

impermissible bolstering of the complainant's testimony (see *People v McDaniel*, 81 NY2d 10, 16 [1993]; *People v McClean*, 69 NY2d 426, 428 [1987]; *People v Van Ness*, 43 AD3d 553, 554-555 [2007], *lv denied* 9 NY3d 965 [2007]), an error that is especially prejudicial when the complainant's credibility is the linchpin of a conviction. The note that the complainant wrote approximately one year before she made the accusation to the police cannot satisfy the "prompt outcry" exception to the hearsay rule relied on by the trial court, in view of the months-long delay between the charged conduct and the writing of the note, especially in the absence of a sufficient explanation for the complainant's not confiding in someone else earlier (see *People v Banks*, 27 AD3d 953, 954-955 [2006], *lv denied* 7 NY3d 752 [2006]; *People v Allen*, 13 AD3d 892, 894-895 [2004], *lv denied* 4 NY3d 883 [2005]). According to the complainant's testimony, defendant's conduct ended around January or February 2004, whereas the note was written some time around May 2004, which latter date was confirmed by the more definitive testimony of the note's recipient, the complainant's boyfriend.

Nor can we conclude that the note was admissible as a proper rehabilitative response to a claim by the defense that the complainant's accusation was a recent fabrication (see *McDaniel*, 81 NY2d at 18; *People v Davis*, 44 NY2d 269, 277 [1978]). First, this exception allows the use of prior consistent statements to

rehabilitate a witness when the defense asserts that the accusation was recently fabricated, since "it would be unjust to permit a party to suggest that a witness . . . is fabricating a story without allowing the opponent to demonstrate that the witness had spoken similarly even before the alleged incentive to falsify arose" (*McDaniel*, 81 NY2d at 18). Here, however, the prior consistent statement was not used to rehabilitate the complainant. It was offered on the People's direct case, indeed, in the course of the complainant's direct testimony, in anticipation of a defense of recent fabrication; the defense had not yet had any opportunity to make that claim in front of the jury. The rehabilitative purpose of the exception was therefore not served by the note's admission.

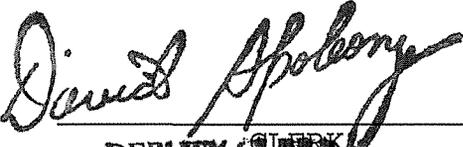
Secondly, such use of a prior consistent statement to rehabilitate a witness is only permissible when the prior consistent statement *predated* the point in time when, according to the defense, the complainant's purported motive to fabricate arose (*see McDaniel* at 18). Here, when the note was admitted into evidence, the defense had done nothing to specify to the jury its claim regarding when and how the complainant had decided to make a false accusation against defendant. It could as easily have claimed that the complainant's motivation to fabricate the accusation arose years earlier, in response to defendant's controlling and overbearing conduct over the years, rather than

on June 24, 2005, when the complainant first defied defendant after he denied her permission to go to the movies with her boyfriend. Defense counsel's statements in voir dire only generally suggested that a child might be motivated to make up a false report if she "backs herself in[to] a compromising position," and did not establish a time frame in which the complainant might have backed herself into such a corner. Similarly, counsel's opening statement to the jury did not specify the moment at which the complainant might have developed a motive to fabricate. Therefore, the note was admitted without any basis to conclude that it predated the claimed fabrication.

Since the trial court ruled that it would admit the prior consistent statement under the prompt outcry exception, defense counsel had neither any occasion nor an obligation to interpose a superfluous objection that the note's admission was improper rebuttal to a recent fabrication claim.

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

ENTERED: DECEMBER 22, 2009


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particularly since that count was based on the testimony of an officer who was not one of the undercover officers who testified about the sale.

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

ENTERED: DECEMBER 22, 2009


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to the "solicitation plus" doctrine (see e.g. *Apicella v Valley Forge Military Academy & Jr. Coll.*, 103 AD2d 151 [1984]; *Weil v American Univ.*, 2008 WL 126604, 2008 US Dist LEXIS 1727 [SD NY 2008]; *Krepps v Reiner*, 414 F Supp 2d 403 [SD NY 2006]). Milton Academy advertises neither on the radio nor on TV in New York, visits New York only occasionally, and held only three alumni-related events in New York in 2007 and three in 2008. The fact that it offers its students bus service to New York - with stops in Connecticut - on five holidays is not dispositive (see *Meunier v Stebo, Inc.*, 38 AD2d 590 [1971]). Unlike the defendant in *Kingsepp v Wesleyan Univ.* (763 F Supp 22 [SD NY 1991]), Milton has issued no bonds in New York and owns no real property in New York. Furthermore, there was no evidence that Milton sent representatives to 44 secondary schools in New York State per year or had more than \$14 million in a New York bank account (cf. 763 F Supp at 27).

Even if, arguendo, Milton engaged in "substantial solicitation" (*Pacamor Bearings v Molon Motors & Coil*, 102 AD2d 355, 357 [1984]), it did not engage in sufficient "activities of substance in addition to solicitation" (*Laufer v Ostrow*, 55 NY2d 305, 310 [1982]). CityTerm is a program of nonparty Masters School, not of defendants. "A business relationship with a New York entity does not provide a sufficient basis for jurisdiction at least in the absence of a showing that that company has become

an agent or division of the company over which the plaintiff seeks to exercise personal jurisdiction" (*Landoil Resources Corp. v Alexander & Alexander Servs.*, 918 F2d 1039, 1046 [2d Cir 1991]). Plaintiff, who bears the burden of proving jurisdiction (see e.g. *Copp v Ramirez*, 62 AD3d 23, 28 [2009], lv denied 12 NY3d 711 [2009]), did not show that the Masters School was defendants' agent, much less a division of defendants.

The fact that Milton had approximately \$14 million (less than 10% of its endowment) invested with New York firms as of June 30, 2006 does not subject it to general jurisdiction here. "[T]he investment of money in New York cannot alone be considered a form of 'doing business' for the purpose of CPLR § 301 ...; 'if it were, then almost every company in the country would be subject to New York's jurisdiction'" (*Weil*, 2008 WL 126604 at *4, 2008 US Dist LEXIS 1727 at *14, quoting *Schenker v Assicurazioni Generali S.p.A., Consol.*, 2002 WL 1560788 at *5, 2002 US Dist LEXIS 12845 at *17 [SD NY 2002]; see also *Nelson v Massachusetts Gen. Hosp.*, 2007 WL 2781241, *31, 2007 US Dist LEXIS 70455, *96 [SD NY 2007], *affd* 299 Fed Appx 78 [2d Cir 2008]).

Similarly, the fact that Milton has a New York bank account for the purpose of receiving wire transfers, which funds are then transferred to a Morgan Stanley account in Boston, does not

subject it to general jurisdiction (see *In re Ski Train Fire in Kaprun, Austria* on Nov. 11, 2000, 2003 WL 1807148, *5, 2003 US Dist LEXIS 5575, *18 [SD NY 2003]; see also *Krepps*, 414 F Supp 2d at 407). Defendants' ordinary business is educating students, which they do in Massachusetts and Vermont; their "maintenance of a bank account in New York is only incidental to" that business (*Weinstock v Le Sport*, 194 AD2d 400, 401 [1993]).

Defendants are not subject to specific jurisdiction under CPLR 302(a)(1). Even if defendants transacted business within New York, "plaintiff's ... injury and the tort action based on it cannot be said to have arisen directly out of this" transaction (*Holness v Maritime Overseas Corp.*, 251 AD2d 220, 224 [1998]; see e.g. *Diskin v Starck*, 538 F Supp 877, 879-880 [ED NY 1982]; *Meunier*, 38 AD2d at 590-591). Defendants' duty of care to plaintiff arose in Vermont, not in New York (see e.g. *Brandt v Toraby*, 273 AD2d 429, 430-431 [2000]; *Gelfand v Tanner Motor Tours, Ltd.*, 339 F2d 317, 321-322 [2d Cir 1964]).

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

ENTERED: DECEMBER 22, 2009


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Gonzalez, P.J., Tom, Sweeny, Freedman, Abdus-Salaam, JJ.

1855 In re Fashion Institute of Technology, Index 108579/08
Petitioner,

-against-

New York State Public Employment
Relations Board, et al.,
Respondents.

Littler Mendelson, P.C., New York (Bertrand B. Pogrebin of
counsel), for petitioner.

David P. Quinn, Albany, for New York State Public Employment
Relations Board, respondent.

Office of James R. Sandner, New York (Ann Burdick of counsel),
for United College Employees of the Fashion Institute of
Technology, respondent.

Determination of respondent New York State Public Employment
Relations Board, dated May 20, 2008, which affirmed the decision
of its Administrative Law Judge finding that petitioner violated
Civil Service Law (Public Employees' Fair Employment Act) § 209-
a.1(d) by unilaterally discontinuing the past practice of
computing day adjunct professors' pay per semester on the basis
of 16 weeks, and directed petitioner to restore the past practice
and to reimburse any wages and benefits lost as a result of the
reduction to 15 weeks, 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 [Michael D. Stallman, J.], entered September 25, 2008),
dismissed, without costs.

The standard of review here is whether there is substantial evidence to support respondent Board's determination (see *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176 [1978]). The standard was met by evidence showing that the practice of computing day adjuncts' pay per semester on the basis of 16 weeks is subject to collective bargaining (see Civil Service Law § 201.4; § 204.2), that the practice "was unequivocal and was continued uninterrupted for a period of time under the circumstances to create a reasonable expectation among the affected unit employees that the [practice] would continue" (*Matter of Manhasset Union Free School Dist. v New York State Pub. Empl. Relations Bd.*, 61 AD3d 1231, 1233 [2009] [internal quotation marks and citations omitted]), and that petitioner had actual or constructive knowledge of the practice.

We find that the remedy of directing petitioner, inter alia, to reimburse any wages and benefits lost as a result of its unilateral change in computation is reasonable (see Civil Service Law § 205.5[d]).

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: DECEMBER 22, 2009


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Gonzalez P.J., Tom, Sweeny, Freedman, Abdus-Salaam, JJ.

1857 In re Deiby C.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

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Presentment Agency

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

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

Order of disposition, Family Court, Bronx County (Juan M.
Merchan, J.), entered on or about February 25, 2008, which
adjudicated appellant a juvenile delinquent, upon his admission
he had committed an act that, if committed by an adult, would
constitute the crime of possession of a stolen vehicle in
violation of Vehicle and Traffic Law § 426, and placed him with
the Office of Children and Family Services for a period of 18
months, unanimously reversed, on the law, without costs, and the
petition dismissed.

Appellant is entitled to vacatur of his admission because
"the court failed to comply with Family Court Act § 341.2(3)
which mandates that a court not proceed with any hearing in the
absence of the juvenile's parent unless a 'reasonable and
substantial' effort has been made to notify the parent. No such
effort was made here, thereby requiring reversal of the

disposition" (*Matter of Timothy B.*, 114 AD2d 336, 337 [1985]). The record contains no satisfactory explanation for the mother's absence from the allocution proceeding, given that she was in court earlier the same day and was also present at the dispositional hearing. Since this requirement is nonwaivable, preservation is not required (*see Matter of Tyler D.*, 64 AD3d 1243, 1244 [2009]).

Since appellant completed his period of placement, we dismiss the petition rather than remanding the matter for further proceedings (*see e.g. Matter of Joshua HH.*, 299 AD2d 760 [2002]). We have considered and rejected the presentment agency's remaining arguments.

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

ENTERED: DECEMBER 22, 2009


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that suggested a possible mitigating circumstance, this comment did not negate the requisite intent for first-degree criminal contempt. We have considered and rejected defendant's remaining claims.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: DECEMBER 22, 2009


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sheeting. The motion court dismissed plaintiff's claim pursuant to Labor Law § 240(1) on the ground that he had not been working at an elevated height. Indeed, it is clear that plaintiff's fall occurred at a place where he had not been working and where he did not need to be in order to perform his assigned task of collecting the lighting fixture since he has conceded that he could have accessed the stairs other than by walking over the newly poured concrete surface. Moreover, he acknowledged that he had been aware of the presence of the hole/ramp since he began work at the site. Under these circumstances, he was not injured because of defendants' failure to protect him against an elevation-related hazard as contemplated by Labor Law § 240(1) (see *Romeo v Property Owner (USA) LLC*, 61 AD3d 491 [2009]; *Geonie v OD & P NY Limited*, 50 AD3d 444, 445 [2008])).

