SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 6, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Friedman, Catterson, Manzanet-Daniels, Román, JJ.

4225 Paul Eggert, Index 11541/07
Plaintiff-Appellant,

-against-

GCD Recording Studios, etc., et al.,
Defendants,

Juan Perez,
Defendant-Respondent.

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McCabe & Associates, New York (Gerard McCabe of counsel), for appellant.

Wilk Auslander LLP, New York (Helen A. Rella of counsel), for respondent.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered February 13, 2009, which granted defendant Perez's motion to dismiss the second amended complaint as against him, unanimously reversed, on the law, without costs, and the motion denied.

The motion court improperly determined that the cause of action alleging fraud as against Perez was not pleaded with sufficient particularity under CPLR 3016(b). The second amended

complaint cured the initial infirmities identified by the court on a prior motion by alleging that Perez, in seeking to persuade plaintiff to invest in defendant GCD, told plaintiff that he "was an active participant in GCD," an assertion allegedly false when made, and that based on that representation plaintiff agreed to loan money to GCD. Accordingly, plaintiff has alleged facts "sufficient to permit a reasonable inference of [fraud]" against Perez (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]).

Plaintiff's belated compliance with the stipulation so ordered by this Court on February 2, 2010 and failure to comply with the stipulation filed with this Court on April 19, 2010 do not constitute "frivolous conduct" for the purpose of imposing sanctions under 22 NYCRR 130-1.1. Although counsel's conduct was less than punctilious, it did not constitute willful delay, harassment, or intent to maliciously injure.

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

ENTERED: DECEMBER 6, 2011

CLERK

Andrias, J.P., Saxe, Catterson, Abdus-Salaam, Manzanet-Daniels, JJ.

4796 Andre P. Chappotin, Index 107593/04
Plaintiff-Respondent,

-against-

City of New York,
Defendant,

Consolidated Edison Companies,
Defendant-Appellant.

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

Greenberg & Stein, P.C., New York (Ian Asch of counsel), for respondent.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered July 14, 2010, which granted plaintiff's motion to set aside the verdict in favor of defendant Consolidated Edison Companies on the ground that defense counsel's summation remarks deprived him of a fair trial, reversed, on the law, without costs, plaintiff's motion denied, and the verdict reinstated. The Clerk is directed to enter judgment dismissing the complaint as against Consolidated Edison Companies.

Trial counsel is afforded wide latitude in presenting arguments to a jury in summation (*see Califano v City of New York*, 212 AD2d 146, 154-155 [1995]). Where defense counsel remains within the broad bounds of rhetorical comment in pointing

out the insufficiency and contradictory nature of a plaintiff's proof, such remarks do not deprive the plaintiff of a fair trial (*McDonald v City of New York*, 172 AD2d 296, 297 [1991], *lv denied* 78 NY2d 861 [1991]). Defense counsel came close to overstepping that line when he argued, inter alia, referring to plaintiff, that "this is a man who has played the system going on 15 years," noting that he had been on disability since 1995; that "[h]ere's someone who doesn't have a concern about getting medical care. He doesn't have a concern about working."

However, plaintiff failed to object to 13 of the 15 comments of which he now complains. The court sustained the two objections that were actually made by plaintiff. Furthermore, the court gave a curative instruction. Plaintiff failed to preserve his objections and the verdict should be reinstated (*see Penn v Amchem Prods.*, 73 AD3d 493 [2010]; *Wilson v City of New York*, 65 AD3d 906 [2009]; *Bennett v Wolf*, 40 AD3d 274 [2007], *lv denied* 9 NY3d 818 [2008]; *Smith v Au*, 8 AD3d 1 [2004].

All concur except Manzanet-Daniels, J. who dissents in a memorandum as follows:

MANZANET-DANIELS, J. (dissenting)

I would find that defense counsel overstepped the permissible line of advocacy. Defense counsel argued that plaintiff "is a man who has played the system going on 15 years," further noting that plaintiff had been on disability since 1995; that "[h]ere's someone who doesn't have a concern about getting medical care. He doesn't have a concern about working." Defense counsel made additional comments including "This is someone who understands how to make his way in the world. He has come here with a story about falling here." Counsel argued, "I submit to you that the truth that you heard from [plaintiff] stopped by the time he was picked up on the corner of 112th Street and Third Avenue. And that everything from that time forward has been designed to create and advance a lawsuit. Money is a huge motivator. Now, Lord knows it's true, that he is looking for my money. And I don't want to give it. And you shouldn't want to give it when you really evaluate how this case has come to you." Defense counsel further remarked, "This is a classic case. You have been lied to by the plaintiff. There is no nice way to say this. You have been lied to by the plaintiff and his goal is to obtain money."

Counsel's assertions that plaintiff had "played the system,"

"[had no] concern about working," and had concocted a story about falling just so he could collect a windfall, were highly inflammatory and served to deprive plaintiff of a fair trial (*see McArdle v Hurley*, 51 AD3d 741, 743 [2008] [defense counsel's remark that plaintiff's husband's disability retirement, with 3/4 pay, was evidence that her entire family was seeking to "'max out in the civil justice system' so contaminated the proceedings as to deprive the plaintiff of a fair trial"]).

I acknowledge that plaintiff failed to preserve his argument as to the propriety of the summation (*see Bennett v Wolf*, 40 AD3d 274, 275 [2007], *lv denied* 9 NY3d 818 [2008]; *Lucian v Schwartz*, 55 AD3d 687, 689 [2008], *lv denied* 12 NY3d 703 [2009]). Given the egregious nature of the remarks, however, I believe that this Court should reach the issue in the interest of justice. Defense counsel's remarks were not isolated, but constituted a "seemingly continual and deliberate effort to divert the jurors' and the court's attention from the issues to be determined" (*Clarke v New York City Tr. Auth.*, 174 AD2d 268, 278 [1992] [internal quotation

marks and citation omitted]), that deprived plaintiff of a fair trial.

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

ENTERED: DECEMBER 6, 2011

CLERK

Andrias, J.P., Sweeny, Acosta, Freedman, Manzanet-Daniels, JJ.

5856 The Lansco Corporation, Index 601089/10
Plaintiff-Respondent,

-against-

Strike Holdings LLC,
Defendant,

GFI Realty Services., Inc.,
Defendant-Appellant.

_____

Stahl & Zelmanovitz, New York (Joseph Zelmanovitz of counsel), for appellant.

