SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 1, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Andrias, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

5034N Arnold Joseph Mars, Index 116675/03
Plaintiff-Appellant,

-against-

Robert Z. Dobrish, Esq., et al.,
Defendants-Respondents,

William Beslow,
Defendant.

Howard A. Altschuler, New York, for appellant.

Dobrish Zeif Gross, LLP, New York (Erin McMurray-Killelea of counsel), for Robert Z. Dobrish, Hoffinger, Friedland, Dobrish & Stern P.C. and Nina Gross, respondents.

Ohrenstein & Brown, LLP, Garden City (Lauren M. Pape of counsel), for Aimee M. Maddalena, respondent.

Appeal from order, Supreme Court, New York County (Marcy Friedman, J.), entered June 15, 2007, which denied plaintiff's motion to reject the report of the Special Referee, confirmed that report, and directed plaintiff to file a note of issue, unanimously dismissed as academic, without costs.

Our affirmance (Appeal No. 1084, decided herewith) of a subsequent order dismissing the complaint renders this appeal academic.

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

ENTERED: OCTOBER 1, 2009

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Renwick, JJ.

1069 Randa Bishop, Index 101683/04
Plaintiff-Respondent,

-against-

59 West 12th Street Condominium,
Defendant-Appellant,

Goodstein Management, Inc., et al.,
Defendants.

Braverman & Associates, P.C., New York (Jonathan Kolbrener of counsel), for appellant.

Marcus Rosenberg & Diamond LLP, New York (David Rosenberg of counsel), for respondent.

Order, Supreme Court, New York County (Louis B. York, J.), entered September 26, 2008, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for renewal of a prior motion to the extent of reinstating her claim for punitive damages against defendant condominium, unanimously affirmed, without costs.

Plaintiff seeks damages based on defendant condominium board's alleged breach of fiduciary duty in connection with its decision to halt plaintiff's alteration of her first-floor commercial unit. The plans involved venting a bathroom and new mechanical equipment in the kitchen through an exterior wall and onto the terrace owned by another unit owner, who was also a board member. Plaintiff, as owner of a commercial unit, had the right to make alterations without the board's consent, to the extent it did not create a "nuisance" or interfere with any other resident's peaceful possession or proper use of the property.

The IAS court properly granted plaintiff's motion for renewal of her prior motion to the extent of reinstating her claim for punitive damages. Punitive damages are available in a tort action where the wrongdoing is intentional or deliberate, presents circumstances of aggravation or outrage, evinces a fraudulent or evil motive, or is in such conscious disregard of the rights of another that it is deemed willful and wanton (*Prozeralik v Capital Cities Communications*, 82 NY2d 466, 479 [1993]).

Plaintiff's allegations of defendant condominium's misconduct in improperly withholding approval of her proposed alterations satisfy these criteria. Plaintiff alleges that the condominium board withdrew its prior approval at the behest of a board member whose property may have been affected by the proposed alterations. In addition, plaintiff claims that the board's action took place at a secret meeting in which the affected board member participated and where no quorum was present. Finally, plaintiff alleges that the Department of Buildings twice rejected the condominium's request to revoke her plan for renovations. If these allegations of intentional and willful disregard of plaintiff's rights prove true, the trier of facts could well conclude that punitive damages are warranted.

M-3972 ***Randa Bishop v 59 W. 12th Street Condo., et al.***

Motion seeking leave to supplement brief granted.

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

ENTERED: OCTOBER 1, 2009

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Richter, JJ.

1071 Jose Minaya, Index 105182/06
Plaintiff-Respondent,

-against-

Duane Reade International, Inc., etc.,
Defendant-Appellant.

Chesney & Murphy, LLP, Baldwin (Michael Jenks of counsel), for appellant.

Trolman, Glaser & Lichtman, P.C., New York (Michael T. Altman of counsel), for respondent.

Order, Supreme Court, New York County (Debra A. James, J.), entered January 22, 2009, which denied defendant's motion for summary judgment dismissing the complaint and granted plaintiff's cross motion to strike defendant's answer on the ground of spoliation of evidence to the extent of precluding defendant from presenting evidence at trial as to the issue of its notice of the condition of the stairs on which plaintiff was injured and directing that an adverse inference be charged, unanimously modified, on the law, to direct that the sanction be limited to directing that an adverse inference be charged, and otherwise affirmed, without costs.

In sanctioning defendant for failing to preserve critical evidence, the motion court appropriately exercised its "broad discretion to provide . . . relief to the party deprived of the lost evidence" (*Ortega v City of New York*, 9 NY3d 69, 76 [2007]).

Defendant failed to preserve a video recording that may have shown the stairway before and during plaintiff's accident. The unavailability to plaintiff of the video recording may have impaired his ability to establish that defendant possessed the requisite notice of a defective condition on the stairs. Under these circumstances, however, the extreme sanction of preclusion is not warranted "to restore balance to the matter" *(Baldwin v Gerard Ave.*, LLC, 58 AD3d 484 [2009]). Rather, an adverse inference is sufficient to prevent defendant from using the absence of the videotape to its own advantage (*Tomasello v 64 Franklin, Inc.*, 45 AD3d 1287 [2007]).

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

ENTERED: OCTOBER 1, 2009

CLERK

Andrias, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

1084 Arnold Joseph Mars, Plaintiff-Appellant, Index 116675/03

-against-

Robert Z. Dobrish, et al.,
Defendants-Respondents,

William Beslow,
Defendant.

Howard A. Altschuler, New York, for appellant.

Dobrish Zeif Gross LLP, New York (Robert Z. Dobrish of counsel), for Hoffinger, Friedland, Dobrish & Stern P.C. and Nina Gross, respondents.

Ohrenstein & Brown, LLP, Garden City (Lauren M. Pape of counsel), for Aimee M. Maddalena, respondent.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered October 27, 2008, which, in an action for legal malpractice, granted defendants' motions for summary judgment dismissing the complaint and denied plaintiff's cross motions for partial summary judgment, unanimously affirmed, without costs.

Plaintiff's cross motions were properly denied, inasmuch as the proffered expert witness statement, even without opposition, did not establish a prima facie case of legal malpractice (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The court also properly determined that defendants were entitled to summary judgment, where plaintiff was unable to establish that the actions complained of were negligent, rather than strategic or the result of an error in judgment (*see Rosner v Paley*, 65 NY2d 736, 738, [1985]; *Hand v Silberman*, 15 AD3d 167 [2005], *lv denied* 5 NY3d 707 [2005]), or that they caused him damage (*see Pellegrino v File*, 291 AD2d 60, 63 [2002], *lv denied* 98 NY2d 606 [2002]).

The court properly rejected plaintiff's claim that defendants' fees were excessive, as it was unsupported by any documents or expert opinion, and since there is no indication that plaintiff ever requested an evidentiary hearing at the time of trial (*see Winter v Winter*, 50 AD3d 431, 432 [2008]; *Adler v Adler*, 203 AD2d 81 [1994]).

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

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

ENTERED: OCTOBER 1, 2009

CLERK

Tom, J. P., Andrias, Nardelli, DeGrasse, Freedman, JJ.

1085 The People of the State of New York, Respondent, Ind. 6196/06

-against-

Darryl Leak, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Paula-Rose Stark of counsel), for respondent.

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered March 17, 2008, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third degree (two counts) and criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony offender, to an aggregate term of 5 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility, including its evaluation of alleged inconsistencies in testimony and its rejection of defendant's claim that the officers fabricated a drug transaction.

The court properly received evidence that the building in front of which the officers observed defendant was a drug-prone location, and that the officers were patrolling there in response to citizen complaints, since this evidence tended to explain the presence and conduct of the police (*see e.g. People v Washington*, 259 AD2d 365 [1999], *lv denied* 93 NY2d 1006 [1999]); the fact that the officers described the particular building as drug-prone was not unduly prejudicial. Since defendant was charged with possession with intent to sell, the court also properly received evidence of his possession of $337 in small bills (*see e.g. People v White*, 257 AD2d 548 [1999], *lv denied* 93 NY2d 930 [1999]). Even if police credibility was the main issue, intent to sell was still an essential element, and the People "were not bound to stop after presenting minimum evidence" (*People v Alvino*, 71 NY2d 233, 245 [1987]). We also note that, with respect to both the drug-prone location evidence and the cash, the court provided suitable limiting instructions that minimized any potential prejudice.

Defendant's challenges to the prosecutor's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits (*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: OCTOBER 1, 2009

CLERK

Tom, J.P., Andrias, Nardelli, DeGrasse, Freedman, JJ.

1086 Julia Danger, Index 606259/98
Plaintiff-Appellant,

-against-

Elizabeth Combier,
Defendant-Respondent.

Kenneth T. Wasserman, New York, for appellant.

Elizabeth Combier, respondent pro se.

Order, Supreme Court, New York County (Karla Moskowitz, J.), entered January 2, 2008, which, insofar as appealed from in this action for, inter alia, the conversion of monies from a trust, granted defendant's motion to dismiss the complaint, unanimously affirmed, with costs.

The complaint was properly dismissed since the action is barred by reason of the release that plaintiff executed in favor of both the trustee and defendant (her sister) that was contained in the instrument that settled the account of the subject trust, which had been established by the parties' maternal grandfather for the benefit of the parties' mother, with the remainder of the trust to be divided equally between the parties upon their mother's death (*see D'Amico v First Union Natl. Bank*, 285 AD2d 166, 173 [2001], *lv denied* 99 NY2d 501 [2002]). Furthermore, defendant neither controlled the trust nor determined how its assets were to be distributed.

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

ENTERED: OCTOBER 1, 2009

CLERK

Tom, J.P., Andrias, Nardelli, DeGrasse, Freedman, JJ.

1087 Veena Sadhwani, Index 116533/06
Plaintiff-Respondent,

-against-

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

Wallace D. Gossett, New York (Steve S. Efron of counsel), for appellants.

Morrison & Wagner, LLP, New York (Eric Morrison of counsel), for respondent.

Judgment, Supreme Court, New York County (Jane S. Solomon, J.), entered November 20, 2008, upon a jury verdict finding defendants 100% negligent in causing plaintiff's personal injuries, unanimously affirmed, without costs.

Plaintiff was unavailable to testify due to memory loss. The trial court did not abuse its discretion in permitting plaintiff's attorney to read excerpts of her prior General Municipal Law § 50-h hearing and deposition testimony into evidence in lieu of her live testimony at trial (*see generally Feldsberg v Nitschke*, 49 NY2d 636, 643 [1980]). CPLR 3117(a)(3)(iii) permits the use of anyone's deposition "for any purpose against any other party who was present or represented at the taking of the deposition or who had the notice required under those rules, provided the court finds . . . that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment." The court correctly determined the proper foundation was laid for a finding that plaintiff's memory loss had rendered her too infirm to testify at trial (*see People v Parks*, 41 NY2d 36, 46 [1976]; *Cutler v Konover*, 81 AD2d 571, 572 [1981], *affd* 55 NY2d 891 [1982]; *Wojtas v Fifth Ave. Coach Corp.*, 23 AD2d 685 [1965]). Plaintiff's treating physician testified that plaintiff's injuries severely impaired her immediate and delayed recall and abstract thinking, and her orientation to time and space, resulting in memory loss, and that these injuries and resulting deficits were causally related to the bus accident. The physician's assessment of plaintiff's limited ability to recall the events surrounding the accident was highlighted when plaintiff herself attempted to testify at trial, during which she was unable to recollect her accurate home address, the current month, the circumstances of the accident, or any details concerning her medical treatment. This was consistent with excerpts of her prior testimony read to the jury, which were incoherent and internally contradictory, and did little or nothing to advance her case.

There is also no merit to defendants' argument that the trial court erred in giving a *Noseworthy* charge, i.e., instructing the jury that if it were satisfied plaintiff had proven by clear and convincing evidence that she was suffering from memory loss caused by the accident, she would not be held to as high a degree of proof as a plaintiff who could herself describe what happened, thus giving the jury greater latitude in inferring defendants' negligence based on circumstantial evidence. At no time during the course of the proceedings did defendants object to the *Noseworthy* charge, and thus the issue is not properly preserved for appellate review (CPLR 5501[a][3]; *see Moore v Leaseway Transp. Corp.*, 49 NY2d 720, 722 [1980]). In any event, the record reveals ample evidence from which the jury could rationally have concluded that defendants were negligent and plaintiff was not contributorily negligent, and even if the charge had erroneously been given, any such error was not "so fundamental that it preclude[d] consideration of the central issue upon which the action is founded" (*Breitung v Canzano*, 238 AD2d 901, 902 [1997]), or "prejudiced a substantial right" of defendants (CPLR 2002), so as to warrant reversal and a new trial.

Finally, in light of the extensive nature of plaintiff's brain injury resulting from the accident, and the devastating effects the injury has had on her physical being and her quality of life, the award of $1.9 million for past and future pain and suffering over ten years does not materially deviate from what would be reasonable compensation under the circumstances (CPLR 5501[c]; *see Hernandez v Vavra*, 62 AD3d 616, 617 [2009]).