Plaintiff's cause of action under Labor Law § 241(6) was properly dismissed. The regulation relied upon by plaintiff, Industrial Code (12 NYCRR) § 23-1.7(b), which applies to hazardous openings of significant depth and size (see *Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [2009]) was inapplicable. Plaintiff failed to establish that the ramp constitutes a hazardous opening (see *Smith v McClier Corp.*, 38 AD3d 322, 323 [2007])).

Finally, it is noted that the motion court appropriately declined to permit plaintiff to amend his bill of particulars

after the filing of a note of issue (see CPLR 3042[b]) and in the absence of a valid reason for the delay in proposing the amendment (see *Brunetti v Musallam*, 59 AD3d 220, 223 [2009]).

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

ENTERED: DECEMBER 22, 2009



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Gonzalez, P.J., Tom, Sweeny, Freedman, Abdus-Salaam, JJ.

1862 N.K. International, Inc., et al., Index 600833/04
Plaintiffs-Respondents-Appellants,

-against-

Dae Hyun Kim, etc.,
Defendant-Appellant-Respondent,

D&K NY Fashion Resources, Inc., et al.,
Defendants.

Ballon Stoll Bader & Nadler, P.C., New York (Avraham Z. Cutler of
counsel), for appellant-respondent.

Fox Rothschild LLP, New York (Robert J. Rohrberger of counsel),
for respondents-appellants.

Order, Supreme Court, New York County (Herman Cahn, J.),
entered September 10, 2008, which, after a non-jury trial,
awarded plaintiffs damages in the amount of \$468,152 plus
interest as against defendant-appellant, dismissed plaintiffs'
claims against defendant D&K NY Fashion Resources, Inc. (D&K),
and dismissed defendants' counterclaims, unanimously affirmed,
with costs.

Upon plaintiffs' demonstration that defendant Kim breached
his fiduciary duty as an employee by secretly diverting purchase
orders from his employer, plaintiff NK, to himself and a newly-
formed corporation (D&K), plaintiffs were entitled to recover
damages calculated on the basis of what the employer would have

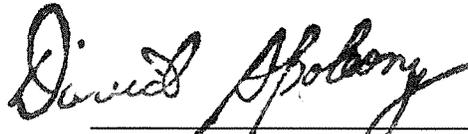
made of the diverted corporate opportunity (*Harry R. Defler Corp. v Kleeman*, 19 AD2d 396, 403-404 [1963], *affd* 19 NY2d 694 [1967]; see *Duane Jones Co. v Burke*, 306 NY 172, 192 [1954]). Plaintiffs met their burden of establishing with reasonable certainty the net amount of profit NK would have earned on the diverted orders through the testimony of NK's owner and his expert, whose calculations were supported by voluminous documentary evidence (see *E. W. Bruno Co. v Friedberg*, 28 AD2d 91, 92-95 [1967], *affd* 23 NY2d 798 [1968]). In opposition, defendant failed to substantiate his claims that some purchase orders were cancelled through no fault of D&K, or the amount or relevance of a claimed loss suffered as a result of one customer's bankruptcy. The decision of the fact-finder, supported by a fair interpretation of the evidence, will not be disturbed upon appeal (*Reichman v Warehouse One*, 173 AD2d 250, 252 [1991], *lv denied* 78 NY2d 1058 [1991]).

We further find that the trial court's conclusion that plaintiffs failed to establish any claim against the corporate defendant, D&K, which realized little if any profit on the orders

diverted to it, is supported by the record (see *Duane Jones Co. v Burke* at 188-189).

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

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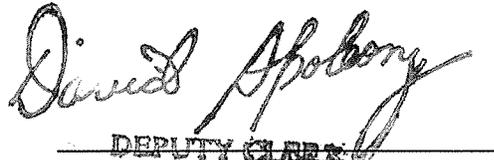
name and a tenuous means of contacting him. Accordingly, the likelihood that defendant could find the witness and bring him to court was speculative at best. Moreover, the value of this witness's proposed testimony was dubious, especially since it would have conflicted with the testimony of a witness defendant had already called. To the extent defendant is arguing that he had a constitutional right to an adjournment, that claim is unpreserved (see *People v Lane*, 7 NY3d 888, 889 [2006]) and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits (see *Ungar v Sarafite*, 376 US 575, 589 [1964]).

Defendant did not preserve his claim that there was an insufficient foundation for testimony by a records custodian that cell phone records showed the probable location of defendant's phone at a time a particular call was made, and we decline to review it in the interest of justice. As an alternative holding, we conclude that the custodian testified to matters within her knowledge and experience. Trial counsel's failure to object did not deprive defendant of effective assistance. Counsel could have reasonably concluded that demanding more of a foundation would have had the counterproductive result of causing the People

to elicit the same evidence in a manner more impressive to the jury.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: DECEMBER 22, 2009


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Gonzalez, P.J., Tom, Sweeny, Freedman, Abdus-Salaam, JJ.

1865-

1865A Metropolitan Transportation
Authority, et al.,
Plaintiffs-Appellants,

Index 603299/07

-against-

Zurich American Insurance Company,
Defendant-Respondent.

Mendes & Mount, LLP, New York (Robert J. Brown of counsel), for appellants.

Melito & Adolfsen P.C., New York (S. Dwight Stephens of counsel), for respondent.

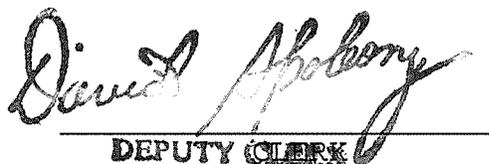
Judgment, Supreme Court, New York County (Richard F. Braun, J.), entered July 16, 2009, declaring that the coverage afforded plaintiffs under a \$10 million umbrella policy issued by defendant regarding an underlying personal injury action was limited to \$1 million in excess insurance, and that defendant was entitled to \$500,000 on its counterclaim for the amount it paid to settle the underlying action, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered May 29, 2009, to the extent it granted defendant's motion for summary judgment on its counterclaim, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Defendant excess insurer issued a follow-form policy, which incorporated the terms and conditions of an underlying \$1 million general liability insurance policy to the extent not contradicted

by the excess policy's express terms (see *Vigilant Ins. Co. v Bear Stearns Cos., Inc.*, 10 NY3d 170, 177 [2008]). Here, the underlying policy provided that additional insureds, such as plaintiffs, would be covered up to the lesser of the policy limits or the amount required by their trade contracts with the insured. There is no doubt that plaintiffs were additional insureds (*Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.*, 53 AD3d 140, 146-147 [2008]). Nor was there any conflict between the excess policy terms and the blanket additional insured rider in the underlying policy. As such, the trade contract limitation was incorporated into the excess policy (see *id.*).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: DECEMBER 22, 2009


DEPUTY CLERK

Gonzalez, P.J., Tom, Sweeny, Freedman, Abdus-Salaam, JJ.

1866 Maria Ramos Cortwright, et al., Index 27327/02
Plaintiffs-Respondents,

-against-

City of New York,
Defendant-Respondent,

CVS Pharmacy, Inc.,
Defendant-Respondent-Appellant,

2112 White Plains Road, LLC, et al.,
Defendants-Appellants-Respondents.

- - - -

CVS Pharmacy, Inc.,
Third-Party Plaintiff,

-against-

Trammell Crow Corporate Services, Inc.,
Third-Party Defendant-Respondent.

Law Office of Lori D. Fishman, Tarrytown (Michael J. Latini of
counsel), for appellants-respondents.

McAndrew, Conboy & Prisco, LLP, Woodbury (Yasmin D. Soto of
counsel), for respondent-appellant.

Silberstein, Awad & Miklos, P.C., Garden City (Dana E. Heitz of
counsel), for Maria Ramos Cortwright and Mohammad Malik,
respondents.

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

White, Quinlan & Staley, L.L.P, Garden City (Eileen Farrell of
counsel), for Trammell Crow Corporate Services, Inc., respondent.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.),
entered August 11, 2008, which, to the extent appealed from,
denied the motions by defendants 2112 White Plains Road, LLC,

ACHS Management Corp. and CVS Pharmacy, Inc., for summary judgment dismissing the complaint as against them, unanimously modified, on the law, to grant the motion by 2112 White Plains Road and ACHS Management, and otherwise affirmed, without costs. The Clerk is directed to enter judgment in favor of defendants 2112 White Plains Road, LLC and ACHS Management Corp. dismissing the complaint as against them.

Defendants 2112 White Plains Road and ACHS Management established prima facie that they neither created a defective condition in the sidewalk nor used the sidewalk for a special purpose (see *Romero v ELJ Realty Corp.*, 38 AD3d 263 [2007]). ACHS's senior property manager testified that ACHS had no record of any sidewalk maintenance performed by ACHS in front of the CVS Pharmacy store where plaintiff Cortwright allegedly slipped and fell on the ramp in the curb. In opposition, plaintiffs offered no evidence to support either their allegation that 2112 and ACHS may have undertaken such a repair or their contention that 2112 and ACHS used the public sidewalk for their own special benefit (see *Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 298-299 [1988], *lv dismissed in part, denied in part* 73 NY2d 783 [1988]).

However, issues of fact remain whether defendant CVS Pharmacy engaged in repair work that may have created a defective condition that caused the accident, in light of CVS's allegation that third-party defendant Trammell Crow Corporate Services,

which has not yet been deposed, negligently repaired the sidewalk where the accident occurred and the record evidence that before the accident CVS had made one call concerning the sidewalk on the "fixed line" it maintained for requesting repairs (see *George v New York City Tr. Auth.*, 306 AD2d 160 [2003]).

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

ENTERED: DECEMBER 22, 2009


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The agreement between the defendants did not indicate that CPC assumed any duty of the City to maintain the premises in a safe condition.

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

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

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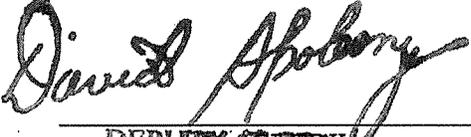


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"drug transaction" to signify (see *People v Martin*, 50 NY2d 1029, 1031 [1980]). As an alternative holding, we also reject defendant's claim on the merits. The observing officer's radio message stating that there had been a drug transaction, and giving a detailed description of defendant, justified defendant's arrest under the fellow officer rule (see *People v Washington*, 87 NY2d 945 [1996]). In context, the phrase "drug transaction" was indistinguishable from such phrases as "positive buy" or "positive transaction" (see *People v Genyard*, 276 AD2d 299 [2000], *lv denied* 95 NY2d 963 [2000]; see also *People v Fisher*, 270 AD2d 90 [2000], *lv denied* 95 NY2d 796 [2000] [in context of police narcotics operation, radioed description itself may reasonably imply described person's involvement in drug transaction]).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: DECEMBER 22, 2009


DEPUTY CLERK

on the truck failed. A police officer who responded to the accident observed a maladjustment on the slack adjuster, a mechanism that controlled the brake, and an oil leak on the hub of the truck. An expert retained by Daily News opined that the maladjustment and the oil leak could lead to brake failure and were indicative of improper maintenance or inspection of the truck. Although the expert did not inspect the truck, his opinions were sufficiently supported by photographs of the scene and the firsthand observations of the police officer.

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: DECEMBER 22, 2009


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stage during the relevant time period and whether his course of treatment would have been different had the disease been diagnosed earlier. Furthermore, the opinion of plaintiffs' expert was not merely conclusory, as it relied on plaintiff's medical records to draw conclusions (see *Boston v Weissbart*, 62 AD3d 517 [2009]; compare *Parnell v Montefiore Med. Ctr.*, 63 AD3d 573, 574 [2009]).