Law Office of Lionel A. Barasch, New York (Lionel A. Barasch of counsel), for respondent.

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Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered January 27, 2011, insofar as it granted plaintiff's motion for leave to file a second amended complaint, unanimously modified, on the law, to deny the motion as to the sixth cause of action, and otherwise affirmed, without costs, and the appeal from said order, insofar as it denied defendant GFI's cross motion pursuant to CPLR 3211(a)(7) to dismiss the claims asserted against it in the first amended complaint, unanimoulsy dismissed, without costs, as academic.

GFI's motion to dismiss was rendered academic by the grant of plaintiff's motion to amend (*see Thompson v Cooper*, 24 AD3d 203, 205 [2005]).

The third cause of action states viable claims against GFI. Plaintiff alleges that GFI and defendant Strike conspired to interfere with its right to be the real estate broker for a lease agreement between Strike and the nonparty premises owner. "[C]onspiracy as an independent tort is not recognized in New York" (*Loeb Partners Realty v Sears Assoc.*, 288 AD2d 110, 111 [2001]). However, plaintiff states a cause of action for tortious interference with contract (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]). Plaintiff alleges that GFI tortiously interfered with its alleged co-brokerage agreement with nonparty Robert K. Futterman and Associates, LLC (RKF), and with Strike's alleged promise that it would receive a commission (*see Edward S. Gordon Co. v Tucker Anthony & R.L. Day*, 162 AD2d 319 [1990]). Plaintiff adequately alleges but-for causation (*see Williams & Co. v Collins Tuttle & Co.*, 6 AD2d 302, 307-310 [1958], *lv denied* 5 NY2d 710 [1959]).

The fourth cause of action states a claim against GFI for tortious interference with business relations, specifically plaintiff's relationships with RKF and Strike (*see Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [2009], *lv dismissed in part, denied in part* 14 NY3d 736 [2010]).

The fifth and seventh causes of action also state claims against GFI. Plaintiff alleges that GFI is liable for real

estate brokerage commissions that plaintiff should receive or should have received but for GFI's wrongdoing. If the tortious interference claims are proven, then GFI may well be liable for damages in the amount of the commissions that plaintiff lost.

However, leave to amend is denied as to the sixth cause of action, brought pursuant to Real Property Law § 442-e(3), to recover the commission paid to GFI, an allegedly unlicensed real estate broker. Plaintiff did not pay the commission and accordingly is not a "person aggrieved" under the statute (*see e.g. 2 Park Ave. Assoc. v Cross & Brown Co.*, 43 AD2d 37, 39-40 [1974], *affd* 36 NY2d 286 [1975]).

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

ENTERED: DECEMBER 6, 2011

CLERK

Andrias, J.P., Sweeny, Acosta, Freedman, Manzanet-Daniels, JJ.

5857 In re Arkel Wilson, Index 116992/09
Petitioner,

-against-

New York City Housing Authority, et al.,
Respondents.

_____

Cohen, Weiss and Simon, LLP, New York (Travis M. Mastroddi of counsel), for petitioner.

Sonya M. Kaloyanides, New York (Mindy Merdinger Blackstock of counsel), for respondents.

_____

Determination of respondent New York City Housing Authority, dated August 7, 2009, which, after a hearing, terminated petitioner's employment based on misconduct, unanimously annulled, with costs, the petition granted, petitioner reinstated to his former position, and the proceeding (transferred to this Court by order of the Supreme Court, New York County [Marylin G. Diamond, J.], entered June 17, 2010) remanded to the Supreme Court for a determination of an award of back pay and benefits from the date of termination to the date of reinstatement.

The finding that petitioner was in constructive possession of a loaded firearm on the date at issue, based on the statutory presumption of Penal Law § 265.15, was not supported by substantial evidence (*see Matter of American Tel. & Tel. Co. v State Tax Commn.*, 61 NY2d 393, 400 [1984]).

Petitioner was driving his friend's car when it was stopped for a traffic violation. His friend was sitting in the front passenger seat and petitioner's brother was sitting behind petitioner in the back seat.

One of the arresting officers testified that after shining his flashlight into the car, he was able to see some loose cartridges on the rear floor mat behind the passenger seat. Consequently, the car was searched and a loaded firearm and additional ammunition were recovered in a cooler bag underneath the front passenger seat where petitioner's friend was sitting. While all three occupants of the car were arrested, the officer testified that, as far as he knew, there was no criminal case against petitioner.[1]

The other arresting officer testified that he did not see the loose ammunition in the back seat when he first approached the vehicle and that he took a verbal statement from petitioner's friend, who said that the firearm and the ammunition found in the bag was his. Petitioner testified that he did not know that there was a gun or cartridges in his friend's car. He never saw a bag under the front passenger seat and did not look into the

[1]We note that on August 25, 2010 petitioner pleaded guilty to the traffic violation of illegal signaling, and was sentenced to a conditional discharge of one year and a $1 fine.

back seat.

By this evidence, the presumption that petitioner possessed a loaded firearm was rebutted (Penal Law § 265.15[3]). Indeed, there is no evidence that petitioner had access to the bag hidden under the front passenger seat or that he was aware of its contents (*see People v Lemmons*, 40 NY2d 505, 511 [1976]), and petitioner's friend, the owner of the car, admitted against his penal interest that the firearm found in the car was his (*see People v Cullen*, 138 AD2d 501, 503 [1988] [statutory presumption was rendered incredible where a passenger in the car at the time of the defendant's arrest testified that the gun in question was his and that, without the defendant's knowledge, he had been carrying it in his pocket]). As such, it was error for the Hearing Officer to find that petitioner possessed a firearm and to recommend that he be terminated from his position.

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

ENTERED: DECEMBER 6, 2011

CLERK

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

5951 Leon O. Woods, Index 17360/06
Plaintiff-Respondent,

-against-

M.B.D. Community Housing
Corporation, etc., et al.,
Defendants-Appellants.

_____

Daniel J. Sweeney & Associates, PLLC, White Plains (Brian M. Hussey of counsel), for appellants.

Timothy P. Devane, New York, for respondent.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about January 19, 2010, which denied defendants' motion to dismiss the complaint pursuant to CPLR 3211 based upon improper service of process, and denied, as moot, plaintiff's cross motion for an extension of time within which to serve defendants pursuant to CPLR 306-b, unanimously reversed, on the law and the facts and in the exercise of discretion, without costs, defendants' motion granted, unless, within 120 days from the date of entry of this order, plaintiff effects proper service on defendants, and plaintiff's cross motion to extend his time to serve granted as indicated.

