SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**DECEMBER 21, 2010**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, Nardelli, Richter, Román, JJ.

3571N Milton Moracho, Index 103377/07
Plaintiff-Appellant,

-against-

Open Door Family Medical
Center, Inc., et al.,
Defendants-Respondents,

Primary Care Development Corporation,
Defendant.

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

Mauro Goldberg & Lilling, Great Neck (Matthew W. Naparty of counsel), for Open Door Family Medical Center, Inc., respondent.

White, Fleischner & Fino, LLC, New York (Jason Steinberg of counsel), for Scully respondents.

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Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered September 25, 2009, which granted the motions of defendants Open Door Family Medical Center, Scully Construction Corp. and Scully Construction LLC to change venue to Westchester County, reversed, on the law, and the motions denied.

While there is no statutory time limit for a motion to change venue upon dismissal of a party whose residence provided the basis for venue, this Court has nonetheless required that such motions be made promptly (*Clase v Sidoti*, 20 AD3d 330

[2005]; *Caplin v Ranhofer*, 167 AD2d 155, 157-58 [1990]), that is, within a reasonable time after the movant obtains knowledge of the facts supporting the request (*Herrera v R. Conley Inc.*, 52 AD3d 218 [2008]; *Diaz v Clock Tower Assoc.*, 271 AD2d 290 [2000]). It also bears noting that a party need not wait for notice of entry of the order dismissing the improper party before it moves for a change of venue (*see Emerick v Metropolitan Transp. Auth.*, 272 AD2d 150 [2000] [venue motion made simultaneous with dismissal motion]).

Here, defendants may have been aware as early as February 28, 2008, fifteen months before making their motion, that Primary Care Development Corporation, the sole defendant on whose residence venue in New York County was based, sought dismissal of the action against it[1]. Thereafter, Primary Care's September 2008 dismissal motion, made more than eight moths prior to the other defendants' venue applications, was unopposed. By order entered March 4, 2009, the court dismissed Primary Care from the case. In its order, the court explicitly stated that "none of the remaining parties has any connection to New York County and that [the] case is therefor amenable to a motion to change venue".

Notwithstanding this pronouncement, the remaining defendants waited an additional three months, during which time they

[1]This motion was apparently withdrawn.

appeared in New York County and set a trial date, without giving any indication of a venue problem. Two months after the trial date was set, the motion was made to change venue to Westchester. Given these circumstances, the grant of the motion was an improvident exercise of discretion and an implicit endorsement of careless motion practice, in disregard of the important principles of fair notice and judicial economy (*see e.g. Herrera v R. Conley Inc.*, 52 AD3d 218 [2008]; *Schwarz v Erpf Estate*, 232 AD2d 316 [1996]; *see also Litt v Balmer*, 146 AD2d 559 [1989] [that trial date had been set was factor supporting finding that granting untimely venue change was abuse of discretion]).

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

NARDELLI, J. (dissenting)

The motion court properly exercised its authority and discretion when it granted defendants' motion to change venue to Westchester County, once the court dismissed the action as against the sole defendant whose residence was the basis for setting venue here. The majority's reversal of that order, thereby requiring the trial to be held in New York County, constitutes an undue interference with the motion court's discretion. I therefore respectfully dissent.

When this action was commenced, one of the parties, Primary Care Development Corporation, resided in New York County; accordingly, no ground was presented to demand, or make a follow-up motion for, a change of venue as of right under CPLR 511(b). It was not until the IAS court dismissed the action as against Primary Care Development Corporation, by order entered March 4, 2009, that the remaining defendants had grounds to move for a change of venue to Westchester County under CPLR 510(1).

Where the designated county is not a proper county, the CPLR requires that a party seeking a change of venue must serve a written demand either with or prior to service of the answer, and must then make a motion for that relief within 15 days after service of the demand (CPLR 511[a], [b]).

As a rule, these statutory dictates are strictly applied. Normally, the failure to comply with either the demand

requirement or the 15-day time limit of CPLR 511 results in the denial of motions for change of venue (*see Herrera v R. Conley Inc.*, 52 AD3d 218 [2008]; *Schwarz v Erpf Estate*, 232 AD2d 316 [1996]). To the extent the motion court has some discretion when the movant's venue motion is made after the expiration of the 15-day deadline, we have warned that such discretion is strictly limited (*see Simon v Usher*, 73 AD3d 415 [2010]; *Banks v New York State & Local Employees' Retirement Sys.*, 271 AD2d 252 [2000]).

However, all the foregoing cases concerned circumstances where it was possible for the movant to abide by the procedural mandates of CPLR 511(b), because the grounds for a change of venue as of right existed at the outset. In circumstances such as these, where the designated county was proper when the action was commenced, and thereafter, the sole defendant whose residence made venue in that county proper was eliminated from the action, motions for a change of venue have repeatedly been granted, notwithstanding the absence of any prior demand in the form contemplated as a prerequisite to such a motion by CPLR 511 (*see Clase v Sidoti*, 20 AD3d 330, 331 [2005]; *Crew v St. Joseph's Med. Ctr.*, 19 AD3d 205, 206 [2005]; *Halina Yin Fong Chow v Long Is. R.R.*, 202 AD2d 154 [1994]; *Gramazio v Borda, Wallace & Witty*, 181 AD2d 428, 429 [1992]; *Caplin v Ranhofer*, 167 AD2d 155, 157 [1990]).

The right of the remaining defendants to seek a change of

venue at that juncture thus arose from a new circumstance, i.e. once the improper party was removed from the action, there was no longer any justification for setting venue in the county chosen by the plaintiff. CPLR 510(1) permits a change of venue when "the county designated for that purpose is not a proper party." Since these circumstances arose after service of the answer, the procedural and time restrictions contained in CPLR 511 that would otherwise normally limit the party's right to seek a change of venue under CPLR 510(1) are inapplicable.

There is no authority to support the suggestion of plaintiff's counsel that we "posit" that the 15-day deadline of CPLR 511(b) begins to run on the date of the dismissal order in such circumstances. Similarly, the majority's assertion that the motion and cross-motion to change venue were not made "promptly" enough is not based on any controlling statutory time limits applicable to the circumstances presented.

The one statutory time limit that may arguably be applicable here is the requirement of CPLR 511 that venue motions made on other grounds "shall be made within a reasonable time" of commencement of the action. In my view, defendants' motions were made within such a reasonable time.

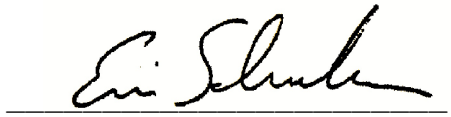
A party's time to act in response to an order is generally counted from the time that order is served with notice of entry thereon (*see e.g.* CPLR 5513[a]). Defendants' time in which to

move to change venue did not begin to run until the dismissal order entered on March 4, 2009 was served on them; yet, we have no information as to when it was served with notice of entry. Of course, the date when Primary Care made its first motion to dismiss on the grounds that it was not a proper party, February 28, 2008, has absolutely no relevance to this analysis; until the actual dismissal against Primary Care, defendants had no right to bring a CPLR 510(1) venue motion.

The present motion violated no statutory time limits, and, as the majority recognizes, the motion court was entitled to exercise its discretion in connection with this motion. The grant of this motion, made less than three months of entry of the dismissal order, was well within that discretion, and should not be disturbed by this Court.

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

ENTERED: DECEMBER 21, 2010



DEPUTY CLERK

Gonzalez, P.J., Mazzarelli, Nardelli, Renwick, DeGrasse, JJ.

3721 Norman Andrew Malloy, Index 18248/07
Plaintiff-Appellant,

-against-

Felipe A. Matute,
Defendant-Respondent.

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Raskin & Kremins L.L.P., New York (Andrew J. Metzar of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered on or about October 6, 2009, which granted defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to deny the motion as to plaintiff's claim of serious injury to his right knee, and otherwise affirmed, without costs.

Plaintiff's submissions were sufficient to raise a triable issue of fact as to whether he suffered a "serious injury" to his right knee. While defendant's experts found that plaintiff's injuries were degenerative, plaintiff's doctors were unanimous in concluding that the subject accident was the sole competent producing cause of plaintiff's knee injuries, based upon (1) their individual examinations; (2) MRI results; and (3) the necessity of surgery to repair a tear in the medial meniscus, a

partial tear of the anterior cruciate ligament, chondromalacia, synovitis, and fibrosis (*see Pommells v Perez,* 4 NY3d 566 [2005]; *Colon v Bernabe*, 65 AD3d 969, 970 [2009]). It also bears noting that plaintiff was 37 years old when he was hit on his right side by defendant's taxi, he had no prior knee problems or injuries to his right leg, and his right knee surgery took place within four months of the accident.

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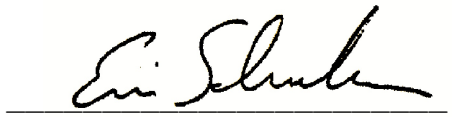
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: DECEMBER 21, 2010



DEPUTY CLERK

Friedman, J.P., Nardelli, Moskowitz, Freedman, Manzanet-Daniels, JJ.

2965-
2965A Index 602283/07

Chrisette Michele Payne,
Plaintiff-Appellant,

-against-

Douglas Ellison, et al.,
Defendants-Respondents.

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The Songwriter's Guild of America,
Amicus Curiae.

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Ryan E. Long PLLC, New York (Ryan E. Long of counsel), for appellant.

Anthony R. Cueto, Manhasset, for respondents.

Charles J. Sanders, Briarcliff Manor, for amicus curiae.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered on or about April 14, 2009, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss plaintiff's first, second, fifth, sixth, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth and seventeenth causes of action, unanimously modified, on the law, to deny so much of the motion as sought to dismiss the first, second, ninth, tenth and eleventh causes of action, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered August 20, 2009, which denied plaintiff's motion to renew and reargue, unanimously dismissed, without costs, as academic with respect to renewal and as taken from a non-appealable paper with respect to reargument.

The contracts upon which defendants relied in moving to dismiss the first cause of action, which alleges that defendants breached the parties' management agreement by taking more than 20% of a $125,000 advance plaintiff received from her music composition licensor, do not conclusively establish, as a matter of law, a defense to the asserted claims, i.e., that defendants were entitled to 50% of the advance (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Similarly, with respect to the ninth and tenth causes of action, the evidence does not conclusively establish defendants' right to 50% of each of two advances plaintiff received from third-party record label EMI April Music Inc. Attempting to determine the percentages to which defendants are entitled based on plaintiff's recordings and compositions raises factual issues that require analysis of the parties' agreements, including their agreements with third parties such as the aforementioned EMI, and of contract provisions as to what constitutes "writer's share," "public performance income" and "mechanical royalty income," and cannot, at this juncture, be determined as a matter of law.

The eleventh cause of action, which alleges that defendants breached the parties' recording agreement by charging expenses that were not bona fide, should not have been dismissed as redundant of the third cause of action, which alleges that defendants improperly charged expenses in relation to the

management agreement, even though the damages sought are in the same amount. The documentary proof offered fails to establish either the origin or the basis for the expense charges. Further, whether the expenses were justified under either the management or recording agreement, or neither, is a determination that cannot be made on this record.

Likewise, the second cause of action, which alleges that defendants breached the management agreement by taking 50% of a monthly living subsidy advance made to plaintiff by third-party record label Island Def Jam Music Group, should not have been dismissed, since there are questions not only as to whether the recording agreement establishes this as an authorized commission, but also as to what type of advances were subject to the agreement.

Plaintiff's fifth and twelfth causes of action, which allege that defendants fraudulently induced her to enter into the management and recording agreements, respectively, by promising to look after her best interests, take care of her and make her a star, were correctly dismissed, since these alleged promises were not extraneous to the agreements (*see First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 291-292 [1999]; *Big Apple Car v City of New York*, 234 AD2d 136, 138 [1996]).

Likewise, the court did not err in dismissing plaintiff's sixth and thirteenth causes of action, which allege unjust

enrichment, since plaintiff's claim to certain advances is contract-based, and the parties' arguments are predicated upon reasonable interpretations of the various interrelated agreements (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]).

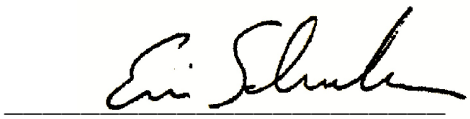
Plaintiff's fourteenth cause of action, which alleges breach of fiduciary duty in relation to the recording agreement, was also correctly dismissed since that agreement did not create a special relationship of trust and confidence between the parties (*compare Surge Licensing v Copyright Promotions*, 258 AD2d 257 [1999], *with Apple Records v Capitol Records*, 137 AD2d 50, 57 [1988]).

Plaintiff's eighth and fifteenth causes of action, which allege that defendants converted advance monies, were correctly dismissed, since they do not state a tort claim independent of the contract claims (*cf. Apple Records*, 137 AD2d at 57-58).

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: DECEMBER 21, 2010



DEPUTY CLERK

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

3137 The Plaza PH2001 LLC, Index 602673/08
Plaintiff-Appellant,

-against-

Plaza Residential Owners LP, et al.,
Defendants-Respondents.

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Morrison Cohen LLP, New York (Y. David Scharf of counsel), for appellant.

Kramer Levin Naftalis & Frankel LLP, New York (Jeffrey W. Davis of counsel), for respondents.

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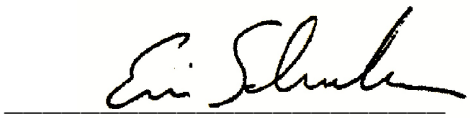
Order, Supreme Court, New York County (Marilyn Shafer, J.), entered November 17, 2009, which granted defendants' motion to dismiss the complaint, unanimously modified, on the law, to deny the motion as to the causes of action for breach of contract, recovery of legal fees pursuant to contract, and return of deposits, and otherwise affirmed, without costs.

The motion was correctly granted as to the fraud cause of action because plaintiff stipulated in the Purchase Agreements that it was not relying upon any extra-contractual representations. "Such a specific disclaimer destroys the allegations in [the] complaint that the agreement was executed in reliance upon [defendants'] contrary oral representations" (*Danann Realty Corp. v Harris*, 5 NY2d 317, 320-321 [1959]). The exception to *Danann Realty* set forth in *Steinhardt Group v Citicorp* (272 AD2d 255 [2000]) is inapplicable here. That exception applies

only where the defendant was in exclusive possession of facts demonstrating that a disclaimed representation was false at the time the time the disclaimer was made. Here, the allegedly misrepresented facts were the actual measurements and attributes of the finished apartment, which did not exist at the time the disclaimers were made. However, plaintiff stated a cause of action for breach of contract by alleging that certain aspects of the finished penthouse apartment did not conform to the specifications of the condominium offering plan incorporated by reference into the Purchase Agreements, and defendants' submissions failed to establish grounds to dismiss the contract claim pursuant to CPLR 3211(a)(1). Finally, since the complaint states a cause of action for breach of contract, the causes of action for recovery of legal fees pursuant to the Purchase Agreements and for return of the deposit are also viable.

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

ENTERED: DECEMBER 21, 2010



DEPUTY CLERK

Friedman, J.P., Nardelli, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3347 Manuel P. Asensio, Index 100257/10
Plaintiff-Appellant-Respondent,

-against-

Casa 74th Development, LLC, et al.,
Defendants-Respondents-Appellants.

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Rosabianca & Associates, PLLC, New York (Jeremy Panzella of counsel), for appellant-respondent.

Starr Associates LLP, New York (Evan R. Schieber of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered March 5, 2010, which granted defendants' motion to cancel a notice of pendency filed by plaintiff with respect to a newly constructed condominium unit and for summary judgment as to the complaint and their counterclaims only to the extent of cancelling the notice of pendency, modified, on the facts, to deny the part of the motion that sought to cancel the notice of pendency, and otherwise affirmed, without costs.

Triable issues of fact, including whether construction of the condominium unit was "substantially completed" at the time of the proposed closing, preclude summary dismissal of the complaint and judgment in favor of defendants on their counterclaims. Defendant sponsor's failure to substantially complete the work would have constituted a breach of the agreement to sell the unit and relieved plaintiff of his duty to attend the closing and

tender the balance of the purchase price (*see Kopp v Boyango*, 67 AD3d 646, 650 [2009]). For that reason, defendants' argument that plaintiff may not seek specific performance because the agreement was terminated on May 20, 2009, when the purported cure period expired without any closing, is also unavailing.

Contrary to defendants' contention, plaintiff did not choose either of the inconsistent remedies of rescission and specific performance in the earlier escrow dispute proceeding before the Attorney General; he argued in the alternative, and he withdrew his claim before the Attorney General issued any decision. Having never definitely opted for rescission, plaintiff is not precluded from pursuing specific performance in this action (*compare 331 E. 14th St. v 331 E. Corp.*, 293 AD2d 361 [2002], *lv dismissed* 98 NY2d 727 [2002]).