Contrary to defendants' contention, since the opinion of plaintiff's expert did not concern a novel scientific theory of causation, a hearing pursuant to *Frye v United States* (293 F 1013 [DC Cir 1923]), was unnecessary (see e.g. *Marsh v Smyth*, 12 AD3d 307 [2004]).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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Gonzalez, P.J., Tom, Sweeny, Freedman, Abdus-Salaam, JJ.

1871 Cambridge Development, LLC, Index 67120/05
Petitioner-Appellant,

-against-

Bruce Staysna,
Respondent-Respondent.

Rose & Rose, New York (David P. Haberman of counsel), for
appellant.

Law Offices of Santo Golino, New York (Brian W. Shaw of counsel),
for respondent.

Order of the Appellate Term of the Supreme Court of the
State of New York, First Department, entered December 23, 2008,
which modified an order of Civil Court, New York County (Marc
Finkelstein, J.), entered on or about November 3, 2006, inter
alia, granting petitioner landlord's cross motion for summary
judgment awarding it a final judgment of possession, by
permanently staying execution of the warrant of eviction,
unanimously affirmed, without costs.

Appellate Term properly modified the order of the Civil
Court by permanently staying execution of the warrant of eviction
because although a tenant who profiteers on a rent-stabilized
apartment by substantially overcharging a subtenant may forfeit

his or her rights under rent stabilization (see e.g. *Matter of 151-155 Atl. Ave. v Pendry*, 308 AD2d 543 [2003]; *Continental Towers Ltd. Partnership v Freuman*, 128 Misc 2d 680, 681-82 [1985]), the circumstances presented do not warrant termination of tenant's 16-year rent-stabilized tenancy. Although tenant sublet his rent-stabilized apartment to a subtenant for a substantial percentage above the legal rent, the tenancy was to be of short duration and upon learning of the illegality of the rent being charged, tenant promptly cured any violation of Rent Stabilization Code (9 NYCRR) § 2525.6(b) by immediately agreeing with the subtenant to offset his future rent and utility payments at the legal rate against the full amount of his initial overpayment. This arrangement was reached before the first month of the sublease had ended, and thus the duration of the illegal overcharging by tenant was brief, the offset resulted in a full refund of the overpayment, and landlord was aware of tenant's

cure before the commencement of the holdover proceeding (see e.g. *Ariel Assoc. v Brown*, 271 AD2d 369 [2000], lv dismissed 95 NY2d 844 [2000]; *Central Park W. Realty v Stocker*, 1 Misc 3d 137[A], 2004 NY Slip Op 50058[U] [2004]; *Husda Realty Corp. v Padien*, 136 Misc 2d 92 [Civ Ct, NY County 1987]).

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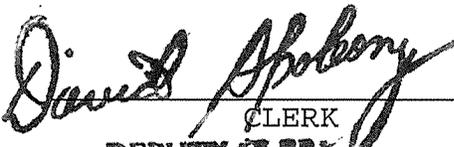

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specific definition in the latter regarding which sentences other than those for sex offenses may be considered in determining an offender's eligibility for civil management (see generally *People v Finley*, 10 NY3d 647, 655 [2008]), render Penal Law § 70.30 inapplicable for the purpose of merging the sentence for the rape into respondent's subsequent sentence for the non-sexual offense (cf. *People v Buss*, 11 NY3d 553 [2008]). Contrary to the State's contention, Penal Law § 70.30 and Mental Hygiene Law Article 10 are not so related that they must be harmonized (cf. *Rector, Church Wardens & Vestrymen of St. Bartholomew's Church v Committee to Preserve St. Bartholomew's Church*, 84 AD2d 309, 313 [1982], appeal dismissed 56 NY2d 645 [1982]).

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

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

ENTERED: DECEMBER 22, 2009


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Friedman, J.P., McGuire, Moskowitz, Acosta, DeGrasse, JJ.

1264-

1264A Sivin-Tobin Associates, LLC,
Plaintiff-Appellant,

Index 107123/06

-against-

Akin Gump Strauss Hauer & Feld LLP,
Defendant-Respondent.

Ackerman, Levine, Cullen, Brickman & Limmer, LLP, Great Neck
(John M. Brickman of counsel), for appellant.

Kavanagh Maloney & Osnato LLP, New York (James J. Maloney of
counsel), for respondent.

Judgment, Supreme Court, New York County (Jane Solomon, J.),
entered April 14, 2008, dismissing the complaint, unanimously
affirmed, without costs. Appeal from order, same court and
Justice, entered April 1, 2008, which granted defendant's motion
for summary judgment, unanimously dismissed, without costs, as
subsumed in the appeal from the aforesaid judgment.

On December 19, 2005, plaintiff, a recruitment firm, sent,
via e-mail, an unsolicited resume of an attorney specializing in
Korean practice to a partner in defendant's New York office.
According to plaintiff, a copy of its placement terms and
conditions (term sheet) describing the anticipated fee for
attorney placement with defendant was sent along with the resume.
The term sheet provided that "[t]he interviewing of any attorney
submitted to the firm will constitute acceptance of these terms
and conditions unless [plaintiff] is notified to the contrary in

writing prior to the first interview."

The partner to whom the resume and term sheet were sent has no recollection of receiving the e-mail but does not deny that he did so. At the time it was sent, defendant's New York office did not have a Korean practice, and thus the resume was of no interest to the partner who received the e-mail. Approximately nine days later, on December 28, 2005, a partner in defendant's Washington D.C. office, which has a Korean practice, was working with another recruitment firm from which it received the same candidate's resume. Unaware of the resume that was sent to the New York office, the partner in the Washington office, working with the other recruitment firm, interviewed and ultimately hired the candidate to work in defendant's New York office in or about the beginning of February 2006. A fee was ultimately paid to the second recruitment firm for its efforts.

At about the same time that defendant hired the candidate, plaintiff e-mailed the New York partner, stating that it was aware that defendant had been working with another recruitment firm and "reminding" the New York partner that it had previously sent the resume of this candidate to him. The e-mail further stated that if defendant hired the candidate, it would be required to pay plaintiff's placement fee in accordance with the term sheet that was e-mailed along with the candidate's resume back in December.

Defendant responded to plaintiff's e-mail, stating that plaintiff was not entitled to a fee. Plaintiff then commenced the instant action, asserting causes of action for breach of contract, unjust enrichment, and quantum meruit, all under the theory that there was an implied-in-fact agreement between the parties. Plaintiff maintains that an implied-in-fact agreement to pay its placement fee arose from their course of dealing for over a decade and defendant's receipt and retention of the term sheet without objection.

"In connection with an implied contract to pay for personal services, the plaintiff usually must prove that the services were performed and accepted with the understanding on *both* sides that there was a fee obligation" (*Shapira v United Med. Serv.*, 15 NY2d 200, 210 [1965] [emphasis added]). Thus, "[t]he assent of the person to be charged is necessary, and unless he has conducted himself in such a manner that his assent may fairly be inferred he has not contracted" (*Harvey v Gen. Cable Corp.*, 1 AD2d 79 [1955] [internal quotation marks omitted], *affd* 2 NY2d 986 [1957]). As it is undisputed both that the New York partner did not know that the candidate was being interviewed by the Washington office, and that the Washington office did not know prior to interviewing the candidate that his resume had been sent to the New York partner, the required assent necessary to establish an implied contract cannot be inferred. There was no

"meeting of the minds" (*I.G. Second Generation Partners, L.P. v Duane Reade*, 17 AD3d 206, 208 [2005]) sufficient to establish an implied contract pursuant to which defendant agreed to pay plaintiff a fee even if there was no causal connection between plaintiff's submission of the candidate's resume and defendant's decision to interview and hire the candidate.

Further, an implied contract cannot be inferred based on the parties' prior conduct. Defendant never hired any of the 10 candidates plaintiff referred to it over the course of approximately ten years, and the mere fact that defendant interviewed three of those candidates does not permit an inference that defendant had agreed to pay plaintiff a placement fee even in instances where plaintiff's efforts played no role in defendant's decision to interview and hire the candidate.

Plaintiff's unjust enrichment and quantum meruit claims, assuming that they are not merely duplicative of plaintiff's breach of contract claim (see *Stephen Pevner, Inc. v Ensler*, 309 AD2d 722, 723 [2003]; *J.E. Capital v Karp Family Assoc.*, 285 AD2d 361, 362 [2001]), fail for the same reason, i.e., defendant received no benefit from plaintiff's submission of the unsolicited resume as it went unacknowledged and was not acted on by anyone in the firm (see *Stephen Pevner, Inc.*, at 723).

Contrary to plaintiff's claim, no law of the case was established by the court's prior order denying defendant's motion

to dismiss the complaint (see *Friedman v Connecticut Gen. Life Ins. Co.*, 30 AD3d 349, 349-350 [2006], *affd as mod* 9 NY3d 105 [2007]).

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

ENTERED: DECEMBER 22, 2009


DEPUTY CLERK

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

1517 American Transit Insurance Company, Index 112463/06
Plaintiff-Appellant,

-against-

Mohamed Abdul Hashim,
Defendant-Respondent,

Jose S. Cuzco,
Defendant.

Marjorie E. Bornes, New York, for appellant.

Kagan & Gertel, Brooklyn (Irving Gertel of counsel), for
respondent.

Order, Supreme Court, New York County (Richard F. Braun,
J.), entered February 27, 2009, which granted defendant Hashim's
motion for summary judgment seeking a declaration that plaintiff
had a duty to defend Cuzco, its insured, and indemnify Hashim in
an underlying action, modified, on the law, to additionally
declare that indemnification recovery is subject to the monetary
limits of the policy, and otherwise affirmed, without costs.

Hashim claims to have sustained severe and crippling
permanent injuries in a collision in October 2005 with another
motor vehicle driven by Cuzco. On November 3, 2005, counsel for
Hashim notified plaintiff in writing of the personal injuries.
Hashim commenced the underlying action against Cuzco, and moved,
in May 2006, for summary default judgment when Cuzco failed to
answer. On June 19, 2006, plaintiff wrote to Hashim's attorney,

advising that since its recent receipt of Hashim's motion for default judgment was the insurer's first notification of legal action against its insured, it was accordingly disclaiming coverage under the policy. Hashim's counsel wrote back to plaintiff that its disclaimer letter was transmitted "after an unidentified person from your firm called me to ask whether we would voluntarily accept an answer in your behalf, to which I replied that we would not." On or about July 28, 2006, a default judgment was entered against Cuzco, with inquest scheduled for September 26, 2006. At the inquest, damages were assessed and awarded to Hashim in the amount of \$250,000.

Having received timely notice of claim, plaintiff insurer was not entitled to disclaim coverage based on untimely notice of the claimant's commencement of litigation unless it was prejudiced by the late notice (*American Tr. Ins. Co. v B.O. Astra Mgt. Corp.*, 39 AD3d 432 [2007], *lv denied* 9 NY3d 802 [2007]). Plaintiff has not demonstrated prejudice by reason of the late notice of the underlying action. Plaintiff was notified of the legal action after the motion for a default judgment was made, but before the July 28, 2006 order scheduling an inquest. It could have appeared, opposed the motion, and filed for leave to file a late answer, but pursued none of those options.

Hashim failed to appeal from the order insofar as it denied his request for a direction that plaintiff satisfy the judgment

in the underlying action. However, were we to consider the issue, we would find that recovery is confined to the monetary limits of the policy (Insurance Law § 3420[a][2]).

All concur except Nardelli, J. who dissents in a memorandum as follows:

NARDELLI, J. (dissenting)

I would modify the declaration in defendant's favor to declare that plaintiff American Transit Insurance Company is obligated to defend and/or indemnify Jose Cuzco in the underlying negligence action on condition that defendant Mohamed Hashim consent to vacatur of the default judgment he obtained, and permit American Transit to file an answer on behalf of Cuzco.

It is clear that counsel for Hashim, despite having previously exchanged correspondence with claims representatives at American Transit, did not notify American Transit of the negligence action until after he moved for a default judgment. He further acknowledges that he had spoken with claims examiners for American Transit on at least six occasions prior to any litigation. Yet, he did not give American Transit the courtesy of advising it that litigation had been commenced.

