SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 20, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., DeGrasse, Freedman, Manzanet-Daniels, Román, JJ.

2330-
2331 Maryanne Fletcher, Index 114698/07
Plaintiff-Appellant,

-against-

Boies, Schiller & Flexner, LLP, et al.,
Defendants-Respondents,

Hayes & Hardy LLP, et al.,
Defendants.

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Law Offices of Annette G. Hasapidis, South Salem, (Annette G. Hasapidis of counsel), for appellant.

Boies, Schiller & Flexner LLP, New York (Robert J. Dwyer of counsel), for respondents.

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Judgment, Supreme Court, New York County (Richard B. Lowe, III, J.), entered March 19, 2009, insofar as appealed from as limited by the briefs, dismissing the complaint as against defendants Boies, Schiller, Flexner, Hayes, Haazen, Lewicky and Boies Schiller & Flexner, LLP, unanimously modified, on the law, to reinstate the first and third causes of action as against defendants Boies Schiller & Flexner, LLP and Andrew Hayes, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered December 26, 2008, unanimously dismissed, without costs, as subsumed within the appeal from the judgment.

Plaintiff, a fashion model, pleaded that a prominent agency mismanaged her and lost or withheld her crucial portfolio; that she had evidence of a scheme involving bogus expenses charged by that agency against other models; that images of her were profitably used by a large retail chain, wrongfully and without her authorization, via a subsidiary; and that a second agency had interfered with bookings that would have earned her $275,000, and instead booked another model for those jobs.

Plaintiff further pleaded that, when she consulted the Boies Schiller law firm and met with defendant Hayes, she was persuaded to turn over a large body of self-gathered evidence and told that her claims were worth large, specified amounts, and that the firm, and defendant Hayes concealed a conflict of interest between her and existing classes in state and federal actions; excluded her from the federal class action; subordinated her interests to those of other class members; participated lackadaisically in settlement discussions; and failed to timely file a claim in a crucial bankruptcy proceeding while successfully prosecuting the claim of the federal class.

The complaint should not have been dismissed insofar as it pleaded two causes of action for malpractice. Plaintiff has pleaded that, but for defendants' malpractice in failing to advise her properly, she "would have avoided some actual

ascertainable damage" (*see IMO Indus. v Anderson Kill* & Olick, 267 AD2d 10, 11 [1999]), including sufficient detail as to the "nature of" the underlying claim (*see Reid v Druckman*, 309 AD2d 669 [2003]). She need not, at this early stage, offer a detailed pleading to support her quantifying her alleged loss (*see Proskauer Rose Goetz & Mendelsohn v Munao*, 270 AD2d 150, 151 [2000]).

All of the remaining causes of action pressed on appeal were properly dismissed. Plaintiff implicitly concedes that she pleaded no wrongdoing by the individual defendants-respondents other than Hayes, and it is no answer to state that she would have used discovery in an attempt to discover facts showing those defendants to be potentially liable. Her fraud claim was properly dismissed as it was "premised upon representations of future intent that are non-actionable since there is no allegation that would support an inference that the representations were made with a present intention that they would not be carried out" (*see* P*app v Debbane*, 16 AD3d 128, 128 [2005]).

Plaintiff's cursory request for leave to replead was properly denied because there was no proposed pleading

accompanied by an affidavit of merit (*see HT Capital Advisors v Optical Resources Group*, 276 AD2d 420 [2000]). Plaintiff's argument that "facts essential to justify opposition may exist but cannot then be stated" (CPLR 3211[d]), is improperly made for the first time on appeal (*see Copp v Ramirez*, 62 AD3d 23, 31 [2009], *lv denied* 12 NY3d 711 [2009]). With no request made to Supreme Court, plaintiff has never made make the necessary showing that there is a reasonable basis for her belief that facts essential to opposing dismissal may exist (*see Putter v North Shore Univ. Hosp.*, 7 NY3d 548, 554 [2006]).

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

ENTERED: JULY 20, 2010

CLERK

Andrias, J.P., Sweeny, Acosta, Richter, JJ.

980-
980A Thomas J. Campbell, Index 600673/08
Plaintiff-Respondent-Appellant, 650058/08

-against-

Robert B. McKeon, et al.,
Defendants-Appellants-Respondents.

- - - -

Veritas Capital Management, L.L.C., et al.,
Plaintiffs-Respondents,

-against-

Thomas J. Campbell,
Defendant-Appellant.

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Schulte Roth & Zabel LLP, New York (Ronald E. Richman of counsel), for appellants-respondents/respondents.

Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, P.C., New York (Edward M. Spiro of counsel), for respondent-appellant/appellant.

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Order, Supreme Court, New York County (Herman Cahn, J.), entered November 28, 2008, which, to the extent appealed from, denied defendant Thomas J. Campbell's motion to disqualify Schulte Roth & Zabel LLP and one of its partners, Benjamin M. Polk, Esq. ("SRZ") from representing the Veritas plaintiffs, and order, same court and Justice, entered February 2, 2009, which, to the extent appealed from, granted Campbell's motion to disqualify SRZ from representing defendant Robert McKeon, and denied Campbell's motion to disqualify SRZ from representing the Veritas defendants, unanimously affirmed, without costs.

Campbell and McKeon founded the Veritas entities, which are investment funds and management entities for the funds. McKeon was the majority member of the management entities and Campbell was a minority member. When McKeon and the Veritas entities parted ways with Campbell, the opposing sides brought these actions against each other. This appeal consolidates the review of orders deciding Campbell's motions, made in each action, to disqualify SRZ and Polk as legal counsel to the Veritas entities and McKeon.

The court correctly held, pursuant to rule 1.13 of the Rules of Professional Conduct (22 NYCRR 1200.13), former Code of Professional Responsibility DR 5-109 (22 NYCRR 1200.28) (conflict of interest between an organizational client and an individual associated with such client) that as counsel to the Veritas entities, SRZ and Polk could not also represent McKeon in an action in which his interests would be adverse to the Veritas entities and other members of the entities such as Campbell. Campbell's allegations include that McKeon violated fiduciary duties to the Veritas entities, including usurpation of an investment opportunity. Counsel for an organizational client is required to act as is reasonably necessary in the best interests of the client when an individual associated with the client may

have violated legal duties which are likely to result in substantial injury to the organization. Any doubts as to the sufficiency of the showing of an asserted conflict of interest were properly resolved in favor of disqualification (*see Lammers v Lammers*, 205 AD2d 432, 433 [1994], *lv dismissed* 89 NY2d 860 [1996]).

