SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 2, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

13739 Castlepoint Insurance Company, Index 154789/12
Plaintiff-Appellant,

-against-

Sewnarine Jaipersaud, et al.,
Defendants-Respondents.

_____

Law Office of Max W. Gershweir, New York (Jennifer Kotlyarsky of counsel), for appellant.

Joseph A. Altman, P.C., Bronx (Joseph A. Altman of counsel), for Jaipersaud respondents.

Burns & Harris, New York (Judith F. Stempler of counsel), for Antoinette Fernando, respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered August 19, 2013, which denied plaintiff's motion for summary judgment seeking a declaration that it has no duty to defend or indemnify under defendant insureds' policy, unanimously reversed, on the law, without costs, the motion granted, and it is declared that plaintiff is under no duty to defend or indemnify the defendant insureds in the personal injury action brought against them by defendant Fernando. The Clerk is directed to enter judgment accordingly.

Plaintiff demonstrated prima facie through the insured's admission in a statement to plaintiff's investigator and the investigator's conclusion upon inspection of the premises regarding its structural configuration that his home was a three-family dwelling, rather than a two-family dwelling as covered by the subject policy and as represented in the application for insurance (*see Schaaf v Pork Chop, Inc.*, 24 AD3d 1277, 1278 [4th Dept 2005]; *Dauria v CastlePoint Ins. Co.*, 104 AD3d 406, 407 [1st Dept 2013]). The insureds failed to explain why the premises had separate entrances, and their explanation that the premises were always a two-family dwelling was conclusory, and failed to raise an issue of fact. Contrary to the insureds' contention, taking judicial notice of the certificate of occupancy would be unavailing, because the number of families is determined by actual use, even if in violation of the certificate of occupancy (*see Hermitage Ins. Co. v LaFleur*, 100 AD3d 426, 427 [1st Dept 2012]). Thus, we are constrained to find that plaintiff is under no duty to defend or indemnify defendant insureds, in the personal injury action brought against them by defendant Fernando, notwithstanding the inherent inequity of Castlepoint's acceptance and retention of premiums paid by defendants Jaipersauds on the premises.

Although it is unnecessary to determine whether the

misrepresentation on the insurance application vitiated the policy, we note that the underwriting guidelines and the underwriter affidavit that the policy would not have been written had plaintiff known the true status of the premises sufficed for this purpose (*see id.*).

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

ENTERED: APRIL 2, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Richter, Gische, JJ.

14122 Jean Ocean, Index 307691/09
Plaintiff-Appellant,

-against-

Mohammad M. Hossain, et al.,
Defendants-Respondents.

_____

Mitchell Dranow, Sea Cliff, for appellant.

Marjorie E. Bornes, Brooklyn, for respondents.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered on or about January 6, 2014, which, insofar as appealed from as limited by the briefs, granted defendants' renewed motion for summary judgment dismissing the claims of permanent consequential and significant limitations of use of the knees pursuant to Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion denied.

By order entered December 23, 2011, Supreme Court denied defendants' original motion for summary judgment, with leave to renew following the completion of discovery. By notice of motion dated June 19, 2013, defendants moved to renew their motion, relying, inter alia, on the medical reports they had submitted on the original motion and a supplemental report from their orthopedist.

Defendants established prima facie that plaintiff did not

sustain a serious injury to his knees within the meaning of Insurance Law § 5102(d) by submitting their radiologist's and orthopedist's reports finding that the injuries in both knees were degenerative changes that existed before the motor vehicle accident and were consistent with plaintiff's weight and age (*see Henchy v VAS Express Corp.*, 115 AD3d 478, 478 [1st Dept 2014]). Defendants also relied on plaintiff's radiologist's MRI reports, which found degenerative conditions in both knees.

In opposition, the affirmations by plaintiff's treating physicians failed to address defendants' proof of preexisting degenerative conditions related to his age and weight (*see Soho v Konate*, 85 AD3d 522, 523 [1st Dept 2011]) or the evidence of degeneration noted in his own radiologist's MRI reports (*see Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044 [1st Dept 2014]). However, the affirmation by plaintiff's orthopedic surgeon, Dr. Harshad Bhatt, is sufficient to raise an issue of fact as to whether plaintiff suffered a serious injury causally related to the accident (*see Bonilla v Abdullah*, 90 AD3d 466 [1st Dept 2011], *lv dismissed* 19 NY3d 885 [2012]).

Dr. Bhatt affirmed that he reviewed the report of defendant's expert radiologist and "completely disagree[d]" with the doctor's opinion that the injuries to plaintiff's knees were due to degeneration. Rather, based on his personal observation,

the lack of any previous knee complaints, and the "acute onset of pain directly after the subject accident," Dr. Bhatt affirmed that the injuries were causally related to the accident.

The court concluded that Dr. Bhatt's affirmation could not be considered because he was no longer licensed to practice medicine in New York. In the context of the renewed motion for summary judgment, this was error. Dr. Bhatt's medical license was revoked before the renewed motion was argued. However, he was licensed to practice medicine in New York when the affirmation was subscribed and when it was submitted to the court in opposition to defendants' original motion for summary judgment (*see Fung v Udin*, 60 AD3d 992 [2d Dept 2009]). The revocation of Dr. Bhatt's license raises issues of credibility, but "[i]t is not the court's function on a motion for summary judgment to assess credibility" (*Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]). Thus, a question of fact exists as to causation,

and any questions about the credibility of the conflicting doctors' opinions are for the jury to resolve (*Perl v Meher*, 18 NY3d 208, 218-219 [2011]).

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

ENTERED: APRIL 2, 2015

CLERK

Sweeny, J.P., Renwick, Saxe, Manzanet-Daniels, Gische, JJ.

14520 Kathleen Bednark, Index 102889/09
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Respondent,

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

Heron Real Estate Corp., et al.,
Defendants-Appellants.

_____

Carman, Callahan & Ingham, LLP, Farmingdale (Joshua N. Copperman of counsel), for appellants.

Rheingold Valet Rheingold McCartney & Giuffra LLP, New York (Jeremy A. Hellman of counsel), for Kathleen Bednark, respondent.

Zachary W. Carter, Corporation Counsel, New York (Drake A. Colley of counsel), for municipal respondent.

_____

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered October 11, 2013, which granted defendant City of New York's motion for summary judgment dismissing the complaint and all cross claims as against it, and denied the motion of defendants Heron Real Estate Corp., BP America, Inc. and Accede, Inc. (Heron defendants) for summary judgment dismissing the complaint as against them, unanimously modified, on the law, to deny defendant The City of New York's motion, and otherwise affirmed, without costs.

Plaintiff was injured when, while disembarking from the rear doors of a bus, she stepped onto an allegedly broken and uneven sidewalk causing her to fall; the Heron defendants owned the property that abutted the sidewalk. Located approximately 55 feet west of the location where plaintiff fell is a bus stop sign designating an M60 bus stop.

A bus stop is not delimited to the roadway where buses operate but includes the sidewalk where passengers board and disembark from the bus (*see Phillips v Atlantic-Hudson, Inc.*, 105 AD3d 639 [1st Dept 2013]; *Garcia-Martinez v City of New York*, 20 Misc 3d 1111(A) [Sup Ct 2008], *affd* 68 AD3d 428 [1st Dept 2009]). The City's director of bus stop management testified that the length of the bus stop measured from the intersection of Second Avenue and westward along East 125th Street was 158 feet long, beginning 20 feet from the curb of Second Avenue. Plaintiff fell approximately 118 feet from the curb of Second Avenue. The fact that plaintiff believed she did not fall within the bus stop is immaterial since she has no knowledge regarding what defendant The City of New York has designated to be the location of the bus stop. Since a triable issue of fact exists as to whether plaintiff fell within a designated bus stop location, we modify to reinstate the complaint as against The City.

The motion court's reliance on Section 16-124.1(a)(2) of the

Administrative Code as limiting a bus stop to "five feet of the sidewalk and the gutter immediately adjacent to the curb," was misplaced. The regulation pertains to the City's responsibility to remove snow and ice adjacent to bus stops, and does not purport to define "bus stop" for all purposes. The regulation, which became effective three years post-incident, is in any event inapplicable.

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

ENTERED: APRIL 2, 2015

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Feinman, Gische, JJ.

14692 The People of the State of New York, Ind. 3986/11
Respondent,

-against-

Nelson A. Rosa,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ryan Gee 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 (Lewis Bart Stone, J.), rendered on or about June 7, 2012,

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

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

ENTERED: APRIL 2, 2015

CLERK

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

Mazzarelli, J.P., Sweeny, DeGrasse, Feinman, Gische, JJ.

14693 Albert Cali, Jr., Index 304456/13
Plaintiff-Appellant,

-against-

Joseph J. Savino, et al.,
Defendants-Respondents.

_____

Brian M. Levy, New York, for appellant.

Daniel Szalkiewicz & Associates, PC, New York (Daniel S. Szalkiewicz of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered March 7, 2014, which granted defendants' motion to dismiss the complaint, unanimously reversed, on the law, without costs, and the motion denied.

The fiduciary duty claims here sound in fraud, and thus the 2 year discovery rule of CPLR 213(8) applies to this action (*see Kaufman* at 122). Under the circumstances of this case, and at this pleading stage, it was error for the IAS court to conclude

as a matter of law that the case was barred by the statute of limitations.

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

ENTERED: APRIL 2, 2015

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Feinman, Gische, JJ.

14694-
14695 In re Davontay Peter H., etc.,

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

Makeba H.,
Respondent-Appellant,

St. Dominic's Home,
Petitioner-Respondent,

Administration for Children's
Services,
Respondent.

_____

Patricia W. Jellen, Eastchester, for appellant.

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the child.

_____

Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about September 23, 2013, which, to the extent appealed from as limited by the briefs, upon a finding that respondent mother had substantially failed to comply with the terms of a suspended judgment, terminated the mother's parental rights to the subject child, and committed the child's custody and guardianship to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

Appeal from order, same court and Judge, entered on or about May 28, 2013, which, after a hearing, found that termination of the mother's parental rights was in the child's best interests, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

A preponderance of the evidence supports the finding that the mother had violated the terms of the suspended judgment (*see Matter of Aliyah Careema D. [Sophia Seku D.]*, 88 AD3d 529, 529 [1st Dept 2011]). Although respondent made efforts to comply with some of the terms of the suspended judgment, she failed to obtain suitable housing or maintain a steady income, refused to take a drug test on one occasion, and tested positive for alcohol on three occasions (*see id.*).

A preponderance of the evidence also supports the court's determination that termination of the mother's parental rights is in the child's best interests, given, among other things, the mother's failure to address her alcohol addiction and the length of time the child has been in foster care (*see Matter of Tyshawn Jaraind C.*, 36 AD3d 564 [1st Dept 2007]). Since the court had already granted an extension of the suspended judgment, it lacked

authority to grant another extension (*see* Family Ct Act § 633[f]).

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

ENTERED: APRIL 2, 2015

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Feinman, Gische, JJ.

14696 Cynthia Salichs, Index 7438/07
Plaintiff-Respondent,

Efrain Hernandez, etc.,
Plaintiff-Respondent-Appellant,

-against-

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

White Castle System, Inc., et al.,
Defendants-Appellants,

Alexander Fontanez, et al.,
Defendants.

_____

White, Fleischner & Fino, LLP, New York (Daniel Stewart of counsel), for White Castle Systems, Inc. and White Castle Management Co., appellants.

O'Connor Redd LLP, Port Chester (Amy L. Fenno of counsel), for Westec Interactive Security, Inc., appellant.

Simpson Thacher & Bartlett LLP, New York (William T. Russell, Jr. of counsel), for appellants-respondents.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for respondent-appellant.

Soberman & Rosenberg, New Hyde Park (Arthur H. Rosenberg of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered January 13, 2014, which denied the motions of defendant Westec Interactive Security, Inc. (Westec) and defendants White Castle System, Inc. and White Castle Management

Co. (collectively White Castle) for summary judgment dismissing the complaint and cross claims as against them, and granted the motion of defendants City of New York and Alfredo Toro for summary judgment solely to the extent of dismissing the cause of action premised upon General Municipal Law (GML) § 205-e, unanimously modified, on the law, the motions of Westec and White Castle granted, and otherwise affirmed, without costs. The Clerk is directed to enter judgment in favor of Westec and White Castle dismissing the complaint and all cross claims as against them.