In view of defendants' failure to demonstrate their entitlement to summary judgment, there is no need to reach their contention that plaintiff's default entitles defendant sponsor to retain the down payment monies and to recover costs and attorneys' fees.

Since, as the motion court found, defendants are not entitled to summary judgment, the notice of pendency filed by plaintiff is not subject to mandatory cancellation (CPLR 6514[a]; *see Sorenson v 257/117 Realty, LLC*, 62 AD3d 618, 619 [2009], *lv dismissed* 13 NY3d 935 [2010]). Nor does the record support a

discretionary cancellation pursuant to CPLR 6514(b) on the ground that plaintiff has not prosecuted this action in good faith (*see 551 W. Chelsea Partners LLC v 556 Holding LLC*, 40 AD3d 546, 548-549 [2007]). Contrary to defendants' contention and the court's implicit finding, plaintiff's eight-month delay in commencing the action is an insufficient basis for concluding that he was motivated solely by a desire to impede a sale of the condominium unit to a third party. In any event, it cannot be said, on the existing record, that plaintiff's efforts to protect his rights to the apartment, through litigation, were improper.

All concur except Nardelli and Freedman, JJ.
who dissent in part in a memorandum by
Nardelli, J. as follows:

NARDELLI, J. (dissenting in part)

Since I believe that plaintiff terminated the contract when he wrote a letter to the sponsor's attorney demanding the return of his purchase money deposit, and advising "that a material amount of construction work remains completely undone," I would affirm the order in its entirety, and thus leave the court's decision to strike the notice of pendency undisturbed.

In May 2007, defendant Casa 74th Development, LLC, as sponsor, filed an offering plan for a proposed condominium at 255 East 74th Street, in Manhattan. In pertinent part, in a section entitled "Rights and Obligations of Sponsor," the plan provided:

> "[I]f Purchaser finds that Sponsor's improvements as described in the Plan or in the Option Agreement or other writing duly executed and delivered by Sponsor, have not been fully completed, although such improvements have been substantially completed, then Sponsor or its designated representative and Purchaser will at the time of such execution agree upon and set forth in the Inspection Statement a list of the incomplete work to be completed by Sponsor following the Closing without provision for escrow. Sponsor's obligation thereunder shall survive delivery of the deed to the Purchaser. The failure of Sponsor to complete such work shall not be grounds for Purchaser to delay the Closing or to unilaterally refuse to pay the full Balance of the Purchase Price at Closing."

In July 2007, the sponsor and plaintiff executed an option agreement for the sale of Unit 24C. The agreement expressly incorporated the offering plan by reference, and recited that the

plan's provisions would govern in the event of any inconsistencies between the two. The agreement also provided:

> "[I]f all other prerequisites not involving the construction of the Unit are met, Purchaser shall be obligated to close and complete payment of the full Purchase Price (without any credit against or abatement in the Purchase Price and without provision for escrow) once a Temporary or Permanent Certificate of Occupancy is issued for the Unit (notwithstanding any construction items noted on Purchaser's Inspection Statement (as hereinafter defined) remaining for Sponsor to complete and/or correct in accordance with its obligations under the Plan, and notwithstanding the incomplete construction and/or decoration of any other portions of the Building not affecting the Unit)."

The agreement further provided that in the event that plaintiff did not attend and pay the purchase price at a scheduled closing, then the agreement would be "deemed cancelled." In such case, the sponsor would be entitled to retain all of the downpayment monies and would be entitled to sell the unit to another purchaser. The agreement also gave the sponsor the right to cancel the agreement if the purchaser failed to perform other obligations, including payment of the purchase price when due.

Closing was initially set for January 2009, and was rescheduled several times. On March 31, 2009, the sponsor gave notice that closing had been rescheduled to April 15, 2009.

On April 8 and 14, 2009, plaintiff's architect inspected the premises, as provided for in the agreement. The architect

reported some 104 construction defects and incomplete items. Plaintiff took the position that the construction of the unit was substantially incomplete, and refused to close on the unit.

On April 16, 2009, the sponsor declared plaintiff to be in default, and advised him that unless he cured the default by closing on the unit on or before May 20, 2009, the agreement would be cancelled and the sponsor would retain the deposit monies as liquidated damages.

On May 8, 2009, plaintiff wrote the sponsor a letter demanding the return of the $897,000 in deposit monies, asserting "that a material amount of construction work remains completely undone." A week later, on May 15, 2009, plaintiff filed an application with the Attorney General's Real Estate Finance Bureau for a "Determination on the Disposition of Downpayments." Plaintiff asserted that the agreement was "unenforceable" and "void given the Sponsor's refusal to address any one of the construction issues raised by the Applicant." As an alternative to rescission of the agreement, plaintiff requested that if the agreement were found to be enforceable, he be given a "reasonable opportunity to close" on the sale.

Thus, as of May 8, 2009, two possibilities were presented. The first is that the condominium was substantially complete in accordance with the provisions of the contract, and, therefore, plaintiff was obligated to close upon demand by the sponsor. The

second is that the condominium was not substantially complete and plaintiff was within his rights to refuse to close, and demand a return of his downpayment. Which of the alternatives is correct is an issue that remains to be decided.

In the interim, however, plaintiff is not entitled to maintain a lis pendens on the property, and hold the condominium hostage during the course of the litigation. Inasmuch as he, on two different occasions, evinced an intention to terminate the contract, his sole recourse is to get his money back, if, indeed, the sponsor failed to comply with its obligations under the contract.

The majority finds that plaintiff never definitely opted for rescission of the contract, and, thus, had not made an election of remedies, citing *331 E. 14th St. v 331 E. Corp.* (293 AD2d 361 [2000], *lv dismissed* 98 NY2d 727 [2002]). Yet, in that case, this Court made clear that an election of remedies will be found to have been made if "'a party must have chosen one of two or more co-existing inconsistent remedies, and in reliance upon that election, that party must have also gained an advantage, or the opposing party must have suffered some detriment'" (*id.* at 361, quoting *Prudential Oil Corp. v Phillips Petroleum Co.*, 418 F Supp 254, 257 [SD NY 1975], citing, inter alia, *Hill v McKinley*, 254 App Div 283 [1938]).

I believe that plaintiff had elected the remedy of

rescission with his May 8th notice of cancellation, and confirmed it in his May 15th submission to the Attorney General. It is evident that plaintiff has now gained an advantage, and the sponsor has suffered a detriment. Plaintiff advised on May 8th that he was refusing to close, and demanded a return of his downpayment. He did not file a notice of pendency until January 8, 2010, eight months later, when he also filed a complaint in which he sought, alternatively, specific performance or damages. In the interim, however, the sponsor had obtained another buyer. Plaintiff himself sent an e-mail to the prospective buyer's attorney two days after the action was instituted, in which he advised that he had filed a lis pendens. The e-mail stated, in pertinent part, "I understand from you that your proposed buyer has agreed to a price and accepted a contract that he has or is prepared to execute."

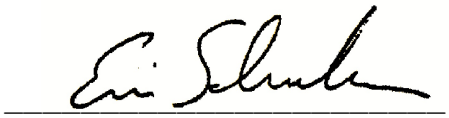
It is therefore evident that plaintiff recognized that the sponsor was prepared to sell the unit to another buyer, and that he consequently had lost significant economic leverage with the sponsor in his dispute over the condition of the unit. By pressuring the prospective plaintiff to withdraw, and now seeking specific performance, plaintiff sought to gain an improper advantage, and the sponsor suffered a detriment.

Such circumstances justify a finding that the portion of the action seeking specific performance was commenced not in good

faith, but as a Damoclean sword to force the sponsor into incurring the cost of carrying the unit while the dispute over whether plaintiff is entitled to a refund is litigated (*see* *Israelson v Bradley*, 308 NY 511, 516 [1955]). Vacatur of the notice of pendency pursuant to CPLR 6514(b) was thus appropriate, and the order should be affirmed.

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

ENTERED: DECEMBER 21, 2010



DEPUTY CLERK

Saxe, J.P., Nardelli, Renwick, Richter, JJ.

3564 National Puerto Rican Day Parade, Inc., et al., Plaintiffs-Respondents, Index 304390/08

-against-

Casa Publications, Inc., et al., Defendants-Appellants,

John Doe "One," Defendant.

_____

Carlos J. Cuevas, Yonkers, for appellants.

Javier A. Solano, New York, for respondents.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered June 30, 2009, which insofar as appealed from as limited by the briefs, denied the cross motion of defendants Casa Publications, Inc., La Voz Hispana Newspaper, Inc., Ruben "Nick" Lugo, Joaquin Del Rio, Julio Garcia and Luis Martinez (collectively, Casa) to dismiss the complaint for failure to comply with CPLR 2101(b), and the motion of defendant Juan R. Feliciano (Feliciano) to dismiss the eleventh and thirteenth causes of action against him pursuant to CPLR 3211(a)(7), unanimously affirmed, without costs.

The instant action arises out of the publication of 19 allegedly libelous articles that appeared, over the course of 16 months, in the Spanish language weekly newspaper, La Voz Hispana, regarding the finances and operations of plaintiffs National

Puerto Rican Day Parade, Inc. (NPRDP) and various named members of the Board of Directors. Plaintiffs also allege that Casa partly relied upon false and malicious information provided by Feliciano, a former NPRDP board member, and that in so doing Feliciano caused the libelous articles to be published.

Plaintiffs' verified complaint sets forth in English the allegedly defamatory words from each of the 19 articles. The actual Spanish language articles alleged to be libelous and two translator affidavits from a translation agency are attached as exhibits to the complaint. The signed translator affidavits state that the translators are qualified professional translators competent in both English and Spanish, and that the translations are an accurate and complete rendering of the content of the original document.

Casa sought dismissal of the complaint under CPLR 2101(b), arguing that plaintiffs failed to attach an English translation for each article in its entirety, and that the translator affidavits were insufficient because the affidavits were not signed contemporaneously with the verified complaint, because they did not include an itemized list of the translators' qualifications, and because the translators' names were not printed below the signature line. Additionally, Feliciano sought to dismiss the eleventh and thirteenth causes of action, arguing that by merely providing information to Casa he did not cause the

articles to be published. Plaintiffs submitted an attorney affidavit in opposition to Feliciano's motion to dismiss, stating that they would be able to show that Feliciano authorized Casa to recommunicate his statements, and that he also paid Casa to publish his "open letter," which discusses individual members associated with NPRDP.

A statute should be interpreted "so as to give effect to the plain meaning of the words used" (*Doctors Council v New York City Employees' Retirement Sys.*, 71 NY2d 669, 675 [1988]). Under CPLR 2101(b) each paper served or filed shall be in the English language and where an affidavit or exhibit annexed to a paper served or filed is in a foreign language, it shall be accompanied by an English translation and an affidavit by the translator stating his or her qualifications and that the translation is accurate. Plaintiffs provided sufficient translator affidavits because both affidavits state that the translators are "qualified professional[s]," competent in both Spanish and English, and that the translations are an "accurate and complete rendering of the content of the original document." (see *Polish Am. Immigration Relief Comm. v Relax*, 172 AD2d 374 [1991]).

The certification that the translation was done by a professional translator competent in both languages is sufficient, especially in this particular case. The statute does not require that the translator affidavit include an "itemized"

list of qualifications. Moreover, Casa had adequate notice and it shows no prejudice from the lack of an itemized list of qualifications. Casa does not allege that it -- the publisher, editor and writer for a Spanish language newspaper -- could not read and understand the articles in the language in which they were written, nor is there any claim that the translations are inaccurate.

The statute also does not require that the translator's affidavit list what was translated. Nor do the words of the statute mandate a "complete translation" as argued by Casa. Moreover, it is perfectly apparent that the articles themselves were the translated documents because they were annexed to the translators' affidavits and submitted with the complaint. Indeed, each of the 19 articles is individually identified within the body of the complaint by the publication date, author's name, and exhibit letter. These identifying characteristics can be matched directly to the articles annexed to the complaint, thus providing the necessary linkage between the translators' affidavits and the translated text.

Casa's reliance on the decisions in *Martinez v 123-16 Liberty Ave. Realty Corp.* (47 AD3d 901 [2d Dept 2008]) and *Yoshida Print. Co. v Aiba* (240 AD2d 233 [1997]), is misplaced because those cases involved the complete absence of any attested translator affidavits. *Martinez* also is distinguishable because

one of the documents was translated by a party's family member, not a professional translator as was the case here.

The motion court also correctly found that the pleading sufficiently stated that Feliciano was the source of the two articles referred to in the eleventh and thirteenth causes of action. Although "[o]ne who makes a defamatory statement is not responsible for its recommunication without his authority or request by another over whom he has no control" (*Hoffman v Landers*, 146 AD2d 744, 747 [1989]), reading the complaint as a whole, and giving plaintiffs the benefit of all reasonable inferences drawn from the complaint, as we must, plaintiffs have sufficiently pleaded that Feliciano authorized Casa to recommunicate his statements. Furthermore, the affidavit submitted by plaintiffs' attorney in opposition to the dismissal motion alleges that Feliciano wrote and submitted an open letter that was published in Casa's newspaper, and that Feliciano paid to have the open letter published.

Defendants incorrectly argue that the attorney's affidavit cannot be considered because it is neither supported by factual proof nor based on firsthand knowledge. Under CPLR 3211, affidavits are not to be examined for the purpose of determining whether there is evidentiary support, but rather, are to be examined for the limited purpose of remedying any defects in the pleadings and may be considered as supplementary to the complaint

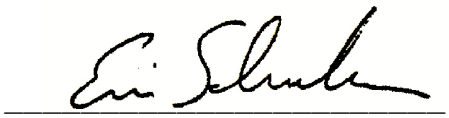
to show that the cause of action is valid (*see Finkelstein Newman Ferrara LLP v Manning*, 67 AD3d 538 [2009]). Here, the affidavit expands upon the pleadings by alleging that Feliciano authorized Casa to recommunicate his statements and paid to have Casa publish his open letter.

*Jee v New York Post Co.* (176 Misc 2d 253 [1998], *affd* 260 AD2d 215 [1999], *lv denied* 93 NY2d 817 [1999]), relied upon by Feliciano, can easily be distinguished because that case involved a ruling on a summary judgment motion. Here, plaintiffs did not need to prove, at this stage, that Feliciano had in fact authorized the recommunication by Casa, but rather, merely needed to establish that they had pleaded a valid cause of action.

We have considered defendants' remaining contentions and find them without merit.

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

ENTERED: DECEMBER 21, 2010



DEPUTY CLERK

Andrias, J.P., Saxe, Moskowitz, Acosta, Freedman, JJ.

3921-
3922 In re Timothy M., also known as
Timothy B., and Another,

Children Under the Age of
Eighteen Years, etc.,

Timothy B.,
Respondent-Appellant,

Edwin Gould Services for Children,
Petitioner-Respondent.

_____

Howard M. Simms, New York, for appellant.

John R. Eyerman, New York, for respondent.

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

_____

Orders, Family Court, New York County (Susan K. Knipps, J.), entered on or about April 13, 2009, which, insofar as appealed from, upon a finding that respondent father's consent was not required for the adoption of the subject children, committed custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence supports the finding that respondent did not meet the parental responsibility criteria set forth in Domestic Relations Law § 111(1)(d). The evidence shows that respondent was incarcerated for a large portion of the children's lives, failed to provide financial support, and did

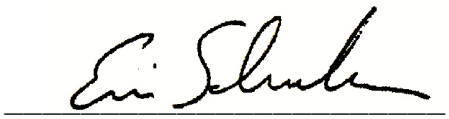
not maintain regular contact with the children (*see Matter of Aaron P.*, 61 AD3d 448 [2009]). Indeed, the unexcused failure to contribute support for most of his children's lives is fatal to his claim that his consent to an adoption is required (*id.*).

A preponderance of the evidence supports the conclusion that it was in the best interests of the children to free them for adoption by their foster mother, who was also their paternal grandmother. The evidence reveals that the children have a loving and supportive relationship with the foster mother with whom they had been living for years, were receiving excellent care, and were thriving in that environment. Furthermore, respondent acknowledged that he was not yet able to provide the children with a stable home, and admitted that he was satisfied with the care given to the children by the foster mother (*see Matter of Juan A. [Nhaima D.R.],* 72 AD3d 542 [2010]).

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

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

ENTERED: DECEMBER 21, 2010



DEPUTY CLERK

Andrias, J.P., Saxe, Moskowitz, Acosta, Freedman, JJ.

3924 Michael Tyrell, Index 106140/07
Plaintiff-Respondent,

-against-

City of New York,
Defendant,

New York City Health and
Hospitals Corporation,
Defendant-Appellant.

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Michael A. Cardozo, Corporation Counsel, New York (Norman Corenthal of counsel), for appellant.

