SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 28, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., DeGrasse, Manzanet-Daniels, Clark, JJ.

10587 Amsterdam Hospitality Group, LLC, Index 113685/11
Plaintiff-Respondent,

-against-

Marshall-Alan Associates, Inc.,
Defendant-Appellant.

_____

Ohrenstein & Brown, LLP, Garden City (Cherice P. Vanderhall of counsel), for appellant.

Cozen O'Connor, New York (Michael C. Schmidt of counsel), for respondent.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered July 16, 2012, which, insofar as appealed from, denied defendant's motion to dismiss the third and fourth causes of action for fraudulent misrepresentation and negligent misrepresentation, affirmed, without costs.

Plaintiff alleges that defendant, a senior executive search firm retained by plaintiff to recruit senior level executives to help it develop its hotel division, misrepresented that a potential placement, nonparty David Bowd, was not subject to a non-solicitation agreement with his former employer. Plaintiff further alleges that it relied on this misrepresentation in

hiring Bowd, and subsequently incurred legal expenses to defend a lawsuit brought by his former employer against plaintiff and the employee for breach of a restrictive covenant between the employee and his former employer.

The allegations set forth in the complaint state causes of action for fraudulent misrepresentation and negligent misrepresentation (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). In support of its argument that plaintiff cannot establish reasonable reliance on the alleged misrepresentation, defendant submits an affidavit and email showing that Bowd informed plaintiff of the non-solicitation agreement with his former employer prior to the effective date of his employment with plaintiff. In opposition, plaintiff submits an affidavit and letter showing that the employee had accepted plaintiff's offer of employment days before the email disclosing the restrictive covenant. The dissent contends that the affidavit and email submitted by defendant, taken together, constitute "documentary evidence" that "negates the element of justifiable reliance as a matter of law." As a result, the dissent argues, defendant's motion to dismiss pursuant to CPLR 3211(a)(1) should have been granted.

The courts of this State have grappled with the issue of what writings do and do not constitute documentary evidence,

since the term is not defined by statute. "Judicial records, such as judgments and orders, would qualify as 'documentary,' as should the entire range of documents reflecting out-of-court transactions, such as contracts, deeds, wills, mortgages, and even correspondence" (David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10 at 22). To qualify as "documentary," the paper's content must be "essentially undeniable and . . ., assuming the verity of [the paper] and the validity of its execution, will itself support the ground on which the motion is based. (Neither the affidavit nor the deposition can ordinarily qualify under such a test)" (*id.*).

We have held that affidavits that "do no more than assert the inaccuracy of plaintiffs' allegations [] may not be considered, in the context of a motion to dismiss, for the purpose of determining whether there is evidentiary support for the complaint . . . and do not otherwise conclusively establish a defense to the asserted claims as a matter of law" (*Tsimerman v Janoff,* 40 AD3d 242, 242 [1st Dept 2007]; *see also Fontanetta v John Doe 1*, 73 AD3d 78, 85 [2d Dept 2010]).

The cases cited by the dissent do not require us to reach a different result in this case. In *WFB Telecommunications v NYNEX Corp.* (188 AD2d 257 [1st Dept 1992], *lv denied* 81 NY2d 709 [1993]), the documentary evidence submitted by defendants

included letters from both parties' counsel, which, taken together, constituted "undisputed proof that defendants' actions were motivated, at least in part, by legitimate business goals" sufficient to defeat plaintiffs' claims for prima facie tort (*id.* at 259). This is wholly consistent with the rule that to constitute documentary evidence, the papers must be "essentially undeniable" and support the motion on its own (Siegel, Practice Commentaries, *supra,* at 2;). Nor is our conclusion that the email in *Advanced Global Tech., LLC v Sirius Satellite Radio, Inc.* (44 AD3d 317, 318 [1st Dept 2007]) did not constitute documentary evidence translate into a blanket rejection of emails as documentary evidence. As Professor Siegel recognizes, "even correspondence" may, under appropriate circumstances, qualify as documentary evidence. In our electronic age, emails can qualify as documentary evidence if they meet the "essentially undeniable" test (*see Art and Fashion Group Corp. v Cyclops Prod., Inc.*, __AD3d__, 2014 NY Slip Op__ [1st Dept 2014] [decided simultaneously herewith]; *see also Langer v Dadabhoy*, 44 AD3d 425 [1st Dept 2007], *lv denied* 10 NY3d 712 [2008]). The email at issue here simply fails this test.

Significantly, we note that a motion to dismiss under CPLR 3211(a)(1) obliges the court "to accept the complaint's factual allegations as true, according to plaintiff the benefit of every

possible favorable inference, and determining only whether the facts as alleged fit within any cognizable legal theory" (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 270 [1st Dept 2004]). Dismissal is warranted only if the documentary evidence submitted "utterly refutes plaintiff's factual allegations" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see Greenapple v Capital One, N.A.*, 92 AD3d 548, 550 [1st Dept 2012]), and conclusively establishes a defense to the asserted claims as a matter of law" (*Weil, Gotshal,* 10 AD3d at 270-271, [internal quotation marks omitted].

Schutty v Speiser Krause P.C. (86 AD3d 484, 485 [1st Dept 2011]), also cited by the dissent, is similarly distinguishable. There we found multiple drafts of a contemplated new employment agreement, the parties' correspondence and plaintiff's written letter of resignation to be sufficient to undeniably establish "that the parties did not intend to be bound until there was a signed written contract and that there was never a meeting of the minds on all material terms of the new agreement."

The emails in this particular case, aside from being not otherwise admissible, are not able to support the motion to dismiss. The "documentary evidence" here, unlike the emails in *Langer,* do not, standing on their own, conclusively establish a defense to the claims set forth in the complaint. While they may

indicate that Bowd put defendants on notice of potential employment restrictions, other letters indicate that Bowd had, in fact, accepted the offer of employment days before he sent the emails in question. Because defendant has not "negated beyond substantial question" the allegation of reasonable reliance, and the submissions raise factual issues concerning the circumstances and communications underlying plaintiff's hiring of Bowd, it cannot be concluded that plaintiff has no causes of action for fraudulent and negligent misrepresentation (*Guggenheimer v Ginzburg*, 43 NY2d at 275).

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

DEGRASSE, J. (dissenting)

As related to this appeal, defendant's motion was for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the third and fourth causes of action for fraud and negligent misrepresentation, respectively. I agree that the motion was properly denied insofar as it called for a dismissal under CPLR 3211(a)(7). I respectfully dissent because the motion should have been granted pursuant to CPLR 3211(a)(1) on the basis of documentary evidence that negates the element of reasonable reliance with respect to each cause of action.

Defendant is an executive search firm. Plaintiff alleges in the complaint that "[a]t the conclusion of the negotiations and discussions, and specifically on the recommendation of [d]efendant, [plaintiff] hired [nonparty David] Bowd as its President of Hotel Operations, effective on or about June 29, 2009." Bowd had been employed by plaintiff's competitor, Morgans Hotel Group Management LLC (MHG), at the time of his negotiations with plaintiff. In support of the instant fraud and negligent misrepresentation causes of action, plaintiff further alleges that it reasonably relied on defendant's false representation that "Bowd did not have any agreements with his employer prior to [plaintiff] that would prohibit or otherwise restrict Bowd's ability to fully perform his anticipated job

duties and responsibilities with [plaintiff]." According to plaintiff, those responsibilities included the utilization of Bowd's contacts within MHG to identify potential talent for plaintiff's business.

On September 4, 2009, MHG brought an action against Bowd, plaintiff and its principals in the Supreme Court, New York County. The causes of action alleged against plaintiff sounded in tortious interference with contract, aiding and abetting breach of fiduciary duty and unfair competition. MHG alleged in its complaint that plaintiff wrongfully induced Bowd to breach his employment agreement with MHG by having him recruit two MHG employees to work for plaintiff. The instant complaint cites as damages legal fees plaintiff was forced to incur before MHG's suit was voluntarily discontinued in May 2010.

