



AD3d 201 [1st Dept 2008], *affd* 12 NY3d 563 [2009]).

The court properly classified defendant as a sexually violent offender. Defendant was convicted of persistent sexual abuse after that crime had been enumerated as a crime requiring classification as a sexually violent offense (see Correction Law §§ 168-a[3][a][ii],[7][b]), even though that crime was not classified under the Penal Law as a violent felony for sentencing purposes until 2007. In any event, defendant was still serving his sentence for that crime at the time of its reclassification in the Penal Law (*cf. People v Buss*, 11 NY3d 553 [2008]).

The Decision and Order of this Court entered herein on October 25, 2012 is hereby recalled and vacated (see M-5141 and M-5575 decided simultaneously herewith).

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

ENTERED: FEBRUARY 28, 2013

  
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Tom, J.P., Mazzairelli, Moskowitz, Abdus-Salaam, Feinman, JJ.

8741- Index 110223/10

8742-

8743 Joseph Piazza,  
Plaintiff-Appellant-Respondent,

-against-

CRP/RAR III Parcel J, LP, et al.,  
Defendants-Respondents-Appellants.

- - - - -

Joseph Piazza,  
Plaintiff-Respondent-Appellant,

-against-

CRP/RAR III Parcel J, LP,  
Defendant,

Bovis Lend Lease, Inc.,  
Defendant-Appellant-Respondent.

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Morgan Melhuish Abrutyn, New York (Douglas S. Langholz of counsel), for Joseph Piazza, appellant-respondent/respondent-appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Richard S. Oelsner of counsel), for CRP/RAR III Parcel J, LP and Bovis Lend Lease, Inc., respondents-appellants, and Bovis Lend Lease, Inc., appellant-respondent.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered March 29, 2012, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion and defendants' cross motion for partial summary judgment on the issue of Labor Law § 240(1) liability, granted defendants' cross motion for summary judgment dismissing plaintiff's claim alleging a

violation of Labor Law § 241(6) insofar as predicated on violations of 12 NYCRR 23-1.7(d) and 12 NYCRR 23-1.7(e), but denied defendants summary judgment insofar as predicated on 12 NYCRR 23-1.7(b), unanimously affirmed, without costs. Order, same court and Justice, entered June 5, 2012, which granted plaintiff's motion to reargue the grant of summary judgment to defendants dismissing his common law negligence and Labor Law § 200 causes of action, and his Labor Law § 241(6) cause of action insofar as it was predicated on violations of 12 NYCRR 23-1.7(e), and, upon reargument, reinstated the Labor Law § 200 and common law negligence causes of action as against defendant Bovis, and otherwise adhered to its prior decision, unanimously affirmed, without costs.

On March 9, 2009, plaintiff was working as a carpenter for non-party Pinnacle Industries at a construction site located at 60 Riverside Boulevard in Manhattan. At the time of plaintiff's accident, defendant CRP/RAR III PARCEL J, LP (CRP) owned the site and Bovis Lend Lease, Inc., (Bovis) operated it as construction manager for the project.

According to his deposition testimony, at the end of his work day, plaintiff was allegedly walking toward the central elevator shaft, the sole means for workers to access the various floors of the building that lacked stairs, when he tripped on

excess material of a tarpaulin hanging to permit the drying of cement. Plaintiff claims that he fell partially into the elevator shaft, and fractured his kneecap as he successfully pulled himself back up to the floor.

While plaintiff has testified that he tripped on a piece of excess tarpaulin and fell partially into the elevator shaft, and has alleged that there were no guardrails or other safety protections around it, this is contradicted by his supervisor, who testified that plaintiff told him he tripped and fell after he had stepped off a ladder and had ascended to the floor on which the tarp was located. The supervisor also described a wooden guardrail on the sides of the ladders. Based on this conflicting testimony, there are questions of fact concerning whether the accident falls within the ambit of Labor Law § 240(1); whether Labor Law § 241(6) liability may be imposed for a violation of Industrial Code (12 NYCRR) § 23-1.7(b), concerning hazardous openings; and whether Bovis, the general contractor, had actual or constructive notice of the hazardous opening

sufficient to impose liability under Labor Law § 200 and common law negligence.

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: FEBRUARY 28, 2013

  
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that the interest to be asserted is within the zone of interest to be protected by the statute" (*id.*).

Here, petitioner repeatedly asserts that the basis for the instant proceeding is the failure by La Esquina and the SLA to comply with Alcoholic Beverage Control Law (ABCL) former § 64(2-a), now § 110-b(1)(b); (5)<sup>1</sup> in its most recent renewal of La Esquina's liquor license. Specifically, petitioner contends that La Esquina failed to abide by the notice requirement promulgated by ABCL former 64(2-a) and that the SLA failed to make Community Board 2's (CB 2) opposition to renewal of La Esquina's license part of the record granting renewal.

ABCL former 64(2-a) stated that:

"upon receipt of . . . an application for renewal under [ABCL § 109] . . . the applicant shall notify the clerk of the village, town or city, as the case may be, by certified mail, return receipt requested, wherein the prospective licensed premises is to be located or, in the case of an application for renewal, or alteration where it is presently located not less than thirty days prior to the submission of its application for a license under this section or for a renewal thereof pursuant to [ABCL §

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<sup>1</sup> Petitioner's brief on appeal is replete with references to the grounds upon which she brings the instant proceeding. For example she avers that the crux of her complaint is that the "SLA renewed La Esquina's liquor license despite La Esquina's failure to timely notify CB2 Manhattan and despite CB2's letter request that the SLA take CB2's resolution into account before making any final determination on the renewal application."

109] . . . *In the City of New York, the community board . . . with jurisdiction over the area in which such licensed premises is to be located shall be considered the appropriate public body to which notification shall be given. Such municipality or community board, as the case may be, may express an opinion for or against the granting of such license. Any such opinion shall be deemed part of the record upon which the liquor board makes its determination to grant or deny such license*" (emphasis added).

Clearly, ABCL former 64(2-a) only conferred the right to notice upon the filing of a licensee's renewal application to the relevant community board. Similarly, pursuant to this statute, only the community board's opposition, if any, must be made part of the record granting or denying renewal. Given petitioner's grounds for the instant proceeding, it is clear that she seeks to assert not her rights as a person injured by the SLA's renewal of La Esquina's alcohol license, but rather the rights afforded to CB 2 by ABCL former 64(2-a). Since petitioner is neither a member of CB 2 nor is bringing this proceeding on its behalf, she must therefore establish that she has third-party standing to bring this proceeding. While generally a party has no standing to raise the legal rights of another (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 773 [1991]), a party establishes third-party standing when (1) there is a substantial relationship between the party asserting the claim and the

rightholder; (2) it is impossible for the rightholder to assert his or her own rights; and (3) the need to avoid a dilution of the parties' constitutional rights (*New York County Lawyers' Assn. v State of New York*, 294 AD2d 69, 74-75 [1st Dept 2002]).

Upon a review of the record we conclude that based on the grounds raised in her petition, namely the SLA's and La Esquina's failure to comply with ABCL former 64(2-a), petitioner fails to establish any of the requisite elements giving her third-party standing to bring this proceeding on CB 2's behalf. Moreover, contrary to petitioner's assertion, she also fails to establish that she has individual standing to bring this proceeding. Generally, upon demonstrating that the SLA's determination to grant a liquor license will cause them injury, residents living in the vicinity of an establishment licensed by the SLA have standing to challenge such a determination (see *Matter of Ban the Bar Coalition v New York State Liq. Auth.*, 12 Misc 3d 1192[A], 2006 NY Slip Op 51544[U], \*8 [Sup Ct, NY County 2006]; *Matter of Soho Alliance v New York State Liq. Auth.*, 10 Misc 3d 1078[A], 2005 NY Slip Op 52253[U], \*4 [Sup Ct, NY County 2005], *revd on other grounds* 32 AD3d 363 [1st Dept 2006]). Here, however, we find that while petitioner avers that she has been injured by the SLA's most recent renewal of La Esquina's liquor license, her petition makes it clear that this injury - primarily the level of

noise emanating from La Esquina - is not the basis for the instant proceeding. On the contrary, as noted above, the petition is premised on injuries to CB 2, which absent the requisite showing, petitioner has no standing to assert. Accordingly, the petition was properly dismissed. Having found that petitioner has no standing to bring the instant proceeding, we need not reach the merits of her appeal.

