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Law Reporting Bureau

No. 22
June 3, 2026

NEW YORK OFFICIAL REPORTS

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COURT OF APPEALS NEW FILINGS

Preliminary Appeal Statements processed by the Court of Appeals Clerk's Office 5/1/26-5/7/26

Each week, the Clerk's Office prepares a list of recently-filed appeals, indicating short title, jurisdictional predicate, subject matter and key issues. Some of these appeals may not reach decision on the merits because of dismissal, on motion or sua sponte, or because the parties stipulate to withdrawal. Some appeals may be selected for review pursuant to the alternative procedure of Rules of the Court of Appeals (22 NYCRR) § 500.11. For those appeals that proceed to briefing in the normal course, the briefing schedule generally will be: appellant's brief to be filed within 60 days after the appeal was taken; respondent's brief to be filed within 45 days after the due date for the filing of appellant's brief; and a reply brief, if any, to be filed within 15 days after the due date for the filing of respondent's brief.

The Court welcomes motions for amicus curiae participation from those qualified and interested in the subject matter of these newly filed appeals. Please refer to Rules of the Court of Appeals (22 NYCRR) § 500.23 and direct any questions to the Clerk's Office.

For May 1, 2026 through May 7, 2026, the following preliminary appeal statements were filed:

BALL v NYSDOH (— AD3d —, 2026 NY Slip Op 02494):

APL-2026-00051

3rd Dept. App. Div. order of 4/23/26; reversal; sua sponte examination of whether a substantial constitutional question is directly involved in the order appealed from; **Constitutional Law—Whether the Seventh Amendment to the U.S. Constitution or article I, § 2 of the NY Constitution entitles plaintiff to a civil jury trial in his pending administrative revocation proceeding;** Supreme Court, Schoharie County, declared, among other things, that the Seventh Amendment to the U.S. Constitution entitles plaintiff to a civil jury trial in a pending administrative license revocation proceeding; App. Div. reversed, declared that neither the Seventh Amendment to the U.S. Constitution nor article I, § 2 of the NY Constitution entitles plaintiff to a civil jury trial in his pending administrative revocation proceeding, and granted the motion to dismiss the complaint.

MATTER OF KATONAH-LEWISBORO UFSD v NYSED/ MATTER OF MAHOPAC CSD v NYSED (243 AD3d 66):

APL-2026-00046/APL-2026-00047

3rd Dept. App. Div. orders of 7/17/25; reversal; leave to appeal granted by the Court of Appeals, 4/21/26; **Administrative Law—Whether the State Education Department violated its own complaint regulations by accepting and determining complaints pertaining to individuals over the age of 21 who were not "students with disabilities" as defined by the Education Law; whether the state must provide a free appropriate public education to students with dis-**

abilities until their 22nd birthdays under the Individuals with Disabilities Education Act even though the Education Law terminates a disabled student's entitlement to receive services at the end of the school year during which the student turns 21; whether the State Education Department exceeded its regulatory policymaking authority and engaged in improper legislating in violation of the separation of powers doctrine; Supreme Court, Albany County, granted petitioners' applications, in proceedings under CPLR article 78, to annul determinations of respondent State Education Department sustaining complaints against petitioners; App. Div. reversed and dismissed the petitions.

OPARAJI v TURKISH AIRLINES (2026 NY Slip Op 66220[U]):

APL-2026-00053

1st Dept. App. Div. order of 4/14/26; denial of motion; sua sponte examination of whether the order appealed from finally determines the action within the meaning of the Constitution and whether any jurisdictional basis exists for an appeal as of right; **Motions and Orders;** App. Div. denied plaintiff's motion for leave to appeal to the Appellate Division from orders of the Appellate Term, First Department, dated September 19, 2025 and November 21, 2025; granted defendant's motions to strike and remove certain of plaintiff's filings, enjoined plaintiff from filing further pleadings without the consent of court, and enjoined plaintiff from further filing any confidential documents; struck from the record and sealed certain of plaintiff's filings; and denied plaintiff's cross-motion for an order finding that defendant's motion was frivolous and for sanctions.