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

ENTERED: OCTOBER 1, 2009

CLERK

Tom, J.P., Andrias, Nardelli, DeGrasse, Freedman, JJ.

1088 The People of the State of New York, Respondent, Ind. 1093/07

-against-

Danny Garcia, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Paula-Rose Stark of counsel), for respondent.

Judgment, Supreme Court, New York County (Gregory Carro, J. at motion to controvert; Arlene Goldberg, J. at plea and sentence), rendered January 29, 2008, convicting defendant of criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to a term of 7 years, unanimously affirmed.

Upon our in camera review of the search warrant materials, we are satisfied that there was probable cause to issue the warrant (*see People v Bigelow*, 66 NY2d 417, 423 [1983]), as well as compliance with the applicable procedural requirements.

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

ENTERED: OCTOBER 1, 2009

CLERK

Tom, J.P., Andrias, Nardelli, DeGrasse, Freedman, JJ.

1089 Reinaldo Lopez, Sr., Index 22023/06
Plaintiff-Respondent,

-against-

American United Transportation, Inc., et al.,
Defendants-Appellants.

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

Alexander J. Wulwick, New York, for respondent.

Order, Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered January 6, 2009, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

The reports submitted by defendants' examining physician sufficiently demonstrated that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d), and supported the theory that his injuries were related to preexisting degenerative conditions rather than to the accident, proffering a detailed analysis of the preexisting condition and its degenerative nature. In response, plaintiff's expert failed to satisfactorily rebut this conclusion, neglecting even to mention, let alone explain, why he ruled out degenerative changes, thus rendering his opinion speculative (*Montgomery v Pena*, 19 AD3d 288, 290 [2005]) and insufficient to raise an issue of fact as to a causal connection between accident and injury (*Pommells v Perez*, 4 NY3d 566, 579-580 [2005]). In particular, plaintiff's expert failed to explain how the alleged serious injuries to plaintiff's right rotator cuff and lumbar spine might not have been related to his age, morbid obesity or prior occupation as a furniture installer (*see Chan v Garcia*, 24 AD3d 197 [2005]).

Plaintiff concedes that he failed to raise an issue of fact concerning his inability to perform substantially all of his routine daily activities for at least 90 of the first 180 days following the accident. There is no competent medical evidence on his behalf that he was unable to perform such activities (*see Prestol v McKissock*, 50 AD3d 600 [2008]).

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

ENTERED: OCTOBER 1, 2009

CLERK

Tom, J.P., Andrias, Nardelli, DeGrasse, Freedman, JJ.

1091 The People of the State of New York, Respondent, Ind. 6630/05

-against-

Benjamin Jameson, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered November 16, 2007, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him, as a second felony offender, to a term of 15 years, unanimously affirmed.

In this store-robbery case where identity was a central issue, the court properly permitted a manager of the store to testify that she recognized defendant because of his prior shoplifting attempts, and that this recognition also led her to pay close attention to defendant immediately before the robbery and to warn another employee to do likewise. This evidence was highly probative of the manager's ability to identify defendant, and its value would have been unduly restricted had it been limited to testimony that the manager had simply seen defendant on prior occasions (*see People v Matthews*, 276 AD2d 385 [2000], *lv denied* 96 NY2d 736 [2001]). The probative value of this evidence outweighed its prejudicial effect, which the court minimized by means of a detailed and thorough limiting instruction.

The court's *Sandoval* ruling, permitting only limited inquiry into portions of defendant's extensive record, balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Walker*, 83 NY2d 455, 458-459 [1994]).

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 1, 2009

CLERK

Tom, J.P., Andrias, Nardelli, DeGrasse, Freedman, JJ.

1092 In re Victoria J.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

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Presentment Agency

Steven N. Feinman, White Plains, for appellant.

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

Order of disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about August 7, 2008, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that she had committed acts which, if committed by an adult, would constitute the crimes of robbery in the second degree and attempted assault in the second degree, and placed her with the Office of Children and Family Services for a period of 18 months, unanimously affirmed, without costs.

The court's fact-finding determination was based on legally sufficient evidence and 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 court's determinations concerning credibility and identification. The victim's testimony clearly established that appellant was not merely present at the scene of the robbery, but that she participated by punching and kicking the victim.

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

ENTERED: OCTOBER 1, 2009

CLERK

Tom, J.P., Andrias, Nardelli, DeGrasse, Freedman, JJ.

1093 The People of the State of New York, Ind. 314/07
Respondent,

-against-

José Rivera,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Jared Wolkowitz of counsel), for respondent.

Judgment, Supreme Court, New York County (Robert Stolz, J.), rendered February 25, 2008, convicting defendant, upon his plea of guilty, of attempted criminal sale of a controlled substance in the third degree, and sentencing him to a term of 5 years' probation, unanimously affirmed.

Since the claims defendant raises on appeal were not raised in his motion to withdraw his guilty plea, those claims are unpreserved (*see People v Lopez*, 71 NY2d 662, 665 [1988]), and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits (*see People v Frederick*, 45 NY2d 520 [1978]). Neither defendant nor his attorney stated any legal basis for withdrawal of the plea, and both declined the court's offer to be heard further. Contrary to defendant's suggestion, it was not the function of the court to attempt to guess what grounds might support the motion.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 1, 2009

CLERK

Tom, J.P., Andrias, DeGrasse, Freedman, JJ.

1094 Capricorn Investors III, L.P., Plaintiff-Appellant, Index 603795/06

-against-

CoolBrands International, Inc., et al.,
Defendants-Respondents,

Gary P. Steven, et al.,
Defendants.

Skadden, Arps, Slate, Meagher & Flom, LLP, New York (Joseph A. Matteo of counsel), for appellant.

Steptoe & Johnson, LLP, New York (Michael C. Miller of counsel), for respondents.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered July 21, 2008, which, to the extent appealed from, granted defendants' motion to dismiss the claims alleging fraudulent inducement, negligent misrepresentation and promissory estoppel, unanimously affirmed, with costs.

In support of its claim of fraudulent inducement, plaintiff alleges that defendants did not keep their oral promises to consolidate the operations of their Arkansas plant and plaintiff's Texas plant and that defendants never intended to keep those promises. However, as plaintiff alleges no facts that would show that defendants never intended to keep their promises, the court correctly dismissed the claim (*see Abelman v Shoratlantic Dev. Co.*, 153 AD2d 821, 822 [1989]). Further, neither the limited partnership agreement nor the related documents provide for the plant consolidation, and all the documents disclaim reliance on oral representations (*see Citibank v Plapinger*, 66 NY2d 90, 95 [1985]; *Emfore Corp. v Blimpie Assoc., Ltd.*, 51 AD3d 434 [2008]).

The court correctly dismissed the claim of negligent misrepresentation because it is predicated upon promises of future conduct, rather than statements as to "existing material fact" (*Margrove Inc. v Lincoln First Bank of Rochester*, 54 AD2d 1105 [1976], *appeal dismissed* 40 NY2d 1092 [1977]). The promissory estoppel claim was properly dismissed because it was flatly contradicted by the parties' written agreement which covered the same subject matter and expressly superseded all other prior agreements and understandings, written and oral (*cf. Prestige Foods v Whale Sec. Co., L.P.*, 243 AD2d 281, 281-282 [1997]).

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

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

ENTERED: OCTOBER 1, 2009

CLERK

Tom, J.P., Andrias, Nardelli, DeGrasse, Freedman, JJ.

1095 Paul Rivers, Index 109112/07
Petitioner-Appellant,

-against-

Board of Education of the City
School District of the City of
New York, et al.,
Respondents-Respondents.

James R. Sandner, New York (Eric W. Chen of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for respondents.

Order, Supreme Court, New York County (Lewis Bart Stone, J.), entered March 17, 2008, which denied petitioner's application brought pursuant to CPLR article 78, seeking to declare that respondents' denial of petitioner's certificate of completion of his probationary employment and the termination of his probationary employment were in violation of Education Law § 2573(1)(a), and dismissed the proceeding, unanimously affirmed, without costs.

Petitioner, a school social worker, was notified by letter from Eric Nadelstern, the Chief Executive Office of the Empowerment Schools, that in accordance with section 2573(1) of the Education Law, he was denying petitioner's certificate of completion of his probationary service and terminating his probationary employment. Petitioner contends that this notice was ineffective because Nadelstern did not have the authority to issue it. However, both Nadelstern and Chancellor Klein stated that in or around September 2006, commencing with the start of the 2006-2007 school year, the Chancellor orally delegated to Nadelstern the authority to discontinue probationary service and deny completion of probation to employees.

Section 2590-h(19) of the Education Law provides that the Chancellor may "[d]elegate any of his or her powers and duties to such subordinate officers or employees as he or she deems appropriate and to modify or rescind any power and duty so delegated," and contrary to petitioner's assertions, nothing in the cited statute or the pertinent provisions of the Education Law require that the Chancellor's delegations of authority be in writing. Although petitioner points to instances where the Chancellor has delegated various powers, including the power to terminate probationary employees, to principals and other employees through formal written memoranda, that does not establish that the Chancellor is required to do so. Moreover, the Legislature's failure to include the requirement of a writing within the scope of the statute may be construed as an indication that its exclusion was intended (*see City of New York v New York Tel. Co.*, 108 AD2d 372, 375 [1985], *appeal dismissed* 65 NY2d 1052 [1985]).

Furthermore, to the extent petitioner contends that his termination was in bad faith, this argument is unpersuasive in light of the evidence that petitioner received "unsatisfactory" ratings in "[a]ttendance and punctuality," "[p]rofessional attitude and professional growth" and "[m]aintenance of good relations with other teachers and supervisors." "Evidence in the record supporting the conclusion that performance was unsatisfactory establishes that the discharge was made in good faith" (*Matter of Johnson v Katz*, 68 NY2d 649, 650 [1986]).

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

ENTERED: OCTOBER 1, 2009

CLERK

Tom, J.P., Andrias, Nardelli, DeGrasse, Freedman, JJ.

1096 The People of the State of New York, Ind. 2459/07
Respondent,

-against-

Cynthie Ferrer,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Jaime Bachrach of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Renee White, J.), rendered on or about February 13, 2008,

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

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

ENTERED: OCTOBER 1, 2009

CLERK

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

Tom, J.P., Andrias, Nardelli, DeGrasse, Freedman, JJ.

1097 Emanuel Stratakis, etc., Plaintiff-Appellant, Index 17222/95

-against-

Valentin Ryjov, et al., Defendants,

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

Bienenfeld & Wertman P.C., New York (Saul W. Bienenfeld of counsel), for appellant.

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

Appeal from order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered May 15, 2008, which, to the extent appealed from, denied portions of appellant's motion denominated one to renew and reargue defendants City of New York and New York City Department of Transportation's motion for summary judgment dismissing the complaint as to them, previously granted in an order of the same court and Justice, entered March 10, 2008, unanimously dismissed as taken from a nonappealable order, without costs.

Although plaintiff's motion was denominated as one for renewal and reargument, it was solely for reargument and was treated as such by the motion court (*see* Williams v *City of New York*, 19 AD3d 251 [2005]). Inasmuch as no appeal lies from the denial of a motion to reargue, and no appeal has been taken from the original March 10, 2008 determination granting defendant City's motion for summary judgment, plaintiff's arguments addressed to that determination are not properly before us (*see Matter of Gonzalez v New York City Clerk*, 25 AD3d 389 [2006]).

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

ENTERED: OCTOBER 1, 2009

CLERK

Tom, J.P., Andrias, Nardelli, DeGrasse, Freedman, JJ.

1098 The People of the State of New York, Ind. 48888C/05
Respondent,

-against-

Curtis Abraham,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Christopher J. Blira-Koessler of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered November 15, 2007, convicting defendant, after a jury trial, of manslaughter in the first degree and attempted assault in the second degree, and sentencing him, as a second felony offender, to concurrent terms of 20 years and 2 to 4 years, respectively, unanimously modified, on the law, to the extent of vacating the second felony offender adjudication and remanding for resentencing, including the filing by the People of a proper predicate felony statement, and otherwise affirmed.

We reject defendant's challenges to the sufficiency and weight of the evidence supporting his attempted assault conviction (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence supports the inference that when defendant and the codefendants opened fire on the homicide victim and his companions in a small enclosed space, defendant intended to shoot all of them (*see People v Getch*, 50 NY2d 456, 465 [1980]).

Defendant's arguments concerning the content of the court's missing witness charge are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. The charge conveyed the proper standards and its content was appropriate to the case. In any event, any error in the language employed was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

Since the People failed to file a predicate felony statement, defendant was improperly adjudicated a second felony offender, and he is entitled to a remand for a proper adjudication and sentence. Since the defective second felony offender adjudication may have affected defendant's sentence on both the manslaughter and attempted assault convictions, we remand for a plenary resentencing.