Justifiable reliance on a misrepresentation or material omission is an element of fraud (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]), as well as negligent misrepresentation (*see Murphy v Kuhn*, 90 NY2d 266, 270 [1997]). Reliance, however, is not justified where the true facts have been made known to the party claiming to have been deceived or misled (*see 200 E. End Ave. Corp. v General Elec. Co.*, 5 AD2d 415, 417 [1st Dept 1958], *affd* 6 NY2d 731 [1959]). I submit that documentary evidence consisting of an email sent by Bowd to

plaintiff 19 days before Bowd was hired negates the element of justifiable reliance as a matter of law.

A June 10, 2009 email from Bowd to Stuart Podolsky, one of plaintiff's principals, reads as follows:

> "Morning Stuart, just wanted to keep you in the loop, Meeting went well yesterday, they are still refusing to accept my resignation and want to counter offer. I have confirmed this is not my intention and I WILL be joining you.
>
> "There are a couple of things that came up yesterday that I wanted you to be aware of:
>
> "1. The Corporate Legal team contacted me to confirm my knowledge of my contract confirming that I cannot approach any member of MHG staff to offer them a role within Amsterdam Hospitality. Obviously you were talking to Blake before me/or without my knowledge so there is no issue there. Although I think once you have done the deal with Blake we need to be strategic on when he resigns as I would like my role announced within MHG before Blake resigns. I am pushing for this to happen today . . . ."

One hour later, Podolsky replied: "Good luck. Anything we could do to help the process we are there for you." Twenty minutes later, Bowd responded: "I think that if I give them 1 extra week it would ease the process - how do you feel about me starting with you on the 29th?"

A motion pursuant to CPLR 3211(a)(1) may be appropriately granted where documentary evidence utterly refutes a complaint's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d

314, 326 [2002]). Bowd's first email on June 10, 2009 plainly put plaintiff on notice of the restrictions imposed upon him by his employment agreement with MHG. The email therefore dispels any notion that plaintiff hired Bowd on June 29, 2009 in justifiable reliance on defendant's alleged representation that Bowd was not subject to such restrictions.

I am not persuaded by plaintiff's argument that correspondence such as Bowd's email does not suffice as documentary evidence for purposes of CPLR 3211(a)(1). Decisions of this Court hold otherwise. For example, in *Schutty v Speiser Krause P.C.* (86 AD3d 484, 484-485 [1st Dept 2011]), we found drafts of an agreement and correspondence sufficient for purposes of establishing a defense under the statute. In *WFB Telecom. v NYNEX Corp.* (188 AD2d 257, 259 [1st Dept 1992], *lv denied* 81 NY2d 709 [1993]), we granted a CPLR 3211 (a)(1) motion on the basis of a letter from the plaintiff's counsel that contradicted the complaint. Therefore, there is no blanket rule by which email is to be excluded from consideration as documentary evidence under the statute. *Advanced Global Tech., LLC v Sirius Satellite Radio, Inc.* (44 AD3d 317 [1st Dept 2007]), which plaintiff cites, does not warrant a contrary conclusion. In *Advanced* we held that an email could not serve as documentary evidence conclusively establishing a defense simply because it was "not otherwise

admissible" (*id.* at 318, *citing Aetna Cas. & Sur. Co. v Island Transp. Corp.*, 233 AD2d 157 [1st Dept 1996]). Here, by contrast, Bowd's affidavit provided the necessary evidentiary foundation for the motion court's consideration of the email. Moreover, in *Langer v Dadabhoy* (44 AD3d 425, 426 [1st Dept 2007], *lv denied* 10 NY3d 712 [2008]), we found "documentary evidence in the form of e-mails" to be sufficient to carry the day for a defendant on a CPLR 3211(a)(1) motion.

There is also no merit to plaintiff's argument that the email does not establish a defense because it was sent after the parties signed a letter of employment dated June 4, 2009. By its own terms, the "letter is not to be construed as an implied contract of employment." It therefore did not obligate plaintiff to hire Bowd on June 29, 2009. The same limitation set forth in the letter of employment refutes the majority's position that "defendant has not 'negated beyond substantial question' the

allegation of reasonable reliance . . . ." Accordingly, I would reverse the order entered below and grant defendant's motion for an order dismissing the third and fourth causes of action pursuant to CPLR 3211(a)(1).

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

ENTERED: AUGUST 28, 2014

DEPUTY CLERK

Moskowitz, J.P., Richter, Manzanet-Daniels, Clark, Kapnick, JJ.

12075 Art and Fashion Group Corporation, et al.,
Plaintiffs-Appellants-Respondents,

-against-

Cyclops Production, Inc., et al.,
Defendants-Respondents-Appellants.

Index 650364/11

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Mark L. Cortegiano, Middle Village, for appellants-respondents.

Aaron Richard Golub, Esquire, P.C., New York (Nehemiah S. Glanc of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about February 24, 2012, which granted defendants' CPLR 3211(a) motion to dismiss the complaint to the extent of dismissing the fraud cause of action and dismissing the complaint as against defendants Cyclops, Albert Watson, Elizabeth Watson and Michael Jurkovac, unanimously modified, on the law, to reinstate the breach of the joint venture agreement and unjust enrichment causes of action as against the individual defendants, to dismiss the conversion/property damage cause of action, and otherwise affirmed, without costs.

In this action, plaintiffs Art and Fashion Group Corporation (AFG) and Pier 59 Studios L.P. (Pier 59) allege that they entered into an oral joint venture agreement with defendants Cyclops,

Cyclops Production, Inc. (CPI), Cyclops, LLC (CL), Albert Watson, Elizabeth Watson and Michael Jurkovac. According to the complaint, plaintiffs and defendants formed 359 Productions, LLC to operate a joint venture to produce defendants' photo shoots and advertising campaigns. The complaint alleges that the parties agreed to operate on a 50/50 basis, to share profits and losses equally, and to pay their respective share of all the expenses of the joint venture, including rents and salaries. Additionally, the parties agreed that all of defendants' campaigns would be produced through 359 Productions and shot exclusively at Pier 59's studios.

The complaint further alleges that defendants breached the joint venture agreement by failing to produce their campaigns through 359 Productions and by conducting the photo shoots at locations other than Pier 59's studios. Plaintiffs allege that Pier 59 paid the salaries of the corporate defendants' employees, and that defendants used plaintiffs' offices, facilities and the services of plaintiffs' employees for their own exclusive benefit. Despite receiving these benefits, plaintiffs allege that defendants failed to remit plaintiffs' share of revenue from the campaigns. The complaint asserts causes of action for breach of the joint venture agreement, unjust enrichment, fraud and conversion/property damage.

Defendants moved to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7) for failure to state a claim and as barred by documentary evidence. The motion court dismissed the complaint in its entirety as against the individual defendants and defendant Cyclops, and dismissed the fraud cause of action as against all defendants. The court denied dismissal of the causes of action for breach of the joint venture agreement, unjust enrichment and conversion/property damage as against CPI and CL. This appeal and cross-appeal ensued.

The motion court correctly denied the portion of the motion seeking dismissal of the claim for breach of the joint venture agreement as against CPI and CL. Accepting the facts as alleged in the complaint as true and according plaintiffs the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), the complaint sufficiently states a cause of action for breach of a joint venture agreement by alleging "acts manifesting the intent of the parties to be associated as joint venturers, mutual contribution to the joint undertaking through a combination of property, financial resources, effort, skill or knowledge, a measure of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses" (*Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 298 [1st Dept 2003]).

The court also properly denied dismissal on the basis of documentary evidence. A cause of action may be dismissed under CPLR 3211(a)(1) "only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). In other words, the documents relied upon must "definitely dispose of [the] plaintiff's claim" (*Blonder & Co. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). Email correspondence can, in a proper case, suffice as documentary evidence for purposes of CPLR 3211(a)(1) (*Amsterdam Hospitality Group, LLC v Marshall-Alan Associates, Inc.*, ___ AD3d ___, 2014 NY Slip Op ___, ___ [1st Dept 2014] [decided simultaneously herewith]). Factual affidavits, however, do not constitute documentary evidence within the meaning of the statute (*Flowers v 73rd Townhouse LLC*, 99 AD3d 431, 431 [1st Dept 2012]).

