2001], *lv denied* 96 NY2d 717 [2001]). Here, although the December 7, 1993 letter unconditionally permitted Arthur to take possession of the Artwork, he did not avail himself of that offer. Thereafter, in the January 27, 1995 letter, Delaine conditioned the turnover of Artwork on payment of storage fees and a release of claims, which constituted a refusal (*id.* ["[t]he father's 1974 letter just as clearly constituted a refusal as it conditioned return of the disputed property on resolution of other disputes, which was

inconsistent with [the] plaintiff's claim of ownership"]; *Grosz v Museum of Modern Art*, 771 F Supp 2d 473, 494 [SD NY 2010] ["An aggrieved owner of property cannot delay the accrual of his cause of action for conversion indefinitely by eliciting multiple rejections from the person who is interfering with his right to possession. And once his claim accrues, the clock does not reset to zero every time the parties reopen the subject of who owns the disputed property"]). Thus, even if the demand and refusal rule applies, the statute of limitations accrued no later than 1995 and the conversion and replevin claims, commenced in 2012, remain untimely.

Unjust enrichment occurs when a defendant enjoys a benefit bestowed by the plaintiff without adequately compensating the plaintiff (*see Sergeants Benevolent Assn. Annuity Fund v Renck*, 19 AD3d 107, 111 [1st Dept 2005]). The statute of limitations for unjust enrichment generally accrues upon "the occurrence of the alleged wrongful act giving rise to restitution" (*Kaufman v*

Cohen, 307 AD2d 113, 127 [1st Dept 2003]). Here, any alleged "enrichment" took place when Delaine retained possession of the Artworks following our 1993 decision. Accordingly, plaintiff's unjust enrichment claim is also time-barred.

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

ENTERED: JANUARY 28, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Gische, JJ.

16741-
16742 Index 653196/14

A.N.R. Investment Company Ltd., et al.,
Plaintiffs-Respondents-Appellants,

-against-

HSBC Private Bank, etc.,
Defendant-Appellant-Respondent.

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Cleary Gottlieb Steen & Hamilton LLP, New York (Thomas J. Moloney of counsel), for appellant-respondent.

Brickman Leonard & Bamberger, P.C., New York (David E. Bamberger of counsel), for respondents-appellants.

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Orders, Supreme Court, New York County (Jeffrey K. Oing, J.), entered on or about July 1, 2015 and July 13, 2015, which, to the extent appealed from, denied so much of defendant's (HSBC) motion as sought to dismiss the causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing, and granted so much of the motion as sought to dismiss the causes of action for breach of fiduciary duty, negligent misrepresentation, fraud, constructive fraud, and violation of General Business Law § 349(a), unanimously modified, on the law, to grant the motion as to the causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing, and otherwise affirmed, without costs.

The Clerk is directed to enter judgment dismissing the complaint.

In 2003, plaintiffs opened private banking accounts with defendant HSBC. Plaintiffs used their HSBC accounts to invest hundreds of thousands of dollars in shares of Fairfield Sentry Limited (Sentry), an off-shore Madoff "feeder fund" -- a hedge fund that invested nearly all of its assets with Bernard L. Madoff Investment Securities LLC. Plaintiffs became beneficial owners of the Sentry shares and thus came to have exclusive rights to any investment returns, interests, benefits and liabilities associated with owning Sentry shares. HSBC, for its part, became the nominee shareholder of plaintiffs' Sentry shares.

Shortly after Madoff's arrest in December 2008, Sentry was placed into liquidation because all of its assets were held with Madoff and had been rendered worthless. Thereafter, in September 2010, the Sentry liquidators filed a series of lawsuits to recover redemption payments made by Sentry to all of its investors, including those made to plaintiffs, in the years before Sentry's insolvency. When Sentry initiated litigation against HSBC as the nominee shareholder of the Sentry shares for the beneficial owners of accounts held at HSBC, HSBC froze the at-risk funds and denied plaintiffs' request to withdraw their

accounts.

Plaintiffs then commenced this action alleging breach of contract and breach of fiduciary duty, among other claims. Plaintiffs essentially allege that HSBC did not have the right to freeze plaintiffs' assets, and they seek a court order directing HSBC to release all assets forthwith. Supreme Court granted HSBC's motion to dismiss all claims, except the breach of contract and breach of the covenant of good faith and fair dealing claims. We now find that those remaining claims should have been dismissed as well.

The cause of action for breach of contract must be dismissed because the terms and conditions that plaintiffs signed when they opened their accounts at HSBC explicitly authorized the conduct of which plaintiffs complain in this action. For instance, section 10 gives HSBC "sole discretion" that, if any instruction might expose it to liability, it may require satisfactory security against loss (here, the instruction to transfer the accounts). Sections 12 and 13 provide additional authorization for HSBC to freeze plaintiffs' accounts by giving HSBC a "continuing lien upon and security interest in all Collateral," including the account, as security for plaintiffs' obligations to the bank, whether these obligations are "matured or not matured."

The terms and conditions specifically recognized that property may become subject to legal process, and that HSBC was "irrevocably authorized" to "block or withhold" any or all collateral "without notice." Section 12 additionally provides that the rights of HSBC under the terms and conditions are cumulative.

Read together, these provisions gave HSBC the authority to freeze the accounts so as to protect itself from certain legal actions commenced in relation to the securities that it had held on plaintiffs' behalf. The bank was not required to give plaintiffs notice of these actions. Nor was it required to treat all its customers facing similar potential liability the same way. In opposition to HSBC's motion to dismiss, plaintiffs admitted that they were John Doe defendants in the legal actions that had been commenced. However, even if they were not defendants in those actions, plaintiffs clearly are within the class of beneficial owners of the securities from which the liquidator in those actions was expressly seeking to recover, and the terms and conditions authorized HSBC's actions even if plaintiffs' obligation to indemnify HSBC had not yet matured.

The cause of action for breach of the implied covenant of good faith and fair dealing must also be dismissed because "[t]he

covenant of good faith and fair dealing cannot be construed so broadly as to effectively nullify other express terms of the contract, or to create independent contractual rights" (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Xerox Corp.*, 25 AD3d 309, 310 [1st Dept 2006], *lv dismissed* 7 NY3d 886 [2006]).

Finally, the causes of action for breach of fiduciary duty, negligent misrepresentation, fraud, constructive fraud, and violation of General Business Law § 349 were properly dismissed as patently insufficient. As fully detailed above, HSBC's actions were fully authorized by the terms and conditions signed by plaintiffs, and HSBC was not required to give plaintiffs notice that it might enforce its rights thereunder.

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

ENTERED: JANUARY 28, 2016

CLERK

Mazzarelli, J.P., Acosta, Andrias, Richter, JJ.

27 The People of the State of New York, Ind. 240/09
Respondent,

-against-

Michael Jordan,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Alexandra Keeling of counsel), and Orrick, Herrington & Sutcliffe LLP, New York (Alec E. Orenstein of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Clara H. Salzberg of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Michael A. Gross, J.), rendered December 1, 2011, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him to a term of 10 years, unanimously affirmed.

The court properly denied defendant's motion to suppress physical evidence and identification testimony. The police had a founded suspicion of criminal activity, warranting a common-law inquiry (*see e.g. People v Trevino*, 126 AD3d 616 [1st Dept 2015], *lv denied* 26 NY3d 1012 [2015]). When officers responding to a radio run involving a robbery of a woman came within half a block of the reported location, they saw defendant and a codefendant run into the street toward the officers' unmarked car while

waving their arms. When the men made eye contact with the officers, they immediately changed direction. This unusual behavior suggested, at least for purposes of founded suspicion, that the two men were fleeing and frantically attempting to hail what they thought was a livery cab but suddenly recognized to be a police car. When the officers asked the men to stop and show identification, the encounter did not exceed the bounds of a common-law inquiry (*see People v Reyes*, 83 NY2d 945 [1994], *cert denied* 513 US 991 [1994]; *People v Bora*, 83 NY2d 531, 535-536 [1994]), and when defendant produced an identification card belonging to a woman, this created reasonable suspicion warranting defendant's detention pending further investigation. The subsequent showup identification was justified by its close temporal and spatial proximity to the crime (*see People v Brisco*, 99 NY2d 596 [2003]), and the circumstances of the showup, viewed as a whole, were not significantly more suggestive than those inherent in any showup (*see e.g. People v Gatling*, 38 AD3d 239 [1st Dept 2007], *lv denied* 9 NY3d 865 [2007]).

The court properly exercised its discretion in precluding defendant from impeaching the victim with an alleged prior inconsistent statement (*see generally People v Duncan*, 46 NY2d 74, 80 [1978], *cert denied* 442 US 910 [1979]), because "the

purported inconsistency rests on a slender semantic basis and lacks probative value" (*People v Jackson*, 29 AD3d 400, 401 [1st Dept 2006], *lv denied* 7 NY3d 790 [2006]). Defendant's constitutional argument in this regard is unavailing (*see Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]).

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 28, 2016

CLERK

Mazzarelli, J.P., Acosta, Andrias, Richter, JJ.

28 Rosa A. Guerrero, Index 21898/14E
Plaintiff-Respondent,

-against-

Marleni F. Milla, et al.,
Defendants-Appellants.

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Russo, Apoznanski & Tambasco, Melville (Susan J. Mitola of counsel), for appellants.

Law Offices of Daniel Chavez, Bronx (Elizabeth Mark Meyerson of counsel), for respondent.

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Order, Supreme Court, Bronx County (Alexander W. Hunter, J.), entered December 22, 2014, which granted plaintiff's pre-discovery motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiff avers in support of her motion that she was driving her vehicle straight in the northbound right lane of White Plains Road, while the vehicle owned by defendant Milla and driven by defendant Nieves, with Milla as a passenger, was in the lane to her left, also traveling northbound. The accident occurred when defendants' vehicle, "without warning," attempted to merge into the right lane, striking plaintiff's vehicle. Thus, plaintiff established prima facie entitlement to partial summary judgment against defendants (*see Cascante v Kakay*, 88

AD3d 588 [1st Dept 2011]; *Flores v City of New York*, 66 AD3d 599 [1st Dept 2009]; *Zummo v Holmes*, 57 AD3d 366 [1st Dept 2008]).

In opposition, defendants failed to offer any non-negligent explanation for the accident, or to raise any triable issue as to any comparative negligence on the part of plaintiff. In their affidavits in opposition to the motion, defendants Nieves and Milla both agreed that the accident occurred when Nieves began to merge into the right lane. They both also averred that neither of them saw plaintiff's vehicle prior to the collision. Thus, both defendants, in effect, admit that defendant Nieves was negligent in violating Vehicle and Traffic Law § 1128(a) by changing lanes when it was not safe to do so, and by failing to see that which was there to be seen. Defendant Milla's assertion that she saw a "fast moving shadow" out of the corner of her eye, just before the accident, which she "believe[d]" was plaintiff's vehicle is insufficient to raise an issue of fact regarding plaintiff speeding, as it amounts to no more than speculation (*see Alston v American Tr., Inc.*, 82 AD3d 546 [1st Dept 2011]; *Murchison v Incognoli*, 5 AD3d 271 [1st Dept 2004]).

Finally, "[d]efendan[ts'] argument that summary judgment is premature because the record is devoid of deposition testimony or 'other documentation ... that might further illuminate the issues

raised by the parties' affidavits' is unavailing. The mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion" (*Flores*, 66 AD3d at 600).

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

ENTERED: JANUARY 28, 2016

CLERK

Mazzarelli, J.P., Acosta, Andrias, Richter, JJ.

32 Sheldon Gross, Index 22304/12
Plaintiff-Appellant,

-against-

Kenneth Gross, et al.,
Defendants-Respondents.

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Law Office of Steven I. Lubowitz, Scarsdale (Susan I. Lubowitz of counsel), for appellant.

Law Office of James J. Toomey, New York (Michael J. Kozoriz of counsel), for respondents.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about May 6, 2014, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff, while visiting defendants, his brother and sister-in-law, mistakenly opened a door to the basement, rather than the door to the bathroom, and fell down a flight of steps leading to the basement. It is undisputed that plaintiff had been to defendants' home at least 10 times during the 45 years that they had owned it, and had previously used the bathroom there.

As landowners, defendants had both a broad duty to maintain their home in reasonably safe condition and a duty to warn

visitors of latent hazards of which they were aware (*see Tagle v Jakob*, 97 NY2d 165 [2001]). Defendants established that they maintained the house in reasonably safe condition by proffering an affidavit by an engineer who opined that the configuration of the basement steps and the doors in the hallway did not violate any applicable building standards or codes, and were safe (*see Witt v Hill St. Commercial, LLC*, 59 AD3d 217 [1st Dept 2009]). In opposition, plaintiff failed to raise an issue of fact as to the safety of the home, since his expert engineer did not identify any condition that violated any applicable standards or codes or that was a proximate cause of plaintiff's accident, which did not involve a trip.

Were we to assume that the proximity of similar-looking basement and bathroom doors could constitute a "trap" for an unwary visitor unfamiliar with the house (*see McKnight v Coppola*, 113 AD3d 1087 [4th Dept 2014]; *Pollack v Klein*, 39 AD3d 730 [2d Dept 2007]), defendants had no duty to provide plaintiff, who was

familiar with his brother's home, with any further warning or directions to the bathroom on the day of the accident (*see Koval v Markley*, 93 AD3d 1171 [4th Dept 2012]; *see generally Tagle*, 97 NY2d 165; *Liriano v Hobart Corp.*, 92 NY2d 232, 242 [1998]).

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

ENTERED: JANUARY 28, 2016

CLERK

Mazzarelli, J.P., Acosta, Andrias, Richter, JJ.

33 The People of the State of New York, Ind. 6512/10
Respondent,

-against-

Alberto Gonzalez,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Michael J. Obus, J. at suppression hearing; Arlene Goldberg, J. at plea and sentencing), rendered January 31, 2013, convicting defendant of two counts of criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to concurrent terms of seven years, unanimously affirmed.

The court properly denied defendant's suppression motion. At the time they approached defendant, the police had a founded suspicion of criminality warranting a common-law inquiry. Specifically, an officer assigned to a subway station saw defendant engage in behavior at MetroCard vending machines that the officer recognized, "based upon [his] training and experience, as indicative of criminal activity" (*People v Wilson*,

52 AD3d 239, 240 [1st Dept 2008][citation omitted], *lv denied* 11 NY3d 743 [2008]; *see also People v Slates*, 57 AD3d 266 [1st Dept 2008], *lv denied* 12 NY3d 787 [2009]). Defendant's moving from one MetroCard vending machine to another, holding a stack of 10 to 15 MetroCards in his hand, without making any purchases, was behavior that, in the officer's experience, was indicative of possible criminal activity, i.e., illegally selling MetroCard swipes and attempting (even if unsuccessfully) to jam the machines in aid of that scheme. Even an untrained observer might find such behavior indicative of possible criminality.

Furthermore, the officer was not obligated to accept at face value defendant's explanation about checking the balances of the MetroCards, and immediately terminate the lawful common-law inquiry. The officer's request for, and brief inspection of, defendant's identification was reasonable, as was asking defendant whether he possessed any contraband (*see People v Rodriguez*, 81 AD3d 404 [1st Dept 2011], *lv denied* 16 NY3d 862 [2011]), particularly in light of defendant's strange behavior during the conversation. In response to this lawful questioning,

defendant spontaneously removed his coat, causing a loaded pistol magazine to fall to the ground, which provided probable cause for his arrest.

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

ENTERED: JANUARY 28, 2016

CLERK

Mazzarelli, J.P., Acosta, Andrias, Richter, JJ.

34 Nur Nabi, et al., Index 307138/10
Plaintiffs-Appellants,

-against-

Con Edison Company of New York,
Defendant-Respondent.

_____

Jekielek & Janis, LLP, New York (Jon D. Jekielek of counsel), for appellants.

David M. Santoro, New York (Stephen T. Brewi of counsel), for respondent.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about July 8, 2014, which, granted plaintiffs' motion to renew and, upon renewal, adhered to its prior order granting defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly granted in this action where plaintiff Nur Nabi was injured when he slipped on interior stairs in his home while attempting to shut off electrical power in response to a fire emanating from an inline service box attached to the exterior of the dwelling, which plaintiffs allege was owned and maintained by defendant. The record establishes that the fire in the inline box was not a proximate cause of

plaintiff's injury (*see Bonomonte v City of New York*, 79 AD3d 515 [1st Dept 2010, *affd* 17 NY3d 866 [2011]; *Escalet v New York City Hous. Auth.*, 56 AD3d 257 [1st Dept 2008]).

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

ENTERED: JANUARY 28, 2016

CLERK

Mazzarelli, J.P., Acosta, Andrias, Richter, JJ.

35 In re Joseph Paul Winery, Inc., Index 101755/13
Petitioner-Respondent,

-against-

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

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Jacqueline P. Flug, Albany (Mark D. Frering of counsel), for appellants.

Sullivan P.C., New York (Peter R. Sullivan of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Doris Ling-Cohan, J.), entered on or about November 26, 2014, which, to the extent appealed from as limited by the briefs, granted a petition brought pursuant to CPLR article 78 seeking to annul a determination of respondent New York State Liquor Authority (SLA), dated December 19, 2013, which had sustained charges 1 through 6 and imposed the penalty of revocation of license and bond forfeiture, unanimously vacated, on the law, without costs, the proceeding treated as if it had been transferred to this Court for de novo review pursuant to CPLR 7804(g), and, upon such review, the petition is granted to the extent of annulling SLA's determination, dismissing charges 2, 5, and 6, sustaining charges 1, 3, and 4, and remanding the

matter to SLA for redetermination of the penalty imposed in a manner consistent with this decision.

Supreme Court should have transferred the proceeding to this Court, since the petition raised a substantial evidence issue, and since petitioner's due process objections did not terminate the entire proceeding (*see* CPLR 7804[g]). Accordingly, we will decide all issues as if the proceeding had been properly transferred (*see id.*; *Matter of Roberts v Rhea*, 114 AD3d 504, 504 [1st Dept 2014]).

By statute, petitioner, as a licensed "farm winery," is entitled to conduct wine tastings and any other business, subject to any rules and regulations promulgated by SLA (*see* Alcoholic Beverage Control [ABC] Law § 76-a[3]; [4][d], [e]). SLA has failed to promulgate any rules and regulations defining "wine tasting" or otherwise restricting this broad statutory authorization. Accordingly, charges 5 and 6, which assert, among other things, that petitioner exceeded the scope of its license by operating as a "night club" and holding "dance part[ies]," must be dismissed as legally insufficient.

Charge 2 asserts that petitioner violated ABC Law § 110(4) by failing to notify SLA of a change in facts concerning "other businesses and other activities conducted on the Licensed

Premises." This charge does not identify the "other businesses and other activities" that petitioner should have reported, and is so vague as to be unenforceable.

Substantial evidence adduced before the Administrative Law judge (ALJ) supports the ALJ's opinion that petitioner violated ABC Law § 110(4) by failing to notify SLA of a change in its operating hours, as asserted in charge 1 (*see generally Matter of Purdy v Kreisberg*, 47 NY2d 354, 358 [1979]). Substantial evidence also supports the ALJ's opinion that petitioner permitted noise, disturbance, misconduct, or disorder on and about its premises, which resulted in the premises becoming a focal point for police attention, in violation of 9 NYCRR 53.1(q), as asserted in charge 3, and which adversely affected the health, welfare, or safety of neighborhood residents, in violation of ABC Law §§ 118(1) and (3), as asserted in charge 4 (*see id.*).

After the administrative hearing before the ALJ, SLA violated petitioner's rights to due process by receiving, at an SLA board meeting, unsworn testimony about petitioner's conduct, without affording petitioner an opportunity to cross-examine those witnesses, and by relying on that testimony in making its determination (*see* State Administrative Procedure Act § 306[3];

Matter of Alvarado v State of N.Y., Dept. of State, Div. of State Athletic Commn., 110 AD2d 583, 584-585 [1st Dept 1985]). Accordingly, we vacate SLA's determination, including the penalty it imposed, and remand the matter to SLA for redetermination of the penalty in light of our decision.

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

ENTERED: JANUARY 28, 2016

CLERK

Mazzarelli, J.P., Acosta, Andrias, Richter, JJ.

36 Marc Winthrop, Index 651142/14
Plaintiff-Respondent,

-against-

Rosenthal & Rosenthal, Inc.,
Defendant-Appellant.

_____

Platzer, Swergold, Levine, Goldberg, Katz & Jaslow, LLP, New York (Stan L. Goldberg of counsel), for appellant.

Troutman Sanders LLP, New York (Joshua A. Berman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered April 30, 2015, which, to the extent appealed from, denied defendant's motion to dismiss plaintiff's cause of action for unjust enrichment, unanimously affirmed, with costs.

This is an action to recover a success or finder's fee allegedly due plaintiff from the proceeds of the sale of certain assets belonging to nonparty Interasian Resources Group, LLC (Interasian), which plaintiff contends was misappropriated by defendant. It is uncontested that the finder's fee allegedly owed plaintiff was a matter of contract between him and Interasian, and that plaintiff and defendant Rosenthal were not parties to a written agreement.

Plaintiff's unjust enrichment claim is not, as defendant

contends, barred by the statute of frauds (General Obligations Law § 5-701[a][10]). An unjust enrichment claim is founded on a "quasi-contract theory of recovery . . . imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned" (*Georgia Malone & Co., Inc. v Reider*, 86 AD3d 406, 408 [1st Dept 2011], *affd* 19 NY3d 511 [2012])). The Court of Appeals in *Georgia Malone* upheld an unjust enrichment claim, in the absence of a writing between the relevant parties, under nearly identical facts (*id.*). The statute of frauds is inapplicable and irrelevant to analyzing an unjust enrichment claim.

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

ENTERED: JANUARY 28, 2016

CLERK

Mazzarelli, J.P., Acosta, Andrias, Richter, JJ.

37 The People of the State of New York, Ind. 1452/12
Respondent,

-against-

Luis Irizarry,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered November 27, 2013, convicting defendant, after a jury trial, of sexual abuse in the first degree and aggravated harassment in the second degree, and sentencing him to an aggregate term of seven years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). We find no basis to disturb the jury's credibility findings. The victim's upset demeanor and prompt report to his father after defendant's attack supported the veracity of his trial testimony.

Defendant did not preserve his argument that by reading to the jury the complete definition of sexual contact (Penal Law § 130.00[3]), the court constructively amended the indictment, and

we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal. Viewing the court's charge, which stated the specific allegations of the indictment, as a whole and in light of the trial evidence and arguments, we find that the jury could not have been misled into convicting defendant on an improper theory. We have considered and rejected defendant's claim that counsel rendered ineffective assistance by failing to raise this issue in a timely fashion.