This action arises out of the shooting death of an off-duty police officer, decedent Eric Hernandez, by uniformed police officer Alfredo Toro in the parking lot of a White Castle restaurant in the early morning of January 28, 2006. That morning, after five men had assaulted decedent inside the restaurant, decedent proceeded outside into the restaurant's parking lot where he confronted an individual he mistakenly believed had participated in the assault and held his handgun to that person. Defendant Toro, responding to a 911 call emanating from a White Castle employee, arrived and ordered decedent to put down the gun. When decedent failed to comply, Toro shot decedent three times.

Dismissal of the complaint as against White Castle is warranted because decedent's death was not a foreseeable result

of any lapse in White Castle's security (*see Maheshwari v City of New York*, 2 NY3d 288, 294 [2004]). Even assuming that the security monitoring system employed by White Castle was inadequate to prevent the initial assault, it is speculative to assume that any other measures could have prevented decedent's subsequent actions in the parking lot, or the police shooting thereafter. Since the subsequent independent acts of decedent and the police were extraordinary and not foreseeable or preventable in the normal course of events, White Castle's purported security failures were not a proximate cause of decedent's injuries (*see Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]).

The summary judgment motion of White Castle's security monitoring company, Westec, should also have been granted. The occurrences in the parking lot after the initial assault constituted unforeseeable superseding or intervening conduct that severed the chain of causation between Westec's alleged inadequate response to the triggered alarm signal and decedent's death (*see Johnson v McLane Assoc., Inc.*, 201 AD2d 436 [1st Dept 1994]). Moreover, the complaint should have been dismissed as against Westec because decedent was not an intended third-party beneficiary of the agreement between White Castle and Westec (*see id.* at 437; *Pagan v Hampton Houses*, 187 AD2d 325 [1st Dept

1992]).

The court properly dismissed plaintiffs' GML 205-e claim. Even assuming that decedent was killed in the line of duty as required under GML 205-e, plaintiffs nonetheless failed to produce compelling evidence demonstrating a material question of fact as to whether the conduct of Officer Toro, who was never officially charged as a result of this incident, was criminal and not justified (*see Williams v City of New York*, 2 NY3d 352, 364-366 [2004]). Nevertheless, as the court found, the City was not entitled to dismissal of plaintiffs' claims sounding in intentional tort and negligence. The evidence presented raised triable issues as to whether Officer Toro acted reasonably under the circumstances (*see McCummings v New York City Tr. Auth.*, 81 NY2d 923, 925 [1993], *cert denied* 510 US 991 [1993]; *Lubecki v City of New York*, 304 AD2d 224, 232-233 [1st Dept 2003], *lv denied* 2 NY3d 701 [2004]).

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

ENTERED: APRIL 2, 2015

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Feinman, Gische, JJ.

14697 The People of the State of New York, Respondent, Ind. 4542/08

-against-

Daishaile Galarza, Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (T. Charles Won of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Ann M. Donnelly, J.), rendered April 23, 2011, convicting defendant, after a jury trial, of murder in the second degree and criminal possession of a weapon in the second degree, and sentencing her to an aggregate term of 25 years to life, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). Contrary to defendant's arguments, the finding that defendant possessed the intent to kill was reasonably based on "the totality of defendant's conduct" (*People v Skian*, 184 AD2d 330, 331 [1st Dept 1992], *lv denied* 80 NY2d 977 [1992]), including her various

threatening statements to the victim over the course of the party where the shooting occurred, her repeated demands for another partygoer to give her his handgun, and her conduct in struggling to break free from a friend who unsuccessfully attempted to hold her back from reaching the weapon. Moreover, after defendant grabbed the weapon, she immediately pointed it at the victim and fired a fatal shot to his groin. The inference of homicidal intent is not negated by the facts that defendant fired only one shot before fleeing, or that she did not hit a more vital area such as the head or heart (*see People v Blue*, 55 AD3d 391, 391 [1st Dept 2008], *lv denied* 11 NY3d 922 [2009]).

Since the court submitted manslaughter in the first degree as a lesser included offense of murder in the second degree, defendant's murder conviction "foreclose[s her] challenge to the court's refusal to charge the remote lesser included offense[]" of second-degree manslaughter (*People v Boettcher*, 69 NY2d 174, 180 [1987]; *see also People v Johnson*, 87 NY2d 357, 361 [1996]). In any event, the court properly declined the request (*see People v Cesario*, 71 AD3d 587 [1st Dept 2010], *lv denied* 15 NY3d 803 [2010], *cert denied* __ US __, 131 S Ct 670 [2010]).

Since defendant did not raise the specific arguments raised on appeal, she failed to preserve her challenges to the procedures by which the court adjudicated her *Batson* application

(*see People v James*, 99 NY2d 264, 272 [2002]), and the court's resolution of an issue involving sworn jurors (*see People v Hicks*, 6 NY3d 737, 739 [2005]). We have considered and rejected defendant's arguments on the issue of preservation of these claims, and we decline to review the claims in the interest of justice. As an alternative holding, we reject them on the merits.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they generally involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state

and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 2, 2015

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Feinman, Gische, JJ.

14698 Claudia Evart, Index 307387/12
Plaintiff-Appellant,

-against-

Shapiro, Beilly & Aronowitz, LLP,
et al.,
Defendants-Respondents.

_____

Ressler & Ressler, New York (Bruce J. Ressler of counsel), for appellant.

Kaufman Dolowich & Voluck, LLP, Woodbury (Brett A. Scher of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about July 2, 2013, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

The motion court properly dismissed plaintiff's legal malpractice claims, since this Court previously dismissed the informed consent claims in the underlying action for lack of causation (*Evart v Park Ave. Chiropractic, P.C.*, 86 AD3d 442 [2011], *lv denied* 17 NY3d 922 [2011]). Accordingly, plaintiff cannot establish that she would have succeeded on the merits of

her underlying informed consent claims "but for" defendants' negligence (*see AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]).

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

ENTERED: APRIL 2, 2015

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Feinman, Gische, JJ.

14699 In re Neamiah Harry-Ray M.,

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

Donna Marie M., also known
as Donna Marie B.,
Respondent-Appellant,

Episcopal Social Services,
Petitioner-Respondent.

_____

John R. Eyerman, New York, for appellant.

Marion C. Perry, New York, for respondent.

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

_____

Order, Family Court, New York County (Jane Pearl, J.), entered on or about October 15, 2013, which, to the extent appealed from as limited by the briefs, upon a fact-finding determination that respondent mother had permanently neglected the subject child, terminated the mother's parental rights and transferred custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

There was clear and convincing evidence that the agency made diligent efforts to reunite the mother with the child (*see* Social Services Law § 384-b[7][a], [f]). An agency caseworker testified

that she provided the mother with referrals for services, scheduled and conducted conferences to assist the mother in complying with the service plan, offered to provide the mother with a bus ticket to visit the child after she moved out of state, and repeatedly reminded the mother of what was necessary in order to have the child returned to her (*see Matter of Natasha Denise B. [Montricia Denise C.]*, 104 AD3d 457 [1st Dept 2013]). Despite these efforts, the evidence shows that the mother declined to visit the child and made no meaningful effort to complete the service plan (*id.*).

The mother's due process rights were not violated by the court's decision denying her permission to testify via telephone under the circumstances of this case. The right to be present at a fact-finding or dispositional hearing is not absolute (*see Matter of Ramon David W.*, 290 AD2d 357, 357 [1st Dept 2002]), and the court properly determined that the mother's credibility would be difficult to determine via telephone. The court had provided the mother with a two-month adjournment at her request to enable her to obtain bus fare to attend the proceedings and even indicated a willingness to consider, as an alternative, letting the mother testify via video conferencing from a local library or other location.

Consequently, the court properly denied the mother's request

for another adjournment, especially since the child had been in foster care for almost three years (*see Matter of James Carton K.*, 245 AD2d 374, 377-378 [2d Dept 1997], *lv denied* 91 NY2d 809 [1998]). In addition, the mother was permitted to listen to the proceedings by telephone, and she was represented by counsel, who actively participated in the proceedings (*see Matter of Joseluise Juan M.*, 302 AD2d 219, 219 [1st Dept 2003], *lv denied* 100 NY2d 508 [2003]).

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

ENTERED: APRIL 2, 2015

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Feinman, Gische, JJ.

14700-
14700A-
14701 &
M-131

Index 653442/11

Allen Bodner, etc.,
Plaintiff-Appellant,

-against-

Harry Grunstein,
Defendant-Respondent,

Leonard Grunstein, et al.,
Defendants-Respondents,

John Does, #1-10, et al.,
Defendants,

DMV Funding LLC, et al.,
Nominal Defendants.

_____

Nathan M. Ferst, New York, for appellant.

Davidoff Hutcher & Citron LLP, New York (Michael Wexelbaum of counsel), for Harry Grunstein, respondent.

Zuckerman Spaeder LLP, New York (James Sottile of counsel), for Leonard Grunstein and Murray Forman, respondents.

Arent Fox LLP, New York (Allen G. Reiter and Jennifer Bougher of counsel), for Fundamental Long Term Care Holdings LLC, Thi of Baltimore, Inc. and the Thi-named Entities (other than Thi of Texas at Samaritan Hospice, LLC and Thi of Michigan at Detroit, LLC), respondents.

_____

Order, Supreme Court, New York County (Lawrence K. Marks, J.), entered April 25, 2013, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the derivative causes of action, unanimously reversed, on the

law, with costs, and the motion denied. Appeal from order, same court and Justice, entered December 17, 2013, to the extent it denied plaintiff's motion to renew, unanimously dismissed, without costs, as academic. Appeal by Harry Grunstein from order entered April 25, 2013, unanimously withdrawn, without costs, pursuant to the stipulation of the parties dated January 28, 2015.

Plaintiff set forth sufficiently particularized facts to raise a reasonable doubt that defendant Harry Grunstein, the only individual upon whom demand to bring suit could be made, was disinterested and independent, and thereby to establish that a demand would have been futile (*see Aronson v Lewis*, 473 A2d 805, 814 [Del 1984], *overruled on other grounds Brehm v Eisner*, 746 A2d 244 [Del 2000]). The potential for this individual's liability was more than a "mere threat" (*see Rales v Blasband*, 634 A2d 927, 936 [Del 1993]; *In re China Agritech, Inc. Shareholder Derivative Litig.*, 2013 WL 2181514, *16, 2013 Del Ch LEXIS 132, *43-44 [Del Ch 2013]). His codefendant brother, although not an officer, director or member of the nominal defendant entities, was the prime mover in the underlying transactions complained of, and, indeed, claimed to control the entities notwithstanding that Harry Grunstein held the management

positions in them (*see In re China Agritech*, 2013 WL 2181514 at *20, 2013 Del Ch LEXIS 132 at *60 [family relationships raise reasonable doubt as to director's lack of independence]; *Mizel v Connelly*, 1999 WL 550369, 1999 Del Ch LEXIS 157 [Del Ch 1999] [same]; *Harbour Fin. Partners v Huizenga*, 751 A2d 879, 889 [Del Ch 1999] [same]). Moreover, Harry Grunstein had operated as a willing extension of his brother in related transactions that resulted in litigation (*see Schron v Grunstein*, 105 AD3d 430 [1st Dept 2013]).

Contrary to defendants' contention, this action is not barred by the dismissal without prejudice of a prior action.

Defendants' request for costs is denied.

M-131 - ***Bodner v Grunstein, et al.***

Motion to take judicial notice granted to the extent of supplementing the record with the amended order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered on or about August 24, 2011, and otherwise denied.

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

ENTERED: APRIL 2, 2015

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Feinman, Gische, JJ.

14702 The People of the State of New York, Respondent, Ind. 4406/10

-against-

Ariel Garcia, Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Katherine A. Gregory of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Margaret L. Clancy, J., at plea; Peter J. Benitez, J., at sentencing), rendered on or about January 10, 2013, as amended April 19, 2013,

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

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

ENTERED: APRIL 2, 2015

CLERK

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

Mazzarelli, J.P., Sweeny, DeGrasse, Feinman, Gische, JJ.

14703 In re Travis D. Griffin, Index 102069/12
Petitioner-Appellant,

-against-

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

_____

Travis D. Griffin, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Drake A. Colley of counsel), for respondents.

_____

Order, Supreme Court, New York County (Lucy Billings, J.), entered October 30, 2013, which denied the petition to annul the determination of respondent New York City Civil Service Commission, dated December 8, 2011, affirming petitioner's disqualification by the New York City Department of Correction for the position of probation officer on the ground that he was not psychologically suited for the position, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The determination that petitioner is not psychologically qualified for the position of probation officer has a rational basis in the record and is not arbitrary and capricious (*see Matter of Talamo v Murphy*, 38 NY2d 637 [1976]; Civil Service Law § 50[4][b]). Petitioner underwent written and in-person

psychological evaluations for the Department of Probation (DOP) by a psychologist who found that petitioner was "not qualified psychologically" for the position of probation officer. Although on the administrative appeal petitioner produced a report from his own psychologist opining that he was mentally competent and a suitable candidate for the position, "[i]t is not for the courts to choose between . . . diverse professional opinions. That is the function of the proper department heads and as long as they act reasonably and responsibly, the courts will not interfere" (*Matter of Palozzolo v Nadel*, 83 AD2d 539, 539 [1st Dept 1981] [internal quotation marks omitted], *affd* 55 NY2d 984 [1982]). We note moreover that both reports were reviewed by a third psychologist, who concurred in the DOP psychologist's finding of psychological disqualification.