In support of the motion, defendants submitted three factual affidavits and a series of emails exchanged between the parties. The affidavits, "which do no more that assert the inaccuracy of plaintiffs' allegations" (*Tsimerman v Janoff*, 40 AD3d 242, 242 [1st Dept 2007]) cannot be considered, and the emails do not conclusively establish a defense as a matter of law. There is no merit to defendants' assertion that the emails show, as a matter

of law, that no joint venture agreement was reached and that the parties were merely engaging in preliminary negotiations. "Even where the parties acknowledge that they intend to hammer out details of an agreement subsequently, a preliminary agreement may be binding" (*Richbell*, 309 AD2d at 298; *accord Foster v Kovner*, 44 AD3d 23, 27-28 [1st Dept 2007]).

Although some parts of the emails suggest that all of the details of the joint venture were not fully agreed upon, the emails, when read in their entirety, do not conclusively refute plaintiffs' allegations that an oral joint venture agreement had in fact been reached. For example, a November 3, 2009 email states that "359 is *already operating* in AFG's [office] space" (emphasis added) and was expected to be "cashflow positive by the end of 2009." This same email talks about "formalizing the establishment of . . . 359 Productions," suggesting that it was already in existence. Furthermore, in a May 1, 2010 email, plaintiffs' representative Federico Pignatelli addresses defendant Michael Jurkovac as "[p]artner," makes reference to "stabiliz[ing] the [c]ompany," and expresses concern about two managerial changes within the past year.

In a May 13, 2010 email, written six months after the initial email submitted by defendants, Pignatelli informs Jurkovac of his decision "not to proceed anymore with 359P."

Contrary to defendants' contention, this statement does not unequivocally establish that no joint venture agreement had been reached in the first place. It can just as easily be read as indicating Pignatelli's decision to terminate an already-established joint venture. The email also discusses 359P's overhead and notes issues about the extent of the work that was brought into 359P, both of which are consistent with plaintiffs' claim that a joint venture had been formed. The emails also make reference to other communications, not produced by defendants, identifying issues with 359P's staff. Thus, it is clear that the emails submitted present only a partial picture of the interactions between the parties.

Finally, although defendants contend that they did not intend to proceed with the alleged joint venture until they executed a formal written agreement, no such express reservation is contained in any of the emails (*see generally Kowalchuk v Stroup*, 61 AD3d 118 [1st Dept 2009]). Because the emails in question fail to definitely refute plaintiffs' claim that the parties had reached an oral joint venture agreement, dismissal at this stage is not warranted (*see Foster v Kovner*, 44 AD3d at 27-28).

The motion court correctly declined to dismiss the unjust enrichment cause of action as against CPI and CL. In light of

defendants' contention that no joint venture agreement existed, plaintiffs are permitted to plead unjust enrichment as an alternative basis for relief (*see Zuccarini v Ziff-Davis Media*, 306 AD2d 404, 405 [1st Dept 2003] ["(w)here . . . there is a bona fide dispute as to the existence of a contract . . . a plaintiff may proceed upon a theory of quasi contract as well as contract, and will not be required to elect his or her remedies"]).

The complaint was properly dismissed as against defendant Cyclops. In the complaint, plaintiffs identify Cyclops as merely a trade name used by one or more of defendants, and thus it is not a legal entity. However, the motion court should not have dismissed the breach of the joint venture agreement and unjust enrichment claims as against the individual defendants. The complaint alleges that *all* of the defendants, both corporate and individual, entered into the joint venture agreement and were unjustly enriched. The individual defendants' claim that plaintiffs negotiated only with the corporate entities is contained in affidavits which, as previously noted, cannot be considered on this motion. Furthermore, the emails submitted shed no light on this issue. Thus, dismissal at this preanswer stage is not appropriate.

Plaintiffs' fraud claim was properly dismissed as duplicative of the cause of action for breach of the joint

venture agreement (*see Cole, Schotz, Meisel, Forman & Leonard, P.A. v Brown*, 109 AD3d 764, 765 [1st Dept 2013]).

The motion court should have dismissed the claim for conversion since the complaint "[does] not identify the property allegedly converted" (*Messiah's Covenant Community Church v Weinbaum*, 74 AD3d 916, 919 [2d Dept 2010]). For the same reason, plaintiffs' property damage claim fails.

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

ENTERED: AUGUST 28, 2014

Margaret Sarah
DEPUTY CLERK

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

12129 Rodney H. Brown, Index 153803/12
Plaintiff-Appellant,

-against-

Deutsche Bank National Trust Company, etc., et al.,
Defendants-Respondents.

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Carl E. Person, New York, for appellant.

Bryan Cave LLP, New York (Scott H. Kaiser of counsel), for respondents.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered January 14, 2013, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

The motion court properly rejected plaintiff's claim that securitization of his mortgage notes was improper (*see Stafford v Mortgage Elec. Registration Sys., Inc.*, 2012 WL 1564701, *4, 2012 US Dist LEXIS 61413, *13 [ED Mich 2012]; *Rodenhurst v Bank of Am.*, 773 F Supp2d 886, 898 [D Haw 2011]), and aptly discerned that plaintiff's contention that defendants lack standing to enforce the notes was a mere semantic variation of that claim. To the extent plaintiff claimed that the securitization was procedurally improper, and to the extent that such a claim is cognizable (*see Johnson v HSBC Bank USA, NA*, 2012 WL 928433, *2, 2012 US Dist LEXIS 36798, *6-7 [SD Cal 2012]), his allegations

were conclusory.

Plaintiff's allegations of improper increased mortgage payments and improper notices of such increases were flatly contradicted by provisions in the loan documents (*see Simkin v Blank*, 19 NY3d 46, 52 [2012]). The motion court correctly found that plaintiff had failed to allege that his next mortgage payments of the minimum amount authorized under the loan documents would not have triggered defendants' right to increase his monthly payment obligations; his assertion that he had not triggered such right at the time of the notices avoided the issue.

The loan documents lacked any provision imposing on defendants a duty to modify the notes or negotiate a workout (*see New York City Educ. Constr. Fund v Verizon N.Y. Inc.*, 114 AD3d 529, [1st Dept]), and such terms cannot be added pursuant to the covenant of good faith (*see D & L Holdings v Goldman Co.*, 287 AD2d 65, 73 [1ST Dept 2001], *lv denied* 97 NY2d 611 [2002]).

Plaintiff's cause of action for violation of General Business Law § 349 was properly held untimely, as it accrued upon

defendants' first notice of mortgage payment increases in April 2009, more than three years before the July 2012 service of the pleadings in this action (*see* CPLR 214).

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

The Decision and Order of this Court entered herein on April 3, 2014 is hereby recalled and vacated (*see* M-2140 decided simultaneously herewith).

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

ENTERED: AUGUST 28, 2014

Margaret Saval

DEPUTY CLERK

Friedman, J.P., Acosta, Saxe, Feinman, Gische, JJ.

12684 The People of the State of New York, Respondent, Ind. 4391/12

-against-

Jeffrey Mercado, 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 (Bruce Allen, J. at suppression hearing; Thomas Farber, J. at plea and sentencing), rendered April 9, 2013, convicting defendant of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 3½ years, affirmed.

The court properly denied defendant's suppression motion. The totality of the information available to the police justified their request to search the trunk of defendant's car, and defendant validly consented to that search.

While patrolling a crime-prone neighborhood, in an unmarked car, nearing midnight on October 4, 2012, the arresting officer and his partner observed defendant in the driver's seat of a vehicle illegally parked near a fire hydrant. Defendant's

companion exited the car and went briefly inside a nearby deli. While defendant was alone, an unidentified man approached the car. Defendant immediately exited the car and the officer observed the men having a very brief and seemingly wordless interaction in which they shook hands and either hugged or chest bumped each other. Although the arresting officer did not see anything exchanged between them, his suspicion was aroused about the possibility of a drug transaction.