At the traverse hearing, plaintiff failed to satisfy his burden of establishing proper service by a preponderance of the evidence (*see Chaudry Constr. Corp. v James G. Kalpakis & Assoc.*,

60 AD3d 544 [2009]; *Elm Mgt. Corp. v Sprung*, 33 AD3d 753, 754-755 [2006]; *Continental Hosts v Levine*, 170 AD2d 430 [1991]). The process server did not produce his log book, and neither his affidavits of service nor his testimony established a sufficient basis for his belief that the person he allegedly served was authorized to accept service on behalf of the corporate defendants. Further, defendants' current property manager, who was an assistant manager at the time of the purported service, testified that the address listed on the affidavit of service was not defendants' actual place of business, that defendants had no relation to the incorrect address, and that the person allegedly served was never defendants' employee and was not an individual authorized to accept service.

Plaintiff's cross motion for an extension of time to serve the summons and complaint pursuant to CPLR 306-b should be granted in the interest of justice (*see Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105-106 [2001]; *Wishni v Taylor*, 75 AD3d 747, 749 [2010]; *Earle v Valente*, 302 AD2d 353, 354 [2003]). To meet the "interest of justice" standard, the court must make "a careful judicial analysis of the factual setting of the case and a balancing of the competing interests," including the "expiration of the statute of limitations, the meritorious nature of the cause of action, the length of delay in service, the

promptness of a plaintiff's request for the extension of time, and prejudice to defendant" (*Leader* at 105-106). While this action was timely commenced by proper filing, plaintiff's claim would be extinguished without an extension since the statute of limitations has expired. Merit is demonstrated via plaintiff's December 2006 deposition testimony that he was injured by a broken window, caused by the faulty roof of defendants' building. Prejudice to defendants is mitigated by the facts that they or their insurers had been on notice of the underlying incident for more than two years preceding the action's commencement, counsel had engaged in preliminary settlement negotiations during that period, and plaintiff provided copies of his relevant medical records and photographs of the accident area in 2006 (*see Frank v Garcia*, 84 AD3d 654, 655 [2011]; *DiBuono v Abbey, LLC*, 71 AD3d 720 [2010]).

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

ENTERED: DECEMBER 6, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

6219 The People of the State of New York, Ind. 4180/08
Respondent,

-against-

Antwan O'Conner, etc.,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered December 4, 2009, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of six years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the jury's credibility determinations, including its resolution of inconsistencies in testimony.

The court properly closed the courtroom during an undercover officer's testimony (*see Waller v Georgia*, 467 US 39 [1984]; *People v Ramos*, 90 NY2d 490, 497 [1997], *cert denied sub nom. Ayala v New York*, 522 US 1002 [1997]). Instead of ordering a

complete closure, the court permitted defendant's family and certain other persons to attend. In addition, it implicitly considered but rejected another alternative to closure proposed by defendant, and that determination was reasonable under the circumstances. Accordingly, the court satisfied the *Waller* requirement of considering alternatives to full closure (*see Presley v Georgia*, 558 US __, __, 130 S Ct 721, 724 [2010]; *People Mickens*, 82 AD3d 430 [2011], *lv denied* 17 NY3d 798 [2011], *cert denied* __US__, 2011 WL 4384159, 2011 US LEXIS 7608 [Oct 31, 2011]; *People v Manning*, 78 AD3d 585, 586 [2010], *lv denied* 16 NY3d 861 [2011], *cert denied* __US__, 2011 WL 4534895, 2011 US LEXIS 5278 [2011]).

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

ENTERED: DECEMBER 6, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

6221 In re Anaya Michelle L.,

A Child Under the Age of
Eighteen Years etc.,

– – – – –

Ronald Shamel L.,
Respondent-Appellant,

Leake and Watts Services, Inc.,
Petitioner-Respondent.

_____

Michael S. Bromberg, Sag Harbor, for appellant.

Law Offices of James M. Abramson, PLLC, New York (Dawn M. Orsatti of counsel), for respondent.

Law Offices of Ava G. Gutfriend, Bronx (Ava G. Gutfriend of counsel), attorney for the child.

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Order of disposition, Family Court, Bronx County (Carol Ann Stokinger, J.), entered on or about January 5, 2010, which, upon a fact-finding determination of permanent neglect made at inquest upon respondent father's default, terminated the father's parental rights to the subject child and committed custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The record reflects that respondent received meaningful representation from his counsel throughout the proceedings. Moreover, respondent has failed to show that his counsel's

performance was deficient and that the deficiency prejudiced him (*People v Benevento*, 91 NY2d 708, 712-713 [1998]; *Matter of Aaron Tyrell W.*, 58 AD3d 419 [2009]). Although respondent's counsel was not present for the fact-finding hearing, he excused himself only after the court denied his request for an adjournment due to respondent's failure to appear. Respondent has not presented any excuse, let alone a reasonable excuse, for his default or a meritorious defense (*Matter of Nikeerah S.*, 69 AD3d 421 [2010]).

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

ENTERED: DECEMBER 6, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

6223 The People of the State of New York, Respondent, Ind. 3732/07

-against-

Rodney Davis, Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Matthew L. Mazur of counsel), and Debevoise & Plimpton, LLP, New York (Jeremy N. Klatell of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Martin J. Foncello of counsel), for respondent.

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Judgment, Supreme Court, New York County (Rena K. Uviller, J. at speedy trial motion; A. Kirke Bartley, Jr., J. at jury trial and sentencing), rendered March 6, 2009, convicting defendant of burglary in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 16 years to life, unanimously affirmed.

Defendant raises several issues relating to DNA evidence. Defendant's DNA matched DNA found on a cigarette butt recovered from a bedroom at the burglarized premises, and it also matched DNA found in a bloodstain left on a wall. It appears that prior to trial both the prosecutor and defense counsel misunderstood a laboratory report to mean that a match was found as to the cigarette butt but not the bloodstain.

Defendant contends that his trial counsel rendered ineffective assistance when he inadvertently elicited testimony that defendant's DNA matched the bloodstain. However, we conclude that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). This is a case where the trial record itself permits review of the ineffective assistance claim (*see People v Brown*, 45 NY2d 852, 853 [1978]).