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

ENTERED: OCTOBER 1, 2009

CLERK

Tom, J.P., Andrias, Nardelli, DeGrasse, Freedman, JJ.

1099 In re Richard Baum, Deceased. Index 1175/07

- - - - -

Gary Baum,
Petitioner-Respondent,

-against-

Valerie Greenly,
Respondent-Appellant.

Markewich and Rosenstock LLP, New York (Lawrence M. Rosenstock of counsel), for appellant.

Cahill & Cahill, P.C., Brooklyn (James H. Cahill, Jr. of counsel), for respondent.

Order, Surrogate's Court, New York County (Kristin Booth Glen, S.), entered on or about March 5, 2009, which, inter alia, determined that respondent Valerie Greenly, decedent Richard Baum's surviving spouse, did not receive a gift interest in decedent's cooperative apartment, unanimously affirmed, without costs.

Petitioner commenced a proceeding to be appointed administrator of his father's estate due to the fact that respondent, his father's widow, failed to take any action to sell the principal asset of the estate, the cooperative apartment where she resides, despite the passage of ten years since the death of decedent. In an effort to resolve the dispute, respondent, petitioner and his sister, decedent's sole distributees, agreed to put the apartment on the market and split the net proceeds.

Shortly thereafter, respondent notified petitioner that while going through some "old papers" in preparation for marketing the apartment, she had found a document signed by decedent making her a co-owner of the apartment. The date February 11, 1993 appears at the top of the document and it bears the apparent signature and stamp of a notary with the date stamp March 2, 1993 beside the notary's signature at the bottom. The document states that "it is my intention, via this statement, to notify all interested parties that my wife . . . is the 'co' and equal owner" of the shares in the cooperative apartment. It is undisputed that no attempt was ever made to obtain the original stock certificates from the bank holding the mortgage on the apartment in order to change the title to reflect the purported gift.

A valid inter vivos gift requires that the donor intend to make an irrevocable present transfer of ownership. There must be either physical, constructive or symbolic delivery to the donee sufficient to divest the donor of dominion and control over the property, and acceptance by the donee (*see Gruen v Gruen*, 68 NY2d 48, 53, 56-57 [1986]). The burden of proving that a gift was made must be established by the party asserting it with clear and convincing evidence (*see Matter of Carroll*, 100 AD2d 337, 338 [1984]).

Respondent failed to sustain her burden of establishing a gift to her of one-half of decedent's interest in the apartment. Serious questions exist regarding the authenticity of the transfer document since the document has no statement from the notary that he either knew the decedent, received proof of identity or that the document was signed in his presence. Additionally, respondent provided no explanation of the circumstances surrounding the gift and why she waited so long to assert her claim.

There is also insufficient evidence of delivery of the gift. Respondent did not assert that the document purporting to transfer an interest in the apartment was given to her by decedent and there is no evidence that decedent ever communicated to anyone, including the bank which held the mortgage on the apartment, that he had given respondent an interest in it. Thus, there is no evidence that decedent ever relinquished dominion and control over the shares; he was free to change his mind at any time (*see Matter of Szabo*, 10 NY2d 94, 99 [1961]). The fact that tax forms and correspondence from the management company for the cooperative were addressed to both parties is not dispositive since no proof was offered that decedent requested that respondent's name be added to these documents. Decedent had sufficient time before his death to effectuate the transfer by notifying the bank holding the shares of the conveyance.

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

ENTERED: OCTOBER 1, 2009

CLERK

Tom, J.P., Andrias, Nardelli, DeGrasse, Freedman, JJ.

1100 The People of the State of New York, Respondent, Ind. 2009/08

-against-

Miguel Corchado, Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered on or about January 20, 2009, unanimously affirmed.

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

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

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

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

ENTERED: OCTOBER 1, 2009

CLERK

Tom, J.P., Andrias, Nardelli, DeGrasse, Freedman, JJ.

1101 The People of the State of New York, Respondent, Ind. 357/08

-against-

Titus McBride, Defendant-Appellant.

Eric E. Rothstein, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (Alan Gadlin of counsel), for respondent.

Judgment, Supreme Court, New York County (Arlene R. Silverman, J.), rendered October 20, 2008, convicting defendant, after a jury trial, of criminal possession of property in the fourth degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously reversed, on the law, and the indictment dismissed with leave to re-present.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence. Nonetheless, as the People concede, defendant is entitled to dismissal of the indictment because the prosecutor rendered the grand jury proceeding defective (*see* CPL 210.35[5]) by instructing the grand jury that the stolen card at issue was a debit card as a matter of law. This was highly prejudicial, because there were factual issues as to the particular status of the card, which was an essential element of the crime for which defendant was indicted (*see* Penal Law § 165.45[2]). Accordingly, the integrity of the proceeding was impaired (*see People v Huston*, 88 NY2d 400 [1996]; *People v Batashure*, 75 NY2d 306, 311-312 [1990]). However, we reject defendant's argument that the People should be denied leave to re-present.

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

ENTERED: OCTOBER 1, 2009

CLERK

Tom, J.P., Andrias, Nardelli, DeGrasse, Freedman, JJ.

1102-
1103-
1103A-
1103B Victor K. Kiam, et al., Index 601424/07
Plaintiffs-Respondents,

-against-

Park & 66th Corporation, et al.,
Defendants-Appellants.

Marin Goodman, LLP, New York (Richard P. Marin of counsel), for appellants.

Tofel & Partners, LLP, New York (Lawrence E. Tofel of counsel), for respondents.

Judgments, Supreme Court, New York County (Herman Cahn, J.), entered September 18, 2008 and September 10, 2008, after a nonjury trial, which declared, respectively, that plaintiffs have the right to have, keep and maintain a sun room built on the terrace appurtenant to their penthouse apartment and that defendants may not interfere with that right, assess any charges or receive any consideration from plaintiffs, unanimously affirmed, with costs. Appeals from orders, same court and Justice, entered on or about August 29, 2008 and September 4, 2008, unanimously dismissed as subsumed in the appeals from the aforesaid judgments.

The record reveals no basis to disturb the court's factual findings supporting its conclusion that the "exclusive use" of the roof appurtenant to the penthouse apartment afforded plaintiffs under the proprietary lease included the right to enclose the space (*see Saperstein v Lewenberg*, 11 AD3d 289 [2004]). There is sufficient evidence to find that the board approved the initial construction of the sun room in 1968 and, in any event, ample evidence that the board knew about the room from the time of its construction and forbore to challenge the legality of the construction for some 35 years. This evidence of the board's knowing forbearance also supports the court's finding that the board waived any lease requirement of written approval for structural alterations (*see Kenyon & Kenyon v Logany, LLC*, 33 AD3d 538, 538-539 [2006]). In light of these findings, there is no merit to defendants' contentions as to corporate waste, self-dealing within the board, or illegality.

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

ENTERED: OCTOBER 1, 2009

CLERK

Tom, J.P., Andrias, Nardelli, DeGrasse, Freedman, JJ.

1105N McClier Corporation, et al., Plaintiffs, Index 28878/01

National Union Fire Insurance Company of Pittsburgh, PA., Plaintiff-Appellant,

-against-

United States Rebar, Inc., etc., et al., Defendants,

Utica First Insurance Company, et al., Defendants-Respondents.

Lester Schwab Katz & Dwyer, LLP, New York (Ellen M. Spindler of counsel), for appellant.

Farber Brocks & Zane, LLP, Mineola (Audra S. Zane of counsel), for Utica First Insurance Company, respondent.

Melito & Adolfsen P.C., New York (Steven I. Lewbel of counsel), for Eurotech Construction Company and Assurance Company of America, respondents.

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered May 15, 2008, which, in a declaratory judgment action involving whether certain of the plaintiffs are additional insureds under policies issued by defendants-respondents insurers (defendants), insofar as appealed from, granted in part defendants' motions for protective orders and denied plaintiff-appellant insurer's (plaintiff) motion to compel discovery, unanimously affirmed, without costs.

In response to plaintiff's discovery demands, defendants submitted privilege logs that identified each of the documents withheld and set forth a basis for the assertion of a privilege as to each. The motion court then conducted an in camera review of the withheld documents and ruled that most were protected by either the attorney-client privilege (CPLR 3101[b]) or the immunities for attorney work product (CPLR 3101[c]) and materials prepared for litigation (CPLR 3101[d][2]). No basis exists to disturb this ruling. Documents in an insurer's claim file that were prepared for litigation against its insured are immune from disclosure (*Grotallio v Soft Drink Leasing Corp.*, 97 AD2d 383 [1983]), and, while documents prepared in an insurer's ordinary course of business in investigating whether to accept or reject coverage are discoverable (*Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190, 191 [2005]), there is no indication that any such documents are being protected here. We have considered plaintiff's remaining arguments and find unavailing.

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

ENTERED: OCTOBER 1, 2009

CLERK

Tom, J.P., Andrias, Nardelli, DeGrasse, Freedman, JJ.

1106N Steven De Castro, Index 114949/07
Plaintiff-Respondent,

-against-

Horace Turnbull,
Defendant-Appellant.

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for appellant.

Arthur W. Greig, New York, for respondent.

Judgment, Supreme Court, New York County (Walter B. Tolub, J.), entered March 20, 2009, after a jury trial, awarding plaintiff the principal sum of $567,600, plus interest from November 5, 2007, unanimously affirmed, without costs.

Assuming arguendo that defendant's challenge to the sufficiency of the evidence was preserved by his unelaborated pro forma motion, the jury's findings that plaintiff attorney had not been discharged for cause and that he was entitled to his contingency fee pursuant to the retainer agreement (*see generally Campagnola v Mulholland Minion & Roe*, 76 NY2d 38, 44 [1990]), were based on legally sufficient evidence. Furthermore, the verdict, premised largely on the determination of credibility (*see Ruiz v City of New York*, 289 AD2d 42 [2001]), by which the jury effectively found that defendant's claimed reasons for discharging his attorney were a pretense to avoid paying his fee, was based upon a fair interpretation of the evidence (*see*

McDermott v Coffee Beanery, Ltd., 9 AD3d 195, 206 [2004]).

Defendant similarly failed to preserve his challenge to the ruling regarding the accrual of prejudgment interest, calculated from the date of the discharge rather than the date of the buyout settlement that provided defendant with the recovery from which the contingency fee was to be paid. In any event, the ruling was fair in light of the fact that defendant discharged his attorney in bad faith just before the attorney's efforts came to fruition (*see* CPLR 5001; *cf. Klein v Eubank*, 263 AD2d 357 [1999]).

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

ENTERED: OCTOBER 1, 2009

CLERK

OCT 1 2009

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
Eugene Nardelli
James M. Catterson
James M. McGuire, JJ.

3846
Ind. 601602/03
601077/04

x

Gulf Insurance Company,
Plaintiff-Appellant,

-against-

Transatlantic Reinsurance Company,
et al.,
Defendants,

Gerling Global Reinsurance
Corporation of America,
Defendant-Respondent.

[And Another Action]

x

Plaintiff appeals from an order of the Supreme Court, New York County (Richard B. Lowe III, J.), entered November 29, 2007, which denied its motion for partial summary judgment, and granted defendant Gerling's motion for partial summary judgment.

Simpson Thacher & Bartlett LLP, New York (Mary Kay Vyskocil, Jonathan K. Youngwood and Michael C. Ledley of counsel), for appellant.

Pitchford Semerdjian LLP, New York (David L. Pitchford and Sylvia Semerdjian of counsel), for respondent.

McGUIRE, J.

This appeal requires us to resolve numerous disputes arising from litigation between Gulf Insurance Company and Gerling Global Reinsurance Corporation of America concerning a series of "quota share" treaties between Gulf on the one hand and Gerling and other reinsurers on the other, and a series of separate agreements, "Interests and Liabilities Contracts" (I&Ls), between Gulf and each of the reinsurers individually, pursuant to which the reinsurers agreed to reinsure a portion of Gulf's losses under a portfolio of automobile residual value insurance (RVI) that Gulf began issuing in 1996 to various policyholders, including nonparty First Union Corporation. The participating reinsurers in "quota share" reinsurance treaties agree in each treaty year to accept a specified percentage of the cedent's covered losses in that year, and to receive in return the same percentage of the premiums paid to the cedent from all the policyholders in the particular "book" of business (*see* Ostrager & Vyskocil,§ 2.01[a], [b] [2d ed 2000]; *see also Christiana Gen. Ins. Co. Of N.Y. v Great Am. Ins. Co.*, 979 F2d 268, 271 [2d Cir 1992] ["Treaty reinsurance obligates the reinsurer to accept in advance a portion of certain types of risks that the ceding company underwrites"]). Facultative reinsurance, by contrast, "is reinsurance that is purchased for a specific risk insured by the cedent" (*id.* § 2.01[b]; *see also Christiana*, 979 F2d at 271, *supra* ["Facultative reinsurance covers only a particular risk or a portion of it, which the reinsurer is free to accept or not"]).