The motion court also correctly held, pursuant to rule 1.9(a) of the Rules of Professional Conduct (22 NYCRR 1200.9[a]), former Code of Professional Responsibility DR 5-108(A)(1) (22 NYCRR 1200.27 [a][1]) (conflict of interest involving a former client) that SRZ and Polk were not prohibited from representing the Veritas entities as against Campbell. On such motion to disqualify counsel, the moving party must prove, among other things, the existence of a prior attorney-client relationship between itself and opposing counsel (*see Tekni-Plex, Inc. v Meyner and Landis*, 89 NY2d 123, 131 [1996]; *Pelligrino v Oppenheimer & Co., Inc.*, 49 AD3d 94, 97-98 [2008]). Campbell failed to establish the existence of an attorney-client relationship between himself, individually, and SRZ. The work SRZ performed was in connection with its representation of the various Veritas entities. A lawyer's representation of a business entity does not render the law firm counsel to an individual partner, officer, director or shareholder unless the law firm assumed an affirmative duty to represent that individual

(*see Polovy v Duncan*, 269 AD2d 111, 112 [2000]; *Omansky v 64 N. Moore Assocs.*, 269 AD2d 336, 336 [2000]; *Talvy v American Red Cross in Greater N.Y.*, 205 AD2d 143, 149 [1994], *affd* 87 NY2d 826 [1995]). Campbell failed to present cogent evidence establishing that Polk had agreed to act or acted as his personal attorney. In his affidavit, Polk unequivocally denies any individual representation of Campbell. Consequently, Campbell's motion must also fail under rule 1.9(c) of the Rules of Professional Conduct (22 NYCRR 1200.9[c]), former Code of Professional Responsibility DR 5-108(A)(2) (22 NYCRR 1200.27 [a][2]) (use of confidential information disclosed by a former client) (*see Jamaica Pub. Serv. Co v AIU Insur. Co.*, 92 NY2d 631, 636-637 [1998]; *Pelligrino*, 49 AD3d at 98-99).

Finally, the motion court properly denied the motion insofar as it was based on the advocate-witness rule (Rules of Professional Conduct rule 3.7 [22 NYCRR 1200.29], former Code of Professional Responsibility DR 5-102(A)(22 NYCRR 1200.21). The court correctly determined that Campbell failed to meet the heavy burden of establishing that Polk's testimony was necessary (*S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 445-446 [1987]; *Talvy*, 205 AD2d at 152), since he failed to identify specific issues requiring Polk's testimony and to demonstrate the significance of the matters Polk would testify

to, the weight of such testimony and the unavailability of other sources of such evidence (*S & S Hotel Ventures Ltd. Partnership*, 69 NY2d at 446).

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

ENTERED: JULY 20, 2010

CLERK

Tom, J.P., Andrias, Sweeny, Nardelli, Renwick, JJ.

2420 Rodney L. Wilkerson, Index 22254/06
Plaintiff-Respondent,

-against-

Joseph Korbl, Jr., et al.,
Defendants-Appellants.

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Carman, Callahan & Ingham, LLP, Farmingdale (Peter F. Breheny of counsel), for appellants.

Levy and Levy, New York (Susan J. Levy of counsel), for respondent.

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about March 12, 2009, which, insofar as appealed from as limited by the briefs, denied defendants' cross motion to compel plaintiff to submit to evaluation by a vocational rehabilitation expert, unanimously reversed, on the law and facts and in the exercise of discretion, without costs, and plaintiff directed to submit to evaluation by a vocational expert not more than 10 days before the date trial is scheduled to commence.

Plaintiff's second supplemental bill of particulars made defendants aware that future lost wages would exceed $900,000. However, not until his deposition of October 24, 2008 was it disclosed that since the date of the accident, plaintiff had neither worked nor attempted to seek any form of employment. While the court's compliance conference order of September 24, 2008 does not specifically provide for vocational evaluation, it

does call for physical examination by a designated physician upon written notice within five business days of plaintiff's further examination before trial. Defendants served a notice of evaluation by their vocational rehabilitation expert on the date of the EBT to be performed four days later, but plaintiff had returned to his home in Georgia by that date.

Because it appears that plaintiff may not resume any form of employment and that future lost wages will comprise a considerable proportion of his total damages, it is appropriate that vocational evaluation be performed. However, to minimize the burden on plaintiff, the evaluation should be scheduled to coincide with his presence in New York in preparation for trial.

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

ENTERED: JULY 20, 2010

CLERK

Tom, J.P., Mazzarelli, Andrias, Saxe, DeGrasse, JJ.

2631 Wendy Hazen, Index 105425/08
Petitioner-Appellant,

-against-

The Board of Education of City School District of City of New York, et al.,
Respondents-Respondents.

_____

Wendy Hazen, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein of counsel), for respondents.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered December 23, 2008, which denied the petition to expunge certain letters from petitioner's personnel file, and directed entry of judgment dismissing this proceeding with prejudice, unanimously affirmed, without costs.

The petition was filed on April 16, 2008. Since the administrative actions that form the basis of petitioner's grievance were the placement of the critical letters in her file, the four-month statute of limitations (CPLR 217) applied as of the date of each such action. The placement of any letters prior to December 16, 2007 cannot be considered. As a result, the earliest letter that is open to challenge is dated January 28, 2008.

Moreover, the petition explicitly seeks to compel respondents to expunge the letters from her file. However,

placing the letters into the file, and deciding whether or not to take them out upon petitioner's demand, are essentially discretionary actions. Mandamus to compel is not an available remedy for discretionary action (*New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 184 [2005]), but is rather an extraordinary remedy limited in its application to vindicate a petitioner's clear legal entitlement to a course of action (*Matter of Legal Aid Socy. of Sullivan County v Scheinman*, 53 NY2d 12 [1981]; *see also Matter of Brusco v Braun*, 84 NY2d 674, 680 [1994]).

Petitioner was not entitled to a hearing in this matter. Article 21 of the collective bargaining agreement, as modified, sets forth the teacher's due process rights to review and challenge entries in her personnel file, and there is no reason to conclude that respondents failed to follow the procedural requirements imposed by that contract or otherwise acted unlawfully. The challenged acts were not disciplinary or penalty measures related to the filing or disposition of formal charges, such as would entitle petitioner to a hearing under Education Law § 3020-a.

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

ENTERED: JULY 20, 2010

CLERK

McGuire, J.P., Moskowitz, Acosta, Freedman, JJ.

2807 Abacus Federal Savings Bank, Index 108378/03
Plaintiff-Appellant,

-against-

Carol John Mee Lim, et al.,
Defendants,

Frances Eng,
Defendant-Respondent.

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McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York (Richard S. Mills of counsel), for appellant.

Peluso & Touger, LLP, New York (Dana Marie Catanzaro of counsel), for respondent.

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Order, Supreme Court, New York County (Jane S. Solomon, J.), entered August 17, 2009, which denied plaintiff's motion for summary judgment as against defendant Frances Eng, unanimously affirmed, with costs.

This action is for restitution of funds embezzled in furtherance of a fraudulent scheme perpetrated by some of plaintiff's employees, particularly Carol John Mee Lim, the manager of one its branches, and others, including Lim's sister, defendant Eng. Although Eng answered, several defendants did not, resulting in a judgment entered on April 23, 2004 against the defaulting defendants in the principal amount of $9,161,633.81.

A 2003 federal indictment charged the bank employees with various offenses, but Lim fled before she could be arrested.

Several years later, under a separate federal indictment, Eng herself was arrested for participating in this criminal enterprise, and charged with conspiring to commit bank fraud, in violation of 18 USC § 1344. The indictment alleged that Eng and others executed "a scheme . . . to defraud a financial institution . . . by means of false and fraudulent pretenses, representations and promises." Eng's overt acts in furtherance of the conspiracy consisted of providing Lim with two checks "that ENG completed, signed, and endorsed for deposit into a victim account at Abacus Bank," apparently to help Lim conceal her embezzled funds. While the instant action was pending, Eng pleaded guilty to one count of conspiracy to commit bank fraud, admitting that she wrote three checks. It was determined that the loss to the bank from the three checks totaled $160,000.