While the issue of standing was raised by the SLA for the first time on appeal, it may nevertheless be entertained at this juncture since it poses a question of law that could not have been avoided had it been raised before the motion court (*Delgado v New York City Bd. of Educ.*, 272 AD2d 207 [1st Dept 2000], *lv denied* 95 NY2d 768 [2000], *cert denied*, 532 US 982 [2001]).

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

ENTERED: FEBRUARY 28, 2013

  
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Tom, J.P., Saxe, Moskowitz, Abdus-Salaam, Gische, JJ.

9072N Adam Robinson, Index 600907/10  
Plaintiff-Respondent,

-against-

Laura Day, et al.,  
Defendants-Appellants,

David J. DePinto, et al.,  
Defendants.

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Peter R. Ginsberg Law, LLC, New York (Peter R. Ginsberg of  
counsel), for appellants.

The Serbagi Law Firm, P.C., New York (Christopher Serbagi of  
counsel), for respondent.

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Order, Supreme Court, New York County (Melvin L. Schweitzer,  
J.), entered April 17, 2012, which, to the extent appealed from,  
granted plaintiff leave to amend his amended complaint,  
unanimously modified, on the law and the facts, to deny leave  
with respect to the thirteenth, twenty-seventh, thirtieth,  
thirty-third, thirty-fourth, and thirty sixth causes of action of  
the second amended complaint (SAC), and otherwise affirmed,  
without costs.

We are not persuaded by defendants' argument that they have  
been prejudiced by plaintiff's allegedly excessive delay in  
moving to amend. "Mere lateness is not a barrier to the  
amendment" (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957,

959 [1983] [internal quotation marks omitted]). "Prejudice requires some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position" (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011] [internal quotation marks omitted]). Defendants failed to demonstrate such prejudice.

Defendants contend that plaintiff's claims regarding an assignment he purportedly executed in 2000 are time-barred. This argument is unavailing. Where, as here, a party seeks to rescind a contract on the ground that the other party fraudulently induced him to enter into it, he may do so "'promptly upon the discovery of the fraud'" (*Ballow Bransted O'Brien & Rusin P.C. v Logan*, 435 F3d 235, 240-241 [2d Cir 2006], quoting *Sarantides v Williams, Belmont & Co.*, 180 NYS 741, 743 [App Term, 1st Dept 1920]). Plaintiff alleges that he did not discover the fraud until August or September 2009. Inasmuch as he commenced this action in April 2010, it is prima facie timely (*cf. Ballow*, 435 F3d at 236, 239-241 [four-year delay was unreasonable]).

Even if plaintiff's delay was excessive (*see Sarantides*, 180 NYS at 742-743 [delay of more than six months was excessive]), plaintiff has sufficiently pleaded that Day should be equitably estopped from invoking the statute of limitations with respect to

the 2000 assignment (see e.g. *Simcuski v Saeli*, 44 NY2d 442, 448 [1978]). Furthermore, he alleges that Day waived her rights under the 2000 assignment because she did not seek to enforce it until June 2010. This presents an issue of fact precluding summary dismissal of plaintiff's claim (see *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 99 [2006]).

Defendants contend that plaintiff's claims to rescind or invalidate the operating agreement of defendant RobinsonDay, LLC, which was executed in 2004, are time-barred. They also contend that plaintiff may not contradict his tax returns. However, plaintiff states that he is not attacking the operating agreement, rendering defendants' arguments academic. In light of plaintiff's admission on appeal, he should not be allowed to assert the twenty-seventh cause of action in the SAC, which seeks a declaration that RobinsonDay was never a valid LLC.

Defendants contend that plaintiff cannot rescind the various contracts at issue in this case (the 2000 assignment, the 2005 assignments, the 2009 option agreements, and the 2009 transfer agreement) due to duress because he was not "compelled to agree to [their] terms by means of a wrongful threat which precluded the exercise of [his] free will" (*Stewart M. Muller Constr. Co. v New York Tel. Co.*, 40 NY2d 955, 956 [1976]). However, plaintiff

and Day did not have an arms-length business relationship like that of the two corporations in *Muller*. Instead, they were romantic companions for 14 years. Thus, their relationship was one of trust and confidence (see *Sharp v Kosmalski*, 40 NY2d 119, 120-121 [1976]). “[I]f a confidential relationship exists, the burden is shifted to the beneficiary of the transaction to prove the transaction fair and free from undue influence” (*Sepulveda v Aviles*, 308 AD2d 1, 7 [1st Dept 2003]). This principle is not limited to the elderly and mentally incapacitated; for example, it was applied in *Matter of Greiff* (92 NY2d 341 [1998]) to “the special relationship between betrothed parties” (*id.* at 343). In any event, plaintiff claims he lacked the psychological capacity to contract with respect to financial matters.

Defendants contend that the documentary evidence belies plaintiff’s claim that he received little or no consideration for the agreements he executed. However, because plaintiff and Day were in a confidential relationship, the burden is on defendants to show that the transactions were fair (see e.g. *Matter of Gordon v Bialystoker Ctr. & Bikur Cholim*, 45 NY2d 692, 698-699 [1978]; *Sepulveda*, 308 AD2d at 7). Moreover, even *Apfel v Prudential-Bache Sec.* (81 NY2d 470 [1993]) – the case on which defendants rely – states, “Absent fraud or unconscionability, the adequacy of consideration is not a proper subject for judicial

scrutiny" (*id.* at 476 [emphasis added]). Plaintiff alleges both fraud and unconscionability.

Defendants contend that plaintiff ratified every agreement at issue in this litigation. However, ratification is a question of fact unless the evidence is undisputed and different inferences cannot reasonably be drawn from it (*see Hedeman v Fairbanks, Morse & Co.*, 286 NY 240, 248-249 [1941]), and "[a] necessary element of ratification is intent" (*Soma v Handrulis*, 277 NY 223, 230 [1938]). We cannot say, as a matter of law, at this early, preanswer stage of the action, that plaintiff ratified the agreements.

We are not convinced by defendants' argument that the statute of limitations bars plaintiff's claims for (1) breach of fiduciary duty, except those arising out of the 2009 agreements, and (2) an accounting related to the 2000 assignment. The statute of limitations "does not begin to run until the fiduciary has openly repudiated his or her obligation or the relationship has been otherwise terminated" (*Westchester Religious Inst. v Kamerman*, 262 AD2d 131, 131 [1st Dept 1999] [an action seeking an accounting]). Day did not relinquish her power of attorney over plaintiff's bank accounts until January 29, 2010, and plaintiff commenced the instant action on April 12, 2010.

Defendants contend that plaintiff's quasi-contract claims

(constructive trust, unjust enrichment, and money had and received) fail because there are express contracts covering the same subject matter. This argument is unavailing because “there is a bona fide dispute as to the existence of a contract” (*IIG Capital LLC v Archipelago, L.L.C.*, 36 AD3d 401, 405 [1st Dept 2007]). Plaintiff contends that all of the contracts on which defendants rely are invalid because he was fraudulently induced into entering them, they are unconscionable, they are the product of undue influence and duress, the consideration he received was inadequate, and he lacked the capacity to enter into them.

We are not persuaded by defendants’ argument that because plaintiff cannot plead the four requirements mentioned in *Sharp* (40 NY2d at 121), plaintiff has no claim for a constructive trust. “Although the [*Sharp*] factors are useful in many cases[,] constructive trust doctrine is not rigidly limited” (*Simonds v Simonds*, 45 NY2d 233, 241 [1978]).