Adam M. Thompson, New York, for respondent.

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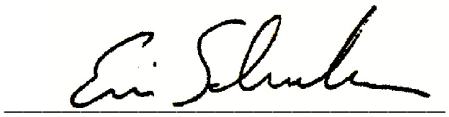
Order, Supreme Court, New York County (Douglas E. McKeon, J.), entered January 22, 2009, which denied defendant New York City Health and Hospital Corporation's motion to dismiss the complaint pursuant to CPLR 3216(e) for failure to prosecute, unanimously affirmed, without costs.

Plaintiff's delay in serving and filing the note of issue was minimal, his explanation for it was adequate, i.e., that there was a misunderstanding between counsel regarding whether defendant would be satisfied with a bill of particulars if it was provided within the 90-day period, and no prejudice to defendant was alleged to have resulted from the delay. Considering the totality of the circumstances, we agree with the motion court

that plaintiff should be permitted to proceed (*see Espinoza v 373-381 Park Ave. S., LLC*, 68 AD3d 532 [2009]; *Davis v Goodsell*, 6 AD3d 382 [2004]).

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

ENTERED: DECEMBER 21, 2010



DEPUTY CLERK

Andrias, J.P., Saxe, Moskowitz, Acosta, Freedman, JJ.

3925 The People of the State of New York, Respondent, Ind. 4222/08

-against-

Steve Trinvil, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Matthew C. Williams of counsel), for respondent.

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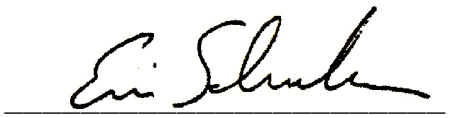
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie G. Wittner, J.), rendered on or about April 28, 2009,

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: DECEMBER 21, 2010



DEPUTY CLERK

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

Andrias, J.P., Saxe, Moskowitz, Acosta, Freedman, JJ.

3926 Leshai Ryals, Index 21244/04
Plaintiff-Respondent,

-against-

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

R.G. Ortiz Funeral Home, Inc., et al.,
Defendants.

_____

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

Arnold E. DiJoseph, New York, for respondent.

_____

Judgment, Supreme Court, Bronx County (Patricia A. Williams, J.), entered June 29, 2009, awarding plaintiff damages, and bringing up for review a trial ruling, same court and Justice, rendered on or about March 23, 2009, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for a directed verdict, unanimously reversed, on the law, without costs, the judgment vacated, the motion denied, and the matter remanded for a new trial on the issue of liability.

Viewing the evidence in the light most favorable to defendants, a rational jury could have found in favor of defendants on the issue of liability (*see Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]; *Sweeney v Bruckner Plaza Assoc.*, 57 AD3 347, 349 [2008], *appeal dismissed* 12 NY3d 832 [2009]). That the

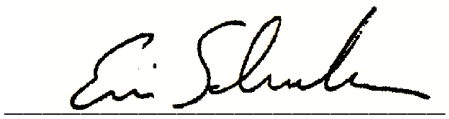
bus stop was located directly in front of the supermarket and was occupied by an 18-wheeler delivery truck at the time of the accident was undisputed. In light of the conflicting testimony concerning the length and condition of the area in front of the bus stop, testimony that supermarket employees cleared a passageway only in front of the supermarket, and testimony that standard procedures required the bus driver to let passengers off at the safest alternative location, we conclude that a rational jury could have found that the driver dropped off passengers at the safest location under the circumstances. That the bus stopped 10 to 15 feet from the curb was of no moment, as the 40-foot long bus could not have safely pulled into the area behind the truck, which plaintiff testified was only about 30 to 40 feet in length. Testimony concerning the existence of black ice also does not establish negligence as a matter of law, as a rational jury could have concluded that the bus driver did not notice the black ice from inside the bus (*see Tolbert v New York City Tr. Auth.*, 256 AD2d 171 [1998]).

We note that the better practice for trial judges is to obtain a jury verdict and then decide, if appropriate, to direct

a verdict. If upon appellate review, the directed verdict is reversed, a jury finding is still available for implementation.

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

ENTERED: DECEMBER 21, 2010



DEPUTY CLERK

Andrias, J.P., Saxe, Moskowitz, Acosta, Freedman, JJ.

3927- SCI 30142/07
3927A The People of the State of New York,
Respondent,

-against-

Scott Linden,
Defendant-Appellant.

---

Steven Banks, The Legal Aid Society, New York (Robert C. Newman of counsel), for appellant.

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

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Order, Supreme Court, New York County (John Cataldo, J.), entered on or about November 4, 2008, which determined that, absent an article 78 proceeding, the Supreme Court did not have jurisdiction to review the determination of the Board of Examiners of Sex Offenders that defendant is required to register as a sex offender on the basis of an out-of-state conviction, and order, same court and Justice, entered on or about January 8, 2009, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The question of whether a person is required to register as a sex offender on the basis of an out-of-state conviction is determined by the Board of Examiners, and is not part of the classification proceeding conducted thereafter by the court; accordingly, a person seeking review of the Board's determination

that he or she is obligated to register in the first place is required to bring an article 78 proceeding against the Board. The plain language of Correction Law § 168-k(2) dictates this result, and we agree with the other appellate courts that have reached this conclusion (*see Matter of Mandel*, 293 AD2d 750, 751 [2d Dept 2002], *appeal dismissed* 98 NY2d 727 [2002]; *People v Williams*, 24 AD3d 894, 895 [3d Dept 2005], *lv denied* 6 NY3d 710 [2006]; *People v Carabello*, 309 AD2d 1227, 1228 [4th Dept 2003]). This Court's decision in *People v Millan* (295 AD2d 267 [2002]) is not to the contrary, because the parties to that appeal did not litigate the present issue and we thus had no occasion to reach it (*see e.g. People v Louree*, 8 NY3d 541, 546 n [2007]). Defendant's policy arguments would be more appropriately addressed to the Legislature than to the courts.

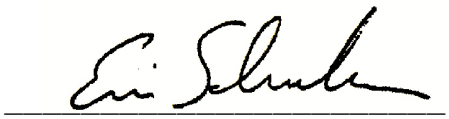
Defendant did not preserve his claim that this interpretation of the statute leads to a deprivation of equal protection and due process. Even if we were to conclude that this claim presents the type of legal question that may be raised for the first time on this civil appeal (*see Chateau D'If Corp. v City of New York*, 219 AD2d 205, 209-210 [1996], *lv denied* 88 NY2d 811 [1996]), we would reject it. There is a rational basis for the Legislature's allocation of the registration determination for in-state offenders to courts and for out-of-state offenders to the Board. New York courts can make the registration

determinations for in-state offenders at the time of sentencing (*see People v Hernandez,* 93 NY2d 261 [1999]), but persons convicted in other states generally have no occasion to appear before New York courts in connection with those convictions. Accordingly, the statute is constitutional to the extent that it delegates to the Board the task of identifying and determining which out-of-state offenders have convictions that require them to register in New York, and to the extent it restricts the availability of judicial review of that issue (*see Matter of New York City Dept. of Envtl. Protection v New York City Civ. Serv. Commn.*, 78 NY2d 318, 322 [1991]).

We also reject defendant's challenges to his adjudication as a level three offender. The court properly based the point assessments at issue on reliable hearsay (*see People v Mingo,* 12 NY3d 563, 572-574, 576-577 [2009]).

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

ENTERED: DECEMBER 21, 2010



DEPUTY CLERK

Andrias, J.P., Saxe, Moskowitz, Acosta, Freedman, JJ.

3928 The People of the State of New York, Respondent, Ind. 4452/00

-against-

Nora Burciaga, Defendant-Appellant.

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

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Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered on or about November 12, 2008, 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.

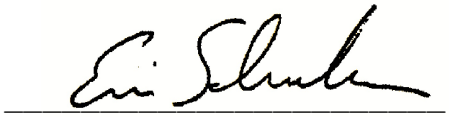
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department 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: DECEMBER 21, 2010



DEPUTY CLERK

Andrias, J.P., Saxe, Moskowitz, Acosta, Freedman, JJ.

3930 Robert Depalo, et al., Index 114656/08
Plaintiffs-Appellants,

-against-

Benjamin Lapin,
Defendant-Respondent.

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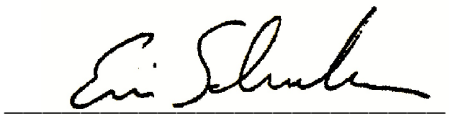
An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Joan Madden, J.), entered on or about July 2, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated November 29, 2010,

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

ENTERED: DECEMBER 21, 2010



DEPUTY CLERK

Andrias, J.P., Saxe, Moskowitz, Acosta, Freedman, JJ.

3935N Edith Glaser, et al., Index 17633/05
Plaintiffs-Appellants,

-against-

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

Consolidated Edison Company
of New York, Inc., et al.,
Defendants.

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Gassler & O'Rourke, P.C., Great Neck (Charles P. Gassler of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Susan B. Eisner of counsel), for respondents.

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Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered June 11, 2009, which, in an action for personal injuries sustained as a result of a trip and fall on an alleged roadway defect, denied plaintiff's motion to strike defendants-respondents' answer for failure to produce records related to street repairs and/or defects, unanimously affirmed, without costs.

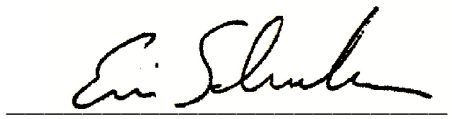
The motion court properly found that the City defendants (the City) did not engage in willful and contumacious conduct in failing to produce records reflecting a street repair made at the location of injured plaintiff's fall (*see generally* CPLR 3126; *Catarine v Beth Israel Med. Ctr.*, 290 AD2d 213, 215 [2002]). The record reflects that the City adequately responded to discovery

demands, albeit in response to several orders calling for production, as well as motions to strike. Affidavits submitted by representatives of the City attesting to standard record searches they personally conducted in their departments for roadbed defects, complaints and repairs dating back three years from the accident date supported the City's position that no record of road repairs to the area where plaintiff fell could be located (*see White v New York City Tr. Auth.*, 308 AD2d 341 [2003]; *cf. Rivera-Irby v City of New York*, 71 AD3d 482, 483 [2010]). The City also presented a Big Apple Map demonstrating a lack of prior written notice to the City of any defect at the accident location.

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

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

ENTERED: DECEMBER 21, 2010



DEPUTY CLERK

Tom, J.P., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

3936 The People of the State of New York, Respondent, Ind. 1891/08

-against-

Jaime Busanet, Defendant-Appellant.

---

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

Jaime Busanet, appellant pro se.

Cyrus R. Vance, Jr., District Attorney, New York (Brian E. Rodkey of counsel), for respondent.

---

Judgment, Supreme Court, New York County (Renee A. White, J. at hearing; Gregory Carro, J. at plea and sentence), rendered May 27, 2009, as amended June 12, 2009, convicting defendant of attempted robbery in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 12 years to life, unanimously affirmed.

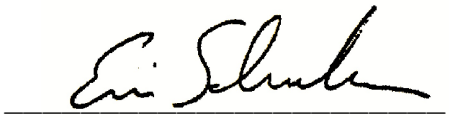
The court properly denied defendant's motion to suppress defendant's statements. Initially, we find no basis for disturbing the court's credibility determinations. The statements made by defendant to the police while defendant was incarcerated on an unrelated matter did not require *Miranda* warnings. The evidence adduced at the hearing established that there were no restrictions on defendant's freedom over and above ordinary prison confinement (*see People v Alls,* 83 NY2d 94

[1994], *cert denied* 511 US 1090; *People v Georgison*, 299 AD2d 176 [2002], *lv denied* 99 NY2d 614 [2003]). Defendant signed a written consent to be interviewed by police, and then was simply brought to an interview room. The subsequent destruction of the consent form does not warrant a different result.

Defendant's pro se challenge to one of the predicate convictions used to enhance his sentence is procedurally barred (*see* CPL 400.15[8]), and in any event is without merit.

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

ENTERED: DECEMBER 21, 2010



DEPUTY CLERK

Tom, J.P., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

3938 In re Ramzy F.,

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

_____

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

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

_____

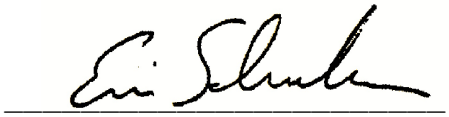
Appeal from order of disposition, Family Court, New York County (Robert R. Reed, J.), entered on or about November 19, 2009, which adjudicated appellant a juvenile delinquent, upon his admission that he committed an act which, if committed by an adult, would constitute the crime of criminal possession of stolen property in the fourth degree, and placed him with the Office of Children and Family Services for a period of 12 months, unanimously dismissed, without costs, as moot.

Appellant's challenge to the court's dispositional order is moot, since he has already completed his placement (*see Matter of Yuan Tung C.*, 296 AD2d 323 [2002]). Were we not dismissing the

appeal as moot, we would find that the placement was a proper exercise of discretion.

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

ENTERED: DECEMBER 21, 2010



DEPUTY CLERK

Tom, J.P., Friedman, Catterson, Richter, Abdus-Salaam, JJ.

3939 Sea Trade Maritime Corp., Index 602648/02
Plaintiff-Appellant, 591240/02

-against-

Hellenic Mutual War Risks
Association (Bermuda) Ltd., et al.,
Defendants-Respondents,

George Christy Peters,
Additional Defendant on
Counterclaims-Appellant,

Miller Marine Ltd., et al.,
Defendants.

[And A Third-Party Action]

_____

Anderson Kill & Olick, P.C., New York (Robert Mark Keenan of counsel), for appellants.

Blank Rome, LLP, New York (Thomas H. Belknap, Jr. of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Eileen Bransten, J.), entered June 9, 2009, recognizing and enforcing London arbitration awards and a London consent judgment in favor of defendant Hellenic Mutual War Risks Association (Bermuda) Ltd. totaling $945,072.60, plus interest and costs, denying plaintiff's claims seeking to recover under a war risk insurance policy and dismissing its complaint, unanimously affirmed, with costs.

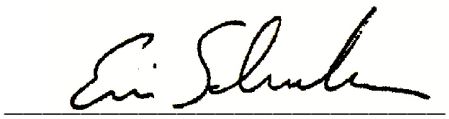
Plaintiff challenges the enforcement of an arbitration award, arguing that it was error to compel it to proceed to

arbitration in London because the provision for the arbitration of disputes contained in the parties' contract for insurance is unenforceable. That issue was expressly decided adversely to plaintiff by this Court (7 AD3d 289 [2004], *lv dismissed* 3 NY3d 766 [2004]). "'An appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as on the appellate court . . . [and] operates to foreclose re-examination of [the] question absent a showing of subsequent evidence or change of law'" (*Kenney v City of New York*, 74 AD3d 630, 630-31 [2010], quoting *J-Mar Serv. Ctr., Inc. v Mahoney Connor & Hussey*, 45 AD3d 809, 809 [2007]; *see Martin v City of Cohoes*, 37 NY2d 162 [1975]).

Plaintiff has failed to establish either part of the test we reiterated in Kenney. Thus, we conclude that the Supreme Court properly recognized and enforced the arbitration award and consent judgment at issue. 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: DECEMBER 21, 2010



DEPUTY CLERK

Tom, J.P., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

3940 The People of the State of New York, Ind. 723/06
Respondent,

-against-

Shane Velasquez,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Maxwell T. Wiley, J.), rendered October 2, 2007, convicting defendant, after a jury trial, of robbery in the first and second degrees and burglary in the first and second degrees, and sentencing him to an aggregate term of 9 years, unanimously affirmed.

Defendant's challenge to the sufficiency of the evidence is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the verdict was based on legally sufficient evidence. Furthermore, we find that it 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 credibility determinations. The evidence established that defendant was an active participant in the crime.

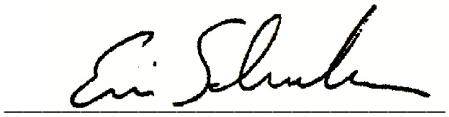
The court charged the jury that one of the prosecution

witnesses was an accomplice as a matter of law, whose testimony would thus require corroboration (*see* CPL 60.22). Defendant then requested that the court submit to the jury the factual issue of whether additional prosecution witnesses were accomplices. The court complied with the request to the extent of charging the jury that the corroboration requirement would apply to any additional witnesses that the jury found to be accomplices. No further objection was made. Defendant never alerted the court to his present claim that the court should have specifically named the two witnesses as potential accomplices in fact. Accordingly, that claim is unpreserved (*see People v Whalen*, 59 NY2d 273, 280 [1983]) and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The jury could readily determine from the evidence presented, as well as defendant's summation, that the accomplice status of two particular witnesses was at issue. "Jurors are presumed to have sufficient intelligence to make elementary logical inferences presupposed by the language of a charge, and defendants are therefore not entitled to select the phraseology to illustrate

such inferences" (*People v Levy*, __NY3d __, 2010 NY Slip Op 08387, *6 [2010] [internal quotation marks omitted]).