Defendant has failed to preserve his challenge to his aggravated harassment conviction under former Penal Law § 240.30(1)(a), and we adhere to our prior determinations that preservation is required in defendant's situation (*see People v Scott*, 126 AD3d 645, 646 [1st Dept 2015], *lv denied* 25 NY3d 1171 [2015]; *see also People v Murphy*, 132 AD3d 550 [2015]). The interest of justice would not be served by relieving defendant of this conviction, particularly since his egregious conduct went

far beyond a mere communication with intent to annoy, which was the primary concern of the Court of Appeals when it invalidated the statute in *People v Golb* (23 NY3d 455, 467-468 [2014]).

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 28, 2016

CLERK

Mazzarelli, J.P., Acosta, Andrias, Richter, JJ.

38 Keith Doyle, Index 602832/09
Plaintiff-Appellant,

-against-

Icon, LLC doing business as
"R Bar," et al.,
Defendants-Respondents.

_____

Cooper & McCann, LLP, New Rochelle (Gary G. Cooper of counsel), for appellant.

Bracewell & Giuliani LLP, New York (Kelly Koscuiszka of counsel), for respondents.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered on or about December 19, 2014, which, to the extent appealed from, denied plaintiff's motion for summary judgment as to liability on his claims for conversion and unjust enrichment, unanimously affirmed, without costs.

Triable issues of fact as to the nature of plaintiff's interest in defendant Icon, LLC, if any, at the relevant time preclude summary judgment in his favor on his causes of action for conversion and unjust enrichment (*see Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]; *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

Contrary to plaintiff's contention, the Limited Liability

Company Law, to which Icon is subject in the absence of a written operating agreement (*see Matter of Eight of Swords, LLC*, 96 AD3d 839 [2d Dept 2012]), does not preclude the members of an informally operated limited liability company from unanimously agreeing upon a course of conduct when faced with extensive losses. Unlike in *Mizrahi v Cohen* (104 AD3d 917, 920 [2d Dept 2013], *lv dismissed* 21 NY3d 968 [2013]), upon which plaintiff relies, the record does not establish that the parties intended to treat defendant Sean Cunningham's infusion of capital as a loan. To the contrary, the individual defendants testified that, at a capital call meeting held in April 2006, plaintiff voluntarily withdrew from or abandoned his interest in Icon.

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

ENTERED: JANUARY 28, 2016

CLERK

Mazzarelli, J.P., Acosta, Andrias, Richter, JJ.

39 In re Rachel Hernandez, Index 101016/14
Petitioner,

-against-

New York City Housing Authority,
Respondent.

_____

Robert T. Drapkin, Brooklyn, for petitioner.

David I. Farber, New York (Andrew M. Lupin of counsel), for respondent.

_____

Determination of respondent, dated June 16, 2004, which, after a hearing, terminated petitioner's tenancy on the ground that she violated a permanent exclusion stipulation, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Shlomo Hagler, J.], entered January 13, 2015), dismissed, without costs.

There was no requirement to transfer this proceeding pursuant to CPLR 7804(g) since petitioner concedes that she violated the permanent exclusion stipulation. Petitioner argues that the penalty of termination of tenancy is contrary to law.

The permanent exclusion stipulation, which petitioner entered into in August 2009, provided that, in exchange for the

preservation of her tenancy after the excluded person allegedly engaged in criminal activity in the apartment, petitioner would not permit that person to reside in or visit her at the apartment in which she was then residing or at any other Housing Authority premises in which she might later reside. On March 27, 2013, the excluded person was found inside petitioner's apartment.

Petitioner contends that respondent, while charging her with this "single incident of violation," terminated her tenancy based on an unproven continuing course of conduct of which it had not provided her with prior notice. This contention is belied by the record, which demonstrates that the termination was based solely on the March 27, 2013 incident. Thus, the issue is whether termination of tenancy is a penalty so disproportionate to the offense of a single violation of the stipulation as to shock one's sense of fairness (*see Matter of Wooten v Finkle*, 285 AD2d 407 [1st Dept 2001]; *see also Matter of Romano v New York City Hous. Auth.*, 121 AD3d 503 [1st Dept 2014]). Under the circumstances, the penalty does not shock our sense of fairness.

Petitioner's remaining contentions, that respondent improperly raised before the hearing officer the issue whether

the excluded person was a danger to others, and that, on appeal, respondent improperly relies upon a statement by the excluded person that was not included in the administrative record, are unavailing.

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

ENTERED: JANUARY 28, 2016

CLERK

Mazzarelli, J.P., Acosta, Andrias, Richter, JJ.

41 Wendy Cruz, Index 308585/11
Plaintiff-Appellant,

-against-

The City of New York,
Defendant,

The New York City Transit Authority,
Defendant-Respondent.

_____

Law Office of Michael S. Lamonoff, PLLC, New York (Stacey Haskel of counsel), for appellant.

Lawrence Heisler, Brooklyn (Anna J. Ervolina of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered May 21, 2014, which granted defendant Transit Authority's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Although defendant moved for summary judgment before producing a witness for deposition, the motion was not premature. Defendant established prima facie that plaintiff's slip and fall on ice was not due to any negligence on its part by submitting an affidavit by the Director of the Short Range Bus Service Planning Department of the Manhattan and Bronx Surface Transit Operating Authority (MABSTOA), a subsidiary of defendant, stating that

defendant operated a bus route with a stop at the subject location but did not "own, manage, maintain, operate, or control any bus stops" (*see Demant v Town of Oyster Bay*, 23 AD3d 333 [2d Dept 2005]). Plaintiff failed to make a showing that discovery might lead to relevant evidence supporting her claim that defendant owned or was responsible for removing snow and ice from the accident location (*see Bailey v New York City Tr. Auth.*, 270 AD2d 156 [1st Dept 2000]).

Plaintiff also contends that summary judgment should not have been granted because triable issues of fact exist whether defendant failed in its duty as a common carrier to provide a safe means of ingress at the bus stop (citing *Bingham v New York City Tr. Auth.*, 8 NY3d 176 [2007]). Defendant argues that plaintiff's claim of breach of a common carrier's duty to provide a safe means of ingress is not viable, because plaintiff did not plead this theory of liability in her notices of claim. Although, as plaintiff asserts, defendant did not make this argument before the motion court, this Court will reach it (*see Chateau D'If Corp. v City of New York*, 219 AD2d 205, 209 [1st Dept 1996], *lv denied* 88 NY2d 811 [1996]). Contrary to plaintiff's contention, the notices of claim do not allege that

defendant breached its duty as a common carrier to provide her with a safe means of ingress. That theory of liability is therefore precluded here (*see Mahase v Manhattan & Bronx Surface Tr. Operating Auth.*, 3 AD3d 410 [1st Dept 2004]).

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

ENTERED: JANUARY 28, 2016

CLERK

Mazzarelli, J.P., Acosta, Andrias, Richter, JJ.

43 Ian Stokoe, et al., Index 652236/14
Plaintiffs-Respondents,

-against-

Marcum & Kliegman LLP, et al.,
Defendants-Appellants.

_____

L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City (Anthony P. Colavita of counsel), for appellants.

Reid Collins & Tsai LLP, New York (Jeffrey E. Gross of counsel), for respondents.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, referee), entered March 24, 2015, which, insofar as appealed from, denied defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

In this accounting malpractice action alleging that defendants failed to uncover fraudulent activity by plaintiffs' insolvents' investment manager, the motion court correctly declined to apply the doctrine of in pari delicto to bar the action; contrary to defendants' understanding of the order on appeal, the doctrine is applicable to accounting malpractice claims (*see Kirschner v KPMG LLP*, 15 NY3d 446 [2010]).

The allegations by these plaintiffs in another action and in a Securities and Exchange Commission complaint, did not

constitute documentary evidence conclusively demonstrating that the investment manager, as agent of the funds in liquidation, engaged in wrongful conduct that was not completely adverse to the interests of the funds; *Concord Capital Mgt., LLC v Bank of America, N.A.* (102 AD3d 406 [1st Dept 2013], *lv denied* 21 NY3d 851 [2013]). The pleading addressed in the dismissal motion alleged that the malefactors acted in the interest of the wronged entity as well as in their own personal interest, and is distinguishable from defendants' attempt on the instant pre-answer dismissal motion to refute the allegations here with those in other pleadings. Moreover, the other pleading by the same plaintiffs is not clearly a conclusive admission. We note that New York requires complete adversity in order to fall within the exception to the imputation rule of the in pari delicto doctrine, and that New York law governs here based on the choice of law provision in the parties' engagement letters.

Nor was the complaint untimely, whether based on the three year limitations period of CPLR 214(6) or the similar contractual limitations period in the engagement letters. Plaintiffs carried their burden of demonstrating evidentiary facts showing that the continuous representation toll applied (*see CRC Litig. Trust v*

Marcum, LLP, 132 AD3d 938 [2nd Dept 2015]), based on the "mutual understanding" set forth in the engagement letters that defendants could be called upon in a government investigation to justify their audit findings.

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

ENTERED: JANUARY 28, 2016

CLERK

Mazzarelli, J.P., Acosta, Andrias, Richter, JJ.

44 The People of the State of New York, Ind. 4246/10
Respondent,

-against-

Michael Rice,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, Bronx County (Patricia M. DiMango, J. at plea and sentence; John Moore, J., at re-sentencing), rendered on or about December 3, 2013, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

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

service of a copy of this order.

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

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

ENTERED: JANUARY 28, 2016

CLERK

Mazzarelli, J.P., Acosta, Andrias, Richter, JJ.

45 Cadlerock Joint Venture II, L.P., Plaintiff-Appellant, Index 107314/09

-against-

Sarita Singh, Defendant-Respondent.

_____

Vlock & Associates, P.C., New York (Steven Giordano of counsel), for appellant.

Law Office of Ariel Berschadsky, New York (Ariel Berschadsky of counsel), for respondent.

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Order, Supreme Court, New York County (Lucy Billings, J.), entered April 25, 2014, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment on an assigned promissory note, unanimously affirmed, without costs.

Summary judgment was properly denied. Even assuming that defendant's signature on the note was genuine (*see* Uniform Commercial Code § 3-307[1]), plaintiff failed to meet its prima facie burden of showing that it owned the note. Plaintiff claims that nonparty Wells Fargo Bank South Dakota, N.A., the original holder of the note, assigned it to nonparty Cadleway Properties, Inc. and that Cadleway Properties assigned the note to it.

However, the first assignment says that Wells Fargo assigns to Cadleway Properties all of its right, title, and interest in each of the accounts identified in an account schedule which was supposed to be attached as exhibit A. However, the documents attached do not sufficiently establish the facts as alleged by plaintiff for the purpose of summary judgment.

In light of the above, we need not reach the parties' remaining arguments.

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

ENTERED: JANUARY 28, 2016

CLERK

Mazzarelli, J.P., Friedman, Acosta, Andrias, JJ.

46 The People of the State of New York, Ind. 6310/88
Respondent,

-against-

Francis Afrane,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Shannon Henderson of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alberto Lorenzo, J.), entered on or about December 17, 2014, which adjudicated defendant a level three sexually violent offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion when it declined to grant defendant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant

did not warrant a departure, given the seriousness of the underlying sex crimes that defendant repeatedly committed against his young stepdaughter.

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

ENTERED: JANUARY 28, 2016

CLERK

Mazzarelli, J.P., Acosta, Andrias, Richter, JJ.

47 Gale Sandy Stevens, Index 309474/12
Plaintiff-Appellant,

-against-

Kella M. Bolton,
Defendant-Respondent.
- - - - -
[And A Third-Party Action]

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Latos Latos & Associates, P.C., Astoria (Andrew Latos of counsel), for appellant.

Boeggeman, George & Corde, P.C., White Plains (Daniel E. O'Neill of counsel), for respondent.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered February 4, 2015, which granted defendant's motion for summary judgment dismissing the complaint on the threshold issue of serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to deny the motion as to the claim of a "significant limitation" of use of the right shoulder, and otherwise affirmed, without costs.

Defendant established prima facie that plaintiff did not sustain a "permanent consequential" or a "significant" limitation of use of the right shoulder through the report of her orthopedist, who found equal ranges of motion in the injured right shoulder and the uninjured left shoulder and no functional

impairment of the right shoulder (*see Camilo v Villa Livery Corp.*, 118 AD3d 586 [1st Dept 2014]). Defendant established prima facie that there was no injury to plaintiff's right elbow or spine by submitting an orthopedist's report of normal ranges of motion and negative clinical test results (*see Sylla v Brickyard Inc.*, 104 AD3d 605 [1st Dept 2013]; *Barhak v Almanzar-Cespedes*, 101 AD3d 564 [1st Dept 2012]) and an MRI report by plaintiff's own radiologist finding desiccation in the spine and no herniations in the cervical spine (*see Ahmed v Cannon*, 129 AD3d 645 [1st Dept 2015]).

Plaintiff failed to raise a triable issue of fact as to a "permanent consequential limitation" of her shoulder, since the slight limitation in range of motion in one plane found recently by her orthopedic surgeon was minor (*Licari v Elliott*, 57 NY2d 230 [1982]; *Style v Joseph*, 32 AD3d 212, 214 n [1st Dept 2006]). However, plaintiff raised a triable issue of fact as to a "significant limitation" of use of her shoulder by submitting evidence of limitations in range of motion contemporaneous with the accident (*see Vasquez v Almanzar*, 107 AD3d 538, 539-540 [1st Dept 2013]) and her surgeon's report opining that there was a tear in the shoulder that was causally related to the accident, contrary to an earlier MRI that did not reveal that condition.

Plaintiff failed to raise a triable issue of fact as to her claimed elbow injury since she did not submit any objective evidence of injuries to the elbow, the unaffirmed medical reports failed to compare the measurements recorded in range of motion testing to normal values, and her orthopedic surgeon found a normal range of motion during his recent examination (*see Toure v Avis Rent A Car Sys*, 98 NY2d 345, 353 [2002]; *Bent v Jackson*, 15 AD3d 46, 49 [1st Dept 2005]).

Plaintiff failed to raise a triable issue of fact as to her claimed cervical and lumbar spine injuries, since her physicians did not address defendant's proof of preexisting degeneration, which was shown in her own MRI reports (*see Pommells v Perez*, 4 NY3d 566, 580 [2005]; *Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]).

Defendant established that plaintiff sustained no 90/180-day injury by submitting plaintiff's deposition testimony that she missed less than 90 days of work (*see Williams v Perez*, 92 AD3d 528, 529 [1st Dept 2012]). Plaintiff contends that her medical proof showing persisting pain and an extensive course of treatment is sufficient to raise an issue of fact, but this evidence does not show that she was prevented from performing any of her usual and customary daily activities during the relevant

period (*Uddin v Cooper*, 32 AD3d 270 [1st Dept 2006], *lv denied* 8 NY3d 808 [2007]).

We note that if plaintiff establishes a significant limitation of use of her right shoulder, she may recover for all injuries causally related to the accident, even if they do not meet the serious injury threshold (*see Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549 [1st Dept 2010]).

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

ENTERED: JANUARY 28, 2016

CLERK

Mazzarelli, J.P., Acosta, Andrias, Richter, JJ.

48-
49-
50N Index 108357/09

Vornado 40 E. 66th Street Member LLC,
Plaintiff-Appellant,

-against-

Krizia SPA, etc.,
Defendant-Respondent.

_____

Rosenberg & Estis, P.C., New York (Brett B. Theis of counsel), for appellant.

Wilk Auslander LLP, New York (Pamela L. Kleinberg of counsel), for respondent.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered April 10, 2014, which, to the extent appealed from as limited by the briefs, denied plaintiff's request for attorneys' fees, unanimously reversed, on the law, with costs, and the request granted in its entirety.

Plaintiff's request for attorneys' fees is governed by article 19 of the lease, not article 52. Article 19 applies if defendant tenant defaults in the observance or performance of any term of the lease, and the court's summary judgment order, from which defendant did not appeal, found that defendant had breached the lease.

According to the plain language of article 52, it applies to the costs of arbitration. The parties did not arbitrate; rather, they litigated. "[W]hen parties set down their agreement in a clear, complete document, their writing should ... be enforced according to its terms" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). This rule is especially important "in the context of real property transactions" (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004] [internal quotation marks omitted]).

Defendant relies on the rule that if there is "an inconsistency between a specific provision and a general provision of a contract. . ., the specific provision controls" (*Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42, 46 [1956]). However, as in *Muzak*, there is no inconsistency between the general and specific provisions. They simply apply to different situations.

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

ENTERED: JANUARY 28, 2016

CLERK

Tom, J.P., Sweeny, Gische, Kapnick, JJ.

51 The People of the State of New York, Ind. 1738/11
Respondent,

-against-

Richard Ortiz,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Ramandeep Singh of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Megan Tallmer, J.), rendered July 12, 2013, convicting defendant, after a jury trial, of sexual abuse in the first degree and endangering the welfare of a child, and sentencing him, as a persistent felony offender, to an aggregate term of 18 years to life, unanimously reversed, on the law, and the matter remanded for a new trial.

The court erred when it permitted the People to introduce, under the prompt outcry exception to the hearsay rule, the fact that the 15-year old complainant sent a text message discussing the alleged sexual assault to her friends two or three months after the alleged assault occurred. A complaint is timely for purposes of the prompt outcry exception if made "at the first suitable opportunity," which is a "relative concept dependent on

the facts" (*People v McDaniel*, 81 NY2d 10, 17 [1993].

While a significant delay in reporting does not necessarily preclude outcry evidence, especially where the victim is a child (*see e.g. People v Stuckey*, 50 AD3d 447 [1st Dept 2008], *lv denied* 11 NY3d 742 [2008], when the complainant is a teenager (or older), "the concept of promptness necessarily suggests an immediacy not ordinarily present when months go by" (*People v Rosario*, 17 NY3d 501, 513 [2011]. With respect to teenagers and adults rather than young children, a reporting delay of several months may be justified if there were "legally sufficient circumstances" that would excuse the victim's delay, such as the victim being "under the control or threats of the defendant...or being among strangers and without others in whom [the victim] could confide" (*People v Allen*, 13 AD3d 892, 896 [3d Dept 2004], *lv denied* 4 NY3d 883 [2005]).

Here, as in *Allen*, there is an absence of circumstances to bring this lengthy delay within the prompt outcry rule. While the evidence indicated that the complainant experienced confusion, shock, embarrassment, and fear of not being believed, as well as concern about her mother and grandmother's reactions, there is no evidence that she was threatened by defendant or was under his control. Although the outcry occurred after defendant

was incarcerated on a parole violation, the complainant made the disclosure at least a month after that circumstance occurred, and she did not testify that she delayed her disclosure based on a fear of retribution.

We also conclude that this prior consistent statement would not have been admissible on a theory of rebutting a charge of recent fabrication. Furthermore, the erroneous admission of this evidence was not harmless, given the less than overwhelming evidence and the significant probability that the prior consistent statement affected the verdict by bolstering the veracity of the victim.

In light of this determination, we find it unnecessary to reach any other issues.

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

ENTERED: JANUARY 28, 2016

CLERK

Tom, J.P., Sweeny, Gische, Kapnick, JJ.

52 Jose Brito, Index 302568/13
Plaintiff-Respondent,

-against-

RDJ Express Transport, et al.,
Defendants-Appellants.

_____

Keane & Bernheimer PLLC, Hawthorne (Jason M. Bernheimer of counsel), for appellants.

Subin Associates, LLP, New York (Robert J. Eisen of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered April 17, 2014, which granted plaintiff's motion for partial summary judgment on the issue of liability, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff failed to establish entitlement to summary judgment on the issue of liability in this action where plaintiff's vehicle was double-parked in a lane of travel in violation of 34 RCNY 4-08(f)(1), when it was struck by defendants' vehicle as that vehicle attempted to pass plaintiff's car. Plaintiff failed to show that his own negligence in double-parking his car in the traveling lane was not a proximate cause of the accident (*see White v Diaz*, 49 AD3d 134, 138-140 [1st Dept 2008]; *Gonzalez v Ceesay*, 98 AD3d 1078 [2d Dept 2012]),

and we reject his assertion that the fact that his vehicle was double-parked merely furnished the occasion for the accident, as a matter of law (*see Pickett v Verizon N.Y. Inc.*, 129 AD3d 641 [1st Dept 2015]).

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

ENTERED: JANUARY 28, 2016

CLERK

Tom, J.P., Sweeny, Gische, Kapnick, JJ.

53 In re Angelina M., and Others,

Children Under Eighteen Years
of Age, etc.,

Joaquin C.,
Respondent-Appellant,

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

Teresa Nicole B.,
Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Dona B. Morris of counsel), for respondent.

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

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Order of fact-finding and disposition (one paper), Family Court, New York County (Jane Pearl, J.), entered on or about January 6, 2015, which, to the extent appealed from as limited by the briefs, determined that appellant, who was a person legally responsible for the care of two of the subject children and was the father of the third, neglected them, unanimously affirmed, without costs.

The court properly found that petitioner satisfied its

burden of demonstrating by a preponderance of the evidence that appellant neglected the subject children based on his admissions that he punched one of the children in the face to extract a loose tooth and was diagnosed with post-traumatic stress disorder, bipolar disorder and depression, and the testimony of the caseworker concerning statements by the older children that he choked the mother in front of them, threatened to kill the mother, the children, and the caseworker, and choked one of the children (*see Nicholson v Scoppetta,* 3 NY3d 357, 368-369 [2004]).

The children's out-of-court statements were admissible because they were cross corroborated and supported by appellant's admissions and the bruises on the mother and two of the children that were observed by different police officers (*see Matter of Nicole V.,* 71 NY2d 112, 118 [1987]; *Matter of Jadaquis B. [Sameerah B.],* 116 AD3d 448, 449 [1st Dept 2014]).

The evidence presented as to appellant's conduct with respect to the mother and the older children was sufficient to support a finding of neglect as to the youngest child (*see Matter of Nhyashanti A. [Evelyn B.]*, 102 AD3d 470 [1st Dept 2013]).

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

ENTERED: JANUARY 28, 2016

CLERK

Tom, J.P., Sweeny, Gische, Kapnick, JJ.

54 Madison Realty Capital, L.P., et al.,
Plaintiffs-Respondents,

-against-

Scarborough-St. James Corporation, et al.,
Defendants-Appellants,

Thomas L. Armano, Jr.,
Nonparty Appellant.

Index 602415/09

_____

LeClairRyan, P.C., New York (Michael T. Conway of counsel), for Scarborough-St. James Corporation and 67500 South Main Street Richmond LLC, appellants.

Thomas L. Armano, Jr., appellant pro se.

Westerman Ball Ederer Miller Zucker & Sharfstein, LLP, Uniondale (Jeffrey A. Miller of counsel), for respondents.