Even after the lawsuit was commenced, and it was evident that Cuzco was not corresponding with his insurer, counsel for Hashim did not advise American Transit of the lawsuit. Only after he submitted a motion for a default judgment did he advise American Transit that the matter was in litigation. He admits that within a few days after American Transit was finally and actually made aware of the motion for a default judgment, a representative telephoned him, and advised that American Transit was willing to defend and indemnify Cuzco, if he would agree to

accept a late answer. He refused this requested courtesy, despite the fact that all evidence indicates that American Transit had just become aware of the lawsuit.

Of particular concern in evaluating counsel's good faith is a clouded representation in his affidavit in support of his motion for summary judgment in this action. At paragraph eight he states that notice of the lawsuit had been provided to American Transit on May 3, 2006, and that the June 19, 2006 disclaimer letter from American Transit was thus untimely. Review of the May 3, 2006 letter, however, makes clear that the letter was addressed to Cuzco, with a copy sent to American Transit, and advised Cuzco to contact his insurance company about "correspondence" which he had received previously. The letter did not advise that the "correspondence" was actually a summons and complaint.

In reality, American Transit did not receive notice of the actual litigation until June 5, 2006, when counsel for Hashim first communicated directly with the insurer.

While some may question American Transit's strategy in not opposing the motion for a default judgment, and then commencing the declaratory action two months later, the issue for this Court is not whether American Transit was wise, but whether it was prejudiced (see *American Tr. Ins. Co. v B.O. Astra Mgt. Corp.*, 39 AD3d 432 [2007], *lv denied* 9 NY3d 802 [2007]). Inasmuch as

counsel for Hashim did not advise the insurer of the pendency of the litigation until after he had moved for a default judgment, and then refused the common and professional courtesy of permitting it to file an answer, the prejudice is self-evident. There is no guarantee that the trial court would have extended American Transit's time to answer, especially in view of Hashim's opposition.

The underlying negligence action was commenced on February 24, 2006, and Hashim's counsel did not advise the insurer of the pendency of the action until June 2006. No excuse is offered for the delay in giving notice, and, additionally, counsel was not quite candid about a purported notice given two months after the litigation was commenced. Since counsel had been in communication with the insurer on several occasions before the litigation was commenced, and yet did not timely advise of the pendency of the litigation, there is no justification for finding that the insurer's conduct was more grievous than Hashim's, or that it was not prejudiced. No one will suffer if this action is tried on the merits.

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

ENTERED: DECEMBER 22, 2009


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

1554-

1555 Dental Management & Development, Inc., Index 17135/05
Plaintiff-Respondent,

-against-

Bronx-Lebanon Hospital Center,
Defendant-Appellant.

Garfunkel, Wild & Travis, P.C., Great Neck (Roy W. Breitenbach of
counsel), for appellant.

Borah, Goldstein, Altschuler, Schwartz & Nahins, P.C., New York
(Paul N. Gruber of counsel), for respondent.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.),
entered October 16, 2008, which granted plaintiff subtenant's
motion for summary judgment, and order, same court and Justice,
entered or about March 5, 2009, which denied defendant's motion
to renew and, upon granting defendant's motion for reargument,
adhered to its prior decision, unanimously affirmed, with costs.

Because the agreement between two dentists utilizing the
basement premises did not result in a complete surrender of the
demised premises from one to the other, or a grant of exclusive
use to the purported sub-subtenant, the agreement constituted a
license rather than an unauthorized sub-sublease (*cf. Matter of
Dodgertown Homeowners Assn. v City of New York*, 235 AD2d 538, 539
[1997], *lv denied* 89 NY2d 809 [1997]). In regard to the
contention that there was an illegal fee-splitting arrangement,
we note that neither notice to cure raised this as a violation,

nor is this a fee-splitting agreement in violation of Education Law § 6509-a. As to the waiting room, which was subdivided into two sections without visible demarcation, the use of the entire common space by plaintiff's dental patients, including defendant's portion of the undivided area, did not constitute a breach of the sublease between plaintiff and defendant.

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

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

ENTERED: DECEMBER 22, 2009


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Mazzarelli, J.P., Nardelli, Catterson, DeGrasse, Román, JJ.

1567 Donald Lee,
Petitioner-Respondent,

-against-

Elizabeth Lee,
Respondent-Appellant.

Law Offices of Clifford J. Petroske, P.C., Bohemia (Clifford J. Petroske of counsel), for appellant.

Ali, Pappas & Cox, P.C., Syracuse (P. Douglas Dodd of counsel), for respondent.

Order, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about September 3, 2008, which, insofar as appealed from, denied respondent wife's objections to the Support Magistrate's order that, inter alia, granted petitioner husband's petition for a downward modification of his spousal maintenance obligation and denied respondent's application for attorney's fees, unanimously modified, on the law and the facts, to grant respondent's objection pertaining to the downward modification of spousal maintenance, the payment schedule of \$5,800 per month reinstated and otherwise affirmed, without costs.

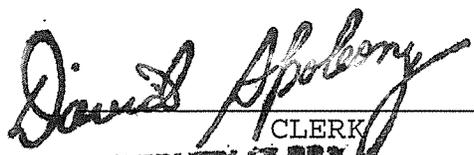
The downward modification of spousal maintenance was improperly granted as the record does not support the finding that petitioner demonstrated a "substantial change in financial circumstances" as required in the parties' stipulation with respect to maintenance, which was merged into the judgment of

divorce. Indeed, petitioner's current overall income is greater than his income at the time of the divorce and he continues to maintain a lavish lifestyle (see *McCarthy v McCarthy*, 11 AD3d 402 [2004], *lv dismissed in part, denied in part* 4 NY3d 793 [2005]; *Dunnan v Dunnan*, 293 AD2d 345 [2002]). Nor does respondent's post-divorce receipt of social security benefits and payments from petitioner's pension constitute a substantial change in financial circumstances sufficient to have warranted the downward modification (see *Block v Block*, 277 AD2d 87 [2000]; *Wells v Wells*, 242 AD2d 934 [1997]).

The denial of respondent's application for counsel fees was a provident exercise of discretion under the circumstances (see *Matter of Lawrence v Lawrence*, 187 AD2d 995 [1992]).

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

ENTERED: DECEMBER 22, 2009


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Mazzarelli, J.P., Nardelli, Catterson, DeGrasse, Román, JJ.

1574 David Frydman, et al., Index 601721/07
Plaintiffs-Appellants,

-against-

Fidelity National Title Insurance
Company, etc.,
Defendant-Respondent.

Frydman LLC, New York (David S. Frydman of counsel), for
appellants.

McCullough, Goldberger & Staudt, LLP, White Plains (Patricia
Wetmore Gurahian of counsel), for respondent.

Judgment, Supreme Court, New York County (Debra A. James,
J.), entered March 3, 2009, declaring that defendant title
insurer has no obligation to defend and indemnify plaintiffs in
an underlying action, unanimously affirmed, with costs.

The subject title policy took effect as of May 26, 1999, the
date the insureds acquired title to the insured property.
Insofar as pertinent to the appeal, the policy specifically
excludes from coverage "rights of tenants or persons in
possession." It additionally excludes "fences ... [that] vary
with the record lines," as indicated in a 1972 "survey report,"
as well as a May 5, 1999 "survey inspection" reporting no changes
to the property's "boundary indicator."

The 2002 underlying complaint for adverse possession against
plaintiffs by their neighbors was based entirely on the location
of a fence that varied from the actual boundary line. Thus, the

policy's exception to coverage for varying fences clearly applies.

Assuming, as plaintiffs argue, that the pre-policy "certificate of title," dated May 26, 1999, and the attached "marked title report" reveal an intention to cover claims based on a fence that varied from the actual boundary line, we would find that any such intention did not survive issuance of the policy. The certificate of title specifically states that upon delivery of the final policy, the certificate becomes null and void. Moreover, Section 15 of the policy specifically states that, together with any attached endorsements, it constitutes the entire contract between the parties, and defendant's liability is limited only to its terms (*see Hess v Baccarat*, 287 AD2d 834 [2001]).

Plaintiffs' reliance on *Fresh Pond Rd. Assoc. v TRW Title Ins. of N.Y.* (176 AD2d 660 [1991]) is misplaced, since the case is distinguishable. In that case, since the insurance policy contained only general exclusionary language and a marked title report contained handwritten notes indicating that certain specific exclusions were to be omitted from the policy, we found issues of fact as to the intended scope of the policy. Here, the policy contains specific exclusions, and pursuant to its terms is the sole agreement between the parties. We have considered plaintiffs' argument that the court improperly converted a breach

of contract action into a declaratory judgment action and, without CPLR 3211(c) notice, converted a motion by defendant to dismiss the complaint into a motion for summary judgment, and find it to be unavailing (see CPLR 2002; *Shah v Shah*, 215 AD2d 287, 289 [1995]). This case contains no factual disputes, and by submitting before the Supreme Court every relevant piece of documentary evidence, along with affidavits of representatives of both parties discussing the application of such evidence, the parties have charted a course for summary judgment. Accordingly, the court properly entered a declaratory judgment in favor of defendants.

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

ENTERED: DECEMBER 22, 2009


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allowed him to earn the "extraordinary" income the parties enjoyed during the marriage. While defendant contributed to the further development of the business by, among other things, decorating and renovating the parties' residences to create impressive surroundings in which to entertain plaintiff's clients and potential investors, the 35% allocation was reasonable under all the circumstances (see *McKnight v McKnight*, 18 AD3d 288 [2005]).

The court properly treated the couple's trading accounts with plaintiff's brokerage business as business assets. The accounts were managed solely by plaintiff (see *Orofino v Orofino*, 215 AD2d 997, 998 [1995], *lv denied* 86 NY2d 706 [1995]), who invested the funds in a manner intended to improve his companies' returns. As such, the accounts were an integral part of the business.

We do not agree, however, with the court's treatment of the deferred incentive fees owed to the investment management company as business assets subject to the 65%/35% division, and modify accordingly to equalize each party's share of this item at 50%. Although these fees, which total \$31,020,400, were earned by plaintiff's company for managing a hedge fund during 1996 through 2000, plaintiff caused the company to defer receipt of payment from the fund, and they remain unpaid. Upon their payment to the company, which is a Subchapter S corporation, the fees would be

taxable to plaintiff as income, and as plaintiff acknowledges, he deferred their receipt to postpone paying personal income tax. Plaintiff also claims that the deferral was intended to benefit the fund's performance by increasing the amount available for investment. However, under the circumstances, where plaintiff chose not to realize profits from his business that were earned years before the commencement of this action, the deferred fees constitute marital property to be divided equally.

The court correctly recognized that defendant's share of the deferred fees must be reduced by 48.77%, which the parties stipulated would be the applicable tax rate for the fees. These incentive fees were not intangible assets whose valuation depended on the occurrence of a contingent event (*compare Harmon v Harmon*, 173 AD2d 98 [1992]); rather, they constitute earned income in a definite amount whose receipt will lead to certain tax liability (*see Wechsler v Wechsler*, 58 AD3d 62 [2008], *appeal dismissed* 12 NY3d 883 [2009]).

Accordingly, in connection with the deferred fees, defendant is awarded 50% of their post-tax value of \$15,896,135, which equals \$7,948,067, or an increase of \$2,384,420 from the lower court's award of \$5,563,647.

We find no grounds for disturbing the lower court's other determinations. The court rejected defendant's claim that a \$1 million note on the couple's Bedford property was a fiction after

weighing the credibility of conflicting testimony, and accordingly reduced the in-kind distribution to plaintiff by the amount of the note. It was also reasonable for the court to take into account that defendant's father prepared the note, yet she did not call him to testify.

The court appropriately concluded that defendant had only presented evidence that plaintiff had used \$74,000 of marital property to satisfy premarital tax liens, and so denied her claim that he had used greater sums. While plaintiff had deposited sale proceeds of separately owned properties into the couple's brokerage accounts, from which other marital assets were purchased, the court appropriately credited him for the purchase price (but not the increased sale value) of these separate properties (see Domestic Relations Law § 236[B][5][d][13]; *Heine v Heine*, 176 AD2d 77, 84 [1992], *lv denied* 80 NY2d 753 [1992]).