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

ENTERED: DECEMBER 21, 2010



DEPUTY CLERK

Tom, J.P., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

3941 In re Judith Melendez, Index 114670/09
Petitioner,

-against-

Rafael E. Cestero, as Commissioner of
the New York City Department of Housing
Preservation and Development, et al.,
Respondents.

_____

William E. Leavitt, New York, for petitioner.

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

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Determination of New York City Department of Housing Preservation and Development (HPD), dated June 16, 2009, which, after a hearing, terminated petitioner's Section 8 subsidy on the ground that she failed to report all earned income in her annual re-certification packages, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Eileen A. Rakower, J.], entered January 27, 2010), dismissed, without costs.

Petitioner's contention that the termination of her Section 8 housing subsidy was contrary to HPD's policy under its Administrative Plan is unpreserved for review (*see Washington Mut., FA v Metropolitan Transp. Auth.*, 67 AD3d 552, 552 [2009]). As an alternative holding, we conclude that HPD's determination

was in accordance with the Administrative Plan. Because the documents petitioner submitted during and after the pre-termination conference confirmed that she did not comply with the requirement to report all earned income, respondent could properly terminate her subsidy under the policy.

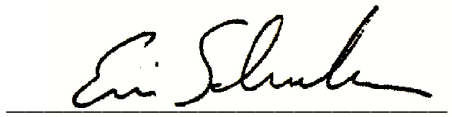
HPD's finding that petitioner misrepresented her income in her 2005, 2006, and 2007 re-certification packages is supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179-182 [1978]). That petitioner submitted a Verification of Wages form and documentation of her employment with the hotel with her re-certification forms each year demonstrated that she was aware of the requirement to report all employment. Her contention that she had submitted her 2005 and 2006 tax returns, which reflected income from both jobs, is undermined by the record. Rather, the evidence shows that such returns were submitted for the first time at the pre-termination conference. In any event, there is no basis to interfere with the hearing officer's rejection of this contention as incredible (*see Matter of Porter v New York City Hous. Auth.*, 42 AD3d 314 [2007]). Because the hearing officer's determination was based on a complete case file, and the hearing transcript adequately reflected petitioner's contentions and explanations, we find it unnecessary to remand

the matter for a new hearing.

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

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

ENTERED: DECEMBER 21, 2010



DEPUTY CLERK

Tom, J.P., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

3942-
3942A Index 601279/10

In re BDO USA, LLP,
Petitioner-Appellant,

-against-

Denis M. Field,
Respondent-Respondent.

_____

DLA Piper LLP (US), New York (Christopher P. Hall of counsel), for appellant.

Kostelanetz & Fink, LLP, New York (Brian C. Wille of counsel), for respondent.

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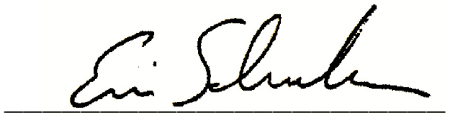
Orders, Supreme Court, New York County (Barbara R. Kapnick, J.), entered July 12, 2010, which, inter alia, denied the petition to stay arbitration and to modify the subject arbitration agreement, and granted respondent's motion to compel arbitration, respectively, unanimously affirmed, with costs.

The provision of the Amendment to Settlement Agreement that states that "the arbitrator shall decide the dispute based on a written submission from each Party and a non-evidentiary hearing" was not unconscionable (*see generally Yonir Tech., Inc. v Duration Systems [1992] Ltd.*, 244 F Supp 2d 195, 209 [SD NY 2002]). The provision was neither the result of disparate bargaining power nor "grossly unreasonable" under the circumstances (*see Gillman v Chase Manhattan Bank*, 73 NY2d 1, 10-11 [1988] [internal quotation marks and citations omitted]).

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

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

ENTERED: DECEMBER 21, 2010



DEPUTY CLERK

Tom, J.P., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

3946 The People of the State of New York, Respondent, Ind. 2356/07

-against-

Monique Clark, Defendant-Appellant.

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

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Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered on or about October 29, 2008, 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.

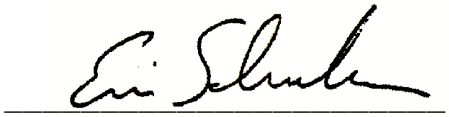
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department 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: DECEMBER 21, 2010



DEPUTY CLERK

Tom, J.P., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

3949 The People of the State of New York, Respondent, Ind. 6246/08

-against-

Ira Rosenfeld, Defendant-Appellant.

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

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

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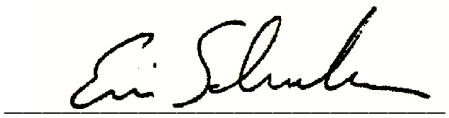
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard D. Carruthers, J.), rendered on or about April 1, 2009,

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: DECEMBER 21, 2010



DEPUTY CLERK

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

Tom, J.P., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

3950N Thelen LLP, Index 107975/09
Plaintiff-Appellant,

-against-

Omni Contracting Co., Inc.,
Defendant-Respondent.

_____

Donald Pearce, New York, for appellant.

Feinstein & Nisnewitz, P.C., Bayside (Neil H. Angel of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered July 15, 2010, which, in an action to recover legal fees, denied plaintiff's motion for summary judgment on its cause of action for an account stated, unanimously reversed, on the law, with costs, and the motion granted.

The record demonstrates that plaintiff was entitled to summary judgment on its cause of action for an account stated. Although discovery had yet to be conducted in this matter, this does not require the denial of the motion as premature (*see Duane Morris LLP v Astor Holdings Inc.*, 61 AD3d 418 [2009]).

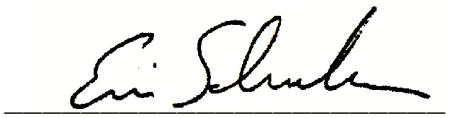
Contrary to defendant's contention, plaintiff did not have to establish the reasonableness of its fee (*see e.g. Cohen Tauber Spievak & Wagner, LLP v Alnwick*, 33 AD3d 562 [2006], *lv dismissed* 8 NY3d 840 [2007]). Nor does its failure to provide a written retainer agreement bar its claim for an account stated (*see Kramer Levin Naftalis & Frankel LLP v Canal Jean Co., Inc.*, 73

AD3d 604, 605 [2010]).

The affidavit of defendant's president was insufficiently specific to raise a triable issue of fact as to the existence of an account stated (*see e.g. Zanani v Schvimmer*, 50 AD3d 445, 446 [2008]), and while the president incorporated his current attorney's affirmation by reference, that affirmation was "without probative value for [the attorney] apparently ha[d] no personal knowledge of the pertinent facts" (*PPG Indus. v A.G.P. Sys.*, 235 AD2d 979, 980 [1997]). Furthermore, even if defendant's president orally complained that plaintiff's bills were excessive, that is insufficient to avoid summary judgment (*see Berkman Bottger & Rodd, LLP v Moriarty*, 58 AD3d 539 [2009]).

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

ENTERED: DECEMBER 21, 2010



DEPUTY CLERK

Gonzalez, P.J., Saxe, Nardelli, McGuire, Moskowitz, JJ.

2606 & M-2198 Index 601991/06

Siegmund Strauss, Inc.,
Plaintiff-Respondent,

-against-

East 149th Realty Corp.,
Defendant,

Windsor Brands, Ltd., et al.,
Defendants-Appellants.

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

Epstein Becker & Green, P.C., New York (Ralph Berman of counsel), for respondent.

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Judgment, Supreme Court, New York County (Bernard J. Fried, J.), entered April 7, 2009, affirmed, without costs.

Opinion by McGuire, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
David B. Saxe
Eugene Nardelli
James M. McGuire,
Karla Moskowitz, JJ.

2606 &
M2198
Index 601991/06

_____x

Siegmund Strauss, Inc.,
Plaintiff-Respondent,

-against-

East 149th Realty Corp.,
Defendant,

Windsor Brands, Ltd., et al.,
Defendants-Appellants.

_____x

Defendants Windsor Brands, Ltd., Twinkle Import Co., Inc., Teresa Rodriguez and Robert Rodriguez appeal from the judgment of the Supreme Court, New York County (Bernard J. Fried, J.), entered April 7, 2009, declaring plaintiff to be the lawful tenant of the subject premises.

Mischel & Horn, P.C., New York (Scott T. Horn and Naomi M. Taub of counsel), for appellants.

Epstein Becker & Green, P.C., New York (Ralph Berman and Adrian Zuckerman of counsel), for respondent.

McGUIRE, J.

Plaintiff Siegmund Strauss, Inc., a wholesale food and beverage distributor, entered into negotiations with defendants Windsor Brands, Ltd. and Twinkle Import Co. to merge their businesses and operate in premises leased by Windsor at 520 Exterior Street (a/k/a 110 East 149th Street), Bronx, New York (the premises). Windsor had a lease agreement with defendant East 149th Street Realty Corp. (the landlord) that commenced on September 1, 1992 and expired on August 31, 2007. Defendant Twinkle was a wholesale distributor of food products and paper goods which, prior to May 1, 2006, paid Windsor rent as a subtenant and operated its business at the premises. The individual defendants, husband and wife, are the respective sole owners and shareholders of the corporate defendants, Twinkle and Windsor (collectively, the Rodriguez defendants). Specifically, Mr. Rodriguez is the sole owner, shareholder and officer of Twinkle and the sole officer of Windsor. His wife is the sole owner and shareholder of Windsor.

A letter agreement was drafted but never signed by the parties. The agreement provided, inter alia, that Strauss would purchase all of Windsor's equipment and fixtures for a total of $100,000; Windsor would terminate its business, be dissolved and use its best efforts to negotiate a new lease between the

landlord and Strauss; upon execution of the new lease, Strauss would reimburse Windsor for its $100,000 security deposit; and the Rodriguezes would purchase a one-third ownership of Strauss based on its net book value. A dispute arose between the parties over whether the Rodriguezes would have an interest in payments or grants that Strauss received from the City of New York.

A letter agreement between Strauss and Twinkle was also drafted providing that Strauss would purchase Twinkle's inventory of goods at Twinkle's "cost as reflected on its books and records"; Twinkle would furnish Strauss with an itemized bill of sale for its inventory; Twinkle would terminate its business; and Twinkle would act as Strauss's sales representative, earning a 3/4% commission on Strauss's net sales.

Before the letter agreements were presented for execution on May 1, 2006, the parties began performing thereunder. In particular, on April 29 and 30, the Rodriguezes used their trucks and employees to help Strauss move its business into the premises, Twinkle ceased its operations and all of the Windsor and Twinkle employees, including the Rodriguezes, became employees of Strauss. Shortly thereafter, the relationship between the parties became strained. It was suggested that the Rodriguezes come up with a monetary amount they would be willing to accept to leave the newly merged business. The parties tried

to negotiate an agreement, but the negotiations reached a stalemate by the end of May 2006. On June 1, 2006, Strauss changed the locks on the premises so that the Rodriguezes could not enter, and on June 5, Strauss terminated the Rodriguezes' employment and removed them from Strauss's payroll.

Strauss commenced the instant action by summons and complaint dated June 6, 2006, seeking, inter alia, a declaratory judgment that it is the rightful tenant of the premises and that neither Windsor nor Twinkle has an interest in the premises. Strauss also sought relief against the landlord, seeking a lease for the premises. After Strauss entered into a lease for the premises, the claims against the landlord were discontinued. The Rodriguez defendants filed an answer in which they asserted counterclaims sounding in fraud, conversion and tortious interference with contractual relations.[1]

Strauss moved for a preliminary injunction and temporary restraining order prohibiting the Rodriguezes from entering the premises. The Rodriguezes cross-moved for an order declaring that they had the sole right to the premises, to the exclusion of

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[1]The Rodriguez defendants had initially commenced an action in New Jersey but they agreed to its dismissal and refiling in New York; after the dismissal of the New Jersey action, they asserted counterclaims against Strauss in this action as well as third-party claims against Strauss's officers.

Strauss. The court denied both parties' requests for a TRO, and the parties entered into a so-ordered stipulation providing that Strauss would pay the Rodriguez defendants $40,000 and that Strauss would be entitled to exclusive possession of the premises pending a hearing on the preliminary injunction. After a hearing, the court granted Strauss's motion and denied the Rodriguez defendants' cross motion, finding that Strauss was likely to prevail on the merits of its claim for possession based on the unexecuted letter agreements (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 13 Misc3d 1209[A], 2006 NY Slip Op 51753[u] [2006], *8). Specifically, the court concluded that Strauss would likely prevail on its claim that the unexecuted agreements are enforceable "based on the doctrine of partial performance," because neither party disputes that the "letter agreements contemplated that Strauss would move its business onto the property and take over Windsor's lease" (*id.*). The court noted that Strauss had not only moved its business onto the premises and made rent payments but also had made improvements to the property, having repaired the bathrooms and constructed a cashier's booth in the warehouse. The court found that this conduct was "inexplicable except for the alleged oral agreement" (*id.*).

In addition, the court noted that Strauss took these actions with the acquiescence and cooperation of the Rodriguez defendants who "helped Strauss set up its business on and move its inventory onto their property; they lent Strauss their employees' labor and trucks" (*id.*), went to work for Strauss and had their employees work for Strauss. The court concluded that "[b]y these actions, the Rodriguezes acknowledged the existence of the oral agreement alleged by Strauss" (*id.*).

In the meanwhile, during the pendency of this action, the landlord terminated the lease with Windsor on the ground that it had an illegal sublet. The facts regarding the illegal sublet are not clear from the record but the record does make clear that the court concluded that the landlord lawfully terminated the lease on this basis and entered into the new lease with Strauss.

Thereafter, the Rodriguez defendants served an amended answer, counterclaim, cross claim and third-party complaint. The amended counterclaims asserted causes of action against Strauss sounding in fraud, conversion and tortious interference with contracts with the landlord, customers and vendors. The third-party complaint asserted causes of action against Strauss' principals sounding in fraud, conversion, tortious interference with contract, improper accounting and wrongful termination. Critically, the Rodriguez defendants did not assert a claim for

breach of contract and in their answer denied that an agreement existed between the parties.

Strauss and its principals moved to dismiss the counterclaims and the third-party complaint, arguing that the Rodriguez defendants failed to state a cause of action. By order entered August 6, 2007, the court granted the motion, finding that the fraud claims were predicated on a breach of contract because the fraud alleged is that Strauss entered into the agreement without an intention of performing it. The court noted that the Rodriguez defendants "do not allege that the Strauss parties owed them any duties outside of those in the proposed agreement." The court similarly found that because the counterclaim for conversion was based on a claim for breach of contract, the allegations did not support the claim for conversion. With regard to the portion of the tortious interference claim that was premised on Strauss's alleged interference with Windsor's lease, the court found that it was not sufficiently pleaded and dismissed it. The court also dismissed that portion of the tortious interference claim that was based on the Rodriguez defendants' contractual relationships with suppliers, customers and vendors, finding that it, too, was not sufficiently pleaded.

After further motion practice, Strauss filed its note of issue on or about February 1, 2008. Thereafter, the Rodriguez defendants moved for leave to amend their answer, counterclaims and third-party complaint to assert, among other things, claims for breach of contract against Strauss and its principals. Strauss opposed the motion, arguing that the Rodriguez defendants failed to provide an excuse for their substantial delay in seeking to amend their pleadings and that it had been prejudiced because it did not have the opportunity to conduct discovery regarding the breach of contract claims. In addition, Strauss argued that the claims were legally deficient.

By order entered February 25, 2008, the court denied the motion without explanation. At the hearing on the motion, however, the court noted that the note of issue had been filed, determined that the motion was untimely and deemed it "almost frivolous at this time." The court also noted that the Rodriguez defendants "had 20 months to amend the [pleadings]" but waited until after the note of issue was filed "to totally change the theory of the case" after the court had previously written two decisions addressing the pleadings.

The Rodriguez defendants filed a notice of appeal but subsequently decided not to perfect the appeal, opting instead to appeal from the final judgment.[2] After a bench trial, the court issued an order, declaring, among other things, that Strauss is entitled to possession of the premises pursuant to its lease with the landlord and that the Rodriguez defendants have no interest in the lease or the property. The Rodriguez defendants appeal from the judgment and assert that it brings up for review the prior orders, entered August 6, 2007 and February 25, 2008, dismissing their claims and denying their motion to amend their pleadings, respectively. After oral argument of the appeal, we requested supplemental briefs from the parties on the question of whether the appeal from the judgment brings up for review the prior orders.

