SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 19, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Sweeny, Moskowitz, Acosta, Manzanet-Daniels, JJ.

4925- John Anthony Rubino & Company, etc., Index 402788/08
4926- Plaintiff-Respondent,
4927-
4928 -against-

Mark H. Swartz, M.D.,
Defendant-Appellant.

_____

Menaker & Herrmann LLP, New York (Richard G. Menaker of counsel), for appellant.

Blodnick, Fazio & Associates, P.C., Garden City (Thomas R. Fazio of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Judith J. Gische, J.), entered August 27, 2010, after a nonjury trial, awarding plaintiff the principal sum of $113,187.50 on its causes of action for quantum meruit and unjust enrichment, and bringing up for review an order, same court and Justice, entered August 25, 2010, which, to the extent appealed from as limited by the briefs, found in plaintiff's favor on its causes of action for quantum meruit and unjust enrichment, unanimously affirmed, with

costs. Appeal from the order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Appeals from order, same court and Justice, entered July 16, 2010, which denied plaintiff's motion to, among other things, strike defendant's answer, and order, same court (Joan M. Kenney, J.), entered on or about March 10, 2010, which denied defendant's motion for summary judgment dismissing the complaint, unanimously dismissed, without costs, as abandoned.

The record does not establish that, during the telephone conversation that gave rise to the parties' alleged oral contract, the parties used the term "on spec" to describe the arrangement for plaintiff's compensation. Accordingly, contrary to defendant's contention, the court properly declined to interpret the term. The court also properly determined that there was no contract because there was no meeting of the minds with respect to a material term of the contract, namely plaintiff's compensation (*see Gessin Elec. Contrs., Inc. v 95 Wall Assoc., LLC,* 74 AD3d 516, 518-519 [2010]).

The elements of quantum meruit and unjust enrichment were shown (*cf. Snyder v Bronfman*, 13 NY3d 504, 508 [2009]; *Fulbright & Jaworski, LLP v Caruvcci*, 63 AD3d 487, 488-489 [2009]). The record establishes that plaintiff had a reasonable expectation of

payment, and that defendant received a benefit from plaintiff's services even though defendant's project ultimately failed. Plaintiff's 18-month delay in providing an invoice was insufficient to constitute a waiver of his claims; the instant circumstance involving a relationship between previously unacquainted parties is distinguishable from that in *Umscheid v Simnacher* (106 AD2d 380, 383 [1984]), in which personal services rendered to an old friend were unaccompanied by any bills.

The court's award was reasonable and supported by the record.

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

ENTERED: MAY 19, 2011

CLERK

Mazzarelli, J.P., Saxe, McGuire, Freedman, Abdus-Salaam, JJ.

3657 Frank Montalbano, Index 112714/08
Plaintiff-Appellant,

-against-

136 W. 80 St. CP,
Defendant,

James Callanan,
Defendant-Respondent,

80th Street Owners Corp.,
Defendant-Appellant.

_____

Stanford Kaplan, Mineola, for 80th Street Owners Corp., appellant.

Petrocelli & Christy, New York (Michael D. Zentner of counsel), for Frank Montalbano, appellant.

Michelle S. Russo, Port Washington, for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered March 10, 2009, which, to the extent appealed from as limited by the briefs, granted defendant James Callanan's cross motion for summary judgment dismissing the complaint and all cross claims against him, unanimously affirmed, without costs.

On March 24, 2008, plaintiff was walking on West 80th Street at approximately 8:00 P.M. when he tripped and fell on a defect in the sidewalk. Specifically, the sidewalk flag was raised on

one side at the expansion joint. Initially, it was unclear whether the area of the sidewalk where plaintiff fell abutted the property of 136 W. 80th Street, Callanan's property, or 134 W. 80th Street, defendant 80th Owners Corp.'s property. Plaintiff commenced the instant action against both defendants.

After discovery took place, Owners Corp. moved for summary judgment, arguing that the area where plaintiff fell was under the sole dominion and control of Callanan and abutted his property. Owners Corp. noted that Callanan had testified during his deposition that he had replaced the sidewalk in front of his property, including the elevated flag that caused plaintiff to fall, in 1972 and again in 2009, after plaintiff's accident. It also argued that Callanan had caused the defect in the sidewalk to occur by his special use of the sidewalk. Specifically, it cited to the fact that in 2000 when Consolidated Edison replaced the flag where plaintiff fell after installing a gas line for Callanan's building, it left an oil cap in the flag so that conversion back to oil would be a viable future option. Owners Corp. maintained that this was a special use of the sidewalk. Additionally, Owners Corp. argued that because the stoop in front of Callanan's building abutted the sidewalk flag, it was Callanan's responsibility to comply with the Administrative Code

and keep the sidewalk in good repair.

Callanan cross-moved for summary judgment, arguing that he did not breach any duty owed to plaintiff, as a pedestrian on the public sidewalk, because the portion of the sidewalk where plaintiff fell does not abut his property. Although Callanan had initially believed that it did abut his property, a survey prepared after his deposition revealed that the area of the sidewalk where plaintiff fell abuts 134 West 80th Street. Callanan submitted an affidavit from Angelo J. Fiorenza, the professional land surveyor who performed the survey of his property. Fiorenza stated that prior to performing the survey, he reviewed the deed to Callanan's property, visited the property, and reviewed the photograph marked by plaintiff which indicated the spot where he fell. He "conclude[d] that no portion of the area of the sidewalk where the plaintiff claims to have fallen abuts Callanan's property. Rather, the area of the sidewalk where the plaintiff claims to have fallen abuts, in its entirety, the premises known as 134 W. 80th Street ..., which is the property immediately to the west of Callanan's building." He further stated that this conclusion holds true even though "the entire wall supporting the westerly side of the stairway to house number 136 (Tax Lot 50) lies upon land of house number 134 (Tax

Lot 149)."

In opposition to the cross motion, Owners Corp. argued that the survey submitted by Callanan failed to establish that Callanan did not acquire the property on which the wall supporting his stairwell encroaches (property belonging to 80th Street Owners Corp.) through an easement or by adverse possession. It further argued that Callanan failed to establish that the sidewalk defect was neither caused by an affirmative act carried out by Callanan or by the special use of the sidewalk, i.e., replacement of the sidewalk by Callanan and Consolidated Edison and retention of the oil cap. Additionally, Owners Corp. argued that Callanan exercised continuing control over the sidewalk by replacing the defective sidewalk flag after the accident.

The motion court granted Callanan summary judgment based on the undisputed survey, which establishes that the defective area of the sidewalk which caused plaintiff's fall does not abut his property. Plaintiff and Owners Corp. argue on appeal that the entire sidewalk flag abuts both properties with the majority of the sidewalk flag abutting Callanan's property. They also argue that the entire flag was raised, not just the portion where plaintiff tripped. Both plaintiff and Owners Corp. argue as well

that Callanan had a special use of the sidewalk flag based on the gas line running underneath the sidewalk and the oil cap that was left in the sidewalk flag for potential future use. They maintain that whether this alleged special use created or contributed to the sidewalk defect raises a question of fact precluding summary judgment. Owners Corp. also argues that after the installation of the gas line, Callanan assumed a duty to maintain and repair the repaved sidewalk flag.

Neither plaintiff nor Owners Corp. presented any evidence suggesting that any special use caused the sidewalk defect. There is no evidence that the oil cap, the gas pipe underneath the sidewalk, or the repaving done by Consolidated Edison caused, or even contributed to, the defect. Accordingly, this is pure speculation insufficient to defeat summary judgment. Likewise, there is nothing to establish that Callanan assumed a duty to maintain and repair the sidewalk. Prior to the survey, he mistakenly believed that the entire sidewalk flag abutted his property. Neither plaintiff nor Owners Corp. cites any authority for the proposition that Callanan assumed a continuing duty based on this mistake. Nor do they cite any authority for the proposition that because the majority of the flag abuts his property, he is liable to plaintiff. Plaintiff did not fall on a

portion of the sidewalk abutting Callanan's property. As the motion court noted, neither Owners Corp. nor plaintiff disputes the findings of Mr. Fiorenza. Rather, they maintain that Callanan's alleged exercise of control over the sidewalk somehow makes him liable pursuant to the Administrative Code. But the Code does not make persons who exercise control over the sidewalk liable -- it refers only to owners of real property.

The argument that Callanan is liable because a wall supporting the stairwell in front of his building encroaches on Owners Corp.'s property is similarly deficient. An encroachment does not establish ownership of the property on which the structure encroaches and Administrative Code of City of NY § 7-210 applies only to owners of real property abutting the sidewalk. Neither Owner's Corp. nor plaintiff has submitted any evidence of an easement or anything else that would establish ownership of that portion of the property by Callanan.