Defendant has not shown a reasonable probability that any mistake in eliciting incriminating evidence concerning the bloodstain affected the outcome of the trial or rendered the trial unfair (*see People v Davis*, 78 AD3d 435, 436 [2010], *lv denied* 16 NY3d 742 [2011]). The evidence of defendant's guilt was already overwhelming without the second DNA match. This evidence included the DNA match relating to the cigarette butt, as well as defendant's highly incriminating statements and behavior when he returned to the scene and encountered the victim. Contrary to defendant's arguments, the evidence excludes any reasonable possibility that defendant left the cigarette in the apartment at the time he returned to the premises instead of at the time of the burglary.

Defendant did not preserve his claim that the prosecutor

deprived him of a fair trial by creating a misleading impression that only the cigarette yielded a DNA match. Defendant made that claim for the first time in a postverdict motion, which was insufficient to preserve the issue for appellate review (*see People v Padro*, 75 NY2d 820, 821 [1990]).

We decline to review this claim in the interest of justice, and as an alternative holding we find no basis for reversal. The People fulfilled their discovery obligations by turning the DNA report over to the defense (*see* CPL 240.20[1][c]). At various stages of the litigation, including the trial itself, the prosecutor did create a misleading impression that defendant's DNA was found only on the cigarette and not the bloodstain; the prosecutor evidently was under that misimpression himself. Nevertheless, this did not require the drastic remedy of a new trial, the only remedy available given that defendant did not raise the issue until after the verdict. The People did not act in bad faith (*see People v McNeil*, 63 AD3d 551, 552 [2009], *lv denied* 13 NY3d 861 [2009]). Even if the prosecutor's error contributed to defense counsel's error in eliciting the bloodstain DNA evidence, that evidence did not affect the outcome of the trial, as noted above.

Defendant did not preserve his claim that the admission of certain DNA evidence violated his constitutional right of

confrontation (*see People v Liner*, 9 NY3d 856 [2007]). Defendant's objections unmistakably invoked the hearsay rule rather than the right of confrontation, as the trial court's ruling made clear. We decline to review this claim in the interest of justice. As an alternative holding, we reject it on the merits. In *People v Brown* (13 NY3d 332, 335 [2009]) the Court of Appeals found a similar DNA report to be nontestimonial for Confrontation Clause purposes, and we find no basis to distinguish the report in this case.

The court properly denied defendant's speedy trial motion. The contested periods were excludable because they involved motion practice (*see* CPL 30.30[4][a]; *People v Williams*, 213 AD2d 350 [1995], *lv denied* 87 NY2d 852 [1995]), because defense counsel actively participated in setting the adjourned date and sought a longer adjournment for his own convenience (*see* CPL 30.30[4][b]; *People v Davis*, 80 AD3d 494, 495 [2011]), or because

defense counsel requested additional adjournments after the People's statement of readiness (*see People v Reyes*, 240 AD2d 165, 166 [1997], *lv denied* 90 NY2d 942 [1997]).

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

ENTERED: DECEMBER 6, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

6224 Derfner Management, Inc., Index 650060/11
Plaintiff-Respondent,

-against-

Lenhill Realty Corp, et al.,
Defendants-Appellants.

_____

Stroock & Stroock & Lavan LLP, New York (Ernst H. Rosenberger of counsel), and Arent Fox LLP, New York (Bernice K. Leber of counsel), for appellants.

Kaye Scholer LLP, New York (Richard C. Seltzer of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered February 22, 2011, which, insofar as appealed from as limited by the briefs, denied defendants' motion to enjoin plaintiff from destroying certain records that predate the commencement of this action by seven years, and granted plaintiff's cross motion for a protective order against disclosing records that predate that seven-year period, unanimously modified, on the law, to grant defendants' motion and deny plaintiff's motion with respect to the books and records of the corporate defendants and the family corporations in which the individual defendants have an interest, and otherwise affirmed, without costs.

On appeal, defendants argue that the motion court abused its

discretion in limiting discovery to a seven year period measured from the allegations in the complaint. Defendants contend that the statute of limitations was an inappropriate tool to limit discovery because of plaintiff's status as a fiduciary, with a duty to account. Defendants also argue that the pre-2004 records are a part of, and shed light on, the self-dealing carried out by plaintiff within the statutory period and thus, are relevant to this action. However, defendants failed to establish that they could not, with reasonable diligence, have discovered plaintiff's alleged fraud earlier (*see Lucas-Plaza Hous. Dev. Corp. v Corey*, 23 AD3d 217 [2005]; *see also Endervelt v Slade*, 214 AD2d 456, 457 [1995]). However, to the extent defendants seek their own corporate books and records, their request should be granted with no time limitation imposed. The corporate defendants clearly have a right to their own books and records. The individual defendants, as shareholders of the defendant corporations and other family corporations, have a qualified right to examine the books and records of those corporations (*see* Business Corporation Law § 624 ["for any purpose reasonably related to (their) interest as [] shareholder[s]"]). That right "is to be liberally construed" (*Matter of Bohrer v International Banknote Co.*, 150

AD2d 196 [1989]). Moreover, those individual defendants who are directors or officers of the corporations have "an absolute, unqualified right . . . to inspect their corporate books and records" (*Matter of Cohen v Cocoline Prods.*, 309 NY 119, 123 [1955]).

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

ENTERED: DECEMBER 6, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

6225 The People of the State of New York, Ind. 5480/09
Respondent,

-against-

Stevon McFadden,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered on or about July 21, 2010,

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

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

ENTERED: DECEMBER 6, 2011

CLERK

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

Mazzarelli, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

6226 Pauline Phillips, Index 301712/08
Plaintiff-Appellant,

-against-

Paul Katzman,
Defendant-Respondent.

_____

James Newman, P.C., Bronx (Kyle Newman of counsel), for appellant.

Law Offices of Gregory Sutton, New York (Debora L. Jacques of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered February 28, 2011, which, in this action for personal injuries sustained in a motor vehicle accident, granted defendant's motion pursuant CPLR 4404 to set aside the jury's verdict and ordered a new trial on the issue of liability, unanimously affirmed, without costs.