OSUAGWU v OSUAGWU (247 AD3d 1051):

APL-2026-00049

2nd Dept. App. Div. order of 3/18/26; affirmance; sua sponte examination of whether any jurisdictional basis exists for an appeal as of right; **Parent and Child—Whether defendant's constitutional rights were violated when plaintiff's motion to modify the judgment of divorce to permit plaintiff to relocate was granted;** Supreme Court, Rockland County, after a hearing, granted plaintiff's motion, in effect to modify the judgment of divorce so as to permit her to relocate; App. Div. affirmed.

MATTER OF VALENTIN v DANNHAUSER (2026 NY Slip Op 60200[U]):

APL-2026-00045

2nd Dept. App. Div. order of 1/7/26; dismissal; sua sponte examination of whether the order appealed from finally determines the action within the meaning of the Constitution and whether any jurisdictional basis exists for an appeal as of right; **Appeal—Dismissal;** App. Div., on the court's own motion, dismissed appeal from an order of Supreme Court, Kings County, dated December 4, 2025, and declined to grant leave to appeal.

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ATTORNEY AND CLIENT.

Disciplinary Proceedings.

Disbarment.—Pursuant to the reciprocal disciplinary provision of 22 NYCRR 1240.13, respondent was disbarred based upon orders of disbarment imposed upon him in Texas for failure to keep clients reasonably informed of the status of their matters despite reasonable requests for information; neglect of clients' matters, and upon termination of the representation, failure to take steps to the extent reasonably practicable to protect the clients' interests including surrendering papers and property to which the clients were entitled and refunding any unearned fees; improper settlement of a legal malpractice claim with a client; improper division of legal fees; and failure to properly supervise subordinate lawyers. Respondent associated with outside attorneys as a purported "virtual law office" within respondent's firm, and approved the use of retainer agreements which stated that clients were hiring respondent's firm and did not list the names of any other attorneys or law firms, nor did the agreements outline any division of legal fees. An aggravating factor that weighed in favor of the sanction of disbarment was respondent's failure to self-report the Texas disbarments and prior suspension, as well as his failure to report his reciprocal disbarments from the Bureau of Immigration Appeals and New Mexico Supreme Court to the Attorney Grievance Committee and/or to the Appellate Division, First Department.— *Matter of Hernandez*, 247 AD3d 121.

Public Censure.—Respondent attorney was guilty of professional misconduct stemming from her misdemeanor criminal contempt conviction for violating a protection from abuse order issued in her favor but requiring her to refrain from contact with her former domestic partner. A public censure—requested by consent of the parties pursuant to 22 NYCRR 1240.8 (a) (5)—was warranted in light of respondent's admitted misconduct, the total lack of malice in the contents of her text and email communications, and the mitigating and aggravating factors presented. Respondent had no prior disciplinary history; she fully cooperated with the Attorney Grievance Committee's (AGC) investigation; her misconduct arose out of the mistaken view that she as the protected party was allowed to send communications; and she expressed remorse for her conduct, conviction, and failure to report her conviction to the AGC, an aggravating factor. In addition, respondent submitted two references attesting to her good character.— *Matter of Malig*, 247 AD3d 113.

Resignation.—Inasmuch as resignor's proffered resignation complied with the requirements of 22 NYCRR 1240.10 in that his affidavit attested that the resignation was submitted voluntarily, without coercion or duress, and with full awareness of the consequences, and he acknowledged that the Court's approval of the application would result in the entry of an order disbarring respondent, and that he could not successfully defend himself against allegations of professional misconduct if they were predicated upon the matters under investigation concerning his handling of funds in his Interest on Lawyer Account, resignor's resignation was accepted and he was immediately disbarred.— *Matter of Nussbaum*, 247 AD3d 128.

Resignation.—Inasmuch as resignor's proffered resignation complied with the requirements of 22 NYCRR 1240.10 in that his affidavit attested that the resignation was submitted voluntarily, without coercion or duress, and with full awareness of the consequences, and he acknowledged that the Court's approval of the

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application would result in the entry of an order disbarring respondent, and that he could not successfully defend himself against charges of professional misconduct if they were predicated upon the matters under investigation, including that he failed to answer to a grievance complaint in Connecticut, failed to submit to an audit, and failed to attend three hours of continuing legal education, which resulted in respondent's resignation from the practice of law in Connecticut, resignor's resignation was accepted and he was immediately disbarred.— *Matter of Bennett*, 247 AD3d 117.