Defendant's original companion returned and the two men drove off. The police followed the car and they observed defendant's companion lean forward in a manner suggestive of secreting something under his seat. They then observed defendant committing a second traffic violation and lawfully stopped the car, asking defendant for his license and registration. Defendant who was "sweating profusely" and crying, told police he did not have a license and that he did not want to go back to jail. Defendant could not produce any form of identification, and the car registration belonged to someone other than defendant or his companion.

At the police officer's request, defendant exited the vehicle; he was still visibly agitated and repeated that he did not want to go back to jail. The arresting officer patted defendant down and found nothing. Defendant was then asked by

the officer whether he and the car were "straight." After defendant confirmed that they were, the arresting officer asked for defendant's consent to search the car, which was given. The interior of the car was searched and nothing was found. The arresting officer then asked defendant whether he could search the trunk of the car, and defendant consented to that search as well. Over 120 glassine envelopes of heroin were ultimately discovered in the trunk, and defendant admitted they belonged to him.

Once defendant revealed that his license was suspended, the officer had probable cause to arrest him for a misdemeanor (Vehicle and Traffic Law [VTL] § 511) and was entitled to conduct a search of his person incident to the arrest (*see People v Troiano*, 35 NY2d 476 [1974]). In order to ask defendant for his consent to search the car, however, the police needed a founded suspicion that criminality was afoot (*People v Garcia*, 20 NY3d 317, 324 [2012]; *People v De Bour*, 40 NY2d 210, 223 [1976]). We conclude that based on the totality of known circumstances, the police had a founded suspicion that criminality was afoot. That suspicion justified a common-law inquiry in the form of a request for defendant to consent to a search of the car, which also included the subsequent request to search the trunk (*see People v Battaglia*, 86 NY2d 755, 756 [1995]; *People v Loretta*, 107 AD3d

541 [1st Dept 2013], *lv denied* 22 NY3d 1157 [2014]). While nervousness, by itself, does not establish a founded suspicion of criminality (*Garcia*, 20 NY3d at 324), here it was coupled with other relevant factors, including the observed interaction between defendant and an unidentified man, defendant's admission that he was driving with a suspended license, his complete inability to provide any form of identification, that the car's registration was in the name of someone other than defendant or his passenger, and defendant's expressed concern that he would face reincarceration for a VTL infraction (*see People v Devone*, 15 NY3d 106, 114 [2010]; *People v Major*, 115 AD3d 1, 4-5 [1st Dept 2014]).

The request for defendant's consent to search the trunk of the car was reasonably related in scope to the circumstances that justified the interference in the first place (see *People v William II*, 98 NY2d 93, 98 [2002]). Thus, the same founded suspicion that permitted the police to ask for consent to search the car extended to the request to search the trunk (*see Battaglia*, 86 NY2d at 756). The Court of Appeals' decision in *People v Battaglia* is directly on point. In *Battaglia*, the Court of Appeals held that a vehicle stopped at 3:00 a.m. for proceeding the wrong way down a one-way street, coupled with the driver producing a false identification, supported a finding that

criminality was afoot sufficient to justify a common-law inquiry in the form of a request for consent to search the defendant's vehicle, including the trunk (*id.*). While defendant is correct that any concern the police may have had about some illegal object hidden under the passenger seat dissipated after the interior of the car was searched by the police, the other factors still present, which included driving without a license, identification and apparent connection to the registered owner of the car, supported a basis to request consent for a more thorough search of the vehicle. Contrary to the conclusion reached by the dissent, there was more than continued nervousness to support the request to search the trunk.

We also find that the People satisfied their heavy burden of proving the voluntariness of defendant's consent (*see generally People v Gonzalez*, 39 NY2d 122, 128 [1976]). In determining whether the consent was voluntary or coerced, the court considers the circumstances present, including whether the consent was given while the individual was in police custody, how many officers were present, the personal background of the consenter, including his age and prior experience with the law, whether the consenter offered resistance and whether the police advised the consenter of his right to refuse to consent (*id.* at 128-31; *Matter of Daijah D.*, 86 AD3d 521 [1st Dept 2011]). No one

circumstance is determinative of the voluntariness of consent (39 NY2d at 128). The suppression court found that the two officers testified credibly. At no time before the searches did either of the only two officers present draw their guns. The officers did not handcuff the defendant or his traveling companion, nor did they threaten defendant with arrest or actually arrest him before obtaining his consents. Defendant admitted to having prior contact with the criminal justice system. Although defendant appeared to be very nervous, he was cooperative, alert and offered no resistance to any of the actions being taken by the police before he gave his consents. The police officer's response that defendant "wasn't necessarily going back to jail" to defendant's repeated expressed concern about going to jail again was not an implicit threat that he would go to jail unless he gave consent to a search of the car (*see People v Sora*, 176 AD2d 1172, 1174 [3d Dept 1991] *lv denied* 79 NY2d 86 [1992]; *People v Fillion*, 160 AD2d 538 [1st Dept 1990], *cert denied* 498 US 1068 [1991]).

We perceive no basis for reducing the sentence.

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

ACOSTA, J. (dissenting)

I would reverse, vacate the plea and sentence, grant defendant's motion to suppress to the extent of suppressing the physical evidence found in the trunk and statements defendant made to the police after the officer asked if he could search the trunk, and remand for further proceedings. While the facts that defendant committed a traffic infraction and hugged another man with no indicia of a drug transaction being committed, that a passenger in the car made somewhat furtive movements, and that defendant was nervous upon being stopped and said he did not want to go back to jail may have justified the request to search the inside of the car, upon finding nothing therein or on the defendant after a frisk, the officers lacked a founded suspicion that criminal activity was afoot to justify the request to search the trunk of the car (*People v Garcia*, 20 NY3d 317 [2012]; *People v Hollman*, 79 NY2d 181, 194 [1992]; *People v Hogencamp*, 295 AD2d 808, 810 [3d Dept 2002] [ordering suppression and dismissing indictment where police continued investigation after initial suspicions were exhausted, notwithstanding the continued nervousness in the defendant's voice]; *People v Springer*, 92 AD2d 209, 212 [2d Dept 1983] [a fruitless frisk of the defendant's person decreased any objective suspicion of that defendant, contributing to finding that further investigation was

unreasonable]; *Sampson v City of Schenectady*, 160 F Supp 2d 336, 344 [ND NY 2001] ["(a)ssuming for purposes of this motion that the() (officers) did have reasonable suspicion to believe that (the) (p)laintiff was engaged in a narcotics transaction at the time they stopped him and that their search of [the] [p]laintiff was legally justified, that suspicion evaporated when they discovered that (the) (p)laintiff was not carrying any narcotics"]). I disagree that *People v Battaglia* (86 NY2d 755 [1995]) is directly on point as the majority asserts. In *Battaglia*, not only was the driver of the car seen driving the wrong way on a one-way-street at 3:00 in the morning, when stopped, he gave the police a false name. Under these circumstances an officer could rightfully assume that the occupants of the car were attempting to hide something illegal in the car. The police were therefore justified in asking the defendant, the owner of the car and who was seated in the back seat, for consent to search the trunk. Here, contrary to the majority, the request to search the trunk was not reasonably related in scope to the circumstances which justified the interference in the first place (*People v William II*, 98 NY2d 93, 98 [2002]; *People v Quackenbush*, 88 NY2d 534, 541 [1996]).

Defendant's continued nervousness was simply insufficient indicium that criminal activity was afoot. As we held in *People*

v Garcia (85 AD3d 28, 32-33 [1st Dept 2011], *mod on other grounds* 20 NY3d 317 [2012]),

> "There must be something more than mere nervousness on the part of the people in the stopped vehicle to establish a founded suspicion of criminal activity. Here, by describing unspecified motions as furtive, the officers were making conclusory assertions that the conduct was suspicious. The officers' unspecific testimony does not support a finding of founded suspicion of criminal activity" [citations omitted]

(*see also People v Irizarry*, 168 AD2d 337 [1st Dept 1990], *affd* 79 NY2d 890 [1992] [finding request to search improper because there was no founded suspicion, even though the record revealed that the defendant's hands were shaking during the police encounter]). In any event, with the information the police possessed at the time, the most plausible explanation for defendant's concern that he did not want to go back to jail was that he was driving without a valid license and feared incarceration for that offense.