In March 2000, First Union brought a coverage action against Gulf in North Carolina and ultimately claimed that Gulf owed it $418 million in RVI losses under the First Union policy. In February 2003, Gulf and First Union agreed to settle the litigation for $266 million. The next month, Gulf submitted a bill to the applicable reinsurers, a group that did not include Gerling, for the treaty years 1996 through 1998. The reinsurers refused to pay and Gulf initiated this action to collect the reinsurance protection to which it contended it was entitled. In March 2004, Gulf submitted a second billing to the applicable reinsurers for later treaty years, including 1999; Gerling was among this group of reinsurers. Gerling also refused to pay and commenced a separate action against Gulf that was consolidated for pretrial purposes with the action commenced by Gulf.

In its complaint, Gerling seeks to rescind the three treaties it concededly participated in, the 1999, 2000 and 2001 treaties, on the basis of alleged nondisclosures and misrepresentations that it claimed Gulf either made or for which it was responsible. In addition, Gerling contends in its sixth cause of action that although Gulf had billed losses to Gerling as if it were a participant in the 1998 treaty, no agreement exists between Gerling and Gulf with respect to the 1998 treaty. Thereafter, Gulf amended its complaint to include Gerling as a defendant and alleged, among other things, in the first cause of action of its second amended complaint, that Gerling had breached its indemnification obligations under the 1999 treaty by failing to pay some $789,820, its alleged share of the First Union settlement. In addition, in its answer in the action commenced by Gerling, Gulf brought this same claim as its first counterclaim; Gulf's fifth counterclaim, also for breach of contract, asserted that Gerling had failed to pay over $31,775,000, representing Gerling's alleged share of losses under the 1998, 1999, 2000 and 2001 treaties relating to RVI policies other than the First Union policy. As discussed below, moreover, Gulf also asserted, in the alternative, two counterclaims for reformation of certain of the I&L contracts.

Following discovery, Gulf moved for partial summary judgment on its first cause of action against Gerling and other of the reinsurers. Gerling also moved for partial summary judgment in both actions and, insofar as is relevant to this appeal, sought a declaration that no agreement existed between Gulf and Gerling with respect to the 1998 treaty, a declaration concerning the extent of Gerling's participation in the 1999 and 2000 treaties, a declaration that the First Union policy is not covered by the 1999 treaty and dismissal of Gulf's second amended complaint. In addition, Gerling sought summary judgment dismissing Gulf's counterclaims for reformation. Eventually, Gulf settled with all reinsurers other than Gerling. As discussed below, Supreme Court denied Gulf's motion and granted Gerling's. Gulf appeals from the order denying its motion and granting Gerling's.

One of the disputes between the parties concerns the extent of the participation by Gerling in the risks it reinsured under the treaties for 1999 and 2000 and the accompanying I&L contracts. That dispute turns on whether Gerling's participation is stated as a percentage of the risk assumed by all the reinsurers collectively or as a percentage of all the risk assumed by Gulf under its RVI book. As elucidating this dispute will help explain the other disputes, we begin with it.

A

Under the 1999 treaty -- the relevant language of the 2000 treaty is identical -- the reinsurance coverage is divided into "Section A" and "Section B," with the former covering Gulf's liabilities to its policyholders under all but one of the RVI policies and the latter covering its liabilities to nonparty General Electric Capital Auto Financing Services, Inc. The "Business Covered" section of the treaty provides with respect to

Section A that "[t]he Company [Gulf] shall cede to the Reinsurer [a term defined to include all participating reinsurers collectively] and the Reinsurer shall accept from the Company a 45% quota share participation of the net retained insurance liability of the Company on each risk insured." With respect to Section B, the relevant language is identical except that it provides for a 65% quota share participation. The term "net retained insurance liability" is defined as "the remaining portion of the Company's gross liability on each risk reinsured under this Agreement after deducting recoveries from all reinsurance, other than the reinsurance provided hereunder and the reinsurance provided in the Company Retention Article." With respect to Section A, the treaty states in Article VII, "Company Retention," that "[t]he Company will maintain for its net account a 55% participation in the business reinsured hereunder. However, at its discretion, the Company may purchase facultative reinsurance." With respect to Section B, the language in Article VII is identical except that a 35% participation is specified.

The last clause of the definition of "net retained insurance liability" is problematic.[1] In its brief, Gerling states that

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[1]Although the definition contemplates that reinsurance other than facultative reinsurance and the reinsurance provided under the treaty was available to Gulf so as to reduce its gross liability, the nature of that other reinsurance is not stated in

the term is defined "as Gulf's 'gross liability on each risk reinsured ... after deducting recoveries from all [other] reinsurance ...'" [brackets in original]. Gerling thus states -- Gulf expresses no disagreement -- that recoveries from any facultative reinsurance Gulf purchased but not recoveries from the reinsurance provided under the treaty are deducted from Gulf's gross liability of 100% to determine Gulf's "net retained insurance liability." In computing Gulf's "net retained insurance liability" it makes sense not to deduct from Gulf's gross liability the amount of the recoveries from the reinsurance provided under the treaty, because the amount of those recoveries is itself a function of Gulf's "net retained insurance liability." Read literally, however, the last clause of the definition also would require that Gulf's gross liability not be

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the definition. However, the definition of the term "original gross net written premium," which presumably is intended to be in balance with the definition of "net retained insurance liability," states that the term "shall be defined as gross written premium less returns, cancellations, inuring excess of *loss reinsurance* and facultative reinsurance, if any" (emphasis added). Apart from facultative reinsurance, the parties do not mention the subject of any other form of reinsurance, and so we need not be concerned with it. We note as well that the word "recoveries" in the definition of "net retained insurance liability" suggests that gross liability is reduced not by the extent of the risk assumed under any other reinsurance but only to the extent that the reinsurer makes good on the risk it assumes and actually indemnifies Gulf for a particular loss. The parties, however, do not so contend or make any hay of the word "recoveries."

reduced by recoveries from any facultative reinsurance Gulf purchased in accordance with its discretionary authority under Article VII. As the parties appear to agree that a portion of the last clause of the definition -- i.e., the phrase "and the reinsurance provided in the Company Retention Article" -- should be read out of the treaty, we follow the course they have charted (*see Mitchell v New York Hosp.*, 61 NY2d 208, 214 [1984]).

Because Gulf's gross liability of 100% is reduced to the extent it secures facultative reinsurance, it follows that its "net retained insurance liability" is not necessarily a constant over the life of the treaty. For the same reason, although the quota share ceded to the reinsurer for the two sections is fixed at 45% and 65%, those percentages also are not necessarily constant over the life of the treaty when expressed as a percentage of Gulf's total exposure for each section under its RVI book.

Gulf, however, relies on extrinsic evidence -- i.e., that it never exercised its right to purchase facultative reinsurance. Gerling does not object to or dispute this extrinsic evidence, perhaps because it relies on it as well and contends that the absence of any facultative reinsurance supports its position. In any event, Gulf stresses that it is undisputed that it never obtained any reinsurance for its RVI book other than that provided under each treaty, and thus that its "net retained insurance liability" was at all times equal to its "gross liability" of 100%. Accordingly, it argues with respect to Section A -- the analysis is the same with respect to Section B -- that "[i]t follows per force [*sic*] that the portion of Gulf's 'net retained insurance liability' ceded to the quota share reinsurers collectively was 45% of its 'gross liability' of 100%." Gulf further maintains that this conclusion is reinforced by the provision in Article VII, the "Company Retention" article, stating, with respect to Section A, that "[t]he Company will maintain for its own net account a 55% participation in the business reinsured hereunder." Again, the analysis is the same with respect to Section B, as Article VII goes on to provide that Gulf will maintain for its own net account a 35% participation.

Gulf then points to its I&L contract with Gerling for 1999, which states that Gerling "shall have a 6.50% participation as respects Section A and a 26.50% participation as respects Section B in the Interests and Liabilities of the Reinsurer as set forth in the agreement attached hereto entitled Quota Share Reinsurance Agreement." According to Gulf, the treaty defines the participation of the reinsurers collectively as a percentage of Gulf's total risk of loss under the RVI book, and thus it contends that "Gerling's individual participation therein necessarily also reflects a percentage in Gulf's total risk of loss."[2] Gulf buttresses this conclusion with additional evidence (as discussed below, it also is extrinsic evidence) by pointing to the I&L contracts with the other reinsurers and asserting that "when all of the reinsurers' individual participations under their I&L contracts are added up (TRC 12.5%; XL 11.25%; Odyssey 11.25%; and Gerling 10%), they total the 45% share of Gulf's gross liabilities that the ... reinsurers agreed collectively to accept under the [treaty]."[3]

Finally, Gulf relies on other extrinsic evidence, including,

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[2]This argument proves too little. The question is not whether Gerling's participation reflects *a* percentage in Gulf's total risk of loss -- it clearly does -- but what that percentage is of Gulf's total risk of loss. Specifically, with respect to Section A liabilities for 1999, the question is whether Gerling's participation is 6.5% of Gulf's 100% total risk of loss or 2.925% (6.5% of 45%) of that 100% risk.

[3]In support of this assertion Gulf does not cite to the I&L contracts with the other reinsurers, and the parties appear not to have included copies of the I&L contracts with the other reinsurers in the voluminous record on appeal. Rather, Gulf cites to deposition testimony from representatives of each of the other reinsurers regarding their participation in Section A for 1999; the percentage figures quoted above by Gulf apparently reflect Section A participation in 2000, when Gerling increased its share from 6.50% to 10%. However, Gerling does not take issue with this assertion and the parties apparently agree that for all relevant treaty years the sum of the individual participations specified in the I&L contracts for each section equals the applicable quota share percentage of the net retained insurance liability that was ceded collectively to the reinsurer.

most significantly, testimony that for each treaty year Gerling and other reinsurers received premiums from Gulf that matched the premiums that would be due if the stated percentage participation of each reinsurer were a percentage of Gulf's 100% total risk. Thus, for example, with respect to Section A liabilities for 1999, Gerling received 6.5% of all the premiums Gulf received from its policyholders. For its part, Gerling does not deny that it received a premium that significantly exceeded the amount that would be due to it under its construction of the treaties and I&L contracts. Rather, it offers an explanation. As Supreme Court stated in apparently accepting that explanation, "Gerling explains that its acceptance of the [higher amounts of premium] was based upon its mistaken acceptance of the broker's representations to its bookkeeping department that the amounts were correct." In addition, Gerling maintains that because the premium was received after, not contemporaneously with, execution of the contract documents, its receipt and related documents of its bookkeepers "do not reflect any interpretation of treaty wordings."[4]

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[4]Although the receipt of the premium under the 1999 treaty and I&L contract occurred after their execution, the receipt of that premium preceded the execution of the 2000 treaty and I&L contract, which in relevant part are identically worded. Thus, if the relevant contractual language were ambiguous, the payment and receipt of the premium in amounts consistent only with

Gerling's arguments also focus for illustrative purposes on Section A under the 1999 treaty and I&L contract. Gerling's argument, however, stresses that the I&L contract unequivocally states that "[Gulf] shall pay [Gerling] 6.50% of all premiums due ... the Reinsurer in accordance with the provisions of the Agreement [the treaty] attached." The treaty states that "[Gulf] shall pay to the Reinsurer 45% of [Gulf's] original gross net written premium ... in respect to its net retained insurance liability." As noted above, the treaty defines "original gross net written premium" as "gross written premium less returns, cancellations, inuring excess of loss reinsurance and facultative reinsurance, if any." Gerling goes on to argue that Gulf's "original gross net written premium" is "simply put -- the 100% of policy premiums from which it pays the reinsurers their 45% portion." The truth of that statement depends on extrinsic matters, including whether Gulf exercised its right to purchase facultative reinsurance; Gerling immediately goes on to state, citing to Gulf's brief, that Gulf obtained no other reinsurance.

Although extrinsic proof is necessary to determine whether

Gerling's stated participation being a percentage of Gulf's total exposure for its RVI business would be relevant. In any event, the course-of-performance evidence Gulf relies upon is critical to the next issue we discuss, whether Supreme Court erred in granting summary judgment to Gerling dismissing Gulf's counterclaims for reformation.

Gulf's "gross written premium" equals its "original gross net written premium," Gerling's reliance on extrinsic evidence in this regard is inconsequential. After all, the provision of the I&L contract specifying that Gerling is entitled to 6.5% of all premiums "*due ... the Reinsurer*" is consistent with Gulf's position that Gerling assumed 6.5% of Gulf's "net retained insurance liability" -- which happens here to equal Gulf's "gross liability" of 100% -- only if the reinsurer is entitled under the treaty to 100% of Gulf's "original gross net written premium." Obviously, the reinsurer is entitled to far less, the specified 45% of Gulf's "original gross net written premium." In short, the language of these provisions unambiguously supports Gerling's position.

