SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 3, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, McGuire, DeGrasse, Manzanet-Daniels, JJ.

1717-
1717A Index 112467/08

E-Z Eating 41 Corp.,
Plaintiff-Appellant,

E-Z Eating 47 Corp.,
Intervenor-Plaintiff-Appellant,

-against-

H.E. Newport L.L.C., et al.,
Defendants-Respondents.

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Karson & Long LLP, New York (Barry M. Karson of counsel), for E-Z Eating 41 Corp., appellant.

Tobias Law Firm, P.C., New York (David G. Tobias of counsel), for E-Z Eating 47 Corp., appellant.

Rosenberg & Estis, P.C., New York (Jeffrey Turkel of counsel), for respondents.

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Appeals from orders, Supreme Court, New York County (Carol R. Edmead, J.), entered March 27, 2009, which, inter alia, denied plaintiff tenant's and intervenor subtenant's motions for *Yellowstone* injunctions and dismissed their complaints for declaration of their rights under a lease and sublease, dismissed

as moot, without costs, and the orders vacated.

Given that the time to cure the alleged lease default has expired, and that the E-Z Eating 41 Corp. has surrendered possession of the premises, the orders appealed are presently moot (*see Matter of Johnson v Pataki*, 91 NY2d 214, 222 [1997]; *cf. Automated Ticket Sys., Ltd. v Quinn*, 90 AD2d 738, 739 [1982] [dismissing claims for declaratory relief relating to contract; "[t]he contract having expired, all of the rights asserted by plaintiff against defendants have accrued, and plaintiff should seek its remedy in an action at law for damages"] [internal quotation marks omitted]). In addition, there is no indication that the appeal should be excepted from the mootness doctrine (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

While the general rule in New York is to simply dismiss an appeal which has been rendered moot, vacatur of an order or judgment on appeal has, in circumstances such as those presented here, been held to be an appropriate exercise of discretion where necessary "'in order to prevent a judgment which is unreviewable for mootness from spawning any legal consequences or precedent'"

(*see Funderburke v New York State Dept. of Civ. Serv.*, 49 AD3d 809, 811 [2008], *quoting Matter of Hearst Corp. v Clyne*, 50 NY2d at 718).

Our vacatur is without prejudice to the parties seeking any further relief they deem appropriate.

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

McGUIRE, J. (dissenting)

I disagree with the majority on an issue about which reasonable minds can differ: whether these appeals and the underlying actions are moot. Because I conclude the appeals and the underlying actions are not moot, I reach the merits and would reverse.

In July of 1997, plaintiff-appellant E-Z Eating 41 Corporation (E-Z Eating) entered into a 20-year lease with an entity that is not a party to this action to operate a Burger King restaurant on certain premises at 485 Fifth Avenue in Manhattan. Nonetheless, subparagraph (a) of paragraph 41, entitled "Use and Occupancy," of a "Rider" to the lease states that "[t]enant shall operate its business in the Demised Premises during the term and occupy the Demised Premises solely as a restaurant with table-seating operated under the name and style of 'Burger King' for on and off site consumption of food and beverage and for no other purpose." On the other hand, subparagraph (b) of the same paragraph states that "[t]enant shall use, occupy, operate and maintain the Demised Premises through the Term as a restaurant with table-seating for on and off site consumption in a reputable manner and in a manner which shall not detract from the character, appearance or dignity of

the Building." Although these two subparagraphs share a common parent in paragraph 41, the relationship between these siblings is at best strained. That relationship and certain provisions of the lease relating to assignment and subletting are at the heart of the parties' dispute.

In July of 2008, a federal district court in Florida granted permanent injunctive relief to Burger King in an action between it and, inter alia, E-Z Eating, its affiliate, E-Z Eating 47 Corporation (E-Z 47), and Elizabeth and L. Luan Sadik, the principals of both entities, each of whom owns 50% of each corporation's shares. The injunction bars E-Z Eating, E-Z 47 and the Sadiks from operating a Burger King restaurant. In addition, the court granted summary judgment to Burger King, declaring, inter alia, that Burger King's termination of franchise agreements between it and E-Z Eating and E-Z 47 had been proper.

E-Z Eating commenced this action for declaratory and injunctive relief on September 11, 2008,[1] asserting in its complaint that counsel for the owners of the building in which the premises are located, the successors-in-interest to the

[1]Although the complaint also seeks attorney's fees, E-Z Eating does not press this claim on appeal or even assert that it saves the complaint from mootness.

original landlord, defendants H.E. Newport L.L.C., HTS-NYC LLC and Hyatt Hotels Corporation (the Owners), had taken the erroneous position that, absent the Owners' consent, the lease did not permit E-Z Eating to use the premises for any purpose other than a Burger King. E-Z Eating seeks a declaration that it is permitted to use the premises for a fast food burger restaurant in the style and manner of a Burger King and an injunction barring the Owners from requiring E-Z Eating to seek their consent to use the premises for the purpose of operating such a restaurant.

Shortly thereafter, the Owners served E-Z Eating with a 15-day notice to cure in which they contended that E-Z Eating was in breach of the lease because subparagraph (a) of Paragraph 41 requires it to operate its business in the premises solely as a Burger King restaurant. By order to show cause dated October 16, 2008, E-Z Eating sought both a *Yellowstone* injunction tolling the running of the notice to cure and an injunction restraining the Owners from taking steps to terminate its tenancy and from commencing any action to recover possession of the premises. The next day, Supreme Court granted the requested relief in the form of a temporary restraining order, thereby tolling the running of the notice to cure, which otherwise would have expired on October

22, 2008. Meanwhile, E-Z Eating and E-Z 47 entered into a sublease, dated as of October 1, 2008, of the premises. On October 30, 2008, Supreme Court granted, on consent, E-Z 47's motion to intervene. In its intervenor complaint, E-Z 47 alleges that: the lease permits E-Z Eating, without the consent of the Owners, "to sublet the entire premises . . . for the continued use of the entire premises for restaurant purposes with table-seating for on and off site consumption and for no other purpose to an affiliate, as defined in the lease, or to a subsidiary"; it is such an affiliate and is not required by the lease to operate a Burger King restaurant on the premises; and any default under the lease by E-Z Eating had been cured. Accordingly, E-Z 47 seeks a judgment declaring, inter alia, that: the lease is in force and effect; any default under the lease has been cured; it is permitted by the lease to operate such a restaurant on the premises and is not required to operate a Burger King; and the sublease is effective and binding on the Owners.

By an order dated March 24, 2009 and a decision and order dated March 25, 2009, Supreme Court denied E-Z Eating's motion for *Yellowstone* relief and for an injunction restraining the Owners from taking steps to terminate its tenancy and from bringing any action to recover possession of the premises. In

Supreme Court's view, the lease unambiguously "precludes the use of the premises by either [t]enant or its subtenant, for any purpose, other than 'as a restaurant with table-seating operated under the name and style of 'Burger King' for on and off site consumption of food and beverage.'" Although Supreme Court acknowledged that the lease permitted E-Z Eating to assign or sublet the lease to an affiliate without the consent of the landlord, the court ruled that such an assignee or sublessee is required, absent the consent of the landlord, to operate a Burger King restaurant. For these reasons, and because it was undisputed that E-Z Eating and E-Z 47 were barred by the federal injunction from operating a Burger King, Supreme Court denied the motion. Although the Owners had not cross-moved for any relief, Supreme Court nonetheless dismissed both complaints.

On March 27, 2009, the Owners served a five-day notice of cancellation of the lease on E-Z Eating. Both E-Z Eating and E-Z 47 promptly moved in this Court for injunctive relief pending their separate appeals from the two March orders of Supreme Court. Specifically, each sought an order tolling the notice of cancellation and enjoining the Owners from interfering with their possession and use of the premises. A Justice of this Court granted an interim stay on April 2, 2009, but a panel of this

Court denied their respective motions on May 14, 2009 (*see* M-1604-1605, 2009 NY Slip Op 72471[u]; 2009 NY Slip Op 72472[u] [1st Dept 2009]).

By a letter dated August 31, 2009, counsel for the Owners advised this Court of a decision in a summary holdover proceeding it had commenced against E-Z Eating and E-Z 47 in Civil Court. According to the decision, dated August 20, 2009, the Owners commenced the proceeding on June 12, 2009. The decision recites statements by E-Z Eating and E-Z 47 that once this Court denied their motions for an order, inter alia, tolling the expiration of the notice of cancellation, the Owners regained possession of the premises. For this reason, Civil Court granted the motion of E-Z Eating to dismiss the Owners' petition, reasoning that the proceeding was pointless because "the landlord already ha[d] full legal possession of the premises." In his letter, counsel for the Owners did not assert that the appeals or the underlying action were moot. Nor did the Owners move to dismiss the appeals thereafter, during the period of almost three months that elapsed between Civil Court's decision and oral argument of the appeals before this Court.

I

The question of mootness was not raised until oral argument. We all agree, and E-Z Eating and E-Z 47 did not contend otherwise at oral argument, that the claims for injunctive and declaratory relief are moot because neither E-Z Eating nor E-Z 47 is in possession of the premises. For this reason, counsel for the Owners took the position that the appeals were moot. Counsel for E-Z Eating and E-Z 47, however, took the position that the appeals were not moot because they could recover damages from the Owners for wrongful termination of the lease.

In retrospect, we should have requested supplemental briefing from the parties on the question of whether the claim for money damages first raised at oral argument saves the appeals (and the underlying action) from dismissal on mootness grounds. We have left ourselves to puzzle out the answer on our own, and the majority not unreasonably concludes that the answer is no. Although my less than exhaustive research has not yielded any New York precedents on point, several federal decisions are and they lead me to the opposite conclusion.

In *Z Channel Ltd. Partnership v Home Box Office* (931 F2d 1338 [9th Cir 1991], *cert denied* 502 US 1033 [1992]), Z Channel abandoned count 2 of its complaint after discovery, leaving only

a claim in count 1 for declaratory and injunctive relief. HBO sought summary judgment on count 1 and the district court granted it. After Z Channel filed its appeal, its new owners made a business decision that rendered moot its claims for injunctive and declaratory relief (*id.* at 1340). The panel began its analysis by noting that on the basis of precedent and rule 54(c) of the Federal Rules of Civil Procedure, "[i]t is clear that Z Channel did not foreclose relief in damages by failing to ask for them in its Count one prayer" (*id.* at 1341).[2] The panel distinguished its decision in *Dan Caputo Co. v Russian River County Sanitation Dist.* (749 F2d 571 [9th Cir 1984]), on the ground that "[i]n *Caputo* there was no indication that damages were sought even as late as appeal, or that damages would have been appropriate" (*id.*). The panel held that "the damages remedy is sufficiently before us to preclude a dismissal for mootness" because Z Channel raised a claim for damages on appeal and count 1 "construed favorably to it, alleges restraints that could have

[2]Rule 54(c) provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." CPLR 3017(a) is to the same effect. With an exception not relevant here, it provides that "the court may grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded, imposing such terms as may be just."

resulted in financial damage to Z Channel" (*id.*).

Chicago United Indus., Ltd. v City of Chicago (445 F3d 940 [7th Cir 2006]) also is on point. After one of its contractors commenced an action against it seeking injunctive relief, the City took certain actions that rendered the claim for injunctive relief moot (*id.* at 946-948). Writing for a unanimous panel of the Seventh Circuit, Judge Posner held that the contractor's "claim" for lost profits, although "made only in its brief and oral argument in this court," "saved [the suit] from complete mootness, though only barely" (*id.* at 948). And despite the briefness of the period in which the contractor might have lost profits, the panel regarded it as sufficient that "it is at least plausible that [it] lost profits" (*id.*). As did the Ninth Circuit panel in *Z Channel*, the court relied in part on the sweeping terms of rule 54(c) (*id.*). Moreover, the panel was undeterred by the City's argument, "with considerable force[,] that [the contractor] deliberately withheld its damages claim lest such a claim weaken its case for preliminary relief by indicating that it had incurred no irreparable harm" (*id.*). Distinguishing cases coming to the opposite conclusion, Judge Posner wrote that "[t]his case is different because the litigation had barely begun before it came to us; had there been

no appeal, [the contractor] would doubtless have asked for damages before the litigation had proceeded far" (*id.*).