Petitioner has been given procedural due process (*see Pinder v City of New York*, 49 AD3d 280 [1st Dept 2008]; *Matter of Tully Constr. Co. v Hevesi*, 214 AD2d 465, 466 [1st Dept 1995]). He was afforded an administrative appeal, at which he availed himself of the opportunity to make submissions, including the report of his own psychologist, and the administrative determination has undergone judicial review for rationality. No hearing was

provided for by statute or otherwise procedurally required (*see Talamo*, 38 NY2d at 639; *Matter of Albury v New York City Civ. Serv. Commn.*, 32 AD2d 895 [1st Dept 1969], *affd* 27 NY2d 694 [1970]).

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

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

ENTERED: APRIL 2, 2015

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Feinman, Gische, JJ.

14704- Ind. 5602/12
14705- 4794/12
14706 The People of the State of New York, 5175/12
Respondent,

-against-

Paul W. Wise,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgments, Supreme Court, New York County (Richard D. Carruthers, J.), rendered on or about May 1, 2013, as amended, May 17, 2013, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after

service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: APRIL 2, 2015

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Feinman, Gische, JJ.

14707-
14707A Index 800067/10

Vincent M. Cracolici, et al.,
Plaintiffs-Appellants-Respondents,

-against-

Sovrin Shah, M.D.,
Defendant-Appellant,

Simon Barkagan, M.D., et al.,
Defendants-Respondents,

Gabor Nemesdy, M.D., et al.,
Defendants.

_____

Cohen, Labarbera & Landrigan, LLP, Goshen (Joshua A. Scerbo of counsel), for appellants-respondents.

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Steven C. Mandell of counsel), for appellant, and Zafar Khan, M.D., respondent.

Kaufman Borgeest & Ryan LLP, Valhalla (Adonaid C. Medina of counsel), for Simon Barkagan, M.D., respondent.

_____

Orders, Supreme Court, New York County (Alice Schlesinger, J.), entered July 31, 2013, which, to the extent appealed from, dismissed the action as against defendants Drs. Zafar Khan and Simon Barkagan and denied Dr. Sovrin Shah's motion to dismiss the complaint as against him, unanimously affirmed, without costs.

In this action for medical malpractice, the claims against Drs. Khan and Barkagan were properly dismissed as untimely (*see* CPLR 214-a). Plaintiff last treated with Dr. Khan on October 15,

2007 and with Dr. Barkagan on April 24, 2008. The mere hope that discovery may reveal a course of continuous treatment with Dr. Khan, does not warrant denial of the motion (*see* CPLR 3211[d]). With respect to Dr. Barkagan, the motion court properly found that the claims asserted against him do not relate back to those timely asserted against Dr. Shah (*see* CPLR 203[c]; *Buran v Coupal*, 87 NY2d 173, 177-178 [1995]). The allegations against the two doctors relate to separate conduct (*Buran*, 87 NY2d at 178). Plaintiffs have not established a "unity of interest" since they have not identified any relationship between the doctors, let alone one "giving rise to the vicarious liability of one for the conduct of the other" (*Cuello v Patel*, 257 AD2d 499, 500 [1st Dept 1999]) or that their interests will stand or fall together (*see id.; see also Lord Day & Lord, Barrett, Smith v Broadwell Mgt. Corp.*, 301 AD2d 362 [1st Dept 2003]). Additionally, there is no evidence that Dr. Barkagan had notice of the complaint or reason to believe that he would be named as a defendant, within the statutory period (*see Buran v Coupa*l, 87 NY2d at 180*; Alvarado v Beth Israel Med. Ctr.*, 60 AD3d 981, 982 [1st Dept 2009]).

The court properly found that service of the amended complaint on Dr. Shah, within 120-days of the filing of the

action, was proper and timely (see CPLR 306-b; *Schroeder v Good Samaritan Hosp.*, 80 AD3d 744, 746 [2d Dept 2011]). Leave of the court was not required for the amendment since defendants' time to respond to the original complaint had not yet expired (see CPLR 1003; CPLR 3025[a]; *Schroeder*, 80 AD3d at 746). The court providently exercised its discretion in disregarding the fact that the amended complaint was served prior to its filing (*see* CPLR 2001; *Matter of United Servs. Auto. Assn. v Kungel*, 72 AD3d 517 [1st Dept 2010]).

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

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

ENTERED: APRIL 2, 2015

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Feinman, Gische, JJ.

14708 Vincent M. Cracolici, et al., Index 800035/12
Plaintiffs-Appellants,

-against-

Simon Barkagan, M.D., et al.,
Defendants-Respondents.

_____

Cohen, Labarbera & Landrigan, LLP, Goshen (Joshua A. Scerbo of counsel), for appellants.

Kaufman Borgeest & Ryan LLP, Valhalla (Adonaid C. Medina of counsel), for respondents.

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered August 1, 2013, which granted defendants' motion to dismiss the complaint and denied plaintiffs' cross motion for leave to amend the complaint, unanimously affirmed, without costs.

In this action for, among other things, fraud, plaintiff Vincent Cracolici alleges that defendants knowingly and fraudulently concealed the existence of medical malpractice committed by Dr. Simon Barkagan, in the performance of urological surgery in August 1995, and that, as a result, he failed to commence a medical malpractice claim within the statutory time period. Plaintiff's complaint was properly dismissed since he fails to allege the existence of any material misrepresentation on which he justifiably relied, and resulting damages that are

separate and distinct from those caused by the alleged malpractice (*see Simcuski v Saeli*, 44 NY2d 442, 453-454 [1978]; *Atton v Bier*, 12 AD3d 240, 241 [1st Dept 2004]).

Notably, the complaint asserts that plaintiff witnessed the alleged malpractice, and thus, he cannot have reasonably relied on falsified and/or altered records in refraining from commencing a medical malpractice action. Further, plaintiff's allegations of falsity are based on, *inter alia*, inconsistencies and inaccuracies concerning the dates and times relating to his hospitalization and surgery and the identity of the anesthesiologist, who is not alleged to have committed medical malpractice, information not material to the existence or concealment of Dr. Barkagan's alleged malpractice.

The court providently exercised its discretion in denying plaintiff leave to amend the complaint absent any indication as to the nature of, evidentiary basis for, or viability of, the

proposed amendment, a copy of which was not annexed to the cross motion (*see* CPLR 3025[b]; *Davis & Davis v Morson*, 286 AD2d 584, 585 [1st Dept 2001]).

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

ENTERED: APRIL 2, 2015

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Feinman, Gische, JJ.

14709 Anabell Rivera, Index 309570/08
Plaintiff-Respondent,

-against-

The Port Authority of New York
and New Jersey,
Defendant-Appellant.

_____

Cheryl Alterman, New York, for appellant.

Segal & Lax, New York (Patrick D. Gatti of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Edgar G. Walker, J.), entered November 8, 2013, upon a jury verdict awarding plaintiff $206,500 for past pain and suffering, $206,500 for future pain and suffering, $6,100 for past medical expenses and $87,000 for future medical expenses, unanimously modified, on the facts, to reduce the award for future medical expenses to $37,000, and otherwise affirmed, without costs.

The court correctly permitted defendant to recall a nonparty witness for the purpose of cross-examining him using his prior deposition testimony, pursuant to CPLR 3117(a)(1). Any argument that prejudice accrued from plaintiff's counsel's commentary on the timing of this cross-examination is unpreserved, as no objection was made during plaintiff's counsel's closing argument.

In light of plaintiff's clear and unequivocal testimony that photographs taken at her request within a few days after the accident were of the stairs where she fell and fairly and accurately depicted the conditions thereat, the photographs were properly admitted into evidence (*see Simmons v New York City Tr. Auth.*, 110 AD3d 625 [1st Dept 2013]). The court properly declined to preclude the use of X rays taken by plaintiff's testifying treating physician, where defendant was aware that the films had been taken in the months leading to trial, having been served with an updated physician's report, and was in possession of an open-ended HIPAA authorization that would have permitted defendant to obtain a copy of the films on request (*see* CPLR 4518; *Freeman v Kirkland*, 184 AD2d 331 [1st Dept 1992]).

Regarding defendant's request for a failure to mitigate charge, it failed to adduce sufficient evidence that plaintiff was at fault for failing to attend prescribed physical therapy (*see Eskenazi v Mackoul*, 72 AD3d 1012, 1014 [2d Dept 2010]). As for its request for a missing witness charge, defendant's request was untimely (*see Spoto v S.D.R. Constr.*, 226 AD2d 202 [1st Dept 1996]). Prior to the commencement of trial the parties exchanged witness lists. Defendant was aware that plaintiff would only be calling one of her two treating physicians before the trial commenced, when the court requested that the party serve witness

lists. That the charge conference where the request for the missing witness charge was made was held before plaintiff formally rested does not make it timely. Furthermore, the record shows that the testimony of the subject physician would have been cumulative (*see e.g. Jellema v 66 W. 84th St. Owners Corp.*, 248 AD2d 117 [1st Dept 1998]).

Defendant is correct that no evidence was adduced by either party that plaintiff's future medical costs were expected to exceed $37,000. Since plaintiff has agreed to a reduction of the award to that amount, the judgment is reduced to the extent indicated.

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

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

ENTERED: APRIL 2, 2015

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Feinman, Gische, JJ.

14710 The People of the State of New York, Ind. 3162/12
Respondent,

-against-

Edward Salce,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (William Terrell, III of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Ethan Greenberg, J.), rendered on or about January 17, 2013,

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

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

ENTERED: APRIL 2, 2015

CLERK

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

Mazzarelli, J.P., Sweeny, DeGrasse, Feinman, Gische, JJ.

14712 In re Edmund Burke, et al., Index 650147/11
Petitioners-Respondents,

-against-

Carlos Sobral,
Respondent-Appellant.

_____

Arent Fox LLP, New York (Elliott M. Kroll of counsel), for appellant.

Sankel, Skurman & McCartin, LLP, New York (William F. McCartin of counsel), for respondents.

_____

Appeal from order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered July 1, 2014, confirming the Arbitrator's partial final award, dated August 6, 2013, and the final award, dated December 31, 2013, deemed an appeal from the judgment, same court and Justice, entered August 12, 2014, awarding petitioners Edmund and Suzanne D. Burke $2,003,290.33, and so considered, the judgment unanimously affirmed, without costs.

Contrary to respondent's claim, the arbitrator did not exceed his power (*see* CPLR 7511[b][1][iii]). The finding of

liability was not "totally irrational" (*Matter of Port Auth. of N.Y. & N.J. v Local Union No. 3, Intl. Bhd. of Elec. Workers*, 117 AD3d 424 [1st Dept 2014] [internal quotation marks omitted], *lv denied* __ NY3d __, 2015 NY Slip Op 63896 [2015]), nor did it ignore the provisions of the parties' operating agreement.

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

ENTERED: APRIL 2, 2015

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Feinman, Gische, JJ.

14173 In re Zbigniew Jakubiak, Index 100744/13
Petitioner-Respondent,

-against-

New York City Department of Buildings,
Respondent-Appellant.

_____

Zachary W. Carter, Corporation Counsel, New York (Dona B. Morris of counsel), for appellant.

Gregory T. Chillino, PLLC, New York (Gregory T. Chillino of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Donna M. Mills, J.), entered November 13, 2013, granting the petition, brought pursuant to CPLR article 78, to annul respondent's determination, dated April 30, 2013, which denied petitioner's application to renew his general contractor's registration, and remanding the matter for further proceedings, unanimously affirmed, without costs.

Respondent's determination lacked a rational basis (*see* CPLR 7803[3]; *see also Matter of Peckham v Calogero*, 12 NY3d 424, 430-431 [2009]). Respondent arbitrarily concluded that petitioner's prior conviction for filing false documents bore a direct relationship to the duties and responsibilities attendant to the general contractor registration, the license for which he sought

renewal (*see* Correction Law §§ 752[1], 750[3]; *Matter of Dellaporte v New York City Dept. of Bldgs.*, 106 AD3d 446 [1st Dept 2013], *affd* 22 NY3d 1121 [2014]; *Matter of Gil v New York City Dept. of Bldgs.*, 107 AD3d 632 [1st Dept 2013], *lv denied* 22 NY3d 852 [2013]).