Gerling also relies on equally unambiguous language in the 1999 I&L contract specifying its share of Section A liabilities. Consistent with the provisions specifying Gerling's share of premiums, it states that "[Gerling] shall have a 6.50% participation ... in the Interests and Liabilities of the Reinsurer as set forth in the Agreement attached hereto entitled Quota Share Reinsurance Agreement." The treaty provides that "Gulf shall cede to the Reinsurer and the Reinsurer shall accept from [Gulf] a 45% quota share participation of [Gulf's] net retained insurance liability ... on each risk insured."

Accordingly, reading both documents together, Gerling has a 6.5% participation in the 45% quota share of Gulf's net retained insurance liability. Again, the fact that it cannot be determined from the four corners of both documents whether Gulf's net retained insurance liability is equal to or less than 100% of Gulf's gross liabillity of 100% is irrelevant. The crucial and unambiguous fact is that Gerling has a 6.5% participation in the 45% quota share and that quota share cannot be equal to 100% of Gulf's net retained insurance liability.

In any event, the extrinsic proof that Gulf relies on, however powerful it may be, is irrelevant for it cannot be admitted to vary the unambiguous language of each I&L contract and its accompanying treaty (*see Greenfield v Philles Records*, 98 NY2d 562, 569-70 [2002]). It may be, the point need not be decided, that the relevant language of each I&L between Gulf and Gerling and its accompanying treaty might be rendered ambiguous if each of these sets of agreements could be read in conjunction with the other I&L contracts for each treaty year. Gulf correctly argues that each of its I&L contracts with Gerling must be read with the applicable treaty as a single agreement as the I&L contract and treaty for each year form part of a single transaction (*Nau v Vulcan Rail & Constr. Co.*, 286 NY 188, 197 [1941] ["All three instruments were executed at substantially the same time, related to the same subject-matter, were contemporaneous writings and must be read together as one"]; *see also This Is Me, Inc. v Taylor*, 157 F3d 139, 143 [2d Cir 1998] [same, construing New York law]). But Gulf cites to nothing in the record to support the proposition that for each year the treaty and the I&L contracts with all the reinsurers, regardless of when each I&L contract was executed, can be regarded as a single transaction. Indeed, Gulf does not so contend and advances only the correct and more modest argument that each of its I&L contracts with Gerling must be read together with the accompanying treaty. Thus, we have neither the occasion to determine nor an adequate factual basis for determining the applicability of authority holding "that all writings which form part of a single transaction and are designed to effectuate the same purpose [must] be read together, *even though they were executed on different dates and were not all between the same parties*" (*This Is Me*, 157 F3d at 143, *supra* [emphasis added]).

As it also depends on the same extrinsic evidence concerning the terms of its I&L contracts with the other reinsurers, Gulf's reliance on the Company Retention provision of the treaties is misplaced. Moreover, Gulf simply assumes both that the percentage participation specified in the Company Retention provision is a maximum participation and that it did not breach its obligation to retain no more than the specified percentage participation. By contrast, Gerling cites to treatises (*see* Jean F. Webb, *The Pro Rata Treaty*, in Reinsurance, revised edition 34 [Robert W. Strain ed., 1997]; Walter J. Coleman, *The Pro Rata Treaty in Property Insurance*, in Reinsurance 143 [Robert W. Strain ed., 1980]) in support of its position that the specified percentage participation is a minimum participation (albeit one that Gulf can reduce to the extent it exercises its discretionary authority to purchase facultative reinsurance). Although we need not decide the point, we note that in its reply brief Gulf does not address Gerling's argument that the specified retention is a minimum participation.

In sum, Supreme Court correctly concluded that the relevant provisions of the 1999 and 2000 treaties and I&L contracts unambiguously state Gerling's percentage participation as a percentage of all risk assumed by the reinsurers.

B

Gulf hedged its position that under the treaties and I&L contracts the percentage participation of Gerling stated in each I&L contract is a percentage of all of Gulf's exposure under the applicable section. That is, as noted earlier, Gulf asserted, in the alternative, two counterclaims for reformation, one relating to reinsurance of losses under the First Union policy and the other relating to reinsurance of losses under Gulf's other RVI policies. Gulf alleged that the mutual intent of the parties with respect to each treaty and I&L contract was that the percentage participation of Gulf stated in each I&L contract was a percentage of all of Gulf's losses under the applicable Section, not a percentage of the applicable quota share (the portion of Gulf's total exposure ceded collectively to the reinsurer). Accordingly, Gulf claimed that to the extent the language of the I&L contracts could be interpreted to state Gerling's percentage participation as a percentage of the applicable quota share, the language reflected a mutual mistake requiring reformation of the I&L contracts "to make clear that Gerling agreed to reinsure Gulf for its agreed upon share of 100% of *all* losses under Gulf's" RVI book (emphasis in original).

Supreme Court granted summary judgment to Gerling dismissing Gulf's counterclaims for reformation. Contending that its submission in opposition to Gerling's motion raised material issues of fact that require a trial, Gulf argues that Supreme Court erred. We agree that summary judgment dismissing Gulf's reformation counterclaims should not have been granted. As discussed below, the course-of-performance evidence and the other evidence Gulf relied on constitutes unequivocal and persuasive evidence of mutual mistake.

In *Chimart Assoc. v Paul* (66 NY2d 570 [1986]), although a letter agreement signed by a businessman, David Paul, unequivocally obligated him both to make a guarantee payment to Chimart Associates and to pay interest on a late payment, Paul contended that he was required only to pay interest. Stressing that "a party resisting pretrial dismissal of a reformation claim [is required] to tender a high level of proof in evidentiary form" (*id.* at 574 [internal quotation marks omitted]), the Court held that summary judgment properly was granted to Chimart notwithstanding Paul's counterclaim seeking to reform the letter agreement to require only the payment of interest. Writing for a unanimous Court, then-Judge Kaye reasoned as follows:

> "First, the contract at issue is part of a multimillion dollar transaction involving sophisticated, counseled parties dealing at arm's length. Second, the language of the agreement was plain and unambiguous, and by Paul's own admission he failed to read the agreement. Crucially, there is no unequivocal evidence of mutual mistake or fraud.
>
> "As to mutual mistake, Paul sets forth no basis for his contention that both parties reached an agreement other than that contained in the writing. His affidavit contains no specific claim that both parties agreed that Paul could pay only interest and in fact strongly suggests that the mistake was not mutual. The affidavit of Chimart's attorney, by contrast, squarely addresses the point: 'Whether or not [Paul] signed the Agreement under such a mistaken impression, I can state categorically that Chimart did not labor under the same mistaken impression. As

> noted above, I played a key role in helping Chimart to negotiate the Agreement. I therefore have direct knowledge of the facts to which I am testifying. Without doubt, the Agreement's words reflected exactly what I intended them to reflect'" (*id.* at 574-575 [internal citation omitted]).

Under these circumstances, "Paul was required -- and failed -- to come forward with something more than his own conclusory assertion that mistake existed" (*id.* at 575).

As Judge Kaye noted, the result in *Chimart* was "dictate[d]" (*id.* at 574) by *Backer Mgt. Corp. v Acme Quilting Co.* (46 NY2d 211 [1978]). In *Backer*, "summary judgment was granted dismissing a reformation claim because '[a]s a matter of law, no showing free of contradiction or equivocation [came] through from the affidavits submitted' in opposition to the motion (46 NY2d, at p 220)" (*Chimart*, 66 NY2d at 574 [brackets in original]). In *Backer*, as in *Chimart*, "the negotiations had been conducted by sophisticated, counseled businessmen, and the undisputed evidence showed that the unambiguous language reflected precisely what the moving party intended" (*id.*).

Here, too, the I&L contracts are part of multimillion dollar transactions between sophisticated parties dealing at arm's length[5] and, as discussed above, the relevant language of the

[5]We are not told by the parties whether they were advised by counsel concerning the language of the 1999 and 2000 I&L

contracts unambiguously provides that Gerling's percentage participation is a percentage of the applicable quota share. Moreover, as in *Chimart*, Gerling submitted an affidavit from its underwriter "squarely address[ing]" (*id.* at 575) the claimed mutual mistake. With respect to the 1999 and 2000 I&L contracts, John Rausch, the Gerling underwriter who signed both contracts on behalf of Gerling, asserted that "[t]here was no mistake on my part, as I understood and intended at the time that ... Gerling's stated share was of the reinsurers' [quota share], exactly as stated in the 1999 and 2000 contracts."

Unlike the parties raising reformation claims in *Chimart* and *Backer*, however, Gulf did not rely solely on conclusory or equivocal assertions of mistake.[6] Rather, in opposing Gerling's

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contracts.

[6]Gulf asserts that John Curtis, the broker from Guy Carpenter who placed the reinsurance with Gerling, testified that it was the intent of Gulf and all the reinsurers that each reinsurer's percentage participation was a percentage of Gulf's entire exposure. A review of the broker's testimony, however, makes clear that he opined -- albeit with some factual predicate for his opinion -- that all the reinsurers knew that their participation was stated as such a percentage. Gulf also relies on the testimony of one of its executives, Susan Morgan, that "everyone's understanding within Gulf was that [each reinsurer's percentage participation] was on a hundred percent basis." This testimony, however, also appears to reduce to opinion testimony. In any event, we need not consider whether the testimony of Curtis and Morgan supports denial of Gerling's motion, as we conclude that the motion should have been denied on the basis of other evidence adduced by Gulf.

motion for summary judgment dismissing its reformation counterclaims, Gulf principally relied on undisputed evidence that until April 2003, i.e., until Gulf ceded the First Union claim to the reinsurers, Gerling not only received and retained the premium from Gulf but paid claims on the basis of its percentage participation being a percentage of all of Gulf's exposure for its RVI business, not a percentage of the applicable quota share. Indeed, a Gerling vice-president conceded in an affidavit that premiums and losses under the 1999 and 2000 treaties had been ceded "on a 100% basis" until April 2003. With respect to the premium, Gerling did not dispute that it had received several million dollars more from Gulf than it would be entitled to under the 1999 and 2000 treaties if its percentage participation were a percentage of the applicable quota share. Gulf also relied on documentary evidence of internal Gerling "Account Instructions" reflecting that its participation was based on 100% of Gulf's RVI business. Those instructions directed that premiums paid by Gulf to Gerling be "gross[ed] up ... to 100%" to calculate Gerling's share.

As Supreme Court correctly recognized, to support a claim for reformation a "mutual mistake must exist at the time the agreement is signed" (*Shults v Geary*, 241 AD2d 850, 852 [1997]). Supreme Court erred, however, in concluding that this course-of-performance evidence is not probative of a belief by Gerling, when the 1999 and 2000 I&L contracts were signed, that its percentage participation was a percentage of Gulf's entire exposure for its RVI business. How the parties perform a contract necessarily is manifested after execution of the contract, but their performance is highly probative of their state of mind at the time the contract was signed. As Justice Sullivan stated in *Federal Ins. Co. v Americas Ins. Co.* (258 AD2d 39, 44 [1999]):

> "[T]he parties' course of performance under the contract is considered to be the 'most persuasive evidence of the agreed intention of the parties.' (*Websters's Red Seal Publs. v Gilberton World-Wide Publs.*, 67 AD2d 339, 341, *affd* 53 NY2d 643.) 'Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence.' (*Old Colony Trust Co. v City of Omaha*, 230 US 100, 118; *see*, *IBJ Schroder Bank & Trust Co. v Resolution Trust Corp.*, 26 F3d 370, 374 [2d Cir], *cert denied* 514 US 1014). As Restatement (Second) of Contracts § 202, comment *g* has expressed it, 'The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning.'"

To be sure, neither Gulf's course-of-performance evidence nor the Gerling "Account Instructions" conclusively establish mutual mistake. Gerling countered Gulf's evidence with an affidavit from Alice Belkin, an assistant secretary and account analyst in Gerling's accounting department who was involved in reviewing and booking premiums and losses reported to Gerling by Gulf through its broker, Guy Carpenter. According to Ms. Belkin, she recorded in Gerling's books premium and loss experience relating to the reinsurance agreements with Gulf in accordance with assurances she received from Guy Carpenter, not on the basis either of any review by her of the terms of the treaties and I&L contracts or of discussions with Gerling underwriters knowledgeable about those terms. Referring to Ms. Belkin's affidavit, and apparently accepting the truth of its factual assertions, Supreme Court wrote that "Gerling explains that its acceptance of the [higher amounts of premium] was based on its mistaken acceptance of the broker's representations to its bookkeeping department that the amounts were correct."