This case is a fortiori to *Z Channel* and *Chicago United*. As noted, rule 54(c) and CPLR 3017(a) are substantively identical. E-Z Eating and E-Z 47 made clear at oral argument that as a result of the Owners' termination of the lease, they are seeking money damages. And it certainly is more than plausible that they can recover money damages if, construing their allegations favorably to them, the Owners wrongfully insisted both that E-Z Eating was required to operate only a Burger King and that without their consent E-Z 47 could not as an assignee operate any restaurant other than a Burger King. Here, as in *Chicago United*, the case had barely begun before it came to us. Indeed, not only has no discovery been taken, no answer was filed and no dispositive motion ever was made by the Owners. Supreme Court's sua sponte dismissal of E-Z Eating's and E-Z 47's complaints prevented E-Z Eating and E-Z 47 from amending their complaints to seek damages, amendments they otherwise could have made as of right. Moreover, there is no reason to think that E-Z Eating and E-Z 47 withheld a claim for damages for tactical reasons. To the contrary, they may well not have sustained any cognizable damages before the complaints were dismissed. After all, it was not

until after the complaints were dismissed that the Owners were able to cancel the lease and E-Z Eating and E-Z 47 vacated the premises. Nor should we look askance at the claim for damages because it was raised for the first time at oral argument rather than in the main or reply briefs of E-Z Eating and E-Z 47. We have no reason on this record to conclude that they had vacated the premises prior to the dates, July 9 and 10, 2009, they filed their main briefs. And as the Owners never raised the question of mootness in their respondent's brief, we should not fault E-Z Eating and E-Z 47 for not addressing the subject in their reply briefs.

Finally, to the extent that judicial economy considerations are relevant (*see Thomas R. W. v Massachusetts Dept. of Educ.*, 130 F3d 477, 479 [1st Cir 1997] ["rationale for the mootness doctrine is predicated on judicial economy – saving the use of the court's scarce resources for the resolution of real disputes"]), they support the conclusion that this case is saved from dismissal on mootness grounds because of the claim for money damages. That can be seen by considering what is all but certain to follow once we dismiss the appeal and, vacate the decision and orders from which E-Z Eating and E-Z 47 appeal so that they can

amend their complaints to add claims for money damages.[3] The Owners undoubtedly will move to dismiss the amended complaint and the aggrieved parties, whoever they will be, then will take an appeal to this Court. Another panel of this Court will read the briefs and the relevant portions of the record and hear oral argument; the time the members of this panel devoted to the record, the briefs and the parties' arguments will be for nought.[4]

II

Turning to the merits, I think Supreme Court erred in holding that the relevant provisions of the lease unambiguously support the Owners' position. Unquestionably, viewed in isolation, subparagraph (a) of paragraph 41 is unambiguous in

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[3]Because Supreme Court dismissed the complaints on the merits, the majority correctly vacates the orders (*see e.g. Alvarez v Smith*, _ US _, _, 130 S Ct 576, 581 [2009]). Although I would go further and vacate the decision underlying the orders, I note that the law of the case doctrine is not an inflexible one (*Metropolitan Package Store Assn. v Koch*, 89 AD2d 317, 321-322 [1982], appeal dismissed 58 NY2d 1112 [1983]), and thus Supreme Court will not be obligated to come to the same conclusion regarding the terms of the lease. Of course, if an amended complaint seeking money damages is not filed by E-Z Eating or E-Z 47, Supreme Court should dismiss the applicable action as moot.

[4]I concede, however, that judicial resources will be conserved to the extent the panel members decide that they need only read my discussion of the merits.

permitting the tenant to "operate its business in the Demised Premises during the Term and occupy the Demised Premises solely as a restaurant with table-seating operated under the name and style of 'Burger King' for on and off site consumption of food and beverage and for no other purpose." But just as unquestionably, viewed in isolation, subparagraph (b) of the same paragraph is unambiguous in permitting the tenant, more expansively, to "use, occupy, operate and maintain the Demised Premises through the Term as a restaurant with table-seating for on and off site consumption in a reputable manner and in a manner which shall not detract from the character, appearance or dignity of the Building." As is proper, the Owners seek to reconcile the two subparagraphs, arguing that the former specifies what can be operated and the latter specifies how it shall be operated. But this interpretation of subparagraph (b) certainly is not commanded by the language of the subdivisions. Moreover, it renders portions of subparagraph (b) -- the words "as a restaurant with table-seating for on or off site consumption" -- surplusage, contrary to a basic precept of contract interpretation (*Two Guys from Harrison - N.Y. v S.F.R. Realty Assoc.*, 63 NY2d 396, 403 [1984]). To be sure, as the Owners correctly argue, in the event of a conflict between two

provisions, the specific should control over the general (*John Hancock Mut. Life Ins. Co. v Carolina Power & Light Co.*, 717 F2d 664, 670 [2d Cir 1983] [applying New York law]). But the applicability of this precept underscores that there is conflict between the two subdivisions.

If there were no other relevant provisions of the lease, I might agree with Supreme Court's and the Owners' interpretation of the lease. But in determining whether contractual provisions are ambiguous, the entire contract must be considered (*Metropolitan Life Ins. Co. v Noble Lowndes Intl.*, 84 NY2d 430, 437 [1994]). There are other relevant provisions, including paragraph 12 of a "Supplemental Rider" to the lease. "In order to determine the nature of the thing promised, recourse to the circumstances attending the execution of the writing may be had" (*Sun Oil Co. v Heller*, 248 NY 28, 31 [1928]). A significant attending circumstance revealed by paragraph 12 is that a franchise agreement between E-Z Eating and Burger King Corporation had not been executed at the time the lease was executed. Under the Owners' interpretation of the lease, however, E-Z Eating would have been at the complete mercy of the then-landlord in the event E-Z Eating had been unable to conclude a franchise agreement with Burger King (*see Noble Lowndes Intl.*,

84 NY2d at 438 ["[l]anguage in contracts placing one party at the mercy of the other is not favored by the courts"] [i*nternal quotation marks and cit*ation omitted]; *see also Fleischman v Furgueson*, 223 NY 235, 241 [1918] ["[a] court will endeavor to give the construction most equitable to both parties instead of the construction which will give one of them an unfair and unreasonable advantage over the other"]).

In addition, the Owners' interpretation of the lease entails something that at least borders on the absurd: the notion that the then-landlord, an entity with no economic interest in Burger King Corporation, considered that particular type of hamburger joint to be the sole restaurant that could be operated on the premises "in a reputable manner which [would] not detract from the character, appearance or dignity of the Building." Regardless of whether that notion is absurd (*see Matter of Lipper Holdings v Trident Holdings*, 1 AD3d 170, 171 [2003] ["a] contract should not be interpreted to produce a result that is absurd"]), it is difficult to square this interpretation of the lease with the precept that contracts should be construed in a commercially reasonable manner (*see e.g. Elsky v Hearst Corp.*, 232 AD2d 310, 311 [1996]). As discussed below, moreover, there is yet another reason to conclude that subparagraph (a) is ambiguous.

The disputed assignment and subleasing provision of the lease, set forth in paragraph 3 of a Supplemental Rider to the lease, also is ambiguous. Paragraph 53 of the Rider to the lease begins by prohibiting the tenant from assigning the lease or subleasing the premises without the prior written consent of the landlord. It immediately goes on to state that the landlord shall not unreasonably withhold its consent, "provided that . . . the proposed use of the premises shall be as a restaurant with table-seating for on and off-site consumption and for no other purpose and shall not violate the terms of this lease or of any applicable law." Paragraph 3 of the Supplemental Rider provides as follows: "Notwithstanding any provisions to the contrary contained in this Lease, this Lease may be assigned, or the Premises may be sublet in whole or in part, without the consent of the Landlord, to any corporation or other entity into or with Tenant may be merged or consolidated or to any corporation or other entity which shall be an affiliate, subsidiary, parent or successor of the Tenant, or of a corporation or other entity into or with which Tenant may be merged or consolidated."[5]

[5]The term "affiliate" is broadly defined as "any corporation which, directly or indirectly, controls or is controlled by or is under common control by the principals of Tenant." The parties do not dispute that E-Z 47 is an affiliate of E-Z Eating.

Paragraph 3 is ambiguous because at least two reasonable interpretations of it are possible (*see Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986] [in determining whether contract is ambiguous, "[t]he initial question . . . is whether the agreement on its face is reasonably susceptible of more than one interpretation"]). One possible reading of it, the one Supreme Court adopted, is that E-Z Eating may assign or sublet to an affiliate without the landlord's consent only if the affiliate operates a restaurant in accordance with the terms of subparagraph (a) of paragraph 41, i.e., a Burger King in the premises. The other possible reading, the one Supreme Court rejected, is that E-Z Eating may assign or sublet without the landlord's consent only if the affiliate operates a restaurant in accordance with the terms of subparagraph (b) of paragraph 41, i.e., a restaurant "with table-seating for on and off site consumption in a reputable manner and in a manner which shall not detract from the character, appearance or dignity of the Building." Neither reading is commanded by the text, as neither

restriction is stated in paragraph 3.[6]

However, there is a text-based reason to reject the first interpretation of paragraph 3. Under it, paragraph 3 would not give E-Z Eating anything it does not already have in the event it merged or consolidated with or otherwise was succeeded by another entity. After all, paragraph 39 of the lease specifies that its "covenants, conditions and agreements . . . shall bind and *inure to the benefit of* Owner *and Tenant* and their respective heirs, distributees, executors, administrators, [and] *successors* (emphasis added). In other words, without paragraph 3 any successor of E-Z Eating would have the right to operate a Burger King on the premises. Accordingly, this reading of paragraph 3 is at odds with the precept that each provision of a contract should be given meaning (*Ruttenberg v Davidge Data Sys. Corp.*, 215 AD2d 191, 196 [1995]). Relatedly, the requirement of landlord consent under paragraph 53 is insubstantial with respect to an assignment to or sublease with an affiliate of E-Z Eating solely for the purpose of operating a restaurant with table

[6]A third interpretation of paragraph 3 is that it permits E-Z Eating to assign to or sublease with an affiliate without any use restrictions. But neither E-Z Eating nor E-Z 47 embraces this manifestly unreasonable interpretation of paragraph 3 and the Owners vanquish a strawman by imputing it to them.

seating for on and off site consumption. Provided only that the restaurant would operate in a reputable manner without affecting adversely the "character, appearance or dignity" of a building that had been housing a Burger King, it is difficult if not impossible to understand how consent reasonably could be denied. In other words, the second interpretation of paragraph 3 does not entail a significant concession by the landlord.

In opposition to the second interpretation, the Owners insist that a tenant cannot confer on an assignee or sublessee a right of use greater than the right it enjoys under the lease. But the force of this argument wholly depends on the premise that E-Z Eating must operate only a Burger King restaurant. If that premise is incorrect, the argument is irrelevant. Even assuming that the lease does require E-Z Eating to operate only a Burger King, the parties were free to agree to permit the tenant to assign or sublease to an affiliate for a broader purpose (*Miller v Continental Ins. Co.*, 40 NY2d 675, 679 [1976]). It is no doubt very unusual and perhaps exceedingly rare for the parties to a lease to have a reason to permit the tenant to confer by assignment or sublease a right it does not enjoy under the lease. But a reason certainly can exist and the law certainly does not prevent such an assignment or sublease.

The ambiguous character of paragraph 3 provides another reason to conclude that subparagraph (a) of paragraph 41 does not unambiguously trump subparagraph (b). If, as I submit is plain, paragraph 3 reasonably can be read to permit E-Z Eating to assign or sublease to an affiliate for the purposes of operating a restaurant with table seating for on and off site consumption (in, of course, a "reputable" manner), it becomes all the more reasonable to construe paragraph 41 to permit E-Z Eating itself so to use the premises. To construe paragraph 41 otherwise would be to read the lease to prohibit E-Z Eating from doing directly what the lease freely permits it to do indirectly. That makes no sense.

For these reasons, Supreme Court erred in holding that the relevant lease provisions unambiguously support the Owners' position. Accordingly, the complaints should be reinstated and the lease should be interpreted in light of the extrinsic evidence offered by E-Z Eating and E-Z 47 concerning the negotiations over the lease with the then-landlord. The gist of that evidence is that the language of subparagraph (a) was nothing more than a sop for Burger King (which required E-Z Eating and its principals to operate a restaurant in the name and style of Burger King as long as they were franchisees) and was

included in the use provisions of paragraph 41 at its request, and for its rather than the Owners' benefit. On this record we cannot tell whether the Owners are in a position to counter that evidence, but of course any competent extrinsic evidence they may offer also is admissible.