Petitioner's prior conviction was based on his submission to respondent of several forms on behalf of his business bearing his deceased business partner's signature as a special rigger licensee. Petitioner's partner died shortly after a cancer diagnosis, petitioner filed the forms in 2006 while his own application for a special rigger license was pending, and petitioner's application for that license was ultimately approved. While these facts do not excuse petitioner's misconduct, it demonstrates that he possessed the substantive qualifications to sign the forms, and respondent has never claimed that there was any problem with those forms, or that the public safety was endangered. Moreover, respondent granted petitioner's general contractor registration renewal application in 2010, six months after his guilty plea on the prior conviction.

The record shows that during the three-year period between that renewal and the denial of his March 2013 renewal application, petitioner submitted nearly 400 permits and other

documents under the general contractor registration without incident. Further, respondent did not seek the surrender of the registration as part of the plea agreement, despite seeking the surrender of his other licenses, including the special rigger license. Under these circumstances, respondent's claim that the 2010 renewal was mere administrative error finds no basis in the record. Respondent previously determined that petitioner possessed the requisite good moral character to hold the registration and that his prior criminal offense was not directly related to the registration. Respondent's failure to meaningfully explain why it departed from its prior determination renders the instant determination arbitrary and capricious (*see Matter of La Casa Di Arturo Inc. v New York City Dept. of Consumer Affairs*, 120 AD3d 1107, 1108 [1st Dept 2014]).

Respondent's failure to rebut the presumption of rehabilitation deriving from petitioner's certificate of relief

from disabilities also renders its determination arbitrary and capricious (*see Matter of Bonacorsa v Van Lindt*, 71 NY2d 605, 614 [1988]; *see also* Correction Law § 753[2]).

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

ENTERED: APRIL 2, 2015

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Feinman, Gische, JJ.

14714 The People of the State of New York, Ind. 926/76
Respondent,

-against-

Luis Rosado,
Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Kerry Elgarten of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Diane A. Shearer of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Megan Tallmer, J.), rendered March 22, 2010, adjudicating defendant a level three sexually violent offender under the Sex Offender Registration Act (Correction Law art 6-c), unanimously affirmed, without costs.

We find no basis for a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). Defendant's point score was far above the threshold for a level three offender, and a downward departure was not warranted merely because he was 58 years old at the time of the adjudication, especially in light of his violent criminal behavior, his prior history of sexual misconduct, and

his very poor prison disciplinary record. Although defendant's sex crimes were committed many years ago, his disciplinary record over the course of his lengthy incarceration demonstrates that his risk of recidivism has not abated. We have considered and rejected defendant's remaining claims.

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

ENTERED: APRIL 2, 2015

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Feinman, Gische, JJ.

14715N Admiral Indemnity Company, as subrogee of 441 East 57th Street Condominium, et al., Plaintiffs, Index 150207/13 590167/14

-against-

Popular Plumbing & Heating Corp., Defendant.

- - - - -

Popular Plumbing & Heating Corp., Third-Party Plaintiff-Appellant,

-against-

Yeung's Contracting LLC, Third-Party Defendant-Respondent.

_____

Guararra & Zaitz LLP, New York (Michael J. Guararra of counsel), for appellant.

Weiner Millo Morgan & Bonanno, LLC, New York (Keith A. Nezowitz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered August 20, 2014, which granted third-party defendant Yeung's Contracting LLC's (Yeung's) motion to sever the third-party action, unanimously affirmed, with costs.

In this action for property damage allegedly caused by a malfunction in a sprinkler system that was being repaired and/or renovated by defendant/third-party plaintiff Popular Plumbing & Heating Corp. (Popular), severance of the third-party action for contribution and indemnification was a proper exercise of

discretion. Popular impleaded third-party defendant Yeung's more than one month after the note of issue was filed in the main action and provided no reasonable justification for its delay. Popular, which was hired by Yeung's to relocate some of the sprinkler heads, had a direct contractual relationship with Yeung's and was therefore aware of its identity and its role in the sprinkler replacement project from the outset. While the main action is trial-ready, there is outstanding discovery in the third-party action, including depositions and documentary discovery. If the actions are not severed, Yeung's will be prejudiced since it will be precluded from conducting meaningful discovery or from making dispositive motions (*see Torres v Visto Realty Corp.*, 106 AD3d 645 [1st Dept 2013]). Further, although the main action and the third-party action are based on the same nucleus of facts, they involve disparate issues of law. Contrary to Popular's argument, there is no possiblity of inconsistent

verdicts since Yeung's liability for common law indemnification and contribution in the third-party action is contingent upon a finding that Popular is liable in the main action (*see id.*).

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

ENTERED: APRIL 2, 2015

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Feinman, Gische, JJ.

14716N Delta Dallas Alpha Corp., doing business as Bridgewaters, Plaintiff-Respondent, Index 654499/12

-against-

South Street Seaport Limited Partnership, et al., Defendants-Appellants.

_____

Solomon & Tanenbaum, P.C., White Plains (Clifford M. Solomon of counsel), for appellants.

Rottenberg Lipman Rich, P.C., New York (Robert A. Freilich of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered December 17, 2013, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for leave to amend the complaint to add a cause of action for breach of the implied covenant of good faith and fair dealing as against defendant South Street Seaport Limited Partnership (SSSLP) based on SSSLP's commencement of an action to recover rent under a promissory note and a nonpayment proceeding to evict plaintiff, and to add The Howard Hughes Corporation (HHC) as a defendant and assert a cause of action for intentional interference with contractual relationship against it, unanimously affirmed, with costs.

Plaintiff's failure to submit an affidavit of merit in

support of its motion to amend is not fatal to the motion; plaintiff need only show that the proposed amendment is not palpably insufficient or clearly devoid of merit (*see MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]).

To the extent the claim for breach of the implied covenant of good faith and fair dealing is based on SSSLP's commencement of an action to recover rent under a promissory note and a nonpayment proceeding to evict plaintiff, it is not duplicative of the breach of contract claims since it is based on allegations different from those underlying the contract claims and does not implicate the lease (*see Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440 [1st Dept 2009]). Further, the complaint alleges that SSSLP commenced the promissory note action and nonpayment proceeding to get plaintiff out of the premises, as part of a plan to redevelop the area and charge higher rents, i.e. in bad faith (*see Maddaloni Jewelers, Inc. v Rolex Watch U.S.A., Inc.*, 41 AD3d 269 [1st Dept 2007]; *Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 302 [1st Dept 2003]).

At this pleading stage, it cannot be determined whether the claim of intentional interference with contractual relationship

against HHC is precluded by HHC's economic justification defense (*see Foster v Churchill*, 87 NY2d 744, 750-751 [1996]).

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

ENTERED: APRIL 2, 2015

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Feinman, Gische, JJ.

14717 In re Isa Bako, Ind. 5023/13
[M-650] Petitioner, 2001/14

-against-

Hon. Neil Ross, etc., et al.,
Respondents.

_____

Isa Bako, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Michelle R. Lambert of counsel), for Hon. Neil Ross, respondent.

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

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: APRIL 2, 2015

CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Feinman, JJ.

12100 Andrew Kolchins, Index 653536/12
Plaintiff-Respondent,

-against-

Evolution Markets, Inc.,
Defendant-Appellant.

_____

Wechsler & Cohen, LLP, New York (David B. Wechsler of counsel), for appellant.

Debevoise & Plimpton LLP, New York (Jyotin Hamid of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered August 22, 2013, modified, on the law, to dismiss so much of the first cause of action for breach of contract as seeks to recover a Special Non-Compete Payment under plaintiff's 2009 Employment Agreement, and otherwise affirmed, without costs.

Opinion by Renwick, J. All concur except Friedman, J.P. who dissents in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Dianne T. Renwick
Karla Moskowitz
Rosalyn H. Richter
Paul G. Feinman, JJ.

12100
Index 653536/12

_____x

Andrew Kolchins,
Plaintiff-Respondent,

-against-

Evolution Markets, Inc.,
Defendant-Appellant.

_____x

Defendant appeals from the order of the Supreme Court, New York County (Eileen Bransten, J.), entered August 22, 2013, which, insofar as appealed from, denied its motion to dismiss the first cause of action for breach of contract.

Wechsler & Cohen, LLP, New York (David B. Wechsler and Todd Gutfleisch of counsel), for appellant.

Debevoise & Plimpton LLP, New York (Jyotin Hamid and Olga Kaplan of counsel), for respondent.

RENWICK, J.

This breach of contract action stems from plaintiff Andrew Kolchins's employment with defendant Evolutions Markets, Inc. The most recent employment agreement commenced on September 1, 2009 and ended on August 31, 2012. Before its expiration, the parties engaged in correspondence with regard to an extension of the agreement. The question for our determination is whether the parties' emails and other correspondence can be viewed as constituting a binding offer and acceptance of an extension of the 2009 Employment Agreement, such that in the absence of a formal contract they created a legally enforceable contract. Because we find that the documentary evidence does not utterly refute plaintiff's factual allegations that the parties reached an agreement on the material terms of a contract renewal, we conclude that Supreme Court properly denied defendant's motion, pursuant to CPLR 3211(a)(1), to dismiss the first cause of action for breach of contract.

Factual Background

The international finance firm of Evolutions Markets, Inc. structures transactions and provides brokerage and advisory services in the global environmental and energy commodities marketplace. Plaintiff joined defendant in 2005. In 2006, the

parties entered into a three-year employment agreement dated September 1, 2006. Over the course of his tenure with defendant, plaintiff came to manage defendant's renewable energy market group.

On August 31, 2009, the parties executed the 2009 Employment Agreement covering the three-year period ending on August 31, 2012. The 2009 Agreement provided for plaintiff to receive a base salary of $200,000 per year, and for plaintiff to receive a number of bonuses. Among these was a "Sign on Bonus" of $750,000, payable in three installments, with $300,000 due within 10 days of the employment agreement start date and equal installments of $225,000 due on the first and second anniversaries of the start date. The 2009 Agreement also provided for plaintiff to participate in a Production Bonus of at least 55% of net earnings received by plaintiff's group, paid on a trimester basis, payable "within two months of the close of a given trimester."

The third significant provision in the 2009 Employment Agreement was the Special Non-Compete Payment. This payment provision was triggered if plaintiff were terminated by defendant "without cause" or quit his employment for "Good Reason" at any time prior to termination of the three-year period of employment.

In such event, plaintiff was entitled to receive, along with his base salary and bonuses, a Special Non-Compete Payment in exchange for agreeing not to work "for a competitor" for a period of six months after his termination or resignation. The Special Non-Compete Payment was to be made "on the firm-wide bonus payment dates following receipt of funds by [defendant]," with any such payments "calculated consistent with the calculation of [plaintiff's] bonus compensation during the last trimester [he was] an employee of [defendant]." The "Special Non-Compete Payment" was defined as "bonus compensation in respect of transactions: (i) that [plaintiff] brokered during the period of [his] employment and (ii) for which any contingency associated with [defendant's] right to receive payment is satisfied during the Non-Compete Period."

The fourth significant provision of the 2009 Employment Agreement was the Guarantee Payment. As the label indicates, this provision guaranteed that plaintiff would receive a minium combined base salary and bonus for each year of the contract of no less than $750,000. If such combined bonus and salary did not reach the $750,000 threshold for a specific year, the difference would constitute a "Made Whole Payment" due to plaintiff at the end of each year. The Guarantee calculation, however, did not

include the "Sign on Bonus." In addition, the provision contained a "For the [A]voidance of [D]oubt" clause, which provided that, unlike the other bonuses, the bonus that plaintiff would earn during the second trimester of the 2009 Employment Agreement would not count toward the computation of the Guarantee Payment. On the other hand, any amounts payable to plaintiff under the Special Non-Compete Payment would count toward the computation of the Guarantee Compensation for the last year of the contract ending on August 31, 2012.

Finally, the 2009 Agreement stated that, "[e]xcept as provided above with respect to the Sign On Bonus and Special Non-Compete Payment, in order to be eligible to receive any Production Bonus . . . or Guaranteed Compensation, [plaintiff] must be actively employed by [defendant] at the time of [its] firm-wide bonus payment dates." Likewise, the Agreement stated, plaintiff "will not be eligible to receive any such bonus or Guaranteed Compensation if [he had] already given notice of [his] intention to resign."