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Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered March 16, 2015, which confirmed an arbitration award in favor of plaintiffs and against defendants for the total sum of $720,204.80, and bringing up for review an order, same court, entered August 5, 2014, as amended by order, entered December 1, 2014, which granted plaintiffs' motion to confirm the arbitration award and denied defendants' cross motion to vacate or modify the arbitration award, unanimously affirmed, with costs.

"A court cannot examine the merits of an arbitration award

and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one. Indeed, even in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role of overseers to conform the award to their sense of justice" (*Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 326 [1999] [citations omitted]). Applying this standard, there is no basis to upset the final award.

The final award, which found that plaintiff Madison is now the landlord of the subject shopping center, and that the annual rent due - calculated as gross revenues of the shopping center minus operating expenses - must now be paid to Madison, instead of being used to "pay down" a wraparound mortgage that was intended to fund a stipulation of claims in a bankruptcy proceeding involving nonparty Richmond and the defendants, is not a totally irrational construction of the contractual provisions in dispute and does not remake the contract for the parties (*see Matter of Port Auth. of N.Y. & N.J. v Local Union No. 3, Intl. Bhd. of Elec. Workers*, 117 AD3d 424 [1st Dept 2014], *lv denied* 24 NY3d 916 [2015]).

Further, the arbitrator did not exceed his authority when he found that defendant Scarborough-St. James Corporation was

required to pay annual rent to Madison, as pursuant to the express terms of the servicing agreement, Scarborough was required to execute the tenant's obligations under the lease, which included the obligation to pay annual rent to the landlord (Madison) under section 1.01.

CPLR 7511(c)(1) only authorizes modification of computational errors and mistakes in description, not reversal of substantive rulings (*see Matter of Daly v Lehman Bros.*, 252 AD2d 357, 357 [1st Dept 1998]). Defendants challenge the arbitrator's calculation of rent on multiple bases; however, not only are their arguments substantive, they are unavailing. The calculation of rent on an annualized basis is supported by section 1.01 of the lease. The exclusion of a purported expense payment for legal fees related to the arbitration was supported by defendants' own unexplained summary of income and expenses, even though they had the opportunity to review and explain such summary after the interim award. Even if the arbitrator erred in addressing 2013 rent, such error was harmless (*see Matter of Barnes [Council 82, AFSCME]*, 246 AD2d 755, 756 [3d Dept 1998], *affd* 94 NY2d 719 [2000]), as the arbitrator's determination of the manner in which rent was to be calculated would be res judicata to any other request for arbitration arising out of the

same claim (*see Waverly Mews Corp. v Waverly Stores Assoc.*, 294 AD2d 130, 132 [1st Dept 2002]).

The motion court properly found that nonparty appellant Armano, a purported partner of the former corporate landlord of the shopping center, has no standing to intervene. In any event, his arguments are precluded by the arbitrator's determination.

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

ENTERED: JANUARY 28, 2016

CLERK

Tom, J.P., Sweeny, Gische, Kapnick, JJ.

55 The People of the State of New York, Ind. 1755/11
Respondent,

-against-

Mohammed Azam,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes of counsel), for respondent.

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Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered May 31, 2013, convicting defendant, after a jury trial, of assault in the second degree and leaving the scene of an incident without reporting, and sentencing him to an aggregate term of three years, unanimously affirmed.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received

effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that the absence of a request by counsel for submission of third-degree (criminally negligent) assault as a lesser included offense fell below an objective standard of reasonableness or affected the outcome of the case. The trial record supports the conclusion that defense counsel had chosen an "all-or-nothing" strategy (*see People v Lane*, 60 NY2d 748, 750 [1983]; *People v Clarke*, 55 AD3d 370 [1st Dept 2008], *lv denied* 11 NY3d 923 [2009]) in opposing the submission of any lesser included offenses, and defendant has not established that this strategy was unreasonable or prejudicial.

Defendant's challenges to the content of the annotated verdict sheet, to which he consented, and to the court's accompanying instructions, are claims requiring preservation (*see e.g. People v Wheeler*, 257 AD2d 673, 674 [2d Dept 1999], *lv denied* 93 NY2d 930 [1999]), and we decline to review these claims in the interest of justice. As an alternative holding, we find

no violation of CPL 310.20(2) or prejudice to defendant. Similarly, that portion of defendant's ineffective assistance claim relating to the verdict sheet is, to the extent reviewable, unavailing.

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

ENTERED: JANUARY 28, 2016

CLERK

Tom, J.P., Sweeny, Gische, Kapnick, JJ.

56 Jessica Sierra, Index 103927/11
Plaintiff, 590040/12
590674/12

-against-

Ogden Cap Properties, LLC, et al.,
Defendants-Respondents,

Emblemhealth Services Company,
LLP, et al.,
Defendants.

- - - - -

Ogden Cap Properties, LLC, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Health Insurance Plan of Greater New York,
Third-Party Defendant,

Lenox Hill Hospital,
Third-Party Defendant-Appellant.

- - - - -

[And A Second Third-Party Action]

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The Law Offices of Tobias & Kuhn, New York (Michael V. DiMartini of counsel), for appellant.

Mauro Lilling NaParty LLP, Woodbury (Kenneth B. Danielsen of counsel), for respondents.

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Order, Supreme Court, New York County (Joan M. Kenney, J.),

entered July 14, 2014, which denied defendant/third-party

defendant Lenox Hill Hospital's[1] motion for summary judgment dismissing the complaint and all other claims against it and its application for leave to submit a new dispositive motion following the completion of discovery, unanimously affirmed, without costs.

The motion court correctly found that Lenox Hill failed to establish prima facie that its sublease had expired before plaintiff's 2009 accident. While the initial term of the sublease expired in 2006, the sublease provided for automatic renewals, and indicated that it was co-terminous with the within-referenced Health Care Services Agreement between Lenox Hill and codefendant Health Insurance Plan of Greater New York. In support of its motion, Lenox Hill submitted the sublease and an affidavit asserting that the Health Care Services Agreement was terminated on July 31, 2006. However, it did not submit the Health Care Services Agreement itself. The motion court correctly determined that that omission was fatal to the motion.

We decline to consider Lenox Hill's argument as to standing,

[1]Lenox Hill Hospital, among other parties, was named as a defendant in the second amended complaint. It was omitted as a defendant from the consolidated caption due to a clerical error.

which it raised for the first time in its reply brief. We have considered Lenox Hill's remaining arguments and find them unavailing.

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

ENTERED: JANUARY 28, 2016

CLERK

Tom, J.P., Sweeny, Gische, Kapnick, JJ.

57 Wayne Schnapp, Index 115059/08
Plaintiff-Appellant,

Joanne Schnapp,
Plaintiff,

-against-

Miller's Launch, Inc.,
Defendant-Respondent.

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Hofmann & Schweitzer, New York (Paul T. Hofmann of counsel), for appellant.

Rubin, Fiorella & Friedman, LLP, New York (Michael E. Stern of counsel), for respondent.

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Appeal from order, Supreme Court, New York County (Lucy Billings, J.), entered January 6, 2015, which granted defendant's motion for summary judgment dismissing the complaint, unanimously dismissed, without costs.

Plaintiff Wayne Schnapp has advised this Court that his wife, plaintiff Joanne Schnapp, died during the pendency of this action. That notification is contained in his appellate brief, without any indication of when her death occurred. As of this date, there has been no substitution of a personal representive.

"If a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of the

proper parties" (CPLR 1015[a]). Furthermore, the death of a party divests the court of jurisdiction and stays the proceedings until proper substitution has been made (CPLR 1015[a], 1021; *see Noriega v Presbyterian Hosp. in the City of New York*, 305 AD2d 220, 221 [1st Dept 2003]).

Here, if the underlying motion for summary judgment was made before co-plaintiff's death, it was proper for the motion court to have entertained it (*Gonzalez v 231 Ocean Assoc.*, 131 AD3d 871, 872 [1st Dept 2015], citing CPLR 1015). However, there is no proof of when plaintiff's wife died. Once she died there was an automatic stay of all proceedings until a proper substitution was made (*see Noriega v Presbyterian Hosp. in City of N.Y.*, supra). Any determination that was rendered after her death, but before substitution of a legal representative for her would, therefore, be void (*Griffin v Manning*, 36 AD3d 530 [1st Dept 2007]; *Singer v Raskin*, 32 AD3d 839 [2d Dept 2006]).

If plaintiff's wife's death occurred before the motion court decided the motion, the court's determination is void.[1] Whether she died before or after this appeal was filed, this court lacks jurisdiction to review the motion court's decision because to

[1]If that is the case, nothing in the record indicates that it was brought to the motion court's attention.

date there has been no proper substitution (*see Silvagnoli v Consolidated Edison Employ. Mut. Aid Soc.*, 112 AD2d 819 [1st Dept 1985]; *Singer v Raskin*, 32 AD3d at 840). Since we do not address the merits of the underlying appeal, this dismissal is without prejudice.

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

ENTERED: JANUARY 28, 2016

CLERK

Tom, J.P., Sweeny, Gische, Kapnick, JJ.

58 Nazneen Mamoon, also known as Nazneen Ahmed,
Plaintiff-Respondent,

-against-

Dot Net Inc., et al.,
Defendants,

Moss & Moss LLP, et al.,
Defendants-Appellants,

Ket Equipment Finance Inc., et al.,
Defendants.

Index 652902/13

_____

Moss & Moss LLP, New York (Donald C. Moss of counsel), for appellants.

Sipsas, P.C., Astoria (Ioannis [John] P. Sipsas of counsel), for respondent.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered June 17, 2014, which denied the motion of defendants Moss & Moss LLP and John O. C. Moss, Esq. (the Moss defendants) to dismiss the claims against them pursuant to CPLR 3211(a)(1) and (7), unanimously modified, on the law, to grant the motion as to the claims for fraud, breach of contract, conspiracy, conversion, unjust enrichment, and breach of fiduciary duty, and otherwise affirmed, without costs.

The Moss defendants' contention that the complaint was

merely verified by plaintiff's attorney is a red herring, as the complaint was not required to be verified at all (*see* Weinstein-Korn-Miller, NY Civ Prac ¶ 3020.09 [2d ed 2015]; *see also* Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3020:3 and :5).

Although we do not condone the conduct of plaintiff's attorney, plaintiff should not be punished for her lawyer's faults to the extent of having her opposition to the Moss defendants' motion stricken as untimely.

"In assessing a motion under CPLR 3211(a)(7), ... a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint" (*Leon v Martinez,* 84 NY2d 83, 88 [1994]). The affidavit that plaintiff submitted in opposition to the Moss defendants' motion to dismiss stated, in nonconclusory terms, that defendant John O. C. Moss, Esq. (Mr. Moss) told her that he and his firm (defendant Moss & Moss LLP) represented her in the sale of her shares of defendant Dot Net Inc. to defendant Kamal Uddin Mridha.

Mr. Moss submitted an affirmation, denying that the Moss defendants ever said they would act as plaintiff's attorney.

However, an affidavit – let alone an affirmation[1] – is not documentary evidence (*see e.g. Flowers v 73rd Townhouse LLC*, 99 AD3d 431 [1st Dept 2012]).

The fact that the Moss defendants represented Mridha does not preclude the possibility that they also represented plaintiff (*see Talansky v Schulman*, 2 AD3d 355, 359 [1st Dept 2003]; *see also Leon*, 84 NY2d at 86-87, 90).

The October 2011 letter that plaintiff sent the Moss defendants did not utterly refute her "factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). First, the fact that there was a meeting in April 2011 does not preclude the possibility that there was another meeting in May 2011. Second, plaintiff may simply have misremembered the date; she said in her affidavit, "*on or about* May 1, 2011"(emphasis added). Her confusion is understandable because she executed documents on April 11, 2011 which became effective on May 1, 2011. Moreover, she stated that her understanding of English is limited.

"In order to state a cause of action for legal malpractice, the complaint must set forth three elements: the negligence of

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[1] Since Mr. Moss is a defendant, he should have submitted an affidavit, not an affirmation (*see* CPLR 2106[a]).

the attorney; that the negligence was the proximate cause of the loss sustained; and actual damages" (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied* 552 US 1257 [2008]). If one considers the allegations in the claims for breach of fiduciary duty and negligence (as opposed to just the conclusory allegations in the malpractice claim), the complaint satisfies the requirements of *Leder*. Contrary to the Moss defendants' claim, the documentary evidence does not show that plaintiff was paid in full for her Dot Net shares and therefore sustained no damages.

Unless a plaintiff alleges that an attorney defendant "breached a promise to achieve a specific result" (*Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35, 39 [1st Dept 1998]), a claim for breach of contract is "insufficient" (*id.*) and duplicative of the malpractice claim (*id.* at 38-39). Plaintiff does not allege that the Moss defendants breached a promise to achieve a specific result. Hence, her contract claim should have been dismissed as against those defendants.

Plaintiff's claims for breach of fiduciary duty and fraud are also duplicative of her malpractice claim (*see e.g. Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1st Dept 2004]; *Sage Realty*, 251 AD2d at 39).

"[C]ivil conspiracy is not recognized as an independent tort in this State" (*Shared Communications Servs. of ESR, Inc. v Goldman Sachs & Co.*, 23 AD3d 162, 163 [1st Dept 2005]). Therefore, that claim should have been dismissed.

It is true that "in considering a motion to dismiss brought pursuant to CPLR 3211(a)(7), the court must presume the facts pleaded to be true and must accord them every favorable inference" (*Leder*, 31 AD3d at 267). However, "factual allegations ... that consist of bare legal conclusions, or that are inherently incredible ..., are not entitled to such consideration (*id.*). Plaintiff makes only conclusory, incredible allegations that the Moss defendants converted her money and were unjustly enriched. Rather, the factual allegations of the complaint and the documentary evidence show that *Mridha* owed plaintiff $75,000 for her Dot Net shares and was unjustly enriched because he did not pay her for them.

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

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

ENTERED: JANUARY 28, 2016

CLERK

Tom, J.P., Sweeny, Gische, Kapnick, JJ.

59 The People of the State of New York, Ind. 2402/03
Respondent,

-against-

Eugene Herbert,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Thomas M. Nosewicz of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Natalia Bedoya-McGinn of counsel), for respondent.

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Judgment of resentence, Supreme Court, New York County (Rena K. Uviller, J.), rendered April 25, 2012, resentencing defendant to a term of nine years, with five years' postrelease supervision, unanimously affirmed.

The court properly resentenced defendant in his absence. The record supports the court's conclusion that, under the unusual circumstances presented, defendant forfeited his right to be present and sentencing in absentia was permissible (*see People v Halls*, 85 AD3d 632 [1st Dept 2011], *lv denied* 17 NY3d 869 [2011]). The Correction Law § 601-d proceeding to add postrelease supervision was adjourned 13 times over a 17-month period, because the correctional authorities repeatedly indicated that defendant's behavior and mental condition were incompatible

with transporting him to New York County for resentencing. In order to prevent defendant from being released without any supervision, the court finally imposed the resentence in defendant's absence, three days before his prison term expired.

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

ENTERED: JANUARY 28, 2016

CLERK

Tom, J.P., Sweeny, Gische, Kapnick, JJ.

60 Alihja Hill, by Her Mother and Natural Guardian, Mayra Perez, etc., et al., Plaintiffs-Appellants, -against- Lorac House, Inc., Defendant-Respondent. Index 350392/10

Fitzgerald Law Firm, P.C., Yonkers (John M. Daly of counsel), for appellants.

Brody & Branch LLP, New York (Mary Ellen O'Brien of counsel), for respondent.

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered July 15, 2014, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiffs, through the affidavit of their expert, proffered evidence that their apartment at defendant's premises was tested in 2008, and lead paint was located in the baseboards and closet supports (*compare Concepcion v Walsh*, 38 AD3d 317 [1st Dept 2007]). This finding, along with proof that defendant was on notice that a child under the age of seven resided at the apartment, was sufficient evidence that defendant was on constructive notice of a lead hazzard (*see Juarez v Wavecrest*

Mgt. Team, 88 NY2d 628, 646-647 [1996]; *Woolfalk v New York City Hous. Auth.*, 263 AD2d 355 [1st Dept 1999]). That the apartment was inspected in 2004 and 2008, and no lead was found, are facts that go to the reasonableness of defendant's behavior, an issue to be decided by a jury (*see Rivas v 1340 Hudson Realty Corp.*, 234 AD2d 132, 136 [1st Dept 1996]).

In light of the parties' competing expert affidavits, the issue of whether the infant's cognitive deficits were caused by exposure to lead, or by solely unrelated biological processes, is a question for a jury (*see Bygrave v New York City Hous. Auth.*, 65 AD3d 842, 847 [1st Dept 2009]; *Robinson v Bartlett*, 95 AD3d 1531, 1535 [3d Dept 2012]).

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

ENTERED: JANUARY 28, 2016

CLERK

Tom, J.P., Sweeny, Gische, Kapnick, JJ.

61 In re Nataysha O., and Others,

Children Under Eighteen
Years of Age, etc.,

Administration for Children's
Services,
Petitioner-Appellant,

Manuel O.,
Respondent-Respondent.

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Zachary W. Carter, Corporation Counsel, New York (Antonella Karlin of counsel), for appellant.

The Bronx Defenders, Bronx (Saul Zipkin of counsel), for respondent.

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

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Order, Family Court, Bronx County (Fiordaliza A. Rodriguez, J.), entered on or about July 22, 2015, which, after a fact-finding hearing, dismissed the petitions alleging that respondent neglected one of the subject children by inflicting excessive corporal punishment on her and derivatively neglected the other two children, unanimously reversed, on the law and the facts, without costs, findings of neglect and derivative neglect entered against respondent, and the matter is remanded to Family Court for a dispositional hearing.

Contrary to the court's determination, a preponderance of the evidence establishes that respondent intentionally burned Jamylezse, who was then almost four years old, with a cigarette after he became angry with her for taking a toy from another child. By thus inflicting excessive corporal punishment upon her, respondent failed to provide the child with proper supervision or guardianship, rendering Jamylezse a neglected child (Family Court Act 1012[f][i][B]).

A daycare worker testified that after she noticed a round burn mark on Jamylezse's inner arm and asked her about the "boo boo," the child replied, "[D]addy burn me with a cigarette," and demonstrated a motion with her wrist twisting into the underside of her arm. An agency caseworker similarly testified that the child told her that she got the mark from "poppy" and used a circular motion to show something being pressed against her arm. The court credited the testimony of both these witnesses. Jamylezse's out-of-court statements were corroborated by a photograph taken by the caseworker of the mark on the child's arm, coupled with the caseworker's testimony as to her observations of the injury (*see Matter of Harrhae Y. [Shy-Macca Ernestine B.]*, 112 AD3d 512 [1st Dept 2013]; *Matter of Yvelize T.*, 302 AD2d 242, 242-243 [1st Dept 2003]).

The court also credited respondent's testimony that the child's injury was caused by accidental contact with the lit cigarette. However, we reject this testimony as "inherently improbable" (*see Matter of Allen v Black*, 275 AD2d 207, 210 [1st Dept 2000] [internal quotation marks omitted]) because of the location of the burn, respondent's varying accounts of how the accident occurred, and his testimony that no mark appeared until the next day and that the mark was then no larger than a mosquito bite and never as bad as what was depicted in the photograph entered into evidence.

The fact that Jamylezse's injury was the result of a single incident does not preclude a finding of excessive corporal punishment, although it may be relevant to disposition. By intentionally burning his young daughter with a cigarette, respondent demonstrated that his "parent[al] judgment was strongly impaired and the child exposed to a risk of substantial harm" (*see Matter of Cevon W. [Talisha W.]*, 110 AD3d 542, 542 [1st Dept 2013] [internal quotation marks omitted]).

We find that respondent derivatively neglected the other two children, who were present when he intentionally burned Jamylezse with his cigarette, because the record demonstrates that

respondent's parental judgment was so impaired as to create a substantial risk of harm for any child in his care (*see Matter of Joshua R.*, 47 AD3d 465, 466 [1st Dept 2008], *lv denied* 11 NY3d 703 [2008]).

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

ENTERED: JANUARY 28, 2016

CLERK

Tom, J.P., Sweeny, Gische, Kapnick, JJ.

64 The People of the State of New York, Ind. 5180/03
Respondent,

-against-

Derrick Bostic,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Lee M. Pollack of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Edward McLaughlin, J.), rendered on or about April 8, 2015,

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

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

ENTERED: JANUARY 28, 2016

CLERK

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

Tom, J.P., Sweeny, Gische, Kapnick, JJ.

65 Regla Echevarria, Index 303213/12
Plaintiff-Appellant,

-against-

Amy Lee Ocasio, et al.,
Defendants-Respondents.

_____

Mitchell Dranow, Sea Cliff, for appellant.

Richard T. Lau & Associates, Jericho (Marcella Gerbasi Crewe of counsel), for respondents.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered July 28, 2014, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the complaint based on plaintiff's inability to demonstrate that she suffered a serious injury to her cervical or lumbar spine within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to deny the motion as to plaintiff's claim that she suffered serious injuries involving significant limitations of use of the cervical and lumbar spine, and otherwise affirmed, without costs.

In opposition to defendants' prima facie showing of the lack of a serious injury (*see Kone v Rodriguez*, 107 AD3d 537, 538 [1st Dept 2013]), plaintiff failed to provide medical evidence

reconciling the current findings of limitations in her spine's range of motion and the earlier findings of normal range of motion in the spine. Accordingly, the motion court correctly dismissed her claims of injuries involving "permanent consequential" limitations to the spine (*Perdomo v City of New York*, 129 AD3d 585, 586 [1st Dept 2015]; *see Santos v Perez*, 107 AD3d 572, 574 [1st Dept 2013]). However, plaintiff's medical evidence was sufficient to raise an issue of fact as to whether she suffered injuries involving significant limitation in use of her spine (*see Sutliff v Qadar*, 122 AD3d 452, 453 [1st Dept 2014]).

The motion court correctly dismissed plaintiff's 90/180-day claim, given her deposition testimony that she returned to work immediately after the accident, and was not confined to bed or home during the relevant period (*see Mitrotti v Elia*, 91 AD3d 449, 450 [1st Dept 2012]).

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

ENTERED: JANUARY 28, 2016

CLERK

Tom, J.P., Sweeny, Gische, Kapnick, JJ.

66 Old Republic Insurance Company, directly and as subrogee of STS Steel, Inc., Plaintiff-Appellant, Index 155995/12

-against-

United National Insurance Company, Defendant-Respondent.

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Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Andrew N. Adler of counsel), for appellant.

Brad C. Westlye, New York, for respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered July 2, 2014, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the amended complaint with prejudice, and declared that defendant is not obligated to reimburse plaintiff for any portion of the $1,000,000 it paid toward the settlement of the underlying personal injury action, unanimously reversed, on the law, with costs, the motion denied, and the declaration vacated.