Plaintiff moved for summary judgment against Eng based upon this criminal conviction, and argued that the conviction collaterally estopped her from denying liability. The motion did not, however, attached plea minutes or even attempt to establish an identity of elements between the civil claims and the criminal proceeding. It did seek the full amount of the default judgment against Eng.

Although an "issue decided in a criminal proceeding may be given preclusive effect in a subsequent civil action" *(D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990]),

there must be an identity of issue necessarily decided in the prior action that is decisive of the present action, and "there must have been a full and fair opportunity to contest the decision now said to be controlling" (*see Launders v Steinberg*, 9 NY3d 930, 932 [2007], *quoting Buechel v Bain*, 97 NY2d 296, 303-304 [2001], *cert denied* 535 US 1096 [2002]). This standard has not been satisfied in this case. The complaint asserts six causes of action against Eng: conversion, constructive trust, restitution, unjust enrichment, conspiracy, and demand for an accounting. A cause of action for fraud was asserted only against Lim. In not identifying the cause of action on which similar relief had been obtained against Eng, plaintiff failed to establish its entitlement to summary judgment on any of its present claims.

Specifically, a "conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). Plaintiff failed to establish that Eng ever assumed or exercised control over any property belonging to the bank. As for unjust enrichment, which is defined as the receipt by one party of money or a benefit to which it is not entitled, at the expense of

another (*see City of Syracuse v R.A.C. Holding*, 258 AD3d 905, 906 [1999]), plaintiff failed to show how Eng was personally enriched at the expense of the bank, or that she herself benefitted from the fraudulent scheme. For this same reason, summary judgment is unavailable for the restitution claim (*see Matter of Witbeck*, 245 AD2d 848 [1997]). The elements necessary for the imposition of a constructive trust are a confidential or fiduciary relationship, a promise, a transfer in reliance thereon, and unjust enrichment (*see Matter of Gupta*, 38 AD3d 445, 446 [2007]). Plaintiff has, at the very least, not demonstrated the existence of a confidential or fiduciary relationship between itself and Eng. The failure to establish the existence of such a fiduciary relationship also precludes summary judgment for an accounting (*see Akkaya v Prime Time Transp., Inc.*, 45 AD3d 616 [2007], *lv denied* 10 NY3d 704 [2008]). Therefore, the fact that Eng pleaded guilty to conspiracy in federal court does not aid plaintiff in establishing its prima facie entitlement to summary judgment on the above-mentioned claims.

Collateral estoppel is also inapplicable with respect to the conspiracy claim. As Supreme Court correctly noted, New York does not recognize an independent cause of action for conspiracy to commit a civil tort (*see Romano v Romano*, 2 AD3d 430, 432 [2003] ["a cause of action sounding in civil conspiracy cannot stand alone, but stands or falls with the underlying tort"]). In

fact, "[a]llegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort" *(Alexander & Alexander of N.Y. v Fritzen*, 68 NY2d 968, 969 [1986]). Therefore, under New York Law, to establish a claim of civil conspiracy, the plaintiff "must demonstrate the primary tort, plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury" (*World Wrestling Fedn. Entertainment v Bozell*,142 F Supp 2d 514, 532 [SD NY 2001]).

Here, Eng was not sued for fraud. In any event, she pleaded guilty solely to conspiracy to defraud, and her plea minutes were not attached to the motion.[1] The mere attachment of the judgment, without the plea allocution and without any analysis, was insufficient to establish an identity of issues (*see Searles v Dalton*, 299 AD2d 788, 789 [2002]). Indeed, although Eng admitted to signing three checks, there is no indication in the record that she allocuted to the elements of bank fraud (18 USC §

[1]To establish a conspiracy to commit bank fraud, the government must prove beyond a reasonable doubt that (1) a conspiracy existed, (2) the defendant knew of and voluntarily participated in the conspiracy, and (3) there was an overt act in furtherance of the conspiracy, which requires proof of intention both to agree and to commit the substantive offense (*United States v Munoz-Franco*, 487 F3d 25, 45 [1st Cir. 2007], cert denied 552 US 1042 [2007]).

1344), which are to "knowingly execute[], or attempt[] to execute, a scheme or artifice (1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises." To support a conviction for the crime of bank fraud, the government must prove that defendant "(1) engaged in a course of conduct designed to deceive a federally chartered or insured financial institution into releasing property; and (2) possessed an intent to victimize the institution by exposing it to actual or potential loss" (*United States v Barrett*, 178 F3d 643, 647-648 [2d Cir 1999]).

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

ENTERED: JULY 20, 2010

CLERK

Tom, J.P., McGuire, Moskowitz, Acosta, Freedman, JJ.

2809 Brenda Leanne Berger, Index 115702/06
Plaintiff-Appellant,

-against-

Dr. Mark Bronsky,
Defendant-Respondent,

Dr. David Zadick, et al.,
Defendants.

_____

Joel M. Kotick, New York for appellant.

Landman Corsi Ballaine & Ford P.C., New York (Cristi L. Fusaro of counsel), for respondent.

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Judgment, Supreme Court, New York County (Carol Edmead, J., and a jury), entered April 22, 2009, in favor of defendant-respondent, unanimously affirmed, without costs.

While plaintiff's expert testified that the failure to take x-rays was a departure from the accepted standard of orthodontic practice and that x-ray monitoring would have shown rapid deterioration of plaintiff's condition, he did not specifically opine on whether that departure caused plaintiff's injury, and the record otherwise lacks evidence of causation for those departures. Thus, the trial court properly refused to submit to the jury whether defendant was negligent in not radiographically monitoring plaintiff's progress during treatment (*see Stanski v Ezersky*, 228 AD2d 311, 312 [1996], *lv denied* 89 NY2d 805 [1996]; *Georgetti v United Hosp. Med. Ctr.*, 204 AD2d 271, 272 [1994]).

Plaintiff failed to preserve her contention that the trial court erred in excluding evidence that defendant's initiation of orthodontic treatment was negligent, and we decline to review it. Further, considering the jury's findings that defendant had obtained plaintiff's consent to the treatment plan and the defendant's continuation of orthodontic treatment was not negligent, the error was harmless.

Plaintiff's other contentions are either not preserved or without merit.

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

ENTERED: JULY 20, 2010

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

3028 Katz Communications, Inc., et al., Index 600831/09
Plaintiffs-Appellants,

-against-

US International Media LLC,
Defendant-Respondent,

Martin Retail Group, LLC,
Defendant.

An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Charles E. Ramos, J.), entered on or about August 10, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated July 1, 2010,

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

ENTERED: JULY 20, 2010

CLERK

Andrias, J.P., Saxe, Sweeney, Nardelli, Catterson, JJ.

3055 In re Martha A., and Others,

Children Under the Age of
Eighteen Years, etc.,

New York City Administration for
Children's Services,
Petitioner-Appellant,

Diana C.,
Respondent-Respondent.

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Michael A. Cardozo, Corporation Counsel, New York (Sharyn Rootenberg of counsel), for appellant.

Daniel M. Gonen, New York for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Doneth Gayle of counsel), Law Guardian.