If the truth of Ms. Belkin's factual assertions is accepted, Gulf's course-of-performance evidence could be viewed as equivocal (*see Jansen v United States*, 344 F2d 363, 369 [Ct Cl 1965] [the interpretation of a contract manifested by a party's performance "must be the conscious action of a responsible agent of the party against whom the interpretation is urged"]). On Gerling's motion for summary judgment, however, Supreme Court could not properly have accepted her assertions as true (*Ferrante v American Lung Assn.*, 90 NY2D 623, 631 [1997] ["It is not the court's function on a motion for summary judgment to assess credibility"]). Moreover, as Gerling was the moving party seeking summary judgment dismissing Gulf's reformation counterclaims, Gulf was entitled to have all reasonable inferences drawn in its favor (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]). The trier of fact might have a favorable impression of Ms. Belkin's credibility. But it also might regard testimony in accordance with those factual assertions as a *deus ex machina*, appearing too suddenly and conveniently after Gulf ceded the First Union claim to its reinsurers. Gulf contends, and we agree, that from all the evidence it submitted, a fact finder reasonably could conclude that a multibillion dollar reinsurance company does not collect the premium and pay losses for more than three years without any internal controls whatsoever to ensure that the substantial amounts it receives and pays are consistent with the terms of the underlying contracts. As a panel of the Third Department stated in a similar context, "we think it cannot be said on this record that a reasonable person could by no rational process find the evidence of mutual mistake to be clear, positive and convincing. [S]ummary judgment on affidavits should not be granted where there is any doubt as to the existence of triable issues of fact" (*Weiss v Garfield*, 21 AD2d 156, 159-160 [1964] [internal quotation marks omitted]).

In sum, Gulf was not required to come forward with incontrovertible proof of mutual mistake. It met the heavy burden it was required to shoulder of coming forward with "unequivocal evidence of mutual mistake" "in evidentiary form" (*Chimart*, 66 NY2d at 574, *supra*), and Gerling's motion for summary judgment dismissing Gulf's reformation counterclaims should have been denied.[7]

C

Under Endorsement Number 1 to the 1999 treaty, the "Term" of the treaty is stated to be "Effective January 1, 1999 at 12:01 a.m., Eastern Standard Time, to January 1, 2000 at 12:01 a.m. Eastern Standard Time, as respects losses occurring on *policies attaching during the term*" (emphasis added). Under Article 1 of the treaty, "Business Covered," Gulf ceded to the reinsurer a "quota share participation of the net retained insurance liability of [Gulf] on each risk insured under *new and renewal policies becoming effective* at and after 12:01 a.m., Eastern

[7]Gerling's other arguments for affirmance, including its argument based on changes to the 2001 treaty and I&L contract that indisputably state Gerling's percentage participation as a percentage of Gulf's entire RVI exposure, are unpersuasive.

Standard Time, January 1, 1999, as respects losses occurring at and after said date covering business classified by [Gulf] as Automobile Residual Value Insurance" (emphasis added). The term "policies" is defined in Article I as "[Gulf's] binders, policies and contracts providing insurance and reinsurance on the business covered under this Agreement." Article XXVI of the treaty provides in relevant part that "[t]his Agreement shall be governed by and construed according to the laws of the State of New York."

The verb "attaching" is not expressly defined in the treaty. The parties do not cite to any New York cases construing the word, although they cite to various treatises. Its meaning, however, seems clear from the above-quoted language of Article I of the treaty, and the parties appear to be in agreement that a policy, be it a "new" or a "renewal" policy, "attach[es]" during the term of the treaty if it becomes effective during the treaty's term. If policy A had a term of one year beginning on December 1, 1998 and policy B had a term of one year beginning on December 1, 1999, policy A would not be a policy "attaching during the term" of the treaty, but policy B would be; no losses occurring on policy A (as a result of leases issued by the insured during its term) would be reinsured under the treaty, but all losses occurring on policy B would be reinsured under the treaty (even if no leases were issued by the insured in 1999).

The parties agree that Gulf provided coverage to First Union under an RVI policy for the first three months of 1999. The parties also agree that the original RVI policy issued by Gulf to First Union was effective as of January 1, 1996 at 12:01 a.m., Easter Standard Time (the 1996 policy). The parties appear to agree that the 1996 policy had a 12-month policy period and that coverage for each of the following two calendar years was provided under distinct policies (the 1997 and 1998 policies).[8]

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[8]The "Declaration" section of the original RVI policy issued by Gulf & First Union states only a policy effective date of "1/1/96" at "12:01 a.m. [Eastern] Standard Time" without stating a calendar date on which coverage expires. Rather, the "[p]olicy period is defined as a twelve month beginning 1 January 1996 and each twelve month period thereafter." The policy also states that "[u]nless discontinued as herein provided this policy shall be automatically renewed from year to year." With respect to cancellation, the policy "may be cancelled by you or us by sending written notice to the other, stating when, not less than 30 days thereafter, such cancellation will be effective." Although Gulf states in its brief that "[f]rom 1996 through 1998, Gulf and First Union renewed the policy each year," Gulf does not state whether the policy was renewed automatically or otherwise. Gerling, however, states in its brief that the 1996 policy "was endorsed to reflect renewals with effective dates of 1/1/97 and 1/1/98." Presumably, the endorsements to which Gerling refers are a "General Change Notice" effective January 1, 1997 and a "General Change Notice" effective January 1, 1998. In addition to setting forth various changes to the policy, the former notice states, consistently with the 1996 policy, that the "[p]olicy period is defined as a twelve month period beginning 1 January 1996 and each twelve month period thereafter." The latter change notice contains no definition of the "policy period."

In their briefs, the parties do not refer to or base any

Although the parties also agree that the coverage in early 1999 was the result of an "agreement" between Gulf and First Union to extend coverage on the same terms as the 1998 policy while negotiations were ongoing, they disagree about whether that coverage was provided pursuant to a policy "attaching" during 1999. More specifically, they disagree about whether the 1999 coverage was pursuant to a "new" or a "renewal" policy that became effective in 1999. We are not told whether the agreement was an oral one, although it presumably was, or whether it was reached before or after December 31, 1998; nor do the parties cite to any evidence bearing on the question of whether the agreement, as opposed to the coverage, was effective as of a date in 1998, as of 12:01 a.m. on January 1, 1999 or as of a later time and date in 1999.

Supreme Court granted partial summary judgment to Gerling declaring that the extension of coverage into 1999 under the 1998 policy is not covered by the 1999 treaty, and denied partial summary judgment to Gulf declaring that Gerling is obligated to indemnify Gulf under the 1999 treaty for Gerling's share of the First Union settlement ceded to the 1999 RVI coverage. According

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arguments on the language quoted above from the 1996 policy and the 1997 General Change Notice. Accordingly, the legal import of that language is not before us.

to Supreme Court, the extension of coverage into 1999 did not "constitute[] a renewal" of the 1998 policy. Supreme Court relied on one of the definitions of the term "renewal" in Black's Law Dictionary -- i.e., "The re-creation of a legal relationship or the replacement of an old contract with a new contract, as opposed to the mere extension of a previous relationship or contract" (Black's Law Dictionary 1322 [8th ed]) -- and, because First Union is a North Carolina corporation, on a North Carolina precedent quoting that definition in support of the conclusion that an insurance policy was "subject to renewal" within the meaning of a North Carolina statue (*Daganier v Carolina Mountain Bakery*, 179 NC App 179, 189, 633 SE2d 696, 700 [NC App 2006]).

Gulf argues, among other things, that Supreme Court erred in looking to North Carolina law; that under New York law, the "renewal" of insurance coverage includes an extension of the policy's period or term; that, in any event, the agreement to provide coverage effective January 1, 1999 on the basis of the terms of the 1998 policy constituted a new contract of insurance (and thus a "policy" of insurance within the meaning of the treaty) that attached during the term of the treaty; and that, even assuming ambiguity about whether a policy "extended" to cover part of 1999 "attached" in 1999, extrinsic evidence supports its position that the parties intended losses under the

1999 coverage of First Union to be reinsured under the treaty.[9]

Gerling argues, among other things, that the deposition testimony of Susan Morgan, an executive of Gulf who was involved in the preparation of the "policies attaching" language of Endorsement Number 1, establishes that losses occurring on RVI leases issued by First Union in early 1999 "go back" to the 1998 policy and thus are reinsured under the 1998 treaty, not the 1999 treaty; that Gulf admitted that the RVI coverage was not renewed in 1999; that no new coverage attached on January 1, 1999 by virtue of the agreement to extend the prior years's coverage; that Supreme Court properly looked to North Carolina law; and that Gulf's reliance on a provision of New York law is misplaced.

Contrary to Gerling's contention, the testimony of Ms. Morgan does not establish the correctness of its position. As Gulf maintains, Ms. Morgan was addressing a hypothetical RVI policy that became effective in one calendar year (either at the

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[9]Gulf also asserts in its main brief that "[a]ny policy insuring losses occurring during 1999 'attached' during that year and, as such, the losses are covered under the treaty." As Gerling correctly argues in response, however, the reinsurance furnished by the treaty is not triggered by the occurrences of a loss in 1999 -- i.e., the treaty is not a "losses-occurring" treaty -- and a loss on a First Union lease issued in 1999 could not occur until after 1999, when the lease went to its full, multi-year term. This incorrect assertion, which Gulf does not defend in its reply brief, is of no moment as it does not undermine Gulf's other arguments.

beginning of or at a later date during the year) and, by its terms, continued to be in effect as of the beginning and during a portion of the next calendar year. Thus, to vary somewhat for ease of exposition an example posited by Ms. Morgan, if the terms of such a policy provided that it would be in effect from January 1, 1998 through March 31, 1999, losses occurring on leases issued by the insured during the first three months of 1999 would not be reinsured under the 1999 treaty, because the policy "attached" -- i.e., took effect -- before the term of the treaty commenced on January 1, 1999. By contrast, as Ms. Morgan also explained, under the wording of the treaty before it was amended by Endorsement Number 1 -- i.e., "Effective January 1, 1999 at 12:01 a.m., Eastern Standard Time, to January 1, 2000 at 12:01 a.m., Eastern Standard Time, as respects losses occurring on *leases incepting* during the term of this Agreement" (emphasis added) -- the same losses would be reinsured under the treaty, because the leases resulting in the losses "incepted" -- i.e., were issued -- during the term of the treaty. Gerling's reliance on Ms. Morgan's testimony simply assumes that the 1999 coverage was pursuant to a policy indistinguishable from the hypothetical policy.

Contrary to Supreme Court's conclusion, because the treaty expressly states that it "shall be governed by and construed according to the laws of the State of New York," North Carolina law is not controlling on the meaning of the word "renewal" in the treaty. In attempting to defend that conclusion, Gerling does no more that assert its correctness. However, the definition of the word "renewal" in Black's Law Dictionary provides some support for Gerling's position that the 1998 policy was not renewed in 1999. But as Gulf stresses, another definition of the word supports its position. Insurance Law § 3426(a)(4) provides as follows: "'Renewal' or 'to renew' means the issuance or offer to issue by an insurer of a policy superceding a policy previously issued and delivered by the same insurer ... or the issuance or delivery of a certificate or notice *extending the term of a policy beyond its policy period or term*" (emphasis added). To be sure, Gerling maintains that § 3426 "applies neither to residual value policies, nor to non-NY policies."[10] Moreover, although Gerling does not make the point, Gulf does not contend that it issued or delivered "a certificate or notice extending the term" of the 1998 policy beyond "its policy period or term." Nonetheless, Gulf's central point on

[10]In this regard, Gerling cites, among other authorities, an opinion of the Insurance Department concluding that RVI policies are exempt from the cancellation and non-renewal provisions of Insurance Law § 3426 (Proposed Residual Value Policy, Op. NY State Ins. Dept, at 1 [April 20, 2004]).

this score is that the statutory definition of the term "renewal" supports its position because the mere extension of a policy beyond its policy period or term can constitute a renewal of the policy. As between the two definitions, the one defining the term as a matter of New York law in the specific context of insurance is more illuminating. But as discussed below, the ambiguity of the term is not decisive.

Gerling is not persuasive in asserting that Gulf has "admitted" that the RVI coverage was not renewed in 1999. Of the three witnesses whose deposition testimony Gerling cites in support of the assertion, two of the witnesses -- an employee of Lee & Mason of Maryland, Inc. (L&M), the program manager through which Gulf wrote its RVI business, and an employee of First Union's broker -- testified only that the 1998 coverage was extended in 1999 and did not even offer opinions on the legal issue of whether the extension constituted a "renewal" of the coverage. Only the third witness, another employee of L&M, opined that the 1998 policy "was not renewed" and went on to state that it "was extended for three months ... at the same terms as the '98 policy year, and then it was, they did not renew it." This witness' opinion, however, is not a binding admission by Gulf (*see* Prince, Richardson On Evidence, § 8-219, at 530 [Farrell 11th ed]; *see also Matter of Union Indemn. Ins. Co. of*

N.Y., 89 NY2d 94, 103 [1996]; *Baje Realty Corp. v Cutler*, 32 AD3d 307 [2006]).

Putting aside the question of ambiguity in the phrase "renewal policies" in Article I of the treaty, Gulf argues that the reference in Article I to "new ... policies" unambiguously includes the agreement to provide coverage effective January 1, 1999 on the same terms as the 1998 policy. In response, Gerling argues only that the agreement is not a "new" policy because it is an extension of the 1998 policy. This response fails to meet Gulf's overarching contention that any distinctions between, on the one hand, the agreement to extend coverage and, on the other, either a "new" or "renewal" policy, are purely formal.