Suspension.—Respondent attorney failed to seek the lawful objectives of a client through reasonably available means, failed to act with reasonable diligence and promptness, failed to comply in a prompt manner with a client's reasonable requests for information, commingled personal funds with client funds, and engaged in conduct that adversely reflected on his fitness as a lawyer (Rules of Prof Conduct [22 NYCRR 1200.0] rule 1.1 [c] [1]; 1.3 [a], [b]; 1.4 [a] [4]; 1.15 [a]; 8.4 [d], [h]). Under the totality of the circumstances, including respondent's admitted misconduct, which caused harm or prejudice to several clients, and his failure to cooperate in the grievance investigation or participate in the disciplinary proceeding, which evinced a disregard for his fate as an attorney, respondent was suspended from the practice of law for a period of three years.— *Matter of Barnes*, 247 AD3d 132.

WITHDRAWAL FROM REPRESENTATION.

Hoffman & Hoffman LLC v Smith, 88 Misc 3d 1267(A), 2026 NY Slip Op 50659(U).

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NEW YORK STATE HUMAN RIGHTS LAW.

Access to Educational Facilities.—In an action against the state and city actors responsible for overseeing New York City's public education system, plaintiffs failed to state a claim that defendants' practices and policies denied Black and Latino students access to educational facilities in violation of the New York State Human Rights Law (Executive Law § 296 [4]). Initially, the complaint did not sufficiently allege discriminatory intent. Assuming, without deciding, that disparate educational outcomes alone could in some circumstances sustain such a claim, the complaint failed to include allegations by individual students who were denied admission to a particular school or school program by an identified screening mechanism that was alleged to have a disparate impact, or that a specific screening mechanism lacked validity in predicting the ability of students to thrive in the curriculum offered at any particular screened school. Plaintiffs' conclusory allegation that Black and Latino students would not have been excluded but for the discriminatory admissions testing was insufficient even under the liberal standard applied on a motion to dismiss.— *IntegrateNYC, Inc. v State of New York*, 45 NY3d 176.

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system, plaintiffs failed to state a claim that defendants' policies and practices deprived Black and Latino students of a sound basic education in contravention of the Education Article of the State Constitution (NY Const, art XI, § 1). The more traditional allegations concerning the condition of facilities and tools for learning at unscreened schools were insufficient to state a cause of action for the fundamental reason that they did not allege any district-wide failure. It was unclear whether the alleged deficiencies extended to a few schools or were district-wide, and the complaint did not provide any benchmarks from which to assess these allegations. Plaintiffs also failed to establish a causal connection between the deficient outputs and any failure of defendants to provide resources—financial or otherwise—to the unscreened schools. Finally, plaintiffs' novel input allegations regarding curriculum content and diversity hiring practices were also incapable of supporting their Education Article claim. Plaintiffs offered nothing to support the proposition that "disrupt[ing] the 'complex system of biases and structural inequities in society' " through culturally sensitive curricula or faculty is a component of the Constitution's guarantee of a sound basic education. At best, plaintiffs' novel input allegations represented a policy disagreement rather than a gross and glaring inadequacy in the education being provided.— *IntegrateNYC, Inc. v State of New York*, 45 NY3d 176.

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Automatic Discovery—Good Faith and Due Diligence.— *People v Robinson*, 88 Misc 3d 1267(A), 2026 NY Slip Op 50660(U).

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REPORTS OF CASES

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COURT OF APPEALS

OF THE

STATE OF NEW YORK

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[— NE3d —, — NYS3d —]

IntegrateNYC, Inc., et al., Respondents, v State of New York et al., Appellants, and Parents Defending Education, Intervenor-Appellant.