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Order, Family Court, New York County (Jody Adams, J.), entered on or about February 3, 2010, which, inter alia, granted respondent mother's application pursuant to Family Court Act § 1028 for the return of the children Martha A., Rae Leann A., and Raymond A., unanimously reversed, on the law, without costs or disbursements, the application denied, and the matter remitted to the Family Court, New York County for further proceedings consistent herewith.

The mother has five children, Jennifer, Jessica, Rae Leann, Martha, and Raymond, ages 19, 14, 12, 10, and 8, respectively. On January 6, 2010, the Administration for Children's Services (ACS) filed petitions against the mother alleging that by failing

to protect Rae Leann from sexual abuse by Jayson Maldonado, age 25, the mother abused Rae Leann and derivatively abused Jessica, Martha and Raymond. ACS's initial application to remand the children was denied, with the court paroling them to the mother, subject to her enforcing a temporary order of protection directing Maldonado to stay away from the children, ensuring that the children continue to receive therapeutic services and cooperating with Child Advocacy Center recommendations.

On January 20, 2010, ACS filed amended petitions alleging that the mother had a pattern of allowing her children to be sexually abused. This included allegations that in addition to Rae Leann being sexually abused by Maldonado, while living with the mother, Jessica was sexually abused by her stepfather; Rae Leann and Martha were sexually abused by a family friend; Rae Leann became sexually active at age nine and was seen in a video performing a sexual act on a 14 year-old boy; and Jennifer, at age 14, was statutorily raped and impregnated by Maldonado. The amended petition further alleged that the mother failed to report the statutory rape of Jennifer and continued to maintain a relationship with Maldonado, allowing him to sleep over in her apartment. The Family Court then issued an order authorizing ACS to remove the children from the home immediately and the mother timely applied for their return pursuant to Family Court Act § 1028.

Under Family Court Act § 1028, "[t]he court *must do more* than identify the existence of a risk of serious harm. Rather, a court must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal. It must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests" (*Nicholson v Scoppetta*, 3 NY3d 357, 378 [2004]).

"In order to justify a finding of imminent risk to life or health, the agency need not prove that the child has suffered actual injury. Rather, the court engages in a fact-intensive inquiry to determine whether the child's emotional health is at risk" (*Nicholson v Scoppetta*, 3 NY3d at 377 [internal citations omitted]). In making the determination that imminent risk exists, it is "sufficient if the officials have persuasive evidence of serious ongoing abuse and, based upon the best investigation reasonably possible under the circumstances, have reason to fear imminent recurrence" (*id.* at 381 [internal citations omitted]).[1]

At the Family Court Act § 1028 hearing, the testimony of a child protective specialist assigned to the case showed that the

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[1]Although the Court of Appeals articulated this in reference to removals under section 1024, it is applicable in section 1028 determinations (*see Matter of Abraham P.*, 21 Misc 3d 1144[A], 2008 NY Slip Op 52498[u], at *11 [Fam Ct, NY County 2008]).

mother, knowing that Maldonado had statutorily raped and twice impregnated Jennifer when she was 14, and that Rae Leann was sexually active and had a "crush" on Maldonado, nevertheless allowed Maldonado, who resides in the same building, to sleep over in her apartment in the same bedroom as Rae Leann. When the mother noticed a hickey on Rae Leann's neck, she asked Jessica to speak to her. Although Jessica reported that Rae Leann admitted that she had sex with Maldonado, and that Maldonado had also inappropriately touched Jessica and asked for sex, the mother told Jessica to keep quiet and that she would handle it. However, the mother never contacted the police and did not seek medical treatment for Rae Leann even though she knew that Maldonado was rumored to have a sexually transmitted disease. The mother allegedly told caseworkers that she did not know what to do and did not see the point in contacting the police because while Maldonado would be arrested, the "child's head would still be messed up." It was not until Jessica reported the incident, that ACS became involved and the mother's cooperation began.

Jessica also told caseworkers that Maldonado visited the mother's apartment twice a week and that he drank and smoked marijuana. During July 2009, Jessica smoked marijuana with Maldonado while the mother was in the apartment. The mother claimed that Maldonado rarely drank, but sometime in August 2009 she allowed him to sleep over even though he smelled of alcohol.

Further, the mother stated that she had a good relationship with Maldonado and admittedly had sex with him on at least one occasion. When asked why she allowed men to sleep in the home given the history of her children being sexually abused, the mother allegedly responded that she did not want the children to grow up hating men and that she did not think Maldonado would abuse a child because she trusted him.

This evidence of the repeated sexual abuse of the children while in the mother's care, the mother's allowing Maldonado to sleep over in the same bedroom as the children despite the knowledge that he previously statutorily raped and twice impregnated Jennifer, the mother's failure to report the statutory rape of Jennifer or the sexual abuse of Rae Leann to the authorities, and the mother having a sexual relationship with Maldonado after the statutory rape of Jennifer, shows such poor judgment and flawed understanding of the mother's role as a caretaker over a period of years as to place the children at risk of imminent harm (see *Matter of Daniel W.*, 37 AD3d 842 [2007]; *Matter of Christina Z.*, 284 AD2d 210 [2001]). Accordingly, applying the *Scoppetta* balancing test, notwithstanding the mother's recent cooperation and the temporary order of protection, we find that the best interests of the subject children will be served by continuing their removal until

additional facts are adduced at a full fact-finding hearing (*see Matter of Rosy S.*,54 AD3d 377 [2008]; *see also Matter of Gabriel James M.*, 59 AD3d 448 [2009]).

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

ENTERED: JULY 20, 2010

CLERK

Andrias, J.P., Nardelli, Catterson, Acosta, DeGrasse, JJ.

5209 The People of the State of New York, Dkt. 51080C/05
Respondent,

-against-

Edgar Correa,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Harold V. Ferguson, Jr., of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Justin J. Braun of counsel), for respondent.

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Upon remittitur from the Court of Appeals (__ NY3d __, 2010 NY Slip Op 4662 [June 3, 2010]) for consideration of the facts and issues raised on the appeal but not yet determined, judgment, Supreme Court, Bronx County (Robert G. Seewald, J.), rendered September 27, 2006, convicting defendant, after a nonjury trial, of harassment in the second degree, and sentencing him to a term of 15 days, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence. The evidence supports the inference (*see People v Getch*, 50 NY2d 456, 465 [1980]) that at the time defendant struggled with his wife, grabbed her by her

hair and slammed her into a wall, he did so with the intent to harass, annoy or alarm her (*see* Penal Law § 240.26).

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

ENTERED: JULY 20, 2010

CLERK

Mazzarelli, J.P., Saxe, Acosta, DeGrasse, Manzanet-Daniels, JJ.

2004-
2005 Gotham Partners, L.P., et al., Index 602582/04
Plaintiffs-Respondents,

-against-

High River Limited Partnership,
Defendant-Appellant.

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Morrison Cohen LLP, New York (Y. David Scharf of counsel), for appellant.

Dechert LLP, New York (Andrew J. Levander of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered January 21, 2009, reversed, on the law, without costs, plaintiffs' motion denied, defendant's cross motion granted, and the matter remanded for further proceedings.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
David B. Saxe
Rolando T. Acosta
Leland G. DeGrasse
Sallie Manzanet-Daniels, JJ.