Defendants contend that the statute of limitations bars plaintiff’s fraud claim insofar as the 2000 assignment is concerned. This argument is unavailing (see *Sargiss v Magarelli*, 12 NY3d 527, 532 [2009]). Plaintiff states that if he entered into the 2000 assignment, he did so in exchange for Day’s promise to manage his financial and legal affairs. He allegedly did not discover until early August 2009 that this promise was false. He

commenced the instant action within two years of August 2009.

Defendants contend that plaintiff's fraud claim is barred because the contracts' "express terms contradict [plaintiff]'s allegations that he executed the contract[s] in reliance upon . . . oral misrepresentations" (*LaBarbera v Marino*, 192 AD2d 697, 698 [2d Dept 1993]). This argument is meritless: the contracts at issue do not even contain general merger clauses, let alone "specific disclaimer[s] [that would] destroy[] allegations that the agreements were executed in reliance upon contrary oral misrepresentations" (*id.*).

Defendants' contention that plaintiff fails to plead fraud with the particularity required by CPLR 3016(b) is unavailing. A complaint need only "allege the misconduct complained of in sufficient detail to inform the defendants of the substance of the claims" (*Bernstein v Kelso & Co.*, 231 AD2d 314, 320 [1st Dept 1997] [emphasis omitted]) and the SAC meets this standard.

Plaintiff's conversion claim with respect to the 2009 option and transfer agreements is however, time-barred, and in any event, plaintiff does not even address the dismissal of this claim in his opposition. Therefore leave to amend is denied as to the thirteenth cause of action.

Leave to amend is also denied as to the thirtieth and thirty-third causes of action, which are, respectively, for

aiding and abetting fraud and defendants' negligent conduct in handling plaintiff's accounts, since plaintiff has not opposed the arguments raised by defendants for dismissal of these claims.

The thirty-fourth cause of action is dismissed because "an attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against the corporation" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). Leave to amend should have been also denied as to the thirty-sixth cause of action because "New York does not recognize an independent tort cause of action for civil conspiracy" (*Montan v Saint Vincent's Catholic Med. Ctr.*, 81 AD3d 431, 431 [1st Dept 2011], *lv dismissed* 17 NY3d 872 [2011]).

We have considered defendants' remaining arguments and find them unavailing. We reject plaintiff's argument that this appeal should be stayed pending decisions by the motion court on the motions to dismiss the SAC.

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

ENTERED: FEBRUARY 28, 2013

  
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The right to appeal from the instant intermediate order was extinguished with the entry of the final custody and visitation order during the pendency of this appeal (see *Matter of Aho*, 39 NY2d 241, 248 [1976]).

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

ENTERED: FEBRUARY 28, 2013

  
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against a child (see e.g. *People v Melendez*, 83 AD3d 448 [1st Dept 2011]). Although defendant describes his sexual relationship with the victim as consensual, we note that it began when the victim was only 11 years old.

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

ENTERED: FEBRUARY 28, 2013

  
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Tom, J.P., Sweeny, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

9394 Janet H. Accardo, Index 108865/10  
Plaintiff-Respondent,

-against-

Metro-North Railroad,  
Defendant-Appellant.

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Seth J. Cummins, New York (Jesse A. Raye of counsel), for  
appellant.

Gregory W. Bagen, Brewster, for respondent.

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Order, Supreme Court, New York County (Richard F. Braun,  
J.), entered on or about May 17, 2012, which denied defendant's  
motion for summary judgment dismissing the complaint, unanimously  
affirmed, without costs.

Summary judgment was properly denied in this action where  
plaintiff was injured when, while stepping off defendant's train,  
she slipped and fell on an icy condition on the platform. The  
expert's report, submitted in support of defendant's motion, was  
unsworn, and thus, not in admissible form. This was an error  
that could not be cured by submitting a sworn affidavit by this  
expert in reply papers (*see Damas v Valdes*, 84 AD3d 87, 95-96 [2d  
Dept 2011]; *see also Batista v Santiago*, 25 AD3d 326 [1st Dept  
2006]). Moreover, the record presents triable issues as to

whether, since the cessation of the storm, defendant had a reasonable amount of time to remedy the icy-wet conditions at the station where plaintiff fell (see *Powell v MLG Hillside Assoc.*, 290 AD2d 345 [1st Dept 2002]).

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

ENTERED: FEBRUARY 28, 2013

  
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Tom, J.P., Sweeny, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

9395- Index 113094/10

9396 Fan-Dorf Properties, Inc., et al.,  
Plaintiffs-Appellants,

-against-

Classic Brownstones Unlimited, LLC,  
Defendant-Respondent,

15 West 129th Street Corp.,  
Defendant.

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Craig K. Tyson, New York, for appellants.

Char & Herzberg LLP, New York (Edward M. Char of counsel), for  
respondent.

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Order, Supreme Court, New York County (Manuel Mendez, J.),  
entered August 2, 2012, which denied plaintiffs' motion to renew,  
unanimously reversed, on the law, the facts, and in the exercise  
of discretion, without costs, the motion granted and, upon  
renewal, defendant Classic Brownstones Unlimited, LLC's  
(defendant) motion to dismiss and for summary judgment denied.  
Appeal from order, same court and Justice, entered August 30,  
2011, which granted defendant's motion to dismiss and for summary  
judgment, unanimously dismissed, without costs, as academic.

In this action to quiet title to real property located at 15  
West 129<sup>th</sup> Street in New York, brought pursuant to RPAPL Article  
15, defendant met its prima facie burden of showing that it is a

bona fide purchaser for value, entitled to the protection of Real Property Law § 266, by submitting the deeds in its chain of title, all of which were duly acknowledged and recorded, and an affidavit from defendant's managing member explaining that defendant purchased the subject property for \$1,650,000 in an arms length transaction (see *Commandment Keepers Ethiopian Hebrew Congregation of the Living God, Pillar & Ground of Truth, Inc. v 31 Mount Morris Park, LLC*, 76 AD3d 465 [1st Dept 2010]). In opposing defendant's motion, plaintiffs failed to raise an issue of fact because they only proffered the affirmation of counsel (see *Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]; *Murray v City of New York*, 74 AD3d 550 [1st Dept 2010]). However, in support of the motion to renew, plaintiffs submitted an abundance of evidence, including six affidavits and sworn statements and a host of public records, showing that the deed purportedly conveying the subject property, which was signed by Robert Adamson, as president of plaintiff Fan-Dorf Properties, Inc., was forged.

Plaintiffs' evidence established that Robert Adamson never existed, was never president of Fan-Dorf, and that plaintiff Michael Adamson's decedent, Randolph Adamson, who was Fan-Dorf's president prior to his death, had singlehandedly managed the corporation. Plaintiffs also proffered evidence that defendant

15 West 129th Street Corp. was not incorporated until after the deed purporting to convey title to it was executed, which would render the deed void (see *Matter of Hausman*, 13 NY3d 408, 410-413 [2009]; *Diallo v Grand Bay Assoc. Enters., Inc.*, 85 AD3d 628 [1st Dept 2011]). Accordingly, Real Property Law § 266, which “applies to fraud situations that are voidable, not those which are void such as here where a forged deed is alleged” (*Yin Wu v Yin Wu*, 288 AD2d 104, 105 [1st Dept 2001]), is inapplicable. Thus, this action is governed by the 10 year statute of limitations pursuant to CPLR 212(a) rather than the 6 year statute of limitations pursuant to CPLR 213(8), requiring denial of defendant’s motion to dismiss on statute of limitations grounds.

The portion of defendant’s motion seeking summary judgment must also be denied since plaintiffs demonstrated that there are questions of fact as to whether defendant is a bona fide purchaser for value and whether the deed purporting to convey the property from Fan-Dorf to defendant was forged (see *Yin Wu*, 288 AD2d at 105; see *Marden v Dorothy*, 160 NY 39 [1899]; *ABN AMRO Mortg. Group, Inc. v Stephens*, 91 AD3d 801, 803 [2d Dept 2012];

*LaSalle Bank Natl. Assn. v Ally*, 39 AD3d 597, 599-600 [2d Dept 2007]).