Plaintiff insurer seeks to have defendant insurer either contribute toward, or reimburse plaintiff completely for, the $1 million that plaintiff paid toward the settlement of the

underlying personal injury action. The motion court dismissed the complaint on the ground that while a question of fact existed concerning whether plaintiff's subrogor, STS Steel, was required to be covered by an umbrella insurance policy procured by its subcontractor, no amount of coverage was ever agreed to in the subcontract. Thus, the court concluded, based on the language in defendant's policy, which provided coverage in the amount of the lesser of $5 million or the amount of the subcontractor's policy, that defendant's coverage obligation was $0.

We find that there is an issue of fact as to the amount of umbrella insurance the subcontractor was required to procure. The subcontract originally called for $5 million in coverage, but STS permitted its subcontractor to proceed with the work while leaving the amount of coverage ambiguous because of the subcontractor's cost concerns.

We also find an issue of fact surrounding the timeliness of United National's disclaimer to STS (*see First Fin. Ins. Co. v*

Jetco Contr. Corp., 1 NY3d 64 [2003]; *Hernandez v American Tr. Ins. Co.*, 31 AD3d 343, 344 [1st Dept 2006]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: JANUARY 28, 2016

CLERK

Tom, J.P., Sweeny, Gische, Kapnick, JJ.

67 The People of the State of New York, Ind. 2619/13
Respondent,

-against-

Maximo Reinoso,
Defendant-Appellant.

_____

Office of the Appellate Defender, New York (Richard M. Greenberg of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered March 21, 2014, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the fourth degree and criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to concurrent terms of 4½ years, unanimously modified, on the facts and as a matter of discretion in the interest of justice, to the extent of vacating the possession conviction and dismissing that count of the indictment, and otherwise affirmed.

Although there was overwhelming evidence that defendant sold Suboxone (containing the controlled substance buprenorphnine) to an undercover officer, the possession conviction was based on

legally insufficient evidence and was against the weight of the evidence, in that the People failed to prove that defendant unlawfully possessed the 24 additional strips of Suboxone that formed the basis of the charge of possession with intent to sell. The additional strips, recovered on defendant's arrest, were in a box bearing a prescription in defendant's name. Defendant testified that the medication was prescribed for him by a doctor months earlier to treat his arthritis, and the People, who presented no contrary evidence, effectively conceded that defendant had the right to possess this medication on the basis of his prescription. Given these facts and the People's concession, there is no basis for finding that defendant's possession of the unsold medication was unlawful in the first place, even if the evidence supported an inference that defendant intended to sell these drugs as well. We need not decide whether, and under what circumstances, possession of drugs by the holder of a valid prescription might be unlawful.

In any event, defendant would be entitled to a new trial on the possession charge because the court erred in instructing the jury, in its charge on unlawful possession, that "with certain exceptions not applicable here, a person has no right, no legal right to possess buprenorphine." The court's instruction

effectively removed the element of unlawfulness from the jury's consideration (*see People v Milhouse*, 246 AD2d 119, 123 [1st Dept 1998]), and this was clearly prejudicial for the reasons already stated. Although defense counsel did not move to dismiss the possession count or object to the instruction, the interest of justice warrants vacatur of this count.

However, we decline to review defendant's unpreserved challenge to the prosecutor's summation in the interest of justice. As an alternative holding, we find no basis for reversal because the challenged remarks, viewed in context, essentially asked the jury to evaluate the credibility of conflicting testimony and did not shift or reduce the People's burden of proof.

Defendant's ineffective assistance of counsel claims, to the extent not rendered academic by our dismissal of the possession count, are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received

effective assistance under the state and federal standards (*see* People v Benevento, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 28, 2016

CLERK

Tom, J.P., Sweeny, Gische, Kapnick, JJ.

68 In re Samantha Diop, Index 401345/13
Petitioner,

-against-

New York City Housing Authority,
Whitman Houses,
Respondent.

_____

Samantha Diop, petitioner pro se.

David I. Farber, New York (Laura R. Bellrose of counsel), for respondent.

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Determination of respondent, dated May 9, 2013, which, after a hearing, denied petitioner's grievance seeking succession rights as a remaining family member to the tenancy of her deceased stepfather, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Peter H. Moulton, J.], entered April 16, 2014), dismissed, without costs.

Respondent's determination is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). Petitioner's stepfather, the tenant of record, never obtained respondent's written consent for petitioner's occupancy, and petitioner admits

that her most recent continuous residence in the apartment was for a period of less than one year prior to her stepfather's death (*see e.g. Matter of Adler v New York City Hous. Auth.*, 95 AD3d 694 [1st Dept 2012], *lv dismissed* 20 NY3d 1053 [2013]). The fact that petitioner may have paid rent for the premises does not warrant a different determination (*see Matter of Vereen v New York City Hous. Auth.*, 123 AD3d 478 [1st Dept 2014]). Nor do the mitigating factors set forth by petitioner provide a basis for annulment (*see e.g. Matter of Rodriguez v New York City Hous. Auth.*, 103 AD3d 538 [1st Dept 2013]).

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: JANUARY 28, 2016

CLERK

Tom, J.P., Sweeny, Gische, Kapnick, JJ.

69 Tyrone Covington, Index 150104/10
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for appellant.

Diamond & Diamond, LLC, Brooklyn (Stuart Diamond of counsel), for respondent.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered on or about October 15, 2014, which denied defendant's (NYCHA) motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

NYCHA failed to establish prima facie that it did not have constructive notice of the urine condition in its building's stairwell that caused plaintiff's accident. Its supervisor of caretakers stated that the caretaker assigned to the building conducted a "walk down" of the building on the morning of the accident in adherence to a routine cleaning schedule. However, NYCHA submitted no deposition testimony or affidavit by the caretaker himself stating that he followed the cleaning schedule that day and setting forth what he observed during the "walk

down" (*see Hawthorne-King v New York City Hous. Auth.*, 128 AD3d 539 [1st Dept 2015]; *Gautier v 941 Intervale Realty LLC*, 108 AD3d 481 [1st Dept 2013]). Plaintiff's deposition testimony that he did not notice the condition when he used the stairs earlier on the morning of the accident does not definitively establish NYCHA's lack of notice (*Wade-Westbrooke v Eshaghian*, 21 AD3d 817 [1st Dept 2005]).

In any event, plaintiff raised a triable issue of fact by submitting affidavits by three tenants stating that the urine condition was a recurring condition that NYCHA has failed to take reasonable measures to address, despite their repeated complaints (*see Hill v Lambert Houses Redevelopment Co.*, 105 AD3d 642 [1st Dept 2013]; *Cignarella v Anjoe-A.J. Mkt., Inc.*, 68 AD3d 560 [1st Dept 2009]).

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

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

ENTERED: JANUARY 28, 2016

CLERK

Tom, J.P., Sweeny, Gische, Kapnick, JJ.

70 Hector Gomez, Index 304328/11
Plaintiff-Respondent,

-against-

Isaac M. Santiago, et al.,
Defendants,

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

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London Fischer LLP, New York (Amy Kramer of counsel), for appellants.

Louis A. Badolato, Roslyn, for respondent.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered October 23, 2014, which, inter alia, denied the motion of defendants City of New York and Welsbach Electric Corp. (Welsbach) for summary judgment dismissing the complaint and all cross claims as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Dismissal of the complaint and all cross claims as against the City and Welsbach is warranted in this action involving a motor vehicle accident between plaintiff's van and a car driven by defendant Santiago and owned by defendant Salgado. Plaintiff testified that as he approached the intersection he saw that the

traffic signal was flashing yellow, and Santiago stated that as he approached the intersection he was faced with a flashing red signal. Both drivers also testified that they saw the respective flashing signals before they neared the intersection, and understood what the signals meant. Accordingly, the record establishes that the flashing traffic signals caused no confusion, and were not a proximate cause of this accident (*see e.g. Minemar v Khramova*, 29 AD3d 750 [2d Dept 2006]*; Bisceglia v International Bus. Machs.*, 287 AD2d 674 [2d Dept 2001], *lv denied* 98 NY2d 605 [2002]).

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

ENTERED: JANUARY 28, 2016

CLERK

Tom, J.P., Sweeny, Gische, Kapnick, JJ.

71-
71A The People of the State of New York, Respondent,

Ind. 1998/12
4368/09

-against-

Paul Samuels,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Shera Knight of counsel), for respondent.

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Judgments, Supreme Court, Bronx County (Martin Marcus, J.), rendered February 28, 2013, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and rendered February 28, 2013, as amended April 3, 2013, convicting him, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree, and sentencing him to concurrent terms of two years, unanimously modified, on the law, to the extent of vacating the sentence on the attempted weapon possession conviction only and remanding for resentencing for a youthful offender determination on that conviction, and otherwise affirmed.

As the People concede, based on *People v Rudolph* (21 NY3d

497 [2013]), which was decided after the sentencing in this case, defendant is entitled to resentencing for an express youthful offender determination on his weapon conviction.

We perceive no basis for reducing the sentence, or for any other relief, on defendant's controlled substance conviction, which involved a crime committed while defendant was 20 years old and thus ineligible for youthful offender treatment.

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

ENTERED: JANUARY 28, 2016

CLERK

Tom, J.P., Sweeny, Gische, Kapnick, JJ.

72N In re Steven Banks, etc., Index 401056/13
Petitioner-Respondent,

-against-

Ruth B., A Person Alleged to be Incapacitated,
Respondent-Appellant.

_____

Advocates for Justice, New York (Arthur Z. Schwartz of counsel), for appellant.

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

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Appeal from order and judgment (one paper), Supreme Court, New York County (Tanya R. Kennedy, J.), entered February 26, 2014, inter alia, appointing a guardian for respondent, unanimously dismissed, without costs, as moot.

By order entered on or about April 7, 2015, after a hearing attended by respondent, Supreme Court appointed Arthur Schwartz, Esq., as respondent's guardian, with her consent. The New York County Clerk issued a commission to Mr. Schwartz pursuant to that order, and respondent has been discharged from the nursing home in which she had been confined. These events render this appeal moot (*see Sedita v Board of Educ. of City of Buffalo*, 43 NY2d 827, 828 [1977]).

Another ground for dismissal is the insufficiency of the appendix (*see* CPLR 5528[a][5]), which fails to include certain parts of the record that are relevant and necessary to a determination of the appeal, most notably the transcript of the December 11, 2013 hearing at which respondent's right to appear was allegedly waived and at which proof of incapacity would have been submitted (*see e.g. Copp v Ramirez*, 62 AD3d 23, 28 [1st Dept 2009], *lv denied* 12 NY3d 711 [2009]).

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

ENTERED: JANUARY 28, 2016

CLERK

Sweeny, J.P., Andrias, Saxe, Richter, Feinman, JJ.

13419 Jacob Gottlieb, Index 311197/12
M-5007 Plaintiff-Appellant-Respondent,

-against-

Alexandra Lumiere Gottlieb,
Defendant-Respondent-Appellant.

_____

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

Law Office of William S. Beslow, New York (William S. Beslow of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Ellen Gesmer, J.), entered October 31, 2013, modified, on the law and the facts, to deny the cross motion to dismiss the first and third counterclaims, to declare that the parties' prenuptial agreement is valid and enforceable, that the agreement's maintenance provisions were fair as of the date of execution and are not currently unconscionable, and that the agreement's property distribution provisions were fair as of the date of execution, to deny the cross motion for interim counsel fees, to vacate the award of such fees, to remand the matter for proceedings consistent herewith, and otherwise affirmed, without costs.

M-5007 - Motion for stay denied as academic.

Opinion by Richter, J. All concur except Saxe, J. who concurs in a separate Opinion and Feinman, J. who dissents in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, J.P.
Richard T. Andrias
David B. Saxe
Rosalyn H. Richter
Paul G. Feinman, JJ.

13419 & M-5007
Index 311197/12

_____x

Jacob Gottlieb,
Plaintiff-Appellant-Respondent,

-against

Alexandra Lumiere Gottlieb,
Defendant-Respondent-Appellant.

_____x

Cross appeals from an order of the Supreme Court, New York County (Ellen Gesmer, J.), entered October 31, 2013, which, to the extent appealed from as limited by the briefs, denied defendant's motion for partial summary judgment on the first counterclaim, granted plaintiff's cross motion for partial summary judgment dismissing the first and third counterclaims, denied plaintiff's cross motion to the extent it sought dismissal of the second counterclaim, and granted defendant's cross motion for interim counsel fees.

Berkman Bottger Newman & Rodd, LLP, New York (Walter F. Bottger and Jacqueline Newman of counsel), for appellant-respondent.

Law Office of William S. Beslow, New York (William S. Beslow and Aimee M. Maddalena of counsel), for respondent-appellant.

RICHTER, J.

In anticipation of their planned marriage, plaintiff Jacob Gottlieb (the husband) and defendant Alexandra Lumiere Gottlieb (the wife) entered into a prenuptial agreement. The agreement was the product of months of negotiations among the parties and their attorneys, and provided for, in the event of a divorce, the distribution of assets, spousal maintenance and health insurance, inheritance rights, and the purchase by the husband of a luxury apartment in which the wife and children would reside. Prior to the agreement's execution, the wife's counsel, an experienced matrimonial practitioner, advised her not to sign it, but the wife ignored that advice.

After the parties' marriage broke down, the husband filed this divorce action and the wife moved to set aside the agreement, claiming it was the product of overreaching resulting in manifestly unfair terms. The motion court dismissed the wife's claim that the entire agreement is unenforceable, but reserved for trial the limited issue of whether the agreement's maintenance provisions could be enforced. For the reasons that follow, we reject all of the wife's challenges to the agreement, and issue declarations in the husband's favor upholding the agreement and all its provisions. We also vacate the court's award of interim counsel fees to the wife and remand the matter

for further proceedings on that issue.

The wife, now 37 years old, was born in New York City, attended private schools in Manhattan and Connecticut, and received a bachelor's degree in economics from the University of Pennsylvania. After working for several years in advertising and finance, she decided to pursue a real estate career, and obtained a salesperson's license and a position with Brown Harris Stevens, Inc. She later obtained a certification enabling her to teach yoga classes, but has not worked outside the home for several years. The husband, now 44 years old, also grew up in New York City, and obtained a bachelor's degree from Brown University and a medical degree from New York University School of Medicine. After working as a portfolio manager for various financial firms, he started a hedge fund, of which he is currently majority owner.

The parties met in September 2003, began living together in the beginning of 2004, and became engaged in September 2005. Prior to the engagement, the husband told the wife that he would not marry her unless there was a prenuptial agreement, and the parties began to discuss terms. In October 2005, while negotiations were ongoing, the wife learned that she was pregnant. She told the husband that she did not want to have a child out of wedlock, and asked to finalize the prenuptial agreement so that they could marry before the child was born.

The parties discussed the terms of the prenuptial agreement many times during the wife's pregnancy, but no agreement was reached. In mid-March 2006, after consulting with a number of attorneys, the wife retained the services of a partner in a prominent New York matrimonial firm. The husband, however, told the wife that, on the advice of his attorney, he would not finalize the prenuptial agreement, or marry her, until after the child was born. In May 2006, the wife gave birth to a daughter, and the negotiations temporarily abated.

In the fall of 2006, the wife asked her attorney to resume negotiations and finalize the terms of the agreement. In early 2007, the husband's counsel sent a draft agreement to the wife's counsel. In a letter dated March 2, 2007, the wife's attorney proposed changes to the draft, many of which were incorporated into the final agreement. The letter states that the wife "understands all that she is potentially giving up by virtue of this Agreement."

In April 2007, the wife learned that she was pregnant again, and told her counsel that she wanted to execute a prenuptial agreement as soon as possible. Counsel for both parties continued negotiating. In a letter dated April 20, 2007, the husband's counsel sent the wife's counsel a list of revisions to the draft agreement, incorporating many of the changes that had

been proposed by the wife's counsel. The husband's counsel also sent a statement outlining the husband's financial circumstances. On April 27, 2007, the wife went to her counsel's office and signed the agreement. The wife concedes that she ignored her counsel's advice not to sign the agreement. Several days later, the husband executed the agreement. The parties were married in May 2007 and their second daughter was born in November 2007.

The prenuptial agreement states that each party had legal counsel of his or her own choosing "who advised him or her fully with respect to his or her rights in and to the property and income of the other and with respect to the effect of this Agreement and that such party understands such advice." Each party acknowledged that the agreement was "fair and reasonable and not unconscionable," and was entered into "freely and voluntarily and not as a result of fraud, duress, coercion, pressure or undue influence exercised by the other." The agreement also stated that the parties had been advised that they might acquire other rights granted to divorcing spouses, but that such rights could be limited or forfeited by the terms of the agreement.

The agreement defines marital property as (i) all property held jointly by the parties; and (ii) any property agreed to by the parties in writing. Separate property is defined in the

agreement as all other property, including business interests, retirement benefits, professional licenses and educational degrees, income earned during the marriage, and any interest in the increase in value of the parties' separate property. Although each party waived any right to equitable distribution, the agreement provided for the following in lieu of a distributive award. First, for each year of the marriage (up to a maximum of 15 years), the husband agreed to deposit into an investment account the sum of $300,000. In the event of divorce, the wife would receive these funds along with any accrued interest. Next, the parties agreed to divide equally all wedding gifts, and real property and financial accounts registered in both parties' names. Any other marital property would be divided in proportion to each party's financial contribution to the asset.

Further, if there were minor children of the marriage at the time of divorce, the husband agreed to purchase, at his total cost and expense, an apartment for the use of the wife and the children. The apartment was required to be in a full-service doorman building located between 60th and 80th Streets and Third Avenue and Broadway, above the third floor and with one bedroom

each for the wife and the children.[1] The husband agreed to pay the maintenance charges, utilities, and other expenses of the apartment, until all of the children reached the age of majority, at which point the wife would vacate the apartment. The husband also is obligated to pay the wife's and children's moving expenses to the apartment. The agreement also provides that two specified Manhattan apartments, including the residence occupied by the parties during their relationship, shall remain the husband's separate property.

With respect to spousal support, the parties each acknowledged that in light of his or her assets, education, employment history, and rights under the agreement, he or she is "self-supporting and has sufficient ability to maintain a reasonable and satisfactory standard of living." Nevertheless, in the event of divorce, the husband agreed to pay the wife, as taxable maintenance, the sum of $12,500 per month, as long as there is a child of the marriage under the age of four. This amount was in addition to the husband's agreement to purchase, and pay all costs for, an apartment for the wife to live in. The

[1] The agreement also provided that if the marriage lasted 10 years, and there were no living issue of the marriage at the time of divorce, the husband would purchase, in the wife's name, a one-bedroom apartment in the same location and with the same attributes.

husband also agreed to pay, as nontaxable maintenance, the wife's health insurance, until the parties' children are emancipated. Aside from these provisions, the parties waived any additional spousal maintenance and acknowledged that such waiver was fair and reasonable. In addition, in the spousal support section of the agreement, the wife waived any right to counsel fees, both interim and final.

The agreement also provided for certain inheritance rights for the wife and children. The parties agreed that if the marriage was still intact at the time of the husband's death, the wife would receive her elective share of the husband's estate. In the event of divorce, the husband agreed to leave, either outright or in trust, a specified percentage of his estate to the children of the marriage. Finally, financial statements annexed to the agreement list each parties' assets, liabilities and net worth, although the parties' incomes were not included. The husband and the wife explicitly acknowledged that, upon being advised by counsel, each fully understood the financial information provided by the other, and recognized that their financial circumstances could be considerably different at the time of dissolution of the marriage.

The marriage ultimately broke down, and in August 2012, the husband brought this action for divorce. In her answer, the wife

asserts four counterclaims. The first counterclaim seeks a declaration that the entire prenuptial agreement is invalid and unenforceable. The fourth counterclaim seeks rescission of the agreement based on a purported mutual mistake concerning the cost of the apartment the husband was obligated to purchase for the wife. The second and third counterclaims, asserted in the alternative to the first and fourth counterclaims, seek, respectively, declarations that the agreement's maintenance provisions were unfair when the agreement was executed and are currently unconscionable, and that the agreement's property distribution provisions were unfair as of the execution date.

The wife moved for partial summary judgment on her first counterclaim seeking a declaration that the entire prenuptial agreement is invalid. The wife argued that the agreement was not enforceable because it was the product of overreaching by the husband that resulted in manifestly unfair terms. In her affidavit in support of the motion, the wife expressly acknowledged that she does not seek to invalidate the agreement based on unconscionability, coercion, duress or fraud. The husband cross-moved for partial summary judgment dismissing the wife's four counterclaims.

The motion court denied the wife's motion, and granted the husband's cross motion to the extent of dismissing the wife's

first counterclaim attacking the validity of the entire agreement and the third counterclaim challenging the property distribution provisions. The court, however, denied dismissal of the wife's second counterclaim seeking to invalidate the maintenance provisions, and reserved for trial the issues of whether those provisions were fair and reasonable when entered into and whether they are unconscionable today.[2] Both parties now appeal.

The wife, on her appeal, contends that the motion court erred in denying her motion to set aside the prenuptial agreement. The standards for assessing the validity of a prenuptial agreement are well-settled. A strong public policy exists in favor of parties deciding their own interests through premarital contracts, and a duly executed prenuptial agreement is given the same presumption of legality as any other contract (*Bloomfield v Bloomfield*, 97 NY2d 188, 193 [2001]; *Matter of Greiff*, 92 NY2d 341, 344 [1998]). Thus, a prenuptial agreement "is presumed to be valid and controlling unless and until the party challenging it meets his or her very high burden to set it aside" (*Anonymous v Anonymous*, 123 AD3d 581, 582 [1st Dept 2014]).

Despite the presumption of validity, an agreement between

[2] The wife withdrew the fourth counterclaim during oral argument before the motion court.

prospective spouses can be set aside where it is shown to be the product of fraud, duress, overreaching resulting in manifest unfairness, or other inequitable conduct (*see Christian v Christian*, 42 NY2d 63, 72 [1977]). In the absence of such inequitable conduct, however, courts should not redesign the bargain reached by the parties merely because in retrospect the provisions might be viewed as improvident or one-sided (*id.*). Rather, judicial review should be "exercised circumspectly, sparingly and with a persisting view to the encouragement of parties settling their own differences in connection with the negotiation of property settlement provisions" (*id.* at 71-72). The setting aside of a prenuptial agreement is "the exception rather than the rule," and the burden of establishing fraud, duress or overreaching is on the party seeking to set aside the agreement (*Anonymous*, 123 AD3d at 582).