Index 602582/04
2004-2005

_____x

Gotham Partners, L.P., et al.,
Plaintiffs-Respondents,

-against-

High River Limited Partnership,
Defendant-Appellant.

_____x

Defendant appeals from an order of the Supreme Court, New York County (Eileen Bransten, J.), entered January 21, 2009, which granted plaintiffs' motion and denied defendant's cross motion for summary judgment on plaintiffs' claim for attorney's fees under the indemnification provision of the parties' agreement.

Morrison Cohen LLP, New York (Y. David Scharf, Jerome Tarnoff and Jay R. Speyer of counsel), for appellant.

Dechert LLP, New York (Andrew J. Levander and Jonathan D. Perry of counsel), for respondents.

SAXE, J.

In this State, and indeed, in the rest of the country, the longstanding "American rule" precludes the prevailing party from recouping legal fees from the losing party "except where authorized by statute, agreement or court rule" (*U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 597 [2004]). Indemnification provisions in contracts have spurred the ingenuity of attorneys who parse the language of such provisions with an eye to extracting the essence of a right to attorney's fees for the winning side. New York, however, has been distinctly inhospitable to such claims; in fact, in the leading case of *Hooper Assoc. v AGS Computers* (74 NY2d 487, 492 [1989]), the Court of Appeals rejected a claim for attorney's fees under an indemnification clause because the language of the clause did not make it "unmistakably clear" that the winning side should be awarded such fees. Because the indemnification provision under scrutiny on this appeal does not meet the exacting *Hooper* test of unmistakable intention, we reject the motion court's interpretation of the parties' indemnification provision and reverse its grant of summary judgment to plaintiffs.

The parties entered into a Unit Purchase Agreement by which defendant High River Limited Partnership purchased from

plaintiffs Gotham Partners, L.P., Gotham Partners III, L.P., and Gotham Holdings II, L.L.C. (collectively, Gotham) their shares of Hallwood Realty Partners, L.P. In addition to the $18.8 million purchase price, the agreement required High River to pay plaintiffs an "Additional Purchase Price" if it sold or transferred any of the Hallwood units within 36 months. The agreement also contained the following indemnification provision, on which plaintiffs rely for their attorney's fees claim:

"Section 7.10 PURCHASER OBLIGATION.

> "(a) [High River] agrees to indemnify and hold [Gotham] harmless from and against any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, charges, expenses and disbursements (including reasonable fees and expenses of counsel) which may at any time be imposed on, incurred by or asserted against [Gotham], as the result of any action taken by (or failure to act of) [High River] following the execution and delivery of this Agreement with respect to, or associated or in connection with, [Hallwood] or [High River]'s interests [in Hallwood] . . . (provided, that for avoidance of doubt, such obligation of [High River] shall not arise out of the entry of the parties into this Agreement or any breach by [Gotham] of any of [its] representations, warranties, covenants or agreements hereunder).
>
> "(b) If a third party commences any action or makes any demand against [Gotham], [Gotham] will promptly notify [High River] . . . [High River] shall, at its own expense, defend any action for which [Gotham] is entitled to indemnification hereunder and shall be entitled to control the defense of such action with counsel (which counsel shall be chosen by [High River] and reasonably acceptable to [Gotham] who shall jointly represent [High River] and [Gotham]; provided

> that in the event that [Gotham] desires to participate in such action with counsel selected by [Gotham], [Gotham] may do so at its sole cost and expense . . .
>
> "(c) [High River] shall have the right to settle any action, so long as any such settlement results in a full release to [Gotham] subject to such action with respect to the matters asserted therein.
>
> "(d) In the event that [Gotham] brings a legal action against [High River] in order to enforce its right to such indemnification, if it is ultimately determined by a final non-appealable order . . . that: (i) [Gotham] is so entitled to indemnification, then [Gotham] shall also be entitled to recover the reasonable cost and expense of counsel incurred in asserting such claim . . .; or (ii) [Gotham] has not prevailed in any such action, then [Gotham] shall pay to [High River] the reasonable cost and expense of counsel incurred by [High River] in defending such claim."

Plaintiffs prevailed on their claim that as a result of Hallwood's merger with another entity within 36 months of the sale of their shares to High River, under which merger Hallwood unit owners received cash in exchange for their units, High River was required to pay plaintiffs the contemplated additional purchase price (*Gotham Partners, L.P. v High Riv. Ltd. Partnership*, 33 AD3d 453 [2006]). Plaintiffs then sought an award of attorney's fees and expenses of $736,839.28 incurred in suing High River for the additional purchase price, asserting that High River indemnified plaintiffs for these expenses in section 7.10(a) of the agreement, and the motion court granted their motion for summary judgment.

However, we conclude that the language of the indemnification provision falls short of satisfying the exacting standard of *Hooper Assoc. v AGS Computers* (74 NY2d 487 [1989], *supra*), that for an indemnification clause to cover claims between the contracting parties rather than third party claims, its language must unequivocally reflect that intent.

The *Hooper* court examined an indemnification provision in a contract for the purchase of computer equipment and services that obligated the defendant seller to

> "'indemnify and hold harmless [plaintiff] ... from any and all claims, damages, liabilities, costs and expenses, including reasonable counsel fees' arising out of breach of warranty claims, the performance of any service to be performed, the installation, operation and maintenance of the computer system, infringement of patents, copyrights or trademarks and the like" (74 NY2d at 492).

Relying on the rule that "[w]hen a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*id.* at 491), the court considered the indemnification provision's list of potential grounds for claims, and observed that all were "susceptible to third-party claims" and none were "exclusively or unequivocally referable to claims between the parties themselves" (*id.* at 492). Therefore, the *Hooper* court held, the indemnification clause

could not properly be interpreted to cover costs arising out of the litigation between the parties.

The indemnification clause at issue here, like the one considered in *Hooper*, is framed in language "typical of those which contemplate reimbursement when the indemnitee is required to pay damages on a third-party claim" (74 NY2d at 492). We also recognize that the agreement itself establishes that the parties were well aware of how to frame an enforceable provision creating an entitlement to prevailing party attorney's fees; section 7.12 constitutes an unmistakable, unequivocal prevailing party attorney's fees provision in favor of High River:

> "(Gotham) shall...be liable with respect to all losses, costs, damages, judgments, suits, charges, expenses and disbursements (including reasonable fees and expenses of counsel) ... incurred or suffered by (High River) as a result of or arising out of a breach by (Gotham) under this Agreement . . ."

In contrast, section 7.10(a) nowhere clearly states that it covers expenses incurred by plaintiffs as a result of High River's breach of the parties' contract. Rather, plaintiffs rely on the portion of the clause that refers to fees and expenses "which may at any time be imposed on, incurred by or asserted against [Gotham], *as the result of any action taken by (or failure to act of) [High River]* following the execution and delivery of this Agreement with respect to . . . [Hallwood] or

[High River]'s interests [in Hallwood]." They argue that attorney's fees incurred as a result of *any* action or inaction by High River concerning the Hallwood units *could* include, as well as a third-party claim, a breach by High River of the contract between the parties.