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: FEBRUARY 28, 2013

  
CLERK

Tom, J.P., Sweeny, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

9397 Elena G. De Madariaga, Index 651262/11  
Plaintiff-Appellant-Respondent,

-against-

Union Bancaire Privée, et al.,  
Defendants-Respondents-Appellants.

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Bickel & Brewer, New York (Alexander D. Widell of counsel), for  
appellant-respondent.

Seward & Kissel LLP, New York (Anne C. Patin of counsel), for  
respondents-appellants.

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Order, Supreme Court, New York County (Paul G. Feinman, J.),  
entered June 26, 2012, which granted so much of defendants'  
motion as sought to dismiss the first and fourth through seventh  
causes of action and denied so much of the motion as sought to  
dismiss the second and third causes of action, unanimously  
modified, on the law, to grant the motion as to the second and  
third causes of action, and otherwise affirmed, without costs.  
The Clerk is directed to enter judgment in defendants' favor  
dismissing the complaint.

Defendants' policy that the payment of bonuses was entirely  
discretionary was clearly expressed in the offer letter to  
plaintiff, in the company handbook, and in a memorandum  
confirming plaintiff's 2010 bonus, and plaintiff acknowledged in  
writing that she understood the policy. Thus, none of her bonus-

based claims - the causes of action for breach of an oral contract, quantum meruit/unjust enrichment, promissory estoppel, violation of Labor Law § 193, and fraud - are viable (see *Kaplan v Capital Co. of Am.*, 298 AD2d 110 [1st Dept 2002], *lv denied* 99 NY2d 510 [2003]).

Plaintiff's severance-related breach of contract claims are premised upon defendants' alleged promise to pay her a severance package "consistent with the severance packages paid to" other "senior executives who were terminated by [defendants]." This alleged promise is "too indefinite to permit enforcement" (see *Glanzer v Keilin & Bloom*, 281 AD2d 371 [1st Dept 2001]).

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

ENTERED: FEBRUARY 28, 2013

  
CLERK

Tom, J.P., Sweeny, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

9398           In re Sandra N.,  
                  Petitioner-Appellant,

-against-

Administration for Children's Services,  
et al.,  
Respondents,

Seamen's Society for Children  
and Families, et al.,  
Respondents-Respondents.

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Law Offices of Randal S. Carmel, Syosset (Randall S. Carmel of  
counsel), for appellant.

John R. Eyerman, New York, for Seaman's Society for Children and  
Families, respondent.

Carrieri & Carrieri, P.C., Mineola (Ralph R. Carrieri of  
counsel), for Little Flower Children and Family Services,  
respondent.

Tennille M. Tatum-Evans, New York, attorney for the child Elijah  
N.

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Order, Family Court, New York County (Douglas E. Hoffman,  
J.), entered on or about July 22, 2011, which, inter alia, denied  
and dismissed petitioner great grandmother's petition for custody  
of the subject children, and transferred custody and guardianship  
of the children to the respective agencies and the Commissioner  
of Social Services for the purpose of adoption, unanimously  
affirmed, without costs.

The court properly determined that it was in the best

interests of the children to deny the petition and to free each child for adoption by their respective foster mothers, with whom each child has lived since shortly after birth (see *Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]). There is no presumption that it is in a child's best interest for custody to be awarded to a relative (see *Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]), and the record demonstrates that each child has thrived in their foster homes, and both foster parents have tended to the needs to the children and have expressed a love for the child in their custody and the desire to adopt. Although the court-appointed expert expressed some reservations concerning one of the foster parents, the court properly determined that there was no ambivalence in her love for the child and the desire to adopt him (see *Matter of Louise E.S. v W. Stephen S.*, 64 NY2d 946, 947 [1985]). Moreover, the expert noted that petitioner had minimized the children's problems, namely, one child's special needs and the other child's language and development delays.

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

ENTERED: FEBRUARY 28, 2013

  
CLERK

Tom, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

9400           The People of the State of New York,           Index 401004/12  
              etc.,  
                  Plaintiff-Respondent,

-against-

John C. Moore, et al.,  
Defendants-Appellants.

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Simpson Thacher & Bartlett LLP, New York (Barry R. Ostrager of  
counsel), for appellants.

Eric T. Schneiderman, Attorney General, New York (Scott R. Wilson  
of counsel), for respondent.

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Order, Supreme Court, New York County (Anil C. Singh, J.),  
entered September 17, 2012, which denied defendants' motion to  
dismiss the complaint, unanimously affirmed, without costs.

The motion to dismiss the complaint against defendants, a  
not-for-profit corporation and its directors, was properly  
denied. Defendants are not entitled to pre-discovery dismissal  
of the complaint based on the business judgment rule where, as  
here, the complaint is replete with allegations that the  
directors did not act in good faith (*see e.g. Ackerman v 305 E.  
40th Owners Corp.*, 189 AD2d 665, 667 [1st Dept 1993]).

Defendants are also not entitled to dismissal based on documentary evidence since they failed to proffer materials that utterly refute the complaint's factual allegations (see *Goshen v Mut. Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

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

ENTERED: FEBRUARY 28, 2013

  
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interpretation of that exemption in *Empire Ctr. for N.Y. State Policy v New York City Police Pension Fund* (88 AD3d 520 [1st Dept 2011], *lv dismissed* 18 NY3d 901 [2012]), which followed *Matter of New York Veteran Police Assn. v New York City Police Dept. Art. I Pension Fund* (61 NY2d 659 [1983]). Accordingly, we adhere to our prior holding under the principle of *stare decisis*, which applies with particular force to issues of statutory interpretation (see *Matter of Higby v Mahoney*, 48 NY2d 15, 18-19 [1979]).

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

ENTERED: FEBRUARY 28, 2013

  
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Tom, J.P., Sweeny, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

9404-

Index 312670/11

9405 Erica Francine Gottlieb,  
Plaintiff-Respondent,

-against-

Ian Samuel Gottlieb,  
Defendant-Appellant.

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Robert G. Smith, New York, for appellant.

Stephen N. Preziosi, New York, for respondent.

Jo Ann Douglas, New York, attorney for the children.

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Order, Supreme Court, New York County (Ellen Gesmer, J.), entered January 11, 2012, which, following an interim order, same court and Justice, entered on or about December 6, 2011, granting plaintiff's motion to declare New York the home state of the parties' children and denying defendant's motion to decline jurisdiction pursuant to the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) in the underlying child custody proceeding, directed defendant to return the children to New York, unanimously affirmed, without costs. Appeal from December 6, 2011 order unanimously dismissed, without costs, as subsumed in the appeal from the January 11, 2012 order.

Defendant does not dispute that the trial court correctly determined that New York was the home state based on the fact

that both children lived in New York for more than six consecutive months before the commencement of child custody proceedings (see Domestic Relations Law [DRL] §§ 75-a[7], 76[1][a]). Indeed, the children had never lived outside of New York until July 3, 2011, when they moved with defendant to North Carolina, and their mother continues to reside in New York. Moreover, the UCCJEA "elevates the 'home state' to paramount importance in both initial custody determinations and modifications of custody orders" (*Matter of Michael McC. v Manuela A.*, 48 AD3d 91, 95 [1st Dept 2007], *lv dismissed* 10 NY3d 836 [2008]).

Contrary to defendant's assertions, Supreme Court properly weighed all factors relevant to a determination whether North Carolina was a more appropriate forum and properly concluded that it was not (see DRL § 76-f[1], [2]). Among other things, the court weighed defendant's superior financial circumstances and the much shorter length of time the children resided in North Carolina, as well as the fact that the majority of witnesses and documents are located in New York, including evidence relevant to the parents' allegations of misconduct against each other. In addition, defendant himself seemed to acknowledge that New York was a more appropriate forum to look into allegations of abuse and neglect of his daughter, which are relevant to any custody

determination, because he reported these allegations to the New York City Administration for Children's Services, although he claimed to have learned of the alleged abuse only after moving to North Carolina.