Callanan submitted uncontroverted evidence that his property does not abut the portion of the sidewalk where plaintiff fell. He thus established that he did not have a duty to maintain the portion of the sidewalk where plaintiff fell in a reasonably safe

condition (*De Garcia v Empire Fasteners, Inc.*, 57 AD3d 710, 711 [2008]). Accordingly, he is entitled to judgment as a matter of law.

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

ENTERED: MAY 19, 2011

CLERK

Tom, J.P., Mazzarelli, Renwick, Freedman, Manzanet-Daniels, JJ.

4144 In re Arthur J. Elkan, Index 316P/02
Deceased.
- - - - - - -
Lynne H. Federman,
Petitioner-Appellant,

Peter Gold,
Petitioner,

-against-

Marion R. Gerdus,
Objectant-Respondent.

_____

Stagg, Terenzi, Confusione & Wabnik, LLP, Garden City (Michelle E. Tarson of counsel), for appellant.

Coyle & Associates, LLP, Bronx (Lorraine Coyle of counsel), for respondent.

_____

Decree, Surrogate's Court, Bronx County (Lee L. Holtzman, S.), entered July 16, 2009, which granted the objectant's motion to deny admission of a will to probate, unanimously affirmed, without costs.

The proponent of the will failed to sustain his burden of showing that the testator possessed testamentary capacity when he signed the will, i.e., that he understood the nature and consequences of executing a will (*see Matter of Kumstar*, 66 NY2d 691 [1985]; *Matter of Coddington*, 281 AD 143 [1952], *affd* 307 NY 181 [1954]). The testimony of the disinterested witnesses

demonstrated that the testator suffered from various ailments that significantly affected his mental capacity and, more specifically, that he was unable to make financial decisions and that he was likely not competent when he signed the will.

In light of the above, we need not reach the merits of the claim that the will at issue was the result of undue influence. This should not be interpreted to favor either party's position on that subject.

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

ENTERED: MAY 19, 2011

CLERK

Tom, J.P., Sweeny, Catterson, Acosta, Manzanet-Daniels, JJ.

4651 The Board of Managers of 500 West End Condominium, Plaintiff, Kevin Maloney, Intervenor-Respondent, -against- Isaac Ainetchi, et al., Defendants-Appellants. Index 107344/04

Cuddy & Feder LLP, White Plains, (Joshua E. Kimerling of counsel), for appellants.

Franklin R. Kaiman, New York, for respondent.

Order, Supreme Court, New York County,(Saliann Scarpulla, J.), entered May 10, 2010, which, after a non-jury trial, dismissed defendants' counterclaims against intervenor Kevin Maloney and awarded him attorneys' fees, unanimously modified, on the law and the facts, to vacate the award of attorneys' fees, and otherwise affirmed, without costs.

This appeal involves a dispute between the owners of two duplex penthouse condominiums located on the 13th and 14th floors of a Manhattan building concerning the intervenor's use of certain exterior space. Defendants Ainetchi and Krasnow are the owners of Penthouse West and Maloney is the owner of Penthouse

East.

Pursuant to the terms of a purchase agreement, Maloney was prohibited from, inter alia, applying to the Department of Buildings (DOB) "for a construction or work permit . . . to enclose all or a portion of a terrace or other space appurtenant [to his apartment] without obtaining [defendants'] prior written consent . . . ." Despite this prohibition, Maloney applied for a DOB permit in order to construct a pool, deck and shed on the 13th floor terrace adjacent to his apartment (the pool area) without first obtaining defendants' consent, in breach of the purchase agreement. While the pool area was depicted in the tax lot drawings as being a general common element of the building, Maloney previously swore that this designation was a mistake and that the pool area was always intended to be a limited common element "appurtenant" to his apartment. However, as Maloney acknowledged in his brief, and as the trial court correctly determined, the pool area does not belong to, nor is it appurtenant to Penthouse East. Rather, it is a general common element belonging to the condominium which was not a party to and thus not bound by the purchase agreement. Moreover, it is undisputed that Maloney paid the board $315,960.52 for a revocable license to use this common area to construct the pool

and a shed. Based upon all of the evidence adduced at the trial, the court properly found that the pool area was thus "neither essential nor reasonably necessary" to the full, beneficial enjoyment of the demised premises and is thus, not an appurtenance to Penthouse East (*see Prospect Owners Corp. v Sandmeyer*, 62 AD3d 601, 603 [2009], *lv denied* 13 NY3d 717 [2010]).

The trial court also properly found that defendants have failed to establish any damages flowing from Maloney's breach. Additionally, they have failed to establish entitlement to the extraordinary injunctive relief sought, i.e., the restoration of the pool area to its prior condition. Although defendants first counterclaimed against Maloney prior to the start of construction, they did not seek any preliminary injunctive relief, which would have preserved the status quo (*cf. Westmoreland Assn. v West Cutter Estates*, 174 AD2d 144 [1992]) and they have not established irreparable harm (*cf. Forest Close Assn., Inc. v Richards*, 45 AD3d 527 [2007]). Further, their inaction is not attributable to Maloney's conduct, and it can be assumed that the majority of Maloney's $600,000 construction costs were incurred after commencement of the action (*cf. Goldfarb v Freedman*, 76 AD2d 565 [1980]).

Defendants do not have standing to individually bring a counterclaim against Maloney for his alleged improper exercise of control over general common elements of the building (*see Board of Mgrs. of the Chelsea 19 Condominium v Chelsea 19 Assoc.*, 73 AD3d 581 [2010]).

Additionally, defendants failed to establish that the pre-conditions required for the placement of a restrictive covenant in the deed to Maloney's apartment have been met. The subject contractual provision is clear and unambiguous and should be construed as written (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]).

In light of our mixed findings that Maloney is neither an "aggrieved party" pursuant to the terms of the contract, nor a "prevailing party," he should not have been awarded attorneys' fees.

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

ENTERED: MAY 19, 2011

CLERK

Tom, J.P., Sweeny, Catterson, Acosta, Manzanet-Daniels, JJ.

4655 In re Shamar D.,

A Person Alleged to be a Juvenile Delinquent,

Appellant.

- - - - -

Presentment Agency.

_____

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

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

_____

Order of disposition, Family Court, Bronx County, (Robert R. Reed, J.), entered on or about February 3, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of attempted sexual abuse in the third degree, and placed him on supervised probation for a period of 18 months, unanimously reversed, on the law, without costs, and the petition dismissed.

While there is no dispute that the 11-year-old appellant inappropriately touched the 12-year-old complainant without her permission in a crowded school auditorium and that his behavior is deeply offensive, the evidence was insufficient to establish

beyond a reasonable doubt that he was acting for the purpose of obtaining "sexual gratification" as required under the Penal Law (*see* Penal Law § 130.00 [3]; *see also Matter of Keenan O*, 273 AD2d 167 [2000], citing *Matter of Clifton B.*, 271 AD2d 285 [2000]).

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

ENTERED: MAY 19, 2011

CLERK

Andrias, J.P., Friedman, Freedman, Richter, Román, JJ.

5124 The People of the State of New York, Ind. 1076/08
Respondent,

-against-

Pedro Pagan,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Allen H. Saperstein of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Denis J. Boyle, J. at hearing; Michael Sonberg, J. at jury trial and sentencing), rendered May 22, 2009, convicting defendant of robbery in the second degree, and sentencing him, as a second felony offender, to a term of 10 years, unanimously affirmed.

The court properly denied defendant's suppression motion. Defendant's sole challenge to the prompt showup identification is his claim that the police should have also shown the victim a second possible suspect. Police radio communications indicated that at the time the police stopped defendant, who met a detailed description of the alleged robber, another team of officers stopped a second man several blocks away, allegedly in response to the same radioed description. This man was apparently not

detained for any significant period, and no stop-and-frisk report or other record was made of the stop. The hearing evidence did not establish whether, or to what extent, the second man may have met the description. In any event, regardless of whether the second man met the description, defendant has not provided any authority for the proposition that the police are constitutionally required to include alternative suspects in a showup. Moreover, defendant has not advanced any lawful basis for the police to detain and transport a person for investigatory purposes after they no longer consider the person a suspect.

The police stop of a second man around the time of defendant's arrest was also the subject of issues raised at trial. The trial court properly exercised its discretion when it precluded defendant from introducing a tape recording of the police broadcast of the stop of the second man, or the testimony of the officers who made the stop. Given the very limited information about this stop, the proffered evidence lacked any probative value either to challenge the reliability of the police investigation or to suggest third-party culpability.

The tape only established the fact that a second man was stopped at a particular place, but nothing about the second man's appearance. The officers could not recall the stop even after

defense counsel played the tape for them. Defendant relies on the inference that if the police stopped the second man after hearing a description on the radio, he must have met the description. However, the record is consistent with various scenarios. Among other things, the police may have momentarily stopped the man and released him upon a realization that he did not meet the description, or the man may have attracted police attention for some kind of suspicious behavior unrelated to the description. Accordingly, the court properly concluded that the proffered evidence was too speculative to have any probative value, and that any reference to the second man was likely to confuse or mislead the jury (*see People v Schulz*, 4 NY3d 521, 528 (2005); *People v Primo*, 96 NY2d 351, 355-357 [2001]).