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

ENTERED: MAY 3, 2011

CLERK

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

4122 The People of the State of New York, Ind. 116/09
Respondent,

-against-

Jamel Johnson,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered August 19, 2009, convicting defendant, upon his plea of guilty, of attempted murder in the second degree, and sentencing him to a term of 15 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the prison term to 10 years, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

The Decision and Order of this Court entered herein on January 27, 2011 is hereby recalled and vacated (*see* M-858 decided simultaneously herewith).

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

ENTERED: MAY 3, 2011

CLERK

Andrias, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Román, JJ.

3468 Jill Williams, et al., Claim 94695
Claimants-Appellants,

-against-

The State of New York,
Defendant-Respondent.

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McGarry & Simon, New York (William A. Simon of counsel), for appellants.

Andrew M. Cuomo, Attorney General, New York (Julie S. Mereson of counsel), and Raffi Melkonian, New York, for respondent.

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Judgment of the Court of Claims of the State of New York (Alan C. Marin, J.), entered June 10, 2009, after a nonjury trial, dismissing the claim, reversed, on the law and the facts, without costs, the claim reinstated, liability on the part of the State is found, and the matter remanded for a trial on the issue of damages.

The issue in this case is proximate cause: Where defendant allows a voluntary mental patient to "elope" from its facility, can that defendant be liable for an assault that the patient perpetrates two years later? Given the extensive history of extreme and consistent violence the patient in this case exhibited, we answer that question in the affirmative.

On July 25, 1993, Tony Joseph, a voluntary mental patient at

Manhattan Psychiatric Center (MPC), eloped from the facility for the eighth time in a 29-month period. Joseph, who required an escort on the facility's grounds, eloped when his escort permitted him to use a bathroom out of her sight, in violation of proper procedure for an escorted patient. When Joseph did not return, defendant classified him as on "LWOC" (leave without consent) as opposed to an "escape." In the case of an escape, the police must receive notification. Police notification is not necessary for an LWOC.

Joseph had a history of assaultive behavior, including convictions for attempted assault in the second degree and assault in the second degree. Starting in 1977, Joseph was hospitalized in various State psychiatric facilities. He was in and out of those facilities and often eloped from them. Joseph's extensive history of mental illness in particular included violence against women. On September 26, 1982, he was arrested for assaulting a woman and her infant son. Joseph repeatedly struck the woman in the groin and the child in the face and head. In January 1983, Joseph was admitted as a patient at an Office of Mental Health (OMH) facility. There, he had a history of altercations with other patients. A year later, he was discharged, but he returned to a different OMH facility the

following month (February 1984). In 1984 and 1985, Joseph moved around among a few different facilities. In connection with his plea in the 1982 assault, Joseph was required to enter an MPC facility and remain there until discharged. But, on December 6, 1985, while he was at MPC, two physicians determined that Joseph should be involuntarily committed.

On April 8, 1986, Joseph jumped over a half-door in the nurse's station at MPC and attacked a ward nurse so badly that she sustained a concussion. A report following the attack noted that Joseph's doctor stated that Joseph was in a psychotic state of mind at the time of the attack and could not be held accountable for his actions. A clinical summary from the same time period stated that Joseph had no control over his aggressiveness and noted that he had been placed in seclusion at times because he was dangerous to other patients. On May 29, 1986, Joseph was transferred to a different facility.

On June 30, 1986, Joseph was indicted for assault in the second degree based on his attack on the nurse at MPC. On July 14, 1987, he was convicted of assault in the second degree after a trial, and was sentenced on August 20, 1987 to a term of two to four years. He was initially sent to Fishkill Correctional Facility, but was soon transferred to an OMH facility.

On December 25, 1987, Joseph threatened to kill staff members at the OMH facility. On January 28, 1988, he was transferred to Clinton Correctional Facility, where he was hostile and threatening to staff members, especially females.

In 1989, Joseph was admitted to MPC on an involuntary basis. On November 16, 1989, he threatened female staff members. On November 20, 1989, he reportedly wanted to attack another patient for no apparent reason. Various notes from this time period indicate that Joseph had a history of hospitalizations due to "assaultive behavior," primarily directed at women, and that he was aggressive and threatening. At some point, his doctors formulated a plan for Joseph that involved addressing his assaultive behavior toward females, improving his self-acknowledgment of his illness, and encouraging him to continue his medications. However, Joseph left MPC without consent in September 1990, and the plan for him was abandoned.

On June 5, 1991, police officers brought Joseph to St. Luke's Hospital in Manhattan after he tripped a woman on the street, knocked her pizza out of her hand and punched a store window. He was transferred from St. Luke's to MPC on July 23, 1991. On September 25, 1991, a two physician certification was prepared to keep him at MPC involuntarily.

Notes dated November 9, 1991 indicate that Joseph was agitated and hit a nurse while she attempted to give him new medication. A January 8, 1992 note indicates that Joseph was involved in a physical altercation.

Although Joseph's last admission to MPC was via a court retention order pursuant to Mental Hygiene Law § 9.33, defendant later converted Joseph from involuntary to voluntary status. In April of 1993, defendant granted Joseph escorted grounds privileges. As noted earlier, on July 25, 1993, Joseph escaped from defendant's care when his escort permitted him to use a bathroom out of her sight, in violation of proper procedure.

On July 7, 1995, while on the street in Manhattan, Joseph threw a large glass bottle at claimant Jill Williams's leg, causing multiple fractures of her right tibia and requiring her to undergo two surgeries. The police apprehended Joseph, who was later convicted of assault in the first degree. He received a sentence of four to eight years. Aside from an arrest on March 14, 1995, after which he pleaded guilty to criminal trespass, there is no evidence of Joseph's activities during the time between his 1993 elopement and his 1995 assault on claimant.

It is well settled that "[w]here the State engages in a proprietary function, such as providing medical and psychiatric

care . . . [it] is held to the same duty of care as private individuals and institutions engaging in the same activity" (*Schrempf v State of New York*, 66 NY2d 289, 294 [1985] [internal citations omitted]). "[T]here is both a duty to the inmate to provide him with reasonable rehabilitational conditions under the circumstances and to the outside public to restrain the dangerous, or potentially dangerous, so that they may not harm others" (*id.* at 295 [internal quotation marks omitted]). "The State has frequently been held liable for the consequences of its breach of duty to protect others from the acts of the mentally ill confined to State institutions" (*id.* at 294). While the concept of proximate cause can be difficult to define, in general, "[t]o carry the burden of proving a prima facie case, the plaintiff must . . . show that the defendant's negligence was a substantial cause of the events which produced the injury" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]).

Here, there is no doubt that defendant's carelessness in supervising Joseph was the proximate cause of claimant's injuries. Joseph had an extensive and consistent history of assaults, particularly against women, including two physical altercations while institutionalized in the two years prior to his escape. Defendant was clearly on notice of Joseph's history

and violent tendencies. It was defendant's negligent supervision of Joseph that allowed him to escape. Moreover, at trial, claimants' psychiatric expert testified that, based on his review of Joseph's records, it was virtually guaranteed that Joseph would decompensate and become violent after his elopement. The record amply demonstrates that MPC and OMH were familiar with Joseph's history of violence as well as his many elopements from psychiatric facilities. MPC was also well aware that Joseph had a chronic mental illness, and was aggressive and violent and prone to engage in "assaultive behavior" directed mostly at women. However, despite Joseph's long history of violence, defendant not only created the opportunity for Joseph to escape from its care, but also, by classifying him as LWOC, absolved itself of the obligation to notify the police that a dangerous, violent and mentally unstable individual was loose somewhere in New York City. Thus, we find that the consequences that resulted in this case from failing to escort Joseph to the bathroom were foreseeable and the element of proximate cause satisfied (*see Rattray v State of New York*, 223 AD2d 356 [1996]).

While defendant speculates that there could be many intervening factors or acts that occurred between the time of Joseph's elopement and the assault on claimant, it offered no

evidence of any intervening factors or acts. Further, we note that "a mere lapse of time, no matter how long[,] is not sufficient to prevent [an actor's conduct] from being the legal cause of the other's harm" (*Alvarez v Telemechanics, Inc.*, 307 AD2d 304, 305 [2003][internal quotation marks and citation omitted]; *see also T.W. v City of New York*, 286 AD2d 243, 246 [2001]). Thus, as here, proximate cause may be found long after the negligent act occurs (*see Steel v State of New York*, Ct Cl, Jan. 15, 2003, Marin, J., UID No. 2003-016-500, affd 11 AD3d 673 [2004]).

The dissent correctly notes that Joseph's status was that of a voluntary patient at the time of his elopement and that he had escorted grounds privileges. The dissent credits this, and the fact that defendant classified Joseph as an LWOC, to conclude that at the time he escaped, Joseph was not in a decompensated psychiatric condition and was not a danger to himself and others. The dissent also relies on defendant's expert who speculated that Joseph's conversion to voluntary status was part of a plan eventually to integrate Joseph back into society. The dissent concludes that it is therefore speculative to assume that he would still have been at MPC in July 1995.

However, it is the conclusions the dissent reaches that are

speculative. OMH's policy manual paragraph D(3)(a)(i) provides:

> "[M]issing patients on voluntary admission status who are subsequently located shall not be returned to a State operated psychhiatric facility if they object . . . unless they meet the criteria for an involuntary form of admission. If such criteria are met, involuntary admission shall be pursued."

Accordingly, had defendant located Joseph, under this provision he would have returned to the facility if either he did not object or he met the criteria for an involuntary admission. Thus, as a voluntary patient, Joseph was not simply free to walk away from the facility. Had defendant found him, it may have conducted a psychiatric evaluation to determine the propriety of releasing him. It is possible that upon evaluation, Joseph would have been remanded to involuntary status. But we do not know what Joseph's status would have been because he did not remain under defendant's treatment. Further, a properly discharged patient receives several kinds of support that give him or her the greatest chance of avoiding rehospitalization. These include a residence, a medication arrangement, therapy and someone to monitor his or her progress.

Nor do we know what level of sanity Joseph could have achieved from "a well-planned treatment plan." The reason we do not know this is because defendant's lack of due care allowed

Joseph to abscond from MPC before he could finish any treatment plan. We appreciate the dissent's concern about rendering the State "answerable in perpetuity for [the] criminal and tortious conduct [of Joseph]." However, under *Schrempf v State of New York* (66 NY2d 289 [1985] *supra*), the State has a duty to protect the public from persons whose mental illness renders them dangerous. Given Joseph's history, it was a near certainty that he would attack someone, most likely a woman. There is nothing in the record to support the possibility that an intervening event was the proximate cause. The bottom line is, had defendant not allowed Joseph to abscond, plaintiff would not have been injured.

All concur except Andrias, J.P. and DeGrasse, J. who dissent in a memorandum by Andrias, J.P. as follows:

ANDRIAS, J.P. (dissenting)

After trial, the Court of Claims found that "the failure to prevent [Tony] Joseph from sneaking out of [the Manhattan Psychiatric Center (MPC)] on July 25, 1993 . . . does not support a legal nexus to his assault on [claimant Jill] Williams nearly two years later." The majority disagrees and finds for claimants on the issue of liability. Because I believe that a fair interpretation of the evidence, including the expert testimony, supports the Court of Claims' determination that Joseph's assault on Ms. Williams was too remote in time to be proximately caused by the State's negligence in allowing him to elope almost two years earlier (*see Watts v State of New York*, 25 AD3d 324 [2006]), I respectfully dissent and would affirm the judgment dismissing the claim.

Joseph was first hospitalized at a psychiatric facility operated by the State through the Office of Mental Health (OMH) in July 1977. He was subsequently discharged to the custody of his father, who resided on Riverside Drive. On September 26, 1982, Joseph assaulted a mother and her infant son in that neighborhood. Found unfit to stand trial, he was committed to OMH facilities. On September 12, 1985, Joseph pleaded guilty to attempted assault in the second degree and was sentenced to five

years' probation. As a condition of the plea, Joseph was to enter MPC on Wards Island and remain there until discharged.

On April 8, 1986, Joseph assaulted a female nurse at MPC. A clinical summary prepared after the event indicates that Joseph had been involved in several unprovoked attacks on other patients while hospitalized. On July 14, 1987, he was convicted, after trial, of assault in the second degree, and sentenced to two to four years. After going back and forth between prisons and OMH facilities, where he engaged in threatening behavior towards staff members, especially females, on April 5, 1989, Joseph applied for a conditional release to parole supervision and was admitted to MPC on a two-physician certification.