Argued September 10, 2025; decided October 23, 2025

PROCEDURAL SUMMARY

Appeal, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that Court, entered May 2, 2024. The Appellate Division modified, on the law, an order of the Supreme Court, New York County (Frank P. Nervo, J.; op 2022 NY Slip Op 34736[U] [2022]), which had granted defendants' and intervenor-defendant's motions to dismiss the amended complaint on the ground that it did not present a justiciable controversy and otherwise denied the remaining relief, as academic. The modification consisted of (1) denying the motions on the ground of nonjusticiability, and (2) denying defendants' and intervenor-defendant's motions to otherwise dismiss the first and second causes of action and that portion of the third cause of action against defendants Bill de Blasio, the New York City Department of Education, and Meisha Porter based on the denial of the use of the City's facilities. The following question was certified by the Appellate Division: "Was the order of this Court, which modified the Order of the Supreme Court, New York County, properly made?"

IntegrateNYC, Inc. v State of New York, 228 AD3d 152, modified.

HEADNOTES

Constitutional Law — Education Article — Sound Basic Education — Failure to State Claim

1. In an action against the state and city actors responsible for overseeing New York City's public education system, plaintiffs failed to state a claim that defendants' policies and practices deprived Black and Latino students of a sound basic education in contravention of the Education Article of the State Constitution (NY Const, art XI, § 1). The more traditional allegations concerning the condition of facilities and tools for learning at unscreened schools were insufficient to state a cause of action for the fundamental reason that they did not allege any district-wide failure. It was unclear whether the alleged deficiencies extended to a few schools or were district-wide, and the complaint did not provide any benchmarks from which to assess these allegations. Plaintiffs also failed to establish a causal connection between the deficient outputs and any failure of defendants to provide resources—financial or otherwise—to the unscreened schools. Finally, plaintiffs' novel

input allegations regarding curriculum content and diversity hiring practices were also incapable of supporting their Education Article claim. Plaintiffs offered nothing to support the proposition that "disrupt[ing] the 'complex system of biases and structural inequities in society' " through culturally sensitive curricula or faculty is a component of the Constitution's guarantee of a sound basic education. At best, plaintiffs' novel input allegations represented a policy disagreement rather than a gross and glaring inadequacy in the education being provided.

Constitutional Law — Equal Protection of Laws — Standardized Testing Policies — Discriminatory Intent

2. In an action against the state and city actors responsible for overseeing New York City's public education system, plaintiffs failed to state a claim that defendants' standardized testing policies for admission to prime educational opportunities denied Black and Latino students the equal protection of the laws (NY Const, art I, § 1). To state an equal protection claim based on disproportionate impact of a facially neutral action or policy, a plaintiff must show proof of racially discriminatory intent or purpose. Allegations of disparate impact and foreseeability, standing alone, are insufficient to survive a motion to dismiss even where refusal to act in response to that impact is alleged. Therefore, to make out an equal protection violation, plaintiffs' claim of intent would have to be grounded in the passage of the 1971 Hecht-Calandra Act (L 1971, ch 1212) (HCA), which mandated an admissions test for certain specialized high schools in New York City. At most, the legislative history suggested that the HCA was passed with knowledge of, or in spite of, the adverse affects that the version of the test then being administered had upon an identifiable group. Ultimately, the allegations of foreseeable disparate impact and the fragments of legislative history showing awareness of the disparate impact of the test that was administered in 1971 were insufficient to establish discriminatory intent.

Civil Rights — New York State Human Rights Law — Access to Educational Facilities

3. In an action against the state and city actors responsible for overseeing New York City's public education system, plaintiffs failed to state a claim that defendants' practices and policies denied Black and Latino students access to educational facilities in violation of the New York State Human Rights Law (Executive Law § 296 [4]). Initially, the complaint did not sufficiently allege discriminatory intent. Assuming, without deciding, that disparate educational outcomes alone could in some circumstances sustain such a claim, the complaint failed to include allegations by individual students who were denied admission to a particular school or school program by an identified screening mechanism that was alleged to have a disparate impact, or that a specific screening mechanism lacked validity in predicting the ability of students to thrive in the curriculum offered at any particular screened school. Plaintiffs' conclusory allegation that Black and Latino students would not have been excluded but for the discriminatory admissions testing was insufficient even under the liberal standard applied on a motion to dismiss.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

Am Jur 2d Civil Rights §§ 12–13, 353; Am Jur 2d Constitutional Law § 931; Am Jur 2d Schools §§ 248–250.