Defendant did not assert, except by way of an untimely postverdict motion (*see People v Padro,* 75 NY2d 820 [1990]), any constitutional right to introduce the precluded evidence. Accordingly, he did not preserve his constitutional claims (*see e.g. People v Lane*, 7 NY3d 888, 889 [2006]; *People v Angelo*, 88 NY2d 217, 222 [1996]; *People v Gonzalez*, 54 NY2d 729 [1981]; *see also Smith v Duncan*, 411 F3d 340, 348-349 [2d Cir 2005]), and we decline to review them in the interest of justice. As an alternative holding, we find no violation of defendant's right to confront witnesses and present a defense (*see Crane v Kentucky*,

476 US 683, 689-690 [1986]).

Defendant did not preserve his challenge to the sufficiency of the evidence supporting the element of physical injury, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits (*see People v Chiddick*, 8 NY3d 445, 447 [2007]; *People v Guidice*, 83 NY2d 630, 636 [1994]). To the extent defendant is arguing that the verdict was against the weight of the evidence as to this element, we likewise reject that claim.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 19, 2011

CLERK

Andrias, J.P., Friedman, Freedman, Richter, Román, JJ.

5125 Heather Darcy Bhandari et al., Index 650662/09
Plaintiffs-Appellants,

-against-

Ismael Leyva Architects, P.C.,
Defendant-Respondent.

_____

Mandel Bhandari LLP, New York (Evan Mandel of counsel), for appellants.

Gogick, Byrne & O'Neill LLP, New York (Stephen P. Schreckinger of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered September 1, 2010, which granted defendant's motion to dismiss the complaint, unanimously modified, on the law, to deny the motion as to the causes of action for common-law fraud, and otherwise affirmed, without costs.

Plaintiffs' claims are not preempted by the Martin Act (General Business Law article 23-A) since, with respect to each cause of action in the complaint, plaintiffs allege not that defendant omitted to disclose information required under the Martin Act but that it affirmatively misrepresented, as part of the offering plan, a material fact about the condominium, i.e., the floor dimensions of certain units, including the one they purchased (*see Assured Guar. [UK] Ltd. v J.P. Morgan Inv. Mgt.*

Inc., 80 AD3d 293, 301 [2010]).

The complaint states a cause of action for common-law fraud by alleging that defendant knowingly made a material misrepresentation, purposefully inducing plaintiffs to rely on it, and that plaintiffs, among other things, purchased and prepared to move into the unit (*see Peach Parking Corp. v 346 W. 40th St., LLC*, 42 AD3d 82, 86 [2007]).

However, the complaint fails to state a cause of action for negligent misrepresentation because plaintiffs do not allege that defendant knew they were prospective buyers who would likely rely on its misrepresentations, or indeed that defendant knew of their existence (*see Sykes v RFD Third Ave. 1 Assoc., LLC*, 15 NY3d 370, 327-373 [2010]). Furthermore the complaint fails to state causes of action under GBL §§ 349 and 350 since there are insufficient allegations of a broad impact on consumers at large.

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

ENTERED: MAY 19, 2011

CLERK

Andrias, J.P., Friedman, Freedman, Richter, Román, JJ.

5127-
5128-
5129-
5130-
5130A

In re Naomi S.,
A Dependent Child Under Eighteen Years
of Age, etc.,

Hadar S.,
Respondent-Appellant.

Commissioner of Social Services of
the City of New York,
Petitioner-Respondent,

- - - - -

In re Uriel S.,
Petitioner-Respondent,

-against-

Hadar S.,
Respondent-Appellant.

_____

Louise Belulovich, New York, for appellant.

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

Benjamin Haber, Staten Island, for Uriel S., respondent.

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

_____

Order of disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about November 30, 2009, which, upon denial of respondent mother's application to dismiss the neglect petition pursuant to Family Court Act § 1051(c) and a

fact-finding determination that the mother neglected the subject child, among other things, released the subject child to the custody of non-respondent father, and order, same court and Judge, entered on or about November 9, 2009, which, to the extent appealed from as limited by the briefs, awarded custody of the child to the father, unanimously affirmed, without costs. Appeal from orders, same court and Judge, entered on or about February 2, 2010 and February 16, 2010, which, respectively, to the extent appealed from as limited by the briefs, set forth a visitation schedule for respondent mother and certain travel and relocation conditions for petitioner father, unanimously dismissed, without costs, as taken from non-appealable orders. Order, same court and Judge, entered on or about April 8, 2010, granting respondent father's motion to dismiss the mother's petition to modify the visitation orders, unanimously affirmed, without costs.

A preponderance of the evidence supports Family Court's finding that the child's physical, mental or emotional condition was in imminent danger of becoming impaired as a result of the mother's long-standing history of mental illness and resistance to treatment (*see* Family Ct Act §§ 1046[b][i], 1012[f][i][B]; *Matter of Madeline R.*, 214 AD2d 445 [1995]). The mother testified to multiple extended hospitalizations for mental

illness and the record showed her lack of insight into her illness and her repeated relapses due to noncompliance with treatment and medication (*see Matter of Christopher R. [Lecrieg B.B.]*, 78 AD3d 586, 586-587 [2010]). Family Court also properly denied the mother's motion to dismiss the neglect petition pursuant to Family Ct Act § 1051(c), since the dangers the mother posed to the child had not passed and thus the court's continued aid was required (*cf. Matter of Eustace B. [Shondella M.]*, 76 AD3d 428, 428 [2010]).

The totality of the circumstances establish that the award of custody of the child to her father was in the best interests of the child and has a sound and substantial basis in the record (*see Eschbach v Eschbach*, 56 NY2d 167 [1982]). The evidence at the consolidated hearing on the disposition of the neglect petition and the father's custody petition showed that the mother was incapable of caring for the child and continued to have a lack of insight about her illness, and that the child is doing well while living with her father.

Because the visitation orders were entered on consent, they are not appealable (*see Matter of Reilly v Reilly*, 49 AD3d 883, 884 [2008]).

Family Court properly dismissed, without a hearing, the

mother's petition to modify the visitation orders. The mother failed to make an evidentiary showing of changed circumstances sufficient to warrant a hearing (*see Matter of Rodriguez v Hangartner*, 59 AD3d 630, 631 [2009]).

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

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

ENTERED: MAY 19, 2011

CLERK

Andrias, J.P., Friedman, Freedman, Richter, Román, JJ.

5131-
5131A Biber Kukic, et al., Index 21955/05
Plaintiffs-Appellants,

-against-

Blanca N. Grand, M.D.,
Defendant,

Steven J. Colucci, M.D., et al.,
Defendants-Respondents.

_____

Duffy & Duffy, Uniondale (James N. Li Calzi of counsel), for appellants.

Garbarini & Scher, New York (William D. Buckley of counsel), for St. Barnabas Hospital, respondent.

Callan, Koster, Brady & Brennan, LLP, New York (Michael P. Kandler of counsel), for George Amilo, M.D., and Bronx Psychiatric Services, P.C., respondents.

Jones, Hirsch, Connors & Bull P.C., New York (Michael P. Kelly of counsel), for Steven J. Colucci, M.D., and Patricia Dharapak, M.D., respondents.

_____

Judgment, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered February 1, 2010, dismissing the complaint against defendants Steven J. Colucci, M.D., George M. Amilo, M.D., and St. Barnabas Hospital, and bringing up for review an order, same court and justice, entered January 27, 2010, which granted those defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs. Appeal from the

above order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The motion court correctly found that Drs. Colucci and Amilo established their prima facie entitlement to summary judgment by submitting medical experts' affidavits opining that their treatment of plaintiff Biber Kukic comported with good and accepted medical practice, and that Kukic's jump from a window while under one-to-one supervision was neither foreseeable nor proximately caused by any departures or deviations in the standard of care by either doctor.

As there is no liability for plaintiff's injuries against Colucci, Amilo, and the other physician defendants previously dismissed from this action, there can be no vicarious liability for plaintiff's injuries against the hospital (*Lopez v Master*, 58 AD3d 425 [2009], citing *Magriz v St. Barnabas Hosp.*, 43 AD3d 331 [2007], *lv denied, lv dismissed* 10 NY3d 790 [2008]; *Bertini v Columbia Presbyt. Med. Ctr.*, 279 AD2d 492 [2001]). In any event, the opinions in plaintiff's expert's affirmation identifying the manner in which the hospital staff deviated from good and accepted medical practice are speculative and wholly unsupported

by the record (*see DeFilippo v New York Downtown Hosp.*, 10 AD3d 521 [2004]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: MAY 19, 2011

CLERK

Andrias, J.P., Friedman, Freedman, Richter, Román, JJ.