On June 15, 2012, towards the end of the 2009 Agreement, defendant's CEO, Andrew Ertel, sent plaintiff an email captioned "In writing," which stated:

"The terms of our offer are the same terms of your existing

> contract (other than a clarification around the issue of departed members of the team), and include:
>
> "3-year term
>
> "$200,000 base salary
>
> "$750,000 sign on bonus ($300,000 payable upfront, $225,000 payable on 1st and 2nd anniversaries)
>
> "$750,000 per year minimum cash compensation
>
> "production bonus pool of 55% of net earnings of [renewable energy] desk.
>
> "Any further questions, let me know but u do have your existing contract."

On July 16, 2002, plaintiff replied to Ertel's June 15 email, stating, in full, "I accept, pl[ease] send contract." Ertel immediately replied, stating, in full, "Mazel. Looking forward to another great run . . ."

On July 20, 2012, defendant's general counsel Benjamin Zeliger emailed plaintiff a "clean and marked draft of [his] new employment agreement." Zeliger stated that "[m]ost of the changes are simply updates to dates and your role as [director] of the [renewable energy] business." Zeliger noted two "substantive changes," however. The first of these proposed changes was that plaintiff repay any year's installment of the Sign on Bonus if he quit "without Good Reason or [were] terminated for Cause" in that year. Zeliger asserted that this

"clawback" provision was now standard company policy in order to "protect the company from paying a sign on bonus and then having the employee quit after receiving it." The second change related to "clarifying language regarding the retention of desk employee bonuses if the employees are no longer with [defendant]."

A few minutes later, plaintiff responded, "I will review and provide my initial feedback before sending to counsel. I will just want reciprocal language pertaining to clawback prob [sic]. If you fire me [without] cause I get the full sign-on bonus." Zeliger replied, "[T]hat protection is already in there for you."

On July 24, 2012, Zeliger emailed plaintiff a "[r]evised" "draft." Zeliger stated that he had "agreed to make several changes that you [plaintiff] requested," including "[s]pecifying that [plaintiff] shall be a member of the management committee," reducing the number of people to whom plaintiff had to report on certain issues, and "[s]pecifying" plaintiff's power to effect a "management override" relating to bonuses for departed employees. Zeliger declined to make certain changes, explaining:

> "We did not change the clawback to reflect a pro rata repayment. The repayment amount remains the amount of the last sign on bonus paid.
>
> "We did not reinsert the 'For the avoidance of doubt . . .' sentence in the guarantee paragraph. That provision was unique to 2009 when your current contract was signed, and

> was meant to not include the [second trimester] bonus from 2009 as part of your guarantee for the first year of your current contract because your bonus structure had changed. Your new contract, however, roles [sic] the guarantee from your current contract, and the guarantee for the next three years should continue to be calculated in the same way as the guarantee from the previous 2 years - i.e., calculated by measuring total cash compensation received during each one year period beginning on Sept 1st."
>
> "We did not change the terms of the Special Non-Compete Payment, which remain the same as your current contract."

Zeliger closed, "I am happy to discuss further, and I understand that you are going to show the agreement to your attorney for review." Within a few minutes, plaintiff responded:

> "We can discuss tomorrow. But not including the avoidance of doubt sentence makes no sense. Why would any money that I earned for the company in [the second trimester] and paid in a new contract go against my minimum[?] It defie[s] logic and common sense. This provision will actually benefit [defendant] as say in any one year I may have a large bonus due to me on Oct 31 that could be used against my minimum, rather than be forced to pay me."

Zeliger replied, "Let's discuss tomorrow. As I understand it, the calculation is meant to be total cash paid to you between Sept 1st through August 31st." Plaintiff responded, again a short time later, "The statement that was meant for 2009 only is BS [sic] and is not what the intended [language] was created for. It was created for just this. No way should this revenue go against my minimum in a new contract year. It is a bad faith statement and I don't understand [defendant's] logic." Plaintiff

then added, "This contract was presented to me as a mirror image of my last one. This doesn't reflect that."

"On August 3, 2012, Zeliger emailed plaintiff:

> "We have discussed your request regarding the calculation of your guarantee and, in an effort to finalize your contract, we've agreed to make that change. Please note that we're agreeing to this change subject to you not having any additional substantive changes to your contract, as we hope the agreement is now substantially final. Attached is a marked draft of your contract compared against the last draft I sent. You'll see that we extended your term by two months and now have the guarantee calculated from each Nov 1 - Oct 31 period during the term."

On August 13, 2012, plaintiff responded with "limited comments" from his "attorney." Zeliger replied two days later, stating that defendant had "accepted some of [plaintiff's] lawyer's changes and tweaked some others," and "hope[d] to be able to sign this soon."

In an email to Zeliger dated August 15, 2012, plaintiff suggested that they "discuss in person," stating:

> "It seems to me to be over reaching to not allow me to communicate with clients or solicit [defendant's] employees for a period of time after my non compete. Understanding we are negotiating a worst case scenario, how can you expect to prevent me from working or doing a job WITHOUT paying me. If you want to prevent me from doing these things th[e]n pay me.
>
> "In regards to the special non compete, why would any monies paid to me after the contract period go against a previous years guaranteed comp [sic]? [Doesn't] that go against common sense? If you want that term,

> th[e]n protect me with the special non compete payment if and when my contract expires and you hold me out. These are all reasonable requests.
>
> "You have to understand that my base salary is a mere portion of my compensation and if you hold me out of the market (in a worst case scenario) than [sic] you are really not paying me to sit out as my comp [sic] is mainly determined thr[ough] my bonus. In other words, you already have a VERY RESTRICTIVE non compete, which [I] am fine with . . . but you have to pay me to enforce it."

In an email dated August 17, 2012, Zeliger offered to set up a call to discuss the contract, stating:

> "At this time, we are not willing to make the additional requested changes to your agreement other than the changes that we accepted in the last draft. Also, we have two changes that we want to make: (1) extending the employee non-solicit from 9 months to 18 months following the non-compete period; and (2) revising the production bonus language to clarify that while your payout from the bonus pool is 55% of your net income, the payout for others on the desk is less depending on seniority."

Within minutes, plaintiff responded, stating, "We are headed the wrong way. I cannot accept noncompete language that prevents me from doing my job or a job without getting paid." In an email to Zeliger dated August 23, 2012, plaintiff followed up, stating, "I am not willing to consider your two proposed changes. Let me know what the next steps are if any." Zeliger responded, "[J]ust so I understand, do you otherwise accept the last draft of your agreement that we sent to you?" Plaintiff replied:

"For the most part my comments are not meant to be commercial but to tinker with language that was written 3 yrs ago to reflect today's scenario.

"[Defendant's] approach was to counter my comments with terms that did not do anything to improve the contract language[;] rather it was to be confrontational.

"I just don't understand why common sense refuses to be used on some of this language.

"I haven't had a chance to review this language for over a week and don't think your 2 unreasonable terms were going to have me change my opinion on some of this language.

"Is that how you were negotiating[?] Actually I don't want to negotiate. I think we agreed to terms. It is clarifying some old language."

While on vacation, plaintiff informed defendant that he wished to continue discussing the contractual "documentation issues" when he returned to the office on Tuesday, September 4, 2012. This did not happen.

Instead, by letter dated September 1, 2012, defendant advised plaintiff that his employment had "ceased":

> On June 22, 2012, you notified us that you do not wish to extend (i.e., renew) your Employment Agreement with [defendant]. Since then, despite our efforts, you have not entered into a new written employment agreement with us. That is unfortunate, but your decision. However, as a result of your decisions, the Ending Date under your Employment Agreement was yesterday, August 31, 2012. As a result, your employment with [defendant] has ceased effective today. That

> said, we remind you of, and expect you to abide by, your ongoing obligations under your Employment Agreement, including without limitation those set forth in Section 6 [restrictive covenants], which [defendant] will enforce. . .
>
> "While we believe the cessation of your employment is not a termination by [defendant], and instead a non-extension of your Employment Agreement at your choice, without prejudice to [defendant's] positions, in an effort to avoid any dispute, and fully reserving all of its rights and claims, [defendant] will nonetheless pay you: (i) thirty days base salary and benefits in lieu of notice; and (ii) your base salary during the Non-Compete Period so long as you execute and return to [defendant] the enclosed General Release (the form of which was annexed to your Employment Agreement as Exhibit B . . .)."

Following the notification from defendant that his employment had "ceased," plaintiff commenced this action in October 2012. The first cause of action alleges breach of contract and seeks damages for "benefits to which [plaintiff] is entitled under the 2009 Employment Agreement as extended by the Extension Agreement." The second cause of action alleges unjust enrichment, by virtue of defendant's "retaining" his Production Bonus for the second trimester of 2012, as well as further monies allegedly owed him as a Special Non-Compete Payment.[1]

[1] Plaintiff also avers a third cause of action seeking a declaration that Section 6.3(b) of the 2009 Agreement, which "purports to prohibit [plaintiff] from having any business dealings or communications with a client of [defendant] for a

In November 2012, defendant moved pursuant to CPLR 3211(a)(1) to dismiss the first and second causes of action of the complaint for failure to state a claim based on documentary evidence. In support of its motion, defendant submitted, among other things, copies of the correspondence between the parties summarized above. As to plaintiff's claim that defendant had breached the 2009 Agreement, defendant argued that, because his employment ended before the contractual due date of the Production Bonus and Special Non-Compete Payment, plaintiff had "forfeited his right to the monies." Defendant argued that plaintiff's second cause of action, for unjust enrichment, was "precluded by the existence of a written contract," namely, the 2009 Agreement.

The motion court partially granted defendant's motion to dismiss to the extent of dismissing the second cause of action for unjust enrichment as duplicative of the breach of contract claim. The court, however, denied dismissal of the breach of

---

period of nine months following the termination of his employment," is "not enforceable to prohibit [plaintiff] from entering into a consulting arrangement with a client (not a competitor) that would not involve any activity competitive with the business of [defendant], any solicitation on behalf of a competitive business, or any use or disclosure of any confidential information of [defendant]."

contract claim on two grounds. First, the court found that the "emails submitted are not 'documentary evidence' under [CPLR 3211(a)(1)." Secondly, the court found that even if deemed documentary evidence, the emails do not "conclusively refute Plaintiff's contention that the parties entered into a binding agreement as of July 16, 2012."

Discussion

On a motion to dismiss pursuant to CPLR 3211(a)(1), a court is obliged "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 Shirt Hills, Inc.*, 10 AD3d 267, 270 [1st Dept 2004] [internal quotation marks omitted]). Moreover, dismissal pursuant to CPLR 3211(a)(1) 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, Manges, LLP,* 10 AD3d at 270-271 [internal

quotation marks omitted]). If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(1) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action (*see McGuire v Sterling Doubleday Enters., L.P.*, 19 AD3d 660, 661 [1st Dept 2005]).

In this case, defendant's defense to the breach of contract claim, premised upon documentary evidence, boils down to the contention that the exchange of emails and other correspondence described above establishes as a matter of law that the parties did not enter into an extension of the 2009 Employment Agreement. Since the employment agreement had not been renewed, defendant argues, it had no duty to pay a Sign on Bonus for any new contract. Likewise, it had no duty to pay any Production Bonus for the second trimester of 2012 (which ended on August 31, 2012), since, under the 2009 Agreement, plaintiff was only entitled to receive that bonus if he remained employed two months after it had accrued. Similarly, since plaintiff's contract had simply expired, and he had not been terminated, it had no duty to give plaintiff any Special Non-Compete Payment.

Preliminarily, we reject Supreme Court's conclusion that correspondence such as the emails here do not suffice as

documentary evidence for purposes of CPLR 3211(a)(1). This Court has consistently held otherwise. For example, in *Schutty v Speiser Krause P.C.* (86 AD3d 484, 484-485 [1st Dept 2011]), this Court found drafts of an agreement and correspondence sufficient for purposes of establishing a defense under the statute. Similarly, in *Langer v Dadabhoy* (44 AD3d 425, 426 [1st Dept 2007], *lv denied* 10 NY3d 712 [2008]), this Court found "documentary evidence in the form of emails" to be sufficient to carry the day for a defendant on a CPLR 3211(a)(1) motion. Likewise, in *WFB Telecom. v NYNEX Corp.* (188 AD2d 257, 259 [1st Dept 1992], *lv denied* 81 NY2d 709 [1993]), this Court 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.

Nevertheless, we agree with Supreme Court that the disputed emails and other correspondence do not utterly refute plaintiff's allegations that the parties reached an agreement on the material terms of the contract renewal. To establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound (22 NY Jur 2d, Contracts § 9). That meeting

of the minds must include agreement on all essential terms (*id.* at 31)" (*Kowalchuk v Stroup*, 61 AD3d 118, 121 [1st Dept 2009]).