In any event, this debate obscures the real issue, which is one of substance. Regardless of whether the agreement is characterized as an "extension," a "new" or a "renewal" policy, the decisive question is whether that policy attached -- i.e., became effective -- during the term of the treaty. The point is illustrated by considering another contractual variant, an amended policy. If the 1998 policy had been amended in early 1998 to extend the period of the policy through March 31, 1999, the amended policy would be indistinguishable from the hypothetical policy discussed above. Because the amended policy, like the hypothetical policy, would have attached in 1998, before and not during the term of the treaty, losses occurring on leases issued during the first three months of 1999 would not be reinsured under the treaty. The analysis could not be different if the amendment occurred in late 1998, perhaps just days from the expiration of the term of the 1998 policy. Of course, instead of agreeing to such an amendment in late December 1998, a new policy could have been issued in late December 1998 with a term running from January 1, 1999 to March 31, 1999. Because the new policy would have attached in 1999, losses occurring on the policy would be reinsured under the treaty. Even then, the form of the agreement, a new policy rather than an amended policy, would not be the decisive factor. Rather, the parties' intent that the agreement become effective on a date during the term of the treaty would be decisive.

Accordingly, if Gulf and First Union agreed in 1998 to extend the 1998 policy and intended their agreement to be effective in 1998, Gerling would be entitled to summary judgment. But if Gulf and First Union agreed in 1999 to extend the 1998 policy, or agreed in 1998 to such an extension but intended their agreement to be effective in 1999, Gulf would be entitled to summary judgment (putting aside, of course, Gerling's claim that it is entitled to rescission of the 1999 treaty). As neither party alerts us to any evidence presented to Supreme Court bearing on when the agreement was reached or when it was intended to be effective, neither party met its burden and each party's motion for partial summary judgment should have been denied.[11]

D

Gulf contends that a "separate agreement between Gulf and Gerling reinsured Section B [i.e., Gulf's liabilities under the RVI policy it issued to a subsidiary of General Electric] from August 1, 1998 through December 31, 1998, which was intended to be memorialized in a separate I&L contract for the 1998 period." Supreme Court granted Gerling's motion for partial summary judgment declaring that it has no liability for losses arising from the Section B coverage provided during the last five months of 1998, ruling that Gulf's claim of an oral agreement is barred by the terms of a reinsurance placement slip, which states an effective date of January 1, 1999 for both sections and provides both that it constitutes the entire agreement of the parties and that any modification is void unless made in a writing signed by the parties. Although Gulf notes that the placement slip Supreme Court relied on was superseded by the 1999 treaty, Gerling points

[11]According to Gulf, Gerling also argued before Supreme Court that the First Union settlement was in part an extra-contractual liability for which it was not responsible under the treaty. To the extent Gerling did so contend, that contention has been abandoned as Gerling does not raise it in its brief (*see e.g. Gary v Flair Beverage Corp.*, 60 AD3d 413, 415 [2009]).

out that the relevant language of the placement slip is replicated verbatim in the treaty. However, stressing that its claim is that a "separate" agreement existed, Gulf argues that Supreme Court erred and asserts that "[w]hether the oral agreement is characterized as applying the 1999 Treaty retroactively or as an independent agreement to reinsure the 1998 period is of no moment."

Gulf cites no authority in support of its assertion that despite the effective date of the 1999 treaty, its integration clause and its provision barring oral modifications, the oral agreement is valid even if it is "characterized as applying the 1999 treaty retroactively." On Gulf's view, the integration clause and the provision barring oral modifications are not implicated by the oral agreement because it is a "separate" agreement, i.e., not in substance a modification of the written agreement. Gerling does not take issue with Gulf in this regard, and instead advances independent reasons for affirming Supreme Court's order granting its motion for summary judgment regarding Section B coverage during the last five months of 1998. Because Gerling is correct that in opposing its motion for summary judgment Gulf failed to raise a triable issue of fact with respect to the existence of the oral agreement, we need not decide whether recognizing the agreement's validity would be inconsistent with the treaty's integration clause and its provision barring oral modifications.

"To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms" (*Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589 [1999]). As stated by the Fourth Department, a party cannot defeat summary judgment with affidavits that are "purely conclusory and do not set forth such necessary evidentiary details as when, where or by whom the alleged oral agreement was made or the substance of the conversations" (*Apache-Beals Corp. v Intl. Adjusters, Ltd.*, 59 AD2d 1032, 1033 [1977], *affd* 46 NY2d 888 [1979]).

Gulf failed not only to identify the Gerling representative who made the oral agreement, it did not set forth any evidentiary details as to "when, where or by whom the alleged oral agreement was made or the substance of the conversations" (*id.*). The March 29, 1999 fax from Guy Carpenter to John Rausch of Gerling, purporting to "confirm," among other things, coverage under Section B "[e]ffective August 1, 1998," does not identify "when, where or by whom" Gerling agreed to such coverage. It was undisputed, moreover, that Rausch did not respond to the fax or to a subsequent letter from Guy Carpenter enclosing for Rausch's signature an I&L contract for Section B coverage only for the period from August 1, 1998 through December 31, 1998. The other facts Gulf relies on, including Gerling's receipt of a premium from Gulf consistent with participation by Gerling on Section B coverage for the last five months of 1998, might be sufficient to establish an implied contract (*see generally Parsa v State of New York,* 64 NY2d 143, 148 [1984]), but that question is not before us. As is clear from its briefs in this Court and its "Counterstatement of Material Facts in Opposition to Gerling's Motion for Partial Summary Judgment," Gulf's claim is that it had an actual, oral agreement with Gerling.

Accordingly, Supreme Court properly declared that Gerling is not obligated to reimburse Gulf for losses arising from business covered by the 1998 treaty.

E

Gulf moved for partial summary judgment on its first cause of action asserting that Gerling breached its indemnification obligations under the 1999 treaty by refusing to pay its alleged share of the First Union settlement. Gerling opposed the motion on the ground that it was entitled to rescission of the treaty because of misrepresentations and nondisclosures of material information by Gulf. Although our reasoning differs from Supreme Court's, we conclude that Gulf's motion properly was denied.

"A reinsured is obliged to disclose to potential reinsurers all material facts concerning the original risk, and failure to do so generally entitles the reinsurer to rescission of its contract" (*Sumitomo Mar. & Fire Ins. Co. v Cologne Reins Co.*, 75 NY2d 295, 303 [1990] [internal quotation marks omitted]). "The relationship between a reinsurer and a reinsured is one of utmost good faith, requiring the reinsured to disclose to the reinsurer all facts that materially affect the risk of which it is aware and of which the reinsurer itself has no reason to be aware" (*Christiana*, 979 F2d at 278, *supra*; *see also Unigard Sec. Ins. Co. v North Riv. Ins. Co.*, 4 F3d 1049, 1069 [2d Cir 1993] [duty of utmost good faith requires reinsured to "place the reinsurer in the same situation as himself" with respect to assessment of the risk (internal quotation marks and brackets omitted)]). Although "the failure to disclose need not be fraudulent or even intentional, the party with a duty to disclose must at least have reason to believe the fact not disclosed is material" (*Christiana*, 979 F2d at 279, *supra*). "Material facts are those likely to influence the decisions of underwriters; facts which, had they been revealed by the reinsured, would have either prevented a reinsurer from issuing a policy or prompted a reinsurer to issue it at a higher premium" (*Matter of Union Indem. Ins. Co.*, 89 NY2d at 106, *supra*).

Viewed in a light most favorable to it, the party opposing summary judgment, Gerling came forward with evidence that when Gulf solicited its participation in the RVI insurance program in late 1998, Gulf did not disclose that it, through L&M -- a firm Gulf describes as the "specialized program manager or managing general agent" through which it wrote its RVI business -- was seeking a 360% increase in the premium rate on its largest policy, the First Union policy, even though, in response to inquiries from John Rausch, Gerling's underwriter, Gulf stated that it was too early in the program to seek premium adjustments from its insureds.

Gulf does not dispute that the First Union policy, which was due to expire on December 31, 1998, represented about half of the program premium reported, that L&M was seeking such a substantial premium increase or that Gerling was not informed of the requested premium increase before it agreed to participate in the 1999 treaty.[12] Rather, Gulf's principal argument is that there is no evidence that it knew, at the time Gerling was solicited to participate in the RVI program, about the premium rate L&M was attempting to negotiate for the First Union policy. In this regard, Gulf argues that L&M's knowledge of the significant rate

[12]As noted above, First Union paid the 1998 premium rate for the coverage it obtained in the first three months of 1999.

increase it was seeking from First Union cannot be imputed to it because L&M acted not as its agent but as an independent contractor. That argument is meritless. Its sole support is a single recitation in the agreement between Gulf and L&M, an agreement that is entitled "General Agency Agreement," stating that "the General Agent [i.e., L&M] is not an employee of the Company [i.e., Gulf] for any purpose, but is an independent contractor for all purposes and in all situations." Regardless of whether this recitation might be effective to disclaim an employment relationship, it is not effective as a disclaimer of an agency relationship (*Rubinstein v Small*, 273 App Div 102, 104 [1st Dept 1947] [a "court is not bound by the disclaimer of ... agency between the parties in determining their true relationship"]). Under "New York common law ..., an agency relationship 'results from a manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and the consent by the other to act'" (*New York Mar. & Gen. Ins. Co. v Tradeline [L.L.C.]*, 266 F3d 112, 122 [2d Cir 2001], *quoting Meese v Miller*, 79 AD2d 237, 242 [4th Dept 1981]). As a review of the "General Agency Agreement" makes clear, the true relationship between Gulf and L&M with respect to Gulf's RVI program is that of principal and agent.

Accordingly, L&M's knowledge of the premium increase sought from First Union on behalf of Gulf is properly imputed to Gulf (*Farr v Newman*, 14 NY2d 183, 187 [1964] [a "principal is bound by ... knowledge of his agent in all matters within the scope of his agency although in fact the information may never actually have been communicated to the principal"]; *see also New York Mar. & Gen. Ins. Co.*, 266 F3d at 121-23, *supra* [imputing knowledge of its agent to insurer]). Gulf unpersuasively argues that in the reinsurance context the knowledge of a reinsured's agent cannot be imputed to the reinsured for the purposes of a rescission claim. No case cited by Gulf purports so to hold or even to suggest that the common-law rule imputing the knowledge of an agent to the principal is not applicable in the reinsurance context. Nor does Gulf provide any justification for such an exception or reconcile it with the duty of utmost good faith owed by reinsureds.

Of course, the materiality of the requested premium increase is for the trier of fact (*Feldman v Friedman*, 241 AD2d 433, 434 [1997]). But insofar as Gerling thus raised a triable issue of fact as to whether it is entitled to rescission of the 1999 treaty, Gulf's motion for partial summary judgment properly was denied. We need not consider any of Gerling's other claims of misrepresentations and failures to disclose that essentially warrant rescission of the 1999 treaty. Finally, as Gerling did not move for summary judgment to rescind the 1999, 2000 or 2001 treaties, its arguments that it is entitled to summary judgment are not properly before us (*see e.g. Danham v Hillco Constr. Co.*, 89 NY2d 425 [1996]), and we grant Gulf's motion to strike Gerling's appellate request for summary judgment on its rescission claims.

Accordingly, the order of the Supreme Court, New York County (Richard B. Lowe III, J.), entered November 29, 2007, which denied plaintiff Gulf's motion for partial summary judgment, and granted defendant Gerling's motion for partial summary judgment, should be modified, on the law, to the extent of reversing that portion of the order which granted partial summary judgment to Gerling on its reformation counterclaims and reinstating Gulf's reformation counterclaims, and reversing that portion of the order which declared that the First Union policy is not covered by the 1999 treaty, and otherwise affirmed, without costs.

M-1607 *Gulf Ins. Co. v Transatlantic Reinsurance Co., et al.*

Motion seeking leave to strike defendant Gerling's appellate request for summary judgment on its rescission claims granted.

All concur.

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

ENTERED: OCTOBER 1, 2009

CLERK

OCT 1 2009

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
John W. Sweeny, Jr.
Karla Moskowitz
Rolando T. Acosta
Rosalyn H. Richter, JJ.

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In re Thomas B.,
Petitioner-Respondent,

-against-

Lydia D.,
Respondent-Appellant.

Respondent appeals from an order of the Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about May 2, 2008, insofar as it denied her mother's objection to the Support Magistrate's finding that the parties' son was emancipated for a six-month period, abated the child support for said period and fixed child support arrears; and an order, same court (Nicholas J. Palos, Support Magistrate), entered on or about May 30, 2008, insofar as it awarded those arrears and terminated the child support provision of the divorce judgment.

Peter F. Edelman, New York, for appellant.

Thomas B., Sag Harbor, respondent pro se.

SWEENY, J.

The issue presented is whether, by written agreement, two parents may terminate the child support obligation because of the child's full-time employment, without a simultaneous showing of the economic independence of the child. We hold they may not.