Unfortunately for the Rodriguez defendants, who appear not to have received appropriate compensation for their business as a result of the failed merger, we conclude that the appeal from the judgment does not bring up for review the prior orders. Pursuant to CPLR 5501(a)(1), an appeal from a final judgment brings up for

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[2]The Rodriguez defendants intended to withdraw their notice of appeal but mistakenly addressed their letter of withdrawal to the Court of Appeals. Nonetheless, they informed their adversary that they were withdrawing the notice and did not move for an enlargement of time to perfect the appeal before the expiration of the nine month period in 22 NYCRR 600.11(a)(3).

review "any non-final judgment or order which necessarily affects the final judgment." As Professor David Siegel has explained, determining whether an order is brought up for review by an appeal from the final judgment "introduces the sometimes difficult inquiry of when it is that an intermediate order or interlocutory judgment 'necessarily affects' the final judgment" (Siegel, NY Prac § 530 at 910 [4th ed]). He concedes that his test for making such a determination is "not perfect but helpful." That is, he suggests asking the following question: "assuming that the nonfinal order or judgment is erroneous, would its reversal overturn the judgment? If it would, it is a reviewable item; if it would not, and the judgment can stand despite it, it is not reviewable" (*id.*). Here, if the orders granting dismissal of the counterclaims and denying the motion to amend the answer were reversed, the Rodriguez defendants' claims would be reinstated and they would be permitted to pursue a claim for breach of contract. However, the judgment which declared that Strauss was entitled to possession of the leased premises would still stand.

In *Barrett Japaning, Inc. v Bialobroda* (68 AD3d 474 [1st Dept 2009]), we applied the test suggested by Professor Siegel, albeit without expressly stating that we were utilizing that

test. We held that the appeal by the defendant, a resident of the building owned by the plaintiff cooperative corporation, from the 2008 judgment in favor of the plaintiff did not bring up for review a 2006 order, since the defendant sought to challenge only so much of that order as dismissed her seventh and eighth counterclaims for breach of warranty of habitability and discrimination, while the judgment dealt solely with whether the Roommate Law permitted the defendant to have more than one roommate living in her unit (*id.* at 475). Specifically, the judgment enjoined the defendant from having persons unrelated to her, except for one roommate, occupy the fifth floor of the subject premises, and directed the eviction of all but one of the co-residents. Our decision noted that "[a]n appeal from a judgment encompasses any nonfinal determination that necessarily affects the judgment," and explained that because the judgment dealt solely with the defendant's roommate claims and was not affected by the 2006 prior order dismissing her counterclaims for breach of warranty of habitability and discrimination, the prior order was not reviewable on the appeal from the judgment (*id.*).

The next question is whether the Rodriguez defendants can avoid this result because they also have moved for an enlargement of time to perfect their appeal from the February 2008 order and

to consolidate that appeal with the instant appeal. Since they filed their notice of appeal on March 26, 2008, their time to perfect the appeal effectively expired in December 2008 (22 NYCRR 600.11[a][3]). The Rodriguez defendants did not have any contact with this Court regarding this appeal until April 2010, after we requested supplemental briefing. While this Court generally has some discretion with regard to these types of motions, we cannot exercise that discretion in favor of the Rodriguez defendants.

The critical fact is that the Rodriguez defendants' right to appeal the prior order terminated when the final judgment was entered (*see Matter of Aho*, 39 NY2d 241, 248 [1976] [any right of direct appeal from intermediate order terminates with entry of final judgment]). Because of the rule of *Matter of Aho*, a significant problem may arise if an interlocutory appeal is taken and a final judgment is entered during the pendency of that appeal (*see* Siegel, 1997 Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 5501, 2010 Pocket Part, at 3-5; Davies, New York Civil Appellate Practice § 4.4 at 97-98 [8 West's NY Prac Series 2008]. The Legislature provided a sensible but partial measure of relief in 1997 when it amended CPLR 5501(c) (1997, ch 474) by adding what is now the second

sentence.[3] Pursuant to the amendment, an appeal from an order directing summary judgment or directing judgment on a motion addressed to the pleadings is deemed to be an appeal from an ensuing judgment entered on the order.

The rule of *Matter of Aho*, however, presents a fatal problem for litigants who take an interlocutory appeal from an order that does not necessarily affect the final judgment only to have final judgment entered before the interlocutory appeal is decided. However erroneous the order may be, they irrevocably lose their right to appellate review once final judgment is entered, regardless of whether they would obtain substantial relief if the order were reversed and even if they diligently pursued their interlocutory appeal. Moreover, given that final judgment might have been entered when the appellate court was on the verge of issuing a decision resolving the interlocutory appeal, judicial

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[3]CPLR 5501(c) provides, in relevant part:

> "The appellate division shall review questions of law and questions of fact on an appeal from a judgment or order of a court of original instance and on an appeal from an order of the supreme court, a county court or an appellate term determining an appeal. The notice of appeal from an order directing summary judgment, or directing judgment on a motion addressed to the pleadings, shall be deemed to specify a judgment upon said order entered after service of the notice of appeal and before entry of the order of the appellate court upon such appeal, without however affecting the taxation of costs upon the appeal."

economy considerations can be undercut by the rule of *Matter of Aho*. For these reasons, the Legislature might wish to consider another amendment to CPLR 5501(c) giving appellate courts discretion to review the order notwithstanding entry of final judgment. Without such an amendment, litigants in this position can protect their interlocutory appeal only by moving in the trial court for an order staying entry of the judgment.

The Rodriguez defendants' appeal from the judgment therefore does not bring up for review the August 6, 2007 order granting plaintiff's motion to dismiss the amended counterclaims and third-party complaint or the February 28, 2008 order denying their cross motion for leave to amend the answer. These prior orders do not "necessarily affect[]" the final judgment (CPLR 5501[a]; *see Barrett Japaning, supra*; *Paru v Mutual of Am. Life Ins. Co.*, 52 AD3d 346, 348 [2008]), and any right of direct appeal terminated with entry of the final judgment (*Matter of Aho*, *supra*).

Accordingly, the judgment of the Supreme Court, New York County (Bernard J. Fried), entered April 7, 2009, declaring plaintiff to be the lawful tenant of the subject premises, should be affirmed, without costs.

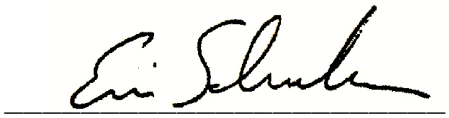
**M-2198 - *Strauss v East 149th Realty Corp., et al.,***

Motion seeking enlargement of time and consolidation denied as untimely; appeal dismissed.

All concur.

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

ENTERED: DECEMBER 21, 2010



DEPUTY CLERK

Saxe, J.P., Catterson, Renwick, Richter, Abdus-Salaam, JJ.

2832 In re Noah Jeremiah J.,

A Child Under the Age of
Eighteen Years, etc.,

Kimberly J.,
Respondent-Appellant,

The Administration for Children's Services,
Petitioner-Respondent.

_____

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Louise Feld of counsel), attorney for the child.

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Order, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about April 22, 2009, affirmed, without costs.

Opinion by Catterson, J. All concur except Saxe, J.P. who dissents in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
James M. Catterson
Dianne T. Renwick
Roslyn H. Richter
Sheila Abdus-Salaam, JJ.

2832

_____x

In re Noah Jeremiah J.,

A Child Under the Age of
Eighteen Years, etc.,

Kimberly J.,
Respondent-Appellant,

The Administration for Children's Services,
Petitioner-Respondent.
_____x

Respondent Kimberly J. appeals from the order of the Family Court, New York County (Rhoda J. Cohen, J.), entered on or about April 22, 2009, which, to the extent appealed from as limited by the briefs, determined, after a fact-finding hearing, that respondent mother neglected the subject child.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Larry A. Sonnenshein and Leonard Koerner of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Louise Feld of counsel), attorney for the child.

CATTERSON, J.

In this Family Court neglect proceeding, the respondent mother challenges the finding of neglect of her son who was born HIV positive and required antiretroviral medication administered on a strict schedule. The record establishes the effects of her mental illness and failures to administer her own medication on her ability to care for her infant son, and hence a finding of neglect based on the risk of imminent harm is supported by a preponderance of the evidence.

The mother began treatment for her mental health disorders and drug addictions in December 2001. Psychiatric reports and medical records listed her diagnoses as including major depression with psychotic features, cannabis dependence, cocaine dependence, alcohol dependence, past history of attention deficit hyperactivity disorder, and bipolar II disorder. Evaluations in her medical record documented her cocaine/crack and marijuana abuse and psychiatric history, and detailed her unstable relationships with her two sons and with the father of the two boys.

In 2006, the court entered a finding of neglect of her two sons, and by order dated March 6, 2007 placed the two boys in foster care. The court further ordered the mother to cooperate

with mental health services, participate in a drug treatment program, and complete vocational and educational skills training. The service plan established for her included completion of parenting classes and a drug treatment program, random drug testing, continuous mental health services, and procurement of suitable housing, employment, and a GED.

In mid-2007, she became pregnant with Noah, the infant at issue in this case. Quarterly reports chronicle her subsequent lapses in compliance with the court order and her psychiatric treatment. She gave birth on April 9, 2008. Noah, weighing only four pounds, fourteen ounces, was HIV-positive and required immediate specialized medication intervention. Accordingly, he was placed on medical hold at the hospital.

On April 15, 2008, less than a week later, the Administration for Children's Services (hereinafter referred to as "ACS") filed a neglect petition in New York County Family Court on behalf of Noah alleging, inter alia, that the mother "suffers from a mental illness and/or a mental condition which impairs her ability to care for [Noah]" and that, as a result, Noah is "in danger of becoming a neglected child." An April 28, 2008 amendment also alleged that she failed to take her prescribed medications, that there was a prior finding of neglect of Noah's

two siblings based on drug abuse, and that she had not complied with the court's 2007 order.

At the time the petition was filed, the mother was attending a drug treatment program, but had missed several sessions and so had not completed the program, although regular testing indicated that she had not tested positive for illegal drugs. She had not enrolled in a GED program or vocational training.

On June 18, 2008, the mother's attorney submitted a proposed order to the court pursuant to article 18-b, section 722-c of the County Law for the purpose of obtaining the services of a mental health professional for the mother who was indigent. Following an administrative delay, the court received the mother's medical records from the mental health clinic in December 2008. In early 2009, the court rejected a proposed resolution by the parties and scheduled a pretrial conference on March 9, 2009, and a fact-finding, disposition, and permanency hearing on April 22, 2009. At the pretrial conference, the court denied the mother's request for the services of a mental health professional to assist in preparation for trial on the grounds that her treating psychiatrist was already scheduled to testify.

At the fact-finding hearing, the mother's psychiatrist described the symptoms of bipolar mental illness. An individual

diagnosed as bipolar suffers periods of major depression and hypomania which may last for weeks. During episodes of depression, an individual's sleep, appetite, energy, and ability to function are compromised. During episodes of hypomania, an individual can experience difficulty with impulsivity, and sleep, speech and concentration are affected.

The psychiatrist testified that the mother's bipolar condition made her irritable, impulsive, and likely to make poor decisions, primarily affecting her interactions with others. He established that any failure to take her medications would exacerbate her condition, making her more moody, impatient and susceptible to major depression, thus impairing her ability to care for herself and Noah.

He further testified that on two occasions the mother had stopped taking her psychotropic medications, Wellbutrin and Zyprexa, once during a three-week visit to Ohio in December 2008, and once several months later for four days following Noah's birth. He stated that when he saw her after the four days without medication, she was "distress[ed]," however he could not ascertain how much of her reaction was attributable to her failure to take her medication rather than the fact that the baby did not go home with her. Although her mood swings were stable,

he stated unequivocally that while the mother was not on medication, she would be unable to care for Noah.

The mother's psychiatrist further observed that, while her medications were generally effective, "loose" or "tangential thinking," a chronic manifestation of her condition, persisted even with periodic increases in dosage during her pregnancy. He further opined that this would affect her ability to take care of herself and Noah, "a very small, very young child who is completely dependent on her care."

An ACS child protective specialist who was assigned to the family testified as to the agency's concern that based on discussions with the mother's clinic, she would be unable to administer Noah's antiretroviral medications on the required strict schedule. While there was some discussion among the mother and Noah's healthcare providers of arranging home support, the ACS specialist concluded that even with homemaking support or visiting nurse services, the mother's lapses in taking her medication together with other indicators such as her difficulty waking up in the morning and keeping required appointments suggested that she would be unable to adhere to the newborn's strict medication regimen. Furthermore, although she had secured housing, she was unprepared for the baby's arrival in other

respects. For example, there were no provisions at home for an infant, such as a crib or infant clothes, and her live-in boyfriend had not been cleared with ACS.

The court concluded that as a result of her mental illness, the mother's ability to care for Noah was impaired. The court entered a disposition of neglect because he was "at risk," particularly with respect to his required "strict course of medication." The court also noted its prior finding of neglect against the mother as to her two older boys. By order dated April 22, 2009, Noah was placed in the custody of the Commissioner of Social Service of New York County until completion of the next permanency hearing scheduled for September 10, 2009.

On appeal, the mother argues that the ACS failed by a preponderance of the evidence to establish a causal connection between her mental health condition and any potential harm to Noah. She argues that the totality of the record supports a finding that with the appropriate services in place, Noah could have been discharged to her care without placing him at risk. Additionally, she argues that the court erred in denying her motion for appointment of an expert psychiatrist. The attorney for the child and ACS argue that the evidence supports the court's findings. For the reasons set forth below, we affirm the

findings of the court.

As a threshold matter, the court's denial of the mother's motion for appointment of an expert was an appropriate exercise of its discretion. It is well established that where there is extensive medical evidence in the record, the court may decline to authorize an expert on the basis that such services are not necessary. See Matter of Penny B. v. Gary S., 61 A.D.3d 589, 591, 878 N.Y.S.2d 307, 309 (2009), lv. denied, 13 N.Y.3d 705, 887 N.Y.S.2d 2, 915 N.E.2d 1180 (2009) (no demonstrated need where the court was sufficiently informed about the child's behavioral problems and had extensive medical evidence); see also Matter of Garfield M., 128 A.D.2d 876, 877, 513 N.Y.S.2d 798, 799 (1987) (extensive evaluation and psychological examination of the appellant by the Family Court Mental Health Services rendered an additional expert unnecessary). Here, the mother's medical records and testimony by the psychiatrist who treated her for eight years obviated the necessity for additional expert testimony.

Further, the court's finding of neglect was supported by a preponderance of evidence that the mother's mental illness resulted in her inability to care for Noah putting him at immediate risk of harm. Family Ct. Act § 1046(b)(1) provides that at a fact-finding hearing, "any determination that the child

is an abused or neglected child must be based on a preponderance of the evidence." Family Court Act defines a neglected child as one whose "physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent . . . to exercise a minimum degree of care." Family Ct. Act 1012(f)(i). Therefore, "[a] respondent's mental condition may form the basis of a finding of neglect if it is shown by a preponderance of the evidence that his or her condition resulted in imminent danger to the child[]." Matter of Jesse DD., 223 A.D.2d 929, 930-931, 636 N.Y.S.2d 925, 927 (1996), lv. denied, 88 N.Y.2d 803, 645 N.Y.S.2d 445, 668 N.E.2d 416 (1996).

However, the court need not wait for a child to be harmed before "extending its protective cloak around [the] child." Matter of Cruz, 121 A.D.2d 901, 903, 503 N.Y.S.2d 798, 801 (1986) (internal quotation marks and citation omitted). The rationale for derivative neglect rests partly upon the proposition that when a prior finding of neglect is proximate in time to the derivative proceeding, the parent's impaired judgment is presumed to continue endangering any child in that parent's care. See e.g. Matter of Amber C., 38 A.D.3d 538, 540-541, 831 N.Y.S.2d 478, 481 (2007), lv. denied, 8 N.Y.3d 816, 839 N.Y.S.2d 454, 870 N.E.2d 695 (2007), lv. dismissed, 11 N.Y.3d 728, 864 N.Y.S.2d

380, 894 N.E.2d 643 (2008) (parents' neglect of their children due to keeping an unsafe and unsanitary home seven months prior to the derivative proceeding indicated continued impaired parental judgment); Matter of Andrew DeJ. R., 30 A.D.3d 238, 239, 817 N.Y.S.2d 24, 25 (2006)(a father's neglectful conduct in possessing drugs was sufficiently close in time to the derivative proceeding to support the court's conclusion that his parental judgment remained impaired); Matter of Hannah UU, 300 A.D.2d 942, 944-945, 753 N.Y.S.2d 168, 170-171 (2002), lv. denied, 99 N.Y.2d 509, 760 N.Y.S.2d 100, 790 N.E.2d 274 (2003) (a mother's neglect of her son due to mental illness and her continued impairment during her pregnancy justified a finding of derivative neglect of her newborn daughter); Matter of Kimberly H., 242 A.D.2d 35, 39, 673 N.Y.S.2d 96, 99 (1998) (finding of a mother's neglect due to excessive corporal punishment one month before child's birth indicates that the mother's pattern of behavior is likely to continue).