The court also gave proper weight to plaintiff's claims that defendant moved the children to North Carolina without her consent, and thus engaged in "unjustifiable conduct," which, if true, would obligate the North Carolina court to decline jurisdiction (see DRL § 76-g). Without making any determination whether defendant engaged in such conduct, the court observed, correctly, that if a determination were made that he did so, North Carolina would have no basis for continuing jurisdiction, whereas there are no such potential hindrances to jurisdiction in New York.

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

ENTERED: FEBRUARY 28, 2013

  
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Tom, J.P., Sweeny, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

9407 Julio Ortiz, Index 15143/05

Plaintiff-Respondent,

-against-

The City of New York,  
Defendant-Appellant,

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

Shelter Express Corp.,  
Defendant-Respondent.

- - - - -

The City of New York,  
Third-Party Plaintiff-Appellant,

The New York City Transit Authority, et al.,  
Third-Party Plaintiffs,

-against-

Viacom Outdoor Incorporated, et al.,  
Third-Party Defendants-Respondents.

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Gallo Vitucci Klar, New York (Yolanda L. Ayala of counsel), for appellant.

Samuel Katz, New York, for Julio Ortiz, respondent.

Dennis S. Connor, Rockville Center, for Shelter Express Corp., respondent.

McAndrew, Conboy & Prisco, Melville (Mary C. Azzaretto of counsel), for Viacom Outdoor Incorporated and New York Subway Advertising Co., Inc., respondents.

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Order, Supreme Court, Bronx County (Larry Schachner, J.), entered October 17, 2011, which, to the extent appealed from,

denied the City's cross motion for summary judgment dismissing the complaint and granting its third party claims for contractual defense and indemnification against Viacom Outdoor Incorporated and Shelter Express Corp., unanimously affirmed, without costs.

Plaintiff allegedly slipped and fell on snow that remained in a City-owned bus shelter six days following a snow storm. The City, generally responsible for all snow removal on public property, had contracted this obligation out to third-party defendant Viacom Outdoor, Inc., which in turn had contracted it out to defendant/third-party defendant Shelter Express Corp.

The record shows that approximately 10.4 inches of snow fell on January 27 and 28, 2004. On January 28, 2004, Shelter Express, as contractually required, conducted snow removal at the bus shelter. However, on January 29, 2004, the City undertook additional snow removal. When Shelter Express returned to the scene the morning of February 3, 2004, prior to plaintiff's accident, it did not conduct any additional snow removal. Accordingly, a question of fact exists concerning whether the City's intervening affirmative act of snow removal, if done negligently, was a proximate cause of plaintiff's accident (see *e.g. San Marco v Village/Town of Mount Kisco*, 16 NY3d 111 [2010]).

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

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED: FEBRUARY 28, 2013

  
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*Human Rights*, 83 AD3d 1159, 1163 [3d Dept 2011]). Contrary to plaintiff's contention that she was terminated on April 26, 2004, the record shows that she was not actively working after that date and was effectively on unpaid leave while engaging in an interactive process with defendant (see *Jacobsen v New York City Health & Hosps. Corp.*, 97 AD3d 428, 431-432 [1st Dept 2012]).

Plaintiff's claim that defendant subjected her to adverse employment action in retaliation for her requests for reasonable accommodation is unavailing. Under both New York State and New York City Human Rights Laws, a request for reasonable accommodation is not a protected activity for purposes of a retaliation claim (see *McKenzie v Meridian Capital Group, LLC*, 35 AD3d 676, 677-678 [2d Dept 2006]).

Defendant's statements that it would fire her were not so pervasive as to establish a hostile work environment (see *Ferrer v New York State Div. of Human Rights*, 82 AD3d 431 [1st Dept 2011]). Nor does plaintiff's contention that she was transferred to an assignment, which she perceived to be less desirable, establish a claim of hostile work environment (see *Bazile v City of New York*, 215 F Supp 2d 354, 361 [SD NY 2002], *affd* 64 Fed Appx 805 [2d Cir 2003]).

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

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

ENTERED: FEBRUARY 28, 2013

  
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Tom, J.P., Sweeny, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

9409           In re Errol S.,  
                  Petitioner-Respondent,

-against-

                  Shelidah D.,  
                  Respondent-Appellant.

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Geoffrey P. Berman, Larchmont, for appellant.

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of  
counsel), for respondent.

Leslie S. Lowenstein, Woodmere, attorney for the child Dante S.

Michael S. Bromberg, Sag Harbor, attorney for the child Jatai S.

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Order, Family Court, New York County (Marva A. Burnett,  
Referee), entered on or about September 1, 2011, which granted  
the father's petition to modify an order of joint custody and  
awarded sole custody of the children to him, with visitation to  
respondent mother, unanimously affirmed, without costs.

Pursuant to the prior order of the Family Court, the parties  
shared joint custody of their two children, with primary physical  
custody to the mother, who resides in Mount Vernon, with liberal  
visitation to the father, who resides in Manhattan.

Subsequently, the father brought the instant proceeding seeking  
sole custody of the children based on a change in circumstances,  
namely, that the mother was not meeting the children's basic

hygiene and medical needs, and he had safety concerns regarding their school commute.

There is a sound and substantial basis in the record for the Referee's credibility determinations (see *Matter of Frank M. v Donna W.*, 44 AD3d 495, 495-496 [1<sup>st</sup> Dept 2007]; *St Clement v Casale*, 29 AD3d 367, 368 [1<sup>st</sup> Dept 2006]). In particular, the mother's testimony regarding the children's medical needs was contradicted not only by the father, but by the social worker and her children, as well as the children's dentist, who informed the social worker that he had advised the mother one child had "rampant cavities." The mother did nothing until the Referee ordered her to take the child to the dentist. Similarly, while she claimed that the children never traveled to school unaccompanied by an adult, the children themselves told the social worker otherwise.

The record also supports the Referee's determination that the father has provided a stable home for the children and has sought to get them adequate medical attention and meet their educational needs. While the father is unemployed, it has not hindered his ability to adequately care for the children. In contrast, the mother, who is employed, was consistently unable to tend to the children's health and safety concerns (see *Matter of Blerim M. v Racquel M.*, 94 AD3d 562 [1<sup>st</sup> Dept 2012]).

The attorneys for both children favor affirming the Referee's determination, as both children seem to be well cared for and are satisfied with their living arrangements with the father (see *Matter of Osbourne S. v Regina S.*, 55 AD3d 465, 466 [1<sup>st</sup> Dept 2008], *lv dismissed* 13 NY3d 782 [2009]).

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED: FEBRUARY 28, 2013

  
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within the clerk's authority as a speaking agent on behalf of defendant (see *Tyrrell v Wal-Mart Stores*, 97 NY2d 650 [2001]; *Loschiavo v Port Auth of N.Y. & N.J.*, 58 NY2d 1040 [1983]). The error in admitting the statement was not harmless under the circumstances presented.

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

ENTERED: FEBRUARY 28, 2013

  
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746 A2d 244, 254 [Del 2000]), since he failed to address this issue in his appellate briefs. We note, however, that the motion court correctly found that plaintiff failed to set forth particularized facts to show that the directors were not independent or could be subject to liability for decisions beyond the scope of the business judgment rule.

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

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

ENTERED: FEBRUARY 28, 2013

  
CLERK

Tom, J.P., Sweeny, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

9412 Maud Rios, Index 101470/05  
Plaintiff-Respondent,

-against-

New York City Transit Authority,  
Defendant-Appellant.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Lottie E. Wilkins, J.), entered on or about December 20, 2011,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated February 7, 2013,

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

ENTERED: FEBRUARY 28, 2013



CLERK

Tom, J.P., Sweeny, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

9413-

Index 302534/08

9414-

9414A Constantine Spathis,  
Plaintiff-Respondent,

-against-

Alina Dulimof-Spathis,  
Defendant-Appellant.

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Alina Dulimof, appellant pro se.

Lawrence H. Bloom, New York, for respondent.