Between April 5, 1989 and April 3, 1990, Joseph eloped five times from MPC, sometimes returning to his father. Each time, Joseph was placed on "leave without consent" (LWOC), and was returned to MPC, usually within a few days, as follows:

Date of Elopement	Date of Return
August 21, 1989	August 24, 1989
September 21, 1989	September 25, 1989
November 13, 1989	November 14, 1989
February 4, 1989	February 5, 1989
February 24, 1990	April 3, 1990 (readmitted)

At some point, a plan for Joseph was formulated, but it was abandoned after he eloped from MPC on August 9, 1990 and was

again placed on LWOC status. On June 5, 1991, Joseph tripped a woman in the street and was brought to St. Luke's Hospital in Manhattan by police officers. On July 23, 1991, he was transferred back to MPC pursuant to a Mental Hygiene Law § 9.33 retention order.

On September 25, 1991, a two-physician certification was prepared for Joseph's involuntary retention at the MPC. On February 14, 1992, he eloped and was classified LWOC. Due to threatening behavior towards his father, Joseph was placed in Harlem Hospital. On January 5, 1993, he was transferred back to MPC, where he was soon converted from involuntary to voluntary status. In April of 1993, Joseph was granted escorted grounds privileges.

On July 25, 1993, Joseph was on an escorted visit to the chapel on hospital grounds and "sneaked out" when his escort permitted him to use a bathroom out of her sight. Staff members and safety officers searched Wards Island for Joseph but did not find him. As in the past, MPC classified Joseph as LWOC as

opposed to placing him on "Escape" status.[1] Joseph did not return to OMH custody before injuring Ms. Williams, and MPC administratively discharged him on November 1, 1994.

On July 7, 1995, Joseph threw a bottle at Ms. Williams as she was waiting to cross Riverside Drive. A police officer arrested him and took Ms. Williams to the hospital.[2] Although claimants do not challenge the professional decision to grant Joseph escorted grounds privileges, they allege that the State was negligent in allowing Joseph, who was known to the State to be violent and dangerous to other persons due to his mental illness, to elope in violation of proper procedure.

"[W]hen the State acts in a proprietary capacity as a landlord, it is subject to the same principles of tort law as is a private landlord" (*Miller v State of New York*, 62 NY2d 506, 511 [1984]). Accordingly, "a public entity may not escape liability

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[1]Under § QA-520 of the OMH Official Policy Manual, in 1993, a patient's leaving was classified as an "Escape" when the patient was considered dangerous to him or herself or others and as "LWOC" when the patient was not considered dangerous. The policy required that each missing patient incident be reviewed and classified by a psychiatrist as either "Escape" or "LWOC." In the event of an escape, the police were to be notified.

[2]Joseph was indicted and charged with two counts of assault in the first degree. He later pleaded guilty to one count of assault in the first degree, and was sentenced, as a second felony offender, to a term of four to eight years.

for negligent acts which it performs in a proprietary capacity and which are a proximate cause of an injury which was sustained as the result of a foreseeable act by a third party" (*Marilyn S. v City of New York*, 134 AD2d 583, 584 [1987], *affd* 73 NY2d 910 [1989]; *see generally Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980] ["Where the acts of a third person intervene between the defendant's conduct, and the plaintiff's injury . . . liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence"]). "[W]hether an act is foreseeable and the course of events normal are questions which are generally subject to varying inferences presenting issues for the fact finder to resolve" (*Lynch v Bay Ridge Obstetrical & Gynecological Assoc.*, 72 NY2d 632, 636 [1988]).

Providing psychiatric care is a proprietary function (*see Schrempf v State of New York*, 66 NY2d 289, 294 [1985]), and the State has been held liable for negligently permitting a mental patient to escape (*see Rattray v State of New York*, 223 AD2d 356 [1996]). However, even if the State had a duty to claimants and was negligent in allowing Joseph to elope, claimants must establish that the State's negligence was a proximate cause of the injuries Ms. Williams sustained when she was assaulted by

Joseph almost two years later (*Dunn v State of New York*, 29 NY2d 313, 318 [1971]).

In *Derdiarian* (51 NY2d at 314), the Court of Appeals observed that

> "[t]he concept of proximate cause, or more appropriately legal cause, has proven to be an elusive one, incapable of being precisely defined to cover all situations . . ., in part because [it] stems from policy considerations that serve to place manageable limits upon the liability that flows from negligent conduct" (internal citations omitted).

To establish a prima facie case of proximate cause, a plaintiff must show "that the defendant's negligence was a substantial cause of the events which produced the injury" (51 NY2d at 315). In determining whether a defendant's conduct is a substantial cause in bringing about injury,

> "consideration should be given to: the aggregate number of factors involved which contribute toward the harm and the effect each had in producing it; whether the defendant had created a continuous force active up to the time of the harm, or whether the situation was affected by other forces for which the defendant was not responsible; and the lapse of time" (*Baptiste v New York City Tr. Auth.* 28 AD3d 385, 386 [2006]; *see also* Restatement [Second] of Torts § 433).

Applying these principles, there is no basis for disturbing the Court of Claims' finding that Joseph's criminal actions were so attenuated from any negligence on the part of the State in allowing him to elope almost two years earlier as to relieve the State of liability.

While Joseph had eloped from MPC eight times in a 29-month period, in many instances he returned in a matter of days. Despite these elopements and his history of assaultive behavior, before his July 25, 1993 elopement, MPC, exercising its professional judgment, converted Joseph from involuntary to voluntary status and granted him escorted grounds privileges.

Dr. Joel Silbert, a psychologist and Director of Quality Assurance at MPC at the time Joseph eloped, testified that a patient was eligible for escorted grounds privileges as long as he was not dangerous or at risk of injuring himself or doing something untoward while out of the hospital, and that the imposition of an escort did not necessarily mean that a patient was dangerous. The State's expert, Dr. Paul Nassar, a clinical psychiatrist with a subspecialty in forensic psychiatry, testified that, based on the fact that Joseph had been granted escorted grounds privileges several months before he eloped and was classified as LWOC after he eloped, it was a fair assumption

that at the time of his elopement Joseph was not in a decompensated psychiatric condition and was not a danger to himself or others.

Dr. Nassar also opined that Joseph's conversion to voluntary status was significant because it was an important part of the treatment plan, i.e., a "statement of positive reinforcement," and that granting Joseph escorted grounds privileges was part of a "well-planned treatment plan" designed to progressively integrate him back into the community. Claimant's expert, Dr. Alan Tuckman, a forensic psychiatrist who consulted at MPC, testified that a psychiatric patient who was in an institutional setting could progress to a point where he or she could be discharged into the community. Accordingly, it is speculative to conclude that, but for his 1993 elopement, Joseph would still have been at MPC in July 1995.

Dr. Tuckman also testified:

> "A voluntary patient is someone who has either signed themselves in or have been converted subsequently to a status where they have the same obligations and rights of an involuntary patient except, if they wish to leave the facility, they can give a time, I believe it's forty-eight or seventy-two hours['] notice, and it is then up to the hospital to either allow them to leave or convert them to involuntary status, and they have those days in order to do that."

Thus, even if he had been found after his elopement, Joseph, as a voluntary patient, could have refused to stay, and OMH would have had to show clinical grounds to compel his retention.

There is also insufficient evidence that Joseph's condition when he eloped was such that the elopement, without more, would directly result in the assault. Dr. Tuckman testified that he could not, with reasonable psychiatric certainty, identify Joseph's mental status at the time he eloped. Dr. Nassar agreed that the available information was insufficient to determine Joseph's mental status at that time. There was no evidence that Joseph was involved in episodes of violence in the months before he eloped when he was converted to voluntary status and given escorted grounds privileges. Indeed, the last notation of physical violence cited by the majority is that Joseph hit a nurse on November 9, 1991, eight months before he eloped, and was involved in a physical altercation on January 8, 1992, six months before he eloped. These incidents predate Joseph's conversion from involuntary to voluntary status and the grant of escorted grounds privileges in 1993.

The majority gives great weight to Dr. Tuckman's testimony that the chances of Joseph's breaking down and becoming violent again were 100%, especially since he absconded and was not

monitored, not medicated, and did not have a support system. However, Dr. Tuckman explained:

> "With a patient with a long history of non-compliance with treatment winding them up in trouble, arrests, assaults without arrests, the likelihood of him at some point in the *near future* breaking down and either assaulting somebody or becoming psychotic is very, very high" (emphasis added).

Here, the assault did not occur in the near future; it occurred almost two years later. In that regard, Dr. Nassar testified that the fact that Joseph had a chronic mental illness was not on its own sufficient to support a prediction that he would decompensate some time in the future, and that one could not predict the likelihood that Joseph would assault someone two years after he eloped, because

> "there are so many intervening factors that go on within the course of those two years from things like, oh, a reemergence of psychiatric symptomatology, a failure of medication, the introduction of substances, alcohol, drugs, the intervention between . . . within two years of interactions with people, family provocative events, disturbing events. There are so many possible issues that could provoke a behavior that it would be impossible to predict that an event two years away from Mr. Joseph's elopement inevitably would have led to this event."

Further, the only evidence introduced concerning Joseph's activities during the time period between his 1993 elopement and his 1995 assault on Ms. Williams was an entry in his criminal history that indicated that he was arrested on March 14, 1995, convicted, upon a plea of guilty, of criminal trespass in the third degree two days later, and sentenced to time served. Although the majority gives weight to the fact that MPC classified Joseph as LWOC, rather than as an escapee, which would have required MPC to notify the police, this arrest and release was an intervening event that served to attenuate the State's negligence in allowing Joseph to elope from his assault on Ms. Williams.

Based on this evidence, the Court of Claims rationally found that the situation was affected by other forces for which the State was not responsible and that the assault on Ms. Williams in July 1995 was too remote in time to be proximately caused by Joseph's decompensation following his removal from treatment and supervision at MPC in July 1993.

Rattray v State (223 AD2d 356 [1996], *supra*) does not alter this conclusion. In *Rattray*, this Court found that the hospital was negligent in allowing a voluntary mental patient unsupervised access to an unguarded window, since it was on notice of the patient's escapist and assaultive tendencies. However, in *Rattray,* the patient assaulted the claimants within a day or two of his escape, and proximate cause was not at issue.

The majority also relies on *T.W. v City of New York* (286 AD2d 243 [2001]) and *Steel v State of New York* (Ct Cl, Jan. 15, 2003, Marin, J., UID No. 2003-016-500, *affd* 11 AD3d 673 [2004]) for the principle that a "mere" lapse of time is not enough to preclude negligent conduct from being the legal cause of an injury and that proximate cause may be found long after the negligent act occurs. However, as set forth above, the finding that claimants did not establish proximate cause is based not on a "mere" lapse of time, but on an analysis of the trial evidence, including the expert testimony. Further, in *T.W.*, the lapse of time was not enough to sever the causal relationship because the negligent hiring directly placed the employee, while under the employer's continuous control, in constant contact with children each day during the two-year period between his hiring and the assault. In *Steel*, there was only a 10- or 11-month gap between

the assailant's premature release from prison and the assaults, and the basis for expecting a continuation by a prematurely released felon of his violent behavior is not the same as the basis for a mental patient to act out after relapsing without some immediate intervening triggering event.[3]

Indeed, under the majority's analysis, no period of time, be it 5, 10 or 15 years, would suffice to attenuate the State's negligence from a criminal act committed by Joseph. To adopt this view would, for all intents and purposes, make the State an insurer of Joseph, answerable in perpetuity for his criminal and tortious conduct, thereby placing no manageable limit upon the liability flowing from the State's alleged negligent conduct in allowing Joseph to elope, in contravention of the principles set forth in *Derdiarian* (51 NY2d at 314; *see also Devellis v Lucci*, 266 AD2d 180, 181 [1999] ["One who inadvertently facilitates the theft of a vehicle by neglecting to comply with the statute is

[3]It may be noted that Judge Marin, who was also the judge in *Steel*, included *Steel* in the cases he compared to this action, stating that "[t]he Court is aware of no precedent which would offer support for a finding of proximate cause under the subject fact pattern."

not answerable in perpetuity for the criminal and tortious conduct of others who may come into possession of the stolen vehicle in the distant future."]).

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

ENTERED: MAY 3, 2011

CLERK

Sweeny, J.P., Moskowitz, DeGrasse, Freedman, Richter, JJ.