It was also reasonable for the court to find that the value of certain artwork would be shared equally. While the court rejected plaintiff's testimony that this art belonged to a third party, there was no credible evidence that plaintiff had acted improperly so as to justify an unequal award (*cf. K. v B.*, 13 AD3d 12, 18-19 [2004], *lv denied* 4 NY3d 878 [2005]; *Davis v Davis*, 175 AD2d 45, 48 [1991]; see Domestic Relations Law § 236[B][5][d][11]). Moreover, defendant offered no proof of her claim that the artwork was worth more than the court's valuation.

It was reasonable to deny defendant's request for counsel fees since the equitable distribution will provide her with adequate funds to pay her attorney (see *Sementilli v Sementilli*, 102 AD2d 78, 91 [1984]). The court's denial of prejudgment interest under CPLR 5001 recognized that plaintiff had been paying pendente lite maintenance totaling more than \$3 million, and was within its discretion (see *Rubin v Rubin*, 1 AD3d 220, 221 [2003], *lv denied* 2 NY3d 706 [2004]). While interest from the decision to the entry of final judgment is mandatory (CPLR 5002), the court continued the pendente lite award in lieu of interest.

Finally, as to plaintiff's argument that the judgment overstates the distributive award to defendant by miscalculating the credit for her separate property, the court's method for arriving at this figure does not merit review, given that the calculation was one of numerous carefully reasoned steps used to equitably distribute assets in this complex case. However, since defendant concedes that the judgment awarded her \$17,645 more than the court intended, we reduce the increased judgment to her by that amount. The matter is remanded for entry of a judgment of divorce reflecting our modification of the award.

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

ENTERED: DECEMBER 22, 2009


DEPUTY CLERK

"relinquishe[d] control" (*People v Toliver*, 89 NY2d 843, 844 [1996]) over jury selection. The court, in effect, excused certain jurors as unqualified on the basis of their responses to a single question posed by the court. Thus, the court supervised that stage of jury selection, notwithstanding that it did so in a manner to which defendant belatedly objects.

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

ENTERED: DECEMBER 22, 2009



DEPUTY CLERK

Sweeny, J.P., Catterson, Renwick, Freedman, Abdus-Salaam, JJ.

1834 In re Isaiah F., and Another,
 Dependent Children Under The Age
 Of Eighteen Years, etc.,

 Alexander W., et al.,
 Respondents-Appellants,

 Alexander F., et al.,
 Respondents,

 Administration for Children's Services,
 Petitioner-Respondent.

Geoffrey P. Berman, Larchmont, for Alexander W., appellant.

Andrew J. Baer, New York, for Anita T., appellant.

Michael A. Cardozo, Corporation Counsel, New York (Suzanne K. Colt of counsel), for respondent.

Tamara A. Steckler, Esq., The Legal Aid Society, New York (Marcia Egger of counsel), Law Guardian.

Order of fact-finding, Family Court, Bronx County (Monica Drinane, J.), entered on or about September 9, 2008, which found that the subject child, Isis, was neglected and that the subject child, Isaiah, was derivatively neglected, unanimously affirmed, without costs.

The court correctly found appellant Anita T. to be a person legally responsible for the subject children (see *Matter of Yolanda D.*, 88 NY2d 790, 796 [1996]).

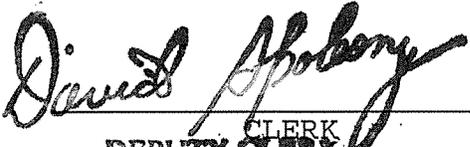
The findings of neglect are supported by a preponderance of the evidence that sexual abuse occurred, including testimony by a

mental health expert based on independent observations of the children, Isis's demonstration to the expert using anatomically correct dolls corroborating her prior, consistent, independently recalled out-of-court statements regarding the abuse, and Isaiah's out-of-court statements corroborating Isis's account of the abuse (see *Matter of Nicole V.*, 71 NY2d 112, 124 [1987]; *Matter of Pearl M.*, 44 AD3d 348, 349 [2007]; *Matter of Najam M.*, 232 AD2d 281, 282 [1996]).

Expert testimony concerning respondent Alexander F.'s Abel test results did not pertain to appellant Alexander W., who did not urge admission of the expert's finding that Alexander F. is not sexually aroused by children, or appeal the court's *Frye* decision to exclude the test results and the expert's testimony. In any event, the court properly found, based on the expert's testimony, that the Abel test, while designed to diagnose and treat pedophilia, does not apply to intrafamilial sexual abuse, which occurs as a result of family dynamics rather than a general sexual interest in children, and thus was not relevant to whether the acts of intrafamilial sexual abuse alleged herein occurred.

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

ENTERED: DECEMBER 22, 2009


CLERK
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claims that these amounts were insufficient. Furthermore, defendant breached an oral promise to create a pool equal to 15% of hedge fund revenues from which bonuses were to be paid to plaintiff and others in his department. In addition, plaintiff, whose employment with defendant ended in March 2006, claims entitlement to a bonus for the year 2006.

The employment agreement, which identified plaintiff's title, salary, estimated start date, vacation days, and benefits, was an integrated agreement. As such, parol evidence was inadmissible to vary its terms (see *Unisys Corp. v Hercules Inc.*, 224 AD2d 365, 369-370 [1996], appeal withdrawn 89 NY2d 1031 [1997]; *Stamelman v Fleishman-Hillard, Inc.*, No. 02 Civ 8318, 2003 WL 21782645 [SD NY 2003]). Where, as here, the bonus component of compensation dwarfs plaintiff's stated base salary component, "the parties would be expected to make reference to such a large sum of money in the [written] agreement with particularity" (*Namad v Salomon Inc.*, 74 NY2d 751, 753 [1989]) and thus, plaintiff cannot rely on the alleged oral promise of the creation of a defined bonus pool to vary the terms of the written agreement. Moreover, the clear terms of the employment agreement preclude plaintiff from receiving any bonus, which was only determined at year-end, for the year 2006. Accordingly, plaintiff is not entitled to recovery for breach of contract.

As the parties' relationship is governed by a contract,

plaintiff may not recover under quasi-contractual theories (see *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382 [1987]) and cannot rely on such theories in contravention of the parol evidence rule (see *Unisys Corp.*, 224 AD2d at 370).

Finally, plaintiff is not entitled to the imposition of a constructive trust, relief not previously sought or requested in the complaint (see *Macina v Macina*, 60 NY2d 691 [1983]).

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

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

ENTERED: DECEMBER 22, 2009


DEPUTY CLERK

Sweeny, J.P., Catterson, Renwick, Freedman, Abdus-Salaam, JJ.

1836-

1836A B.E.N. Trading Corp.,
Plaintiff,

Index 602707/05
590872/05

-against-

Shirley Import, Inc., et al.,
Defendants/Third-Party
Plaintiffs-Appellants,

Binyamin Abadi, et al.,
Third-Party Defendants-Respondents.

Silver & Silver, LLP, Somerset, NJ (Herbert J. Silver of
counsel), for appellants.

Jonathan A. Stein, Cedarhurst, for respondents.

Judgment, Supreme Court, New York County (Richard B. Lowe
III, J.), entered July 23, 2008, awarding plaintiff the principal
sum of \$250,000 against defendants, dismissing the third-party
action and awarding third-party defendants nominal costs and
disbursements against defendants/third-party plaintiffs,
unanimously affirmed, with costs. Appeal from order, same court
and Justice, entered July 17, 2008, which granted plaintiff's
motion to strike defendants' answer, unanimously dismissed,
without costs, as subsumed in the appeal from the judgment.

Defendants' failure to offer a reasonable excuse for their
noncompliance with discovery demands, court orders and the
court's rules gives rise to an inference of willful and
contumacious conduct (*Siegman v Rosen*, 270 AD2d 14, 15 [2000]).

The striking of their answer and third-party complaint was a proper exercise of judicial discretion in light of such conduct (CPLR 3126; see *Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]).

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

ENTERED: DECEMBER 22, 2009


CLERK
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to the August 16, 2006 adjournment, defendant failed to rebut the People's contention that defense counsel, who insisted on examining certain items of physical evidence prior to going ahead with the scheduled suppression hearing, requested the adjournment, and the motion court properly found this time to be excludable on that basis. Furthermore, these items were not necessary for the hearing, and their absence did not make the People responsible for the delay (see *People v Anderson*, 66 NY2d 529, 543 [1985]; *People v Wright*, 50 AD3d 429, 430 [2008], *lv denied* 10 NY3d 966 [2008]).

Since defendant's motion for a trial order of dismissal raised completely different issues from the issue he raises on appeal, his present challenge to the legal sufficiency of the evidence is unpreserved (see *People v Hawkins*, 11 NY3d 484, 492 [2008]), and we decline to review it in the interest of justice. As an alternative holding, we find that the verdict was based on legally sufficient evidence. We also find that the verdict was not against the weight of the evidence (see *People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. The evidence warranted the inference that when defendant attacked the victim he intended to commit robbery, and not merely assault, regardless of which of the attackers took the victim's wallet, watch and cell phone. There was no reasonable explanation except that of

robbery for this sudden, unprovoked attack on a stranger (see e.g. *People v Nur*, 52 AD3d 351 [2008], lv denied 11 NY3d 792 [2008]). When a factfinder draws, from the circumstances, a reasonable inference about a defendant's intent, this does not impermissibly shift the burden to the defendant to provide an alternative explanation (see *Sandstrom v Montana*, 442 US 510, 515 [1979]; *People v Getch*, 50 NY2d 456, 465 [1980]). Furthermore, defendant's knowledge of, and complicity in, the theft were underscored by evidence that the property, especially the watch, was taken in a manner that was open and obvious to all the attackers, and that they all fled together immediately after the taking was accomplished (see *Matter of Juan J.*, 81 NY2d 739 [1992]; *People v Mendez*, 34 AD3d 697 [2006]).

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 22, 2009


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negligence (*Pagan v Local 23-25 Intl. Ladies Garment Workers Union*, 234 AD2d 37, 38 [1996]).

Here, defendants met their burden of establishing entitlement to summary dismissal. The infant plaintiff, while claiming he slipped on wax, acknowledged in his testimony that the wax was not wet, that he did not see a particular accumulation of wax that caused his fall, and that he never experienced any slipperiness prior to this slip and fall. Without any specific allegations as to what precipitated his fall, his claim that the City's negligence in maintaining the floor was the proximate cause of his injuries is based on speculation (see *Zanki v Cahill*, 2 AD3d 197 [2003], *affd* 2 NY3d 783 [2004]). On this record, the infant plaintiff's fall could just as likely have been caused by some other factor than defendants' negligence (see *Oettinger v Amerada Hess Corp*, 15 AD3d 638, 639 [2005]).

The negligent supervision claim was properly dismissed in the absence of any evidence that the allegedly negligent supervision was a proximate cause of this injury (*Capotosto v Roman Catholic Diocese of Rockville Ctr.*, 2 AD3d 384, 385 [2003]). Based on the infant plaintiff's testimony as to how he fell, no additional supervision would have prevented the accident

(see *McCollin v Roman Catholic Archdiocese of N.Y.*, 45 AD3d 478
[2007]).

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

ENTERED: DECEMBER 22, 2009


DEPUTY CLERK

for plaintiff's injuries 40% to the City and 60% to Brian Morales was rationally supported by the evidence. Contrary to the City's contention, the jury could reasonably have concluded that the police officers continued their pursuit of the stolen vehicle driven by Morales after entering the Bronx River Parkway, thereby recklessly disregarding the safety of others (see Vehicle and Traffic Law § 1104[e]; see *Fioriello v Sasson*, 255 AD2d 549 [1998], *lv denied* 93 NY2d 817 [1999]). There was also sufficient evidence to support the jury's verdict that the police officers' conduct was a proximate cause of the accident and plaintiff's injuries. Contrary to the City's contention, it cannot be said as a matter of law that Morales's conduct was the sole, superseding cause of the accident (see *Mercado v Vega*, 77 NY2d 918, 919-920 [1991]).