The problem with plaintiffs' position is not that their interpretation is irrational; it is that the strict standard imposed by *Hooper* requires more than that. For an indemnification clause to serve as an attorney's fees provision with respect to disputes between the parties to the contract, the provision must *unequivocally* be meant to cover claims between the contracting parties rather than third party claims. The quoted provision at issue here is simply not so unequivocally referable to a breach of contract claim by plaintiffs against High River. Indeed, from the language referring to costs incurred by plaintiffs as the result of any action or inaction by High River "with respect to . . . [Hallwood] or [High River]'s interests therein, including the Sale Units," the provision can be read at least as easily in the manner suggested by High River; that is, it seems to protect plaintiff from being subjected to costs incurred as a result of High River's actions or inaction *with respect to Hallwood*, as opposed to defendant's inaction with respect to its contractual duties to plaintiffs.

Contrary to the motion court, we do not view the "proviso" at the end of section 7.10(a) as a sufficient basis for interpreting the rest of the provision as a prevailing party attorney's fees provision. That parenthetical portion of the provision merely excludes from High River's indemnification obligation claims arising out of "the entry of the parties into this Agreement or any breach by [Gotham] of any of [its] representations, warranties, covenants or agreements hereunder." In this respect as well, we need not, and do not, find the motion court's reasoning irrational. Rather, because the *Hooper* standard requires the relied-upon language to make it "unmistakably clear" that the winning side should be awarded attorney's fees, we cannot rely upon the fact that the remainder of the provision contains no exception for a breach of the agreement by High River to mean that it must cover such a breach. The absence of that exception simply does not render the claims listed in the rest of section 7.10(a) "unequivocally referable to claims between the parties themselves," as required by *Hooper* (74 NY2d at 492).

Our conclusion is buttressed by several federal cases that have considered indemnification provisions referring to attorney's fees without specifying that such fees would arise out of actions between the parties to the contract. In

Bridgestone/Firestone Inc. v Recovery Credit Servs., Inc. (98 F3d 13, 21 [2d Cir 1996]), the collection agreements under consideration provided that the collection agency would

> "indemnify and save [the plaintiff, BFI] harmless from any and all claims, demands or causes of action, any and all costs or expenses, including attorney fees, that may be asserted due or arising out of the Agency's collection activity or employee dishonesty deemed contrary to prevailing guidelines on accounts referred by [BFI]."

The Second Circuit held that this language was not an unmistakably clear statement of an intention to cover an attorney's fee award resulting from a claim between the parties for breach of contract (*id.*). In *Sequa Corp. v Gelmin* (851 F Supp 106, 110-111 [SD NY 1994]), the Southern District held that the broad indemnification provision there did not cover claims between the parties, explaining that "[i]f the claims covered refer 'exclusively' or 'unequivocally' to claims between the parties, a Court may interpret an indemnification agreement to include such claims. If not, then a court must find the agreement to be lacking evidence of the required intent."

The bottom line is that a contract provision employing the language of third-party claim indemnification may not be read broadly to encompass an award of attorney's fees to the prevailing party based on the other party's breach of the

contract; the provision must explicitly so state. The *Hooper* standard requires more than merely an arguable inference of what the parties must have meant; the intention to authorize an award of fees to the prevailing party in such circumstances must be virtually inescapable.

Accordingly, the order of the Supreme Court, New York County (Eileen Bransten, J.), entered January 21, 2009, which granted plaintiffs' motion and denied defendant's cross motion for summary judgment on plaintiffs' claim for attorney's fees under the indemnification provision of the parties' agreement, should be reversed, on the law, without costs, plaintiffs' motion denied and defendant's cross motion granted, and the matter remanded for further proceedings.

All concur.

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

ENTERED: JULY 20, 2010

CLERK

Mazzarelli, J.P., McGuire, DeGrasse, Freedman, Richter, JJ.

2919-
2920 Mitchell Mosallem, Index 115654/05
Plaintiff,

-against-

Robert L. Berenson, et al.,
Defendants-Respondents,

Skadden, Arps, Slate, Meagher &
Flom, LLP,
Defendant,

Jim Edwards,
Intervenor-Appellant.

_____

Levine Sullivan Koch & Schulz, L.L.P., New York (David A. Schulz of counsel), for appellant.

Davis & Gilbert LLP, New York (Howard J. Rubin of counsel), for respondents.

_____

Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered June 5, 2009, reversed, on the law, without costs, the motion denied, the sealing order vacated and the Clerk of this Court directed to remit a copy of the unsealed exhibits.

Opinion by Richter, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
James M. McGuire
Leland G. DeGrasse
Helen E. Freedman
Rosalyn H. Richter, JJ.

Index 115654/05
2919-2920

_____x

Mitchell Mosallem,
Plaintiff,

-against-

Robert L. Berenson, et al.,
Defendants-Respondents,

Skadden, Arps, Slate, Meagher & Flom, LLP,
Defendant,

Jim Edwards,
Intervenor-Appellant.

_____x

Intervenor Jim Edwards appeals from an order of Supreme Court, New York County (Ira Gammerman, J.H.O.), entered June 5, 2009, which, insofar as appealed from, granted defendants-respondents' motion to seal the exhibits submitted by plaintiff in opposition to defendants-respondents' motion to dismiss the complaint.

Levine Sullivan & Koch & Schulz, L.L.P., New York (David A. Schulz of counsel), for appellant.

Davis & Gilbert LLP, New York (Howard J. Rubin, Jessica Golden Cortes, David J. Fisher and Nordia A. Edwards of counsel), for respondents.

RICHTER, J.

The issue before us in this appeal is whether, under section 216.1(a) of the Uniform Rules for Trial Courts (22 NYCRR 216.1[a]), the motion court had good cause to seal and keep from public disclosure a set of exhibits submitted by plaintiff in opposition to a motion to dismiss the complaint. Defendants-respondents moved to seal the documents, alleging that they contained confidential business information, were improperly obtained by plaintiff and were irrelevant to the action. Intervenor-appellant, a journalist who had been reporting on this action, opposed the motion and argued that the public had a strong interest in inspecting the documents and that defendants-respondents had not established the requisite good cause to seal them. The motion court agreed with defendants-respondents and issued an order sealing the exhibits. We now reverse and find that defendants-respondents failed to meet their burden to justify sealing the documents.

Plaintiff Mitchell Mosallem was the Executive Vice President and Director of Graphics Services for defendant Grey Global Group, Inc., a leading international advertising agency. In spring 2001, the Antitrust Division of the United States Department of Justice commenced an investigation into allegations of bid-rigging and payment of kickbacks in connection with Grey's

awarding business to print vendors. Federal prosecutors ultimately secured 22 indictments against Grey employees, including Mosallem, various printing firms, and their clients.

The 11-count indictment against Mosallem charged him with fraud, conspiracy and other crimes. According to the indictment, Mosallem had rigged bids so that a third-party vendor would be awarded contracts to supply services for Grey's clients; the vendor, in turn, would pay Mosallem kickbacks of cash, goods and services for securing the contracts. On April 8, 2003, Mosallem entered into a plea agreement in which he pleaded guilty to each count of the indictment. On November 13, 2003, Mosallem was sentenced to a prison term of 70 months.