5132 In re James Cannings, Index 402457/09
Petitioner-Respondent,

-against-

State of New York Department of
Motor Vehicle Appeals Board,
Respondent-Appellant.

_____

Eric T. Schneiderman, Attorney General, New York (Marion R. Buchbinder of counsel), for appellant.

James Cannings, respondent pro se.

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered February 8, 2010, which, in a proceeding pursuant to CPLR article 78 to annul respondent's June 1, 2009 determination affirming petitioner's speeding conviction, granted the petition to the extent of remanding the matter for further proceedings before a different Administrative Law Judge, unanimously affirmed, without costs.

Transfer to this Court was properly denied by the IAS court because petitioner's due process claims "are dispositive and sufficient to 'terminate' this proceeding within the meaning of CPLR 7804(g)" (*Earl v Turner*, 303 AD2d 282, 282 [2003], *lv denied* 100 NY2d 506 [2003]; *McCarter v Franco*, 227 AD2d 358, 358-359 [1996]). Indeed, review of the administrative hearing transcript

reveals that petitioner was not afforded his due process rights (*see Matter of Jackson v Hernandez*, 63 AD3d 64, 67-69 [2009]; *Matter of Hecht v Monaghan*, 307 NY 461, 470 [1954]).

We have reviewed appellant's remaining contentions and find them unavailing.

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

ENTERED: MAY 19, 2011

CLERK

Andrias, J.P., Friedman, Freedman, Richter, Román, JJ.

5133 Charles D. Avolio,
Petitioner-Respondent,

-against-

Patricia Fontecchio,
Respondent-Appellant.

_____

Vitti and Vitti and Associates, P.C., New York (Lois M. Vitti of counsel), for appellant.

Sari M. Friedman, Garden City, for respondent.

_____

Order, Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about March 22, 2010, which, to the extent appealed from as limited by the briefs, found that respondent mother willfully violated an all purpose short order, same court (Karen I. Lupuloff, J.), entered on or about December 20, 2006, and modified the all purpose short order to the extent of directing that the mother stay away from petitioner father's family and ensure that there is no contact by the parties' child with the father or his family except upon the father's application for a modification of visitation and the court's granting of such application, unanimously affirmed, without costs.

The record supports Family Court's determination that the

mother willfully violated the all purpose short order by contacting and communicating with the father's family on more than one occasion (*see Matter of Bronson v Bronson*, 37 AD3d 1036, 1037 [2007]; *see also Matter of Dyandria D.*, 22 AD3d 354, 355 [2005]). The subject order "expressed an unequivocal mandate" that the mother neither contact nor communicate with the father's family (*Bronson*, 37 AD3d at 1037). The mother's arguments to the contrary are unpersuasive because they attempt to justify the violation based upon matters outside the record (*see Matter of Kent v Kent*, 29 AD3d 123, 134 [2006]), or speak to credibility and the weight of the evidence, which are within the exclusive province of Family Court, as the factfinder, to determine (*see Matter of Denzel F.*, 44 AD3d 389, 389-390 [2007]; *Matter of Giovanni C.*, 35 AD3d 220, 220 [2006], *lv denied* 9 NY3d 809 [2007]).

We also reject the mother's argument that Family Court committed reversible error by not appointing an attorney for the child. While the appointment of an attorney for the child is mandatory in certain proceedings (*see* Family Court Act § 249[a]),

such is not the case here (*see Richard D. v Wendy P.*, 47 NY2d 943, 944-945 [1979]).

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

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

ENTERED: MAY 19, 2011

CLERK

Andrias, J.P., Friedman, Freedman, Richter, Román, JJ.

5134-
5135 Wachovia Bank, N.A., Index 602796/09
Plaintiff-Respondent,

-against-

Harvey Silverman et al.,
Defendants-Appellants.

_____

Danzig Fishman & Decea, White Plains (Bradley F. Silverman of counsel), for appellants.

K&L Gates LLP, New York (Michael R. Gordon of counsel), for respondent.

_____

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered February 25, 2010, which, in an action seeking payment on a promissory note, denied defendants' motion to stay this action pending disposition of a related action in the Eastern District of New York (federal action), and order, same court and Justice, entered June 29, 2010, which, to the extent appealed from, granted plaintiff's motion for summary judgment in lieu of complaint, unanimously affirmed, with costs.

Supreme Court providently exercised its discretion in denying defendants' motion for a stay pending the outcome of the federal action, which was in its early stages (*see* CPLR 2201). Granting the stay would have, among other things, unfairly deprived plaintiff of the speedy and efficient remedy provided by

CPLR 3213 (*see Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 383 [2004]). Furthermore, in the federal action, the District Court deferred to Supreme Court in making the sought-after determination of plaintiff's rights under the subject note.

Supreme Court also properly granted plaintiff's motion for summary judgment in lieu of complaint. Plaintiff established its entitlement to judgment as a matter of law by producing the promissory note allegedly executed by defendants and demonstrating that defendants failed to pay (*see Solomon v Langer*, 66 AD3d 508 [2009]). In opposition, defendants asserted defenses that are extrinsic to the subject note and do not raise triable issues of fact (*see Skilled Invs., Inc. v Bank Julius Baer & Co., Ltd.*, 62 AD3d 424, 425 [2009], *lv dismissed* 13 NY3d 934 [2010]; *Richmond Plaza Assoc. v Santucci*, 192 AD2d 412, 412 [1993]). Defendants are free to continue seeking related relief in the federal action based on such extrinsic evidence.

We decline to review the denial of defendants' motion to

renew (denominated a motion to renew or reargue), which was never appealed from (*see* CPLR 5517[a][3],[b]).

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

ENTERED: MAY 19, 2011

CLERK

Andrias, J.P., Friedman, Freedman, Richter, Román, JJ.

5136 The People of the State of New York, Ind. 6705/08
Respondent,

-against-

John Singletary,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered on or about September 9, 2009.

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

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

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

ENTERED: MAY 19, 2011

CLERK

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

Andrias, J.P., Friedman, Freedman, Richter, Román, JJ.

5137 JPMCC 2007-CIBC19 Bronx Apartments, LLC,
Plaintiff-Appellant,

-against-

Fordham Fulton LLC, et al.,
Defendants-Respondents,

New York City Housing Development Corporation, et al.,
Defendants.

Index 381025/09

Herrick, Feinstein LLP, New York (Paul H. Schafhauser of counsel), for appellant.

Zane and Rudofsky, New York (Eric S. Horowitz of counsel), for Fordham Fulton LLC and Mark Karasick, respondents.

Troutman Sanders, New York (Daniel N. Anziska, Mitchell Hill and Adam S. Libove of counsel), for Terrace Fulton Associates, L.P., Terrace Fordham Associates, L.P., Fulton Terrace LLc, and CF Fulton, LLC., respondents.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered November 16, 2010, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for summary judgment on its foreclosure cause of action against defendants Fordham Fulton LLC and Mark Karasick, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff established prima facie its right to foreclosure,

by producing the mortgage and the note, which was unpaid, and uncontroverted evidence that defendants had made no payments as of February 1, 2009; defendants failed to raise an issue of fact as to any defense to foreclosure (*see Hypo Holdings v Chalasani*, 280 AD2d 386 [2001], *lv denied* 96 NY2d 717 [2001]; *Marine Midland Bank v Fillippo*, 276 AD2d 601 [2000]). In this regard, defendants "faced an insurmountable obstacle" (*see Red Tulip, LLC v Neiva*, 44 AD3d 204, 209 [2007], *lv dismissed* 10 NY3d 741 [2008]). They expressly waived any defense to foreclosure on the mortgage and the note, they agreed in the first and second pre-negotiation agreements that they were barred from bringing any claim or raising any defense to foreclosure arising out of the parties' post-default communications regarding a potential restructuring of the loan, and they entered into a stipulation of discontinuance of their affirmative defenses with prejudice.

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

ENTERED: MAY 19, 2011

CLERK

Andrias, J.P., Friedman, Freedman, Richter, Román, JJ.

5139 James W. Egan, Index 301490/08
Plaintiff-Respondent,

-against-

Consolidated Edison,
Defendant-Respondent,

-and-

New York Yankees Partnership,
Defendant-Appellant.

_____

Gordon & Silber, P.C., New York (Andrew B. Kaufman of counsel), for appellant.

Alexander J. Wulwick, New York, for James W. Egan, respondent.

Law Offices of Richard W. Babinecz, New York (Helman R. Brook of counsel), for Consolidated Edison, respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered on or about August 12, 2010, which denied the motion of defendant New York Yankees Partnership (Yankees) for summary judgment dismissing the complaint and all cross claims as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Dismissal of the complaint and all cross claims as against the Yankees is appropriate in this action where plaintiff was

injured when he allegedly slipped and fell on an icy condition on the edge of an open transformer vault where Con Edison was working. The vault was owned by defendant Consolidated Edison which had a duty to maintain such area. Furthermore, no evidence was presented which raised a triable issue of fact concerning whether the snow removal efforts by the Yankees caused or created the hazardous condition or exacerbated it (*see Gleeson v New York City Tr. Auth.*, 74 AD3d 616, 617 [2010]).