Here, the wife's motion did not challenge the prenuptial agreement on the ground that it is the product of coercion, duress or fraud. Nor did the wife argue that the agreement's terms as a whole are unconscionable. Rather, her only claim was that the agreement is manifestly unfair due to the husband's overreaching (*see Christian*, 42 NY2d at 72). Although no actual fraud need be shown to set aside the agreement on this ground, the challenging party must show overreaching in the execution,

such as the concealment of facts, misrepresentation, cunning, cheating, sharp practice, or some other form of deception (*see id.*, *Stawski v Stawski*, 43 AD3d 776, 777 [1st Dept 2007]; *Matter of Baruch*, 205 Misc 1122, 1124 [Sur Ct, Suffolk County 1954], *affd* 286 App Div 869 [2d Dept 1955]). In addition, the challenging party must show that the overreaching resulted in terms so manifestly unfair as to warrant equity's intervention (*see Levine v Levine*, 56 NY2d 42, 47 [1982] [to set aside agreement, both overreaching and manifest unfairness must be demonstrated]; *Christian*, 42 NY2d at 72*; Barocas v Barocas*, 94 AD3d 551 [1st Dept 2012], *appeal dismissed* 19 NY3d 993 [2012]*; Bronfman v Bronfman*, 229 AD2d 314, 315 [1st Dept 1996] [challenger of agreement bears "very high burden" of showing that it is manifestly unfair and that such unfairness was the result of overreaching]).

Judged by these standards, the wife has failed to meet her heavy burden to set aside the prenuptial agreement. No issue of fact exists as to whether the husband engaged in overreaching during the negotiations leading up to the execution of the agreement. The agreement was the product of on-and-off discussions that took place over the course of more than a year and a half. Although initially the parties negotiated by themselves, about midway through, the wife retained the services

of a partner in a prominent matrimonial firm. Negotiations continued by the parties and their attorneys, with draft agreements exchanged and terms modified. Both the fact that the wife was an active participant in the negotiations, and was the one who was pushing to get the agreement signed, are hard to reconcile with her current claim of overreaching.

There is no basis to conclude that the wife did not have sufficient time to review the agreement, or that she did not understand its terms. Although the wife maintains that she suffered from depression and anxiety at the time the agreement was signed, no showing has been made that she lacked the mental capacity to understand the agreement, or that she suffered from a psychological impairment that prevented her from making a reasoned decision. Indeed, the motion court noted that the wife's counsel, in the papers below, stated that she was not claiming any medical or psychological disability at the time she signed the agreement. In addition, neither of the medical professionals who submitted affidavits expressed the opinion that the wife was incapable of understanding the agreement or the consequences of executing it. And when it came time to execute the agreement, the wife admittedly ignored the advice of her own independent counsel and signed it. In view of all these circumstances, we conclude that no inference of overreaching

exists (*see Barocas*, 94 AD3d at 551-552 [execution of prenuptial agreement not the result of inequitable conduct where, inter alia, agreement was knowingly entered into against counsel's advice]; *Strong v Dubin*, 48 AD3d 232, 232-233 [1st Dept 2008] [prenuptial agreement enforceable where, inter alia, counsel told the defendant that the agreement appeared one-sided, and the defendant responded "It's okay. I just want to get married"]).

The wife complains that she was unaware of the husband's exact income at the time she executed the agreement. However, the mere fact that the husband did not include his income in his financial disclosure, standing alone, is not a basis to set the agreement aside (*see Strong*, 48 AD3d at 233 ["A failure to disclose financial matters, by itself, is not sufficient to vitiate a prenuptial agreement"]). Notably, there is no claim by the wife that the husband concealed or misrepresented his income (*see id.*; *Cohen v Cohen*, 93 AD3d 506 [1st Dept 2012]). Further, as the motion court noted, the wife lived with the husband and was aware of the luxurious lifestyle his income and assets afforded, even if the precise amount of the income was unknown to her (*see Matter of Fizzinoglia*, 118 AD3d 994, 996 [2d Dept 2014], *affd* 26 NY3d 1031 [2015] [record indicates that the petitioner-wife was personally acquainted with the nature of the decedent-husband's assets before signing the agreement, and there was no

indication that the decedent had at any time attempted to conceal or misrepresent the nature or extent of his assets]; *Strong v Dubin*, 48 AD3d at 233). Moreover, the substantial financial disparity between the parties was fully disclosed at the time the agreement was executed (*Smith v Walsh-Smith*, 66 AD3d 534, 535 [1st Dept 2009], *lv denied* 14 NY3d 704 [2010]). Contrary to the dissent's suggestion that there was inadequate financial disclosure, a statement attached to the agreement lists the husband's assets, liabilities and net worth, and the wife, who has a degree in economics and has worked in the finance field, specifically acknowledged in the agreement that she fully understood the information provided.

The wife claims on appeal that the agreement was procured through two instances of fraudulent conduct on the husband's part. At the outset, we note that in her submissions below, the wife explicitly disclaimed that her motion was based on fraud. Thus, her current claims of fraud are not properly before us. In any event, they provide no basis to set aside the agreement. The first alleged fraud centers around the apartment the husband was obligated to purchase for the wife. During negotiations, the parties agreed that the purchase price for the apartment would not exceed 120% of the mean price of a comparable apartment. Due to an apparent typographical error, however, the agreement

mistakenly stated "20%" instead of "120%."

The wife states that she did not notice this error prior to execution of the agreement, but alleges that the husband did and he failed to correct it. The record, however, contains no evidentiary support for these allegations. The husband readily admits that the parties had agreed on the 120% figure and that the agreement contains an error, and acknowledges his present obligation to purchase an apartment within that price range. It is hard to understand how the husband's alleged conduct would amount to fraud in light of the wife's acknowledgment that she did not even notice the error (*see Lemle v Lemle*, 92 AD3d 494, 499 [1st Dept 2012] ["an essential element of fraud is justifiable reliance upon the representations made"]). In any event, even if the husband failed to correct the error before the agreement was signed, the equitable remedy would not be to invalidate the entire agreement, but to require the husband to abide by the 120% cost cap, an obligation he fully accepts.[3]

The wife fares no better with her second claim of alleged fraud, which centers around the inheritance rights contained in the agreement. The agreement provides that, in the event of

[3] Although not in record on appeal, subsequent motion practice in this Court reveals that, in compliance with his obligation under the agreement, the husband purchased an $8.7 million apartment for the wife and children to live in.

divorce, the children of the marriage will receive a portion of the husband's estate, either outright or in trust. The wife alleges that the husband deceptively included the "in trust" language contrary to the parties' prior understanding. However, the record does not support the wife's contention that the parties had agreed that the children would receive their inheritance outright. In fact, the parties' communications on this point addressed only the amount of the inheritance, and not the form in which it would be conveyed.[4] Moreover, it is difficult to understand how this would constitute grounds sufficient to invalidate the agreement. The provision only governs the husband's financial obligations to his children in the event of his death, and does not involve any issues related to the wife's financial welfare if the marriage is dissolved during his lifetime.

There is no merit to the wife's contention that the husband's behavior during her two pregnancies warrants setting aside the agreement. According to the wife, the husband told her that he would not enter into a prenuptial agreement, and thus

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[4] The wife also complains that her counsel was ineffective for failing to notice both the trust provision and the error about the cost of the apartment. Even if true, that would have no bearing on whether the husband engaged in overreaching. We also reiterate that the wife ignored her counsel's advice not to sign the agreement.

would not marry her, until after the birth of their first child. The wife further alleges that the husband told her that he would end their relationship if she terminated her second pregnancy. This Court has held, however, that similar behavior is insufficient to invalidate a prenuptial agreement. For example, in *Cohen* (93 AD3d at 506), we held that a threat to a pregnant woman to cancel the wedding if she refused to sign the agreement provided no basis to set the agreement aside. Likewise, in *Barocas* (94 AD3d at 551), we declined to invalidate a prenuptial agreement where the wife believed that there would be no wedding if she did not sign the agreement (*see also Weinstein v Weinstein*, 36 AD3d 797, 799 [2d Dept 2007]; *Colello v Colello*, 9 AD3d 855, 858 [4th Dept 2004]). We cannot set aside the agreement here merely because the husband's repeated refusal to marry his then-pregnant fiancee without a prenuptial agreement might be viewed by some as callous. The wife's argument that she had no meaningful choice due to the husband's actions is belied by the fact that she knowingly entered into the agreement against the advice of her counsel (*see Barocas*, 94 AD3d at 552).

Because the circumstances surrounding the execution of the agreement raise no issue of fact as to whether there was overreaching, we need not inquire into whether the terms of the agreement are manifestly unfair (*see Christian*, 42 NY2d at 73

["If the execution of the agreement [is] fair, no further inquiry will be made"]; *Barocas*, 94 AD3d at 551). However, because the dissent addresses this issue, we note that the wife has also failed to make the requisite showing that the agreement's terms are manifestly unfair. Under the agreement, the wife is entitled to, in lieu of equitable distribution, the sum of $300,000, along with interest, for each year of the marriage. Further, the agreement provides that all real property and financial accounts in both parties' names would be equally divided, and other marital property would be divided in proportion to each party's financial contribution to the asset.

With respect to spousal support, the agreement provided the wife with $12,500 per month until the youngest child reached the age of four. Although there was no provision for a regular monthly payment thereafter, the agreement provided the wife with free luxury housing (including maintenance, utilities and other expenses) until the youngest child turns 18, along with free health insurance during that time. And, if the parties had no living children at the time of the divorce, the husband would be obligated, if the marriage lasted 10 years, to purchase an apartment for the wife in her own name. The agreement also ensured that, if the marriage was intact at the time of the husband's death, the wife would receive her elective share of his

estate. Finally, although not inuring to the wife's benefit, the agreement provided inheritance rights for the children.

Viewing the parties' prenuptial agreement in its entirety, it cannot be said that its terms are manifestly unfair. This Court cannot invalidate the agreement merely because the husband has more than enough assets to give the wife additional funds. Although, at the end of the day, a significant financial disparity will exist between the parties to this relatively short marriage, any such inequality is simply not a basis for vitiating their freely-negotiated agreement (*see Barocas*, 94 AD3d at 551 [upholding agreement where wealthier spouse retained essentially all of the assets acquired during the marriage]). The wife bargained for the benefits she would receive in the event of a divorce, and we decline to undo the agreement merely because she may now, in retrospect, view her choices as having been improvidently made (*see Barnes-Levitin v Levitin*, 131 AD3d 987, 988 [2d Dept 2015] ["A[] [prenuptial] agreement will not be overturned merely because, in retrospect, some of its provisions were improvident or one-sided"]; *Herr v Herr*, 97 AD3d 961, 963 [3d Dept 2012], *lv dismissed* 20 NY3d 904 [2012] ["[the wife] was fully aware of the rights she was waiving at the time she signed the agreement and, . . . an agreement will not be set aside simply because a party relinquished more than the law would have

provided"]). Moreover, neither the wife nor the dissent cites to any case in which a premarital agreement has been found to be manifestly unfair where it provides a spouse with the financial benefits the wife is receiving in this case.

Although the dissent concludes that it is premature to rule on the validity of the parties' prenuptial agreement because there are triable issues of fact, it fails to identify any specific facts that would, under the case law, require invalidation of the agreement after a trial. Contrary to the dissent's view, our decision upholding the agreement does not turn on the parties' credibility. Rather, for the purpose of this decision, we accept as true the wife's description of the circumstances underlying the execution of the agreement, and conclude that her claims do not support a finding of overreaching.

The wife's description of herself as being in the "precarious position of negotiating as an unmarried mother," a view impliedly adopted by the dissent, is at odds with the fact that she was represented by experienced matrimonial counsel who negotiated the agreement over an extended period of time. Likewise, the dissent all but ignores the fact that the wife, an educated college graduate, signed the agreement against the express advice of her own counsel. Although the dissent decries

the husband's negotiation style, the fact that he may have modified his initial offers can hardly be seen as overreaching where the wife was represented by counsel, who might have been able to continue negotiations if the wife had followed her advice not to sign the agreement.

In questioning the fairness of the separate property provisions of the agreement, the dissent states that the parties intended the wife to raise the children full-time as a stay-at-home spouse. In fact, the record suggests just the opposite. In the agreement, the wife explicitly acknowledged that in light of her assets, education, employment history, and her rights under the agreement, she is "self-supporting and has sufficient ability to maintain a reasonable and satisfactory standard of living." Further, the husband's maintenance obligations, if the parties did not stay together, remained only so long as there is a child under the age of four. This is a strong indicator that the parties intended the wife to return to the workforce when the children started school.

As noted earlier, the husband is obligated to provide a luxury apartment for the wife and children until the last child reaches the age of majority. The dissent finds this provision manifestly unfair because the wife could lose the apartment in the event she decided to give full custody to the husband such

that the children would no longer live with her even part of the time. However, the parties voluntarily settled the issue of legal custody and parenting time, and agreed that the wife would have primary residential custody of the children. The dissent engages in pure speculation by suggesting that the parties plan to change their current custody arrangement, or that the children will not be residing at all with the wife going forward.[5]

We do not share the dissent's view that the terms of a prenuptial agreement are manifestly unfair merely because a party may enjoy a less lavish lifestyle upon divorce than existed during the marriage. It appears that the dissent presupposes that the purpose of a prenuptial agreement is to equitably divide up the parties' assets, and to maintain the marital standard of living for the lesser-monied spouse. That, however, is the purpose of the statutory scheme (*see* Domestic Relations Law § 236 [B][5], [6]), and is not the reason why most prospective spouses enter into prenuptial agreements. We also disagree with the dissent's position that a prenuptial agreement can be set aside if its terms do not match "the degree of economic

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[5] Contrary to the dissent's view, the fact that the wife oversaw the renovations of the apartment in which the parties ultimately resided has no bearing on the parties' intent at the time the prenuptial agreement was signed. Nor does it call into question the validity of the clear and unequivocal separate property provisions of the agreement.

interdependence" the parties shared during the marriage. That standard, which the dissent does not support with any case law, could result in the undoing of the vast majority of marital agreements. The dissent fails to recognize that a party may have legitimate reasons for not wanting to give assets to an ex-spouse, regardless of how the couple managed their money during the marriage. For example, in many cases, prenuptial agreements are used to preserve assets so that they are available for children of the current, or a former, marriage.

It goes without saying that premarital agreements often involve substantial financial disparities between the parties, with the more-monied party seeking to protect his or her assets and business interests. If the unequal division of assets, or the failure to maintain the marital lifestyle, were to be the test used to determine validity, it would inevitably result in the setting aside of many, if not most, prenuptial agreements. The criteria focused on by the dissent include some of the statutory factors used to determine equitable distribution and maintenance awards in a contested divorce proceeding, but here the parties decided not to avail themselves of that statutory scheme. We recognize that there comes a point when the imbalance is so extreme that it is appropriate for equity to intervene. This, however, is not such a case.

Contrary to the dissent's implication, the Court of Appeals' decision in *Christian* (42 NY2d at 63) does not hold that a prenuptial agreement is manifestly unfair when it does not result in a continuation of the marital standard of living. According to the dissent, that test finds support in *Ducas v Guggenheimer* (90 Misc 191 [Sup Ct, NY County 1915], *affd sub nom. Ducas v Ducas*, 173 App Div 884 [1st Dept 1916]), a trial level decision from 1915. Although *Christian* cited to *Ducas*, it did so for an entirely different proposition with which we agree — that agreements between spouses involve a fiduciary relationship requiring the utmost of good faith. In no way does *Christian* support the dissent's position that prenuptial agreements are manifestly unfair merely because there is an appreciable reduction in the marital standard of living or a significant disparity in the allocation of assets.

Petracca v Petracca (101 AD3d 695 [2d Dept 2012]), a case cited by the dissent, is distinguishable on its facts. In *Petracca*, the court set aside a postnuptial agreement where there were gross inaccuracies in the husband's financial disclosures, and the wife had only a few days to review the agreement, did not understand it, and did not have counsel, all factors not present here. Although the court also discussed the disparity in the parties' net worth, it did not establish any bright-line rule

mandating the invalidation of marital contracts based solely on financial imbalances. We note too that, unlike here, there is no indication that the wife in *Petracca* was entitled to distributive payments or free housing and health insurance.

Matter of Greiff (92 NY2d at 341), relied upon by the wife, does not require a different result. In *Greiff*, the Court of Appeals, while affirming the principle that prenuptial agreements are not subject to any special evidentiary burdens, recognized that in "exceptional circumstances," the special relationship between engaged parties may shift the burden of persuasion to the proponent of the agreement to show freedom from overreaching (*id.* at 343, 344). In order for the burden to shift, however, the spouse contesting a prenuptial agreement must establish "a fact-based, particularized inequality" and must demonstrate that the "premarital relationship between the contracting individuals manifested 'probable' undue and unfair advantage" (92 NY2d at 343, 346). Here, no burden shifting is warranted because, for the reasons already discussed, the wife has failed to show any such inequality or undue and unfair advantage (*see Matter of Barabash*, 84 AD3d 1363, 1364 [2d Dept 2011]; *Strong*, 48 AD3d at 232; *Matter of Greiff*, 262 AD2d 320, 321 [2d Dept 1999], *lv denied* 93 NY2d 817 [1999]).

We disagree with the concurrence's view that because the

parties were not married at the time the agreement was executed, the manifest unfairness standard set forth in *Christian* (42 NY2d at 63) has no applicability here. In *Matter of Greiff* (92 NY2d at 341), the Court of Appeals spoke of "the unique character of the inchoate bond between prospective spouses -- a relationship by its nature permeated with trust, confidence, honesty and reliance" (*id.* at 347; *see also Rosenzweig v Givens*, 13 NY3d 774, 775 [2009] [recognizing that a couple can have a fiduciary relationship before marriage]; *Robinson v Day*, 103 AD3d 584, 585 [1st Dept 2013] [romantic companions of 14 years were in confidential relationship of trust and confidence]; *Colello v Colello*, 9 AD3d 855, 858-859 [4th Dept 2004] ["[the] defendant had a fiduciary relationship with [the] plaintiff both as her fiancé and as her spouse"]).

Recognizing the nature of this special relationship, courts have specifically applied *Christian*'s manifest unfairness standard to prenuptial agreements (*see e.g. Lombardi v Lombardi*, 127 AD3d 1038, 1041 [2d Dept 2015]; *Bibeau v Sudick*, 122 AD3d 652, 654-655 [2d Dept 2014]). Here, the undisputed facts show that the parties shared a fiduciary relationship. At the time the prenuptial agreement was entered into, the parties were engaged, had been living together for more than three years, had

a child together, and were expecting another.[6] Thus, their relationship was "permeated with trust, confidence, honesty and reliance" (*Greiff*, 92 NY2d at 347) sufficient to make them fiduciaries.[7] We do not share the concurrence's belief that the husband's negotiating style and his behavior during the engagement negates the existence of a fiduciary relationship between the parties. That position would make it difficult to ever find a fiduciary relationship between couples with significant assets whose marital agreements are sharply negotiated.

On his appeal, the husband challenges the motion court's decision to order a trial on the validity of the agreement's maintenance provisions. Domestic Relations Law § 236(B)(3) provides that a prenuptial agreement may include provisions governing maintenance provided they "were fair and reasonable at the time of the making of the agreement and are not

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[6] We need not decide whether a fiduciary relationship would exist where an affianced couple had little or no relationship prior to executing a prenuptial agreement.

[7] The concurrence also questions the significance of *Christian* in light of the subsequent enactment of the Equitable Distribution Law. This argument was not raised by either party on appeal. Moreover, trial and appellate courts throughout the State have consistently applied *Christian* to marital agreements entered into after the Equitable Distribution Law became effective.

unconscionable at the time of entry of final judgment" (Domestic Relations Law § 236[B][3][3]; *see Anonymous*, 123 AD3d at 584).[8] For the reasons already discussed, and as the parties explicitly acknowledged in the agreement, the maintenance provisions here were neither unfair nor unreasonable at the time the agreement was entered into (*see Barocas*, 94 AD3d at 552 [in light of the wife's knowing and voluntary execution of prenuptial agreement with benefit of counsel, waiver of spousal support was not unfair or unreasonable at time agreement signed]; *Markovitz v Markovitz*, 29 AD3d 460, 461 [1st Dept 2006] [agreement upheld where, inter alia, the parties represented that they considered the agreement fair]).

Nor are the maintenance provisions unconscionable as applied to the present circumstances. An agreement will be viewed as unconscionable only "if the inequality is so strong and manifest as to shock the conscience and confound the judgment of any [person] of common sense" (*McCaughey v McCaughey*, 205 AD2d 330, 331 [1st Dept 1994] [internal quotation marks omitted]; *see also Christian*, 42 NY2d at 71 [an unconscionable agreement is one

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[8] That statutory provision also makes maintenance provisions subject to the requirements of section 5-311 of the General Obligations Law, which prohibits agreements that relieve either spouse of the support obligation such that the other is likely to become a public charge. Here, there is no claim that the wife runs the risk of becoming a public charge.

which no person in his or her senses and not under delusion would make on the one hand, and which no honest and fair person would accept on the other]). Judged by these standards, no unconscionability exists. Although the wife is not currently entitled to a specific monthly maintenance payment, she effectively is receiving nontaxable maintenance by way of other benefits provided for in the agreement. She gets a shelter allowance until the children reach majority (i.e., for the next 10 years), in the form of rent-free, expense-free luxury housing, and she is also entitled to, during that same period, free health insurance.

Moreover, under the agreement, the wife, after only five years of marriage, will receive a monetary distribution from the investment account set up and funded by the husband. The value of that account, as of January 2013, was approximately $1.6 million. This amount is in addition to the wife's listed net worth, as of that same date, of approximately $1.5 million. Thus, the wife will have at her disposal at least $3.1 million in assets, with no housing or health insurance costs, because those costs are being paid by the husband. In addition, although no final child support order had been issued at the time this appeal was heard, the husband has proposed paying $9,000 per month in child support, plus 100% of reasonable child care, health

insurance, unreimbursed medical, dental and optical expenses, private school, Hebrew school, tutoring, summer camp, extracurricular activities and college tuition, room and board.

In view of the wife's current financial circumstances, along with the $1.6 million and other benefits she will be receiving in the future from the husband, it cannot be said that the agreement's maintenance provisions shock the conscience. The wife is only 37 years old, and has an economics degree from the University of Pennsylvania and prior experience in real estate and finance. In the agreement, she explicitly acknowledged that in light of, inter alia, her education and employment history, she is "self-supporting and has sufficient ability to maintain a reasonable and satisfactory standard of living." Thus, there is no reason why she cannot in the future reenter the workforce to supplement the benefits she will receive under the agreement.