"Imminent danger . . . must be near or impending, not merely

possible" (Nicholson v. Scoppetta, 3 N.Y.3d 357, 369, 787 N.Y.S.2d 196, 201, 820 N.E.2d 840, 845 (2004)), and "[t]he quantum of evidence presented at a fact-finding hearing must be sufficient to prove that if the child were released to the mother there would be a substantial probability of neglect that places the child at risk" (Matter of Jayvien E. (Marisol T.), 70 A.D.3d 430, 436, 894 N.Y.S.2d 52, 57 (2010) (internal quotation marks and citation omitted)). Additionally, the court is obligated to consider whether providing support services might eliminate the risk of harm to the child. See Nicholson, 3 N.Y.3d at 379, 787 N.Y.S.2d at 208, 820 N.E.2d at 852.

The record in this case establishes that the effects of the mother's mental illness together with her inability to manage her own medication is such that, if Noah was released to her care, there is a substantial probability that he would not be adequately cared for and, more specifically, would not receive his HIV medication placing him in imminent danger. Moreover, although the mother claims that Noah should have been released to her care with home services, there is no indication that this was a viable alternative either at the time of Noah's discharge or the following year at the hearing.

The record establishes that Noah's mother suffers from bipolar mood disorder type-II. The psychiatrist who has treated her since 2001 explained that without her medication, her bipolar disorder would prevent her from caring for Noah. Her psychiatrist also noted that she would have an even greater need for medication after giving birth to Noah, at which point she would be more vulnerable to an episode of either depression or hypomania. Her psychiatrist opined that even one missed dose would result in insufficient medication levels leaving her less capable of responding to the demands of a newborn baby. He expressed doubt as to whether, even with her medications, her condition was resolved to the extent that she would have the capacity to take care of Noah.

Petitioner ACS and the attorney for the child testified as to concerns that because the mother suffered from bipolar disorder and had a history of noncompliance with her medications, she would either not take her medications rendering her unable to care for Noah, or she would fail to administer Noah's medications according to the requisite strict schedule. Her psychiatrist testified, and the mother does not dispute, that she failed to take her medications for two periods of several days at a time. These two incidents, close in time to Noah's birth, suggest a

substantial probability that she will repeat this behavior and either not take her own medication rendering her incapable of caring for Noah, or not administer Noah's medication on a regular basis.

The dissent's observation that "if bipolar disorder and occasional failures to follow up on medication were enough to support a finding of neglect, many more children would require foster care" is not persuasive. The dissent fails to take into account Noah's exceptional fragility and that newborns must be provided with the maximum protection available. Matter of Kimberly H., 242 A.D.2d at 39, 673 N.Y.S.2d at 99 ("[a] new infant is the most vulnerable of creatures, utterly unable to either defend [himself] or report mistreatment"). At the time of the petition, Noah was a low birth-weight baby battling HIV and required extraordinary care including administration of his anti-retroviral medication on a strict schedule. Under these circumstances, even an "occasional" failure to follow up on medication would have been harmful. Furthermore, a year later, although the baby's prognosis had improved, the mother's circumstances had not changed. At the time of the hearing, she had no housing, had not enrolled in the court-ordered GED or vocational training, and the record is devoid of any indication

that the effects of her mental illness had been resolved or that compliance with her medication had improved such that she could care for the baby.

Nor does the fact that the mother has passed several drug tests help her case. We note that participation in a treatment program does not by itself establish that a mother with a history of neglect has successfully corrected the harmful behavior pattern. This is particularly true where, as occurred here, the mother has not successfully completed prior treatment programs. See e.g. In re Hannah UU, 300 A.D.2d at 944-945, 753 N.Y.S.2d at 170-71 (evidence of a mother's therapy and other services for mental illness during the eight weeks prior to her daughter's birth did not overcome presumption that her mental illness impaired her parental judgment); Matter of Kimberly H., 242 A.D.2d at 39, 673 N.Y.S.2d at 99 (a mother's enrollment in parenting classes did not overcome the presumption that her pattern of inflicting excess corporal punishment would continue). This Court in Matter of Kimberly reasoned that to permit the infant in that case to return to the mother's home was "tantamount to using a defenseless baby to test whether the preventive social services provided to the parent have succeeded in changing the parent's patterns of conduct." 242 A.D.2d at 40, 673 N.Y.S.2d at 99. The same is true here.

The mother's participation in therapy groups, cooperative demeanor, and honesty are commendable. However, these efforts simply cannot compensate for her lack of ability to care for an infant son with special needs and her own inability to comply with a treatment plan for her own mental health problems.

Accordingly, the order of the Family Court, New York County (Rhoda J. Cohen, J.), entered on or about April 22, 2009, which, to the extent appealed from as limited by the briefs, determined after a fact-finding hearing, that respondent mother neglected the subject child, should be affirmed, without costs.

All concur except Saxe, J.P. who dissents in an Opinion:

SAXE, J.P. (dissenting)

On this appeal, we consider allegations of child neglect in the context of the mother's psychological and emotional problems. Based on my evaluation of the record, I believe that petitioner Administration for Children's Services (ACS) did not prove by a preponderance of the evidence that the subject child, Noah J., is a neglected child. While the record establishes that respondent mother Kimberly J. suffers from bipolar disorder, and that *in the past* her mental and emotional condition created imminent risk for her children, ACS failed to demonstrate by a preponderance of the evidence that at the time of the hearing involving Noah, she was unable to care for him without placing him at imminent risk, particularly if appropriate social services assistance had been made available to her. Accordingly, I respectfully dissent.

Under the Family Court Act, a neglected child is one "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent . . . to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship" (Family Court Act § 1012[f][i][B]). In a fact-finding hearing, a determination that a child is neglected must be based on a preponderance of the evidence (Family Court Act § 1046[b][i]). In this instance, the question is whether ACS

proved by a preponderance of the evidence that Noah was in imminent danger of physical impairment as a result of his mother's failure to provide him with proper supervision.

Noah was born on April 9, 2008, HIV positive and with a low birth weight of 4 pounds 14 ounces. On April 15, 2008 ACS filed a neglect petition against Kimberly, alleging that she had failed to follow the mandates of a prior dispositional order dated June 26, 2007, issued as the result of a neglect finding regarding her two older sons, based on her admission that she used marijuana daily in her sons' presence. The specific provisions of the 2007 order with which Kimberly allegedly failed to comply were completion of a drug treatment program, attendance at a GED program and attendance at a vocational training program.

When the Family Court initially considered the application for removal pursuant to Family Court Act § 1027 on April 16, 2008, ACS's Child Protective Specialist, Nichola Martin, testified that Kimberly's treating psychiatrist did not believe Kimberly could consistently administer Noah's necessary regimen of medication, because she was not fully compliant with taking her own psychiatric medication. It was Specialist Martin's understanding (subsequently disproven) that Kimberly had not been taking her psychiatric medications at all during the latter part of her pregnancy and up to the date of the hearing. According to

Martin's testimony on this point, Kimberly had requested to be taken off her psychotropic medications because of the pregnancy, and while her psychiatrist did not agree, he nevertheless "adhered" to the request and took her off the medication.

Martin also testified that Kimberly did not then have the necessary provisions for the child, such as a crib or infant clothes, and suggested that in addition, before the child could be discharged to her home she would need to go back on her medications, to receive additional parenting training to address the child's medical needs, and to receive supporting services in the home. No explanation was offered as to why no homemaking and visiting nurse services had been offered or put in place when Kimberly was being discharged from the hospital to help enable her to care for Noah.

While the Family Court observed that "the A.C.S. has not made reasonable efforts to offer services to prevent the [r]emand of this [c]hild," it nevertheless remanded the infant to ensure his safety, emphasizing the lack of provisions for the baby. It further directed the agency to discuss providing homemaking services and visiting nurse services before the adjourn date.

At the fact-finding hearing held on April 22, 2009, ACS presented evidence that Kimberly has been diagnosed with a bipolar mood disorder causing her to suffer from "major mood

swings" and "impulsivity." She has been under the care of psychiatrist Warren Ng since 2001, who has successfully treated her with the antidepressant Wellbutrin and the mood stabilizer Zyprexa since that time. Dr. Ng explained that while Kimberly's initial diagnosis in 2002 was a major depression with psychotic features, he had never known her to hallucinate, and she had not needed any psychiatric hospitalizations. Rather, the bipolar disorder sometimes caused her to experience "loose" or "tangential" thinking, which the prescribed medications generally effectively treated.

Dr. Ng testified that failure to take her medication would impair Kimberly's ability to care for her newborn. When specifically asked if she could have cared for the newborn infant on her own without assistance, he testified that she could not. However, he did not offer any views as to whether she would be able to do so if provided with homemaker or visiting nurse assistance. He acknowledged Kimberly's full cooperation with and participation in her treatment. He said she is "aware of her challenges and . . . definitely tries to do her very best." He reported that she is fully involved in her individual and group therapy treatment programs, and was attempting to comply with all the requirements imposed on her. She is always polite, behaves appropriately, is properly dressed, uses proper hygiene, and

keeps her appointments. Importantly, he reported that she informs him when she notices that the dosages of her medications may need adjustment in order to effectively control her mood swings and impulsivity.

Dr. Ng testified that Kimberly's mood swings were stable at the time of Noah's birth, and that when he met with Kimberly several times after Noah's birth, her moods remained stable. However, he also testified to two occasions when Kimberly went off her medications. When she came in to his clinic on April 16th, four days after her discharge from the hospital, she informed him that she had not taken her psychiatric medications for those four days, explaining that she had gone home from the hospital without a supply of the medications. He acknowledged that at that time, when the decision was made for Noah to be kept in the hospital while Kimberly's abilities and level of functioning were further evaluated, Kimberly had understandably experienced fear, anxiety and distress. He also reported one prior occasion when, following a three-week visit to Ohio in December 2007, Kimberly informed him when she returned that she had run out of medication while on her trip. Neither situation seems to have involved willful noncompliance with taking her medication; indeed, all the evidence established that Kimberly was generally compliant with her medication. Dr. Ng did not

mention, during his testimony, the assertion made by Nichola Martin during the previous hearing, in which she reported that Dr. Ng had acceded to Kimberly's request to be taken off the medication during the latter part of her pregnancy.

Social worker Vanessa Palma, who had been assigned to Noah's older brothers' case and handled Noah's case as well, explained her initial concerns about Kimberly's ability to care for Noah when he was born, knowing that he would require a strict medication schedule due to his HIV-positive status at birth. Because Kimberly had not always followed through with her own medication, Palma expressed her belief that even with homemaker services it would not be certain that Kimberly would ensure that Noah received the medication on the required strict schedule. However, she did not support that belief with facts justifying her conclusion.

Palma also described Kimberly as having difficulty interacting with her two older sons at the same time on scheduled visits with them. However, she admitted that Kimberly was "consistent" with visits with her older two sons.

As to Kimberly's failure to complete the service plan prepared for her in the context of the 2007 dispositional order, which was the initial ground for the neglect petition, Palma specified that as of the date of Noah's birth, Kimberly still had

not completed her drug treatment program, did not have a stable income, and had not enrolled in either a GED program or vocational training. As to the housing Kimberly had obtained, the social worker voiced concern that she lived in a one-bedroom apartment with her boyfriend, who had not been cleared by ACS.

Importantly, however, Kimberly had neither dropped out of nor failed the drug treatment program, and had not suffered a relapse. Rather, her participation in the program had simply been extended because she had missed several sessions between December and January -- that is, during her trip to Ohio. She continued to be subject to weekly drug tests since her enrollment in the drug treatment program in the fall of 2007, and she consistently tested negative for drugs. Moreover, Kimberly had obtained Medicaid and public assistance. And, while she had not yet enrolled in GED and vocational training programs, Kimberly had explained to Palma that she wanted to focus on one thing at a time, and was at that time focusing on the drug treatment program. The social worker also acknowledged that while Kimberly sometimes missed appointments, she informed the social worker in advance.

The petition was amended on April 28, 2008, so as to also charge that Kimberly was noncompliant in taking her prescribed medications, in that she admitted to not having taken her

medication for at least four days.

The evidence presented to the Family Court painted a portrait of a woman suffering from bipolar disorder who understands and does all that she can to cooperate in the treatment of her psychiatric disorder, including participating in individual and group therapy programs. She has been successful at treating her drug problem, having tested negative for drugs ever since she began drug treatment. According to all the testimony, she is polite, keeps appointments or notifies the appropriate professional if she cannot, and is neither oppositional nor confrontational. Her delay in completing the drug treatment program does not reflect negatively on her in any way, and I fail to see how her failure to enroll in GED or vocational training programs reflects badly on her parenting ability. The only negative assessment of her as a parent is the social worker's bare assertion that she has trouble interacting with both of her two older boys at the same time during their weekly visits.

As to the evidence regarding the two occasions when Kimberly neglected to take her daily medications, having failed to ensure she had the medications she needed, they fall short of justifying the neglect finding. Indeed, on those two occasions, she thereafter notified her psychiatrist of the problem, and

rectified the situation. There was no evidence at all that Kimberly's actual mental, emotional, or psychological condition during the relevant period of time was negatively affected in any way, with the exception of Dr. Ng's assertion that Kimberly, understandably, experienced fear, anxiety and distress when she was informed that her baby was not being discharged to her home.

The doubts expressed by Dr. Ng, echoed by Vanessa Palma and Nichola Martin, as to Kimberly's ability to follow Noah's medication regimen, were not sufficiently supported by evidence to permit their adoption by the court. The two discrete occasions on which Kimberly failed to ensure she had the medications she needed, do not support a conclusion that she would fail to give Noah his medications. To the extent these expressed doubts may have been based on the reasoning that any failure by Kimberly to take her medications could, in turn, cause Kimberly to experience mood swings and impulsivity, which could undermine her ability to provide the necessary care for Noah, the supposition that Noah could be at imminent risk of harm is simply too attenuated to be valid. It is quite possible that Dr. Ng, Vanessa Palma, and Nichola Martin might have had personal experience with Kimberly that justified their concerns about her ability to competently care for Noah; however, the information they provided to the court, in the form of their testimony and

reports, failed to establish grounds for a finding that Noah would be placed in imminent risk of harm if left in his mother's care. The support they provided for their expressed doubts boils down to the two explained and unique incidents of failure to take medication. In and of themselves, those two incidents are an insufficient basis for concluding that it was likely that Kimberly's care would place Noah in imminent danger of physical harm.

"'A finding of neglect should not be made lightly, nor should it rest upon past deficiencies alone'" (*Matter of Jayvien E.*, 70 AD3d 430, 435 [2010]; quoting *Matter of Daniel C.*, 47 AD2d 160, 164 [1975]). Imminent danger must be near or impending, not merely possible (*Jayvien E.*, 70 AD3d at 436). Only where it is shown, by a preponderance of the evidence, that a respondent's mental condition resulted in imminent danger to the child should respondent's mental condition form the basis for a finding of neglect (*id.* at 435). The showing here of Kimberly's bipolar disorder and the two short-lived incidents of failure to take her medication, were insufficient to establish that her psychiatric disorder would be likely to impede her ability to care for her child, resulting in imminent risk of harm to the child if placed with her. Indeed, if bipolar disorder and occasional failures to follow up on medication were enough to support a finding of

neglect, many more children would require foster care.

Moreover, even if the evidence had established by a preponderance of the evidence that Kimberly's psychiatric condition might have made it difficult for her to provide the necessary care for newborn Noah if left entirely on her own, there was a total lack of evidence showing that she could not properly care for Noah if she received daily homemaker and visiting nurse assistance (*see Matter of Daryl R. L.*, 67 AD2d 948 [1979]). Although such assistance is authorized by statute and regulation (*see* Family Court Act § 1015-a; 18 NYCRR 460.2), and although the Family Court initially directed ACS to discuss providing Kimberly with such services, the record fails to reflect that a reasonable effort was made to do so. Notably, while Dr. Ng expressed the view that Kimberly could not handle caring for Noah alone, his opinion seems to have been based on the assumption that she would take the infant home with no social services assistance in place. He was not questioned regarding the nature and extent of services that in his view would enable Kimberly to provide proper care to her infant. Indeed, no witness explained that Kimberly could not successfully care for her infant without placing him at imminent risk if given the assistance of homemaker and visiting nurse services.