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Judgment, Supreme Court, New York County (Marilyn T. Sugarman, Special Referee), entered August 24, 2011, dissolving the parties' marriage and, inter alia, ordering plaintiff to pay pendente lite maintenance arrears of \$25,500 over a period of nine months after entry of judgment, awarding plaintiff \$49,087.05 as and for a distributive award, to be paid by defendant over 18 months after entry of judgment, and denying counsel fee awards to both parties, unanimously modified, on the law and the facts, to: 1) substitute the sum of \$31,750 for the amount of maintenance arrears; 2) substitute the sum of \$9,137.23 for the distributive award to plaintiff; 3) order plaintiff to transfer half of his Partsearch shares to defendant, and otherwise affirmed, without costs. Appeal from order, same court and Special Referee, entered May 31, 2011, unanimously dismissed,

without costs, as subsumed in the appeal from the judgment. Order, same court and Special Referee, entered April 26, 2012, which denied defendant's posttrial motion, unanimously affirmed, without costs, insofar as it dismissed the motion on procedural grounds.

The court correctly determined that defendant was responsible for a portion of plaintiff's tax liability incurred during the marriage (see *Capasso v Capasso*, 129 AD2d 267 [1<sup>st</sup> Dept 1987], *lv denied, dismissed* 70 NY2d 988 [1988]). The court also providently exercised its discretion in finding that plaintiff's payments for his mother's care and for the mortgage on his mother's house were not a waste of marital assets (see *Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 420-421 [2009]; *Azizo v Azizo*, 51 AD3d 438 [1<sup>st</sup> Dept 2008]).

The court correctly found that plaintiff's interest in his business - CE Interactive - could not be distributed because the court-appointed forensic accountant found that the business had no value.

The court correctly found that defendant could not be awarded a portion of the appreciation in the value of the marital apartment, which was plaintiff's separate property, because defendant failed to demonstrate that the property in question increased in value (see *Embury v Embury*, 49 AD3d 802, 804 [2nd

Dept 2008])). Neither party submitted expert appraisals or testimony regarding the apartment (*see Burgio v Burgio*, 278 AD2d 767 [3rd Dept 2000]).

However, defendant should have been awarded half of the mortgage payments made on the apartment with marital funds. Indeed, when marital funds are used to pay off separate liabilities or to increase the value of separate property, "a court has the authority to effectively recoup [such] marital funds . . . and to distribute such funds to the parties in accordance with Domestic Relations Law § 236(B)(5)(c)" when equity warrants such recoupment (*Micha v Micha*, 213 AD2d 956, 957 [3rd Dept 1995]; *Carr v Carr*, 291 AD2d 672 [3rd Dept 2002]; *Mahoney-Buntzman*, 12 NY3d at 421). Accordingly, we have reduced plaintiff's distributive award by \$38,829.42, which is equivalent to half the marital funds used to make mortgage payments on plaintiff's apartment during the marriage.

At trial, defendant submitted evidence that she had incurred medical debt of \$2,240.80 during the marriage. Accordingly, we have also reduced plaintiff's distributive award by half that amount or \$1,120.40.

The evidence also established that plaintiff had Partsearch stock options which he received prior to the marriage, and were thus separate property (*see Wechsler v Wechsler*, 58 AD3d 62,

78-79 [1st Dept 2008], *appeal dismissed* 12 NY3d 883 [2009]).

Plaintiff exercised those options during the marriage. The evidence at trial showed that \$98,268.80 was transferred into the parties' joint checking account from an unknown source. Then, a check from the joint account was made payable to Partsearch in the amount of \$99,656.25 to purchase those shares.

The evidence thus demonstrated that the stock shares were purchased using marital funds from the parties' joint account. Plaintiff failed to demonstrate that the stock was not purchased with marital funds (*see Popowich v Korman*, 73 AD3d 515, 516 [1st Dept 2010]) or to overcome the presumption that monies commingled with marital funds are marital property (*see Pullman v Pullman*, 176 AD2d 113, 114 [1<sup>st</sup> Dept 1991]).

Plaintiff also failed to provide the court-appointed forensic expert with sufficient information to value his stock options at the time of the marriage or the present value of the Partsearch shares, and thus plaintiff cannot be credited in the amount of the value as of the date of the marriage of his right to acquire the shares of stock (*see Wechsler v Wechsler*, 58 AD3d at 78-79). Nor can the value of the shares be distributed since the same is unknown. In such circumstances, it is necessary and appropriate to resolve the issue by ordering an in-kind distribution of the shares, and we have modified the judgment

accordingly.

The trial court providently exercised its discretion in denying maintenance. “[I]t is well settled that the amount and duration of maintenance is a matter committed to the sound discretion of the trial court, and every case must be determined on its own unique facts” (*Wortman v Wortman*, 11 AD3d 604, 606 [2004]). Defendant was awarded pendente lite maintenance for longer than the length of this short marriage. She was also only 44 years old and was capable of becoming gainfully employed.

However, the court improperly calculated the amount of maintenance arrears. The evidence was that plaintiff failed to pay 17 months of temporary maintenance (8 months between October 2010 and May 2011, and 9 months prior to October 2010). The amount of temporary maintenance was \$2,250 per month and plaintiff made a payment of \$6,500 in September 2010 towards his arrears. Thus, the correct amount of the arrears is \$31,750.

The court providently exercised its discretion in denying defendant an award of counsel fees (see *Azizo*, 51 AD3d at 440-441). The court found that both parties had engaged in dilatory tactics and had caused the large expenditure of counsel fees. The court also providently exercised its discretion in denying defendant’s request for sanctions (see *Tag 380, LLC v Ronson*, 51 AD3d 471 [1st Dept 2008]).

The court properly denied defendant's second posttrial motion as improper pursuant to CPLR 4406. In addition, the motion was improper because it was brought more than 15 days after the trial (see CPLR 4405).

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

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

ENTERED: FEBRUARY 28, 2013

A handwritten signature in black ink, appearing to read "Susan R. Jones", is written over a horizontal line.

CLERK



defendants offer a meritorious defense to the specific allegations of asset transfers made with the intent to frustrate plaintiffs' ability to recover on the previously entered judgment.

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

ENTERED: FEBRUARY 28, 2013

  
CLERK



Mazzarelli, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

8640- Index 113240/09  
8641       Cosmetics Plus Group, Ltd., et al.,  
              Plaintiffs-Appellants,

-against-

Paul Traub, et al.,  
Defendants-Respondents.

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Martin J. Rubenstein, Staten Island, for appellants.

Hinshaw & Culbertson, LLP, New York (Richard Supple of counsel),  
for respondents.

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Judgment, Supreme Court, New York County (Judith J. Gische, J.), entered September 30, 2011, affirmed, with costs. Appeal from order, same court and Justice, entered August 5, 2011, dismissed, without costs, as subsumed in the appeal from the judgment.

Opinion by Mazzarelli, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzairelli, J.P.  
John W. Sweeny, Jr.  
Karla Moskowitz  
Dianne T. Renwick  
Helen E. Freedman, JJ.

8640-8641  
Index 113240/09

x

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Cosmetics Plus Group, Ltd., et al.,  
Plaintiffs-Appellants,

-against-

Paul Traub, et al.,  
Defendants-Respondents.

x

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Plaintiffs appeal from the judgment of the Supreme Court, New York County (Judith J. Gische, J.), entered September 30, 2011, dismissing the complaint pursuant to an order, same court and Justice, entered August 5, 2011, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion for summary judgment on their causes of action for negligence and legal malpractice, breach of fiduciary duty, and violation of Judiciary Law § 487, and granted defendants' cross motion for summary judgment dismissing said claims, and from the aforesaid order.

Martin J. Rubenstein, Staten Island, for appellants.

Hinshaw & Culbertson, LLP, New York (Richard Supple of counsel), for respondents.

MAZZARELLI, J.P.