In determining the existence of a valid contract, we begin with the examination of the communications between the parties. We find that the June 15, 2012 email sent by defendant's CEO, Ertel, was not merely an incident in "preliminary negotiations," but an actual offer for the renewal of the 2009 Employment Agreement. Not only did Ertel characterize it as an offer that was made under "the same terms [as the] existing contract . . .," but he specified the material terms of the employment contract: the period of employment, the yearly base salary, the sign in bonus, the minimum yearly compensation, and the production bonus.

When viewed in light of contract law principles that "[a]n offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it," (Restatement [Second] of Contracts § 24), Ertel's June 15, 2012 email can hardly be construed otherwise than extending to plaintiff the power to accept. Regarded in this context, plaintiff's subsequent purported acceptance by his July 16, 2012 email to Ertel, "I accept [please] send [the] contract," in reply to the June 15, 2012 email," must be interpreted as an acceptance

of the offer, to which Ertel immediately replied, stating in full, "Mazel, looking forward to another great run."[2]

"As a general rule, in order for an acceptance to be effective, it must comply with the terms of the offer and be clear, unambiguous and unequivocal" (*King v King*, 208 AD2d 1143, 1143-1144 [3d Dept 1994], citing 21 NY Jur 2d, Contracts § 53, at 470, and 2 Lord, Williston on Contracts § 6:10, at 68 [4th ed]). Inasmuch as there was nothing unclear, ambiguous or equivocal about plaintiff's July 16, 2012 email in response to Ertel's June 15, 2012 email, it appears to constitute an effective acceptance. Hence, according plaintiff the benefit of every possible favorable inference, as we must do on a motion to dismiss pursuant to CPLR 3211(a)(1) (*Weil, Gotshal & Manges, LLP*, 10 AD3d at 270), and viewed in the context of the parties' prior dealings, one may reasonably find that by the June 15-to-July 16, 2012 email exchange, the parties had entered into an agreement to renew plaintiff's employment for a new three-year term, carrying

[2] Mazel is an obvious reference to "Mazel tov" or "mazal tov," a Hebrew or Yiddish phrase used to express congratulations for a happy and significant occasion or event.

forward the existing compensation plan under the 2009 Employment Agreement.

The inquiry, however, does not end there. In order to argue for treating the contract formation process employed here as ineffective to bind it, defendant points out that, after the July 16, 2012 exchange, the parties entered into a long train of correspondence aimed at formalizing the contract, which never took place. However, to overcome the reasonable inference we draw from the language of the correspondence ending in the July 16, 2012 exchange -- that the parties did indeed intend thereby to create a binding contract -- defendant must do more than merely point to the circumstance that a formal document was contemplated: defendant must show either that both parties understood that their correspondence was to be of no legal effect or that plaintiff had reason to know that defendant contemplated that no obligations should arise until a formal contract was executed.

But defendant has referred to no documentary evidence conclusively establishing either of these possibilities. On the contrary, upon this record, no evidence has been shown that either party expressly reserved the right not to be bound prior to the execution of a formal writing. Nor does the language in

their correspondence indicate an unambiguous intent not to be bound until a formal writing was executed by the parties. The mere fact that defendant often referred to the writing in progress as a "draft" is not dispositive here where other correspondence indicates that the parties may have had a different understanding. Indeed, on several occasions plaintiff expressed the view that he was not seeking to "negotiate" but that he was seeking either to clarify language or bring the language to conform with the parties' actual performance under the 2009 Employment Agreement.

Defendant, however, argues that even if we find evidence supporting a contractual intent, a binding contract never came into being because too many important terms were left unsettled by the exchange of letters. In support of this contention defendant points to the subsequent difficulties the parties encountered in reaching agreement on certain terms. The law is clear that although the parties may intend to enter into a contract, if essential terms are omitted from their agreement, or if some of the terms included are too indefinite, no legally enforceable contract will result (*Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 482 [1989], *cert denied* 498 US 816 [1990]; Joseph *Martin, Jr., Delicatessen v Schumacher*, 52

NY2d 105, 109 [1981]; *see also* Restatement [Second] of Contracts § 33 [2]). But it is also plain that all the terms contemplated by the agreement need not be fixed with complete and perfect certainty for a contract to have legal efficacy (*Cobble Hill Nursing Home*, *supra,* at 483; *see also* 21 NY Jur 2d, Contracts, § 20; 1 Corbin, Contracts § 95).

In this case, as indicated, it appears that all of the terms essential to the agreement were specified in the June 15, 2012 email intended to be an offer, and which plaintiff accepted (*see Geller v Reuben Gittelman Hebrew Day School*, 34 AD3d 730, 731 [2d Dept 2006] [material terms of employment agreement include "salary and the amount of services required"]). This militates toward plaintiff's contention that the parties initially did reach an agreement on all material terms, even though there might not have been a meeting of the minds on all details of the agreement (*see Aiello v Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234, 242-243 [1st Dept 2013]).

Indeed, the initial proposed changes appeared to be simple clarifications and modifications that would not necessarily indicate a lack of meeting of the minds on the essential terms. For instance, in the first draft defendant inserted a clawback clause intended to modify the "Sign on Bonus" provision. The

clawback clause, however, did not alter the amounts of the periodic "Sign on Bonus." Instead, the clawback clause simply provided that each periodic bonus was contingent upon the employee remaining employed until the end of each "Sign on Bonus" period. Initially, plaintiff did not find the modification objectionable. Plaintiff only sought clarification that the clawback did not apply if he was terminated without cause or he resigned for good reasons. Defendant accepted this clarification even though the employer found it unnecessary because "that protection [was] already in there for you."

In the first draft, defendant also included a modification of the 2009 Guarantee Payment provision. As the language indicates, such provision guaranteed that plaintiff would receive a minimum combined payment of salary and bonuses totaling $750,000. If the combined salary and bonuses paid to plaintiff for a specific year did not reach the $750,000 threshold, the difference would constitute "Make Whole Payment" due to plaintiff at the end of the year. The 2009 Agreement, however, contained a "For The [A]voidance of [D]oubt" clause. The clause inured to plaintiff's benefit since it provided that the production bonus that he earned during the second trimester of 2009 would not be included in the "guarantee compensation" calculation. Defendant did not

seek to significantly alter the 2009 Guarantee provision; it simply sought to remove the "For [A]voidance of [D]oubt" clause from the provision because the clause was "unique" to the 2009 agreement. It had been inserted to the 2009 Employment Agreement to compensate for the fact that plaintiff's "bonus structure had changed" when such contract was signed. Since the "[A]voidance of [D]oubt" modification involved a single trimester of production bonus, which, as defendant acknowledged, was unique to the 2009 Employment Agreement, it cannot be viewed as a significant change to the Guarantee Compensation scheme.

Plaintiff also complained about defendant's purported insertion of a second modification to the Guaranteed Compensation scheme. Specifically, plaintiff complained about the inclusion of the Non-Compete payment -- which would have been triggered if he was terminated without cause or he quit with a good reason -- as an amount to be factored, along with base salary and bonuses, in the computation of the "Make Whole Payment" due to plaintiff. However, plaintiff was under the misimpression that this was a modification of the Guaranteed Compensation provision of the 2009 Agreement. The 2009 Agreement explicitly provided that any amount due to plaintiff as a Special Non-Compete Payment would

count toward the Guaranteed Compensation calculation during the last year of the contract.

In retrospect, it appears that the only significant change upon which the parties faltered was defendant's attempt to increase the period of the Non-Solicit Restrictive Covenant from 9 to 18 months following the non-compete period. On its face, such modification clearly appears to be a material change of the terms of the non-solicit restrictive covenant. However, plaintiff contends that such last minute modification was an attempt by defendant to renege on the contract by introducing a drastic change that it knew plaintiff was never going to accept, presumably as financially onerous.

If plaintiff's contention is the correct characterization of the parties' negotiations, such impasse on a drastic new change does not necessarily defeat the original agreement of the parties. An agreement is still binding if a party has a change of heart between the time of agreeing to the terms of the agreement and the time those terms are reduced to writing (*see Kowalchuk v Stroup*, 61 AD3d at 122-123). Once the renewal agreement is reached, however, it may not be repudiated by either party. Rather, such agreement must be enforced.

Contrary to the dissent's mischaracterization, we do not hold "that the terms on which the parties failed to agree simply don't matter." Rather, we simply hold that defendant has not established, as a matter of law, that by their emails and other correspondence, that the parties never entered into a valid employment renewal contract and that, instead, their aborted negotiation efforts were intended to reach a new agreement. On the contrary, if we accord to plaintiff the benefit of every possible favorable inference, as we must do on a motion to dismiss pursuant to CPLR 3211(a)(1) (*Weil, Gotshal & Manges, LLP*, 10 AD3d at 270), we find that the emails and other correspondence support an inference that the parties were engaged in attempts to formalize the binding Extension Agreement in a more formal instrument (*see Kowalchuk*, 61 AD3d at 123 ["binding agreement that is nevertheless to be further documented . . . is enforceable with or without the formal documentation"] [internal quotation marks omitted]).[3]

---

[3] The cases cited by the dissent to support its position are easily distinguishable on the facts. For instance, in *Spier v Southgate Owners Corp.* (39 AD3d 277, 278 [1st Dept 2007], this Court found that the defendant's letter was not a contract; it simply referred to "'possible' sale of air rights and the advice that it 'will not consider a sale' of less than a certain square footage did not manifest a present intent to be bound." In *Galesi v Galesi*, 37 AD3d 249, 249 [1st Dept 2007], this Court

Even if we were to agree with the dissent that the parties never entered into an extension of the 2009 Employment Agreement, we would still find that defendant's documentary evidence does not establish, as a matter of law, that plaintiff was not entitled to a production bonus for work done prior to termination of the 2009 Employment Agreement. Defendant claims that plaintiff was not entitled to the production bonus because payment of the bonus was contingent upon plaintiff being

---

found that while the "plaintiffs presented evidence that the negotiating parties had agreed as to price and quantity, the exchange of drafts, further discussion, and the totality of the circumstances clearly showed that there was never a meeting of the minds on all essential terms." In *Yenom Corp. v 155 Wooster St. Inc.* (23 AD3d 259, 259-260 [1st Dept 2005], *lv denied* 6 NY3d 708 [2006]), this Court found that "even if there were no intent to be bound only upon execution of a formal contract, the many substantial changes to [the] draft that were prepared by plaintiff's counsel and the parties' subsequent correspondence establish that there was never a meeting of the minds on material terms, including price." *In Yenom Corp.*, this Court also found it significant that "one section of the draft that plaintiff's counsel did not alter was that requiring execution and delivery, of a formal contract" (*id.* at 260). Finally, in *Dratfield v Gibson Greetings* (269 AD2d 294, 295 [1st Dept 2000]), this Court found that "[t]he parties' correspondence and the surrounding circumstances establish that they did not intend to be bound until their agreement was reduced to writing and formally executed." This Court found it significant that "[a]lthough neither party expressly reserved the right not to be bound prior to the execution of the signed contract, the language used in both of defendant's March letters establishes an intention to be bound only after a formal signing"; thus summary dismissal was properly granted.

"actively employed by [defendant] at the time of [defendant's] firm-wide bonus payment," which took place after the 2009 Employment Agreement expired. Plaintiff, however, claims that the production bonus was "incentive compensation." Plaintiff's contention is supported by contractual language stating that the production bonus was "based on your [plaintiff's] performance" and calculated as "no less than 55% of the Net Earnings of the Desk" that plaintiff managed. Thus, if plaintiff's contention is correct that the production bonus was actually earned through his own performance, plaintiff would be entitled to such bonus as wages, which are not subject to forfeiture (*see Ryan v Kellogg Partners Inst. Servs.*, 19 NY3d 1, 16 [2012] [Court held that "bonus [that] was expressly linked to [employees] labor or services personally rendered . . . had been earned and was vested . . before he left his job . . . [and] its payment was guaranteed and non-discretionary as a term and condition of his employment"] [internal quotation marks omitted]; *Weiner v Diebold Group*, 173 AD2d 166, 167 [1st Dept 1991] ["the long standing policy [in the State] against the forfeiture of earned wages . . . applies to earned, uncollected commissions as well"]; *see also* Labor Law § 190[1]). Thus, given the conflicting language concerning the

nature of the bonus payment, this issue presents a question of fact.

We find, however, that defendant met its burden of establishing that plaintiff does not have a claim under the 2009 Employment Agreement for a Special Non-Compete Payment. The 2009 Employment Agreement provided for this payment to be made "[i]n the event" that plaintiff was "terminated by [defendant] prior to the Ending Date *without cause*." It is undisputed that plaintiff's employment terminated on September 1, 2012, after the 2009 Agreement's "Ending Date" of August 31, 2012. Thus, in accordance with the agreement's plain language, plaintiff is not entitled to any Special Non-Compete Payment under the 2009 Employment Agreement.