Furthermore, consent obtained through an illegal request to perform a search is no consent at all (*Hollman*, 79 NY2d at 194 [ordering suppression "[b]ecause the defendant's consent was a product of the improper police inquiry"]; *People v Irizarry*, 79 NY2d at 892). In any event, even if the request for consent was authorized, I think the majority ignores the reality of a police

stop when it finds that defendant's consent was voluntary and not coerced (*see People v Packer*, 49 AD3d 184, 187 [1st Dept 2008], *affd* 10 NY3d 915 [2008] [recognizing the "inherent potential for intimidation and coercion in police initiated encounters and the daunting burden to which the People are put when the voluntariness of a defendant's consent is at issue"] [internal citations omitted]). As we noted in *People v Turriago* (219 AD2d 383, 389 [1st Dept 1996], *mod on other grounds* 90 NY2d 77 [1997]), a defendant stopped for a traffic infraction can not "reasonably disregard the police and go about his business" (internal quotation marks omitted). Here, defendant, already facing a possible arrest for driving without a license and distraught and crying about the possibility of going back to jail, may have felt compelled to consent to a search of the trunk. Under these circumstances, telling defendant that he "wasn't necessarily going to back jail," could be easily construed as "as long as you cooperate and let us search the trunk.

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

ENTERED: AUGUST 28, 2014

DEPUTY CLERK

Tom, J.P., Friedman, Renwick, Gische, Clark, JJ.

12719 In re Thomas B.,
Petitioner-Respondent,

-against-

Lydia D.,
Respondent-Appellant.

_____

Peter F. Edelman, New York, for appellant.

Thomas B., Sag Harbor, respondent pro se.

_____

Order, Family Court, New York County (Stella Schindler, J.H.O.), entered on or about May 14, 2012, which, upon remand from this Court (89 AD3d 630 [1st Dept 2011], *lv dismissed* 20 NY3d 949 [2012]), clarified its order entered on or about August 30, 2010, concerning the amount of attorneys' fees awarded respondent and the basis for the award, unanimously modified, on the facts, to increase the monetary award in favor of Denton to the sum of $114,830, and, as so modified, affirmed, without costs.

The courts have the inherent power to supervise the legal fees charged for services and regulate the practice of law (*Matter of First Natl. Bank of E. Islip v Brower*, 42 NY2d 471, 474 [1977]. Furthermore, the determination of reasonable counsel fees is a matter within the sound discretion of the trial court and, in the absence of an abuse of discretion, will be upheld

(*see Shrauger v Shrauger*, 146 AD2d 955, 956 [3rd Dept 1989], *appeal dismissed* 74 NY2d 844 [1989]).

In clarifying its prior order, the court properly applied the relevant factors and made an independent determination based on its knowledge and experience as to the appropriate hourly rate for the services rendered and the appropriate amount of time for each category of services *(see Jordan v Freeman,* 40 AD2d 656 [1st Dept 1972]).

However, the trial court, improperly disallowed 20 hours of billing for matters relating to the educational trust. The billings for those services were only 3.9 hours. Consequently, Denton is entitled to an additional $4,830 in legal fees based upon the improperly excluded 16.1 hours of legal fees at $300 per hour, the rate set by the trial court.

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

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

ENTERED: AUGUST 28, 2014

Margaret Saval
DEPUTY CLERK

Tom, J.P., Moskowitz, Manzanet-Daniels, Feinman, Gische, JJ.

12873 Deborah A. Gregor, et al., Index 651432/13
Plaintiffs-Respondents,

-against-

Joseph J. Rossi, et al.,
Defendants,

Barbara Alesi, et al.,
Defendants-Appellants.

_____

L'Abbate, Balkan, Colavita & Contini, LLP, Garden City (Marian C. Rice of counsel), for appellants.

Taylor Colicchio LLP, New York (Ellen Nunno Corbo of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered January 6, 2014, which denied defendants Alesi, Groman and Glascock's motion to dismiss the complaint as against them, unanimously reversed, on the law, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiffs, investor-shareholders in a corporation that was allegedly part of defendant Rossi's fraudulent scheme, allege that defendants Alesi, Groman and Glascock, who were retained as the attorneys for the corporation, were complicit in the scheme by drafting documents and a shareholder agreement designed to give plaintiffs the impression that the corporation was legitimate and by dealing directly with plaintiffs in reviewing

the documents and giving them "accompanying legal advice and counsel."

Fraud and fraudulent inducement are not pleaded with the requisite particularity under CPLR 3016(b), because the words used by defendants and the date of the alleged false representations are not set forth (*see Brown v Wolf Group Integrated Communications, Ltd.*, 23 AD3d 239 [1st Dept 2005]; *Riverbay Corp. v Thyssenkrupp N. El. Corp.*, 116 AD3d 487 [1st Dept 2014]). While the complaint alleges that defendants' actions constituted representations (*see Brown*, 23 AD3d at 239), those actions – allegedly drafting corporate documents and explaining them to plaintiffs – do not reasonably support the inference that defendants were placing an imprimatur on the legitimacy of the investment enterprise.

Moreover, plaintiffs allege that they invested the funds they seek to recover between September 2010 and April 2012, encompassing an eight-month period before defendants, who were first retained in May 2011, ever got involved in these matters. There is no specific allegation that plaintiffs made any of their investments after interacting with defendants. The lack of greater specificity about information peculiarly within plaintiffs' knowledge renders conclusory any claim of reliance on anything defendants said or did. The lack of specificity

similarly renders any claim of the required loss causation conclusory (*see Laub v Faessel*, 297 AD2d 28, 31 [1st Dept 2002]).

The constructive fraud and negligent misrepresentation causes of action are deficient for failure to allege the requisite fiduciary or special relationship between plaintiffs and defendants (*see J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]; *Matter of Aoki v Aoki*, 117 AD3d 499 [1st Dept 2014]). The attorneys for a corporation represent the corporate entity, not the shareholders (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 562 [2009]). The parties did not expressly agree otherwise (*see Talvy v American Red Cross in Greater N.Y.*, 205 AD2d 143, 149 [1st Dept 1994], *affd* 87 NY2d 826 [1995]). Plaintiffs' subjective belief did not create an attorney-client relationship or a close relationship approaching privity that imposed upon defendants a duty to them to impart correct information (*see Pellegrino v Oppenheimer & Co., Inc.*, 49 AD3d 94, 99 [1st Dept 2008]). We note, in addition, that the requisite relationship between the parties must have existed before the transaction from which the alleged wrong emanated, and not as a result of it (*Elghanian v Harvey*, 249 AD2d 206 [1st Dept 1998]; *see also Waterscape Resort LLC v McGovern*, 107 AD3d 571 [1st Dept 2013]).

Plaintiffs do not expressly allege a cause of action against

defendants for aiding and abetting the fraud alleged to have been committed by Rossi. Even if the causes of action as pleaded could be fairly interpreted as including liability for aiding and abetting fraud, they are still deficient because they fail to allege that defendants had actual knowledge of the fraud and provided substantial assistance in its commission (*see Oster v Kirschner*, 77 AD3d 51, 55-56 [1st Dept 2010]). The allegation that the attorneys "knew or should have known" of the fraud is conclusory and alleges mere constructive knowledge (*see Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 101-102 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]; *Weinberg v Mendelow*, 113 AD3d 485 [1st Dept 2014] [allegation that defendant "knew or...should have known" was sufficient because it was coupled with specific allegations of actual knowledge of fraud]). The allegations that the attorneys prepared merger documents and a shareholder agreement are allegations of ordinary professional activity, not substantial assistance (*see Roni LLC v Arfa*, 72 AD3d 413 [1st Dept 2010], *affd* 15 NY3d 826 [2010]).