In August 2001, plaintiffs, business entities that operated retail stores and their principals, retained defendant law firm Traub, Bonaquist & Fox, LLP (TBF) to commence a Chapter 11 bankruptcy proceeding in the Southern District of New York. One month later, two of the stores were destroyed in the terrorist attack at the World Trade Center. Plaintiffs retained special counsel to bring an adversary action in the bankruptcy court against their insurer, which refused to pay a claim under a business interruption policy. The adversary action settled on January 7, 2008, for the sum of \$350,000, subject to the approval of the bankruptcy court. On February 26, 2008, the bankruptcy court issued an order approving the settlement. The approved settlement agreement provided that the proceeds would be delivered to plaintiffs in care of TBF. On March 6, 2008, the proceeds were delivered to Dreier LLP, the firm to which individual defendants Traub and Fox had moved their practice in August 2006. The funds were deposited into Dreier LLP's client trust escrow account number 5966 (the 5966 account). Unbeknownst at the time to plaintiffs, Traub and Fox or apparently anyone else, Marc Dreier, the sole equity owner of his eponymous law firm, was actively engaged in a Ponzi scheme which involved the sale of fraudulent notes. Much of the money entrusted to Marc

Dreier by the defrauded investors was deposited by him into the 5966 account.

Defendants could not release the escrowed funds to their clients until the bankruptcy case was formally dismissed. They sought a "structured dismissal" of the case, negotiating with the creditors' committee and the U.S. trustee as to when and how the various interested parties would be paid by the estate.

Defendants had advised plaintiffs that winding up the estate could "take some time." On September 26, 2008, after agreement with all of the necessary parties had been reached, Fox submitted a motion to the bankruptcy court to approve the voluntary dismissal of the bankruptcy proceeding. The bankruptcy court approved the dismissal in an order dated October 30, 2008. The order provided, in relevant part, for distribution of the cash held for plaintiffs within 15 days, with U.S. trustee fees being paid first, administrative expenses in the amount of \$61,972.94 second, and all remaining cash to be paid to the secured creditors<sup>1</sup> in partial satisfaction of the secured claim.

Following the bankruptcy dismissal order, Fox distributed

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<sup>1</sup> At some point during the bankruptcy, the individual plaintiffs took an assignment of the entities' debts from their secured creditors, thereby entitling them to any funds in the bankruptcy estate that would otherwise have been payable to the secured creditors.

\$61,972.94 from a TBF escrow account<sup>2</sup> to pay the administrative fees, which largely consisted of its own legal fees. On December 2, 2008, after reconciliation of outstanding accounts with the U.S. trustee had been finalized, \$3,475 was paid out of the TBF escrow account to the U.S. trustee in full satisfaction of fees. The remaining cash in the TBF escrow account belonged to plaintiffs, and was paid to them. On the same date, Fox sent an internal email to Dreier LLP accounting personnel requesting that a check payable to plaintiffs for \$350,000 be drawn from the 5966 account and forwarded to Fox for delivery to plaintiffs.

Unfortunately and coincidentally, Marc Dreier was arrested the next day. Upon learning of the arrest, Traub immediately repeated his demand that Dreier LLP transfer funds being held in the 5966 account to the TBF escrow account. Dreier LLP acceded to this request, and the next day wired \$441,145.58 to the TBF escrow account. These monies included the settlement payment to plaintiffs, as well as funds belonging to other clients of defendants. After the monies were transferred, Fox and Traub resigned from Dreier LLP and returned to TBF. On December 10, 2008, a federal district judge appointed a receiver for Dreier

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<sup>2</sup> This was a TBF escrow account that had been established before defendants Fox and Traub moved their practice to Dreier LLP.

LLP and restrained the firm's assets. On December 16, 2008, Dreier LLP filed for bankruptcy.

Plaintiffs demanded that the settlement funds being held in the TBF escrow account be released to them. In response, Fox sent them an email on December 19, 2008 asserting that while those funds were "presently . . . safe in the TB&F escrow account," they could not be released, because other former Dreier LLP clients were likely to assert competing claims for the monies that had been held in the 5966 account. Fox assured plaintiffs that he and Traub were "using every means and resource available to obtain the earliest possible release of the escrow monies." On February 27, 2009, following the directions of the Dreier LLP Trustee, TBF transferred its own escrow funds that had been in the Dreier LLP escrow account to the Dreier LLP bankruptcy trustee, to be held in a separate escrow account under the auspices of the bankruptcy court. Plaintiffs ended their attorney-client relationship with Fox and Traub shortly thereafter.

In this action plaintiffs assert causes of action for negligence and legal malpractice, breach of fiduciary duty, breach of Judiciary Law § 487, and violations of partnership law. They allege that the delay between approval of the settlement with their insurer and the dismissal of the bankruptcy proceeding

was inordinately long and that TBF should have acted more diligently in ensuring release of the funds. They also claim that TBF improperly violated the dismissal order by permitting more than 15 days to elapse before the settlement funds were disbursed. Plaintiffs further allege that after Dreier, LLP transferred the settlement funds from the 5966 account into the TBF escrow account, defendants wrongly decided to remit all of plaintiffs' funds to the Dreier LLP bankruptcy trustee. They claim that TBF should first have sought permission from the bankruptcy judge who had overseen plaintiffs' own bankruptcy proceeding.

Plaintiffs moved for summary judgment on the first three causes of action in their complaint. Defendants opposed the motion and cross-moved for summary judgment dismissing the complaint in its entirety. In support, defendants submitted an expert report from Francis G. Conrad, a retired bankruptcy court judge. Conrad opined that the time taken to negotiate and present the structured dismissal did not deviate from the standard of care and skill of an average New York bankruptcy attorney, and that defendants acted properly in transferring the funds to the Dreier Trustee. The expert also opined that distribution deadlines are arbitrarily established and routinely missed. Plaintiffs, in reply, did not attempt to rebut Conrad's

opinion by submitting an expert report of their own.

The court denied plaintiffs' summary judgment motion and granted defendants' motion dismissing the complaint in its entirety. The court dismissed the claim that defendants should have proceeded more quickly to obtain the dismissal of the bankruptcy case following the insurance settlement. It credited Fox's explanation as to why this took the time it did, as well as defendants' expert report that the time taken did not deviate from what can reasonably be expected in bankruptcy practice. With respect to the claim that defendants were negligent in failing to distribute the monies within the 15 days provided for in the dismissal order, the court noted that plaintiffs had failed to dispute defendants' representation that the U.S. trustee did not finalize the information necessary to be paid until early December 2008. The court held that defendants' failure to comply strictly with the time deadlines was not malpractice, as the delays were not attributable to any neglect by defendants.

With respect to the argument that defendants wrongfully transferred the settlement funds to the Dreier LLP bankruptcy trustee, the court found that this claim was premised upon a presumption that plaintiffs are indisputably entitled to the funds, whereas the ultimate resolution of that issue is subject

to the determination in the Dreier LLC bankruptcy proceeding. The court found that when the funds were given to defendants after December 3, 2008 by Dreier LLC, they were not to be distributed to plaintiffs, but to be held in escrow as subject to potential competing claims. The court cited the expert opinion that once the trustee requested a turnover of the funds, defendants had no reasonable basis to refuse the request. Noting that plaintiffs did not provide an expert opinion to the contrary, the court dismissed the malpractice claim.

The court also rejected plaintiffs' argument that defendants' expert report should not be considered because it was not in appropriate form, and found that there was no basis to discredit the expert opinion. The court held that the fact that defendants' "expert opinion is properly before the court and the plaintiff[s] have not proffered a contrary expert opinion, is a separate, independent basis for the granting of the cross motion and denying the motion in chief."

The court dismissed the claims for breach of fiduciary duty, finding them duplicative of the malpractice claims. Finally, the court dismissed the claims alleging that defendants violated Judiciary Law § 487, holding that there "is no evidence that any of the defendants actually did or intended to deceive the court," there "is no evidence that the bankruptcy proceeding was

willfully delayed in order for defendants to gain some personal advantage," and plaintiffs did not contradict defendants' showing that no delays were caused by their conduct. The court noted that while defendants paid themselves from the TBF escrow monies before they distributed the net proceeds of the estate to plaintiffs, that order of distribution and the amount of fees was approved by the bankruptcy court.