Accordingly, the order of the Supreme Court, New York County (Eileen Bransten, J.), entered August 22, 2013, which, insofar as appealed from, denied defendant's motion to dismiss the first cause of action for breach of contract, should be modified, on the law, to dismiss so much of the cause of action as seeks to recover a Special Non-Compete Payment under plaintiff's 2009 Employment Agreement, and otherwise affirmed, without costs.

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

FRIEDMAN, J.P. (dissenting)

In affirming the denial of defendant's motion, pursuant to CPLR 3211(a)(1), to dismiss plaintiff's cause of action for breach of contract, the majority recites many well-established propositions of the law of contracts with which I fully agree. The majority disregards, however, the cardinal rule that whether a contract has been made must be determined in light of the "'totality'" of the parties' conduct and communications (*Zheng v City of New York*, 19 NY3d 556, 572 [2012], quoting *Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 400 [1977]), without placing "'disproportionate emphasis . . . on any single act, phrase or other expression'" (*Zheng*, 19 NY3d at 572, quoting *Brown Bros.*, 41 NY2d at 399-400). This rule requires dismissal of the breach-of-contract claim in light of the undisputed documentary evidence demonstrating that, when the parties broke off their negotiations for a possible extension of plaintiff's employment, they were unable to agree on certain terms that both sides regarded as essential. To be clear, the parties did not overlook these issues, nor did they decide to revisit them in the future, if necessary, while nonetheless going forward with a new agreement. They were consciously deadlocked on these matters, and neither side would give way. As a matter of law, this

failure to agree on essential terms is fatal to plaintiff's attempt to enforce any alleged agreement to extend his employment, "not because of lack of definiteness, but because of lack of assent" (1 Farnsworth on Contracts § 3.27, at 419 [3d ed 2004]).[1]

No contract can come into existence without "a manifestation of mutual assent to [its] essential terms" (*Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 590 [1999] [internal quotation marks omitted]; *see also e.g. Galesi v Galesi*, 37 AD3d 249, 249 [1st Dept 2007]). Here, the totality of the undisputed documentary evidence of the parties' negotiations submitted in support of the CPLR 3211(a)(1) motion to dismiss — comprising 20 emails, one letter and two drafts exchanged during the period from June 15 through August 23 of

[1]Using as an example the negotiation of a hypothetical sale of apples, the late Professor Farnsworth, who was the Reporter of the Restatement (Second) of Contracts, wrote: "It is essential to distinguish [from indefiniteness] one other cause of incompleteness of agreement — a failure to agree. If the seller and the buyer of apples do discuss the matter of the seller's responsibility for their quality and are unable to agree on how that matter is to be resolved, the incompleteness of their agreement in that respect will be fatal to the enforceability of their agreement — not because of lack of definiteness, but because of lack of assent. There is a critical distinction between remaining silent on such a matter and discussing it but failing to agree" (1 Farnsworth on Contracts § 3.27, at 419-420).

2012 — establishes, as a matter of law, that, far from ever reaching a meeting of the minds, the parties ended their discussions in a state of affirmative and express *disagreement* on several terms they both deemed essential to a possible extension of their contractual relationship. Thus, the documentary evidence of the negotiations, viewed as a whole, "utterly refutes" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]) plaintiff's allegation that he and defendant, as the result of an exchange of three sketchy emails at the outset of their discussions, entered into an enforceable agreement for a new three-year term of employment, notwithstanding their subsequent documented and undisputed failure to agree on all essential terms.

The conclusion that the documentary evidence submitted by defendant utterly refutes plaintiff's claim, so as to render appropriate dismissal pursuant to CPLR 3211(a)(1), is inescapable. First, plaintiff was necessarily a party to each and every step of this bilateral negotiation, and he thus has direct knowledge of the entire course of the negotiations. Second, notwithstanding his direct knowledge of all that transpired between himself and defendant in those discussions, plaintiff makes no claim that the documentary evidence before us

gives a picture of the negotiations that is in any way either inaccurate or incomplete. In particular, plaintiff does not assert that any of the issues left unresolved in the email record supporting the motion were subsequently resolved, either orally or through written communications that defendant has not submitted. Rather, plaintiff's position is that the parties' documented and undisputed inability to resolve their differences on issues they both regarded as essential to concluding an agreement should not prevent him from suing on that putative agreement. Stated otherwise, plaintiff is arguing that he should have a chance to persuade a factfinder to make for the parties a bargain that — as established by undisputed documentary evidence — the parties themselves could not reach. I see no reason to extend proceedings on a claim so lacking in legal merit. Accordingly, we should reverse the order appealed from and grant defendant's motion to dismiss the breach of contract cause of action pursuant to CPLR 3211(a)(1). I respectfully dissent from the majority's failure to do so.[2]

---

[2]For reasons more fully discussed at the end of this writing, I also disagree with the majority's failure to dismiss plaintiff's breach of contract cause of action insofar as he seeks to recover thereunder a discretionary production bonus for the second trimester of 2012 under the parties' 2009 employment agreement, the term of which expired on August 31, 2012, before

The majority can only reach its result by putting "disproportionate emphasis" on the aforementioned 3 emails while disregarding the documentary evidence of the parties' ensuing negotiations, including 17 emails exchanged during the period from July 20 to August 23, 2012.[3] Those subsequent emails

---

any such bonus became payable. The parties' 2009 agreement expressly conditioned plaintiff's eligibility for the bonus in question on his being "actively employed by [defendant] at the time of [the] firm-wide bonus payment date[]."

[3]In fact, the majority inaccurately simplifies the documented sequence of events. It fails to mention that, after defendant sent plaintiff an email on June 15, 2012, proposing to extend his employment for another three-year term "on the same terms as your existing contract" (subject to clarification on one point), plaintiff's initial response was essentially to reject the proposal. Specifically, plaintiff sent defendant a one-sentence letter, dated June 22, 2012, stating: "Please accept this letter as notification per section 2.4 of my existing employment agreement that I do not wish to extend my employment agreement under its existing terms." Thus, when plaintiff subsequently sent defendant his email of July 16, 2012, stating, "I accept, pls send contract," his rejection of June 22 had already terminated his power to accept any offer that might have been extended by defendant's June 15 email (*see* Restatement [Second] of Contracts § 38[1] ["An offeree's power of acceptance is terminated by his rejection of the offer, unless the offeror has manifested a contrary intention"]). Thus, if there were any offer and acceptance here — and, in my view, the totality of the record negates that possibility — it was plaintiff's July 16 email that would have constituted the offer (reviving, as plaintiff's counteroffer, defendant's terminated proposal of June 15) and defendant's responding email of the same date ("Mazel. Looking forward to another great run . . .") that would have constituted the acceptance. But, to reiterate, the parties' subsequent correspondence establishes that they never reached agreement on all essential terms for the contemplated new term of

conclusively establish that, contrary to the premise of plaintiff's claim, neither party intended simply to renew the terms of their previous agreement (the 2009 agreement) for a new three-year term to begin on September 1, 2012, the day following the final date of the term of the 2009 agreement. Rather, in those negotiations, both parties — plaintiff no less than defendant — proposed terms that varied substantially from the terms of the 2009 agreement. And, to reiterate, the parties ultimately could not agree on all of the terms they regarded essential for a new term of employment. Thus, the full course of the parties' negotiations demonstrates that their initial exchange ending on July 16, 2012 — on which the majority relies to the exclusion of the rest of the record — left open essential terms on which no meeting of the minds subsequently could be reached. In view of the parties' ultimate inability to agree on the essential terms "left open" by the early emails singled out by the majority, those communications plainly were "not intended to be understood as an offer or as an acceptance" (Restatement [Second] of Contracts § 33[3]).

---

employment and, therefore, no enforceable contract came into being.

It is telling that, at the outset of the negotiations, plaintiff did not object that an agreement to renew the terms of the 2009 agreement had already been reached when, by email dated July 20, 2012, defendant first sent him a draft for a new contract that included at least three significant changes from the terms of the 2009 agreement. Plaintiff did raise objections to two of the changes proposed by defendant, namely, (1) a new provision for "clawback" of the sign-on bonus in the event of termination for cause or unprovoked resignation and (2) the deletion of a provision that payment of the bonus for the previous contract year would not count against guaranteed minimum compensation for the year in which the payment was made. Notwithstanding plaintiff's opposition to these particular proposals, he did not assert that defendant had no right to propose changes to the terms of the 2009 agreement. In fact, plaintiff proposed a different "clawback" provision that, while more favorable to him than defendant's proposal, had not been present in the 2009 agreement.[4]

---

[4]Before the negotiations broke off, the parties apparently resolved their differences over the "clawback" of the sign-on bonus and the effect on the guarantee for a given year of a bonus paid on account of the previous year (defendant prevailed on the first issue, plaintiff on the second). That the parties ultimately resolved their differences over these issues does not

Ultimately, the record shows, at least three issues remained unresolved upon the expiration of the 2009 agreement at the end of August 2012, after negotiations reached a standstill on or about August 23. Two of those outstanding issues arose from proposals to deviate from the terms of the 2009 agreement that had been made by plaintiff himself, not defendant. These issues were (1) whether defendant would pay plaintiff, after the end of his employment, for the entire period during which he would be forbidden to communicate with defendant's clients and to solicit defendant's employees (three months and nine months, respectively, following the end of the compensated six-month non-compete period), and (2) whether plaintiff's post-employment "special non-compete payment" (as described in the majority's opinion) would count against his guaranteed minimum compensation. The parties were also deadlocked on defendant's proposal to extend by nine months the post-employment period during which plaintiff would be forbidden to solicit defendant's employees.

While the majority makes light of the importance of these issues, it is plain from the record that the parties considered them to be material and essential. For example, regarding his

---

change the fact that plaintiff treated these matters as legitimate subjects for negotiation.

proposal that defendant compensate him during the entire period of post-employment restriction of contact with defendant's clients and employees (a benefit to which he was *not* entitled under the 2009 agreement), plaintiff told defendant in an August 17 email: "I cannot accept non-compete language that prevents me from doing my or a job [*sic*] without getting paid." On its face, this was a demand by plaintiff for a substantive change from the terms of the 2009 agreement, not just a proposal to "tinker with language that was written 3 yrs ago," as he inaccurately characterized his proposals in an August 23 email, the final documented communication of the negotiations in the record, which he sent as the August 31 expiration date of the term of the 2009 agreement loomed only eight days away.[5]

I agree with the majority insofar as it articulates the hornbook principle that, where the parties to an alleged contract have agreed on all essential terms of an agreement, their failure

[5]In the same August 23 email, plaintiff suddenly changed his tune and, after more than a month of proposals and counter-proposals for changes from the terms of the 2009 agreement, told defendant: "Actually I don't want to negotiate. I think we agreed to terms." This self-serving assertion is utterly inconsistent with plaintiff's documented course of conduct over the previous month and, in view of the documentary evidence of the parties' negotiations, gives no support to an inference that the parties had agreed, on July 16, simply to renew the terms of the 2009 agreement.

to carry out their intention to memorialize those terms in a formal, signed writing will not necessarily render their informal agreement unenforceable, provided that neither party has expressly reserved the right not to be bound in the absence of such formal documentation. I also accept, for present purposes, the majority's view that the documentary evidence upon which defendant moved for dismissal does not include an express reservation by either party of the right not to be bound until a formal written contract had been executed (*cf. Jordan Panel Sys. Corp. v Turner Constr. Co.*, 45 AD3d 165 [2007]). This, however, does not mean that the emails of June 15 and July 16, which plaintiff contends gave rise to a binding agreement to extend the terms of the 2009 agreement, can support such an inference in the face of the undisputed documentary evidence, as described above, that both parties contemplated substantial changes to the terms of the 2009 agreement and that each side regarded the issues that remained outstanding at the end of their negotiations as deal-breakers. Even if the June 15 and July 16 emails could support plaintiff's position when viewed in isolation, such support evaporates, as a matter of law, in the context of "the totality of the [parties' undisputed acts and words], given the attendant circumstances, the situation of the parties, and the objectives

they were striving to attain" (*Brown Bros.*, 41 NY2d at 400). Stated otherwise, the documentary evidence of the whole course of the parties' dealings establishes that, notwithstanding what might otherwise appear from three brief emails artificially detached from the communications that followed, the parties never reached a meeting of the minds to extend the terms of the 2009 agreement for another three years, nor did they reach a meeting of the minds on all essential terms of a successor agreement.[6] Since, according to the complaint itself, the fundamental premise of the cause of action for breach of contract is that the parties agreed on July 16, 2012, to extend the terms of the 2009 agreement, the disproof of this assertion by the documentary evidence is fatal to the claim.