The claims under the North Carolina RICO statute fail to set forth the required predicate act as part of a pattern of racketeering activity, since the common-law torts alleged are not viable and, in any event, are otherwise insufficient for the purpose (*see Cofacredit, S.A. v Windsor Plumbing Supply Co.*,

Inc., 187 F3d 229, 242 [2d Cir 1999]).

The conspiracy cause of action is deficient for failure to allege facts supporting a conclusion that there was an agreement among defendants regarding an underlying tort (*see 1766-68 Assoc., LP v City of New York*, 91 AD3d 519 [1st Dept 2012]). The claims for punitive damages cannot stand in the absence of a substantive underlying cause of action (*Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 616-617 [1994]).

Plaintiffs failed to respond to the arguments before the motion court in support of dismissing the claim that defendants are responsible for producing the corporate books and records, and they do not mention the issue on appeal. Accordingly, the claim should be dismissed.

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

ENTERED: AUGUST 28, 2014

Margaret Saval

DEPUTY CLERK

Acosta, J.P., Renwick, Moskowitz, Freedman, Feinman, JJ.

12017 William C. Rose, Index 102533/12
Plaintiff-Appellant,

-against-

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

_____

Arnold E. DiJoseph, New York (Arnold E. DiJoseph of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered October 9, 2012, modified, on the law, to deny the motion to the extent the complaint seeks the equitable relief of reinstatement, and otherwise affirmed, without costs.

Opinion by Feinman, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, J.P.
Dianne T. Renwick
Karla Moskowitz
Helen E. Freedman
Paul G. Feinman, JJ.

12017
Index 102533/12

_____x

William C. Rose,
Plaintiff-Appellant,

-against-

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

_____x

Plaintiff appeals from an order of the Supreme Court, New York County (Geoffrey D. Wright, J.), entered October 9, 2012, which granted defendant's motion to dismiss the complaint.

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph and Arnold E. DiJoseph III of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon and Kristin M. Helmers of counsel), for respondent.

FEINMAN, J.

Following his termination by defendant, plaintiff commenced this whistleblower action (Civil Service Law § 75-b), without first serving a notice of claim. The complaint seeks back pay, reinstatement, costs and attorney's fees. The motion court, characterizing the complaint as one seeking to vindicate a private injury, rather than a public right, granted defendant's motion to dismiss for failure to comply with the notice of claim provision of General Municipal Law § 50-e(1)(a). On appeal, plaintiff argues that, at a minimum, he should be allowed to sever and retain his claim for reinstatement because it is an equitable remedy that does not require a notice of claim. We agree, and now modify the motion court's order accordingly.

I

The following factual allegations are gleaned from the complaint. From approximately August 4, 2008 through May 13, 2011, plaintiff was employed as an administrative manager of the engineering department of Harlem Hospital (the hospital), which is managed by defendant New York City Health and Hospitals Corporation (NYCHHC). Throughout the course of his employment plaintiff received satisfactory job evaluations, and his annual performance reviews for 2009 and 2010 rated him "fully competent." In October 2010, NYCHHC undertook a multi-million

dollar acquisition of new "chillers" for the hospital. Plaintiff further alleges that in March 2011, around the same time Eric Morales became plaintiff's direct supervisor, temporary chillers, part of the air conditioning units that regulate temperature, were rented for use while the new, permanent chillers were being installed. The goal was for the new chillers to be operational by March 15, 2011. Plaintiff became aware that although the new chillers were not working properly, Dr. John Palmer, the hospital's Executive Director, and Dr. Stephen Lawrence, the hospital's Deputy Executive Director, were pressuring the contractor to remove the temporary chillers by April 17, 2011.

Plaintiff believed there was the potential for significant and serious violations of state and federal health standards to occur if the hospital proceeded to rely on the new, not-yet-fully-operational chillers. Because he thought his concerns were not being heard by Morales, plaintiff emailed Palmer and Lawrence directly on April 13, 2011. The next day he was summoned to Palmer's officer for a meeting with Palmer, Lawrence and Morales. At the meeting, he was allegedly berated as an "idiot" for sending the email. Two weeks later, on April 29, 2011, he was presented with a negative written job evaluation, and a termination letter from human resources. Although plaintiff submitted a written rebuttal, his termination was confirmed by

defendant on May 26, 2011.

II

At the outset, it should be noted that the motion court did not reach the branch of the motion to dismiss that challenged whether the allegations in the complaint, if true, state a viable whistleblower claim, and nor do we, as that issue is not before us on this appeal. Rather, the focus of this appeal is whether plaintiff's claim is completely barred based on his conceded failure to serve a timely notice of claim.

The Whistleblower Law forbids retaliatory personnel action by public employers against their employees who disclose to a governmental body information regarding violations of regulations that would present a specific danger to public health or safety, or about what the employee believes to be an improper governmental action (Civil Service Law § 75-b[1][d]; [2][a]). A whistleblower claim, by definition, seeks both equitable and monetary damages. An employee may seek relief for such wrongdoing including an injunction to restrain continued violation of the law, reinstatement to the same or equivalent position as before, with full fringe benefits and seniority rights, compensation for lost wages, benefits and other remuneration, and reasonable costs, disbursements and attorney's fees (Civil Service Law § 75-b[3][c], referencing Labor Law §

740[5]).

Defendant contends that plaintiff's complaint was properly dismissed pursuant to this Court's decision in *Yan Ping Xu v New York City Dept. of Health* (77 AD3d 40 [1st Dept 2010]). In *Xu*, the self-represented petitioner brought a whistleblower claim, seeking reinstatement, back pay, and removal of an unsatisfactory rating; she had not filed a timely notice of claim. The petitioner argued, inter alia, that a retaliatory firing suit is akin to an employment discrimination claim brought under the Human Rights Law (Executive Law § 296), the latter of which does not fall under the categories of claims requiring that notice be served as set forth in General Municipal Law § 50-i (*see e.g. Sebastian v New York City Health & Hosps. Corp.*, 221 AD2d 294, 294 [1st Dept 1995] [because General Municipal Law § 50-i "define[s] the torts for which a notice of claim is required *only* as personal injury, wrongful death, or damage to property and not torts generally," discrimination claimants do not need to file notices of claim when subject only to this notice provision]; *see also Picciano v Nassau County Civ. Serv. Commn.*, 290 AD2d 164, 170 [2d Dept 2001] [explaining that because the Human Rights Law is not a cause of action subject to the General Municipal Law notice requirement, there is no need to serve a notice of claim as a condition precedent to commencing an action based on the

Human Rights Law in a jurisdiction where General Municipal Law §§ 50-e and 50-i provide the sole notice of claim criteria]).[1] The *Xu* Court declined to consider the Whistleblower Law as similar to the Human Rights Law, pointing out that "[j]urisprudence has made clear that a notice of claim is required as a condition precedent in cases similar to petitioner's" (*Xu* at 48). *Xu* also applied *Mills v County of Monroe* (59 NY2d 307 [1983], *cert denied* 464 US 1018 [1983] [holding that a claim brought under the Human Rights Law against a county must be preceded by a notice of claim, unless the plaintiff seeks to vindicate a public right]), to find that the plaintiff in *Xu* also did not fall under the *Mills* exception, as *Xu*'s claim sought only private remedies (*see Xu*, 77 AD3d at 48, citing *Mills*, 59 NY2d at 311-312).

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[1] General Municipal Law § 50-i(1) limits the tort claims requiring a notice of claim to "personal injury, wrongful death or damage to real or personal property. . . sustained by reason of the negligence or wrongful act of [the city], county. . . . "

There are anomalous decisions which appear to read General Municipal Law § 50-i as pertaining to any tort claim against a municipality. For instance, in *Stanford Hgts. Fire Dist. v Town of Niskayuna* (120 AD2d 878 [3d Dept 1986]), the plaintiff sought to obtain moneys wrongly credited to one of the defendants based on incorrect assessments of fire district taxes; its complaint alleged negligence, breach of duty and prima facie tort. The case was dismissed as against the defendant town, as no notice of claim was filed. The Third Department held that the tort claims were subject to the notice requirement in General Municipal Law § 50-e, and gave no credence to the plaintiff's argument that plaintiff was not seeking to recover for "'personal injury, wrongful death or damage to real or personal property'" (120 AD2d at 879, quoting General Municipal Law § 50-i[1]).