McKinney's, Executive Law § 296 (4); NY Const, art I, § 11; NY Const, art XI, § 1.

NY Jur 2d Civil Rights §§ 28–29, 189; NY Jur 2d Constitutional Law §§ 3, 302, 364–365; NY Jur 2d Schools, Universities, and Colleges § 439.

ANNOTATION REFERENCES

De facto segregation of races in public schools. 11 ALR3d 780.

Discrimination in provision of municipal services or facilities as civil rights violation. 51 ALR3d 950.

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POINTS OF COUNSEL

Letitia James, Attorney General, New York City (*Mark S. Grube, Barbara D. Underwood* and *Ester Murdukhayeva* of counsel), for State of New York and others, appellants. I. Plaintiffs fail to state a New York Constitution Education Article claim against defendants State of New York, the Governor of the State of New York, the New York State Board of Regents, the New York State Education Department, and the New York State Commissioner of Education. (*New York Civ. Liberties Union v State of New York*, 4 NY3d 175; *Campaign for Fiscal Equity v State of New York*, 86 NY2d 307; *Silano v Sag Harbor Union Free School Dist. Bd. of Educ.*, 42 F3d 719; *Alliance to End Chickens as Kaporos v New York City Police Dept.*, 32 NY3d 1091; *Davids v State of New York*, 159 AD3d 987.) II. Plaintiffs fail to state an equal protection claim against defendants State of New York, the Governor of the State of New York, the New York State Board of Regents, the New York State Education Department, and the New York State Commissioner of Education. (*Village of Willowbrook v Olech*, 528 US 562; *Myers v Schneiderman*, 30 NY3d 1; *Matter of C.K. v Tahoe*, 211 AD3d 1; *Shaw v Reno*, 509 US 630; *Arlington Heights v Metropolitan Housing Development Corp.*, 429 US 252.)

Muriel Goode-Trufant, Corporation Counsel, New York City (*Jeremy W. Shweder*, *Philip W. Young, Richard Dearing* and

Devin Slack of counsel), for Bill de Blasio and others, appellants. I. Plaintiffs' New York Constitution Education Article claim is based on a novel and aspirational theory that goes far beyond the definition of "sound basic education." (*Board of Educ., Levittown Union Free School Dist. v Nyquist*, 57 NY2d 27; *Aristy-Farer v State of New York*, 29 NY3d 501; *Paynter v State of New York*, 100 NY2d 434; *Donohue v Copiague Union Free School Dist.*, 47 NY2d 440; *New York Civ. Liberties Union v State of New York*, 4 NY3d 175.) II. Plaintiffs' allegations are insufficient to state an equal protection cause of action. (*Matter of Walton v New York State Dept. of Correctional Servs.*, 13 NY3d 475; *Myers v Schneiderman*, 30 NY3d 1; *Hayden v County of Nassau*, 180 F3d 42; *Arlington Heights v Metropolitan Housing Development Corp.*, 429 US 252; *People v Aviles*, 28 NY3d 497.) III. Plaintiffs' allegations are also insufficient to state a cause of action under the State Human Rights Law. (*Godfrey v Spano*, 13 NY3d 358; *Brown v Einstein Coll. of Medicine of Yeshiva Univ.*, 172 AD2d 197; *Matter of Sontag v Bronstein*, 33 NY2d 197; *Levin v Yeshiva Univ.*, 96 NY2d 484; *Margerum v City of Buffalo*, 24 NY3d 721.)

Consovoy McCarthy PLLC, Arlington, Virginia (*Paul R. Draper*, admitted pro hac vice, *J. Michael Connolly*, admitted pro hac vice, and *James F. Hasson*, admitted pro hac vice, of counsel), and *Dennis J. Saffran*, Douglaston, for Parents Defending Education, intervenor-appellant. I. Plaintiffs' claims are not justiciable. (*Roberts v Health & Hosps. Corp.*, 87 AD3d 311; *Campaign for Fiscal Equity, Inc. v State of New York*, 8 NY3d 14; *Klostermann v Cuomo*, 61 NY2d 525; *Price v New York City Bd. of Educ.*, 51 AD3d 277; *Ware v Valley Stream High School Dist.*, 75 NY2d 114.) II. Dismissal was appropriate for the additional reason that plaintiffs failed to state any claim upon which relief could be granted. (*Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186; *Matter of American Dental Coop. v Attorney-General of State of N.Y.*, 127 AD2d 274; *Matter of Richardson v Fiedler Roofing*, 67 NY2d 246; *Chambers v Old Stone Hill Rd. Assoc.*, 303 AD2d 536; *Reform Educ. Fin. Inequities Today [R.E.F.I.T.] v Cuomo*, 86 NY2d 279.)