Nor was it established that some other aspect of Kimberly's

behavior would place Noah at imminent risk in any manner aside from the claimed possibility that Kimberly would neglect to give him his medication. Unlike the circumstances presented when the 2007 neglect proceeding was filed against her, here it was established that Kimberly was drug-free and fully cooperative with the drug treatment process; her former drug problem was characterized as "in remission." She has substantially complied with the guidance offered by ACS in the ongoing effort to improve her parenting abilities. She had living quarters, and to the extent ACS had not determinated whether her boyfriend's presence was acceptable, there was no evidence indicating that her boyfriend's presence could reflect negatively on Kimberly's parenting ability. Her failure to obtain her GED or vocational training does not indicate a poor attitude or uncooperativeness on Kimberly's part, but rather, resulted from her realistic decision to focus on one endeavor at a time. Nor does that choice of focus impact in any way her parenting ability. Finally, the failure to prepare her home for the infant, as attested to on April 16, 2008, was not further explained or discussed at the fact-finding hearing. If that failure was a reflection of a more general inability on Kimberly's part, ACS should have presented testimony establishing such a fact. As the evidence stands, it does not permit an inference that Kimberly

was unable to undertake normal parental responsibilities.

Cases in which the evidence has established that the parents' mental and emotional state posed an imminent risk of harm to their children have made much stronger showings than the case presented here. An illustration of such a case is found in *Matter of Kayla W.* (47 AD3d 571 [2008]), where this Court considered a claim of child neglect relating to the parent's mental illness. We affirmed a neglect finding where a mother with a major depressive disorder exhibited "extrem[e] agitat[ion]," "low frustration tolerance" and lack of insight into her illness and the need for treatment (47 AD3d at 571). She cursed at hospital staff and punched a wall so hard she visibly hurt her hand, necessitating sedation and restraint (*id.*). She also exhibited explosive angry outbursts in front of her child, who was visibly upset (*id.* at 572). The mother was uncooperative with therapists, did not want to discuss her symptoms and her anger and her actions made it likely the child would be at risk of imminent harm (*id.*).

Similarly, in *Matter of Caress S.* (250 AD2d 490 [1998]), this Court affirmed a neglect finding where a mother adamantly refused to take her medication, even during supervised visits with her child, despite her "evident stress." The mother exhibited "bizarre behavior" and "erratic temperament" and

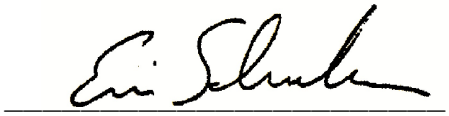
refused to attend recommended psychiatric treatment sessions (*id.* at 490).

Kimberly's situation contrasts sharply with these. Unlike the mother in *Kayla W.*, Kimberly acknowledged that she suffered from a mood disorder and made every effort to get help. Kimberly did not display angry or violent behavior and there was no evidence of her requiring restraints or sedation. Indeed, Dr. Ng acknowledged that her mood swings were stable during the repeated occasions that he met with her after Noah's delivery, so there is no indication that her mood swings would pose an imminent risk of harm to Noah. Dr. Ng described Kimberly as "honest" and "forthright," always very "polite and appropriate," and said she voluntarily asked for her dosages to be adjusted when she felt her symptoms were not adequately controlled. Unlike the mothers in *Kayla W.* and *Caress S.*, Kimberly cooperated with her treatment. She has a history of good relationships with her therapists and regularly attended group and individual therapy, and was "very good with keeping her appointments." In sum, based

upon the evidence presented, it is my view that the evidence failed to establish a likelihood of an imminent risk of harm, and accordingly, I would reverse the finding of neglect.

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

ENTERED: DECEMBER 21, 2010



DEPUTY CLERK

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

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Joseph W. Sullivan,
Plaintiff-Respondent,

-against-

William F. Harnisch, et al.,
Defendants-Appellants.

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Fulbright & Jaworski LLP, New York (James Nespole of counsel), for appellants.

Sklover Donath & Felber, LLC, New York (Daniel M. Felber of counsel), for respondent.

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Orders, Supreme Court, New York County (Richard B. Lowe III, J.), entered March 8, 2010, modified, on the law, to the extent of granting defendants' motion to dismiss the second cause of action, and denying plaintiff's motion to dismiss the first counterclaim, and otherwise affirmed, without costs.

Opinion by Nardelli, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
David Friedman
Eugene Nardelli
Karla Moskowitz
Roslyn H. Richter, JJ.

3147-3147A
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Joseph W. Sullivan,
Plaintiff-Respondent,

-against-

William F. Harnisch, et al.,
Defendants-Appellants.
_____x

Defendants appeal from orders of the Supreme Court, New York County (Richard B. Lowe III, J.), entered March 8, 2010, which, to the extent appealed from, denied their motion for summary judgment dismissing plaintiff's second, third, fourth, fifth, and eighth causes of action and granted plaintiff's motion pursuant to CPLR 3211(a)(7) to dismiss their first counterclaim.

Fulbright & Jaworski LLP, New York (James Nespole and Neil G. Sparber of counsel), for appellants.

Sklover Donath & Felber, LLC, New York (Daniel M. Felber and Benjamin N. Leftin of counsel), for respondent.

NARDELLI, J.

The principal issue before us is whether an exception to the employment-at-will doctrine should be made for an employee who claims that his discharge violated his firm's Code of Ethics, because his superior retaliated against him for his internal inquiries into the superior's illegal trading activity. We hold that in this case such an exception does not exist, and, in the absence of a specific contractual provision protecting plaintiff from termination, those causes of action which are founded on his claim that he had an implicit contractual right not to be fired should be dismissed.

The corporate defendants, Peconic Partners LLC and Peconic Asset Managers LLC (Peconic), are institutional investment managers and registered investment advisors. Defendant William F. Harnisch is the majority owner and president of both companies, and maintains full management control over them. The business of Peconic is subject to the oversight of the United States Securities & Exchange Commission. Between September 28, 2008 and October 13, 2008, plaintiff Joseph Sullivan was Peconic's Chief Compliance Officer (CCO) and Chief Operating Officer, and held a 15% ownership interest in Peconic.

As mandated by, inter alia, 17 CFR 275.206(4)-7, Peconic maintains a written Code of Ethics which all its employees are required to follow. Section I.2 of the Code requires the CCO, "on pains of termination," to "determine" when alerted, whether an employee or member of Peconic has engaged in any Code violation.

Peconic also discloses to its current and prospective clients, and files with the SEC, a document entitled Part II Form ADV, which, inter alia, outlines what controls are in place to ensure compliance with state and federal rules and regulations.

Peconic employees are permitted to maintain and manage proprietary securities accounts. All employees, however, are required to obtain consent from the CCO before engaging in any trades on their own behalf. Proprietary trading is further restricted by the Form ADV and Code restrictions on taking advantage of investment opportunities that should first be accorded to clients.

Peconic had staked large sums of its investors' capital on the fertilizer industry, mostly with Potash Corp. of Saskatchewan, Inc. and a related company, Mosaic Corp. Prior to September 2008, Harnisch personally held over $100 million in

Potash stock, and his clients held approximately $60 million worth of the same stock.

On September 29 and 30, 2008, Harnisch sold two-thirds (784,085 shares) of his Potash shares at $132 per share, without either pre-clearing the trades with Sullivan or notifying Peconic clients who owned holdings in Potash. Also allegedly in violation of the Form ADV and Code, these actions were taken without Harnisch making similar trades for the firms' clients. Upon learning of the sales, Sullivan blocked the October purchase of Potash shares with new client investment monies until he could determine why Harnisch had sold from his own accounts and not for Peconic clients.

On October 1, 2008, Mosaic released a disappointing third-quarter earnings report. By the market opening on the next day, its stock price had dropped more than 15%. On October 2, 2008, Peconic sold half of the shares of Potash stock held in client accounts (230,000 shares) at an average price of $103 per share. Peconic's clients were estimated to have lost $6,670,000 by not having their Potash stock sold at the same time that Harnisch sold his personal Potash shares. Harnisch thereafter sold the remaining shares of Potash held in his personal accounts (243,900 shares) on October 6, 2008 without selling any of the remaining 229,965 shares of Peconic's clients' Potash stock.

Sullivan claims that after reviewing Harnisch's September 29 and 30 Potash sales against Peconic' October 2 trading activity on behalf of clients, he believed, in his professional judgment, that Harnisch had engaged in "front-running," a practice specifically forbidden by Peconic's SEC Form ADV and its Code, as well as its Compliance Manual.

On October 6, 7 and 8, 2008, Sullivan questioned Harnisch about the apparent front-running, and Harnisch allegedly refused to provide Sullivan with any explanation. On October 10, 2008, when all the data necessary to complete the review of the Potash trades would have become available, Harnisch, according to the complaint, summarily terminated the employment of Sullivan and nonparty Daniel Otmar, the Deputy Compliance Officer; wiped out all of Sullivan's computer data, including Peconic's trading logs; and expelled Sullivan from Peconic's partnership. I note that Sullivan does not allege that he made any complaint to the SEC or any other government agency.

Sullivan commenced this action on November 10, 2008, alleging a claim for retaliatory firing as well as claims regarding defendants' refusal to pay Sullivan the value of his

ownership interest in Peconic. Included in the original complaint were the names of four corporate investors set forth as part of the allegations that Harnisch had breached his fiduciary duty to the Peconic clients by his September 29 and 30 Potash trades. After the original complaint was filed, copies were released to the media. Defendants subsequently moved to strike the names of the clients, and the motion was granted in an order entered February 6, 2009. The court specifically stated, in relevant part, "The information is prejudicial as there is no denial that Peconic's client information is deemed confidential and protected by the Peconic companies."

Sullivan filed an amended complaint on March 10, 2009, which asserted nine causes of action, only five of which are relevant to the appeal. They are breach of implied contract of employment (second), tortious interference with Sullivan's contractual relationship with Peconic and third parties (third), fraud (fourth), conspiracy to defraud (fifth) and breach of fiduciary duties (eighth).

In their answer defendants alleged 10 counterclaims, only one of which is at issue on the appeal. In the first counterclaim, defendants alleged that plaintiff had damaged defendants because Sullivan's complaint had identified certain

clients in violation of Sullivan's continuing obligation of confidentiality, and then Sullivan disseminated the complaint publicly. Certain of those clients, it is alleged, subsequently withdrew their funds from Peconic accounts.

After cross-motions to dismiss certain of the causes of action and the counterclaims, the court dismissed the first counterclaim, and denied defendants' motion to dismiss the five causes of action at issue on the appeal.

While acknowledging an employer's right to terminate an at-will employee under normal circumstances, the court found that, at this prediscovery stage, an "express limitation" to the at-will discharge rule may result from the language found both in the Peconic Handbook prohibiting retaliation, and also from the Code language specifically requiring the CCO to report complaints to the SEC. We find that nothing in the record supports the validity of the claim for breach of an implied contract.

It is axiomatic in New York that "where an employment is for an indefinite term it is presumed to be a hiring at will which may be freely terminated by either party at any time for any reason or even for no reason" *(Wieder v Skala*, 80 NY2d 628, 633 [1992], citing *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 300 [1983]). "[A]bsent a constitutionally impermissible purpose,

a statutory proscription, or an express limitation in the individual contract of employment, an employer's right at any time to terminate an employment at will remains unimpaired" (*Murphy*, 58 NY2d at 305).

The Peconic Code of Ethics requires that each person report to the CCO all purchases and sales in any security in which the person has any beneficial interest, and requires that each employee pre-clear trades with the CCO. Additionally, the Code (as well as the Form ADV) requires the CCO to report to the Chief Operating Officer and the President, following the receipt of any employee trading information, any apparent violation of the reporting requirements of this Code.

As hard as the result may seem, however, nothing in either document protects the CCO from being terminated, even though the Code authorized Sullivan to make his complaint to the SEC. As has been observed, courts should not "infer a contractual limitation on the employer's right to terminate an at-will employment absent an express agreement to that effect which is relied upon by the employee" (*Chazen v Person/Wolisky, Inc.*, 309 AD2d 889, 890 [2003], quoting *Doynow v Nynex Publ. Co.*, 202 AD2d 388 [1994]).

In *Wiener v McGraw Hill, Inc.* (57 NY2d 458 [1982]), the Court of Appeals found that a cause of action for breach of an employment contract was sufficiently stated by a security guard who was able to point to specific language in the employee handbook which stated that the employer would "resort to dismissal for just and sufficient cause only, and only after all practical steps toward rehabilitation or salvage of the employee have been taken and failed" (*id.* at 460).

On the other hand, four months later in *Murphy v American Home Prods. Corp.* (58 NY2d 293 [1983], *supra*), the Court of Appeals rejected the claim of a discharged, at-will employee who had reported accounting improprieties but who was relying only on an implied covenant of good faith to support his breach of contract claim (58 NY2d at 304-305). The Court made clear that it believed that any changes in what it viewed as a public policy matter should be made by the Legislature (*id.* at 301-302).

The at-will doctrine was reaffirmed in *Sabetay v Sterling Drug* (69 NY2d 329 [1987]). There, the plaintiff had refused to participate in illegal activities and was terminated. He argued that since the personnel manual enumerated seven grounds for termination, and also required an employee to refrain from illegal and unethical activity, there was an implied promise that

he could not be terminated for any other grounds. The Court held that since there was no express limitation on the employer's unfettered right to terminate at will, all the breach of contract causes of action had to be dismissed. The Court observed that statements in the manual and employment application requiring employees to adhere to company rules "merely suggest standards set by [the employer] for its employees' performance of their duties that, without more, cannot be actionable" (*id.* at 336).

The only retreat from the employment-at-will doctrine by the Court of Appeals was reached in *Wieder v Skala* (80 NY2d 628 [1992], *supra*), a case that is sui generis. In *Wieder* an associate at a law firm claimed that he had been discharged for insisting that the firm report unethical conduct of another associate at the same firm, which conduct included numerous misrepresentations and acts of malpractice against clients and acts of forgery of checks drawn on the firm's account. The court held that Wieder had stated a valid claim for breach of contract based upon an implied-in-law obligation in his relationship with the law firm. It reasoned that intrinsic to the relationship between Wieder and the law firm was an unstated but essential compact that in conducting the firm's legal practice, both Wieder and the firm would do so in compliance with the prevailing rules

of conduct and ethical standards of the legal profession. The firm's insistence that Wieder, as an associate in its employ, act unethically and in violation of Code of Professional Responsibility DR l-103(A), amounted to nothing less than a frustration of the only legitimate purpose of the employment relationship:

> "[I]n any hiring of an attorney as an associate to practice law with a firm there is implied an understanding so fundamental to the relationship and essential to its purpose as to require no expression: that both the associate and the firm in conducting the practice will do so in accordance with the ethical standards of the profession. Erecting or countenancing disincentives to compliance with the applicable rules of professional conduct, plaintiff contends, would subvert the central professional purpose of his relationship with the firm - the lawful and ethical practice of law" (*id.* at 636).

As noted by defendants, *Wieder* has not been applied to a business or profession other than the practice of law (*see e.g. Haviland v J. Aron & Co.*, 212 AD2d 439, 440-41 [1995], *lv denied* 85 NY2d 810 [1995] [plaintiff, who claimed to have been fired for refusing to breach confidentiality of clients, was hired as a broker and not a lawyer, and any services rendered to employer were not sufficient to bring claim within narrow exception of *Wieder*]; *see also Horn v New York Times*, 100 NY2d 85 [2003]

[plaintiff physician's duties as Associate Medical Director arose not solely from her knowledge as a physician, but also in furtherance of her responsibilities as part of corporate management]).

Indeed, we have in the past specifically declined to extend the *Wieder* exception to an auditor employed by a brokerage house (*see Mulder v Donaldson, Lufkin and Jenrette*, 208 AD2d 301 [1995]). In *Mulder*, the court noted that *Wieder* was grounded in the "unique characteristics of the legal profession" (208 AD2d at 306), although it did leave open the potential for a cause of action for breach of express contract based upon a provision in the defendant's employment manual which specifically provided that an employee who reports wrongdoing "will be protected against reprisals" (*id.* at 307). As noted above, however, such language, express or otherwise, does not appear in the Peconic handbook.

Thus, the second cause of action for breach of implied contract should have been dismissed, since it is founded on the erroneous premise that the company "speak out" policy itself protects an at-will employee such as Sullivan. Notwithstanding his employment responsibilities, and the conflict posed, he did not have either an express or implied right to continued

employment. While some may disagree, absent extension of the *Wieder* exception by the Court of Appeals, or action by the Legislature, the existing precedent mandates this result.

The third cause of action for tortious interference with advantageous and prospective advantageous business relations alleges that by terminating Sullivan and by threatening parties that do business with Peconic, Harnisch interfered with Sullivan's relations with Peconic, as well as with the third parties. The language of the cause of action appears to suggest that the business relations with Peconic encompassed not only Sullivan's employment with Peconic, but also his ownership interest in the company. To the extent the third cause of action asserts claims concerning the ownership interest, as well as claims concerning the alleged interference with other third parties, it is permitted to stand. Any claims, however, for damages based on loss of employment cannot be sustained.