The jury's award of \$2.5 million for past pain and suffering and \$1.5 million for future pain and suffering over a period of 14 years deviates materially, to the extent indicated, from what is reasonable compensation for plaintiff's injuries to the left, nondominant hand, including severance of the left pinky finger

(see CPLR 5501[c]; *Bradshaw v 845 U.N. Ltd. Partnership*, 2 AD3d 191 [2003]; *Cabezas v City of New York*, 303 AD2d 307 [2003]).

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

ENTERED: DECEMBER 22, 2009


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Sweeny, J.P., Catterson, Renwick, Freedman, Abdus-Salaam, JJ.

1843-		
1844	Beverly Ann Avery, et al., Plaintiffs-Appellants,	Index 115492/07
		112530/06
		115493/07
	-against-	109837/06
		112531/06
	Pfizer, Inc.,	114267/06
	Defendant-Respondent.	109840/06
		115491/07
		155337/08
		112536/06
		112532/06
		109846/06
		112534/06
		109852/06
		112533/06
		109851/06
		107932/06

Mark Jay Krum, New York, for appellants.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Mark S. Cheffo of counsel), for respondent.

Order, Supreme Court, New York County (Martin Shulman, J.), entered June 17, 2008, which granted defendant's motion to dismiss plaintiff Charles M. Wilson's complaint on the ground of forum non conveniens, unanimously affirmed, without costs.

All of the above plaintiffs, except Charles M. Wilson, have stipulated to a conditional dismissal of their respective complaints based on the court's reasoning in dismissing Wilson's complaint, as they are similarly situated to Wilson. Wilson, who allegedly suffered injuries as a result of his use of defendant's drug Lipitor, is a resident of Georgia; his physician who

recommended and prescribed the drug, and on whose recommendation Wilson solely relied, lives in Georgia; Wilson ingested the drug in Georgia and suffered his injuries in Georgia; all of Wilson's treating physicians are in Georgia; and all of Wilson's witnesses are in Georgia. Under these circumstances, the court properly granted defendant's motion (see *Nicholson v Pfizer, Inc.*, 278 AD2d 143 [2000]; see generally *Islamic Republic of Iran v Pahlavi*, 62 N.Y.2d 474, 478-479 [1984], cert denied 469 US 1108 [1985]). Plaintiffs' "bare assertion[s]" of fraud (*Devore v Pfizer, Inc.*, 58 AD3d 138, 143 [2008], lv denied 12 NY3d 703 [2009]), allegedly committed at defendant's corporate headquarters in New York, are insufficient to create a substantial nexus with New York outweighing the compelling reasons for dismissal. We decline to disregard the traditional forum non conveniens factors in favor of a "mass tort litigation" approach (see e.g. *Matter of OxyContin II*, 23 Misc 3d 974 [Sup Ct, Richmond Co. 2009]). Nor do we find defendant's alleged delay in making this motion sufficient to warrant its denial.

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

ENTERED: DECEMBER 22, 2009


DEPUTY CLERK

amount in controversy (see generally CPLR 205[a]). As such, defendants' neglect-to-prosecute claim is unavailing.

The estate thereafter timely commenced the instant action based on the same transactions or occurrences underlying the federal fraud claim, well within the 6-month extension period provided in CPLR 205(a) (see also 28 USC § 1367[d]). Therefore, contrary to the court's conclusion, all three causes of action (conversion, fraudulent misappropriation of funds and breach of fiduciary duty) are deemed timely for purposes of the applicable statute of limitations (see CPLR 213, 214[3]).

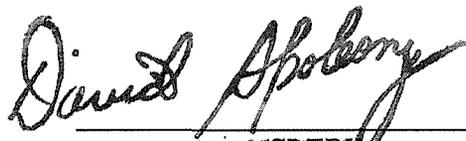
Personal jurisdiction was properly obtained over defendant Celia Fitzpatrick, a New Jersey resident who, while remaining in New Jersey, allegedly obtained by false representation a power of attorney to enable her to remove and convert funds from decedent's New York bank account. Such alleged activity was purposeful and established a substantial relationship between the transaction and the estate's claim for misappropriated bank funds (see *Catauro v Goldome Bank for Sav.*, 189 AD2d 747 [1993]). Plaintiff did not meet its burden, however, in showing that Celia's husband engaged in purposeful conduct to effect the alleged misappropriation so as to warrant the extension of long-arm jurisdiction to him.

There is no basis for granting removal of the action to New Jersey on grounds of forum non conveniens. A substantial nexus

exists between New York and the estate's action for a return of allegedly misappropriated bank funds. The decedent was a New York resident, the bank funds at issue were taken from a Manhattan bank account, defendants often visited New York, and the estate was probated here. Furthermore, defendant has made an inadequate showing of hardship by retention of the action in New York County, which is not far from where defendant and the unidentified defense witnesses live or work (*see generally Bock v Rockwell Mfg. Co.*, 151 AD2d 629 [1989]).

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

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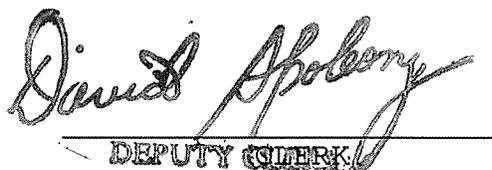
activity (see e.g. *People v Carter*, 77 NY2d 95, 107 [1990], cert denied 499 US 967 [1991]; *People v Urena*, 306 AD2d 137 [2003]), lv denied 100 NY2d 625 [2003]; *People v Julius*, 300 AD2d 167, 168 [2002], lv denied 99 NY2d 655 [2003]; see also *People v Matthews*, 276 AD2d 385 [2000], lv denied 96 NY2d 736 [2001]). We have repeatedly upheld such use of contemporaneous uncharged sales, which "carr[y] relatively little suggestion of general criminal propensity" (*People v Pressley*, 216 AD2d 202 [1995], lv denied 86 NY2d 800 [1995]). With regard to the observing officer's brief mention of defendant's quick exchange with an unidentified man prior to the uncharged sale, defendant has not preserved her current complaint, and we decline to review it in the interest of justice. As an alternative holding, we likewise find this testimony relevant and nonprejudicial.

The court properly exercised its discretion in denying defendant's mistrial motions based on two comments by the prosecutor during summation. As to the first remark, the court's curative actions were sufficient, and the second remark constituted fair comment on the evidence and a reasonable inference to be drawn therefrom. Defendant's remaining challenges to the summation are unpreserved and we decline to review them in the interest of justice. As an alternative

holding, we find no basis for reversal (see *People v Overlee*, 236 AD2d 133 [1997], lv denied 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], lv denied 81 NY2d 884 [1993]).

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

ENTERED: DECEMBER 22, 2009


DEPUTY CLERK

expressly declared that "all property is sold 'as is' without any representation or warranty of any kind by Christie's or the seller." UCC 2-316(3)(a) recognizes that "unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like 'as is' . . . which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty."

Even assuming there was a breach of contract or warranty as to the other two items purchased by plaintiff at the auction, he was, under the Conditions of Sale, contractually precluded from pursuing the massive recovery he now demands. The only remedy available to him thereunder would be a refund of the sale price(s) upon return of the item(s), a limitation generally permissible in contracts for the sale of goods (see UCC 2-719[1][a]).

The allegations of fraud and negligent misrepresentation are virtually identical to those upon which the causes of action for breach of contract and breach of warranty rest, and are thus duplicative, inasmuch as there is no pleading of the breach of a duty separate and apart from the contractual obligation owed to plaintiff. In that regard, it is axiomatic that "a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]).

Nor does plaintiff have a viable cause of action against these defendants under General Business Law § 349 or § 350. A party seeking those remedies must charge conduct that is consumer oriented, with an impact on the public at large (*Canario v Gunn*, 300 AD2d 332 [2002]). Finally, the misconduct alleged here, which arises from a private contract, does not resemble the egregious wrongdoing that could be considered part of a pattern directed at the public generally, so as to warrant the imposition of punitive damages (see *Garrity v Lyle Stuart, Inc.*, 40 NY2d 354, 358 [1976]).

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

ENTERED: DECEMBER 22, 2009


DEPUTY CLERK

Sweeny, J.P., Catterson, Renwick, Freedman, Abdus-Salaam, JJ.

1848 Ventur Group, LLC,
 Plaintiff-Respondent,

Index 604394/06

-against-

Diane Finnerty, et al.,
Defendants-Appellants.

Storch Amini & Munves, P.C., New York (Steven G. Storch of
counsel), for appellants.

Smith Campbell, LLP, New York (Thomas M. Campbell of counsel),
for respondent.

Order, Supreme Court, New York County (Bernard J. Fried,
J.), entered February 24, 2009, which, to the extent appealed
from as limited by the briefs, denied defendants' motion for
summary judgment dismissing the claims for fraudulent inducement
and for breach of a contractual best-efforts clause, and the
demand for punitive damages, unanimously reversed, on the law,
with costs, and the motion granted. The Clerk is directed to
enter judgment dismissing the complaint.

After engaging in almost a year of discussions, plaintiff
entered into a purchase agreement to acquire the assets of two
investment advisory firms (Wealth Management and Asset
Management), which were owned by defendant Finnerty. Under the
agreement, these assets consisted of management agreements with
clients, which could not be assigned without consent. It further
provided that "there can be no assurance that Client Consent can

or will be obtained with respect to any Management Agreement or any particular number of Management Agreements," and no adjustment to the purchase price would be made as a result of failure to obtain client consent.

For purposes of the appeal, defendants do not dispute that Finnerty knowingly misrepresented that she had the primary relationship with -- and "owned" -- the clients of Wealth Management, when in fact those clients had been brought to the firm by an employee, George Graf, who had developed the client relationships over a period of more than 20 years. Plaintiff further alleges that Finnerty misrepresented Graf's importance to the business, and that even though plaintiff had requested a meeting with him, Finnerty refused to schedule one until after the agreement was executed. Shortly after that meeting, Graf resigned from Wealth Management and solicited his clients, 80% of whom left with him.

In order to prevail on a claim for common-law fraudulent inducement, a plaintiff must establish "the misrepresentation of a material fact, which was known by the defendant to be false and intended to be relied on when made, and that there was justifiable reliance and resulting injury" (*Braddock v Braddock*, 60 AD3d 84, 86 [2009]). Defendants do not challenge the motion court's conclusion that the alleged misrepresentations are collateral to the contract, and thus the fraud claim is not

barred by the merger clause in the agreement. Instead, they contend that the claim fails because plaintiff cannot demonstrate justifiable reliance. Although the issue of justifiable reliance is generally a question of fact that is not amenable to summary resolution (see *Brunetti v Musallam*, 11 AD3d 280, 281 [2004]), we have held that "[a]s a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it" (*UST Private Equity Invs. Fund v Salomon Smith Barney*, 288 AD2d 87, 88 [2001]).

Here, even though its ability to review client agreements was limited due to securities regulations governing confidentiality, plaintiff, a financial advisor represented by counsel, proceeded without asking to see any employment contracts or speaking to Graf, who was designated in the agreement as a "key employee" and had not insisted on including protective provisions therein. Having failed to make any effort to verify Finnerty's representations concerning her client relationships and Graf's role in the business, plaintiff cannot demonstrate justifiable reliance on the misrepresentations (see *Valassis Communications v Weimer*, 304 AD2d 448 [2003], appeal dismissed 2 NY3d 794 [2004]; *Stuart Lipsky, P.C. v Price*, 215 AD2d 102, 103 [1995]).

Moreover, plaintiff has not shown evidence sufficient to raise an issue of fact as to whether Finnerty breached her obligation to use best efforts to obtain consents from the Wealth Management clients, or that any particular client was lost as a result of such breach (see *Lexington 360 Assoc. v First Union Natl. Bank of N. Carolina*, 234 AD2d 187, 191-192 [1996]). More likely, any loss of clients was a result of plaintiff's lack of relationship with them.

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

ENTERED: DECEMBER 22, 2009


DEPUTY CLERK

Sweeny, J.P., Catterson, Renwick, Freedman, Abdus-Salaam, JJ.

1849 Alice Gong D'Ariano, et al., Index 25587/04
Plaintiffs-Appellants,

-against-

Monique Meldish, et al.,
Defendants-Respondents.