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

ENTERED: MAY 19, 2011

CLERK

Andrias, J.P., Friedman, Freedman, Richter, Román, JJ.

5140 PETRA CRE CDO 2007-1, Ltd., Index 600880/10
Plaintiff-Appellant,

-against-

Morgans Group LLC,
Defendant-Respondent.

_____

Dickstein Shapiro LLP, New York (Neal S. Barlia of counsel), for appellant.

Hogan Lovells US LLP, New York (David Dunn of counsel), for respondent.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered December 29, 2010, which, inter alia, denied plaintiff mezzanine lender's motion for summary judgment on its complaint alleging breach of contract, and granted defendant-guarantor's cross motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

A senior loan and mezzanine loan originated from a single $40 million loan arrangement between a non-party senior lender (Greenwich Capital) and the defendant (Morgans), as parent negotiator on behalf of the eventual borrower-entities, "MHG" (as borrower on the senior loan) and "Mondrian" (as borrower on the mezzanine loan). The two loan agreements, together with supporting agreements, were executed on the same date. Pursuant

to the express terms of the parties' commitment letter, the $40 million non-recourse loan was split, at Greenwich Capital's discretion, into the senior loan and the subordinate mezzanine loan. An "Intercreditor Agreement" expressly called for the mezzanine loan's subordinate position to the senior loan. The express terms of the senior loan provided that it was secured by the mortgage on the MHG hotel property (property), and that Greenwich Capital, as senior lender, could foreclose on that property in the event of a default by MHG, including non-payment, as occurred. The express terms of the mezzanine loan provided that it was secured by a pledge agreement to the collateral of MHG and Mondrian (i.e., a 100% interest in MHG membership, related dividends and distributions). As a subordinated loan, the mezzanine loan interest in the property was equitable, to the extent there remained any excess value once full payment was made on the obligations owing on the senior loan. The mezzanine loan expressly referenced the senior loan, noting the senior loan's mortgage interest in the property.

Agreements executed at substantially the same time and related to the same subject matter are regarded as contemporaneous writings and must be read together as one (*see Nau v Vulcan Rail & Constr. Co.*, 286 NY 188, 197 [1941];

Perlbinder v Board of Mgrs. of 411 E. 53rd St. Condominium, 65 AD3d 985, 987 [2009]). Here, the clear language of the senior and mezzanine loans provided that the senior loan's mortgage on the property was a "Permitted Transfer," and that Greenwich Capital could foreclose against the property in the event of a default in payment by MHG, as occurred. A "Deed of Transfer" that was executed simultaneously with the senior loan also authorized a foreclosure sale of the property in the event of MHG's default in payment.

Plaintiff's argument, as mezzanine lender, that the mezzanine loan expressly allowed the senior lender to "create" a mortgage on the property, but fell short of authorizing "enforcement" of such mortgage terms, is refuted by a plain reading of the inter-related loan documents. Plaintiff's argument that it should nonetheless be allowed recourse against Morgans as guarantor of the mezzanine loan debt is refuted by the documents and the facts in the record. The mezzanine loan allowed for plaintiff to seek recourse against Morgans on the guaranty only in limited circumstances not applicable here (i.e., debtor's "bad acts," or the transfer of property that was not otherwise "Permitted" under the terms of the mezzanine loan agreement). The documentary evidence establishes that

plaintiff's recovery for Mondrian's default on the mezzanine loan obligation was expressly limited to the collateral of the debtors, as well as any excess foreclosure sale proceeds from the property after the senior loan obligation was satisfied. Here, the foreclosure proceeds failed to fully satisfy the obligations owing on the senior loan. Such potential risk of either limited or non-recovery by the mezzanine lender was expressly recognized by plaintiff in its own offering memorandum sent to potential investors.

Plaintiff's argument that the motion court improperly read into the loan agreements' mortgage language that a right of foreclosure was "subsumed" within the term "mortgage," is unavailing. The relevant documents expressly provided that the senior lender could foreclose in the event of an MHG default. Similarly, plaintiff's argument that the mezzanine loan only specifically permitted the "creation" of a mortgage lien on the property, but not its "enforcement," is, as indicated,

refuted by the express language of the inter-related lending documents.

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

ENTERED: MAY 19, 2011

CLERK

Andrias, J.P., Friedman, Freedman, Richter, Román, JJ.

5141 Tower Risk Management, etc., Index 107495/08
Plaintiffs-Respondents,

-against-

Ni Chunp Hu,
Defendant-Appellant.

_____

Abrams, Gorelick, Friedman & Jacobson, P.C., New York (Steven DiSiervi of counsel), for appellant.

D'Ambrosio & D'Ambrosio, P.C., Irvington (James J. D'Ambrosio of counsel), for respondents.

_____

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered October 15, 2010, which denied defendant's motion for summary judgment declaring that this action is barred by the waiver of subrogation clause in defendant's lease, unanimously reversed, on the law, with costs, the motion granted, and it is so declared.

The lease agreement between defendant and Gila Bitchatcho contained a waiver of subrogation clause, conditioned solely upon there being in each of defendant's and Bitchatcho's insurance policies a clause permitting a waiver of subrogation. It is undisputed that each policy contained such a clause. Plaintiffs argue that the clause in defendant's policy permitted only a limited waiver of subrogation, which did not satisfy the lease

condition. However, the Court of Appeals rejected that argument in *Kaf-Kaf, Inc. v Rodless Decorations* (90 NY2d 654 [1997]), construing nearly identical lease and policy language. Thus, we find that defendant's policy did not limit waiver of subrogation to the areas of the building rented by defendant, and the waiver of subrogation clause in the lease bars this action.

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

ENTERED: MAY 19, 2011

CLERK

Andrias, J.P., Friedman, Freedman, Richter, Román, JJ.

5142N 21st Century Diamond, LLC, Index 650331/09
Plaintiff-Appellant-Respondent,

-against-

Allfield Trading, LLC, et al.,
Defendants-Respondents-Appellants.

– – – – –

[And a Third-Party Action]

_____

Mound Cotton Wollan & Greengrass, New York (Robert S. Goodman of counsel), for appellant-respondent.

Jones Day, New York (James A. A. Kirk of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (James A. Yates, J.), entered January 25, 2011, which, insofar as appealed from as limited by the briefs, denied defendants' motion to compel the disclosure of correspondence post-dating the complaint, unanimously modified, on the law and the facts, and in the exercise of discretion, to grant the motion as to post-complaint correspondence related to plaintiff's customers Blue Nile, Tiffany & Co., and Birks & Mayors, and otherwise affirmed, with out costs.

Correspondence related to Blue Nile, Tiffany & Co., and Birks & Mayors concerns and is essential to the defense of

plaintiff's claims of lost profits and lost business opportunities with respect to these companies (*see Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; *Osowski v AMEC Constr. Mgt., Inc.*, 69 AD3d 99, 107 [2009]; *Flower Cart v Fackovec*, 163 AD2d 184, 187 [1990]).

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

ENTERED: MAY 19, 2011

CLERK

CORRECTED ORDER - MAY 20, 2011

Andrias, J.P., Friedman, Freedman, Richter, Román, JJ.

5143N- 5143NA
Roseann Fornuto, et al.,
Plaintiffs-Appellants,

-against-

Raymond J. Nisi, M.D., et al.,
Defendants-Respondents.

Index 7171/05

Bierman & Palitz, LLP, New York (Mark H. Bierman of counsel), for appellants.

Sack & Sack, New York (Jonathan S. Sack of counsel), for respondents.

Judgment, Supreme Court, Bronx County (Norma Ruiz, J.), entered February 23, 2010, to the extent appealed from as limited by the briefs, awarding plaintiffs damages, pursuant to a stipulation of settlement, on their wage and overtime claims and, after a jury trial, on plaintiff Monaco's sexual harassment claim, unanimously modified, on the law and the facts, to remand the matter for a hearing on the amount of attorneys' fees to be awarded plaintiffs on their wage and overtime claims and Monaco on her sexual harassment claim, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered April 16, 2010, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The New York City Human Rights Law (Administrative Code of City of NY § 8-502[f]), provides that the court, in its discretion, may award the prevailing party costs and reasonable attorney's fees. Here, the court offered no reason for its decision to deny attorney's fees. Using our discretion, we conclude that this case, which involved a jury verdict, warrants the award of some fees.