Two years later, Mosallem brought this action against Grey, its predecessor, successor and parent entities, and several Grey executives (hereinafter defendants).[1] In his pro se complaint, Mosallem alleged that bid-rigging, kickbacks and other corrupt practices were endemic to the operating culture at Grey. According to the complaint, defendants had engaged in a cover-up to insulate Grey senior management from criminal liability by giving the false impression that Mosallem, on his own, had

[1] Plaintiff also named as a defendant the law firm that represented the Grey entities in the federal investigation. That firm is not a party to this appeal.

masterminded the corrupt practices at Grey. In particular, Mosallem alleged that defendants manipulated and withheld information in response to government subpoenas, suborned perjury by witnesses and leaked confidential information to the government. Mosallem claimed that he received a substantially heavier prison sentence for his crimes because he was deemed to have been the ringleader of the corruption at Grey.

On March 22, 2006, defendants moved to dismiss the complaint pursuant to CPLR 3211(a). Mosallem filed an affidavit in opposition on April 24, 2006. On or about September 25, 2006, Mosallem mailed 44 documents to the trial court and asked that the court accept them as exhibits to his previously filed opposition papers. Mosallem argued that defendants would not be prejudiced because the documents were already referred to in his affidavit. The record does not reflect that defendants ever objected to Mosallem's submission of the documents. Nor, at the time of the submission, did defendants file a motion to seal the exhibits. In view of Mosallem's pro se status, the court accepted the late filing as part of Mosallem's opposition to the motion.

Several weeks later, on October 23, 2006, intervenor Jim Edwards, a senior editor at Brandweek magazine, wrote letters to the trial court and the clerk's office seeking access to the

entire case file. Brandweek is a business magazine whose readers include employees and clients of advertising agencies like Grey. Edwards had been reporting on the case for Brandweek and had written on Mosallem's allegations about corruption at Grey. In his letters to the court, Edwards stated that he had reason to believe that Mosallem had made submissions that were not contained in the public file in the clerk's office. It is undisputed that there was no sealing order in place at this time.

On October 25, 2006, the court sent a letter to the parties informing them of Edwards's request for the case file and asking whether any party intended to move for sealing. On November 10, 2006, defendants moved pursuant to 22 NYCRR 216.1 to seal the documents submitted by Mosallem. On March 12, 2008, with no decision on the sealing motion having been rendered, Edwards moved for an order directing the Mosallem exhibits be made available for public inspection. In a decision entered June 5, 2009, the court granted the sealing motion and issued an order directing the clerk to seal the 44 documents submitted by Mosallem.[2] During the extended period the motion was sub judice, the documents were kept in the court's chambers and not made

[2] In its decision, the court also dismissed the complaint with leave to replead the breach of contract claim against Grey Global Group, Inc. That part of the court's order is not the subject of this appeal.

available to the public.

Under New York law, there is a broad presumption that the public is entitled to access to judicial proceedings and court records (*Mancheski v Gabelli Group Capital Partners*, 39 AD3d 499, 501 [2007]; *Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.V.*, 28 AD3d 322, 324 [2006]; *Danco Labs. v Chemical Works of Gedeon Richter*, 274 AD2d 1, 6 [2000]). This State has "long recognized that civil actions and proceedings should be open to the public in order to ensure that they are conducted efficiently, honestly, and fairly" (*Matter of Brownstone*, 191 AD2d 167, 167 [1993]). Thus, Section 4 of the Judiciary Law requires that, with certain exceptions not applicable here, "[t]he sittings of every court within this state shall be public, and every citizen may freely attend the same." Likewise, Sections 255 and 255-b of the Judiciary Law mandate that court records and docket books be available to the public.

The right of access to court proceedings and records also is firmly grounded in the common law, "and the existence of the correlating common-law right to inspect and copy judicial records is beyond dispute" (*Gryphon Dom. VI, LLC*, 28 AD3d at 324 [internal quotation marks and citation omitted]). We have recognized the broad constitutional presumption, arising from the First and Sixth Amendments, as applied to the States by the

Fourteenth Amendment, that both the public and the press are generally entitled to have access to court proceedings (*id.*; *Danco Labs.*, 274 AD2d at 6).

The public right to access, however, is not absolute (*Danco Labs.*, 274 AD2d at 6), and public inspection of court records has been limited by numerous statutes. Thus, for example, restrictions have been placed on access to Family Court records (Family Court Act § 166), records in matrimonial actions (Domestic Relations Law § 235), sealed records in criminal cases (CPL 160.50), adoption proceeding records (Domestic Relations Law § 114) and proceedings seeking disclosure of HIV-related information (Public Health Law § 2785[3]).

In addition to the statutory exceptions to public access, a court is empowered to seal court records pursuant to section 216.1(a) of the Uniform Rules for Trial Courts (22 NYCRR 216.1[a]). That rule states that:

> "[e]xcept where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties."

Although the term "good cause" is not defined, "a sealing order

should clearly be predicated upon a sound basis or legitimate need to take judicial action" (*Gryphon Dom. VI, LLC*, 28 AD3d at 325). "A finding of 'good cause' presupposes that public access to the documents at issue will likely result in harm to a compelling interest of the movant" (*Mancheski*, 39 AD3d at 502). "Confidentiality is clearly the exception, not the rule" (*Matter of Hofman*, 284 AD2d 92, 93-94 [2001]), and the party seeking to seal court records has the burden to demonstrate compelling circumstances to justify restricting public access (*Mancheski*, 39 AD3d at 502; *Danco Labs.*, 274 AD2d at 8).

Applying these principles, we conclude that defendants have failed to meet their substantial burden of establishing good cause to seal the exhibits submitted by Mosallem. First, we reject defendants' assertion that there is no "legitimate public concern" in ensuring that the documents remain available for inspection (*see Matter of Crain Communications v Hughes*, 135 AD2d 351, 352 [1987], *affd* 74 NY2d 626 [1989]). We have previously observed that the public has a powerful interest in open court proceedings (*Danco Labs.*, 274 AD2d at 7; *Matter of Hofman*, 284 AD2d at 94 [judicial proceedings are matters of legitimate public concern]).

The public's interest in this case, both at the time the sealing motion was made and even now, is substantial. Mosallem

is a former executive of a major worldwide advertising agency who was convicted of federal crimes involving corporate corruption. In this action, he alleges that senior executives in the agency engaged in a coverup of corrupt corporate practices at Grey, which is a matter of public concern (*see Danco Labs.*, 274 AD2d at 7 ["The public interest in openness is particularly important on matters of public concern, even if the issues arise in the context of a private dispute"]). The fact that many of the documents are over a decade old does not eviscerate the public's interest in them. The press's interest in the documents is a continuing one, as evidenced by the repeated attempts to gain access to them and the pursuit of this appeal.

Defendants have failed to meet their burden of demonstrating compelling circumstances that would outweigh the public's interest here. The sealing motion below was accompanied solely by the affirmation of an attorney who did not purport to have any personal knowledge of the documents. No affidavits were submitted by any of the defendants, the authors of the documents or the participants in the events recorded therein. Thus, there is no evidence in the record as to why the documents are so confidential or sensitive that public access to them should be restricted (*see L.K. Sta. Group, LLC v Quantek Media, LLC*, 20 Misc 3d 1142[A] [Sup Ct, NY County 2008] [defendants' failure to

address specific documents was fatal to request to seal]).