Great deference is given to a jury's determination as to issues of credibility. However, "that principle should not be carried to such an extreme that a verdict is allowed to stand based on testimony which is utterly incredible as a matter of law because it is manifestly untrue, physically impossible, or contrary to common experience, and such testimony should be disregarded as being without evidentiary value notwithstanding that is is uncontradicted" (*Cruz v New York City Tr. Auth.*, 31

AD3d 688 [2006], *affd* 8 NY3d 825 [2007]).

The trial court correctly determined that "the jury could not have reached its verdict on any fair interpretation of the evidence" (*McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [2004]; *see also Nicastro v Park*, 113 AD2d 129, 133-135 [1985]). Plaintiff's trial testimony was inherently incredible and contradicted her prior statements to the police on the day of the accident, as well as the physical evidence. Moreover, the verdict, that both defendant and plaintiff were negligent, but that only defendant's negligence was a substantial factor in causing the accident, was logically inconsistent under the circumstances presented (*see e.g. Alli v* Lucas, 72 AD3d 994, 995 [2010]; *compare Rivera v MTA Long Is. Bus*, 45 AD3d 557 [2007]).

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

ENTERED: DECEMBER 6, 2011

CLERK

Friedman, J.P., Catterson, Renwick, DeGrasse, JJ.

6228 1515 Broadway Fee Owner, LLC, et al., Index 603461/08
Plaintiffs-Respondents-Appellants,

-against-

Seneca Insurance Company, Inc.,
Defendant-Appellant-Respondent.

_____

Tese & Milner, New York (Michael M. Milner of counsel), for appellant-respondent.

Wechsler & Cohen, LLP, New York (Debora A. Pitman of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Debra A. James, J.), entered March 1, 2011, which denied defendant's motion for summary judgment, and granted in part plaintiffs' cross motion for partial summary judgment and declared that defendant was obligated to defend plaintiffs in the underlying personal injury action, unanimously modified, on the law, to further declare that defendant's insurance policy afforded primary coverage to plaintiffs, and otherwise affirmed, without costs.

At issue is whether the stairwell area where the underlying accident occurred is covered by the additional insured clause in the policy procured by the underlying plaintiff's employer from Seneca. The clause extends coverage to plaintiffs herein, the employer's landlord and the managing agent of the building. Coverage exists because the underlying claim arose out of the

"maintenance or use" of the leased premises, within the meaning of the additional insured clause. The accident occurred in the course of an activity necessarily incidental to the operation of the space leased by the employer. Furthermore, the accident happened in a part of the premises that was used for access in and out of the leased space when the freight elevator was not in service *(see ZKZ Assoc. v CNA Ins. Co.*, 89 NY2d 990 [1997]; *New York Convention Ctr. Operating Corp. v Cerullo World Evangelism*, 269 AD2d 275, 276 [2000]). This result is consistent with the lease, which required the employer to procure insurance against any liabilities "on or about the demised premises or any appurtenances thereto" (*Jenel Mgt. Corp. v Pacific Ins. Co.*, 55 AD3d 313, 313 [2008]). Accordingly, a duty to defend has been triggered and we need not address plaintiffs' argument that the disclaimer was inadequate.

Where all applicable policies have been made available for review (*cf. Liberty Mut. Ins. Co. v Trystate Mech., Inc.*, 15 AD3d 236, 237 [2005]), priority of coverage can be determined as a matter of law (*see Sport Rock Intl., Inc. v American Cas. Co. of Reading, Pa.*, 65 AD3d 12, 21 [2009]). The Seneca policy, providing additional insured coverage, is primary in the underlying action (*see Tishman Constr. Corp. of N.Y. v American Mfrs. Mut. Ins. Co.*, 303 AD2d 323, 324 [2003]; *see also*

Harleysville Ins. Co. v Travelers Ins. Co., 38 AD3d 1364, 1365 [2007], *lv denied* 9 NY3d 811 [2007]; *Pav-Lak Indus., Inc. v Arch Ins. Co.*, 56 AD3d 287, 288 [2008]).

Because plaintiffs failed to address why an immediate hearing was required to determine past defense costs pursuant to CPLR 3212(c), the motion court did not improvidently exercise its discretion in declining to grant such a request.

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

ENTERED: DECEMBER 6, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

6229 The People of the State of New York, Respondent, Ind. 2833/08

-against-

Ronald Hudson, Defendant-Appellant.

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Fahringer & Dubno, New York (Herald Price Fahringer of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

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Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered June 30, 2009, as amended July 23, 2009, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the first degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to a prison term of 15 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There was a chain of circumstantial evidence, including defendant's behavior at the time of the drug transaction, that made no sense unless defendant was a participant.

The court properly exercised its discretion in receiving

proof that the codefendant's cell phone, which was already in evidence, had a contact listing for defendant's known nickname. This evidence was not received for its truth, but even if received for its truth, it was admissible as a statement by a coconspirator (*see generally People v Bac Tran*, 80 NY2d 170, 179 [1992]). Viewing the chain of events in the light of common sense, we find there was ample independent evidence of a conspiracy between defendant and the codefendant. In any event, the contact entry was not prejudicial, because it was merely cumulative to other evidence showing a pattern of calls between the codefendant's phone and a phone that was sufficiently connected to defendant.

The court properly exercised its discretion in permitting the investigating detective to testify about his interpretation of a surveillance videotape that showed suspicious events involving a particular car. The detective, who did not witness those events, did not give an opinion about what the videotape depicted. Instead, he only explained his own state of mind and how it was affected by the videotape. This was relevant to explain the actions of the police in stopping defendant's car several weeks later (*see People v Tosca*, 98 NY2d 660, 661 [2002]).

The court also properly exercised its discretion in

admitting an exhibit prepared by a prosecution witness, summarizing voluminous records of phone calls (*see Ed Guth Realty v Gingold*, 34 NY2d 440, 451-452 [1974]). Defendant's only objection was a meritless claim that the original records were not unduly voluminous. Defendant's remaining challenges to this evidence are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

Finally, defendant's complaints about the prosecutor's summation are also unpreserved, and we likewise decline to review them in the interest of justice. Were we to review these claims, we would find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 119 [1992] *lv denied* 81 NY2d 884 [1993]).

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

ENTERED: DECEMBER 6, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

6230 In re Gene Parker,
Petitioner-Appellant,

-against-

Korena Butler,
Respondent-Respondent.

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Leslie S. Lowenstein, Woodmere, for appellant.