Plaintiff Monaco is a prevailing party within the meaning of Administrative Code § 8-502[f], having obtained both compensatory and punitive damages following a jury trial of her sexual harassment claims (*see Jordan v Bates Adv. Holdings, Inc.*, 11 Misc 3d 764, 778 [2006]). Since Monaco's damages were not nominal, the judgment in her favor need not serve a public purpose (*see Farrar v Hobby*, 506 US 103, 121-122 [1992]; *Pino v Locascio*, 101 F3d 235, 239 [1996]; *McGrath v Toys "R" Us, Inc.*, 409 F3d 513 [2005]). In any event, federal precedent on this issue is not binding in light of the remedial purposes of the City statute (*see Williams v New York City Hous. Auth.*, 61 AD3d 62, 66-69 [2009], *lv denied* 13 NY3d 702 [2009]).

Upon our review of the record, we find that attorneys' fees in connection with plaintiffs' wage claims, which are mandatory under the Fair Labor Standards Act (29 USC § 216[b]) and Labor

Law § 198(1-a), were not included in the amounts stipulated in the settlement (*see Kahlil v Original Old Homestead Rest., Inc.*, 657 F Supp 2d 470, 474 [2009]).

As plaintiffs' case was not complex, the court properly denied them additional costs pursuant to CPLR 8303(a)(2) (*compare Scola v Morgan*, 66 AD2d 228, 235 [1979], *appeal dismissed* 47 NY2d 799 [1979] ["we recognize the substantial time and effort expended to unearth facts to prove the fraud perpetrated by this experienced real estate man"]). Moreover, the extensive discovery purportedly conducted in plaintiffs' case is neither described nor substantiated in the record.

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

ENTERED: MAY 19, 2011

CLERK

Mazzarelli, J.P., Saxe, McGuire, Freedman, Abdus-Salaam, JJ.

3666-
3666A Sandals Resorts International Limited, Index 100628/10
Petitioner-Appellant,

-against-

Google, Inc.,
Respondent-Respondent.

_____

Dave Pitney LLP, New York (David B. Newman of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered April 16, 2010, affirmed without costs. Appeal from order, same court and Justice, entered April 30, 2010, dismissed, without costs, as taken from a nonappealable order.

Opinion by Saxe, J., All concur

Order filed

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
David B. Saxe
James M. McGuire
Helen E. Freedman
Sheila Abdus-Salaam, JJ.

3666
3666A
Index 100628/10

_____x
Sandals Resorts International Limited,
Petitioner-Appellant,

-against-

Google, Inc.,
Respondent-Respondent
_____x

Petitioner appeals from a judgment of the Supreme Court, New York County (Alice Schlesinger, J.), entered April 16, 2010, dismissing the petition for pre-action discovery in an action for libel, and from an order, same court and Justice, entered April 30, 2010, which denied petitioner's ex parte application for renewal and reargument.

Day Pitney LLP, New York (David B. Newman of counsel), for appellant.

SAXE, J.

This proceeding seeking pre-action disclosure requires us to consider a claim of defamation arising out of an e-mail sent to multiple undisclosed recipients in which the unknown writer contrasts the financial circumstances of the people of Jamaica with that of a corporation that operates multiple resorts in Jamaica, implicitly criticizing the corporation's treatment of native Jamaicans. This appeal from an order denying the petition raises questions regarding the distinction between assertions of fact and expressions of opinion, the social context of the e-mail at issue, and anonymous e-mail communications generally.

Petitioner Sandals Resorts International seeks disclosure of information and materials that would enable it to bring a libel claim against the account holder of the Google gmail account from which the complained-of e-mail was sent. The writer of the e-mail is identified as John Anthony, at "jft3092@gmail.com"; its addressees are Betty Ann Blaine and "UNDISCLOSED RECIPIENTS." Apprehension of the contents of the e-mail is somewhat hampered by spelling and syntax errors, and because the first page of the copy of the e-mail appended to the petition is cut off on the right-hand side, leaving gaps in its content.[1]

[1] Missing contents are indicated by the notation "[gap]."

The e-mail's subject line reads: "THERE (*sic*) SOMETHING GRAVELY WRONG WITH THIS PICTURE OF JAMAICA ERRRR. . . SANDALS? (*sic*) THE NEED FOR [gap]." The body of the e-mail intersperses comments by the writer with links to various Web sites that presumably contained information that prompted or support the writer's remarks. The gist of the e-mail is that the country of Jamaica gives subsidies to the Sandals resorts, paid for by Jamaican taxpayers, while the foreign corporation that owns the resort company hires only foreigners for its senior managerial positions and hires Jamaican nationals only for menial jobs at its Jamaican resorts.

The first line of the e-mail's body is a link to a photograph published in the Internet edition of The Jamaica Observer at its Web site, www.jamaicaobserver.com. The next line reads, "Sandals sweeps World Travel Awards in London," and is followed by the link to an article by that name, dated November 11, 2009, published at the Jamaica Observer Web site. The e-mail then proceeds with commentary prompted by that article and the images that accompanied it:

> "Jamaica the land of the Arawak and Caribs now looks like it has had a population shift like that which occurred to Egypt. At least this is [gap]
> the real wealth of the country is now moving to Ireland and elsewhere the rich like the Rollins bank and locals are scared stiff to ask ques [gap]
> "WHY ARE POVERTY-STRICKEN JAMAICAN TAXPAYERS

> SUBSIDIZING THE BILLION DOLLAR TOURIST INDUSTRY [gap]
> GIVING AIRLINE SUBSIDIES WORTH HUNDREDS OF MILLIONS OF
> DOLLARS FOR CHARITY PROGRAMS AND MENIAL [gap]
> OPERATIONS FOR BRINGING IN THEIR TOURISTS FREE
> ESPECIALLY.
>
> "MAKING FOREIGN MILLIONAIRES AT JAMAICANS'S EXPENSE?"

The e-mail then quotes from another article (with accompanying images) published at the Jamaican Observer Web site on August 9, 2008, entitled "'Butch' Stewart Superstar!," which relates that the founder and chairman of Sandals Resorts International, Gordon "Butch" Stewart, and his son, Sandals' CEO Adam Stewart, attended a reception for Canadian travel agents and tour operators. Specifically, the e-mail quotes portions of the article in which it is stated that "Butch . . . was mobbed by travel agents and tour operators hungry to meet the man who had built the brand many of them had made million [gap]" and that relate that a travel agent named "Affonso[] . . . disclosed that this year she had sold 90 bookings and had made over $1 million selling Sandals/ Beaches."

Following the foregoing quoted material from the article is this commentary:

> "SANDALS HAS AN EXTENSIVE OVERSEAS OPERATIONS. HOW MANY
> JAMAICANS WORK IN THIS VAST NETWORK? [gap]
> NATIONALS TO MANAGE AND RUN THEIR OVERSEAS OPERATIONS.
> I WONDER IF SANDALS IS DOING THE SAME TH[gap]
> COMPANY, ETC ALL FOREIGN OWNED LOCAL BASED HAVE
> MANAGERS FROM THE OVERSEAS HEADQUARTERED [gap]
> DIGICEL DOES NOT EVEN HAVE A SINGLE DARK-SKINNED

> JAMAICAN ON ITS BOARD!! IS IT A MATTER OF SKIN CO[gap] BUTCH THIS QUESTION? THEY ALL SEEM TO BE SCARED STIFF OF THIS MAN AND SOMEONE NEEDS TO TELL ME WH[gap]"

Next in the text of the e-mail is a link to a Web site containing an image, apparently depicting Kevin Froemming, the president of Unique Vacations, Inc., which company is part of the Sandals corporate network:

> "K. Froemming. Another millionnaire, President, Unique Vacations - laughing at us?
>
> "Unique Vacations, Inc. the Wordwide Representative of Sandals and Beaches Resorts. How many Jamaican nationals work here?"
>
> "MENIAL-LOW PAYING JOBS FOR JAMAICANS; HIGH PROFILE LUXURY-STYLE JOBS FOR FOREIGNERS!"

Directly below the foregoing is a link to an image located at the sandals.com Web site, which is followed by:

> "MAKING BEDS-MASSAGES-JAMAICAN JOBS!,"

and a similar link to another image at the Sandals Web site. That is followed by:

> "THE SANDALS OVERSEAS NETWORK IS WHERE THE REAL JOBS MAKING REAL MONEY IN THE SANDALS EMPIRE ARE. IT IS NOT MAKING UP BEDS IN MONTEGO BAY OR CLEANING TOILETS IN ST. LUCIA! THESE SCAIRDY CAT JAMAICANS ARE THE STRANGEST CREATURES ON THIS PLANET. AND THEY ARE THE SAME ONES WHO CRY THAT GOVERNMENT IS NOT CREATING ENOUGH JOBS . . . WHEN GOVT IS SUBSIDIZING THE TOURIST EMPIRES WITH THE TAXES OF POVERTY STRICKEN JAMAICANS WHO ARE DRINKING CORNMEAL PORRIDGE FOR SUNDAY DINNER!"