4209N Cynthia Olivaria, et al., Index 7492/02
Plaintiffs-Respondents,

-against-

Lin & Son Realty, Corp.,
Defendant-Appellant,

922 Third Avenue, LLC, et al.,
Defendants.

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Cohen Tauber Spievack & Wagner P.C., New York (Kara L. Gorycki and Stephen Wagner of counsel), for appellant.

Pollack Pollack Isaac & DeCicco, New York (Brian J. Isaac of counsel), for respondents.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered February 8, 2010, which denied defendant Lin & Son Realty Corp.'s motion to vacate the default judgment entered against it, unanimously reversed, on the law and the facts, without costs, and the motion granted.

Plaintiff Cynthia Olivaria was allegedly injured by carbon monoxide fumes that emanated from a portable heater at her workplace. The premises, consisting of two floors of office space, had been leased by Lin to the injured plaintiff's employer under a written instrument.

Upon bringing this negligence action, plaintiffs served Lin

by delivery of copies of the summons and complaint to the Secretary of State pursuant to Business Corporation Law § 306. By order entered on February 4, 2003, Supreme Court (Janice L. Bowman, J.) granted plaintiffs' motion for a default judgment against Lin. Following an inquest, the court (Suarez, J.) directed the Clerk to enter judgment by order dated August 11, 2009. Thereupon, the Clerk entered a money judgment in favor of plaintiffs against Lin on August 20, 2009. In November 2009, Lin moved for an order vacating the default judgment and permitting it to interpose an answer. The Supreme Court denied the motion, finding that Lin was not entitled to relief under CPLR 5015(a)(1) because it had not made the requisite showing of a reasonable excuse for its default. The court also found that relief under CPLR 317 was unavailable because Lin's motion was untimely.

Relief under CPLR 5015(a)(1) was properly denied. The record shows that Lin did not receive process because it failed to maintain a current address on file with the Secretary of State for 18 years (*see On Assignment v Medasorb Tech., LLC*, 50 AD3d 342 [2008]; Business Corporation Law § 408).

The Supreme Court should not have concluded, however, that Lin's request for relief under CPLR 317 was untimely. The statute permits a defendant who has been "served with a summons

other than by personal delivery" and has not appeared to defend the action upon a finding of the court that the defendant "did not personally receive notice of the summons in time to defend and has a meritorious defense" (CPLR 317). A defendant so served may be allowed to defend the action "within one year after [such defendant] obtains knowledge of entry of the judgment, but in no event more than five years after such entry . . ." (*id.*).[1] In making a CPLR 317 motion, a defendant does not have to come forward with a reasonable excuse for its default (*see Pena v Mittleman*, 179 AD2d 607, 609 [1992]).

By regarding the February 4, 2003 order as an entered judgment, the court reached the conclusion that the statutory five-year period had expired. This was error. "A judgment is entered when, after it has been signed by the clerk, it is filed by him" (CPLR 5016[a]). Unlike the 2003 order, the 2009 judgment was duly signed and entered by the County Clerk. Accordingly, the motion was timely because August 20, 2009 is the date of entry from which Lin's time is to be measured.

The lease between Lin and the injured plaintiff's employer

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[1]Plaintiffs do not challenge Lin's assertion that it did not learn of this action until three months after the judgment had been entered.

provided for heating through perimeter ducts and made no mention of portable heaters. Lin's president states by affidavit that the company had no knowledge of the tenant's use of portable heaters. Thus, Lin has demonstrated, prima facie, that it has a meritorious defense to plaintiffs' claims. Moreover, it does not appear that Lin deliberately attempted to avoid notice of this action (*see e.g. Eugene Di Lorenzo, Inc. v Dutton Lbr. Co.*, 67 NY2d 138, 143 [1986]). In the exercise of discretion, we therefore grant Lin's motion to vacate the default judgment pursuant to CPLR 317.

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

ENTERED: MAY 3, 2011

CLERK

Tom, J.P., Saxe, DeGrasse, Freedman, Román, JJ.

4281 Citibank, N.A., Index 105168/09
Plaintiff-Appellant,

-against-

Harvey Silverman, et al.,
Defendants-Respondents.

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Blank Rome LLP, New York (Harris N. Cogan of counsel), for appellant.

Lewis Johs Avallone Aviles, LLP, Melville (James F. Murphy of counsel), for respondents.

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Order, Supreme Court, New York County (Edward H. Lehner, J.), entered November 19, 2009, which denied plaintiff's motion for summary judgment, with leave to renew after the completion of discovery, unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff established prima facie its entitlement to summary judgment on its cause of action to recover $10 million from defendants by submitting the credit agreement and the note executed by defendants and a power of attorney executed by them authorizing a business associate, Marc Roberts, to make withdrawals (*see Takeuchi v Silberman*, 41 AD3d 336, 336-337 [2007]). In opposition, defendants claimed that they were

defrauded by Roberts, who allegedly directed the bank to transfer the funds to his personal account without their knowledge.

We are not persuaded by defendants' argument that the power of attorney was invalid because it was not acknowledged in accordance with former General Obligations Law § 5-1501. Plaintiff's claims in this action are enforceable despite the alleged defect in the acknowledgment because respondents admit that they executed the power of attorney (*cf. Matter of Sbarra,* 17 AD3d 975, 976 [2005]. Moreover, defendants ratified the power of attorney and confirmed their indebtedness to plaintiff by listing it on a net worth statement and making interest payments on the debt (*see Chase Manhattan Bank v Polimeni,* 258 AD2d 361 [1999], *lv dismissed* 93 NY2d 952 [1999]). Defendants also acknowledged Roberts's power of attorney by merely revoking it in response to plaintiff's notice of default. Defendants did not at that time challenge the validity of the power of attorney or the amount of their indebtedness.

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

ENTERED: MAY 3, 2011

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Richter, Manzanet-Daniels, JJ.

4293 The People of the State of New York, Respondent, Ind. 6506/07

-against-

Richard Reyes, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Deborah L. Morse of counsel), for respondent.

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Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered January 14, 2009, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to an aggregate term of 3½ years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. In this observation sale case, the officer's testimony was corroborated by the recovery of a significant amount of drugs, with distinctive markings on their packaging, from defendant.

Defendant claims his counsel provided ineffective assistance

by not requesting the court to charge seventh-degree possession as a lesser included offense. That claim is unreviewable on direct appeal because it involves matters of strategy outside the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). We do not find it unreasonable per se for an attorney to concede a defendant's guilt of conduct that would constitute a lesser included offense while still seeking to avoid a conviction of any offense. Nevertheless, any facts which may have supported the decision to seek a complete acquittal are dehors the record (*cf. People v Colville*, 79 AD3d 189 [2010] [counsel reasonably accepted client's decision not to request lesser-includeds]). A fortiori, so are any facts that would support a reversal based on ineffective assistance.

The court's *Sandoval* ruling, which precluded the People from identifying the nature of defendant's felony convictions, and only permitted them to expose the fact that he had been convicted

of three felonies, balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Walker*, 83 NY2d 455, 458-459 [1994]; *People v Pavao*, 59 NY2d 282, 292 [1983]).

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

ENTERED: MAY 3, 2011

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Richter, Manzanet-Daniels, JJ.

4294 Bob Johnson, Index 102507/09
Plaintiff-Appellant,

-against-

Lebanese American University, et al.,
Defendants-Respondents.

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Zatuchni & Associates, LLC, New York (David Zatuchni of counsel), for appellant.

Wilmer Cutler Pickering Hale and Dorr LLP, Boston, MA (Ariella Feingold of counsel), for respondents.

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Judgment, Supreme Court, New York County (Marylin G. Diamond, J.), entered January 12, 2010, dismissing the complaint, and bringing up for review an order, same court and Justice, entered December 30, 2009, which granted defendants' motion for summary judgment dismissing the complaint, reversed, on the law, without costs, the judgment vacated, and the complaint reinstated.

Plaintiff worked in marketing for defendant university until defendant terminated his employment. At the time of his termination, plaintiff was told that he was being let go due to poor performance. He was further informed that if he signed an agreement entitled "Release & Discharge" (the Release) that defendant forwarded to him he would be paid the sum of $4,651.94.

The agreement read as follows:

> "I, the undersigned Robert Johnson do hereby declare that I have received from the Lebanese American University the sum of $4,651.94 as an ex-gratia payment in full settlement of any and all claims and entitlements related to my services of whatsoever nature with the above mentioned University up to June 10, 2008.
>
> "I therefore hereby remise, release and completely discharge the Lebanese American University and all its responsible officers of and from all actions or rights that I may ever have against the University in respect of my above mentioned service.
>
> "In witness whereof I have signed this full, final and irrevocable Release and Discharge this day of 6/30/08."

Plaintiff executed the document and collected the stipulated amount. However, he claims that five months later a former coworker at the university told him that she had been informed that defendant Joseph G. Jabbra, the university's president, was uncomfortable with plaintiff's "lifestyle choices." Plaintiff interpreted this alleged statement as a reference to his being gay. He then commenced this action alleging that in terminating him defendants had discriminated against him based on his sexual orientation, in violation of the New York State and New York City Human Rights Laws.

Defendants answered and, apparently before any discovery had

been conducted, moved for summary judgment. The sole basis for the motion was the Release by which defendants contended plaintiff had waived the discrimination claim. In opposition, plaintiff submitted an affidavit in which he stated that he was unaware of any basis for a discrimination claim against defendants when he signed the Release and that he did not understand the document to relinquish any such claims. To the contrary, he stated:

> "My understanding was that [the $4,651.94 payment] represented back payment that was owed to me by Defendants, including payment for unused vacation and sick time. Therefore, when I signed the release, I thought that by accepting this payment, I was simply giving up my rights to later claim that the Defendants owed me any more unpaid wages. I also did not understand the meaning of the term 'ex-gratia.'"

Plaintiff argued that because it referred only to "services," the Release should be read narrowly to relinquish only claims for monies owed in exchange for services. At the very least, he asserted, the document was ambiguous as to whether it broadly applied to other rights of employment, such as the right to enforce anti-discrimination laws. Plaintiff also noted in his affidavit that he had not been advised to consult an attorney before executing the Release. Finally, plaintiff contended that,

by falsely representing to him that he was being discharged for poor performance, defendants fraudulently induced him into signing the Release and that the document should be invalidated for that reason.

Supreme Court granted the motion and dismissed the complaint. The court stated:

> "In releasing the University from all actions or rights he may have against the school with respect to his 'service' thereto, the release was clearly referring to his employment by the University. Indeed, the release is a straightforward, uncomplicated document which apprises a reasonable signatory that all claims arising out of such service are being released and discharged, including employment discrimination claims."

The court rejected plaintiff's claim that he had not been advised to consult counsel, finding that no court of this State had held that to be a bar to enforcement of an employment-related release. It further held that plaintiff's fraudulent inducement claim was unavailing because he had not established an issue of fact as to whether he executed the Release in specific reliance on the representation that his termination was performance-based.

Under New York State law, the enforceability of releases of employment discrimination claims is generally analyzed the same way any release of claims would be analyzed, that is, as "a

contract whose interpretation is governed by principles of contract law" (*Goode v Drew Bldg. Supply*, 266 AD2d 925 [1999] [internal quotation marks and citations omitted]). Pursuant to those principles, language in a contract will be deemed unambiguous only if it has "'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion'" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002], quoting *Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978]). However, as the Court of Appeals has explained:

> "There is little doubt that [a release's] interpretation and limitation by the parol evidence rule are subject to special rules. These rules are based on a realistic recognition that releases contain standardized, even ritualistic, language and are given in circumstances where the parties are sometimes looking no further than the precise matter in dispute that is being settled. Thus, while it has been held that an unreformed general release will be given its full literal effect where it is directly or circumstantially evident that the purpose is to achieve a truly general settlement, the cases are many in which the release has been avoided with respect to uncontemplated transactions despite the generality of the language in the release form" (*Mangini v McClurg*, 24 NY2d 556, 562 [1969] [internal citations omitted]).

Indeed, for a release to extend to claims both known and unknown, it must have been both "'fairly and knowingly made'" (id. at 566, quoting *Farrington v Harlem Sav. Bank*, 280 NY 1, 4 [1939]. This does not necessarily mean that the releasor must show that he or she was induced to execute the release by fraudulent means. Rather,

> "[t]he requirement of an 'agreement fairly and knowingly made' has been extended . . . to cover other situations where because the releasor has had little time for investigation or deliberation, or because of the existence of overreaching or unfair circumstances, it was deemed inequitable to allow the release to serve as a bar to the claim of the injured party" (*id.* at 567; *see e.g. Haynes v Garez*, 304 AD2d 714 [2003]; *Starr v Johnsen*, 143 AD2d 130 [1988]).