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Order, Family Court, Bronx County (Myrna Martinez-Perez, J.), entered on or about September 8, 2010, which denied with prejudice petitioner father's application to vacate a prior order dismissing his petition for custody of his daughter and granting a final order of custody of the child to respondent mother, upon the father's default, unanimously affirmed, without costs.

Application by the father's assigned counsel to be relieved as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed

the record and agree with counsel that there are no nonfrivolous issues which could be raised on this appeal.

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

ENTERED: DECEMBER 6, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

6231 The People of the State of New York, Respondent, Ind. 3589/09

-against-

Harold Ringer, Defendant-Appellant.

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Roger Bennet Adler, New York, for appellant.

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

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Judgment, Supreme Court, New York County (Cassandra M. Mullen, J.), rendered November 23, 2010, as amended January 6, 2011, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of five years, unanimously affirmed.

Defendant did not preserve his challenge to the sufficiency of the evidence, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence supports an inference of constructive possession (*see People v Manini*, 79 NY2d 561, 573 [1992]), and it does not support defendant's theory that a coworker may have

secreted drugs in defendant's personal workstation.

The prosecutor's summation did not deprive defendant of a fair trial. Defendant objected to a particular remark as vouching for a witness. However, that remark was a permissible comment on a matter of credibility, and the prosecutor did not become an unsworn witness or interject her personal integrity (*see People v Overlee*, 236 AD2d 133, 144 [1997], *lv denied* 91 NY2d 976 [1998]; *compare People v Moye*, 52 AD3d 1 [2008], *affd* 12 NY3d 743 [2009]). Defendant objected to another remark as improperly suggesting that defendant had sold drugs to another person immediately before the police executed a search warrant at defendant's workplace. However, that was a reasonable inference from the evidence, and relevant to another charge in the indictment. Defendant's remaining challenges to the summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

The court erred in admitting evidence of two bags of cocaine found near defendant, since the People had stipulated at the suppression hearing that they did not intend to offer that evidence at trial (CPL 710.60[2][b]). Under the statute, such a stipulation has the effect of suppressing the evidence. Nevertheless, the error was harmless in light of the overwhelming

evidence of defendant's guilt (*see People v Crimmins*, 36 NY2d 230 [1975]). The police found 88 bags of cocaine in defendant's workstation, and the additional bags added little or nothing to their case.

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

ENTERED: DECEMBER 6, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

6232 In re Lillian Roberts, etc., Index 104695/08
Petitioner-Appellant,

-against-

The Board of Collective Bargaining
of the Office of Collective Bargaining, et al.,
Respondents-Respondents.

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Law Offices of Leonard A. Shrier, New York (Leonard A. Shrier of counsel), for appellant.

John F. Wirenius, New York, for the Board of Collective Bargaining and Marlene A. Gold, respondents.

Michael A. Cardozo, Corporation Counsel, New York (Scott Shorr of counsel), for Robert Doar, Roberto Velez, James F. Hanley and the City of New York, respondents.

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Order and judgment (one paper), Supreme Court, New York County (Edward H. Lehner, J.), entered February 16, 2010, which, in this article 78 proceeding, granted respondent the Board of Collective Bargaining's motion to dismiss the petition, unanimously affirmed, without costs.

The motion court properly dismissed the petition because petitioner, Executive Director of District Council 37, AFSCME, AFL-CIO, cannot challenge the penalty of dismissal, imposed on union member, Zinovy Levitant, in this proceeding. Levitant's termination from his position with the Human Resources Administration (HRA) was preceded by a February 2, 2007 Office of

Administrative Trials and Hearings' recommendation and report. Levitant's appeal of HRA's penalty was dismissed by the Civil Service Commission, and Levitant failed to commence an article 78 proceeding challenging that determination. "The express provisions of Civil Service Law §§ 75 and 76 limit the appealability of a final agency determination to an article 78 proceeding or an appeal to the Civil Service Commission" (*City of New York v MacDonald*, 239 AD2d 274 [1997]).

The motion court also properly found that the challenged January 23, 2008 decision by the Board of Collective Bargaining was not arbitrary and capricious insofar as it failed to order the rescission and expungement of Levitant's termination (see CPLR 7803[3]). The challenged determination only related to the improper charge of misuse of confidential information. Levitant's termination was based on a number of sustained charges which were not found to be the product of improper anti-union practices. Thus, the Board reasonably concluded that there was no basis to order the rescission and expungement of Levitant's termination. Reinstatement of an employee in the context of an improper practice petition before the Board is only warranted where anti-union animus was the "substantially motivating cause of his dismissal and not merely one of the reasons therefor" (*Matter of City of Albany v Public Empl. Relations Bd.*, 57 AD2d

374, 376 [1977]), *affd* 43 NY2d 954 [1978]; *see also Matter of County of Nassau v State of N.Y. Pub. Empl. Relations Bd.*, 103 AD2d 274, 279 [1984]).

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

ENTERED: DECEMBER 6, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

6233 Rosalind Cole, Index 106530/05
Plaintiff-Appellant,

-against-

Mark Johnson, D.D.S.,
Defendant-Respondent,

Lenox Hill Hospital, et al.,
Defendant.

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John V. Decolator, Garden City, for appellant.

Morris Duffy Alonso & Faley, New York (Iryna S. Krauchanka and Kevin G. Faley of counsel), for respondent.

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Judgment, Supreme Court, New York County (Marcy S. Friedman, J.), entered February 8, 2010, to the extent appealed from as limited by the briefs, dismissing the complaint against defendant Mark Johnson, D.D.S., after jury trial, and bringing up for review an order, same court and Justice, entered on or about February 18, 2009, which denied plaintiff's motion to set aside the verdict, unanimously affirmed, without costs.

In this action for dental malpractice, plaintiff alleged that defendant Johnson deviated from good and accepted dental care by placing a putty-like substance known as cavit over her tooth until a scheduled root canal could be performed.

The jury's verdict was based upon a fair interpretation of the evidence (*see McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195,

206 [2004]). Defendant submitted evidence that he did not deviate from accepted dental practices in placing the cavit, since leaving the tooth open would result in collection of additional bacteria and debris. The expert witness for defendant Gray never testified that Johnson's treatment was contraindicated or a deviation from good and accepted dental care. "To the extent that plaintiff's evidence conflicted with defendant's proof on such issue, the jury's resolution of the disputed facts is entitled to deference" (*Warren v New York Presbyterian Hosp.*, 88 AD3d 591 [2011]; *see Bykowsky v Eskenazi*, 72 AD3d 590 [2010], *lv denied* 16 NY3d 701 [2011]). Indeed, the failure to set aside the verdict and direct a new trial is an abuse of discretion only when "the jury's resolution of a factual issue is clearly at variance with the proffered testimony" (*Fisk v City of New York*, 74 AD3d 658, 659 [2010]). That is not the case here.