Next is the remark,

> "LOOK AT THIS GREAT JOB THAT WENT TO A FOREIGNER,"

followed by a link to an article published at www.prweb.com, entitled, "Sandals Resorts Appoints 16-Year Veteran, Dinah Marzullo, As Senior Director of Advertising," which reads,

> "Miami FLA [*link*] June 2, 2008 - Sandals Resorts today announced the appointment of Dinah Marzullo as senior director of advertizing. Mazullo, who most recently served as advertising director at Carnival Cruise Lines, will be based out of Unique Vacations Inc. (UVI)"

followed by these comments:

> "I AM GUESSTIMATING THAT THE SALARY FOR THIS JOB IS OVER USD$150,000 ANNUALLY. NO JAMAICAN NEED APPLY?"

The next comment, "LARGE NUMBER OF JOBS! JAMAICANS EXCLUDED?," is followed by a www.sandals.com/employment link.

> Finally, the remarks
>
> "ALL THE TALK ABOUT WORK PERMITS IS A RED HERRING. WHAT DO IMMIGRATION LAWYERS DO?"

and

> "HOW MANY JAMAICANS ARE MANAGING THESE PROPERTIES? IS ANY JAMAICAN BOLD ENOUGH TO ASK BUTCH THIS?"

are followed by links to sandals.com images of the various Sandals resorts in Jamaica.

Sandals contends that this e-mail is false and defamatory in asserting essentially that Sandals is racist and discriminatory in hiring non-Jamaicans for all positions of management and authority, and giving native Jamaicans only low-paying menial jobs. It therefore seeks

> "all information concerning the Google account designated as jft3092@gmail.com including but not limited to all e-mail, instant messages, text messages, buddy lists, address books, contact lists, account histories, account settings, profiles, mail boxes, folder structure, detailed billing, user activity records (log on and log off times), user identification records, phone number access records, ISP access records, and all information provided by the user at the time the account was created."

Pursuant to a stipulation between the parties, Google notified the account holder and provided him with a copy of the order to show cause and petition; the account holder contacted the motion court, acknowledging receipt of the documents and asserting that the publication was not defamatory.

The court denied the petition, finding that the e-mail is nonactionable opinion, because it "does not contain assertions of fact, nor would a reasonable person construe that it does." The court continued: "For the most part, the account holder enumerates queries in response to articles and pictures. The account holder provides links to the text on which his/her assertions are based." These links, according to the court, provide the reader with the facts and allow the reader to arrive at his or her own conclusions, indicating to the reader "that the account holder's words are meant to provoke either thought or discussion and are therefore protected speech." The court also found that the resort company "offer[ed] no evidence of the harm

the account holder's e-mail has caused it" and therefore could not satisfy the "injury" element of a libel cause of action.

For the reasons that follow, we affirm.

Pre-action discovery is available under CPLR 3102(c) only "where a petitioner demonstrates that [it] has a meritorious cause of action and that the information sought is material and necessary to the actionable wrong" (*see Bishop v Stevenson Commons Assoc, L.P.*, 74 AD3d 640, 641 [2010], *lv denied* 16 NY3d 702 [2011]). The petition fails to demonstrate that Sandals has a meritorious cause of action.

Defamation is defined as the making of a false statement of fact which "tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace" (*Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 379 [1977], *cert denied* 434 US 969 [1977] [citations omitted]). "Since falsity is a sine qua non of a libel claim and since only assertions of fact are capable of being proven false, . . . a libel action cannot be maintained unless it is premised on published assertions of fact," rather than on assertions of opinion (*Brian v Richardson*, 87 NY2d 46, 51 [1995]).

Initially, we observe that nothing in the petition identifies specific assertions of fact as false. That is, there is nothing in the petition contradicting the e-mail's claim that

Sandals offers only menial jobs to native Jamaicans of African heritage.

Nor did Supreme Court err in reasoning that the failure to allege the nature of the injuries caused by the statement was fatal to the petition. While a pleading of special damages is not necessary in a case of defamation per se, there must be something that addresses the element of injury to reputation (*see Ferguson v Sherman Sq. Realty Corp.*, 30 AD3d 288, 289 [2006]). Sandals argues that portraying a plaintiff as racist constitutes libel per se, citing *Herlihy v Metropolitan Museum of Art* (214 AD2d 250 [1995]). However, where the plaintiff is a corporation, a cause of action for libel per se requires the plaintiff to establish that the publication injured its business reputation or its credit standing (*see Warehouse Willy v Newsday*, 10 AD2d 49, 51 [1960]). Thus, even accepting that the e-mail portrays petitioner as a company whose hiring decisions are informed by the applicants' race -- a portrayal that certainly would be defamatory -- there still must be some allegation tending to establish that its business reputation was harmed. Petitioner made no such allegation in its petition.

Even were we to find that the petition sufficiently alleged that the subject e-mail injured Sandals' business reputation or damaged its credit standing, we still would deny the application

for disclosure of the account holder's identification on the ground that the subject e-mail is constitutionally protected opinion.

"Distinguishing between assertions of fact and nonactionable expressions of opinion has often proved a difficult task" (*Brian v Richardson*, 87 NY2d at 51). The approach now used in this State for determining which statements are protected opinion and which are unprotected factual assertions is based on a four-part formula enunciated in *Ollman v Evans* (750 F2d 970 [DC Cir 1984], *cert denied* 471 US 1127 [1985]; *see Immuno AG. v Moor-Jankowski*, 77 NY2d 235, 243 [1991], *cert denied* 500 US 954 [1991])). The four factors of the *Ollman* formula are: (1) whether the statement at issue has a precise meaning so as to give rise to clear factual implications (*id.* at 980), (2) the degree to which the statements are verifiable, i.e., "objectively capable of proof or disproof" (*id.* at 981), (3) whether the full context of the communication in which the statement appears signals to the reader its nature as opinion (*id.* at 982), and (4) whether the broader context of the communication so signals the reader (750 F2d at 983).

The United States Supreme Court substantially altered the last two "context" considerations of this formula in *Milkovich v Lorain Journal Co.* (497 US 1 [1990]), which decision "put[] an

end to the perception -- as it turns out, misperception -- traceable to dictum in *Gertz v Robert Welch, Inc.* (418 US 323, 339-340) that . . . there is a 'wholesale defamation exemption for anything that might be labeled "opinion"'" (*Immuno AG. v Moor-Jankowski*, 77 NY2d 235, 242 [1991], citing *Milkovich,* at 18). Concerned about difficulties it believed would be likely to arise from application of the newly eased standards of the *Milkovich* decision, the Court of Appeals in *Immuno AG. v Moor-Jankowski* announced that the New York State Constitution provides broader speech protections than does the United States Constitution under *Milkovich*. It announced that "the standard articulated and applied in *Steinhilber* furnishes the operative standard in this State for separating actionable fact from protected opinion" (*Immuno AG. v Moor-Jankowski*, 77 NY2d 235, 243 [1991], *cert denied* 500 US 954 [1991], citing *Steinhilber v Alphonse*, 68 NY2d 283 [1986]).

Accordingly, the standard in this state for distinguishing protected expressions of opinion from actionable assertions of fact, as articulated in *Steinhilber*, is as follows:

> "A 'pure opinion' is a statement of opinion which is accompanied by a recitation of the facts upon which it is based. An opinion not accompanied by such a factual recitation may, nevertheless, be 'pure opinion' if it does not imply that it is based upon undisclosed facts. When, however, the statement of opinion implies that it is based upon facts which justify the opinion but are

> unknown to those reading or hearing it, it is a 'mixed opinion' and is actionable. The actionable element of a 'mixed opinion' is not the false opinion itself -- it is the implication that the speaker knows certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking" (68 NY2d at 289-290 [citations and footnote omitted]).

Sandals views the e-mail complained of here as containing actionable false statements of fact, or an actionable statement of mixed fact and opinion, in which the anonymous writer created the impression that Sandals engages in racist hiring practices. Sandals analogizes its claim to that of the plaintiff in *Herlihy v Metropolitan Museum of Art* (214 AD2d 250 [1995], *supra*), who asserted that museum volunteers had falsely accused her of making anti-Semitic remarks and that as a result of these false accusations she was fired. The allegedly false accusations by the defendants included claims that plaintiff had said to them, "[y]ou Jews are such liars" and "[y]ou Jews are all alike" (*id.* at 254). Since "the natural connotation of these statements was that plaintiff was anti-Semitic, a claim of slander per se was stated, and the defendants' motion for summary judgment on that cause of action was denied (*id.* at 261).

However, *Herlihy* is inapposite to Sandals' claim. Although implying that someone is racist is as libelous as representing someone as anti-Semitic, here, we are not dealing with a few oral

statements that each stand on their own, but with a multi-page writing. Consequently, our inquiry must address both the words and the context of the e-mail as a whole, as well as its broader social context, to determine whether the content of the e-mail constitutes defamation.