Nick Fiore, Pound Ridge, for appellants.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Joseph
A.H. McGovern of counsel), for respondents.

Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.),
entered on or about October 16, 2008, which granted defendants'
motion for summary judgment dismissing the complaint for lack of
serious injury, unanimously affirmed, without costs.

Defendants carried their prima facie burden by showing that
the injured plaintiff's disc condition was degenerative and not
caused by the trauma of the accident. Plaintiffs failed to
adequately address such showing (*see DeJesus v Paulino*, 61 AD3d
605, 607-608 [2009]); speculation by plaintiff's family
physician, that a radiologist who conducted an MRI of plaintiff's
lumbar spine would have noted the existence of degenerative disc
disease in his report had he seen any, was properly rejected by

the motion court. In view of the foregoing, it is unnecessary to address the parties' other contentions.

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

ENTERED: DECEMBER 22, 2009


DEPUTY CLERK

light of defendant's pattern of violent sexual offenses (see generally *People v Guaman*, 8 AD3d 545 [2004]).

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

ENTERED: DECEMBER 22, 2009


DEPUTY CLERK

petitioners had agreed to arbitrate the dispute at issue (see *Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v Torino Jewelers, Ltd.*, 44 AD3d 581, 583 [2007]). Indeed, petitioners were not parties to the 1964 agreement, nor did they agree to arbitrate these claims in some other agreement. The fact that petitioners may have held the subject properties as nominees of a signatory to the 1964 agreement is insufficient to demonstrate that they unequivocally agreed to arbitration. In this regard, we note that petitioners were not assigned the signatory's rights under the agreement.

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

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

ENTERED: DECEMBER 22, 2009


DEPUTY CLERK

Sweeny, J.P., Catterson, Renwick, Freedman, Abdus-Salaam, JJ.

1852N Robert Frank, et al.,
Plaintiffs-Respondents,

Index 602247/09

-against-

Wesco Distribution, Inc.,
Defendant-Appellant.

Milbank, Tweed, Hadley & McCloy LLP, New York (Thomas A. Arena of counsel), for appellant.

Kramer Levin Naftalis & Frankel LLP, New York (Robert N. Holtzman of counsel), for respondents.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered August 10, 2009, which granted plaintiffs' motion for a preliminary injunction barring enforcement of restrictive covenants in plaintiffs' employment agreements with defendant, unanimously affirmed, with costs.

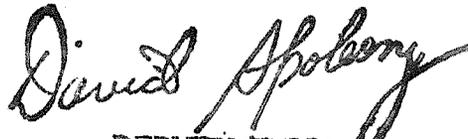
Although plaintiffs were both the sons-in-law of the seller of Liberty, the electrical supply and distribution company which sold its assets and goodwill to defendant Wesco, plaintiffs owned no shares or interest in Liberty, and therefore an incidental covenant not to compete was not applicable to plaintiffs (see generally *Purchasing Assoc. v Weitz*, 13 NY2d 267, 271 [1963]).

Moreover, plaintiffs demonstrated that the non-competition clauses in their employment agreements with Wesco were not likely to be enforceable because they imposed restrictions greater than those required for the protection of Wesco's limited interest

(see *BDO Seidman v Hirshberg*, 93 NY2d 382 [1999]). Furthermore, enforcement was likely unnecessary to prevent the disclosure or use of trade secrets or confidential customer information (see *Reed, Roberts Assoc. v Strauman*, 40 NY2d 303, 307-308 [1976]). In light of plaintiffs' showing that they would continue to be prohibited from working in New York City's electrical supply and distribution industry should the non-competition clauses be enforced, the motion court properly granted plaintiffs' motion for a preliminary injunction.

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

ENTERED: DECEMBER 22, 2009


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CLERK

DEC 22 2009

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
Peter Tom
Richard T. Andrias
David B. Saxe, JJ.

Index 104001/08
1001

x

In re L&M Bus Corp., et al.,
Petitioners-Respondents-Appellants,

-against-

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

Local 1181 of The Amalgamated Transit Union,
Intervenor-Appellant.

x

Cross appeals from an order of the Supreme Court,
New York County (Carol Edmead, J.), entered
on or about December 17, 2008, which, to the
extent appealed from, declared sections 1.35
and 4.24 and parts of section 4.10 of request
for bids B0553 unlawful, declined to hold
section 1.5(A) unlawful, ordered respondents
to include "the addresses of all children
presently at the schools to and from which
children are to be bused" in a revised
specification, and implicitly denied
intervenor's motion to compel respondents to
complete the record. Petitioners purportedly
cross appeal from an order, same court and

Justice, entered on or about April 9, 2008, which granted intervenor's motion for leave to intervene, and/or from an order, same court and Justice, entered May 16, 2008, which, upon granting petitioners' motion for reargument, adhered to its April 9 decision.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris, Francis F. Caputo, Andrew Gelfand, Michael Adler and Eric P. Jewell of counsel), for appellants-respondents.

Meyer, Suozzi, English & Klein, P.C., New York (Richard A. Brook, Richard N. Gilberg, Robert Marinovic and Melissa S. Woods of counsel), for appellant.

Wasserman Grubin & Rogers, LLP, New York (John F. Grubin and James Joyce of counsel), for respondents-appellants.

TOM, J.

At issue on this appeal is the propriety of a request for bids (RFB) issued by respondent New York City Department of Education (DOE). The RFB invites bids for providing transportation between home and school to handicapped children participating in pre-K and early intervention (EI) programs.¹ Bids are required to be submitted "on a per rider per day basis" so that DOE can track transportation costs per child for purposes of its own reimbursement.

DOE solicited bids on a five-year contract to transport participants to program sites, not necessarily located in the same borough, based on what can only be described as a very rough estimate of the number of participants, an inexact description of their location or the frequency and level of transportation required, and no guarantee that any of these factors will remain stable over time. The contract, terminable at DOE's option, contains employee protection provisions (EPPs) and provides that any contract vendor who needs new employees is required to hire workers laid off by a competitor at the worker's same rate of pay and to maintain welfare and pension contributions. The

¹ Children in the pre-K program are between three and five years of age and those in the EI program are less than four years of age.

contract also provides DOE with a 2% discount for timely payment and vendors with increased reimbursement as the result of a reduction in the number of children transported, but only if the decrease exceeds 30% of ridership.

This petition under CPLR article 78 was brought by 23 prospective bidders seeking a declaration that various provisions contained in the RFB violate the public bidding law. Petitioners contended that the RFB is anticompetitive because the inclusion of EPPs renders the calculation of a bid impossible; the bid specification permits adding and dropping schools, programs and participating children without a commensurate reimbursement adjustment; the RFB fails to provide the addresses of participating children; and the 2% reduction for prompt payment is confiscatory, providing for the imposition of what amounts to a 2% fee whether or not a vendor participates in DOE's electronic payment system, for which the fee is imposed. To assist in preparation of their bids, petitioners sought to require DOE to provide "the addresses of all children presently at the schools to and from which children are to be bused."

In their answer, respondents averred that "EPPs (1) ensure labor peace, and, thus, contractual performance without disruption; (2) facilitate the use of proven, experienced workers; and (3) remove a major impediment to bidding (pension

'withdrawal liability')." With respect to petitioners' request for the addresses of the children to be transported, respondents did not contend that disclosing such information would offend federal privacy laws.

Local 1181-1061, Amalgamated Transit Union, AFL-CIO was granted leave to intervene. The union moved to dismiss the petition for failure to state a cause of action insofar as it sought to bar the inclusion of EPPs. In the alternative, the union sought leave to conduct discovery.

Supreme Court, inter alia, granted so much of the petition as sought to strike the EPPs as contrary to the public purpose embodied in the competitive bidding statute and directed that DOE provide the addresses of participating children. It also mandated the removal or revision of provisions that it found merely promote the inflation of bids, specifically, a provision limiting the increase in vendor reimbursement to those contractors experiencing a 30% drop in ridership and the provision for a 2% early payment discount.

Due to the complexity of the bid specifications and the uncertainty resulting from the inability to predict likely revenues and anticipate costs, we agree with Supreme Court's disposition. The RFB provides that transportation is to be provided under a "requirements contract" for the five-year period

from July 1, 2008 through June 30, 2013, with two one-year extensions at DOE's option. Contractors are to "supply transportation service from anywhere in the City to all eligible program participants attending sites within [a particular geographic] zone . . . It is [DOE's] intention . . . that the successful bidders . . . will assume responsibility for any new work that should arise in their geographic zones after July 1, 2008."

Payment to a contractor for transportation provided to a participating child varies according to which of six "categories" the child is assigned. Classification depends on the program in which the child is registered (pre-K or EI), whether the child resides in the same or a different borough as the program site and, for the older EI participants, whether the child is ambulatory or not. The RFB specifies that "children who reside in and are provided services in the same borough should not spend more than one hour on the run each way," and "children who reside in one borough and receive services in another borough or county should not spend more than one and one-half hours on the run each way." Price adjustments for labor and fuel costs over the life of the contract are provided based on the rate of inflation.

The RFB presents a considerable challenge to potential bidders due to the complexity in ascertaining the extent of the

transportation services to be supplied. Bids are solicited for "classes" delineated by the geographic zones in which the various pre-K and EI service sites are located. The intricacy of estimating a bid for a particular class is compounded by the uncertainty as to the number of participating children within the particular zone who are included in each of the six categories. Section 4.2 of the RFB states that DOE "shall provide each bidder with the weighting proportion of each category of service expected in each class. In addition, [DOE] shall indicate the estimated number of children to be served in each service category." However, Section 1.18 warns that DOE's

"estimate of the number of children requiring transportation is only an approximation . . .

"The number of children actually requiring transportation may be less or more than so estimated, and if so, the service must be provided as offered and no claim, action or change order for damages or loss of profits shall accrue to the Contractor by reason thereof.

"Vendors cannot refuse to deliver the . . . services or cancel the contract if quantities exceed or fall short of any estimated quantity."

On the other hand, section 4.4 states the contract may be amended if DOE "is required to add riders in categories with zero expected riders in the RFB."

Section 4.9 states that DOE "does not guarantee, nor may the Contractor rely upon, the durable stability of any schedules for

particular children or service sites." Furthermore, "Individual children may be scheduled . . . for as few as one daily session per month, or more than five daily sessions per week, or any number of daily sessions in between."

Section 4.10(A) provides that "the number of children to be transported and/or sites served by the Contractor" may be reduced at any time, with an attendant reduction in the contractor's compensation. Section 4.10(B) "reserves the right to increase the number of individuals receiving transportation services and/or sites served by the Contractor," obligating the contractor to supply any additional vehicles as may be necessary to accommodate the additional ridership. An amendment adds:

"DOE will negotiate a price adjustment per child based on real per capita cost increases resulting from the loss of ridership if there is a drop in total ridership in a class . . . to less than 70% of the estimated ridership specified in the RFB. Should the ridership . . . at a later date increase above the 70%, pricing will revert back to the original bid price."

Added to the difficulty of determining the extent of transportation services to be provided is the uncertainty surrounding the individual contractor's responsibility for labor costs. The contract under which services are to be rendered incorporates employee protection provisions that obligate a contractor to assume the payroll costs for workers hired by a competitor and ultimately laid off. Section 4.24 of the RFB

provides:

"There shall be established two industry-wide Master Seniority Lists . . . One MSL shall be composed of all pre-kindergarten operators (drivers), mechanics, and dispatchers; and the other MSL shall be composed of pre-kindergarten attendants (escorts-matrons) who were employed as of June 30, 2008, under a contract between their employers and [DOE] . . . who are furloughed or become unemployed as a result of loss of contract or any part thereof by their employers . . . in accordance with their date of entry into the pre-kindergarten school bus industry."

Thus, any existing contractors who need to hire new employees and any new contractors providing transportation services are required to hire from the MSLs, to pay such employees the same compensation they received from their previous employers, and to make, on their behalf, the same welfare and pension contributions as made by the previous employer.