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

ENTERED: DECEMBER 6, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

6235 The People of the State of New York, Ind. 45/00
Respondent,

-against-

Auero Torres,
Defendant-Appellant.

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

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

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Order, Supreme Court, New York County (Charles H. Solomon, J.), entered on or about December 1, 2009, which adjudicated defendant a level three sex offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

We find that regardless of whether defendant's correct point score would make him a presumptive level two offender, this case clearly warrants application of the presumptive override for a prior felony sex crime conviction, and it does not warrant a downward departure. The prior and present convictions involved violent, predatory conduct, and the two incidents were remarkably

similar. This demonstrated a serious threat of recidivism (*see e.g. People v Reid*, 49 AD3d 338, 339 [2008], *lv denied* 10 NY3d 713 [2008]), notwithstanding the passage of time between the two incidents.

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

ENTERED: DECEMBER 6, 2011

CLERK

Saxe, J.P., Sweeny, Catterson, Freedman, Manzanet-Daniels, JJ.

5428 Sixto Ramirez, Index 403136/09
Plaintiff-Appellant,

-against-

National Cooperative Bank (NCB),
Defendant-Respondent,

Giuffie Hyundai Ltd., et al.,
Defendant.

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Lincoln Square Legal Services, Inc., New York (Marcella Silverman of counsel), for appellant.

Lowey Dannenberg Cohen & Hart, P.C., White Plains (Peter D. St. Phillip, Jr., of counsel), for respondent.

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Order Supreme Court, New York County (O. Peter Sherwood, J.), entered August 6, 2010, reversed, on the law, with costs, and the motion denied.

Opinion by Catterson, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
John W. Sweeny, Jr.
James M. Catterson
Helen E. Freedman
Sallie Manzanet-Daniels, JJ.

5428
Index 403136/09

_____x

Sixto Ramirez,
Plaintiff-Appellant,

-against-

National Cooperative Bank (NCB),
Defendant-Respondent,

Giuffre Hyundai Ltd., et al.,
Defendants.

_____x

Plaintiff appeals from the order of the Supreme Court, New York County (O. Peter Sherwood, J.), entered August 6, 2011, which, insofar as appealed from, granted defendant National Cooperative Bank's motion to dismiss the causes of action as against it alleging fraud, fraud in the inducement, unconscionability, and violation of General Business Law § 349.

Lincoln Square Legal Services, Inc., New York (Marcella Silverman and Elizabeth Maresca of counsel), for appellant.

Lowey Danenberg Cohen & Hart, P.C., White Plains (Peter D. St. Phillip, Jr., and Sung-Min Lee of counsel), for respondent.

CATTERSON, J.,

The plaintiff's claims against an automobile dealership require us to examine the circumstances under which the federal Truth in Lending Act (15 U.S.C. § 1601 et seq.) (hereinafter referred to as "TILA") preempts New York State law and the extent of TILA's assignee liability protection. Because the plaintiff's allegations have nothing to do with the disclosure of credit terms required by TILA, the defendant assignee bank may be held derivatively liable for the dealership's alleged fraud and deceptive business practices.

The plaintiff in this case alleges that he was the victim of a "nefarious," illegal "scheme" by a car dealership to fraudulently induce him to purchase three overpriced cars that he could not afford. The plaintiff commenced this action on March 8, 2010 against the dealership (hereinafter referred to as "Giuffre"), Hyundai Finance, and National Cooperative Bank (hereinafter referred to as "NCB") for, inter alia, fraud, fraud in the inducement, unconscionability, and violation of New York General Business Law § 349.

The plaintiff contends that Giuffre engaged in a scheme to entice consumers to the dealership with false promises of a cash prize or a free cruise. After three phone calls and a letter, the plaintiff, an uneducated Spanish-speaking Honduran immigrant

on disability and food stamps, went to the dealership to collect what he believed was his prize. However, rather than collecting any prize, the plaintiff was induced by Giuffre's "fraudulent and unfair sales practices" to purchase three cars in seriatim, when he could afford none of them.

With regard to the second car, a Ford Escape, the plaintiff alleges that Guiffre misrepresented that the first car was irreparably damaged and that the plaintiff had to purchase the Escape. Guiffre showed the plaintiff a piece of paper showing lower monthly payments for the Escape that led him to believe that the Escape was cheaper than the first car. The plaintiff was then presented with paperwork, all in English, including the Retail Installment Contract (hereinafter referred to as "RIC"), which he signed. The plaintiff was also told that he could reduce his payments by refinancing at a later date.

However, when the plaintiff returned to the dealership, Giuffre refused to refinance the transaction or take back the Escape. Instead, Giuffre sold the plaintiff a third car. Guiffre told the plaintiff to call the loan servicer to simply repossess the Escape and assured him that his credit would be unaffected. The plaintiff contends that he was damaged when, among other things, he paid an excessive price for the Escape, he lost the benefit of the Escape when it was repossessed, and his

credit was damaged by his inability to pay the $23,041 deficiency billed by NCB.

These allegations, which at this stage must be accepted as true (Salles v. Chase Manhattan Bank, 300 A.D.2d 226, 754 N.Y.S.2d 236 (1st Dept. 2002)), state claims for fraud, fraud in the inducement, unconscionability, and violation of General Business Law § 349. See e.g. Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, USA Inc., 3 N.Y.3d 200, 205, 785 N.Y.S.2d 399, 402, 818 N.E.2d 1140, 1143 (2004) ("a plaintiff must allege both a deceptive act or practice directed toward consumers and that such act or practice resulted in actual injury to a plaintiff"); Meyercord v. Curry, 38 A.D.3d 315, 832 N.Y.S.2d 29 (1st Dept. 2007); Kaufman v. Cohen, 307 A.D.2d 113, 760 N.Y.S.2d 157 (1st Dept. 2003) (to state a cause of action for fraud, a plaintiff must allege that the defendant knowingly misrepresented a material fact, and that the plaintiff justifiably relied to his detriment).