On their motion for summary judgment, defendants bore the burden of establishing that the Release was unambiguous as a matter of law and that there were no material issues of fact regarding whether it precluded the claims asserted by plaintiff in his complaint. Defendants satisfied their initial requirement by submitting the Release. However, plaintiff raised a triable issue of fact as to whether a release of discrimination claims was "fairly and knowingly made." He did this by stating that it was his "understanding" that the Release was simply an acknowledgment that the $4,651.94 payment that defendants would

make upon receipt of the executed document represented everything he was already owed at the time of his termination, and that he had no right to challenge the amount at a later date. Whether plaintiff had a valid basis for such an "understanding" cannot be determined on this record. Indeed, plaintiff does not reveal who or what led him to form this belief. Further, if plaintiff had inquired into the meaning of the term "ex-gratia," he might have realized that, contrary to his "understanding," defendants considered the payment gratuitous. However, it is significant that defendants did not challenge the legitimacy of plaintiff's "understanding" or offer an affidavit by anybody at the university who was involved in the preparation of the Release. Accordingly, we adhere to the well established principle that evidence submitted in opposition to a motion for summary judgment should be accepted as true (*see Pellegrini v Brock*, 65 AD3d 971 [2009]).

Plaintiff further created an issue of fact as to the fairness of the release by alleging that he was told that the reason for his termination was poor performance. Plaintiff did not make out a claim for fraud because he did not allege that he was induced by defendant's representation to sign the release. We find, however, that the allegation suggests the existence of

"overreaching or unfair circumstances," which, if proved, would render enforcement of the release inequitable (*see Mangini*, 24 NY2d at 567). Additionally, a question of fact exists whether it would be fair to enforce the release against plaintiff's discrimination claims when plaintiff was given the take-it-or-leave-it proposition of signing the document or not receiving the payment. Again, we must assume, for purposes of this motion for summary judgment, where we are required to give plaintiff the benefit of all favorable inferences that can be drawn from the evidence, that the amount offered to plaintiff constituted wages and benefits he had already earned. If that is the case, it would certainly constitute "overreaching" for defendants to tie the payment of those wages to plaintiff's executing a release. We note that, because of the constraints placed on plaintiff's ability to collect those alleged wages, it was not unreasonable for him not to look up the definition of the term "ex-gratia."

If plaintiff's version of events is correct, then the scope of the release is not necessarily as broad as defendants contend. Plaintiff maintains that he was paid only what he was already owed, and that he was given no additional benefits that would have constituted consideration for a release of discrimination claims. If that is true, then he could not have been expected to

understand that he was relinquishing his right to sue for claims unrelated to pay and benefits. Moreover, the Release does not on its face preclude the narrow scope urged by plaintiff. If the parties indeed intended the release to settle payment and benefits issues only, then it makes sense that they used language releasing claims related to the "services" plaintiff provided in exchange for those payments and benefits.

The small amount of consideration paid to plaintiff is also significant and further informs our view that summary judgment was improperly granted. While courts do not ordinarily question the amount of consideration supporting an agreement, it is appropriate to consider whether a relatively small amount of consideration paid to a releasor in exchange for signing a release suggests that the scope of the release is narrower than is urged by the releasee (*see Best v Yutaka*, 90 NY2d 833 [1997]; *Haynes v Garez*, 304 AD2d at 716). We also take note of the precise amount of the payment in this case, which indicates that it may have been chosen to resolve only known, quantifiable claims.

This case differs substantially from *Skluth v United Merchants & Mfrs.* (163 AD2d 104 [1990]), which defendants rely on and which appears to be the most relevant New York State case

addressing the enforceability of releases that purport to waive employment discrimination claims. In *Skluth*, the plaintiff had a contract with his employer, the defendant, which provided that the employer could terminate him upon 90 days' notice. The contract stated that during the 90-day notice period plaintiff would continue to be paid his usual salary and benefits, and for a period of 90 days thereafter he would receive additional severance pay. After the employer terminated the plaintiff, the two parties negotiated additional severance pay not provided for in the contract. According to this Court's recitation of the facts, "[t]his extension of benefits formed the consideration for plaintiff's execution of the release pursuant to which he agreed to 'release and forever discharge [defendant] from all liability of every kind, nature and description' arising out of his employment" (163 AD2d at 105). This Court found that the release unambiguously barred the plaintiff's discrimination claim, and that "no legal authority exists for the proposition that a release must expressly mention a discrimination claim in order to be valid and binding with respect thereto" (*id.* at 107).

Unlike the situation here, the plaintiff in *Skluth* could not credibly argue that the release he executed did not cover discrimination claims. The parties in *Skluth* negotiated a

severance package that was more generous than the plaintiff was already entitled to, and it was obvious that the employer's incentive for paying the plaintiff more money was a release of claims of discrimination. Here, by contrast, plaintiff maintains that he tendered the Release in exchange for a payment of monies already due and owing, and that it would have been unreasonable for him to relinquish additional rights without additional consideration.

The dissent dismisses plaintiff's "understanding" that the release only barred claims for benefits due and owing to him at the time of his termination by citing cases that hold that a releasor's subjective belief as to what he is releasing is irrelevant. However, the dissent ignores the principle that where there is *objective* evidence that the release was not intended to cover certain claims, the releasor will not be barred from asserting those claims (*see Cahill v Regan*, 5 NY2d 292, 299 [1959]). As discussed above, on this record we cannot resolve the precise scope of the Release. Moreover, the dissent disregards well settled rules of construction by reading the operative words of the document in a vacuum. In interpreting contractual language, a court must

> "'consider the relation of the parties and the circumstances under which it was executed. Particular words should be considered, but in the light of the obligation as a whole and the intention of the parties as manifested thereby'" (*Kass v Kass*, 91 NY2d 554, 566 [1998], quoting *Atwater & Co. v Panama R.R. Co.*, 246 NY 519, 524 [1927]).

Here, accepting as true plaintiff's statement that the release was prepared specifically in connection with wages and benefits owed to him at the time of his termination, one can reasonably construe the document as waiving claims related to his earnings, and nothing else.

While the fact that plaintiff was not advised to consult with counsel is not dispositive of the enforceability of the Release (*Skluth*, 163 AD2d at 107), defendants' tying of the payment to plaintiff's return of the Release certainly had a bearing on plaintiff's opportunity to consult counsel. As Supreme Court recognized, the opportunity to consult counsel is at least a factor to be considered when analyzing the volition with which a party entered into a contract (*see id.*). However, with the payment depending on plaintiff's return of the signed Release it can hardly be said, as the court did, that plaintiff had "ample" opportunity to consult an attorney before signing the document.

For the foregoing reasons, we find that issues of fact exist as to whether plaintiff intended to relinquish employment discrimination claims when he executed the Release. Accordingly, Supreme Court erred in dismissing the complaint.

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

ANDRIAS, J. (dissenting)

The issue before us is whether plaintiff's action alleging discriminatory discharge in violation of the City and State Human Rights Laws is barred by the "Release & Discharge" (the release) he executed after his employment with defendant Lebanese American University (LAU) was terminated. While we all agree that defendants satisfied their prima facie burden on the summary judgment motion, the majority finds that plaintiff raised a triable issue of fact as to the scope of the release based on his alleged understanding that he was signing a limited release intended to cover only the issues directly related to his services, such as wage and benefit claims. Because I believe that plaintiff's subjective belief is insufficient to render the terms of the release unambiguous, and that there is no evidence that would establish that plaintiff was deprived of the opportunity to consult with counsel before signing the release, I respectfully dissent.

On June 9, 2008, plaintiff was told that he was being terminated from his position as Marketing Communication Project Manager at LAU due to poor job performance. Thereafter, he was told that if he wished to receive severance pay of $4,651.94, he would have to sign a release. On or about June 27, 2008, LAU's

director of operations e-mailed the release to plaintiff for his review and signature. On or about June 30, 2008, plaintiff signed and returned the release, which reads:

> "I . . . declare that I have received from [the] University the sum of $4,651.94 as an ex-gratia payment in full settlement of any and all claims and entitlements related to my services of whatsoever nature with the above mentioned University up to June 10, 2008.
>
> "I therefore hereby remise, release and completely discharge [defendant] and all its responsible officers of and from all actions or rights that I may ever have against the University in respect of my above mentioned service."

In November 2008, plaintiff, who is gay, was allegedly told by a former coworker that she heard that he had been fired because defendant Jabbra was unhappy with his "lifestyle choice." Plaintiff commenced this action and defendants moved for summary judgment based on the release.

"'[A] valid release which is clear and unambiguous on its face and which is knowingly and voluntarily entered into will be enforced as a private agreement between parties'" *(Skluth v United Merchants & Mfrs.*, 163 AD2d 104, 106 [1990], quoting *Appel v Ford Motor Co.*, 111 AD2d 731, 732 [1985]) and will constitute a complete bar to an action on a claim that falls within its scope (*see Hack v United Capital Corp.*, 247 AD2d 300, 301, 302 [1998]).

Like any contract, a release must be "read as a whole to determine its purpose and intent," and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990] ["before looking to evidence of what was in the parties' minds, a court must give due weight to what was in their contract"]; *see also Kass v Kass*, 91 NY2d 554, 566 [1998]). "A contract is unambiguous if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion'" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002], quoting *Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978]).

Plaintiff asserts that it was his understanding that the release would cover only claims for additional payment or benefits owed for his services and that he did not intend it to apply to any wrongful termination claims. However, "it is not a prerequisite to the enforceability of a release that the releasor be subjectively aware of the precise claim he or she is releasing" (*Mergler v Crystal Props. Assoc.*, 179 AD2d 177, 180 [1992]). If the language of a contract, including a release, is clear and unambiguous, "effect will be given to the intention of

the parties as indicated by the language employed and the fact that one of the parties may have intended something else is irrelevant" (*LeMay v H.W. Keeney*, Inc., 124 AD2d 1026, 1027 [1986], *lv denied* 69 NY2d 607 [1987]; *See Moore v Kopel*, 237 AD2d 124, 125 [1997] [that one party to an agreement may attach a particular, subjective meaning to a term that differs from the term's plain meaning does not render the agreement ambiguous]).

In *Skluth v United Merchants & Mfrs., Inc.* (163 AD2d 104, 105 [1990], *supra*), the plaintiff agreed to

> "release and forever discharge [defendant] from all liability of every kind, nature and description arising out of his employment subject, in part, to the collection of stated salary payments, his pension rights, and his right to participate in defendant's comprehensive medical plan at his own expense so long as he was not enrolled in any other group medical program."

This Court ruled that the quoted language could not be "reasonably construed as restricting the release to claims concerning salary, medical benefits or other forms of financial compensation, and no legal authority exists for the proposition that a release must expressly mention a discrimination claim in order to be valid and binding with respect thereto" (*id.* at 107). Thus, we held that "[s]ince the agreement herein clearly and unambiguously releases defendant from 'all liability of every

kind, nature and description', the instrument operates as a matter of law to release defendant from any and all claims, whether already accrued or which might arise subsequent to the date of execution, including plaintiff's assertion of age discrimination" (*id.*).

The language of the release in this case is comparable to the language used in *Skluth*. By its express terms, the release applies to claims "related to my services *of whatsoever nature*" and to "*all* actions or rights that I may *ever* have against the University *in respect of* my above mentioned service" (emphasis added). There is no language limiting the scope of the release to wage and benefit claims. By executing a release with this broad language, plaintiff released not only the claims that were specifically in dispute at the time the release was executed but also any claims that he may *ever* have against defendants related to his service for LAU. The term "services of whatsoever nature" is broad enough to encompass any aspect of the employer-employee relationship between the parties.

Given the unambiguous language of the release, there is no need to look for extrinsic evidence of the parties' intent (see *Greenfield v Philles Records, Inc.*, 98 NY2d at 569). In any event, plaintiff's subjective understanding as to the scope of

the release does not constitute objective evidence that the release was not intended to cover all claims arising out of his employment and, contrary to the majority's view, no objective evidence was submitted that would suffice to raise an issue of fact as to whether all the parties intended the release to be of limited scope.