Merely because some of the documents were marked "confidential" or "private" "is not controlling on the court's determination whether there is good cause to seal the record" (*Eusini v Pioneer Elecs. (USA), Inc.*, 29 AD3d 623, 626 [2006]). This Court has generally been reluctant to allow the sealing of court records and has authorized sealing only in strictly limited circumstances (*Gryphon Dom. VI, LLC*, 28 AD3d at 324, 325). In the business context, we have allowed for sealing where trade secrets are involved (*see Matter of Crain Communications*, 135 AD2d at 352), or where the release of documents could threaten a business's competitive advantage *(see Matter of Twentieth Century Fox Film Corp.*, 190 AD2d 483, 488 [1993]). Here, however, there is no showing that the documents contain any trade secrets or other revelations that might harm Grey's competitive standing in the industry. Nor have defendants shown that the documents, most of which are more than 10 years old, would cause harm to Grey's present-day business.

A number of the exhibits submitted by Mosallem are copies of what defendants admit are nonprivileged documents that were produced by Grey in 2002 in response to federal grand jury subpoenas. None of these documents are transcripts of any grand jury proceedings, nor do they reveal witness information or

statements. Rather, most, if not all, of the documents appear to be Grey's business records created several years before the issuance of the subpoenas. The motion court's concerns that releasing these exhibits would invade federal grand jury secrecy are misplaced. The mere fact that the documents were produced in response to federal grand jury subpoenas does not establish that they were ever introduced before the grand jury (*see e.g. United States v Phillips*, 843 F2d 438, 441 [11th Cir 1988] [financial documents obtained by grand jury subpoena but never submitted to grand jury not matters occurring before grand jury and not subject to secrecy]). Nor is there any showing that the documents were in any way used in the federal grand jury's deliberative process (*see e.g DiLeo v Commissioner of Internal Revenue*, 959 F2d 16, 19-20 [2d Cir 1992], *cert denied* 506 US 868 [1992]; *Conte v County of Nassau*, 2009 US Dist LEXIS 41348 [ED NY 2009]; *United States v Manko*, 1997 US Dist LEXIS 2578 [SD NY 1997]).

Defendants also argue that sealing is appropriate because the exhibits could be misconstrued by the public and the press. In particular, they express concern that information in the documents could potentially humiliate them and harm their business reputations. However, they have not alleged facts from which any specific harm can be established, let alone harm that

outweighs the importance of public access to the records. In any event, neither the potential for embarrassment or damage to reputation, nor the general desire for privacy, constitutes good cause to seal court records (*see Liapakis v Sullivan*, 290 AD2d 393, 394 [2002]; *Matter of Benkert*, 288 AD2d 147 [2001]; *Matter of Hofmann*, 284 AD2d at 94).

Despite defendants' purported concerns about release of the documents, they did not act with haste in moving to seal. There is nothing in the record to indicate that, at the time Mosallem first submitted the exhibits to the court, they objected in any way or sought to keep the documents out of the public domain. They did not ask the court to reject the exhibits on the ground that they were sent months after the motion to dismiss had been fully submitted. Nor did they make a sealing motion at that time. Rather, the motion to seal came nearly two months later. Although not determinative, defendants' failure to take prompt action undermines their claims that the documents contain confidential business information, would invade federal grand jury secrecy or would cause unspecified harm to their business reputations.

Defendants raise a number of arguments about Mosallem's alleged wrongful conduct in obtaining the documents and his bad faith in submitting them to the court. None of these provides a

basis to seal the record. Defendants argue that sealing is required because Mosallem did not rightfully possess the exhibits. In particular, they allege that Mosallem obtained the subpoenaed documents during the course of his criminal proceedings and that they should have been returned when the criminal case ended because they are Grey's property (*see United States v Interstate Dress Carriers*, 280 F2d 52, 54 [2d Cir 1960]). They further claim that the remaining documents were misappropriated by Mosallem while he worked at Grey.

However, no factual showing was made that Mosallem improperly took documents during the course of his employment. As noted earlier, the sealing motion was only accompanied by an affirmation of an attorney who did not purport to have any personal knowledge of the underlying facts, or of Grey's document retention policies. Nor was an affidavit submitted from anyone with knowledge about Grey's employment policies and procedures. With regard to the subpoenaed documents, defendants offer scant evidence that Mosallem's possession of them was wrongful.

In any event, how Mosallem may have come to be in possession of the documents does not warrant granting the sealing motion. There is nothing in Rule 216.1(a) that addresses whether a court can consider a litigant's wrongful conduct or bad faith in determining whether public access should be restricted. Some

useful guidance can be gleaned from analogous principles governing admissibility of wrongfully obtained evidence. "New York follows the common-law rule that the admissibility of evidence is not affected by the means through which it is obtained" (*Heimanson v Farkas*, 292 AD2d 421, 422 [2002]; *see Stagg v New York City Health & Hosp. Corp.*, 162 AD2d 595, 596 [1990]; *see also* Prince, Richardson on Evidence § 4-104 [Farrell 11th ed]). Thus, in the absence of some constitutional, statutory, or decisional authority requiring the suppression of otherwise valid evidence (*see e.g.* CPLR 4506), such evidence is admissible in a civil action even if obtained by wrongful means (*Radder v CSX Transp., Inc.*, 68 AD3d 1743, 1744-1745 [2009]; *Stagg*, 162 AD2d at 596; *see generally Sackler v Sackler*, 15 NY2d 40 [1964]).

Since wrongfully obtained evidence is nevertheless admissible, we see no reason why the documents should be sealed merely because they were obtained improperly. In this case, we should not be drawn into the ancillary inquiry of whether Mosallem may have engaged in wrongdoing or committed tortious conduct. This is not to say that defendants could not pursue some other remedy to redress the alleged wrongful retention of documents. But denying public access to the court records here is not the proper solution where no tangible harm or independent

statutory basis for sealing has been established, even if the documents are Grey's property.

We reject the argument that the exhibits should be sealed because they purportedly bear no relevance to the motion to dismiss. Defendants did not raise this concern when Mosallem belatedly mailed the documents to the court after the motion was fully submitted. Nor did they provide an affidavit from anyone with knowledge to identify the documents and explain why they were not pertinent to the issues raised. In light of this omission, it is difficult to understand defendants' argument that the documents lack relevance. In any event, neither Rule 216.1(a), nor the case law addressing it, allows for sealing of part of a court file simply because a document may be irrelevant. Nor does the fact that the action was ultimately dismissed provide a basis to restrict public access. This argument, taken to its logical extreme, would allow for sealing of any case that was dismissed.

Finally, Edwards complains about the court's delay in deciding the motion because it resulted in de facto sealing during the extended period the motion was sub judice. Edwards raises a legitimate concern about the lengthy delay here. Sealing motions should be decided expeditiously because undue delays in ruling on such motions implicate the public's right of

access to court records (*see Lugosch v Pyramid Co. of Onondaga*, 435 F3d 110, 126-127 [2d Cir 2006]).

Accordingly, the order of Supreme Court, New York County (Ira Gammerman, J.H.O.), entered June 5, 2009, which, insofar as appealed from, granted defendants-respondents' motion to seal the exhibits submitted by plaintiff in opposition to defendants-respondents' motion to dismiss the complaint, should be reversed, on the law, without costs, the motion denied, the sealing order vacated and the Clerk of this Court directed to remit a copy of the unsealed exhibits.

All concur.

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

ENTERED: JULY 20, 2010

CLERK