Defendant NCB is the assignee of Giuffre's rights in the RIC for the Ford Escape, the second of the three cars that the plaintiff was induced to purchase. The plaintiff claims that NCB is liable pursuant to 16 CFR 433.2 (hereinafter referred to as the "Holder Rule") and New York Personal Property Law § 302(9). The Holder Rule and Personal Property Law § 302(9) preserve

consumer claims and defenses by mandating that "[a]ny holder of [a] consumer credit contract is subject to all claims and defenses which the debtor could assert against the seller of goods or services obtained."

By notice dated February 16, 2010, NCB moved to dismiss the complaint against it for failure to state a cause of action and on the grounds that the plaintiff's action is preempted by 15 U.S.C. § 1641(a), a TILA provision that limits assignee liability to violations that are "apparent on the face of the disclosure statement." NCB contended that Congress amended this provision in 1980 to extend the scope of the assignee liability limitation to non-TILA violations subject to the Holder rule. NCB argued that although "the [c]omplaint does not allege any TILA violation," the plaintiff's action must be dismissed simply because the "claims of wrongdoing" are not "apparent on the face of the disclosure document."

In its decision and order dated August 3, 2010, the motion court granted NCB's motion. While not explicitly finding that the plaintiff stated a TILA claim, the motion court dismissed on the grounds that the alleged "misrepresentations" are not "apparent on the face of the disclosure document." The motion court also agreed with NCB that "[s]everal federal courts have held that state causes of action alleging assignee liability are

preempted as in conflict with the intent of Congress in passing Section 1641(a)."

On appeal, the plaintiff correctly argues that the motion court erred because the limitation on assignee liability is applicable only to TILA claims. Where the plaintiff brings a non-TILA claim under state law, an assignee may be derivatively liable pursuant to the Holder Rule and its New York analogue. As the plaintiff asserts, the plain language of the limitation on assignee liability restricts its application to violations of "this subchapter" -- that is, TILA. See 15 U.S.C. § 1641(a). Further, the plaintiff asserts that the 1980 amendment did not extend assignee protection, which had been in place since 1974, a year before the Holder Rule was promulgated, but merely relocated the provision to a different section of the Code and added two examples of violations that are "apparent on the face of the disclosure statement."

Defendant NCB, apparently recognizing the cogency of the plaintiff's argument, changed course on appeal and now argues that the plaintiff alleges a "TILA-type" violation and therefore the TILA assignee liability limitation applies. For the reasons set forth below, this Court disagrees. The plaintiff does not allege a TILA or "TILA-type" violation. Therefore, the New York State law pursuant to which the plaintiff brought his claims is

not preempted, TILA's assignee liability limitation is inapplicable, and NCB is liable under federal and state Holder Rules.

In Matter of People v. Applied Card Sys., Inc., a Court of Appeals decision addressing TILA preemption in the context of deceptive credit card solicitation schemes, the Court specifically distinguishes between allegations of "affirmative deception" and allegations "relate[d] to the disclosure of credit information," and provides clear guidelines for determining when TILA preempts state law. 11 N.Y.3d 105, 114, 863 N.Y.S.2d 615, 620, 894 N.E.2d 1, 6 (2008), cert. denied, __ U.S.__, 129 S. Ct. 999, 173 L. Ed. 2d 292 (2009). The Court held that TILA preempts "those state laws that relate to 'disclosure of information' in credit card applications and solicitations ... not those that prevent fraud, deception and false advertising." Id. Although the Court in Applied Card Sys. analyzed TILA's preemption provision under section 1610(e), which applies to credit and charge cards, the preemption provision at issue in this case uses identical language to limit preemption only to state laws "relating to the disclosure of information." See 15 U.S.C. § 1610(a) (applying to closed end credit contracts such as RICs). The Court concluded that TILA preempts a state law that "purport[s] to alter the format, content, and manner of the

TILA-required disclosures" or "require[s] credit issuers to affirmatively disclose specific credit term information not embraced by TILA." Applied Card Sys., 11 N.Y.3d at 114, 863 N.Y.S.2d at 620.

TILA requires that a dealership's RIC disclose credit terms such as the amount financed, finance charge, annual percentage rate, total of payments, total sale price, and the number, amount, and due dates or period of payments to repay the total of payments. See generally 15 U.S.C. § 1631 et seq. In this case, the plaintiff claims that the RIC he signed for the Escape stated the credit terms accurately. Thus, the plaintiff in this case, as in Applied Card Sys., "'take[s] no issue' with the substance or sufficiency of ... TILA disclosures." 11 N.Y.3d at 116, 863 N.Y.S.2d at 621.

The New York common law of fraud and General Business Law § 349 do not regulate disclosures in the RIC, nor, in this case, do they require alterations or additions to the RIC disclosure statement that would conflict with federal requirements. See e.g. Applied Card Sys., 11 N.Y.3d at 117-118, 863 N.Y.S.2d at 622. To the extent that this decision departs from the holding of Psensky v. American Honda Fin. Corp. (378 N.J.Super. 221, 875 A.2d 290 (2005)), relied upon by the plaintiff, we decline to follow Psensky.

Contrary to NCB's assertion, the plaintiff does not state a "paradigmatic TILA hidden finance charge claim" merely because he alleges that he was charged a grossly inflated price for the Escape. A hidden finance charge claim requires proof of a "causal connection" between the higher base price of the vehicle and the purchaser's status as a credit customer. Diaz v. Paragon Motors of Woodside, Inc., 424 F. Supp.2d 519, 530 (E.D.N.Y. 2006) (citation omitted); see Ringenback v. Crabtree-Cadillac Oldsmobile, Inc., 99 F. Supp.2d 199, 203 (D. Conn. 2000) (in determining whether a plaintiff is charged a hidden finance charge, factors including cost to seller, profit from the sale, whether seller distinguishes between cash and credit prices, and percentage of seller's cash and credit sales should be considered). In this case, the plaintiff does not allege and there is no evidence supporting a connection between the inflated price of the Escape and his status *as a credit customer*.

Accordingly, the order of the Supreme Court, New York County (O. Peter Sherwood, J.), entered August 6, 2010, which, insofar as appealed from, granted defendant National Cooperative Bank's motion to dismiss the causes of action as against it alleging

fraud, fraud in the inducement, unconscionability, and violation of General Business Law § 349, should be reversed, on the law, with costs, and the motion denied.

All concur.

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

ENTERED: DECEMBER 6, 2011

CLERK