The majority also believes that plaintiff's failure to consult with counsel is a relevant factor and that "it can hardly be said, as the court did, that plaintiff had 'ample' opportunity to consult an attorney before signing the document." However, in *Skluth*, we explained:

> "The other factor deemed crucial by the Supreme Court, plaintiff's failure to consult with an attorney, also does not preclude enforcement of the release. The court properly found that plaintiff is an educated, experienced businessman with knowledge of release letters such as the one that he was asked to execute. He had ample time to seek legal advice prior to signing the instrument and was, even accepting plaintiff's own version of the facts, not prevented or discouraged from doing so by defendant. There is, certainly, no requirement in the law that consultation with a lawyer must occur in order to render a contractual obligation enforceable, even one relinquishing a discrimination claim, so long as the agreement has been knowingly and voluntarily entered into. Although a party's representation by an attorney is some evidence of the knowledge and volition with

> which a particular contract was made, the absence of counsel is far less critical than the opportunity to consult counsel" (163 AD2d at 106 [citations omitted]).

Plaintiff, a marketing communication project manager at LAU, was not forced to sign the release on the spot, and he does not aver that he was given an ultimatum by defendants that they would withdraw the compensation offer if he did not sign and return the release by a date certain. Indeed, plaintiff acknowledges that he "had the release for approximately two days before [he] signed it." Thus, there is nothing to show that plaintiff was in any way deprived of the opportunity to consult with counsel or pressured to forgo that right.

Accordingly, I would affirm the judgment dismissing the complaint.

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

ENTERED: MAY 3, 2011

CLERK

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

4806-
4806A Samuel Fine, Index 302053/08
Plaintiff-Respondent,

-against-

One Bryant Park, LLC, et al.,
Defendants-Appellants,

Tishman Construction Corporation
of New York,
Defendant.

_____

Conway, Farrell, Curtin & Kelly P.C., New York (Jonathan T. Uejio of counsel), for appellants.

Burns & Harris, New York (Blake G. Goldfarb of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered May 25, 2010, which, in this personal injury action, denied defendants-appellants' motion for summary judgment as untimely, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered September 7, 2010, which, upon reargument, adhered to its original determination, unanimously dismissed, without costs, as academic.

It is undisputed that defendants failed to file the motion within the time period set by the assigned IAS judge. The motion court concluded that defendants failed to establish good cause

for the delay in making the motion (*see* CPLR 3212[a]; *Brill v City of New York*, 2 NY3d 648, 652 [2004]). A motion court's exercise of its broad discretion in determining whether the moving party has established good cause for delay will not be overturned unless it was improvident (*see Daley v M/S Capital NY LLC*, 44 AD3d 313, 315 [2007]; *Pena v Women's Outreach Network, Inc.*, 35 AD3d 104, 108 [2006]). Inasmuch as the record establishes that defendants could have easily determined which judge was assigned to the matter (*see Giudice v Green 292 Madison, LLC*, 50 AD3d 506 [2008]), the court's exercise of its discretion was not improvident.

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

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

ENTERED: MAY 3, 2011

CLERK

Saxe, J.P., Friedman, Freedman, Richter, JJ.

4936 The People of the State of New York, Ind. 57/06
Respondent,

-against-

Eddy Momplaisir,
Defendant-Appellant.

_____

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

Eddy Momplaisir, appellant pro se.

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

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Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered October 18, 2007, convicting defendant, after a jury trial, of rape in the first degree, criminal sexual act in the first degree and sexual abuse in the first degree, and sentencing him, as a second violent felony offender, to an aggregate term of 15 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The victim's testimony was corroborated by her prompt outcry and by physical evidence.

Since defendant objected at trial on different grounds from

those raised on appeal (*see People v Graves*, 85 NY2d 1024, 1026-1027 [1995]), he has not preserved his present challenges to expert testimony and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. The court properly permitted a certified sexual assault nurse to testify as an expert in sexual assault forensics. She testified that the victim's injuries had been recently acquired and that the abrasions on the victim's labia were consistent with forcible penetration. These were matters beyond the knowledge of the average juror, and the witness did not intrude on the jury's fact-finding function (*see People v Harris*, 249 AD2d 775 [1998]).

We perceive no basis for reducing the sentence.

Defendant's pro se claims are unpreserved or unreviewable, and we decline to review them in the interest of justice. As an alternative holding, we find them without merit.

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

ENTERED: MAY 3, 2011

CLERK

Saxe, J.P., Friedman, Freedman, Richter, JJ.

4937 Dudley Lawrence, Index 309185/08
Plaintiff-Respondent,

-against-

Parallel Products,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (Edgar G. Walker, J.), entered on or about February 19, 2010,

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 April 15, 2011,

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

ENTERED: MAY 3, 2011

CLERK

Saxe, J.P., Friedman, Freedman, Richter, JJ.

4939 In re Commissioner of Social Services, etc.,
Petitioner-Respondent,

-against-

Zouhier B.,
Respondent-Appellant.

_____

Steven N. Feinman, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondent.

_____

Order, Family Court, New York County (Mary E. Bednar, J.), entered on or about April 8, 2010, which confirmed the support magistrate's March 24, 2010 order finding that respondent willfully violated the court's December 5, 2007 support order, and placed respondent on probation for 6 months, upon certain terms and conditions, unanimously affirmed, without costs.

Respondent's claim that he was not afforded a hearing as mandated by Family Court Act § 454 is unpreserved and thus is not properly before this Court (*see e.g. Matter of Lindsey BB. (Ruth B.B.)*, 72 AD3d 1162, 1164 [2010]; *Matter of Brittni K.*, 297 AD2d 236, 240 [2002]). In any event, respondent participated in the hearing before the magistrate and thus waived this claim (*see Matter of Nilda S. v Dawn K.*, 302 AD2d 237, 238 [2003], *lv denied*

100 NY2d 512 [2003]). Significantly, respondent was represented by counsel, who argued on his behalf at the hearing before the magistrate, and presented evidence to the magistrate. Thus, respondent was afforded a full and fair hearing, and was given the opportunity to submit evidence in his defense.

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

ENTERED: MAY 3, 2011

CLERK

Saxe, J.P., Friedman, Freedman, Richter, JJ.

4940 Chase Equipment Leasing Inc., Index 650168/09
Plaintiff-Respondent,

-against-

Architectural Air, L.L.C., et al.,
Defendants-Appellants.

_____

Chaffetz Lindsey LLP, New York (Peter R. Chaffetz of counsel), for appellants.

Hahn & Hessen, LLP, New York (Zachary G. Newman of counsel), for respondent.

_____

Order, Supreme Court, New York County (James A. Yates, J.), entered March 24, 2010, which, insofar as appealed from, granted plaintiff's motion to dismiss the counterclaims for conversion, breach of the implied duty of good faith, and pre-possession commercially unreasonable failure to dispose of collateral, and related defenses, unanimously modified, on the law, to deny the motion as to the counterclaim for conversion, and otherwise affirmed, without costs.

Plaintiff, as a secured party, was not obligated to act in a commercially reasonable manner before taking possession of the collateral (*Bank Leumi USA v Agati*, 5 AD3d 292, 293 [2004]). Nor was it so obligated by having, as defendants assert, practical control over the collateral, given defendants' refusal to

surrender possession unless plaintiff modified the underlying loan or capitulated to their other demands. Plaintiff's refusal to dispose of the collateral while simultaneously not allowing defendants to do so does not raise an inference of bad faith. In any event, defendants' claim based on the implied covenant of good faith is barred by the no-waiver clause permitting plaintiff's delay in exercising its remedies (*see Chemical Bank v PIC Motors Corp.*, 87 AD2d 447, 450 [1982], *affd* 58 NY2d 1023 [1983]); the duty of good faith does not imply obligations inconsistent with contractual provisions (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]).

However, we find that the equipment that defendant Carl added to the airplane that served as collateral was expressly exempt from becoming collateral itself by the plain meaning of § 1.5 of the security agreement, regardless of the location of

that provision within the agreement. Therefore, Carl has a superior right to ownership or possession of the added-on equipment, which provides a basis for his conversion counterclaim.

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

ENTERED: MAY 3, 2011

CLERK

Saxe, J.P., Friedman, Freedman, Richter, JJ.

4941 Alexander Messina, et al., Index 102507/04
Plaintiffs-Respondents,

-against-

New York City Transit Authority,
Defendant-Respondent,

E.A. Technologies,
Defendant,

E.A. Technologies/Petrocelli,
J.V., LLC, et al.,
Defendants-Appellants.

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Fiedelman & McGaw, Jericho (Ross P. Masler of counsel), for E.A. Technologies/Petrocelli, J.V., LLC, appellant.

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for Stevens Appliance Truck Co., appellant.

Furey, Kerley, Walsh, Matera & Cinquemani, P.C., Seaford (Lauren B. Bristol of counsel), for New Haven Moving Equipment Corporation, appellant.

Silberstein, Awad & Miklos, P.C., Garden City (Dana E. Heitz of counsel), for Messina respondents.

Jeffrey Samel & Partners, New York (David Samel of counsel), for New York City Transit Authority, respondent.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered September 24, 2010, which, to the extent appealed from as limited by the briefs, denied the motions of defendants E.A. Technologies/Petrocelli, J.V., LLC, Stevens Appliance Truck,

Co. and New Haven Moving Equipment Corporation for summary judgment dismissing the complaint and all cross claims as against them, unanimously affirmed, without costs.

Plaintiff was injured when the 1,000 pound load he was moving with a hand truck fell onto him. The court properly found that triable issues remain as to plaintiff's products liability claims with respect to defendant Stevens Appliance Truck, Co., the manufacturer of the hand truck, and New Haven Moving Equipment Corporation, the distributor of the hand truck. The conflicting affidavits of the parties' engineering experts raised triable issues as to whether defendants may be held accountable for plaintiff's accident on a defective design and/or failure to warn theory (*see e.g. Rodriguez v Pelham Plumbing & Heating Corp.*, 20 AD3d 314 [2005]).

The evidence also presents triable issues of fact regarding whether plaintiff was a special employee of defendant E.A. Technologies/Petrocelli, J.V. at the time plaintiff sustained his

injuries. The record remains unclear as to, among other things, which party assumed exclusive control over the manner, details and ultimate result of plaintiff's work (*see Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991]).

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

ENTERED: MAY 3, 2011

CLERK

Saxe, J.P., Friedman, Freedman, Richter, JJ.

4944 The People of the State of New York, Ind. 3378/07
Respondent,

-against-

Ariel Enriquez, also known as
Ariel Henriquez,
Defendant-Appellant.

_____

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

Ariel Enriquez, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered February 6, 2009, convicting defendant, after a jury trial, of assault in the first and second degrees, gang assault in the first degree, and two counts of criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 10 years, unanimously affirmed.

Defendant did not preserve his claim that the evidence was legally insufficient to establish that he acted in concert with the person who actually shot the victim, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. Furthermore, in the exercise of our

factual review power, we find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence clearly supports the conclusion that when defendant and other members of his gang wielded a variety of weapons to attack a member of a rival gang, they were engaging in joint activity (*see e.g. People v Rosario*, 293 AD2d 298 [2002]).

We have considered and rejected defendant's ineffective assistance of counsel argument and his pro se claims.

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

ENTERED: MAY 3, 2011

CLERK

Saxe, J.P., Friedman, Freedman, Richter, JJ.

4945 Avonia Beckford, Index 16466/07
Plaintiff-Appellant,

-against-

The New York City Housing Authority, et al.,
Defendants-Respondents.

_____

Pena & Kahn, PLLC, Bronx (Emily Mann of counsel), for appellant.

Cullen and Dykman LLP, Brooklyn (Andrew Giuseppe Vassalle of counsel), for New York City Housing Authority, respondent.

Wilson, Bave, Conboy, Cozza & Couzens, P.C., White Plains (James A. Rogers of counsel), for Danco, Inc., respondent.

Fiedelman & McGaw, Jericho (Dawn C. DeSimone of counsel), for Abatech Industries, Inc., respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered October 5, 2009, which granted defendants' motions for summary judgment dismissing plaintiff's complaint, unanimously affirmed, without costs.

In this personal injury action, plaintiff, a tenant in an apartment house owned by defendant New York City Housing Authority (NYCHA), alleges that, while attempting to enter the bathtub in her apartment, she lost her balance and fell into the tub when a grab handle, which had been affixed to the side of the tub, broke off as she took hold of it. Plaintiff alleges that,

when she vacated her apartment while asbestos abatement work was being performed as part of overall renovation work at the building, the subject handle, originally installed by Medicaid approximately eight years earlier, had been removed, then reinstalled by either defendant Abatech or Danco.