Finally, the RFB introduces some uncertainty with respect to the amount to be received for services rendered by the successful bidder. Section 1.35 states that DOE "shall have the right to deduct two percent . . . from the adjusted invoiced amounts the Contractor submits if payment is made within thirty . . . days from each date [DOE] . . . shall have received an invoice," raising the question of whether the vendor should base its bid on the gross amount or the reduced amount provided where prompt payment is forthcoming.

Supreme Court properly struck the employee protection provisions on the ground that respondents failed to demonstrate a rational relationship between the EPPs and the public interest promoted by the competitive bidding statute. The court concluded that, contrary to public policy, the EPPs serve to inflate bids to provide transportation services for Pre-K and EI participants, reasoning that experience has shown that the costs associated with EPPs outweigh any public benefit.

General Municipal Law § 103 requires that "all contracts for public work . . . be awarded . . . to the lowest responsible bidder," and Family Court Act § 236(3)(b), which governs the busing of children participating in EI programs, states that transportation "shall be provided . . . as part of a contract awarded to the lowest responsible bidder in accordance with the provisions of" General Municipal Law § 103. Because Pre-K contracts are awarded together with EI contracts, they are likewise subject to competitive bidding. While requirements that increase the cost of providing services, and thus elicit higher bids, are not precluded, "procedures having an anticompetitive effect on the bidding process can be justified only by proof that they are designed to save the public money by causing contracts to be performed at smaller cost or without disruption" (*Matter of Council of City of N.Y. v Bloomberg*, 6 NY3d 380, 392 [2006]).

The EPP provisions at issue raise the prospect that a vendor will be required to assume a competing contractor's labor costs, requiring that the vendor's bid reflect not only the known expense of compensating its own employees but also the unknown and potentially much greater expense of compensating a competitor's employees. The associated risk might well dissuade a prospective vendor from bidding altogether — particularly small, low-cost vendors, for whom the expense of hiring an additional employee represents a proportionally greater burden than it would present to a large, high-wage vendor. Clearly, EPPs do not promote cost savings.

The union's argument that the EPPs are justifiable because they avert strikes is unconvincing. The concept of an EPP is closely akin to a project labor agreement (PLA), which "is a prebid contract between a construction project owner and a labor union (or unions) establishing the union as the collective bargaining representative for all persons who will perform work on the project" (*Matter of New York State Ch., Inc., Associated Gen. Contrs. of Am. v New York State Thruway Auth.*, 88 NY2d 56, 65 [1996]). A PLA typically "provides that only contractors and subcontractors who sign a prenegotiated agreement with the union can perform project work" (*id.*). "By comprehensively requiring all bidders to conform to a variety of union practices and

limiting their autonomy to negotiate employment terms with a labor pool that includes nonunion workers, . . . PLAs have an anticompetitive impact on the bidding process" (*id.* at 65).

The Court went on to

"identify two central purposes of New York's competitive bidding statutes, both falling under the rubric of promoting the public interest: (1) protection of the public fisc by obtaining the best work at the lowest possible price; and (2) prevention of favoritism, improvidence, fraud and corruption in the awarding of public contracts " (*id.* at 68).

To be considered valid, any specification that deters competition in bidding for public work is required to bear a rational relationship to these two goals. But where the particular bid specification is a PLA, which is distinguished by its comprehensiveness and anticompetitive impact, a public authority bears an enhanced burden, to wit, its

"decision to adopt such an agreement for a specific project must be supported by the record; the authority bears the burden of showing that the decision to enter into the PLA had as its purpose and likely effect the advancement of the interests embodied in the competitive bidding statutes. Judicial review, although limited, is not without importance in that it safeguards the interests protected by the competitive bidding mandate. PLAs may not be approved in a pro forma manner" (*id.* at 69).

Though respondents and the union attempt to distinguish EPPs

to remove them from these principles, the anticompetitive impact resulting from the restriction of the vendors' autonomy to hire nonunion workers subjects these arrangements to the same scrutiny applied to PLAs. Respondents' assertion that the EPPs will avoid strikes is not supported by the record. As noted, "*Post hoc* rationalization for the agency's adoption of a PLA cannot substitute for a showing that, prior to deciding in favor of a PLA, the agency considered the goals of competitive bidding" (*id.* at 75) by, for instance, obtaining an expert's estimate of the costs to be avoided. The record is devoid of evidence that respondents considered the goals of competitive bidding before deciding to insert EPPs into the bid specification, and Supreme Court properly struck the provisions from the RFB.

The union's contention that it should have been granted permission to supplement the record in this regard is of no moment. It is settled that a court's review of the propriety of an agency's determination is confined to the particular grounds invoked by the agency in support of its action (*see Matter of Yarborough v Franco*, 95 NY2d 342, 347 [2000]; *Matter of Montauk Improvement v Proccacino*, 41 NY2d 913, 913-914 [1977]); neither evidence nor arguments outside the administrative record may be considered (*Brusco v New York State Div. of Hous. & Community Renewal*, 170 AD2d 184, 185 [1991], *appeal dismissed* 77 NY2d 939

[1991], *cert denied* 502 US 857 [1991]). The union does not identify any statute or regulation that provides a basis upon which the record before the administrative agency can be supplemented (*cf. Matter of Rizzo v New York State Div. of Hous. & Community Renewal*, 6 NY3d 104, 110-111 [2005]). In the absence of such a provision, denial of the union's motion for leave to conduct discovery (CPLR 408) was well within the provident exercise of the court's "considerable discretion" (*Matter of Grossman v McMahon*, 261 AD2d 54, 57 [1999]; *see also Matter of Shore*, 109 AD2d 842 [1985]).

Supreme Court appropriately directed DOE to provide more accurate information concerning the location from which participating children are to be transported. The lack of detail in the specification operates to inflate the bids solicited. As the court explained, the number of buses required to transport children from a given neighborhood depends on the proximity of the children to each other and to their respective schools. Unless their location is known with reasonable accuracy, a contractor might seriously underestimate the number of buses needed to transport children to a school located in a particular zone. If the contractor estimates that three buses should be sufficient and later discovers that six are required, DOE is not obligated to increase the contractor's per pupil reimbursement

rate, which merely prompts the contractor to submit a bid reflecting a higher rate per pupil to guard against the possibility of significantly higher actual transport costs.

The court also properly struck those provisions that limit increases in reimbursement to those vendors experiencing a 30% drop in ridership. The court struck those portions of section 4.10 of the RFB as provide for the increase or decrease in ridership without any adjustment in compensation as anticompetitive, noting that, as written, the provision "causes contractors to inflate their bids by 30% to cover this eventuality," defeating the goal of the public bidding laws that services be obtained at the lowest possible price.

Such provisions discourage vendors from bidding or prompt them to submit inflated bids (see e.g. *Hart v City of New York*, 201 NY 45, 53-55 [1911]; *Matter of Sagamore Auto Body v County of Nassau*, 104 AD2d 818, 821 [1984]; see also *Brooklyn Ash Removal Co. v O'Brien*, 238 App Div 647 [1933]). As observed over a century ago, "Competition is not fostered by a clause reserving the right to change the material and work without any limitation" (*Gage v City of New York*, 110 App Div 403, 420 [1905]).

Because the per-child/per-trip transportation cost eludes determination as a result of the uncertainty of the RFB specifications, this matter is readily distinguishable from

Matter of Randolph McNutt Co. v Eckert (257 NY 100 [1931]), relied upon by respondents. That case involved a needs or requirements contract, in which the vendor undertook to supply as many desks as the Board of Education might require during the year at the per-unit cost stated in its bid. Although the Board failed to supply any estimate of the number of desks that would be needed, the Court noted, "A contract obligating a party to furnish all the materials required during a certain period, deliveries to be made as needed, is a valid and enforceable contract" (*id.* at 106). Indeed, such long-term contracts to supply goods are common in certain industries (*e.g.* *Leclède Gas Co. v Amoco Oil Co.*, 522 F2d 33 [8th Cir 1975] [propane]; *Eastern Air Lines, Inc. v Gulf Oil Corp.*, 415 F Supp 429 [SD FL 1975] [aviation fuel]). The only variable in such arrangements is the quantity of the product to be supplied, the price of which can be determined from the market. Where, as here, the contract involves the provision of a service, the cost of which is dependent on a number of largely unknown variables, the exercise becomes speculative (*Hart*, 201 NY at 51 [indefinite description precludes effective competition of bidders "on a common basis of work to be done and materials furnished"]; *Brooklyn Ash Removal Co.*, 238 App Div at 650 [indefinite and uncertain specifications]).

The court properly required removal of the 2% early payment provision of section 1.35. It stated, "This provision encourages bidders to inflate their bid prices by 2% to anticipate the eventuality that DOE will deduct 2% from its invoices. Such an increase in the bid, unrelated to the services to be provided, contravenes the goal of securing quality services for the lowest possible price." We agree that, as concerns this provision, 2% is merely an arbitrary amount having no relationship to the services to be provided and promotes a commensurate inflation of the bid price.

It should be noted, however, that a related provision, contained in section 1.35.1 of the contract, which includes a 2% service fee for payments received within 15 days, is unaffected by Supreme Court's ruling. Unlike the mandatory provisions of section 1.35, section 1.35.1 concerns a vendor's voluntary participation in an electronic payment system. As petitioners state, they "never challenged the voluntary program encompassed in § 1.35.1, but only the involuntary confiscation provided for in § 1.35." Thus, this provision was not at issue before Supreme Court and is not affected by its ruling.

The court properly left section 1.5(A) in the RFB. Petitioners cite no cases where a termination-for-convenience clause was found to violate the public bidding law. In any

event, where an agency has the right to terminate an agreement without cause, the decision to terminate may not be made in bad faith and is subject to review under CPLR article 78 (*Matter of RX 2000 v DeBuono*, 261 AD2d 162, 163 [1999]).

Under the circumstances, we find that respondents may raise, for the first time on appeal, arguments regarding the addresses they were ordered to supply (see e.g. *Chateau D'If Corp. v City of New York*, 219 AD2d 205, 209 [1996], lv denied 88 NY2d 811 [1996]). Since petitioners concede that disclosure of "the addresses of all children presently at the schools to and from which children are to be bused" is overbroad, we direct that the matter be remanded to DOE for further proceedings in accordance with Supreme Court's opinion (see e.g. *Burke's Auto Body v Ameruso*, 113 AD2d 198, 200-201 [1985]). In order to disclose specific addresses, DOE would have to go through a cumbersome procedure (see 20 USC § 1232g[a][5][B]; 34 CFR § 99.37). Moreover, while petitioners persuasively contend that mere zip codes will not allow a reasonable assessment of the number of buses required to service a particular geographic zone, they state that identifying the cross streets between which pupils live will be sufficient for this purpose.

Accordingly, the order of the Supreme Court, New York County (Carol Edmead, J.), entered on or about December 17, 2008, which,

to the extent appealed from, declared sections 1.35 and 4.24 and parts of section 4.10 of request for bids B0553 unlawful, declined to hold section 1.5(A) unlawful, ordered respondents to include "the addresses of all children presently at the schools to and from which children are to be bused" in a revised specification, and implicitly denied intervenor's motion to compel respondents to complete the record, should be modified, on the law, such portion of the order as requires disclosure of children's addresses vacated, the matter remanded to respondents for further proceedings in accordance with this opinion, and otherwise affirmed, without costs. Petitioners' purported cross appeal from an order, same court and Justice, entered on or about April 9, 2008, which granted intervenor's motion for leave to intervene, and/or from an order, same court and Justice, entered May 16, 2008, which, upon granting petitioners' motion for reargument, adhered to its April 9 decision, should be dismissed, without costs, as those nonfinal orders are not brought up for review on this appeal from the December 17, 2008 order.

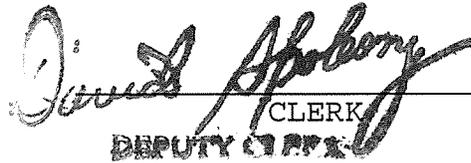
M-2926 *L&M Bus Corp. v The New York City Dept.
Of Education, et al.*

Motion seeking sanctions denied.

All concur.

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

ENTERED: DECEMBER 22, 2009


CLERK
DEPUTY CLERK