Pursuant to a stipulation of settlement entered into as part of the parties' judgment of divorce, petitioner father was obligated to pay annual child support until the parties' child reached the age of 21 or was otherwise "emancipated." The stipulation defined emancipation as, inter alia, "the Child's engaging in fulltime employment; fulltime employment during a scheduled school recess or vacation period shall not, however, be deemed an emancipation event."

A petition for enforcement, dated February 6, 2006, was brought by respondent mother to enforce the child support provision of the stipulation. Petitioner thereafter brought a petition for downward modification, dated November 11, 2006, seeking termination of his child support obligations on the grounds of the child's "emancipation and/or abandonment," retroactive to the date of emancipation. He also sought a refund of any overpayment of child support.

Respondent thereafter moved to dismiss the petition for downward modification, which motion was granted to the extent of dismissing the cause of action alleging abandonment. The court determined that issues of fact remained regarding whether the child was in fact emancipated, and if so, when that event occurred.

Petitioner thereafter moved for summary judgment on the issue of emancipation. He argued that under the terms of the stipulation of settlement, the child became emancipated by reason of his full-time employment at a music store from July through December 2005. He also moved for a suspension of his support obligation, for a refund of any overpayment, retroactive to the date of emancipation, and for dismissal of respondent's enforcement proceeding.

Respondent opposed the motion, arguing that during the time in question, the child was living in a halfway house as part of his treatment for substance abuse. His employment at the music store was one of the conditions of that treatment. She also argued that the child was not economically independent, as he received financial support from her in addition to her payment of 100% of his unreimbursed medical expenses.

The Support Magistrate granted petitioner's motion in toto, finding that the child's full-time employment as of July 2, 2005 was an emancipation event pursuant to the stipulation of settlement, directed the refund of all child support received for the period beginning August 1, 2005, and holding respondent liable for petitioner's counsel fees. Finally, he dismissed respondent's enforcement petition.

In arriving at his decision, the Magistrate stated that "full-time employment" should be given its "common meaning," and that "[w]orking and being compensated for a work schedule that runs from 10:00 a.m. to 5:00 p.m. five days a week with a paid lunch break is a standard thirty-five hour work week which, when worked by an individual, is considered full-time employment."

Respondent filed written objections with Family Court, arguing that the decision regarding both emancipation and retroactive abatement of arrears was contrary to long established case law. She further argued that the award of attorney's fees was erroneous. The court reinstated the summary judgment motion and petitions and remanded the matter, holding that the Magistrate had not adequately addressed the issue of emancipation, particularly with regard to the issue of whether the parties intended that the child be economically independent to be considered emancipated. Moreover, the Magistrate was directed to consider the child's status from January 2006, when he ceased working at the music store, through September 25, 2007, the date of his 21st birthday.

In a supplemental decision, the Magistrate additionally held that in the context of child support, it was standard practice for courts to deem an individual a full-time employee when working and being paid for 35 to 40 hours per week. He further found that respondent did not raise a triable issue of fact that the parties intended the child to be economically independent in order to be deemed emancipated. With respect to the period from January 2006 through September 25, 2007, the Magistrate held there would have been a support obligation but for the fact that the occurrence of emancipation resulted in a termination of the support order. As there was no de novo order of support once the child became "re-unemancipated" due to the loss of his full-time employment, respondent had no obligation to provide support. Finally, he reaffirmed respondent's obligation to refund support payments made after the emancipation event, as well as her obligation to pay petitioner's counsel fees pursuant to the terms of the stipulation of settlement.

Respondent again filed written objections with the Family Court, reiterating her argument that economic independence is a factor that must be considered in determining emancipation. She further contended that no new support application was necessary for the period January 2006 through September 25, 2007.

The court granted the objection in part, accepting the finding that the child was emancipated for the six-month period he worked full time under "the terse language of the 1991 Stipulation." However, the court found the Magistrate erred in determining that the support obligation ended when the child commenced employment July 2, 2005, holding that the support order was merely suspended during the six month emancipation period and not terminated as of the date of full-time employment. The court held Timothy was entitled to support when he returned to live with respondent on January 1, 2006 through his 21st birthday on September 25, 2007. The Magistrate's decisions were modified to the extent of denying summary judgment and granting respondent's support petition to the extent that petitioner was directed to pay support arrears in the amount of $3,978.18.

A parent's duty to support his or her child to the age of 21 is a matter of fundamental public policy in this State and is currently embodied in statutory law (Family Court Act § 413[1][a]; *see Matter of Roe v Doe*, 29 NY2d 188, 192-193 [1971]). The concept of parental financial responsibility has its roots in the common law. Initially limited to paternal support to provide "necessaries" for a child, the support obligation was later expanded to include both parents. Professor Merril Sobie points out in McKinney's Practice Commentaries to Family Court Act § 413 that Sir William Blackstone's 18th century *Commentaries on the Laws of England* captures the essence of the common law rule: "The duty of parents to provide for the maintenance of their children is a principle of natural law . . . [but the parent] is only obliged to fund them with necessaries . . . for the policy of our laws, which are ever watchful to promote industry, did not mean to compel a father to maintain his idle or lazy children in ease and indolence." The present support scheme found in § 413 and Domestic Relations Law § 240 is more expansive, and requires both parents to provide for the support of their children in a number of different aspects beyond what would normally be considered "necessaries."

Statutorily, parental-child support obligations continue until the child attains the age of 21 (Family Court Act § 413[1][a]), unless the child is sooner emancipated. Emancipation of the child suspends or terminates this duty to support (*Matter of Commissioner of Social Servs. [Jones] v Jones-Gamble*, 227 AD2d 618 [1996]). The Practice Commentaries for § 413 summarize the case law defining emancipation in these terms: "Emancipation is also automatic when the child marries or enlists in the military service. A gainfully employed child who is *fully self-supporting and economically independent* from the parents may also be deemed to be emancipated. Or the parties may provide for emancipation contingencies in a written agreement or stipulation" (emphasis added).

Additionally, a child may self-emancipate prior to age 21 where he or she willingly abandons the parent. This implies that the child has become independent, that he or she has willfully abandoned the parent by refusing to abide by reasonable instructions or demands of the parent, and that such abandonment was not the result of actions on the part of the parent (*see Matter of Roe v Doe*, 29 NY2d 188, *supra*; *see also Matter of Parker v Stage*, 43 NY2d 128 [1977]).

The issue of emancipation is significant because a finding of emancipation terminates the parental obligation of support (*see Matter of Bailey v Bailey*, 15 AD3d 577 [2005]).

New York courts have repeatedly spoken on the issue of emancipation. "[C]hildren are deemed emancipated if they attain economic independence through employment, entry into military service or marriage and, further, may be deemed constructively emancipated if, without cause, they withdraw from parental supervision and control" (*Matter of Bogin v Goodrich*, 265 AD2d 779, 781 [1999]).

As to the whether this child was emancipated, a review of the cases that have addressed this issue show each one using the child's "economical independence" as the test (*see e.g. id.; Matter of Alice C. v Bernard G.C.*, 193 AD2d 97, 105 [1993].

In *Matter of Fortunato v Fortunato* (242 AD2d 720, 721 [1997]), the court affirmed the finding of emancipation where the record reflected that the child was economically independent because he was

> working an average of 30 to 35 hours per week . . . [,] he used his earnings to meet all of his personal expenses, including car insurance payments and telephone charges, and . . . he voluntarily contributed modest sums to his mother for room and board. Moreover, the son was not attending school, and had no plans to save money for tuition or return to college in the immediate future.

The fact that the child in *Fortunato* was not only meeting all of his expenses but also contributing money to his mother for his room and board demonstrated the economic independence required by case law. In contrast stands *Bogen v Goodrich, supra*, where the child was employed, occasionally full time, during the period she was allegedly emancipated. She had no plans to attend college. The court found she was not economically independent, and hence not emancipated, since the evidence demonstrated that her mother paid for her food, clothing and miscellaneous expenses during that period, in addition to providing her with a place to live and paying for utilities.

The determination of economic independence necessarily involves a fact specific inquiry. Thus, even where a child is working but still relies on a parent for significant economic support such as paying for utilities, food, car insurance, medical insurance and the like, the child cannot be considered economically independent, and thus is not emancipated (*see e.g. Matter of Fisher v Fritzch*, 35 AD3d 1146, 1148 [2006], *lv denied* 8 NY3d 810 [2007]; *Matter of Reigada v Rinker*, 30 AD3d 716, 717 [2006]; *Matter of Holscher v Holscher*, 4 AD3d 629, 630 [2004], *lv denied* 3 NY3d 606 [2004]; *Matter of Bogin*, 265 AD2d at 781; *Matter of Alice C.*, 193 AD2d at 105-106). This is true even where the child is residing with neither of the parties, so long as the child is still dependent on one of the parties for a significant portion of his or her support. In *Matter of Cellamare v Lakeman* (36 AD3d 906 [2007], *appeal dismissed* 8 NY3d 975 [2007]), the petitioner mother argued that the child was working full time, living with neither of the parties, and hence was emancipated. However, the respondent father testified that he provided the child with food, that the child still received mail at the respondent's house, had his own telephone line at the house, and was covered by the respondent's medical insurance. The court found that the child was not economically independent, and hence not emancipated.

Moreover, the parties cannot contract away the duty of child support. "Despite the fact that a separation agreement is 'entitled to the solemnity and obligation of a contract, when children's rights are involved the contract yields to the welfare of the children'" (*Pecora v Cerillo*, 207 AD2d 215, 218 [1995], quoting *Maki v Straub*, 167 AD2d 589, 590 [1990], *lv denied and appeal dismissed* 78 NY2d 854, 951 [1991]). The duty of a parent to support his or her child "shall not be eliminated or diminished by the terms of a separation agreement" (*Pecora*, at 218), nor can it be abrogated by contract (*Cellamare*, 36 AD3d at 906).

Here, on the issue of whether the child was economically independent of his parents as a result of his working 35 hours per week while living in a halfway house and not attending school, we find insufficient evidence in the record to justify a finding that he was self-supporting. First of all, it is uncontroverted that the child's employment was one of the requirements of participation in the halfway house substance abuse program. Moreover, the following testimony was elicited at the child's deposition concerning his support:

> Q. How else were you supporting yourself?
>
> A. My mother was supporting me and, you know, I also was living at the halfway house and I was sort of - part of the agreement that you had to get a job

and stuff and by doing that, you know, certain expenses at the halfway house were taken care of.

Q. By who?

A. By my mom and by the guy who ran the halfway house.

Elsewhere, this exchange too place:

Q. Who paid for the apartment?

A. My mother assisted and the Whitney Trust Fund as well.

Additionally, it is not controverted that respondent paid all of the child's unreimbursed medical expenses and provided other support for him both before, during and after his employment and residence at the halfway house. In fact, the child returned to reside with respondent and testified at his deposition that he stored his property at respondent's residence. Although respondent did not provide a detailed list of expenses she paid on her son's behalf, it is clear that her support was necessary, and that as a result, the evidence did not show he was "economically independent" of his parents.

Although petitioner relies on the definition of emancipation in the separation agreement that he drafted to support his claim, the agreement purports to do exactly what is prohibited by public policy and case law. Economic independence from the child's parents is not established by merely working a standard, full-time work week.

It is thus clear, that although he was working 35 hours per week during the period of time in question, the child was not economically independent of his parents, and thus was not emancipated during that period of time.

On the question of attorneys' fees, both parties on this appeal claim to be entitled to such fees and costs pursuant to § 15.06 of the stipulation, which provides:

> Notwithstanding anything in this Stipulation to the contrary, in the event that either Party shall default in any of his or her obligations under this Stipulation, or if he or she shall challenge unsuccessfully the validity of any part of this Stipulation, then that Party shall be liable for the cost and expenses of the other Party as a result thereof, including, but not limited to, reasonable attorney's fees incurred in enforcement of any such default or defense to such challenge. In any other case, each Party shall be responsible for only his or her own costs and expenses in connection with prosecuting or defending any other action brought under the terms of this Stipulation.

In light of our decision, respondent is entitled to attorney fees and we accordingly remand for a hearing to determine the amount of those fees.

Additionally, since we have determined that the parties' child was not emancipated during the period from July through December 2005, the calculation of arrears made by the court below is incorrect. Accordingly, we further remand for a recalculation of arrears.

Accordingly, the order of the Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about May 2, 2008, insofar as it denied respondent mother's objection to the Support Magistrate's finding that the parties' son was emancipated for the six-month period from July 2 through December 31, 2005, abated the child support for said period and fixed child support arrears at $3,978.18; and order, same court (Nicholas J. Palos, Support Magistrate), entered on or about May 30, 2008, insofar as it awarded those arrears and terminated the child support provision of the divorce judgment as of September 26, 2007, should be reversed, on the law and the facts, without costs, the objections sustained, the support arrears vacated and the matter remanded for a hearing to determine the amount of support arrears and counsel fees pursuant to the terms of the stipulation of settlement incorporated but not merged in the parties' judgment of divorce.

All concur.

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

ENTERED: OCTOBER 1, 2009

CLERK