Defendants established prima facie entitlement to judgment as a matter of law by showing that they did not alter, remove or reinstall the handle, or have notice of any dangerous or defective condition with respect to the handle (*see Segretti v Shorenstein Co., E.*, 256 AD2d 234, 235 [1998]).

In opposition, plaintiff failed to raise an issue of fact. In particular, plaintiff was unable to identify which, if any, defendant caused the handle to become loose. "[S]peculation regarding causation is inadequate to sustain the cause of action" (*Segretti*, 256 AD2d at 235; *see also Mandel v 370 Lexington Ave., LLC*, 32 AD3d 302, 303 [2006]).

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: MAY 3, 2011

CLERK

Saxe, J.P. Friedman, Freedman, Richter, JJ.

4946 The People of the State of New York, Ind. 3845/07
Respondent,

-against-

Joseph Franco,
Defendant-Appellant.

_____

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.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about October 2, 2008,

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

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

ENTERED: MAY 3, 2011

CLERK

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

Saxe, J.P., DeGrasse, Freedman, Richter, JJ.

4947 In re Barbara Riley, Index 100517/10
Petitioner-Respondent,

-against-

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

_____

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for appellants.

Glass Krakower LLP, New York (Bryan D. Glass of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Saliann Scarpulla, J.), entered September 20, 2010, which, inter alia, denied respondents' motion to deny and dismiss the petition to vacate the termination of petitioner's employment with respondent Department of Education and remand for a lesser penalty, and remanded the matter for a new penalty determination, unanimously affirmed, without costs.

We find the penalty so disproportionate as to be shocking to our sense of fairness (*see Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 569 [2008]). The student admitted that she sustained no physical or emotional injury as a result of the incident, and in the 15 years preceding the incident, petitioner had received not a single formal reproach

(*compare Matter of Weinstein v Department of Educ. of City of N.Y.*, 19 AD3d 165 [2005], *lv denied* 6 NY3d 706 [2006], *Matter of Solis v Department of Educ. of City of N.Y.*, 30 AD3d 532 [2006], *and Gabriel v New York City Dept. of Educ.*, 2009 NY Slip Op 32249[U] [2009], *with Matter of Ebner v Board of Educ. of E. Williston Union Free School Dist. No. 2, N. Hempstead*, 42 NY2d 938 [1977]).

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

ENTERED: MAY 3, 2011

CLERK

Saxe, J.P., Friedman, Freedman, Richter, JJ.

4948-
4948A State of New York, ex rel. Jamaica Hospital Medical Center, Inc., et al., Plaintiffs-Appellants, Index 102740/08

-against-

UnitedHealth Group, Inc., et al., Defendants-Respondents.

Wilentz Goldman & Spitzer, P.A., New York (Barry M. Epstein of counsel), for appellants.

Weil, Gotshal & Manges LLP, New York (Gregory Silbert of counsel), for respondents.

Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered April 14, 2010, dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and J.H.O., entered April 7, 2010, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The court lacked subject matter jurisdiction over this action because plaintiffs' allegations that defendant health insurance providers and related entities wrongfully underpaid them are derived from and substantially similar to allegations publicly disclosed in numerous lawsuits (*see* former State Finance Law § 190[9][b] [amended by L 2010, ch 379, sec 8]). "When the

material elements of a fraud are already in the public domain, the government has no need for a relator to bring the matter to its attention" (*United States ex rel. Ondis v City of Woonsocket*, 587 F3d 49, 58 [1st Cir 2009]; *Glaser v Wound Care Consultants, Inc.*, 570 F3d 907, 915 [7th Cir 2009]).

Moreover, plaintiffs are not the original sources of the information on which their allegations are based (*see* former State Finance Law § 190[9][b] [amended by L 2010, ch 379, sec 8]). Plaintiffs do not allege that they had direct and independent knowledge of the information on which the allegations are based or that they voluntarily provided this information to the government before filing their suit, and they cannot demonstrate that they either directly or indirectly provided the information to the source that publicly disclosed it (*see United States v New York Med. Coll.*, 252 F3d 118, 120 [2d Cir 2001], citing federal False Claims Act on which New York statute is modeled).

In light of the foregoing, we need not reach the issue whether the complaint states a cause of action.

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

ENTERED: MAY 3, 2011

CLERK

Saxe, J.P., Friedman, Freedman, Richter, JJ.

4951 Deutsche Bank National Trust Company, etc., Plaintiff-Appellant, Index 7706/07

-against-

Sonia Gordon, etc., Defendant-Respondent,

David Golding, et al., Defendants.

_____

Moss & Kalish, PLLC, New York (David B. Gelfarb of counsel), for appellant.

Howard L. Sherman, Ossining, for respondent.

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Order, Supreme Court, Bronx County (Lucy Billings, J.), entered on or about April 29, 2010, which denied plaintiff's motion for summary judgment dismissing defendant Gordon's defenses and counterclaim of fraud, unanimously reversed, on the law, without costs, and the motion granted.

By submitting proof of the existence of a mortgage and of default, plaintiff, as assignee of the lender, First Franklin Mortgage Loan Trust, established a prima facie case for foreclosure (*Bank Leumi Trust Co. of N.Y. v Lightning Park*, 215 AD2d 246 [1995]; *Chemical Bank v Broadway 55-56th St. Assoc.*, 220 AD2d 308 [1995]). In opposition, Gordon failed to raise a

triable issue of fact as to plaintiff's knowledge of or involvement in fraud (*see Citidress II v 207 Second Ave. Realty Corp.*, 21 AD3d 774, 776-777 [2005]; *Sinardi v Rivera*, 261 AD2d 388 [1999]). Gordon does not allege that she had any contact with First Franklin, that First Franklin made any misrepresentation to her, or that she justifiably relied upon any misrepresentation by First Franklin (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *Peach Parking Corp. v 346 W. 40th St., LLC*, 42 AD3d 82, 87 [2007]).

In addition, Gordon failed to establish any basis for a fact-finder to conclude that the brokers and mortgage company she alleges conspired against her were acting as First Franklin's agent in connection with the transaction. In any event, the brokers and mortgage company's commission of fraud could not be imputed to First Franklin because the alleged fraud required that the fact that Gordon was the true borrower be withheld from First Franklin (*see G.E. Capital Mtge. Servs. v Holbrooks*, 245 AD2d 170, 171 [1997]). Nor is there evidence to support a finding

that First Franklin had constructive knowledge of any fraud or had a duty to make inquiry of the circumstances of the sale of the property and the issuance of the mortgage (*see e.g. Thomas v LaSalle Bank N.A.*, 79 AD3d 1015 [2010]).

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

ENTERED: MAY 3, 2011

CLERK

Saxe, J.P., Friedman, Freedman, Richter, JJ.

4952 In re Shavenon Edwin N.,
also known as Baby Boy N.,

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

Francisco N., et al.,
Respondents-Appellants,

Cardinal McCloskey Services,
Petitioner-Respondent.

_____

Neal D. Futerfas, White Plains, for Francisco N., appellant.

Dora M. Lassinger, East Rockaway, for Miledy N., appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

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

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Order of disposition, Family Court, Bronx County (Jane Pearl, J.), entered on or about April 7, 2010, which, upon a fact-finding that respondent parents had abandoned the subject child, terminated their parental rights and committed custody and guardianship to the petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The parents admit that they did not have any contact with the subject child during the six-month period prior to the filing

of the petition to terminate their parental rights (*see Matter of Annette B.*, 4 NY3d 509, 513 [2005]). They contend that the agency had previously arranged visits and referrals for the mother's older child which compelled the mother to have contact with a man who fathered that child through rape. While the agency may have shown poor judgment in scheduling such appointments, the parents failed to provide evidence of their intention to assume their parental obligations toward the subject child, with whom they had no contact since his birth (*see Matter of Julius P.*, 63 NY2d 477, 481 [1984]). Moreover, in the abandonment context, diligent efforts by the agency to encourage the parent's relationship with the child are not required (*see Matter of Gabrielle HH.*, 1 NY3d 549, 550 [2003]).

The determination to commit custody of the child to the foster mother was well supported by the record. The case worker stated that the child had resided in the foster home since birth, along with his siblings, and that he was loved by the foster mother, who wished to adopt him and his siblings, and that his needs were being met. A suspended judgment is available only after a finding of permanent neglect (*see* Family Court Act

§ 631). Moreover, the parents presented no evidence that they took steps to develop a positive or meaningful relationship with the child.

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

ENTERED: MAY 3, 2011

CLERK

Saxe, J.P., Friedman, Freedman, Richter, JJ.

4953 In re Mildred Block, Index 109600/09
Petitioner-Appellant,

-against-

Patricia L. Gatling, Commissioner
of the New York City Commission
on Human Rights, et al.,
Respondents-Respondents.

_____

Silberman Law Firm, New York (Martin N. Silberman of counsel), for appellant.

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

Morgan, Lewis & Bockius LLP, New York (August W. Heckman, III of counsel), for Aramark, Inc., respondent.

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Order and judgment (one paper), Supreme Court, New York County (Joan B. Lobis, J.), entered on or about February 18, 2010, inter alia, denying the petition to annul the determination of respondent New York City Commissioner of Human Rights, dated June 12, 2009, which found no probable cause to believe that petitioner was discriminated against by respondent Aramark Sports, LLC (s/h/a Aramark, Inc.), her employer, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The determination that there is no probable cause to believe

that petitioner was discriminated against by her employer is supported by substantial evidence (*see* Administrative Code of City of NY § 8-123[e]). Petitioner's claim that her transfer from a portable beer stand at Shea Stadium to a food stand where she earned less money in tips was an adverse employment action is unsupported in the record (*see Mete v New York State Off. of Mental Retardation & Dev. Disabilities*, 21 AD3d 288, 290 [2005]). The transfer was merely an alteration of her responsibilities and did not result in a "materially adverse change," since petitioner retained the terms and conditions of her employment, and her salary remained the same (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 306 [2004]; *Messinger v Girl Scouts of U.S.A.*, 16 AD3d 314 [2005]). There also was substantial evidence that petitioner failed to substantiate her claim of discrimination based on disability, since she had neither requested nor been refused a reasonable accommodation (*see Pembroke v New York State Off. of Ct. Admin.*, 306 AD2d 185 [2003]).

Respondent's investigation into petitioner's complaint was sufficient, and its determination rational, since petitioner had a full and fair opportunity to present her case (*see Stern v New York City Commn. on Human Rights*, 38 AD3d 302 [2007]). The record establishes that the investigation was not "abbreviated or

one sided" (*David v New York City Commn. on Human Rights*, 57 AD3d 406, 407 [2008] [internal quotation marks and citation omitted]). Petitioner's allegation that respondent's determination was biased was also unsubstantiated.

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

ENTERED: MAY 3, 2011

CLERK

Saxe, J.P., Friedman, Freedman, Richter, JJ.

4955N Marvin Churchill, Index 116636/08
Plaintiff-Respondent,

-against-

Mohammed Abdul Malek,
Defendant-Appellant.

_____

Maroney O'Connor, LLP, New York (Ross T. Herman of counsel), for appellant.

Mirman, Markovits & Landau, P.C., New York (David Bloom of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered March 24, 2010, which, upon reargument, vacated so much of an order, same court and Justice, dated October 30, 2009, as directed plaintiff to produce authorizations releasing his mental health and pharmaceutical records for an in camera review, unanimously affirmed, without costs.

Given that, in this personal injury action, there is no claim to recover damages for emotional or psychological injury (*see Valerio v Staten Is. Hosp.*, 220 AD2d 580 [1995]), or aggravation of a preexisting emotional or mental condition (*see Sternberger v Offen*, 138 AD2d 480 [1988]), plaintiff cannot be compelled to disclose confidential psychological or psychiatric records (*cf. Carr v 583-587 Broadway Assoc.*, 238 AD2d 184, 185

[1997]). Defendant's unsubstantiated claim that plaintiff's mental illness might have caused the accident is insufficient to warrant mental health disclosure (*see Zimmer v Cathedral School of St. Mary & St. Paul*, 204 AD2d 538, 539 [1994]).

Defendant's argument that plaintiff is bound by prior stipulations is unavailing, since both documents were clearly denominated as orders. Equally unavailing is defendant's contention that plaintiff's motion to reargue was untimely. The prior order was never served with notice of entry; therefore, the thirty-day period set forth in CPLR 2221(d)(3) has not been triggered (*see Zhi Fang Shi v Sanchez*, 36 AD3d 486 [2007]).

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

ENTERED: MAY 3, 2011

CLERK