We need not comment on whether *Xu's* reliance on *Mills* was well placed or not, except to note that because the defendant in *Mills* was a county, any claim against it was governed by the notice requirement of County Law § 52. County Law § 52(1) applies to a much broader scope of cases than does the General Municipal Law, as it requires a notice of claim for, inter alia, "any [ ] claim for damages arising at law or in equity, alleged to have been caused . . . because of any misfeasance, . . . or wrongful act on the part of the county."[2] Thus, in *Mills*, if the petitioner had sought to vindicate a public right, no notice of claim would have been needed, despite the notice requirement of County Law § 52. This exception is an important protection for civil rights claims from dismissal based on a procedural ground.[3] However, where no notice of claim is required based on the governing notice statute, the issue of whether a claimant seeks

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[2] This is why a Human Rights Law claim brought in a jurisdiction subject only to the notice provision of General Municipal Law § 50-i does not need a notice of claim; unlike the County Law notice provision, the General Municipal Law notice provision pertains to a more circumscribed category of cases.

[3] *Mills* referred to *Union Free Sch. Dist. No. 6 of Towns of Islip & Smithtown v New York State Human Rights Appeal Bd.* (35 NY2d 371, 379-380 [1974]), which held in relevant part that actions and proceedings which seek only enforcement of private rights and duties must comply with the pertinent notice requirement, but those seeking to vindicate a public interest do not.

only individual relief or public rights, seemingly has no real applicability. Unlike in *Mills*, in jurisdictions where no notice of claim is required prior to commencing an action, the issue of whether a claimant seeks private relief or not is simply not a question that comes into play.[4]

Nonetheless, we are constrained by *Xu* to hold that a party bringing a whistleblower claim, and seeking the full range of remedies, must file a notice of claim pursuant to General Municipal Law §§ 50-e, 50-i, even though the Whistleblower Statute is not a tort statute and technically does not fall within the categories described in General Municipal Law § 50-i.[5]

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[4] It would not make sense that a claim properly commenced without need for a notice of claim, such as, for instance, a claim under the Human Rights Law brought in New York City and subject only to the General Municipal Law notice provision, could subsequently be dismissed because the claimant sought only individual relief, as discussed in *Mills*. Such an understanding would completely contravene the intent of the Human Rights Law.

[5] Indeed, in *Glaves-Morgan v City of New York* (2012 WL 1097288, 2012 US Dist LEXIS 46520 [SD NY 2012]), the district court refused to dismiss a whistleblower claim against the City because the City had not shown that Civil Service Law § 75-b claims "are torts under 50-i or that there is a broader statutory requirement elsewhere that is applicable" (*see Glaves-Morgan*, 2012 WL 1097288, *2, 2012 US Dist LEXIS 46520, *6). The court noted that General Municipal Law § 50-i requires notice be provided only in certain categories of tort and property damage claims, and also the rule in New York that a notice of claim is generally not required when a claim seeks primarily equitable relief (*Glaves-Morgan v City of New* York, 2012 WL 951859, *13, 2012 US Dist LEXIS 38539, *40, *adhered to on reconsideration* 2012 WL 1097288, US Dist LEXIS 46520 [SD NY 2012], citing *People*

As *Xu* acknowledged, there is a body of case law holding that a notice of claim is required when seeking to commence a whistleblower suit. These cases all cite *Mills* or case law following *Mills*, and most of them also consider whether the claim sought private or public vindication (*see e.g. Roens v New York City Tr. Auth.*, 202 AD2d 274 [1st Dept 1994] [notice of claim was required pursuant to broad notice provision of Public Authorities Law § 1212; individual rights]; *Matter of McGovern v Mount Pleasant Cent. Sch. Dist.*, 114 AD3d 795 [2d Dept 2014], *lv granted* __ NY3d __, 2014 NY Slip Op 71973 [May 13, 2014] [notice of claim was required pursuant to broad notice provision of Education Law § 3813(1); individual rights]; *Thomas v City of Oneonta*, 90 AD3d 1135 [3d Dept 2011] [action was time-barred, but no notice of claim had been filed pursuant to General Municipal Law § 50-e]; *Rigle v County of Onondaga*, 267 AD2d 1088 [4th Dept 1999], *lv denied* 94 NY2d 764 [2000] [notice of claim was required

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United for Children, Inc. v City of N.Y., 108 F Supp 2d 275 [SD NY 2000]). The district court reasoned that as the plaintiff sought both equitable relief, including reinstatement, and money damages, it was the City's burden to demonstrate that a notice of claim was required. Interestingly, the district court complained that this Court had not provided "any reasoning for why a § 75-b action against the City falls under § 50-e notice requirements" (2012 WL 1097288, *2, 2012 US Dist LEXIS 46520, *7), and had not given a "justification for applying the notice of claim requirement" to a whistleblower claim (*id.*).

pursuant to County Law § 52]).

Plaintiff argues in essence that if the money damages included in the relief sought in a whistleblower case are the "reason" a notice of claim is required, then he should be allowed to discontinue his claims for money damages and go forward with his claims in equity, and thereby negate any need for a notice of claim. Severing of causes of action in this manner has not been directly addressed by this Court in the context of whistleblower actions. Defendant's brief does not address this argument, and when questioned at oral argument, it relied on its arguments that the complaint must be dismissed based on the holding in *Xu,* and because plaintiff seeks only private remedies.

Although *Xu* has made clear that whistleblower jurisprudence is distinct from Human Rights Law jurisprudence, the dearth of whistleblower cases addressing the severance question requires us to look at how this issue has been treated in other contexts involving equitable claims. Many actions have been brought against municipalities seeking to remedy a continuing wrong, and have included "incidental" money damages; in jurisdictions where the applicable notice of claim statute does not expressly include equitable actions, there is no need to file a notice of claim

prior to commencing an action (*see Fontana v Town of Hempstead*, 13 NY2d 1134 [1964], *affg* 18 AD2d 1084 [2d Dept 1963] [compliance with the notice requirements of the General Municipal Law and of Town Law § 67 was not necessary where an action was brought in equity to restrain a continuing act; demand for money damages was incidental]; *Bass Bldg. Corp. v Village of Pomona*, 142 AD2d 657, 659 [2d Dept 1988] [seeking injunctive relief requiring Village to continue building a road; claims for compensatory and punitive damages were "incidental"]; *Watts v Town of Gardiner*, 90 AD2d 615, 615-616 [3d Dept 1982] [claims seeking abatement of the nuisance and a permanent injunction, as well as incidental monetary damages, did not require filing a notice of claim under General Municipal Law §§ 50-e, 50-i][6]; see *also Johnson v City of Peekskill*, 91 AD3d 825, 826 [2d Dept 2012] [as the claim was subject only to the General Municipal Law notice provisions, no notice of claim was needed to seek injunction to compel the city to issue a building permit and claim money damages for its

[6] We note *Clempner v Town of Southold* (154 AD2d 421 [2d Dept 1989]), wherein the Second Department distinguished cases seeking "injunctive relief from continuing acts by municipalities" from those that do not allege or establish a continuous nuisance, trespass, or diminution of the private properties of adjacent landowners (154 AD2d at 425). Claimants in the latter category must file a notice of claim, according to *Clempner*. Claimants in the former category are "excused" from filing a notice of claim (*id.*). This Court does not necessarily take such a restrictive perspective.

failure to issue the permit]; *but see Matter of Freudenthal v County of Nassau*, 283 AD2d 6, 9 [2d Dept 2001], *affd* 99 NY2d 285 [2003] [in holding that the notice of claim requirement under County Law § 52 is inapplicable when an administrative complaint is timely brought with the State Division of Human Rights alleging discrimination under the Human Rights Law, the Second Department's analysis commenced with the broad statement that "(i)n general, a party may not make a claim in law or equity against a municipality without first notifying the municipality of its intention to make the claim" and cited General Municipal Law §§ 50-i(1); 50-e]).