The husband's appeal also challenges the court's award of interim counsel fees to the wife. In a motion sequence separate from the one involving the prenuptial agreement, the husband sought exclusive occupancy of the marital residence, an order setting the amount of his child support obligation, and a protective order limiting further discovery. The wife opposed the motion and cross-moved for exclusive occupancy, temporary child support and an award of interim counsel fees. The

affidavits in support submitted by the wife and her counsel made clear that the fee request was not made in connection with the litigation involving the validity of the prenuptial agreement. Rather, the wife sought fees of $30,000 for litigating the current motion sequence as well as $20,000 for unspecified additional legal work purportedly unrelated to issues involving the prenuptial agreement. As relevant here, the motion court granted the wife's motion and awarded interim counsel fees in the amount of $50,000.[9]

We reject the husband's contention that the wife's waiver in the prenuptial agreement of interim and final counsel fees bars any fee award. On appeal, the wife maintains that she is entitled to these counsel fees, which she says were awarded for litigating child-related matters. Because the prenuptial agreement does not cover child-related matters, the waiver does not preclude an award of counsel fees connected to litigating the child support issues raised in the motion (*see Vinik v Lee*, 96 AD3d 522, 523 [1st Dept 2012]). Likewise, legal fees related to the exclusive occupancy aspect of the motion are recoverable because the heart of that dispute is the children's best

[9] The parties do not challenge on this appeal the court's determination of the child support, exclusive occupancy or discovery issues raised in the motion.

interests, and the place where the children will be living, which are child-related matters. However, because it is not clear what portion of the $50,000 sought is connected to child-related issues, the matter is remanded for further development of the record as to how much of the fee request involves those issues.[10]

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

Accordingly, the order of the Supreme Court, New York County (Ellen Gesmer, J.), entered October 31, 2013, which, to the extent appealed from as limited by the briefs, denied defendant wife's motion for partial summary judgment on the first counterclaim, granted plaintiff husband's cross motion for partial summary judgment dismissing the first and third counterclaims and denied the cross motion to the extent it sought dismissal of the second counterclaim, and granted defendant's cross motion for interim counsel fees, should be modified, on the law and the facts, to deny the cross motion to dismiss the first and third counterclaims, to declare that the parties' prenuptial agreement is valid and enforceable, that the agreement's

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[10] Because our decision in *Anonymous* (123 AD3d at 581) was issued after this case was argued, the parties have not addressed the question of whether, despite the waiver, counsel fees for non-child-related matters can be awarded "as justice requires" (*id.* at 585).

maintenance provisions were fair as of the date of execution and are not currently unconscionable, and that the agreement's property distribution provisions were fair as of the date of execution, to deny the cross motion for interim counsel fees, to vacate the award of such fees, to remand the matter for proceedings consistent herewith, and otherwise affirmed, without costs.

All concur except Saxe, J. who concurs in a separate Opinion, and Feinman, J. who dissents in an Opinion.

SAXE, J. (concurring)

I agree with the result reached by the majority, and with much of the reasoning of that opinion. I write separately to suggest that the standard enunciated in *Christian v Christian* (42 NY2d 63 [1977]), relied on by both the majority and the dissent to assess the enforceability of the parties' prenuptial agreement, is not the correct analytical framework to use when considering prenuptial agreements, especially their property division provisions. Property division provisions of prenuptial agreements may be set aside only on grounds that would warrant the invalidation of any contract.

Facts

The drawn-out process by which Mr. Gottlieb proposed and re-negotiated the prenuptial agreement at issue here is fully laid out in my colleagues' writings, and need not be reiterated at length. It is enough to say that after first insisting on a prenuptial agreement, he then repeatedly reduced his offered terms, then declined to enter into an agreement while Ms. Lumiere Gottlieb was pregnant with the parties' first child, and only finally acceded to the execution of an agreement when Ms. Lumiere Gottlieb was pregnant with their second child.

The final agreement, executed by Ms. Lumiere Gottlieb against her attorney's advice, listed Ms. Lumiere Gottlieb's net

worth as $610,817 and Mr. Gottlieb's net worth as $103,894,476. It limited the property to be treated as marital property as property titled in both parties' names as joint tenants or tenants by the entirety, along with any property agreed in writing by the parties to be marital property, and defined all other property as separate property, including income earned during the marriage, business interests, and the two apartments Mr. Gottlieb purchased before the marriage. Ms. Lumiere Gottlieb waived any interest in the increase in the value of Mr. Gottlieb's separate property, along with any rights under the Equitable Distribution Law. The only property distribution provided for by the agreement was that Ms. Lumiere Gottlieb would be entitled to payment of $300,000 for each year of the marriage, plus interest compounded annually at the rate of five percent. Pursuant to the agreement, Mr. Gottlieb was required to deposit sums into an account for this purpose during the marriage. The current value of that account is approximately $1,586,219.

Ms. Lumiere Gottlieb also waived spousal maintenance, except that if any minor children resided with Ms. Lumiere Gottlieb at the time of divorce, during the period in which a child of the marriage was under four years old Mr. Gottlieb would pay spousal maintenance of $12,500 per month, and except that as long as a minor child resided with her, Mr. Gottlieb agreed to pay the

carrying costs and utilities for an apartment (of a specified size, location and type) for Ms. Lumiere Gottlieb until the youngest child attained the age of majority, with all such payments to be treated as child support. Mr. Gottlieb also agreed to provide health insurance for Ms. Lumiere Gottlieb until the emancipation of the parties' children.

Mr. Gottlieb commenced this action for divorce in 2012, some five years after their marriage. In her answer, Ms. Lumiere Gottlieb interposed four counterclaims, the first seeking to declare the entire prenuptial agreement unenforceable, the second to set aide the maintenance provisions and the third to set aside the property distribution provisions. Her fourth counterclaim concerned an error in a provision about the price of the apartment Mr. Gottlieb agreed to purchase for her and the children.

Ms. Lumiere Gottlieb moved, and Mr. Gottlieb cross-moved, for partial summary judgment on Ms. Lumiere Gottlieb's counterclaims. Ms. Lumiere Gottlieb contended that as a matter of law, the prenuptial agreement was unenforceable as the product of overreaching causing manifest unfairness.

The motion court dismissed Ms. Lumiere Gottlieb's first and third counterclaims, but denied dismissal of her second cause of action, which challenged the enforceability of the agreement's

maintenance provisions. The majority now holds that the dismissal of the first and third counterclaims was correct, and that the second counterclaim should have been dismissed as well. I agree, although for other reasons. The dissent adopts Ms. Lumiere Gottlieb's suggestion that a prenuptial agreement may be set aside if it is the product of overreaching causing manifest unfairness, and would require a hearing to determine whether to set aside the agreement based on that standard. I strongly take issue with dissent's analysis and its conclusion.

Discussion

Both the majority and the dissent quote *Christian v Christian* for the proposition that "[t]o warrant equity's intervention, no actual fraud need be shown, for relief will be granted if the settlement is manifestly unfair to a spouse because of the other's overreaching" (*id.* at 72), relying on that statement to hold that prenuptial agreements may be set aside (1) if they are the product of "overreaching" and, if so, (2) if they are "manifestly unfair." Unlike my colleagues, I submit that it is not appropriate to look to *Christian* for the current standard for judging the enforceability of prenuptial agreements' property division provisions.

There are two important points to recognize about the *Christian* decision. First, *Christian* was issued in 1977, so its

analysis of this issue must, of necessity, be informed by the provisions of the subsequent Equitable Distribution Law, enacted in 1980, which provides its own approach for judging the enforceability of marital agreement provisions. While the dissent repeatedly characterizes my position as advocating that the statute "supersedes" the *Christian* ruling, I simply point out that instead of automatically applying the *Christian* standard, we should recognize that in Domestic Relations Law § 236(B)(3) — enacted after *Christian* was decided — the legislature explicitly and implicitly provided standards by which to determine the enforceability of the various components of prenuptial agreements.

Second, *Christian* was concerned only with separation agreements between spouses, and its reasoning applied only to married couples who enter into separation agreements; it was not intended to apply to not-yet-married, affianced couples, and there is scant support for extending its application in that way.

Domestic Relations Law § 236(B)(3) creates a different standard than the rule stated in *Christian*. In contrast to *Christian*'s requirement of special scrutiny for separation agreements between a married couple, the statute explicitly authorizes and approves of agreements made both before and during a marriage, setting a baseline by which such agreements are

deemed valid and enforceable as long as they are "in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded" (*id.*).

Importantly, while section 236(B)(3) requires additional scrutiny for particular types of provisions in marital agreements, specifically, maintenance and child-related provisions, the statute makes no provision at all for heightened scrutiny of property division aspects of marital agreements. By imposing a specified heightened standard for support provisions, but not affirmatively imposing any such standard for property division provisions, we may infer, through the principle of *expressio unius est exclusio alterius*, that the legislature intended *not* to apply any such heightened standard to property division provisions of marital agreements (*see* McKinney's Cons Laws of NY, Book 1, Statutes § 240).

So, while Domestic Relations Law § 236(B)(3) sets special standards by which to review maintenance and child support provisions of prenuptial agreements, the absence of a heightened standard in the statute for property provisions indicates that a heightened standard should not be applied when judging property provisions. The *Christian* analysis, which looks for overreaching and then manifest unfairness, creates a standard similar to the § 236(B)(3) standard for judging maintenance provisions, with

Christian's "manifest unfairness" component approximating the "fair and reasonable" component of the statute's maintenance standard, while *Christian*'s "overreaching" component approximates the (procedural) "unconscionability" prong of the statute's standard for judging maintenance provisions. Since *Christian*'s analysis imposes a heightened standard, while § 236(B)(3) requires that property provisions be judged by ordinary standards for contract enforcement, the use of *Christian*'s standards for judging property provisions is incorrect.

In insisting that the *Christian* standard must be employed here, the dissent relies on *Goldman v Goldman* (118 AD2d 498 [1st Dept 1986]), which does not provide any support for its point. *Goldman* involved an action to set aside a reconciliation agreement, which is not an agreement to which Domestic Relations Law § 236(B)(3) applies, so its facts were virtually the converse of the situation presented here, and its use of the analysis provided by *Christian v Christian* was therefore uniquely appropriate there, as opposed to the circumstances of this appeal.

Even if the *Christian* pronouncement survived the Equitable Distribution Law, it would have no applicability to prenuptial agreements. It was the spousal relationship of the parties that prompted the *Christian* Court to explain that "separation

agreements subjected to attack are tested carefully" (42 NY2d at 65) and that "a separation agreement may be set aside on grounds that would be insufficient to vitiate an ordinary contract" (*id.* at 72). In support of its premise regarding the special treatment of separation agreements, it quoted a 1889 Court of Appeals decision for the proposition that "'[a] court of equity … inquires whether the contract [between husband and wife] was just and fair, and equitably ought to be enforced, and administers relief where both the contract and the circumstances require it'" (*id.* at 65, quoting *Hendricks v Isaacs*, 117 NY 411, 417 [1889]).

Indeed, when the Court of Appeals has discussed the *Christian* decision, it has explained that "because of the *fiduciary relationship between husband and wife*, separation agreements generally are closely scrutinized by the courts, and such agreements are more readily set aside in equity under circumstances that would be insufficient to nullify an ordinary contract" (*Levine v Levine*, 56 NY2d 42, 47 [1982] [emphasis added], citing *Christian v Christian*, 42 NY2d at 72, and *McGahee v Kennedy*, 48 NY2d 832, 834 [1979]). Similarly, cases of this and other Departments applying *Christian*'s standard for setting aside marital agreements on the ground that they are "manifestly unfair to a spouse because of the other's overreaching" have most often involved agreements between spouses (*see e.g. Petracca v*

Petracca, 101 AD3d 695, 698 [2d Dept 2012] [internal quotation marks omitted]; *Kleinman v Kleinman*, 289 AD2d 18 [1st Dept 2001], *lv denied* 98 NY2d 610 [2002]; *Gibson v Gibson*, 284 AD2d 908 [4th Dept 2001]).

It is the fiduciary nature of the marital relationship that has prompted the law to apply intense scrutiny to separation agreements between married couples. In contrast, the circumstances of unmarried parties who are negotiating prenuptial agreements are virtually the converse of a marital relationship. Typically, a monied prospective spouse, like Mr. Gottlieb here, will refuse to proceed with the marriage unless the non-monied prospective spouse accedes to the proposed terms; that is, the parties will never marry, and therefore never undertake the fiduciary obligations that status entails, unless and until the proposed agreement is signed.

The distinction between how the law treats the two situations is illustrated by the very fact that despite the inherent duress of a threat not to marry unless the proposed agreement is accepted, such a threat does not invalidate a prenuptial agreement (*see Barocas v Barocas*, 94 AD3d 551 [1st Dept 2012], *appeal dismissed* 19 NY3d 993 [2012]; *Cohen v Cohen*, 93 AD3d 506 [1st Dept 2012]).

The differentiation between married spouses and non-married

couples for purposes of imposing a fiduciary duty is consistent with the law's general approach to marriage. As the U.S. Supreme Court recognized in *Obergefell v Hodges* (576 US __, 135 S Ct 2584 [2015]), marriage fundamentally alters the legal status of the couple, creating new legal rights and obligations that are not present for a non-married couple. Among those rights and obligations is the obligation to give, and the right to receive, the utmost good faith, fairness and loyalty that is the essence of a fiduciary duty.

My colleagues' view that established law imposes the same fiduciary duty owed in marital relationships on engaged couples entering into prenuptial agreements is not well founded. I would not rely on *Matter of Greiff* (92 NY2d 341 [1998]) as does the majority writer, because it is an explicitly narrow ruling; it does not support a broad extension to prenuptial agreements generally of the rule imposing a fiduciary duty on separation agreements between spouses. Unlike *Greiff*, there is nothing extraordinary about Ms. Lumiere Gottlieb's challenge to the prenuptial agreement at issue here. And, while there are circumstances in which a non-married romantic relationship may correspond closely enough to a married relationship to make imposition of a fiduciary duty appropriate (*see e.g. Rosenzweig v Givens*, 13 NY3d 774, 775 [2009]; *Robinson v Day*, 103 AD3d 584,

585 [1st Dept 2013]), in my view the relationship between these parties at the time they entered into the prenuptial agreement does not present such a situation.

A rule that a fiduciary duty arises by virtue of a couple's engagement would clearly be unworkable; the mere label and plan to become married in the future, is not enough in itself to create a duty of loyalty. And, barring such a bright-line rule, it would be difficult to pinpoint the moment in time, or particular circumstances that would cause a fiduciary duty to spring into being between fiancés. While some might suggest that having children together should be viewed as a viable basis for imposing a fiduciary duty, it is important to note that the law limits the obligations of unmarried parents to the support and care of the children, and does not impose a duty of support and care toward the partner. By the same token, the law should not be extended to impose a fiduciary duty solely by virtue of a couple's having children together.

A fiduciary relationship "may arise where a bond of trust and confidence exists between the parties and, hence, the defendant must be charged with an obligation not to abuse the trust and confidence placed in him or her by the plaintiff" (*Rocchio v Biondi*, 40 AD3d 615, 616 [2d Dept 2007]). The essence of a fiduciary relationship is the expectation that the fiduciary

will, and should, be guided by the interests of the other party. No such expectation could have reasonably arisen here.

From nearly the outset of their relationship, Mr. Gottlieb indicated to his fiancée that he was not prepared to be generous with her in any way with respect to the emoluments of marital distribution — that marriage to him required her to accept a hard bargain, given his considerable wealth. But he laid these cards on the table, and, in fact, when the prenuptial agreement was finally negotiated and ready for execution, Ms. Lumiere's counsel urged her not to sign it — advice she refused to take. Ms. Lumiere could have had no expectation that Mr. Gottlieb was protecting her interests as his fiancée; his treatment of her demonstrated the converse, the complete absence of a relationship of trust and confidence.[1]

The dissent suggests that the court should provide legal protection to a party who from the beginning of her relationship with her future spouse refused to acknowledge what was always there to be seen — that her fiancé was never going to meet the

[1] It is not merely Mr. Gottlieb's negotiating style that negates the existence of a fiduciary relationship between the parties at the time they entered into the agreement. Rather, it is the entire constellation of events in the premarital life of this couple, as reflected in the record, that overwhelmingly demonstrates that Ms. Lumiere Gottlieb could not reasonably have reposed trust in Mr. Gottlieb when she executed the agreement.

most basic tenet of a fiduciary relationship. Marriage was a business to him, and he let her know that, not in so many words, but by his conduct. The dissent disagrees, asserting that Mr. Gottlieb did not make any such statements in his submissions to the court, and in fact took the position that the agreement provides Ms. Lumiere Gottlieb with a "luxurious and secure life." However, the record strongly supports the inferences I draw, with regard to how Mr. Gottlieb treated his fiancée at the time they entered into the agreement; assertions made by a party in court papers do not disprove those inferences.

Therefore, in a case such as this, when considering property distribution provisions of prenuptial agreements, we must look to the common-law standards for setting aside any type of contract, such as fraud, duress and unconscionability. Under this general common law rule,

> "[p]eople should be entitled to contract on their own terms without the indulgence of paternalism by courts in the alleviation of one side or another from the effects of a bad bargain. Also, they should be permitted to enter into contracts that actually may be unreasonable or which may lead to hardship on one side. It is only where is turns out that one side or the other is to be penalized by the enforcement of the terms of a contract so unconscionable that no decent, fair-minded person would view the ensuing result without being possessed of a profound sense of injustice, that equity will deny the use of its good offices in the enforcement of such unconscionability"

(8 Lord, Williston on Contracts § 18:1 at 8 [4th ed] [internal

quotation marks omitted]).

"[A]n unconscionable contract has been defined as one which is so grossly unreasonable as to be unenforcible because of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party" (*King v Fox*, 7 NY3d 181, 191 [2006]). "A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made -- i.e., some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party" (*Gillman v Chase Manhattan Bank*, 73 NY2d 1, 10 [1988] [internal quotation marks omitted]). The term "unreasonably favorable" is sometimes referred to as "substantive" unconscionability, while the "absence of meaningful choice" is referred to as "procedural" unconscionability (*see* 1 Farnsworth on Contracts § 4.28 at 583 [3d ed 2004]). Generally, both are necessary for unconscionability to be established as grounds to set aside a contract (*Gillman* at 10).

Procedural unconscionability is essentially equivalent to the term "overreaching." Both concepts focus on the process of arriving at the agreement. The definitions of "overreaching" offered by my colleagues here include "the concealment of facts,

misrepresentation or some other form of deception" (*Stawski v Stawski*, 43 AD3d 776, 777 [1st Dept 2007]) and "cunning, cheating, [and] sharp practice" (*see Matter of Baruch*, 205 Misc 1122, 1124 [Surr Ct, Suffolk County 1954], *affd* 286 App Div 869 [2d Dept 1955]).

Of course, here, Ms. Lumiere Gottlieb explicitly conceded when moving for summary judgment that she was not claiming fraud, duress, or unconscionability. Therefore, her challenge to the property division provisions of the prenuptial agreement must be rejected without further discussion.

In any event, like the majority, I reject any suggestion of overreaching or procedural unconscionability here, because as this Court observed in *Barocas v Barocas* (94 AD3d at 552), "meaningful choice is not an issue inasmuch as defendant knowingly entered into the agreement against the advice of counsel." In concluding otherwise, the dissent employs terms such as "shrewd manipulations" (citing *Ducas v Guggenheimer*, 90 Misc 191, 199 [Sup Ct NY County 1915], *affd sub nom. Ducas v Ducas*, 173 App Div 884 [1st Dept 1916]) and exploitation of trust. However, there was no trickery or subterfuge involved here; Mr. Gottlieb's negotiating strategy was entirely clear and apparent. Ms. Lumiere Gottlieb knew what she was getting into, and was advised not to, but ultimately decided to accept the

offered terms because she wanted to get married. Willingness to enter into an agreement known to be one-sided, against the advice of counsel, because of the desire to get married, cannot establish the type of "absence of meaningful choice" that constitutes overreaching or procedural unconscionability (*see Strong v Dubin*, 48 AD3d 232, 232-233 [1st Dept 2008]).

In the absence of a showing of procedural unconscionability or overreaching in the formation of the prenuptial agreement, even under the *Christian* standard there is no basis to go on to examine the agreement for "manifest unfairness," as the dissent does at length.

Even if further examination were appropriate, that examination should concern whether the terms of the agreement were substantively unconscionable. This would entail considering whether the financial terms were so extreme and one-sided as to appear unconscionable (*see Gillman*, 73 NY2d at 12; 1 Corbin on Contracts, § 128). While a one-sided agreement leaving the parties with substantial disparities of wealth may strike some observers as unfair, that does not make it substantively unconscionable, since the facts were disclosed at the time the parties entered into the agreement (*see Smith v Walsh-Smith*, 66 AD3d 534, 535 [1st Dept 2009], *lv denied* 14 NY3d 704 [2010]), and particularly since Ms. Lumiere Gottlieb is not being left

destitute.

It is possible that the use in *Christian* of the concepts of "overreaching" and "manifest unfairness" may simply have been new terminology essentially recapitulating the concepts of procedural and substantive unconscionability. However, the dissent's discussion expands substantially beyond considerations of substantive unconscionability, emphasizing the word "fairness" in the term "manifest unfairness" to suggest that the enforceability of a prenuptial agreement may be addressed by reference to the concept of adequacy, and by consideration of the marital standard of living.

This turns the law on its head. Indeed, if most prenuptial agreements were to be examined by the standards proposed by the dissent, most if not all of them would be found manifestly unfair. In general, the purpose of such agreements is not to achieve fairness, but to protect the assets of the monied party from being turned over to the other, and to strictly limit what the non-monied spouse will receive in the event of a divorce. In particular, such agreements are geared toward avoiding any claim of entitlement to a distributive award or spousal support in proportion to the parties' standard of living during the marriage. The law imposes minimum requirements for certain types of financial provisions, but even accepting the applicability of

the *Christian* standard, and even assuming there were a question of fact as to whether there was overreaching here, the question would not be whether the amounts being received by the non-monied spouse under the agreement approximates the parties' standard of living during the marriage. The "manifest unfairness" standard is not met by a failure to provide for an approximation of the marital standard of living after a divorce. If it did (assuming *Christian*'s applicability), the very purpose of prenuptial agreements would be eviscerated. There would be no reason to opt out of the Equitable Distribution Law if the very same considerations used to enforce the statute were applied in the event the parties opted out of the statute.

There is no dispute that the maintenance provisions of the parties' agreement must be judged by the standard expressed in Domestic Relations Law § 236(B)(3), which only allows enforcement of maintenance provisions "provided that such terms were fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final judgment." I agree with the majority that as a matter of law Ms. Lumiere Gottlieb failed to satisfy that standard. Ms. Lumiere Gottlieb's waiver of spousal support was not unfair or unreasonable at the time she signed the agreement. She has a degree in economics, and has been employed in finance; while her absence from the field while

the children were young may impact her job search, she certainly has the ability to ultimately be self-supporting. Nor is that waiver unconscionable inasmuch as she will receive approximately $1.5 million, as well as an all-expenses-paid apartment up until the couple's children reach the age of 18.