It bears emphasis that the absence of an express reservation of the right not to be bound before the execution of a formal, written agreement does not mean that the existence of an enforceable agreement cannot be negated, as a matter of law, by uncontroverted evidence of the parties' negotiations after the

---

[6]*See e.g. Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 369-370 (2005) ("the common-law rule . . . authorizes review of the course of conduct between the parties to determine whether there was a meeting of minds sufficient to give rise to an enforceable contract").

promise sought to be enforced allegedly was made, as this Court, among other New York courts, has ruled numerous times (*see Spier v Southgate Owners Corp.*, 39 AD3d 277, 278 [1st Dept 2007] ["(t)he parties' further negotiations showed that there was never a meeting of the minds on all essential terms"]; *Galesi*, 37 AD3d at 249; *Yenom Corp. v 155 Wooster St. Inc.*, 23 AD3d 259, 259-260 [1st Dept 2005], *lv denied* 6 NY3d 708 [2006] ["(E)ven if there were no intent to be bound only upon execution of a formal contract, the many substantial changes to Cooper's draft that were prepared by plaintiff's counsel and the parties' subsequent correspondence establish that there was never a meeting of the minds on material terms"]; *Dratfield v Gibson Greetings,* 269 AD2d 294, 295 [1st Dept 2000] [affirming summary judgment dismissing a claim for breach of contract notwithstanding that "neither party expressly reserved the right not to be bound prior to the execution of the signed contract"]; *May v Wilcox*, 182 AD2d 939, 940 [3d Dept 1992] [no contract came into existence as the result of a written offer because, "(a)s evidenced . . . by the ongoing correspondence between the parties' attorneys as well as the parties' discussions, there was no meeting of the minds with respect to" certain essential terms]; *see also CAC Group Inc. v Maxim Group LLC*, 523 Fed Appx 802, 804 [2d Cir 2013] [in a case

governed by New York law, affirming the dismissal of an action to enforce an unsigned agreement for the sale of a promissory note "(a)lthough neither party expressly reserved the right not to be bound prior to the execution of a document"] [internal quotation marks omitted]).

An instructive illustration of the foregoing principle is provided by the above-cited case of *Galesi* (37 AD3d 249), in which this Court affirmed a judgment dismissing a complaint for breach of contract pursuant to a grant of summary judgment to the defendants. In so doing, we held that the record established that the parties had made, at most, "an indefinite and unenforceable 'agreement to agree'" (*id.*). We explained that, even "[a]ssuming that the alleged promise was made," and notwithstanding evidence that the parties had reached agreement on some terms, "the exchange of drafts, further discussion, and the totality of circumstances clearly showed that there was never a meeting of the minds on all essential terms" (*id.*). Similarly here, the documentary evidence of the parties' negotiations establishes that, notwithstanding their July 16 "agreement to agree" on the terms of a new employment agreement, they were subsequently unable to agree on all of the terms they deemed essential to put such an agreement into operation upon the

expiration of the contract then in force. It necessarily follows that no new agreement came into being, since, as the majority itself recognizes, "an enforceable contract requires mutual assent to its essential terms and conditions" (*Edelman v Poster*, 72 AD3d 182, 184 [1st Dept 2010]).

Remarkably, in purporting to distinguish "easily" the above-cited decisions of this Court in *Spier*, *Galesi*, *Yenom* and *Dratfield* based on "the 'totality of the circumstances'" (quoting *Galesi*) on which those cases were decided, the majority synopsizes the very point I am making. Here, as in the cited cases, the record presents us with more than just the terse email exchange that plaintiff claims to have given rise to a contract, and on which the majority focuses to the exclusion of the remainder of the record. We have before us the documentary record of more than a month of the parties' negotiations following what the majority regards as the decisive email of July 16, 2012, and plaintiff has disputed neither the accuracy nor the material completeness of this record. The Court of Appeals has instructed us to look to the "'totality'" of this record, in light of "'the attendant circumstances, the situation of the parties, and the objectives they were striving to attain'" (*Zheng*, 19 NY3d at 572-573, quoting *Brown Bros.*, 41 NY2d at 399-

400), to determine whether plaintiff may be able to prove that he and defendant entered into a new agreement. When we do look to the totality of the record of the parties' dealings, however, we find — as we found in *Spier*, *Galesi*, *Yenom* and *Dratfield* — that the parties could not agree on all of the essential terms of the agreement they contemplated. The inescapable conclusion is that no enforceable contract came into being.

Since it is plain from the totality of the documentary evidence of the parties' dealings that they did not agree, on July 16, 2012, to extend the terms of the 2009 agreement for another three years, and not even plaintiff claims that the parties reached a meeting of the minds on new terms at any subsequent time, I conclude that plaintiff's cause of action for breach of contract fails as a matter of law. Further, contrary to the majority's position that the terms on which the parties failed to agree simply don't matter, the record establishes that the parties regarded these terms as material and essential. Where "the parties have, in piecemeal fashion, reached an agreement on some terms but not others, . . . there is a contract if the matters left open were not deemed material by the parties, and *there is no contract if the matters left open were deemed material*" (*Four Seasons Hotels v Vinnik*, 127 AD2d 310, 317 [1st

Dept 1987] [emphasis added], citing *Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d 105 [1981]).

In this case, whatever a reviewing court might think, the parties plainly regarded the issues on which unresolved differences remained when negotiations broke off as deal-breakers. Again, those issues included (1) whether plaintiff would be paid during the entire post-employment period of restriction of contact with defendant's clients and employees, (2) whether his post-employment special non-compete payment would count against his minimum guaranteed compensation during the period of his employment, and (3) whether to extend the post-employment period during which plaintiff would be forbidden to solicit defendant's employees by nine months. The first two issues were changes from the terms of the 2009 agreement that plaintiff had proposed; the third was proposed by defendant. Hence, when the negotiations broke off in August, neither plaintiff nor defendant believed that they had already made a deal to extend the 2009 agreement on July 16. Since the existence of such a renewal agreement — the sole basis alleged in the complaint for plaintiff's breach of contract cause of action — is conclusively disproved by the undisputed documentary

evidence (a point that the majority does not, and cannot, dispute), the claim should be dismissed.

Further, we cannot disregard the differences that remained between the parties upon the expiration of the 2009 agreement on the theory that these open terms could, if necessary, have been resolved by judicial gap-filling. Such gap-filling is permissible only where "some objective method of determination [of the open term] is available, independent of either party's mere wish or desire" (*Metro-Goldwyn-Mayer v Scheider*, 40 NY2d 1069, 1071 [1976] [internal quotation marks omitted]; *see also Matter of 166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.*, 78 NY2d 88, 91 [1991] [judicial filling of gaps in a contract is appropriate "where it is clear . . . that the parties intended to be bound and there exists an objective method for supplying a missing term"], quoted in *Aiello v Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234, 244 [1st Dept 2013] [Renwick, J.]). In this case, the issues that remained unresolved between the parties when their negotiations ended do not appear susceptible to such resolution, and "a court, in intervening [to supply the missing terms], would be imposing its own conception of what the parties should . . . have undertaken" (*Martin Delicatessen*, 52 NY2d at

109), rather than enforcing a bargain the parties themselves had made.

Although my colleagues deny it, by allowing plaintiff's breach of contract claim to go forward notwithstanding the parties' undisputed and documented failure to reach a meeting of the minds on a number of terms that *the parties themselves* regarded as essential, the majority treats those essential but disputed terms — terms that, as noted, cannot be supplied through judicial gap-filling on any objective basis — as nullities. In essence, the majority holds that, because the parties agreed on most of the terms for a new period of employment, plaintiff is entitled to ask a factfinder to dictate to the parties the open terms on which they failed to agree and then to award plaintiff damages for defendant's failure to perform the agreement thus imposed on the parties by the judicial system. This approach is contrary to the settled law of this state.

"To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to *all* material terms" (*Express Indus.*, 93 NY2d at 589 [emphasis added], citing *Martin Delicatessen*, 52 NY2d at 109). In *Express Indus.*, for example, the Court of Appeals held, as a matter of law, that no contract

had been created by one party's execution of a writing supplied by the other party that "omitted material terms of the purported contract" (*id.* at 586). In so holding, the Court of Appeals rejected the view of the Appellate Division majority that the items left blank in the writing simply raised "an issue of fact" (*id.* at 589 [internal quotation marks omitted]), noting that Express, the proponent of the alleged contract, had not suggested any objective basis for supplying the omitted terms (*id.* at 590). Further, the Court of Appeals observed that the open issue had been "identified by Express as a deal breaker" (*id.* at 591). Similarly, here, where the documentary record of the negotiations establishes that the parties could not agree on certain material terms, and that each side regarded these open issues as deal breakers, as a matter of law, no binding contract came into being.

I also disagree with the majority's view that plaintiff should be permitted to seek to recover a production bonus for the second trimester of 2012 (which ended on August 31, 2012) under the expired 2009 agreement. This claim is distinct from plaintiff's cause of action alleging that the parties entered into an agreement for a new term of employment commencing on September 1, 2012, or that they agreed to extend the 2009

agreement past its termination date of August 31, 2012. Rather, the claim for the production bonus is based on the 2009 agreement's provision that made plaintiff "eligible to be paid a bonus on a trimester basis" out of a bonus pool for his department, "within two months of the close of a given trimester," which, in this case, was October 31, 2012.[7] However, the 2009 agreement expressly conditions plaintiff's eligibility for payment of a production bonus on his being "actively employed by [defendant] at the time of our firm-wide bonus payment dates," a condition that plainly was not satisfied here, since both parties understood that plaintiff (whether rightly or wrongly) was no longer defendant's employee as of October 31, 2012. Accordingly, plaintiff is not entitled to recover a production bonus for the second trimester of 2012.

[7]Contrary to the impression conveyed by the majority's description, the production bonus provision of the 2009 agreement did not entitle plaintiff personally to "no less than 55% of the Net Earnings of the [renewable energy brokerage] Desk." Rather, plaintiff, along with the other traders working under him, was eligible for a bonus payment out of a pool to be funded in that amount, as becomes clear when one reads the entire sentence from which the quoted words are excerpted: "The total bonus pool available to the Eastern U.S. renewable energy brokerage desk (the 'Desk') will be no less than 55% of the Net Earnings of the Desk."

The majority holds that plaintiff is entitled to seek to recover a production bonus for the second trimester of 2012, notwithstanding the contractual condition that he be "actively employed" by defendant on the date the bonuses for a given trimester are paid, based on its view that plaintiff may be able to prove that he is "entitled to such bonus as wages, which are not subject to forfeiture." The terms of the 2009 agreement defeat this claim as a matter of law.[8] While the 2009 agreement describes the production bonus as "based on your performance," the bonus was plainly discretionary, as no formula was provided for calculating plaintiff's bonus (as opposed to the amount of the bonus pool for the entire department). That plaintiff's superiors considered his performance in determining his production bonuses (which is hardly surprising) did not change the discretionary nature of the payment. Nor does plaintiff allege that his production bonus for the second trimester of 2012 had been allocated while his employment was still ongoing, so he cannot claim that his right to the bonus had become vested before his employment came to an end.

---

[8]Although the majority states that an issue of fact is presented concerning the production bonus claim "given the conflicting language concerning the nature of the bonus payment," it does not specify what "conflicting language" is referred to.

The discretionary nature of the bonus, and the fact that plaintiff's entitlement to it had not vested before he left defendant's employ, distinguish this case from the decisions on which the majority relies (*Ryan v Kellogg Partners Inst. Servs.*, 19 NY3d 1, 16 [2012] [the plaintiff was entitled to recover a bonus that "was vested before he left his job" and the payment of which "was guaranteed and non-discretionary"]; *Weiner v Diebold Group, Inc.*, 173 AD2d 166 [1st Dept 1991] [the plaintiff sued to recover deferred payments of a previously awarded bonus that his former employer had refused to make]). The controlling precedent with respect to plaintiff's bonus production claim is *Truelove v Northeast Capital & Advisory* (95 NY2d 220 [2000]), which recognizes that receipt of a discretionary bonus may lawfully be conditioned on continued employment at the time of payment. I would follow that rule in this case.

For the foregoing reasons, I believe that we should reverse the order appealed from and grant defendant's motion to dismiss plaintiff's cause of action for breach of contract pursuant to CPLR 3211(a)(1). Accordingly, I respectfully dissent.

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

ENTERED: APRIL 2, 2015

CLERK