In actions in equity that also seek substantial money damages as determined by the courts, one solution for the failure to file a notice of claim is severance and dismissal of the money damages claim. For instance, in *American Pen Corp. v City of New York* (266 AD2d 87, 87-88 [1st Dept 1999]), we held that where the plaintiff alleged a continuing trespass and sought abatement of the nuisance and injunctive relief, as well as damages in the millions of dollars, the monetary damages claims had to be dismissed as no formal notice of claim had been filed, but the claims in equity could continue (*see also Robertson v Town of Carmel*, 276 AD2d 543 [2d Dept 2000] [similar]); *Malcuria v Town of Seneca*, 66 AD2d 421, 424 [4th Dept 1979] [similar]); *but see*

Picciano v Nassau County Civ. Serv. Commn., 290 AD2d at 172-173 [claim brought under the Human Rights Law seeking equitable relief and money damages for violations of the plaintiff's rights was subject to County Law § 52 notice requirement; *Mills* controlled and there was "no need to carve out an exception to the notice of claim rule" by dismissing the damages claim and leaving the equitable claims]).

In a separate line of cases subject to the broad notice provision of New York Education Law § 3813(1), this Department has held that a claimant seeking only equitable relief need not file a notice of claim (*see Kahn v New York City Dept. of Educ.*, 79 AD3d 521, 522 [1st Dept 2010] [challenging termination and asserting due process claims pursuant to 42 USC § 1983 did not require filing a notice of claim under Education Law § 3813; petition was dismissed as it was time-barred], *affd* 18 NY3d 457 [2012][7]; *see also Civ. Serv. Empls. Assn., Inc. v Board of Educ. of City of Yonkers*, 87 AD3d 557 [2d Dept 2011] [claimant seeking

[7] In affirming *Kahn*, the Court of Appeals expressly stated that "[i]n light of our disposition of this appeal we need not reach and express no opinion as to whether a plaintiff or petitioner who seeks only equitable relief from DOE must comply with the notice-of-claim provisions in Education Law § 3813(1) as a precondition to suit" (18 NY3d at 473 n 10; *compare Todd v Board of Educ.*, 272 App Div 618, 619-620 [4th Dept 1947], *affd without opinion* 297 NY 873 [1948] [dismissing action seeking declaratory and legal relief that was commenced without filing a "written verified claim" as required by then Education Law § 858-a]).

equitable relief of specific performance of a collective bargaining agreement, and not money damages, was not required to serve a notice of claim under Education Law § 3813[1]). We note that the Second Department has taken a more narrow approach in recent years (*compare Ruocco v Doyle* (38 AD2d 132, 133, 135 [2d Dept 1972] [notice of claim not needed when seeking declaratory judgment that the purported resignation of the plaintiff, a school principal with tenure, was null and void, as well as "merely incidental" money damages], *with Matter of McGovern,* 114 AD3d at 795-796 [stating rule that "notice of claim requirement does not apply when a litigant seeks only equitable relief," but as the petitioner in that proceeding sought reinstatement and back pay after being terminated, a notice of claim was required under Education Law § 3813], *and Matter of Sheil v Melucci*, 94 AD3d 766, 767-768 [2d Dept 2012] [stating rule that the notice requirements under Education Law § 3813 "do not apply when a litigant seeks only equitable relief," but holding in this article 78 proceeding that as the petitioner sought both equitable relief and recovery of damages following her dismissal, she was required to file a notice of claim]; *see also Matter of Stevens v Board of Educ. of McGraw Cent. Sch. Dist.*, 261 AD2d 698, 699 [3d Dept 1999] ["mere fact that [petitioner] seeks only reinstatement to his former position, as opposed to reinstatement

coupled with back pay and benefits, does not exempt him from the requirements of Education Law § 3813, as a review of the petition makes clear that petitioner nonetheless primarily is seeking to enforce a private right"]).

The discussions if not the holdings in cases brought in New York seem to establish a rule that when a case is brought against a municipality or governmental agency and sounds in equity, no notice of claim is required unless the notice requirement specifically includes equitable claims. Claims in equity also seeking substantial damages, on the other hand, will be dismissed or may be severed and the monetary claims dismissed if no notice of claim has been filed. Claims brought under the Whistleblower Law are something of an exception: although the usual common relief, i.e., reinstatement, is equitable in nature, a notice of claim seems to be required even under narrow notice provisions such as General Municipal Law § 50-i.

In *Donas v City of New York* (62 AD3d 504, 505 [1st Dept 2009]), the whistleblower plaintiff sought only back salary and damages for harm to personal reputation. *Donas* was dismissed because the retaliatory acts allegedly took place more than a year before the plaintiff commenced his action, and the statute of limitations provided under Civil Service Law § 75-b had run; his notice of claim was also untimely, and because it did not

allege any retaliatory actions that occurred within the previous 90 days of its filing, there was new no cause of action.[8] As discussed above, we have held in *Xu* that the law is that a whistleblower claim seeking full relief including reinstatement and back pay, is required to file a notice of claim, unless the relief sought is for the public good rather than the individual (*see Xu*, 77 AD3d at 48). We note that there was no discussion in *Xu* concerning severance and dismissal of the monetary damages.

Here, if severance of plaintiff's action is permitted, we have a whistleblower claim seeking *solely* equity, brought in a jurisdiction where the only notice requirement is that of the General Municipal Law. In our view, this is not very different from permitting an equitable claim, for instance one subject to the broader Educational Law notice statute such as *Kahn v New York City Dept. of Educ.* (79 AD3d 521 [1st Dept 2010], *supra*) to be litigated without the filing of a notice of claim. There is no reason the same should not be true for a whistleblower claim seeking only equity. Where a whistleblower claim seeks both equity and monetary damages, but no notice of claim was filed, there is no reason not to treat the claim as we have sometimes

[8] In *Donas*, we did not specifically question the need for a notice of claim under General Municipal Law § 50-i, in particular when only monetary damages were sought, but we noted that one had been filed (*see* 62 AD3d at 505).

treated claims brought against a municipality seeking significant amounts of money damages in addition to resolving the complained-of conditions, that is to say, the equitable portion of the claim can be severed from the claims for monetary damages, and the latter dismissed (*see American Pen Corp. v City of New York,* 266 AD2d at 87*; Robertson v Town of Carmel,* 276 AD2d at 543).

Thus, we conclude that in a whistleblower case, a plaintiff whose claim falls under the jurisdiction of General Municipal Law § 50-e or other narrow statutory notice requirements, should be permitted, if requested, to pursue his or her equitable claim for reinstatement, and any other equitable claim, notwithstanding the absence of the notice of claim required. This would ameliorate the perceived harshness of dismissing whistleblower cases because notices of claim were not filed, even though these cases are not claims of personal injury or damage to real or personal property, as set forth in General Municipal Law § 50-i. It would also, and perhaps more importantly, support the underlying purpose of the Whistleblower Law, which is to reduce risks to the public health and safety by permitting employees to report uncorrected violations or wrongful governmental action by an employer, when the employer has some conflict that prevents that employer from protecting the public (Civil Service Law § 75-b[2][a]). In this regard, the Whistleblower Law, while certainly protecting the

individual employee who reveals the wrongdoing, also serves an important public function (*cf. Mills v County of Monroe,* 59 NY2d at 311).

Accordingly, the order of the Supreme Court, New York County (Geoffrey D. Wright, J.), entered October 9, 2012, which granted defendant's motion to dismiss the complaint, should be modified, on the law, to deny the motion to the extent the complaint seeks the equitable relief of reinstatement, and otherwise affirmed, without costs.

All concur.

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

ENTERED: AUGUST 28, 2014

DEPUTY CLERK