In conclusion, I believe that coursing through the dissent is a not-so-veiled hostility to prenuptial agreements. All prenuptial agreements are in essence one-sided, and may seem unfair to those who believe fairness must be the guiding principal in financial distribution resulting from divorce. But the law gives parties the right to opt out of the Equitable Distribution Law and to order their own affairs. While the law still provides certain minimum standards to protect non-monied parties who sign off on opting out in order to make their own arrangements, none of those protections offer economic recompense measured by the marital standard of living; imposing such a standard would eviscerate the right to opt out. One wonders, after reading our dissenting colleague's opus, whether prenuptial agreements should now be relegated to the dust bin.

FEINMAN, J. (dissenting)

Resolution of this appeal and cross appeal requires us first to determine whether it is appropriate to decide this dispute on summary judgment, and second to clarify the difference between the defenses of "unconscionability" and "manifest unfairness." In this proceeding, each party to this marriage moved for partial summary judgment: plaintiff argued that the prenuptial agreement in question should be enforced as written; defendant argued that the agreement should be declared unenforceable because, among other reasons, it was the product of overreaching and is "manifestly unfair."

In the order appealed from, the motion court dismissed defendant's first and third counterclaims, which challenged the agreement as a whole and the property distribution provisions in particular, because it found "no dispute over material facts." However, the motion court ordered a trial on the second counterclaim, which challenged the maintenance waiver, on the ground that "not enough facts [had been] presented" to grant either party summary judgment. All three counterclaims, however, turn on the same set of facts, and in order to resolve these three counterclaims in a coherent manner, this Court must first determine whether any material issues of fact are in dispute.

I agree with the majority that all three counterclaims need

to be decided on the same facts, but I disagree with its assessment that there are no triable issues at all. While it is certainly possible to cast defendant as impetuous and the negotiations as sober and deliberate, as the majority does, there is a sufficiently compelling alternative reading of the record to warrant a trial on the circumstances surrounding the formation of the prenuptial agreement and whether its enforcement is permissible. By summarily deciding this dispute based on the extant record, there is no real opportunity to evaluate whether any overreaching occurred during the negotiations. The negotiations contained several instances of highly questionable conduct on the part of plaintiff, and given the duty to negotiate marital agreements with the "utmost of good faith" (*Christian v Christian*, 42 NY2d 63, 72 [1977]), we should not be so quick to excuse such conduct as simply "callous." In addition to plaintiff's conduct during the negotiations, the agreement also contains many troubling terms. On the surface, the agreement provides defendant with a handsome settlement estimated at $1.6 million, plus other benefits. However, the amount of the settlement is only part of the story, and a review of the agreement reveals numerous difficulties that could well support a finding of overreaching and manifest unfairness.

As a threshold matter, we must first resolve whether any

overreaching has occurred in the execution of this agreement, and if so, whether the agreement is manifestly unfair as a result. The record does not offer a plain and clear answer to this question, or to whether the maintenance waiver is enforceable, and this case should not be disposed of summarily. Accordingly, I would deny summary judgment and remand the matter for trial so that the court may evaluate the credibility of the parties and decide all three counterclaims consistently and coherently on a more fully developed record.

The Parties

Plaintiff, now 44, is the founder, Chief Investment Officer, and majority shareholder of a biotechnology hedge fund, Visium Asset Management, with an estimated $3.8 billion of funds under management. He graduated from Brown University with a B.A. in economics and earned a medical degree from New York University. After completing an internship in internal medicine, he pursued a career in finance and worked at three investment firms before founding his hedge fund in 2005. At the time he filed for divorce in 2011, plaintiff earned $54 million in income, and he reported a net worth of $188 million in 2013.

Defendant, now 37, is the full-time caregiver of the parties' two young children, one of whom has special needs. She has been out of the workforce since 2007. She received a B.A. in

economics from the University of Pennsylvania and worked at an internet marketing company for one year and then as an analyst at a financial services firm for two years. She later obtained a real estate license, earning commissions on a handful of transactions, and then pursued a teaching certificate in yoga. Defendant is generally in good health but has an autoimmune disorder and suffers from anxiety, depression, and attention deficit disorder. In 2013, defendant earned no income and reported a net worth of $1.5 million.

Background

In September 2003, the parties were introduced at defendant's 25th birthday party and started dating in December of that year. They soon began living together, and after a brief hiatus, they resumed their relationship in November 2004 with the intention of marrying. As discussions of marriage ensued, plaintiff indicated he would not marry without a prenuptial agreement. Defendant did not object, and the parties began discussing the parameters of an agreement based on preliminary terms proposed by plaintiff. The parties later became engaged in September 2005 but did so without an agreement.

One month after the engagement, defendant learned she was pregnant with the parties' first child and told plaintiff she did not want to have children until the parties were married. In

response, plaintiff assured defendant that it would not be necessary to terminate the pregnancy because "there was no question" the parties were going to marry, and sign an agreement, by the time the baby was born.

However, after learning that defendant was pregnant, plaintiff modified his proposal and made defendant a new, and lower, offer. After some discussion, defendant accepted. But this reduction by plaintiff was only the first of many more reductions to come, and each time defendant accepted a new lower offer, plaintiff would lower his offer again and ask defendant to agree to his latest terms. As this pattern repeated itself and the baby's delivery date neared, defendant suggested that the parties separately retain counsel and arranged for the parties to jointly see a licensed clinical social worker. The counseling, however, did not help and the negotiations continued to stall following delays caused by plaintiff and his attorney. Then, when defendant was in the third trimester of the pregnancy, plaintiff unexpectedly announced he would not sign any agreement until after the baby was born, despite his earlier promise to defendant. As a result, the parties did not marry in time, and their first child was born in May 2006.

Several months after the birth of the first child, defendant asked plaintiff to revisit the agreement so that the parties

could finally marry. Their discussions resumed, and plaintiff continued to reduce his obligations under the agreement, presenting lower and lower offers to defendant, each less favorable than the last. As the months passed, defendant learned she was pregnant with a second child, despite her use of birth control. Once again, defendant told plaintiff she did not want any more children until the parties married. This time, plaintiff strongly opposed the suggestion of an abortion and threatened to end their relationship. Plaintiff then presented defendant with yet another offer - his 12th - with even less favorable terms. Throughout these discussions, defendant never made a full financial disclosure or produced financial statements indicating his income. As the second pregnancy progressed and the negotiations wore on, defendant instructed her attorney to finalize an agreement in order to end "the nightmare," in spite of her attorney's advice. Within three weeks of learning that defendant was pregnant with a second child, the parties finally executed an agreement and were married a week later at the Office of the City Clerk in May 2007.

The Agreement

The terms of the agreement are described in detail by the majority, and on the surface, the provisions hardly seem unfair or problematic. For example, defendant receives, in the event of

divorce, a distributive award of $300,000 for every year of marriage, $150,000 in "spousal support" for every year a child of the parties is under the age of four at the time of divorce, the use of an apartment for as long as a minor child of the parties lives with defendant, and health insurance until the children of the parties are emancipated. However, beneath the surface are many questionable provisions which should be examined at trial.

First, the agreement contains a number of sweeping waivers. Under the agreement, defendant waived her right to spousal maintenance, equitable distribution, counsel fees, interim counsel fees, a distributive award, any pension and retirement benefits, and the right to contest the agreement. The extent of these waivers cannot be overstated. Moreover, the waivers do not even seem to comport with the reality of the party's relationship. Such waivers, especially the waiver to spousal maintenance, "essentially declare[] that [defendant did not need support in case of divorce and would not be] economically disadvantaged by the years of marriage" (Robert Leckey, Contextual Subjects: Family, State, and Relational Theory at 118 [2007]). Here, the parties do not dispute that plaintiff was to be the sole source of family income while defendant raised the children full-time and managed the family's household affairs. In fact, plaintiff actively discouraged defendant from pursuing a

career outside the home, going so far as to call her real estate career "a joke" and mocking that he could earn far more in one day than she could in one year. With defendant as the stay-at-home parent and full-time caregiver of the children, it simply cannot be taken at face value that defendant would not be in need of support in case of divorce and would not be economically disadvantaged by the years of marriage. These waivers are difficult to reconcile with the respective roles of the parties during their relationship, and in light of plaintiff's conduct during the negotiations, there are legitimate concerns that the waivers were procured by overreaching and are manifestly unfair.

Second, the agreement contains an expansive definition of separate property that applies to nearly all property acquired by the parties during their marriage, including income. Even assets that are commingled and pooled during the marriage are to be treated as separate property based on the amount deposited or invested by the party. Moreover, any contribution by a spouse that increases the value of the other's separate property is to be considered a "gift." The agreement also expressly designates the matrimonial home, which plaintiff purchased in his own name for $9.7 million, after the parties had married, as his separate property. While this expansive separate property provision suggests that the parties were self-supporting and would lead

financially independent lives, this was never the case, and the agreement fully excludes defendant, the stay-at-home spouse, from sharing in any income earned by plaintiff during the marriage. It is therefore difficult to make sense of the fact that the agreement treats income, which only plaintiff earned, as separate property in light of the distinct family responsibilities assumed by the parties. As for the treatment of non-income property, such as the matrimonial home, the agreement similarly suggests that defendant would not contribute to increasing the value of plaintiff's assets. But here too, the conduct of the parties is entirely at odds with this provision's apparent intention. After plaintiff acquired two adjacent apartment units for $9.7 million, defendant spent more than one year overseeing the combination and renovation of the units. The newly combined units, which became the matrimonial home of the parties, now has an estimated value of $30 million. In spite of defendant's efforts, the agreement leaves her without any property interest in the matrimonial home, let alone to an increase in value equivalent to her contribution, all of which raises doubts as to whether the agreement actually reflects the intentions of the parties at the time of execution.

Third, a significant, and troubling, condition attaches to the housing provision. As the majority notes, defendant is eligible for "rent-free, expense-free luxury housing." However,

this entitlement is conditioned on any minor children of the parties residing with defendant. Otherwise, defendant loses the housing benefit and is given 30 days to vacate the apartment. As much as defendant may want the children to reside with her, this provision does not give her a choice in the matter, unless she is willing to give up the housing. This is no real choice, and it would come at a great cost to defendant if, at a later date, she ever wanted to change roles with plaintiff and have the children live with him. As a result of this requirement, defendant will also have less time to devote to her career than plaintiff will have to his. Ultimately, even though defendant benefits from the housing provision (for as long as the children live with her), it is the children of the marriage who are the primary beneficiaries, not defendant.

Fourth, and similar to the housing provision, the payment of what the agreement refers to as "spousal support" is conditional on there being children of the parties under the age of four at the time of divorce. The agreement does not provide any spousal support that is not contingent on the parties having children under a certain age. Since plaintiff filed for divorce eight months after the parties' youngest child turned four, defendant receives no "spousal support" under the agreement. This provision is far less generous than it appears, and in view of

the other terms of the agreement and the manner in which it was negotiated, further scrutiny is warranted.

Finally, even when dealing with a distributive award amounting to $300,000 per year of marriage, context is everything. It is important to remember that the purpose of a distributive award is to facilitate the distribution or division of property between divorcing parties. It should not be seen or considered as a form of income or support (*see* Domestic Relations Law § 236[B][1][b] ["Distributive awards shall not include payments which are treated as ordinary income to the recipient under the provisions of the United States Internal Revenue Code"]; *see also Holterman v Holterman*, 3 NY3d 1, 11 [2004]). Here, the distributive award was accorded in lieu of equitable distribution, which defendant was required to waive. As mentioned earlier, plaintiff reported a net worth of $188 million in 2013, and even if the distributive award totals $1.6 million after four years of marriage, it is a mere fraction of plaintiff's property. At this stage of the proceeding, we do not need to decide whether equity must intervene, but an imbalance of this magnitude must not be treated lightly, and a trial should determine whether there was any overreaching in the formation of this agreement that led to manifestly unfair terms.

In isolation, no one issue necessarily invalidates the

agreement. Prenuptial agreements often include various waivers, custom definitions of separate and marital property, and arrangements tailored to the particular circumstances and needs of the parties. In this instance, however, because it is certainly possible to draw an inference of overreaching that resulted in manifestly unfair terms based on the totality of the circumstances, defendant's counterclaims should not be dismissed at this stage.

Proceedings in the Motion Court

The proceedings in the motion court are summarized by the majority. It must be highlighted, however, that the parties presented starkly different versions of the negotiations in their motion papers.

On the one hand, plaintiff argued that the parties participated in a fair and thorough process which resulted in a generous agreement. He emphasized that the parties had negotiated for well over a year, were each assisted by experienced and independent counsel, had been advised of their rights, fully understood the agreement, executed it voluntarily, and acknowledged in the agreement that the terms were fair and reasonable.

Defendant, on the other hand, described the process as deeply flawed. She alleged that plaintiff substantially changed

the bargaining position of the parties, that he put her in the unwanted, precarious position of negotiating as an unmarried mother, and that she relied on plaintiff's assurances in deciding to continue the first pregnancy. She also argued that plaintiff took advantage of her diminished emotional and physical state during both pregnancies, as she was not taking certain medications, and that the negotiations were tainted by plaintiff's "bait and switch" offers, numerous insults and threats, and failure to make a full financial disclosure.

As previously mentioned, the motion court dismissed defendant's first and third counterclaims, but not the second counterclaim challenging the maintenance waiver. On this issue, the motion court decided it would "require evidence and testimony to determine whether the waiver of maintenance was fair and reasonable at the time of execution, when [defendant] was expecting the parties' second child, and/or is unconscionable now. Therefore, this issue can be addressed at trial." In addition, the court awarded defendant $50,000 in interim counsel fees to defend against plaintiff's motion for exclusive possession of the matrimonial home, and allowed defendant to affirmatively move for exclusive possession of the matrimonial home and for temporary child support.

Arguments on Appeal

Plaintiff appeals to the extent the motion court granted a hearing on the maintenance waiver, awarded interim counsel fees, and denied his motion to dismiss defendant's second counterclaim, and primarily argues that there are no grounds to invalidate any part of the agreement given the waivers it contains.

Defendant cross-appeals to the extent the motion court dismissed her first and third counterclaims seeking to invalidate the prenuptial agreement. In particular, she argues the motion court misapprehended the equitable standard under which she seeks to invalidate the agreement, namely, manifest unfairness, and failed to shift the burden of proving the validity of the agreement onto plaintiff. Defendant also raises arguments related to a fourth counterclaim concerning the purchase price of the apartment in which defendant would reside with the children in case of divorce; however, because defendant disclaimed that her motion is based on fraud and expressly withdrew the fourth counterclaim below, I agree with the majority that these arguments are not properly before us.

Analysis

The majority concludes that there are no substantial issues of fact and resolves this appeal on summary judgment. It finds that defendant has not shown that the agreement is manifestly

unfair or that plaintiff engaged in overreaching during the negotiations, and that the maintenance waiver was "fair and reasonable at the time of the making of the agreement" and would "not [be] unconscionable at the time of entry of final judgment" (Domestic Relations Law § 236[B][3][3]).

The extant record does not permit any such determination. As already discussed, there is significant controversy concerning the formation of the agreement, and indeed, the motion court ordered a trial on this issue in connection with the second counterclaim. No factfinder has yet evaluated the credibility of either party's version of the facts surrounding the making of the agreement, and it may well be that a factfinder would find that there was overreaching in the formation of a manifestly unfair agreement or that the maintenance waiver is not enforceable.

As the majority resolves this appeal on summary judgment, its decision reaches the merits. Throughout its analysis, the majority asserts that "manifest unfairness" is distinct from the defense of unconscionability. I fully agree with those assertions, but the difference between these defenses is not readily discernable from the majority's application of "manifest unfairness" to this case. The distinction is relevant in this appeal because defendant expressly does not challenge the agreement on the basis of unconscionability, but rather contends

that it is manifestly unfair to her as a result of plaintiff's overreaching. This issue has broad implications and deserves further discussion.

The meaning and significance of the manifest unfairness defense has been the subject of long-standing commentary among members of the bar. Manifest unfairness and unconscionability are terms that are sometimes used interchangeably (*see e.g. Luftig v Luftig*, 239 AD2d 225, 227 [1st Dept 1997] ["the agreement was not unconscionable. . . [Its] terms are not so manifestly unfair that equity must intervene to prevent an injustice"], citing *Christian v Christian*, 42 NY2d at 71), and the resulting ambiguity has left some wondering if manifest unfairness is simply "legal literature" that is "repeated in deference but without consequence" (Elliot Scheinberg, Contract Doctrine and Marital Agreements in New York § 24.2[1] at 799 [2011]), and others observing that "it seems difficult to distinguish between an agreement that is 'unconscionable' and an agreement which is 'plainly inequitable'" (Alan D. Scheinkman, 9PT2 West's McKinney's Forms Matrimonial and Family Law § 4:8 at 41), "inequity" being a term *Christian* employs alongside manifest unfairness (*see e.g. Christian* at 72 [in reference to agreements "subsisting in inequity"] and *id.* at 72 and 73 [in reference to "inequitable conduct" of the parties]) that has also been applied

in subsequent decisions of this and other courts (*see e.g. Cron v Cron*, 8 AD3d 186, 187 [1st Dept 2004], *lv dismissed* 7 NY3d 864 [2006], *lv denied* 10 NY3d 703 [2008] ["the agreement's housing provisions ... are plainly inequitable"]).

Arguably, it may be time to abandon the pretense that a distinction exists at all between unconscionability on the one hand and manifest unfairness (or "inequity") on the other. However, I would not favor moving in that direction as the distinction is not a matter of mere semantics. What is fundamentally at issue is whether there is a distinct standard of vacatur that uniquely applies to marital agreements (Scheinberg § 24.2), and rather than allow this equitable defense, which we refer to as "manifest unfairness," to be subsumed into the general defense of unconscionability, it is critical that the distinction be clarified and not permitted to vanish. Manifest unfairness serves an important and useful purpose in the matrimonial context, in which "[a]greements between spouses, unlike ordinary business contracts, involve a fiduciary relationship requiring the utmost of good faith" (*Christian* at 72). It ensures that married and affianced parties participate in a fair process, and it provides relief when agreements are "manifestly unfair to a spouse because of the other's overreaching" (*id.*).

The difference between unconscionability and manifest unfairness was carefully examined by the Court of Appeals in *Christian*, an appeal which concerned a separation agreement between two parties whose marriage had broken down. At the time, parties in New York could not divorce under then § 170(6) of the Domestic Relations Law without a valid separation agreement. Although both parties in *Christian* wanted to divorce and needed their separation agreement to be recognized as valid to do so, the plaintiff still challenged a portion of the agreement "which stipulated that there be an equal division of certain securities" (*Christian* at 66). Supreme Court declared that the agreement was invalid in its entirety, finding the defendant husband guilty of fraud and overreaching, and in the absence of a valid agreement, the court reasoned it could not grant a divorce and ordered the parties to resume their marital relationship. The Appellate Division reversed and granted a divorce, finding no evidence of fraud or overreaching in the record to invalidate the agreement, but declared that the impugned property provision was "so unconscionable as to be unenforceable" (*id.* at 71). Although the Court of Appeals expressed similar concerns, it reversed the determination of unconscionability by the Appellate Division and remanded the matter to Supreme Court for a full trial on the property provision in accordance with the equitable standard

established by the Court, namely, "manifest unfairness."

In its discussion, the Court noted that the term unconscionability does not actually appear in the case cited by the Appellate Division for that proposition (*id.*; *see also Riemer v Riemer*, 48 Misc 2d 873 [Sup Ct, Kings County 1965], *affd* 25 AD2d 956 [2d Dept 1966], *lv dismissed* 17 NY2d 915 [1966]). As a result, the Court defined unconscionability in these terms:

> "over the years, an unconscionable bargain has been regarded as one 'such as no [person] in his [or her] senses and not under delusion would make on the one hand, and as no honest and fair [person] would accept on the other' (*Hume v United States*, 132 US 406, 411), the inequality being 'so strong and manifest as to shock the conscience and confound the judgment of any [person] of common sense' (*Mandel v Liebman*, 303 NY 88, 94). Unconscionable conduct is something of which equity takes cognizance, when warranted (see *Weirfield Holding Corp. v Pless & Seeman*, 257 NY 536; *Graf v Hope Bldg. Corp.*, 254 NY 1, 4; *Howard v Howard*, 122 Vt 27; 27 Am Jur 2d, Equity,§ 24, pp 549-550; cf. 2 Pomeroy's Equity Jurisprudence [4th ed], § 873, p 1804)"

(*Christian* at 71).

It is worth noting that nearly all the cases cited by the Court in its review of unconscionability concern commercial transactions (*see e.g. Hume v United States*, 132 US 406 [1889] [reasonableness of government contractor costs]; *Mandel v Liebman*, 303 NY 88 [1951] [compensation agreements between agents and principals]; *Weirfield Holding Corp. v Pless & Seeman Inc.*,

257 NY 536 [1931] [unconscionable conduct in mortgage foreclosure proceedings]; *see also Graf v Hope Bldg. Corp.*, 254 NY 1 [1930]; *Howard v Howard*, 122 Vt 27, 163 A2d 861 [1960] [Vermont action to rescind a settlement agreement in a filiation proceeding]).

The Court then turned to the marital context and discussed separation agreements. The Court observed that "[g]enerally, separation agreements which are regular on their face are binding on the parties," that "[j]udicial review is to be exercised circumspectly," and that where there has been full disclosure and "an absence of inequitable conduct, ... courts should not intrude so as to redesign the bargain" (*Christian* at 71, 72). The inquiry, however, does not end there, and the Court outlined a set of equitable principles that also apply in the course of reviewing transactions between spouses. As the Court acknowledged on more than one occasion, conjugal parties are not commercial actors: "Agreements between spouses, unlike ordinary business contracts, involve a fiduciary relationship requiring the utmost of good faith" (*Christian* at 72, citing *Ducas v Guggenheimer*, 90 Misc 191 [Sup Ct, NY County 1915], *affd sub nom. Ducas v Ducas*, 173 App Div 884 [1st Dept 1916]). As a result, "[t]here is a strict surveillance of all transactions between married persons, especially separation agreements," and such agreements may be set aside under principles of equity (*Christian*

at 72). It noted that "[e]quity is so zealous in this respect that a separation agreement may be set aside on grounds that would be insufficient to vitiate an ordinary contract" (*Christian* at 72). The Court summarized these principles in these terms:

> "[t]hese principles in mind, courts have thrown their cloak of protection about separation agreements and made it their business, when confronted, to see to it that they are arrived at fairly and equitably, in a manner so as to be free from the taint of fraud and duress, and to set aside or refuse to enforce those born of and subsisting in inequity"

(*Christian* at 72).

Having considered the equitable principles relevant to the marital context, the Court then established manifest unfairness as a defense to the enforcement of separation agreements:

> "To warrant equity's intervention, no actual fraud need be shown, for relief will be granted if the settlement is manifestly unfair to a spouse because of the other's overreaching. In determining whether a separation agreement is invalid, courts may look at the terms of the agreement to see if there is an inference, or even a negative inference, of overreaching in its execution. If the execution of the agreement, however, be fair, no further inquiry will be made" (internal citations omitted)

(*Christian* at 73).