There is validity to Sandals' argument that the "natural connotation" of the e-mail is that Sandals' hiring policies are racist. Although most of the comments in the e-mail refer to "Jamaicans" and "foreigners" without reference to race or skin color, there is one specific assertion that Sandals "does not even have a single dark-skinned Jamaican on its board," from which it is reasonable to infer that the writer is suggesting that Sandals is biased in its treatment of Jamaicans of color. It is also true, as Sandals states, that assertions of objective fact seem to be contained in the comments that Jamaicans are relegated to menial, low-paying jobs such as making beds, cleaning toilets, and giving massages, while foreigners hold "high profile luxury-style jobs," and that the government is subsidizing tourist empires with the taxes of poverty-stricken Jamaicans.

However, none of these factual assertions establishes a meritorious defamation claim.

The question of whether a defamation claim may be maintained

does not turn on whether the writing contains assertions that may be understood to state facts. "[E]ven apparent statements of fact may assume the character of statements of opinion, and thus be privileged, when made in public debate, heated labor dispute, or other circumstances in which an audience may anticipate [the use] of epithets, fiery rhetoric or hyperbole" (*Steinhilber*, 68 NY2d at 294 [citation and internal quotation marks omitted]). Moreover, "'sifting through a communication for the purpose of isolating and identifying assertions of fact' should not be the central inquiry" (*Guerrero v Carva*, 10 AD3d 105, 112 [1st Dept 2004], quoting *Brian v Richardson*, 87 NY2d at 51). Rather, it is necessary to consider the writing as a whole, as well as the "over-all context" of the publication, to determine "whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff" (*Brian v Richardson*, 87 NY2d at 51, quoting *Immuno AG. v Moor-Jankowski*, 77 NY2d at 254). "[C]ourts must consider the content of the communication as a whole, as well as its tone and apparent purpose" (*Mann v Abel*, 10 NY3d 271, 276 [2008], *cert denied* __ US __, 129 S Ct 1315 [2009] [citations omitted]).

In *Brian v Richardson*, the Court considered an article by former United States Attorney General Elliot Richardson called "A High-Tech Watergate" that was published on the Op-Ed page of the

New York Times on October 21, 1991 (87 NY2d at 48). Although the article contained assertions that the plaintiff, Dr. Earl W. Brian, was "linked to a scheme to take [Richardson's client] Inslaw's stolen software and use it to gain the inside track on a $250 million contract to automate Justice Department litigation divisions" (*id.* at 48-49 [internal quotation marks omitted]), the Court concluded that Brian's defamation claim against Richardson was properly dismissed. It explained that since "the purpose of defendant's article was to advocate an independent governmental investigation into the purported misuse of the software that Inslaw had sold to the Justice Department, . . . a reasonable reader would understand the statements defendant made about plaintiff as mere *allegations* to be investigated rather than as *facts*" (*id.* at 53).

Considering the e-mail in question here as a whole, we find that it is an exercise in rhetoric, seeking to raise questions in the mind of the reader regarding the role of Jamaican nationals in the Sandals resorts located in Jamaica. It is replete with rhetorical questions, asked either in relation to a link to an article about Sandals' companies or executives or in relation to a link to a photograph from the resorts' on-line public relations materials. Its apparent purpose is not to characterize Sandals Resorts as racist. It is to call to the reader's attention the

writer's belief that the native people of Jamaica, specifically the taxpayers, are providing financial support for the resorts on their island, but are not reaping commensurate financial rewards for that investment.

The tone of the e-mail, as well, indicates that the writer is expressing his or her personal views, in that it reflects a degree of anger and resentment at the idea that travel agents make money from the success of Sandals, and foreign nationals earn large salaries from the resorts, while native Jamaicans benefit financially only by being hired for service jobs at the resorts.

To the extent the e-mail suggests that Sandals' hiring of native Jamaicans is limited to menial and low-paying jobs, a reasonable reader would understand that as an allegation to be investigated, rather than as a fact (*see Brian v Richardson*, 87 NY2d at 53).

Nor does the e-mail imply that it is based upon undisclosed facts; on the contrary, each remark is prompted by or responsive to a hyperlink, that is, it is "accompanied by a recitation of the facts upon which it is based," and therefore qualifies as "pure opinion" under the *Steinhilber* analysis (68 NY2d at 289).

Finally, consideration of the "broader social context into which the statement fits" (*Ollman*, 750 F2d at 983) also requires

the conclusion that the e-mail must be treated as an expression of the writer's views and opinions, which he is asking the reader to consider.

The culture of Internet communications, as distinct from that of print media such a newspapers and magazines, has been characterized as encouraging a "freewheeling, anything-goes writing style" (*see* Cheverud, Comment, *Cohen v Google, Inc.*, 55 NY L Sch L Rev 333, 335 [2010/11]).

> "It is . . . imperative that courts learn to view libel allegations within the unique context of the Internet. In determining whether a plaintiff's complaint includes a published 'false and defamatory statement concerning another,' commentators have argued that the defamatory import of the communication must be viewed in light of the fact that bulletin boards and chat rooms 'are often the repository of a wide range of casual, emotive, and imprecise speech,' and that the online 'recipients of [offensive] statements do not necessarily attribute the same level of credence to the statements [that] they would accord to statements made in other contexts.' Because the context of a statement impacts its potentially defamatory import, it is necessary to view allegedly defamatory statements published on the Internet within the broader framework on which they appear, taking into account both the tenor of the chat room or message board in which they are posted, and the language of the statements. The low barrier to speaking online allows anyone with an Internet connection to publish his thoughts, free from the editorial constraints that serve as gatekeepers for most traditional media of disseminating information. Often, this results in speech characterized by grammatical and spelling errors, the use of slang, and, in many instances, an overall lack of coherence" (O'Brien, Note, *Putting a Face to a (Screen) Name: The First Amendment Implications of Compelling ISPs to Reveal the Identities of Anonymous Internet Speakers in*

Online Defamation Cases, 70 Fordham L Rev 2745, 2774-2775 [2002] [citations omitted]).

The observation that readers give less credence to allegedly defamatory remarks published on the Internet than to similar remarks made in other contexts, specifically addresses posted remarks on message boards and in chat rooms. However, it is equally valid for anonymous Web logs, known as blogs, and it applies as well to the type of widely distributed e-mail commentary under consideration here.

Indeed, the e-mail at issue here, which questions not so much Sandals' conduct with regard to race as its use of Jamaican wealth and the Jamaican labor pool, bears some similarity to the type of handbills and pamphlets whose anonymity is protected when their publication is prompted by the desire to question, challenge and criticize the practices of those in power without incurring adverse consequences such as economic or official retaliation (*see generally* Martin, Comment and Casenote, *Freezing the Net: Rejecting a One-Size-Fits-All Standard for Unmasking Anonymous Internet Speakers in Defamation Lawsuits*, 75 U Cin L Rev 1217, 1219 [Spring 2007]; Levine, Note, *Establishing Legal Accountability for Anonymous Communication in Cyberspace*, 96 Colum L Rev 1526, 1531 [1996]). Indeed, the anonymity of the e-mail makes it more likely that a reasonable reader would view its

assertions with some skepticism and tend to treat its contents as opinion rather than as fact.

This observation is in no way intended to immunize e-mails the focus and purpose of which are to disseminate injurious falsehoods about their subjects. However, we should protect against "[t]he use of subpoenas by corporations and plaintiffs with business interests to enlist the help of ISPs via court orders to silence their online critics[, which] threatens to stifle the free exchange of ideas" (Calvert, et al., *David Doe v. Goliath, Inc.: Judicial Ferment in 2009 for Business Plaintiffs Seeking the Identities of Anonymous Online Speakers*, 43 J Marshall L Rev 1, 15 [Fall 2009]).

In sum, while isolated portions of the subject e-mail are arguably factual, those portions constitute facts supporting the writer's opinion, which renders the writing as a whole "pure opinion" since it does not imply that it is based upon undisclosed facts (*see Steinhilber*, 68 NY2d at 289-290). Far from suggesting that the writer knows certain facts that his or her audience does not know, the e-mail is supported by links to the writer's sources. Moreover, the "content of the whole communication, its tone and apparent purpose" (*Immuno AG.*, 77 NY2d at 254), and its very anonymity, would signal to any reasonable reader that the writer's purpose is to foment

questioning by native Jamaicans regarding the role of Sandals' resorts in their national economy. Thus, the communication is not actionable.

Accordingly, the judgment of the Supreme Court, New York County (Alice Schlesinger, J.), entered April 16, 2010, dismissing the petition for pre-action discovery in an action for libel, should be affirmed, without costs. The appeal from the order, same court and Justice, entered April 30, 2010, which denied petitioner's ex parte application for reargument (incorrectly denominated an application for renewal and reargument), should be dismissed, without costs, as taken from a nonappealable order.

All Concur.

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

ENTERED: MAY 19, 2011

CLERK