To prevail on a claim for legal malpractice, a plaintiff must demonstrate that the attorney failed to exercise that degree of care, skill and diligence commonly possessed by a member of the legal profession, and that this failure caused damages (see *AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]). The plaintiff must establish a "but for" relationship between the mal- or nonfeasance alleged and the damage sustained (see PJI 2:152; *Waggoner v Caruso*, 14 NY3d 874 [2010]). A lawyer seeking summary judgment dismissing a legal malpractice claim cannot satisfy its prima facie burden without providing an expert opinion that any or all of the foregoing elements were not met, so long as the subject matter is not within the ken of an ordinary person (see *Suppiah v Kalish*, 76 AD3d 829, 832 [1st Dept 2010]). At the same time, a plaintiff in a malpractice action cannot create an issue of fact without his or her own expert's submission rebutting defendant's expert's opinion (see *Orchard*

*Motorcycle Distribs., Inc. v Morrison Cohen Singer & Weinstein, LLP*, 49 AD3d 292, 293 [1st Dept 2008]).

With respect to whether defendants were responsible for the delay in the insurance settlement proceeds being released to plaintiffs, an expert opinion was necessary to explain whether defendants did everything within their control to ensure timely payment of the funds. The particular vagaries of how long it takes to procure the structured dismissal of a bankruptcy case are not within the usual knowledge of an ordinary person, nor are they purely a matter of bankruptcy law which the court could have determined without the benefit of an expert opinion (*compare Wo Yee Hing Realty Corp. v Stern*, 99 AD3d 58, 63 [1st Dept 2012] [expert opinion was not required where “the mechanics of the governing legal framework [of a “like-kind exchange” under Internal Revenue Code (26 USC) § 1031] [we]re undisputed, and the issue of proximate cause turn[ed] on the discrete factual question of whether plaintiff took the requisite actions to identify and purchase a suitable replacement property in the required time frame”]). Defendants’ expert’s report adequately shifted the burden to plaintiffs by explaining that defendants acted reasonably in seeking a structured dismissal of plaintiffs’ bankruptcy case, and that it was not unusual for it to have taken several months before a motion to dismiss the proceeding could

actually be presented to the bankruptcy judge. By failing to submit their own expert's report, plaintiffs failed to create an issue of fact whether the funds could have been paid out any earlier.

Defendants' expert also adequately explained that defendants' failure to ensure that the settlement funds were paid out within 15 days of dismissal of the bankruptcy case, as ordered by the bankruptcy judge, was not unreasonable under the circumstances. In any event, and as the expert noted, even if defendants could have somehow ensured the release of the settlement funds as early as plaintiffs claim was possible, the funds would have been subject to an avoidance action by the Dreier LLP bankruptcy trustee. That is because the funds would have been considered the property not of plaintiffs, but of the Dreier LLP bankruptcy estate. The Second Circuit Court of Appeals has expressly held that, whether or not a person whose assets were intermingled with the assets of victims of a Ponzi scheme could trace or isolate his or her assets, those assets were subject to pro rata distribution among all of the victims of the scheme (*see Securities & Exch. Comm. v Credit Bancorp., Ltd.*, 290 F3d 80, 88-89 [2d Cir 2002]). It matters not if, like here, a person whose assets were commingled with the proceeds of investors in the scheme was not an investor in the scheme

himself. Indeed, that argument has been made in the context of the Dreier LLP bankruptcy and been rejected (*see In re Dreier LLP*, 429 BR 112, 134-135 [SD NY 2010] [rejecting claim of Dreier client that, because he was not an investor in the Ponzi scheme and was therefore “uniquely situated,” the settlement monies being held for him in the 5966 account were not subject to pro rata distribution]).

By the same token, we reject plaintiffs’ argument that defendants should have sought permission from the bankruptcy judge who ordered release of the settlement funds to them before turning those funds over to the Dreier LLP bankruptcy trustee. In the face of the case law cited above, plaintiffs offer no compelling reason why that judge would have seen fit not to order defendants to comply with the Dreier LLP bankruptcy trustee’s request. Where the failure to perform an act alleged to constitute legal malpractice would have been futile, no claim against the attorneys can be maintained (*see Hefter v Citi Habitats, Inc.*, 81 AD3d 459 [1st Dept 2011]; *Schorsch v Moses & Singer LLP*, 60 AD3d 557 [1st Dept 2009]).

The cases which plaintiffs cite in arguing that the settlement funds became theirs at the time they were originally placed in the 5966 account, and so were outside the 90-day Dreier LLP bankruptcy preference avoidance window, are inapposite. In

*Carlson v Farmers Home Admin.* (744 F2d 621 [8th Cir 1984]), a bank, which had recovered a judgment against the debtor prior to his declaring bankruptcy, agreed to have the funds it recovered placed in escrow pending the debtor's appeal of the judgment. The court found that the transfer to the bank occurred at the time of the escrow, outside of the 90-day preference window, because the debtor retained only a contingent right to the funds. The fact that the event which triggered release of the funds occurred during the preference period was irrelevant. Similarly, in *In Re OPM Leasing Servs., Inc.* (46 BR 661 [SD NY 1985]), money was placed in escrow by the debtor, an equipment lessor, to secure its obligation to reimburse a lessee for a certain lease termination. By the same reasoning as *Carlson*, the bankruptcy trustee was found to have no right to recover the funds, even though the debtor's default on its reimbursement obligation, which triggered release of the escrow, occurred during the preference period.

What separates this case from the cases cited by plaintiffs is the nature of the escrow account in which the subject funds were placed. Because the 5966 account had been used by Marc Dreier to operate his Ponzi scheme, the settlement funds became part of the pool to be distributed on a pro rata basis with the victims of the fraud (see *Securities & Exch. Comm. v Credit*

*Bancorp.*, 290 F3d at 89-90). Accordingly, the analysis performed in *Carlson* and *OPM Leasing Servs.* as to when the funds became the property of the intended beneficiary of the funds is irrelevant. Further, contrary to plaintiffs' argument, it makes no difference that when defendants transferred the funds to the Dreier LLP bankruptcy trustee they had been transferred to the TBF escrow account and were no longer in the escrow account which Marc Dreier had used to perpetrate his Ponzi scheme. Plaintiffs do not dispute defendants' position that the funds were transferred into the TBF escrow account with the understanding that they would not be released to plaintiffs without prior approval by whoever was ultimately assigned the tasks of sorting out the various claims which were sure to be made against the Dreier LLP bankruptcy estate.

Finally, we find that the cause of action for breach of fiduciary duty was properly dismissed as duplicative of the legal malpractice claim. It arose out of the same facts as the legal malpractice claim and did not involve any damages that were separate and distinct from those generated by the alleged malpractice (see *Bernard v Proskauer Rose, LLP*, 87 AD3d 412, 416 [1st Dept 2011]; *Lusk v Weinstein*, 85 AD3d 445 [1st Dept 2011], *lv denied* 17 NY3d 709 [2011]). Dismissal of the Judiciary Law § 487 claim was also warranted, as it is unsupported by evidence of

an "chronic and extreme pattern of legal delinquency" (*Solow Mgt. Corp. v Seltzer*, 18 AD3d 399, 400 [1st Dept 2005], *lv denied* 5 NY3d 712 [2005]).

We have considered plaintiffs' remaining arguments and find them unavailing.

Accordingly, the judgment of the Supreme Court, New York County (Judith J. Gische, J.), entered September 30, 2011, to the extent appealed from as limited by the briefs, dismissing the complaint pursuant to an order, same court and Justice, entered August 5, 2011, which, denied plaintiffs' motion for summary judgment on their causes of action for negligence and legal malpractice, breach of fiduciary duty, and violation of Judiciary Law § 487, and granted defendants' cross motion for summary judgment dismissing said claims, should be affirmed, with costs. The appeal from the aforesaid order should be dismissed, without costs, as subsumed in the appeal from the judgment.

All concur.

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

ENTERED: FEBRUARY 28, 2013

  
CLERK