In contrast to unconscionability, manifest unfairness is rooted in a long line of matrimonial cases which are cited by the

Court (*Hendricks v Isaacs*, 117 NY 411 [1889] [equity may intervene in transactions between married parties]; *Benesch v Benesch*, 106 Misc 395, 402 [NY Mun Ct 1918] ["there is a distinction to be drawn between contracts of separation between husband and wife and strictly business contracts. The same strict principles or the same considerations that are applied to or govern the duties of parties to business contracts cannot always govern or be applied to the enforcement of every provision of a separation agreement"]; *Hungerford v Hungerford*, 161 NY 550, 553 [1900] [contracts between spouses must be "just and fair" and equity intervenes as required]; *Cain v Cain*, 188 App Div 780 [4th Dept 1919] [spousal support agreement may be set aside upon grounds otherwise insufficient to set aside an ordinary contract]; *Scheinberg v Scheinberg*, 249 NY 277, 282 [1928] [settlement agreement between divorcing spouses unenforceable at equity if one party "acts unfairly and the other yields to the pressure of circumstances"]; *Matter of Smith*, 243 App Div 348, 353 [4th Dept 1935] [agreements between divorcing spouses must be "fair and equitable"]; *Ducas v Guggenheimer*, 90 Misc at 194 ["[courts] have thrown around separation agreements the cloak of their protection to the end that they shall be free from the taint of fraud or duress and that they shall be fair, equitable, and adequate, considering the husband's circumstances"];

Montgomery v Montgomery, 170 NYS 867, 869 [Sup Ct, NY County 1918] ["contracts between husband and wife are only upheld [in equity] where they are fair and equitable"], *affd* 187 App Div 882 [1st Dept 1919] and *affd* 188 App Div 965 [1st Dept 1919]).

It is clear that *Christian* intended to distinguish manifest unfairness and to establish a standard that is appropriate for reviewing marital agreements. Indeed, many decisions of this Court follow *Christian* in this regard (*see e.g. Goldman v Goldman*, 118 AD2d 498, 500 [1st Dept 1986] ["In *Christian*, the Court of Appeals held that separation and property settlement agreements are reviewable in equity and may be set aside if 'manifestly unfair to a spouse because of the other's overreaching'"]; *see also Cron v Cron*, 8 AD3d at 187 [1st Dept 2004] [finding that while a prenuptial was not unconscionable, other provisions were invalid as "plainly inequitable"]). Nevertheless, other decisions simply rely on *Christian* for the principle of unconscionability and do not apply the manifest unfairness standard or the equitable principles established therein (*see e.g. Rowley v Amrhein*, 46 AD3d 489, 489 [1st Dept 2007] ["Plaintiff contends that even if the agreement is valid, it is unconscionable. However, nothing in the agreement shocks the conscience"], citing *Christian* at 71; *Kojovic v Goldman*, 35 AD3d 65, 69 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007] ["the

concept of unconscionability is reserved for the type of agreement so one-sided that it 'shock[s] the conscience' such that 'no [person] in his [or her] senses and not under delusion would make [it] on the one hand, and ... no honest and fair [person] would accept [it] on the other'"], quoting *Christian* at 71; *Smith v Walsh-Smith*, 66 AD3d 534, 534 [1st Dept 2009], *lv denied* 14 NY3d 704 [2010] ["We reject defendant's contention that the prenuptial agreement is unconscionable ... [W]e cannot say that the agreement is so unfair 'as to shock the conscience and confound the judgment of any [person] of common sense'"], quoting *Christian* at 71; *Leighton v Leighton*, 46 AD3d 264, 267 [1st Dept 2007, Nardelli J., concurring in part, dissenting in part], *appeal dismissed* 10 NY3d 739 [2008] ["the 1986 prenuptial agreement is manifestly not unconscionable, for it cannot be said that it was so unfair as to shock the conscience"], citing *Lounsbury v Lounsbury*, 300 AD2d 812, 814 [3d Dept 2002]). In some ways, *Christian* is the buffet option of matrimonial cases. There is something for everyone – many cases cite *Christian* for the principle of judicial restraint; many others invoke it for the principle of judicial review (*compare Golding v Golding*, 176 AD2d 20, 22 [1st Dept 1992] *with Kojovic v Goldman*, 35 AD3d at 71). However, *Christian* should not be reduced to mean all things to all people, and this appeal highlights the need to review and

revisit the meaning and application of "manifest unfairness."

"Manifest unfairness" involves a two-pronged inquiry into the execution and substance of the agreement. First, the contestant must show that the other party overreached in the execution of the agreement. *Christian* did not define overreaching but referred to two cases. The first, *Matter of Baruch* (205 Misc 1122, 1124 [Sur Ct, Suffolk County 1954], *affd* 286 App Div 869 [2d Dept 1955]), a dispute over a prenuptial agreement, defined overreaching in these terms: "we come to the charge of overreaching, which means to overdo matters, or get the better of one in a transaction by cunning, cheating, or sharp practice." The other, *Pegram v Pegram* (310 Ky 86, 90, 219 SW2d 772, 774 [1949]), noted that "the court will not suffer the wife to be over-reached. It will not sustain a contract that is unfair or prejudicial to her when obtained while she is under her husband's domination." *Christian* also asserted that overreaching does not require a showing of fraud, and that courts may look at the terms of the agreement to draw an inference or a negative inference of overreaching in the execution.

This first prong is essentially a procedural inquiry and encompasses the entire duration of the negotiations; it is not limited to the period immediately preceding the conclusion of the agreement. Overreaching may be viewed in terms of bargaining

abuses, such as "shrewd manipulations" (*Ducas*, 90 Misc at 199), as well as threats, intimidation, unfair surprises, exploitation of trust, and deceit (*see* Robert S. Adler & Elliot M. Silverstein*, When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 Harv Negot L Rev 1, 29 [2000]). Moreover, overreaching may include tactics which, though permissible in the commercial arena, do not belong in negotiations between parties who owe fiduciary duties to each other (*see e.g. Ducas,* 90 Misc at 196, cited by *Christian* at 72 ["The courts should require the contract to be the free act of the parties rather than the product of shrewd bargaining by astute intermediaries, however free these bargainings may be from the taint of fraud or duress"]). Compared to unconscionability, manifest unfairness subjects the negotiating process between conjugal parties to a higher degree of scrutiny and does not sanction unscrupulous methods.

If the first step shows an absence of overreaching, the inquiry ends and enforcement cannot be avoided under this defense. However, if the contestant establishes overreaching, the inquiry proceeds to the second step in which the contestant must then show that the agreement is manifestly unfair.

What, then, is manifestly unfair in the context of marital agreements? On this point, *Christian* does not provide all the

answers. As a general principle, the fairness of an agreement ought to correspond to the intention of the parties as expressed in an agreement. The function of contract is to "structure a relationship and channel parties' expectations forward in time" (Leckey at 117), and ordinarily, the intention of the parties is found in the four corners of an agreement (*Laurence v Rosen*, 228 AD2d 373, 374 [1st Dept 1996]; *see also Van Kipnis v Van Kipnis*, 11 NY3d 573, 577 [2008] ["As with all contracts, prenuptial agreements are construed in accord with the parties' intent, which is generally gleaned from what is expressed in their writing"]). However, where there has been overreaching, an agreement may not reliably reflect the intentions of the parties, making it more difficult to evaluate whether the parties considered their agreement to be fair.

In the absence of a reliable writing to indicate the intention of the parties, the common law has developed alternatives for determining the fairness of an agreement. In the cases cited by *Christian,* one method of measuring the fairness of an agreement is the "test of adequacy." For instance, in *Ducas*, "[t]he test of adequacy is not what constitutes the minimum upon which a person can live. The question is whether the sum is in itself a reasonable one and will permit of a standard of living commensurate with the

husband's income and the mode adopted by him when the parties lived together" (90 Misc at 200). Under this approach, fairness is measured against the marital standard of living and is based on the financial means of the overreaching party. Another approach, followed by the Second Department, determines fairness according to the nature and magnitude of any rights waived in light of the disparity in net worth and earnings of the parties (*Petracca v Petracca*, 101 AD3d 695, 698 [2d Dept 2012]). These methods of determining the fairness of a prenuptial agreement can be helpful; however a better approach would be one that also considers how well the terms of an agreement align with the conduct of the parties over the course of their relationship as a means of determining what the parties themselves consider to be fair. Terms that may appear to be objectively unfair may nevertheless be considered fair to the parties of an agreement, especially by parties who do not wish to have an economically interdependent relationship. For example, a prenuptial agreement that waives maintenance, narrowly defines marital property, and discourages the commingling of assets would suggest that the parties do not intend to have a relationship of economic interdependence, and if the conduct of the parties is generally consistent with the terms of an agreement, this would support that an agreement is fair to them. But where the expressed terms

of an agreement are so divorced from the reality of a party's relationship, such as where there is a severe disconnect between the degree of economic interdependence expressed by the terms of an agreement compared to the conduct of the parties, as may be the case here, it is appropriate for equity to intervene to the extent a party's overreaching has caused the inconsistency. Indeed, in *Van Kipnis*, the Court of Appeals similarly considered whether the terms of a prenuptial agreement were consistent with the conduct of the parties during their marriage and upheld the prenuptial agreement because they were consistent.[1] Contrary to what the concurrence asserts, I am not suggesting that the marital standard of living or the concept of adequacy be the *sole* criteria for evaluating the fairness of marital agreements.

This review of *Christian* highlights the distinction between manifest unfairness and unconscionability and seeks to clarify certain ambiguities. However, while agreeing that manifest unfairness is the appropriate standard, the majority, by adopting a much more deferential approach, seems to apply an

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[1] "[W]ith the exception of two jointly owned residences (which were distributed as marital property), the parties did not commingle their separately owned assets throughout their 38-year marriage. We therefore agree with the courts below that the agreement constitutes an unambiguous prenuptial contract that precludes equitable distribution of the parties' separate property, rendering it unnecessary to resort to extrinsic evidence" (*Van Kipnis* at 579).

unconscionability standard instead, which in my view is not correct. But notwithstanding this disagreement, there is no dispute between the majority and the dissent concerning the applicability of *Christian*'s manifest unfairness standard to prenuptial agreements.

My concurring colleague, on the other hand, comes to the novel conclusion, on the basis of "*expressio unius est exclusio alterius*," and a series of doubtful inferences, that the Equitable Distribution Law essentially superseded the manifest unfairness standard in *Christian* by "explicitly and implicitly provid[ing] standards by which to determine the enforceability of the various components of prenuptial agreements." There is simply no support for this premise. The interplay between the standards contained in *Christian* and the Equitable Distribution Law has already been considered by this Court in the past, and in cases where the statutory standard did not apply, the *Christian* standard of manifest unfairness has been applied instead (*see e.g. Goldman v Goldman*, 118 AD2d at 500 ["Although the statutory standard in Domestic Relations Law § 236(B)(3) is inapplicable here, traditional common-law standards do apply to test the validity and enforceability of the agreement. In *Christian*, the Court of Appeals held that separation and property settlement agreements are reviewable in equity and may be set aside if

'manifestly unfair to a spouse because of the other's overreaching'. . . In our view, it is appropriate to take into account these common-law equitable factors, notwithstanding the inapplicability here of the broader 'fair and reasonable [when made] and not unconscionable at final judgment' statutory standard" (internal citations omitted)], citing *Christian*). The concurrence contends that the reliance on *Goldman* is misplaced because it was an action to set aside a "reconciliation agreement" to which Domestic Relations Law § 236(B)(3) allegedly does not apply. However, this is incorrect. In *Goldman*, it was not the type of *agreement* that made the Domestic Relations Law inapplicable. Rather, it was the type of *action* that precluded the application of the statute, and since the action brought in *Goldman* was not a "matrimonial action" as defined by the statute, it was not subject to Domestic Relations Law § 236(B)(3).[2] Either way, it is well settled that to the extent the Domestic Relations Law does not apply to particular provisions of a marital

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[2] As this Court decided in *Goldman*, "We agree with Special Term that the second cause of action as couched is legally insufficient. Domestic Relations Law § 236(B)(3) expressly applies to the validity and enforceability of certain agreements "in a matrimonial action," which is defined in Domestic Relations Law § 236(B)(2). This is not a matrimonial action since plaintiff does not seek separation, divorce, annulment, a declaration of the validity or nullity of a marriage, maintenance or a distribution of marital property" (*Goldman* at 500).

agreement, the traditional common-law standard established in *Christian* applies instead. Not only is the view of the concurrence not the law, but it also does not follow that the establishment of a statutory standard for certain provisions voids the common-law standard applicable to all other provisions. The Equitable Distribution Law has never been read as superseding *Christian*, and I see no reason to start reading it that way now.

The concurrence also claims that there is "scant support" for extending *Christian*, which concerned a separation agreement, to prenuptial agreements, and that the cases that apply *Christian* "most often" involve separation agreements. There is simply no support for this generalization. Basic research on any legal database clearly shows that for nearly 40 years, *Christian* has been consistently applied to prenuptial agreements and separation agreements alike by courts at every level, including the Court of Appeals. Indeed, the Court of Appeals has just recently cited *Christian* in a probate action in which a petitioner contested a prenuptial agreement (*see Matter of Fizzinoglia,* 26 NY3d 1031 [2015]). Nevertheless, the concurrence still concludes that *Christian* does not apply to prenuptial agreements or to affianced parties, notwithstanding the overwhelming case law to the contrary.

I agree with the concurrence to the extent it asserts that

"when considering property distribution provisions of prenuptial agreements, we must look to the common-law standards." However, I simply do not agree with the common-law standards my colleague applies or the authorities on which he relies. Even though courts at every level have applied the equitable principles established in *Christian* to premarital and separation agreements for nearly 40 years, the concurrence reaches the conclusion that "it is not appropriate to look to *Christian* for the current standard for judging the enforceability of prenuptial agreements[]" and that "the use of *Christian*'s standards for judging property provisions is incorrect." Instead, the concurrence would apply the standards applicable for setting aside "any type of contract." To do so would be incompatible with *Christian* and 40 years of matrimonial law and would abandon the power of the court to do equity when required. And rather than apply matrimonial standards to matrimonial disputes, the concurrence applies commercial standards to matrimonial disputes. For example, my colleague relies extensively on classic contract law treatises such as *Williston on Contracts*, *Farnsworth on Contracts*, and *Corbin on Contracts* and virtually ignores the authorities in the field of matrimonial law. My colleague also relies extensively on commercial cases such as *Gillman v Chase Manhattan Bank,* 73 NY2d 1, 10 [1988] in support of the

unconscionability standard he advances. However, *Gillman* involved a dispute between Chase Manhattan Bank, N.A. and the creditors of the Jamaica Tobacco and Sales Corp. over a security agreement. This case could not be more removed from the matrimonial context. Nevertheless, the concurrence quotes certain passages from *Gillman* in which the Court addresses the issue of unconscionability. What the concurrence fails to ever mention is that *Gillman* involved the application of the Uniform Commercial Code, and the passage quoted by the concurrence concerns § 2-302 of the Uniform Commercial Code, "Unconscionable Contract or Clause." Never before has the Uniform Commercial Code been applied to the matrimonial context. And while the concurrence strongly opposes applying *Christian,* and four decades of matrimonial case law, to this case because the former concerns a separation agreement and the latter a prenuptial agreement, it is seemingly undisturbed by importing the Uniform Commercial Code and applying *Gillman*, a commercial dispute over a security agreement, to a prenuptial agreement.

Indeed, there is little support for the views expressed by the concurrence among the departments of the Appellate Division. Most notably, *Cioffi-Petrakis*, a leading decision of the Second Department that my colleague does not cite, expressly held that "agreements addressing matrimonial issues have been subjected to

limitations and scrutiny *beyond that afforded contracts in general*" (*Cioffi-Petrakis v Petrakis*, 103 AD3d 766, 767 [2d Dept 2013], *lv denied* 21 NY3d 860 [2013] [emphasis added] [internal quotation marks omitted]). It describes the heightened scrutiny applicable to marital agreements in these terms: "an agreement between *spouses or prospective spouses* may be invalidated if the party challenging the agreement demonstrates that it was the product of fraud, duress, or other inequitable conduct" (*Cioffi-Petrakis* at 767 [emphasis added], citing *Christian* at 73).

At this stage of the proceedings, it is premature to make any findings of fact as to whether plaintiff engaged in overreaching, and similarly premature to find that there are no issues as to whether the spousal maintenance waiver is unconscionable as applied to present circumstances. Even in *Barocas*, a case cited several times by the majority which involves similar issues, the split majority there remanded the spousal support waiver for trial and did not decide that issue summarily (*Barocas v Barocas*, 94 AD3d 551, 552 [1st Dept 2012], *appeal dismissed* 19 NY3d 993 [2012] ["Although defendant's waiver of spousal support was not unfair or unreasonable at the time she signed the agreement, given her knowing and voluntary execution thereof with benefit of counsel, factual issues exist as to

whether the waiver would be unconscionable as applied to the present circumstances"]). I agree with the majority that certain factors, such as the presence of independent counsel, militate against a finding of overreaching. Moreover, the majority correctly points out that "the mere fact that [plaintiff] did not include his income in his financial disclosure, standing alone, is not a basis to set the agreement aside" and that an agreement cannot be set aside "merely because" it may have been improvident or one-sided. However, far from standing alone, plaintiff's failure to make a full financial disclosure is just one of many indicia of either overreaching or manifest unfairness, including his conduct during the negotiations, the use of dilatory tactics, the many questionable provisions and lopsided distribution under the agreement, the conflicting versions of events surrounding the negotiations, and the inconsistency between the conduct of the parties with the terms of the agreement. In short, there are sufficient indicia in the record to support defendant's defenses and counterclaims to preclude summary judgment.

I strongly disagree with the concurrence's assertion that the relationship between the parties here did not give rise to any mutual fiduciary duties. As the majority highlights, "the parties were engaged, had been living together for more than three years, had a child together, and were expecting another."

However, my concurring colleague, who recognizes that "[a] fiduciary relationship 'may arise where a bond of trust and confidence exists between the parties,'" would hold that this particular relationship does not "correspond closely enough to a married relationship." If the relationship between these parties does not "correspond closely enough to a married relationship," I cannot imagine what would. Moreover, rather than conclude that plaintiff was in breach of his fiduciary duties to defendant, the concurrence takes the extraordinary and troubling position that defendant essentially should have known better than to trust plaintiff, that plaintiff's treatment of her demonstrated the absence of a relationship of trust and confidence, and that the harsh consequence of defendant's allegedly misguided judgment is to deny the recognition of any fiduciary relationship whatsoever. This reasoning puts the cart before the horse and is decidedly out of step with the jurisprudence on fiduciary relationships cited by the majority. It is a mistake of law to assert, as the concurrence seems to reason, that conduct in breach of a fiduciary duty proves the absence of a fiduciary relationship altogether. The obligations attendant to fiduciary duties arise out of the particular nature of the relationship of the parties and are imposed by law. The parties did not have an obligation to enter into a prenuptial agreement, but they did, as

fiduciaries, have an obligation of loyalty to each other and an obligation to negotiate with the utmost good faith.

The concurrence also reaches the conclusion that the agreement is not substantively unconscionable because "the facts were disclosed at the time the parties entered into the agreement." However, defendant expressly argues that plaintiff did not make a full financial disclosure. Because there are triable issues concerning the adequacy of plaintiff's disclosure, the concurrence should not be drawing any resulting legal conclusions at this stage.

There is also no basis whatsoever in the record for the concurrence's assertion that "Mr. Gottlieb indicated to his fiancée that he was not prepared to be generous with her in any way with respect to the emoluments of marital distribution," that "marriage to [plaintiff] required [defendant] to accept a hard bargain," and that he "laid these cards on the table." These arguments were never raised by the parties nor do they even come close to their respective versions of events. On the contrary, plaintiff has contended all along in his submissions that the settlement generously provides for defendant. Plaintiff has never alleged that he "required [defendant] to accept a hard bargain." Also without support in the record is the concurrence's claim that "[m]arriage was a business to

[plaintiff], and he let her know that" or the concurrence's unfounded inference that plaintiff somehow communicated this alleged sentiment "not in so many words, but by his conduct." Nowhere in the record is there any support for these claims or inferences. Although this version of events and colorful language may make for interesting reading, it views the record through a prism that examines the record only in the light most favorable to plaintiff.

The concurrence also claims to find a "not-so-veiled hostility to prenuptial agreements" coursing through this dissent. To be clear, I harbor no such sentiment. Rather, the question is simply whether, on the extant record, summary judgment should be denied so that the facts in dispute surrounding the making of the agreement may be determined at trial. I fully agree with my colleague that "the law gives parties the right to opt out of the Equitable Distribution Law," but opting out of the statutory scheme does not also entail opting out of the common law. If it is found that plaintiff did not overreach, that the terms are not manifestly unfair in spite of any overreaching, or that the maintenance waiver is permissible, then those terms should be declared enforceable. The concurrence, however, prefers to exaggerate my position and wonders "whether prenuptial agreements should now be relegated to

the dust bin." Such hyperbole is unnecessary. The defense of manifest unfairness intervenes only where the execution of an agreement is tainted by overreaching, and in the absence of overreaching, courts do not inquire further.

Finally, the award for interim counsel fees should not be vacated, and a hearing should not be required to determine what portion of the $50,000 sought by defendant is connected to child-related issues. Plaintiff primarily argues that the agreement bars any award of counsel fees and that defendant provided no documentation in support of her application. "The purpose of interim counsel fees is to level the playing field while litigation is ongoing" (*Saunders v Guberman,* 130 AD3d 510, 511 [1st Dept 2015], citing *O'Shea v O'Shea,* 93 NY2d 187, 190 [1999] ["The courts are to see to it that the matrimonial scales of justice are not unbalanced by the weight of the wealthier litigant's wallet"]), and it is clear that the playing field between these parties is far from level. Courts possess the discretion to award interim counsel fees, "as justice requires," under Domestic Relations Law § 237(a). The court determined that defendant "lacks sufficient funds of her own to compensate counsel without depleting her assets" and it was well within the discretion of the court to award interim counsel fees to defendant. In the absence of any finding that the motion court

abused its discretion, the award should not be disturbed, especially since this award is interim and subject to adjustment in any final determination.

Conclusion

For the reasons set forth above, I would modify the order of the Supreme Court, to the extent appealed from, by denying plaintiff's motion for summary judgment, reinstating defendant's first and third counterclaims, and remanding for trial on whether the prenuptial agreement should be declared unenforceable in whole or in part.

M-5007 ***Jacob Gottlieb v Alexandra Lumiere Gottlieb***

Motion for stay denied as academic.

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

ENTERED: JANUARY 28, 2016

CLERK