We also find that the court did not err in refusing to dismiss the fourth, fifth and eighth causes of action for fraud, conspiracy to defraud, and breach of fiduciary duty, respectively. Defendants argue these claims are but an alternative way for plaintiff to plead his meritless claim of wrongful discharge. They take note of case law which holds that

the employment-at-will doctrine "cannot be circumvented by casting the cause of action in terms of tortious interference with employment" (*see Barcellos v Robbins*, 50 AD3d 934, 935 (2008), *lv denied* 11 NY3d 705 (2008).

Yet, these three causes of action allege more than conduct resulting in the wrongful termination of Sullivan's employment. In the fourth cause of action for fraud or attempted fraud, for instance, Sullivan alleges, inter alia, that defendants represented that he was a 15% owner of Peconic and was entitled to 33 1/3% of the profits, but that defendants never intended to provide him with his entitlement.

Likewise, in the fifth cause of action, Sullivan alleged that defendants conspired to defraud him of his ownership and management of the companies (as well as his employment and career). In the eighth cause of action, Sullivan alleged that Harnisch breached his fiduciary duties against Sullivan, a co-member of the limited liability companies, by expelling Sullivan and, inter alia, denying him his share of due profits and ownership interests.

Thus, all three of these causes of action seek recompense for property rights that arise, at least in part, from something other than a claim of wrongful discharge, and should not be

dismissed. To the extent they raise such claims, they remain viable, but we caution that any claims relying on the argument that Sullivan was wrongfully discharged cannot be entertained. We make no determination as to the merit of the claims, and note that the only argument presently advanced by defendants for their dismissal is that they are attempts to circumvent the prohibition against claims for wrongful discharge (*see e.g. Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1994])

Finally, the court erred in dismissing the first counterclaim. In granting that part of the motion, it observed that Sullivan was an at-will employee and that fiduciary duties do not exist between an employer and an at-will employee. The court further held that defendants "failed to allege a binding confidentiality agreement." This determination was inconsistent with its prior order in which it found that Peconic's client information was confidential, and directed that the names of the clients should be stricken from the complaint. On this record, it was premature to determine that the obligation to keep the identities confidential did not apply to an at-will employee, especially in view of the confidentiality provision of the firm's Code of Ethics, which appears to apply to all employees, and which specifically recites, "Client and Client account information is also confidential and must not be discussed with

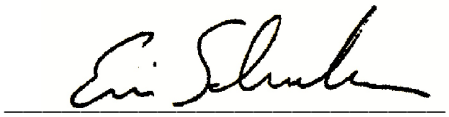
any individual whose responsibilities do not require knowledge of such information."

Accordingly, the orders of the Supreme Court, New York County (Richard B. Lowe III, J.), entered March 8, 2010, which, to the extent appealed from, denied defendants' motion for summary judgment dismissing plaintiff's second, third, fourth, fifth, and eighth causes of action and granted plaintiff's motion pursuant to CPLR 3211(a)(7) to dismiss defendants' first counterclaim, should be unanimously modified, on the law, to the extent of granting defendants' motion to dismiss the second cause of action, and denying plaintiff's motion to dismiss the first counterclaim, and otherwise affirmed, without costs.

All concur.

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

ENTERED: DECEMBER 21, 2010



DEPUTY CLERK

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

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3642A

Index 601148/09

GoSmile, Inc., etc.,
Plaintiff-Appellant,

-against-

Jonathan B. Levine, D.D.S., etc.,
Defendant-Respondent.

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Barack Ferrazzano Kirschbaum & Nagelberg LLP, Chicago, IL (Wendi E. Sloane of the Bar of the State of Illinois, admitted pro hac vice, of counsel), for appellant.

Davidoff Malito & Hutcher LLP, New York (Joshua Krakowsky of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered November 4, 2009, reversed, on the law, with costs, and those causes of action reinstated. Appeal from order, same court and Justice, entered August 10, 2009, dismissed, without costs, as academic.

Opinion by Acosta, J. All concur except Nardelli, J. who dissents in part in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Richard T. Andrias
Eugene Nardelli
Rolando T. Acosta
Leland G. DeGrasse, JJ.

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GoSmile, Inc., etc.,
Plaintiff-Appellant,

-against-

Jonathan B. Levine, D.D.S., etc.,
Defendant-Respondent.

_____x

Plaintiff appeals from an order of the Supreme Court, New York County (Charles E. Ramos, J.), entered November 4, 2009, which granted defendant's motion to dismiss the first and second causes of action (denominated Counts I and II) in the amended complaint, and from an order, same court and Justice, entered August 10, 2009, which also addressed the second cause of action.

Barack Ferrazzano Kirschbaum & Nagelberg LLP, Chicago, IL (Wendi E. Sloane, Heather J. Macklin, Sarah B. Waxman of the Bar of the State of Illinois, admitted pro hac vice, of counsel), and Flemming Zulack Williamson Zauderer LLP, New York (Jonathan D. Lupkin, Mark C. Zauderer and Kimberly A. Pallen of counsel), for appellant.

Davidoff Malito & Hutcher LLP, New York (Joshua Krakowsky and Larry Hutcher of counsel), and Ressler & Ressler, New York (Ellen Werther of counsel), for respondent.

ACOSTA, J.

In this appeal we are asked to consider whether a plaintiff is permitted to assert claims for both fraud and breach of contract, where the fraud claim is based upon allegations that defendant induced plaintiff to enter into a contract based on misrepresentations of present facts. We answer in the affirmative.

In 2002, defendant, and his wife (collectively, the Levines), founded plaintiff corporation, which develops and sells tooth-whitening and oral hygiene products, and were its sole stockholders, directors and employees. In December 2003, defendant sold a majority interest in the company to outside investors. In connection with the sale, on December 30, 2003, the Levines individually entered into confidentiality and non-competition agreements with plaintiff, which provided, among other things, that plaintiff was the exclusive owner of all information and material pertaining to the business, and that the Levines would not unnecessarily disclose such information or use it for their own benefit in any manner adverse to plaintiff's interests. After executing the agreements, the Levines remained at-will employees, directors and minority owners of plaintiff.

In March 2007, plaintiff encountered financial difficulties necessitating a cash infusion. The Levines disagreed with other

large investors as to the best means of accomplishing this, and, as a result, their employment with plaintiff terminated in July 2007. They resigned from the board of directors the following month.

On February 19, 2008, the Levines commenced an action in New York County against plaintiff's controlling shareholder and director alleging that the controlling shareholder destroyed plaintiff's value, and wrongfully terminated defendant. That action was withdrawn and the dispute resolved on April 21, 2008, whereby the Levines entered into a settlement agreement with plaintiff and several other parties, which contained a broad mutual release of all claims of all kinds, whether known or unknown, that the parties ever had or now had. Defendant warranted that he had not breached the 2003 confidentiality and non-compete agreement, and was not then in breach of those agreements. The settlement agreement also provided that plaintiff would buy all of the Levines' stock in plaintiff, and would pay severance to defendant, for which the Levines were paid a total of over $3.35 million.

On that same date, defendant entered into a consulting agreement with plaintiff, which provided, among other things, that all information defendant received while employed by plaintiff would belong only to plaintiff, and that defendant

would not divulge any confidential information and, upon termination, would return all property and information belonging to plaintiff. The consulting agreement also provided for defendant to receive monthly payments totaling $1 million over 4 years. Those payments were made through December 2008, at which time plaintiff allegedly learned that defendant had breached his obligations.

By amended complaint dated July 20, 2009, plaintiff, naming only defendant, alleged fraudulent inducement, based on defendant's representation in Recital 7 of the settlement agreement that he had not breached any provision of the non-compete agreement (first cause of action); breach of contract, based on defendant's breach of the 2003 non-compete agreement (second cause of action); and, in the alternative, breach of contract, based on the settlement agreement (third cause of action) and the consulting agreement (fourth cause of action).[1] Plaintiff sought, among other things, damages and rescission of the settlement and consulting agreements.

Specifically, plaintiff alleged that defendant lied to plaintiff when he represented and warranted that he had never

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[1] On January 29, 2009, plaintiff filed suit in the United States District Court for the Southern District of New York. The District Court dismissed the action based on a forum selection clause.

breached and was not currently in breach of the non-competition Agreement entered into in 2003. Plaintiff also alleged that defendant made misstatements in order to induce plaintiff to settle certain disputes between them and enter into new agreements, the settlement agreement and mutual release of claims, and the consulting agreement, all of which were executed in 2008 (the "2008 agreements"). Plaintiff further alleged that it relied to its detriment on defendant's misrepresentations.

On or about August 13, 2009, defendant moved to dismiss the first and second causes of action, for failure to state a claim, and for sanctions. The motion court granted the motion to the extent of dismissing plaintiff's fraudulent inducement claim on the ground that it was duplicative of plaintiff's claim that defendant breached the 2008 agreements. The motion court also dismissed plaintiff's claim for breach of the 2003 non-compete agreement, on the ground that even in the pre-answer stage in which the court must accept plaintiff's allegations as true and give plaintiff the benefit of every reasonable inference (*see generally Bernstein v Kelso & Co.*, 231 AD2d 314 [1997]), plaintiff had no valid fraudulent inducement claim and was not entitled to rescission of the 2008 agreements. Specifically, the court concluded that since the 2008 agreements included mutual releases, plaintiff had released any claim under the 2003 non-

compete agreement. We disagree.

To state a claim for fraudulent inducement, there must be a knowing misrepresentation of material present fact, which is intended to deceive another party and induce that party to act on it, resulting in injury (*Sokolow, Dunaud, Mercadier & Carreras, LLP v Lacher*, 299 AD2d 64, 70 [2002]). Generally, to recover damages for a tort, such as fraud, in a contract action, plaintiff needs to plead and prove "a breach of duty distinct from, or in addition to, the breach of contract" (*Non-Linear Trading Co. v Braddis Assoc.*, 243 AD2d 107, 118 [1998] [internal quotation marks ommitted]).

This Court, as well as the Court of Appeals, has held that a misrepresentation of present facts, unlike a misrepresentation of future intent to perform under the contract, is collateral to the contract, even though it may have induced the plaintiff to sign it, and therefore involves a separate breach of duty (*Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 {1986]; *see also First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 291-292 [1999] [concurrent causes of action for fraud and breach of contract may lie where plaintiff alleges it was induced to enter into a contract based on defendant's misrepresentation of material facts]).

In the instant matter, plaintiff's allegation that defendant

knowingly misrepresented that he did not breach the confidentiality and non-compete provisions of the 2003 agreement is not merely an insincere promise of future performance. It was instead, a misrepresentation of then present facts that was collateral to the contract, and thus plaintiff sufficiently alleged a cause of action sounding in fraud (*see Graubard Mollen Dannett & Horowitz v Moskovitz*, 86 NY2d 112, 122 [1995] [cause of action for fraud may arise when one party misrepresents a material fact, knowing it is false, which the other party relies on to its detriment]). Plaintiff's claim for fraudulent inducement is not based on an allegation that defendant misrepresented his future intention to comply with the 2008 agreements. It was based, rather, on an allegation that defendant fraudulently induced plaintiff to enter into the 2008 agreements based on the misrepresentation of a present fact, namely that at the time he entered into the contract, plaintiff had not breached the 2003 non-compete agreement. Specifically, even after being paid over $3 million dollars in severance, and agreeing to receive monthly payments totaling $1 million over a four year period, defendant retained and used for his own benefit plaintiff's confidential financial documents and strategic business and marketing plans, and developed and marketed competitive teeth-whitening products through a competing venture.

Plaintiff's fraudulent inducement claim is, therefore, separate from and may be maintained in addition to its breach of contract claim.

The motion court erroneously held that the breach of contract claims regarding the 2003 agreements were not viable since the settlement agreement contained a mutual release of all claims. Inasmuch as plaintiff has pleaded a fraudulent inducement claim, rescission of the 2008 agreements might result, at which time plaintiff's breach of contract claim based on the 2003 agreement might be valid (*see Sokolow, supra*, at 70-71 [rescission is a viable remedy where one party pleads that it was fraudulently induced to enter into a contract]). To be sure, if plaintiff is able to prevail on its fraudulent inducement claim and its request for rescission, the 2008 agreements (and the releases contained therein) may be rendered void, and the 2003 non-compete agreement breach claim revived. Clearly, plaintiff had reason to require a warranty from defendant that plaintiff's trade secrets were intact, and it is eminently plausible that plaintiff would not have paid millions of dollars to defendant had it known that defendant had by that time manufactured a competing product and solicited customers from plaintiff's clients and potential clients.

Defendant's reliance on *Centro Empresarial Cempresa S.A. v*

*América Móvil, S.A.B. de C.V.* (76 AD3d 310 [2010]) is misplaced. In that action, the plaintiffs alleged that they were induced to sell their minority interest in a company based on misrepresentations made to them by the defendants concerning the value of the underlying venture. This Court held that the causes of action for fraud and breach of contract were barred by the general releases granted to the defendants. We specifically noted that the plaintiff in *Centro* entered into the transaction fully aware that the defendants did not give them access to internal financial records, and that if the plaintiffs did not intend to release claims of fraud that they might discover in the future, they should have demanded access to the internal books and records. Moreover, the plaintiffs should have insisted that the release be conditioned on the truth of the financial information provided by the defendants, and in failing to do so, the plaintiffs willingly assumed the business risk. In the instant case, plaintiffs, as we suggested in *Centro,* did in fact request an express warranty from defendants as to the veracity of the information provided. The general release unequivocally stated that it did not extend to claims which "[plaintiff] does not know or suspect to exist in his favor at the time of executing the release."

Finally, the dissent's concerns that our holding could be

cited for the proposition that a breach of a written warranty, without additional facts, would give rise to an independent tort cause of action is unfounded. There are many "additional" facts in this particular case, as well as the written warranty, and our holding based on the facts in this particular action is amply supported by this Court's and Court of Appeals precedent.

Accordingly, the order of the Supreme Court, New York County (Charles E. Ramos, J.), entered November 4, 2009, which granted defendant's motion to dismiss the first and second causes of action (denominated Counts I and II) in the amended complaint, should be reversed, on the law, with costs, and those causes of action reinstated. The appeal from the order of the same court and Justice, entered August 10, 2009, which also addressed the second cause of action, should be dismissed, without costs, as academic.

All concur except Nardelli, J. who dissents
in part in an Opinion:

NARDELLI, J. (dissenting in part)

I agree with the majority that the second cause of action should be reinstated because the motion court's predicate for dismissing it, i.e., that the 2008 settlement agreement could not be rescinded, and thus, as a result of the contractual language contained within it, rendered the 2003 non-compete agreement academic, was faulty.

As the majority notes, the 2008 settlement agreement can be rescinded if plaintiff can prove that defendant's representation that he had not breached the non-compete agreement is established to be false. The elements of a claim for rescission based upon fraudulent inducement are that there must be a knowing misrepresentation of present material fact which is intended to deceive another party and which induces the other party to act upon the misrepresentation with resultant damage (*Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 [2002]). These elements are sufficiently pleaded. If the settlement agreement is rescinded, the non-compete agreement would be revived.

Where I part company with the majority is its determination that the first cause of action for fraudulent inducement based upon a written representation within the settlement agreement is not duplicative of the third cause of action for breach of

contract. "It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.,* 70 NY2d 382, 389 [1987]). "This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract" (*id.*). Here, the representation concerning compliance with the prior non-compete agreement was contained within the settlement agreement, with the result that any resultant damages did not flow from a non-contractual duty extraneous to the contract, but rather from a breach of the contract itself.

The majority's blithe characterization of this dissent as unwarranted because of the existence of "additional" facts (not given) as well as the existence of ample legal precedent (also not given) is, at a minimum, mystifying. This totally conclusory response ignores that in the first cause of action in the complaint, the only fact upon which plaintiff relies is "Dr. Levin's representation and warranty in Recital 7 of the settlement agreement." There are no other facts or, more importantly, no other allegations of any other misrepresentation.

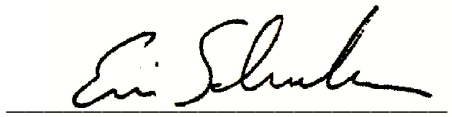
To suggest that there are other misrepresentations means that the majority is conjuring up facts not alleged by plaintiff

in its complaint, and even now not revealed in the majority opinion. This concealment is an invitation to jurisprudential mayhem. It is not the province of any court, let alone an appellate court, to create facts for a party.

Nevertheless, although the tort claim for fraudulent inducement should not be reinstated, this does not mean that the prayer for rescission cannot be entertained. I would nostra sponte grant plaintiff leave to amend its third cause of action for breach of contract to also assert a request for rescission, along with its claim for damages. Although such a result might appear to be a matter of semantics, it would prevent this case from being cited in the future for the proposition that a breach of a written warranty also, without any additional facts, gives rise to an independent tort cause of action.

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

ENTERED: DECEMBER 21, 2010



DEPUTY CLERK