Public Counsel, Los Angeles, California (*Mark D. Rosenbaum*, admitted pro hac vice, and *Amanda Mangaser Savage*, admitted pro hac vice, of counsel), *Sidley Austin LLP*, New York City (*Melissa Colón-Bosolet, Eamon P. Joyce, Karma O. Farra, Alyssa M. Hasbrouck, Ernesto R. Claeyssen* and *Natalie*

T. Jean of counsel) and Washington, D.C. (*Carter G. Phillips*, admitted pro hac vice, of counsel), and *Peer Defense Project*, New York City (*Sarah Medina Camiscoli* of counsel), for respondents. I. The Appellate Division correctly held that plaintiffs' claims are justiciable. (*Campaign for Fiscal Equity v State of New York*, 100 NY2d 893; *Board of Educ., Levittown Union Free School Dist. v Nyquist*, 57 NY2d 27; *James v Board of Educ. of City of N.Y.*, 42 NY2d 357; *Klostermann v Cuomo*, 61 NY2d 525; *Campaign for Fiscal Equity, Inc. v State of New York*, 8 NY3d 14.) II. The Appellate Division correctly held that each of plaintiffs' causes of action states a claim. (*Paynter v State of New York*, 100 NY2d 434; *Aristy-Farer v State of New York*, 29 NY3d 501; *Mirand v City of New York*, 84 NY2d 44; *New York Civ. Liberties Union v State of New York*, 4 NY3d 175; *Davids v State of New York*, 159 AD3d 987.)

New York Civil Liberties Union Foundation, New York City (*Stefanie D. Coyle, Emma Curran Donnelly Hulse, Arthur Eisenberg* and *Molly K. Biklen* of counsel), and *Education Law Center*, Newark, New Jersey (*Wendy Lecker* of counsel), for New York Civil Liberties Union and another, amici curiae. I. The plaintiffs-respondents have stated a claim under article XI, § 1 of the New York State Constitution. (*New York Civ. Liberties Union v State of New York*, 4 NY3d 175; *Paynter v State of New York*, 100 NY2d 434; *Matter of Bezio v New York State Off. of Mental Retardation & Dev. Disabilities*, 62 NY2d 921; *Caulfield v Board of Ed. of City of New York*, 632 F2d 999; *Brown v Board of Education*, 347 US 483.) II. The plaintiffs-respondents have stated an equal protection claim under article I, § 11 of the New York State Constitution. (*Brown v State of New York*, 89 NY2d 172; *Village of Belle Terre v Boraas*, 416 US 1; *City of White Plains v Ferraioli*, 34 NY2d 300; *Alevy v Downstate Med. Ctr. of State of N.Y.*, 39 NY2d 326; *Regents of Univ. of Cal. v Bakke*, 438 US 265.)

New York City Bar Association, New York City (*Evan Henley, Kayla Morin, Jonathan Glater, Laura Barbieri, Particia Jendraszek, Melissa Rooker* and *Chantelle Williams* of counsel), for New York City Bar Association, amicus curiae. I. A disparate impact discrimination claim is consistent with the plain meaning, legislative intent, and judicial interpretation of the New York State Human Rights Law. (*Matter of Lynch v City of New York*, 40 NY3d 7; *Matter of Sontag v Bronstein*, 33 NY2d 197; *Matter of Sanbonmatsu v Boyer*, 45 AD2d 249, 39 NY2d 914; *State Div. of Human Rights v Kilian Mfg. Corp.*, 35 NY2d 201;

People v New York City Tr. Auth., 59 NY2d 343.) II. To make out a claim of disparate impact discrimination, the plaintiffs need simply allege a *policy or practice*, a *disparity* adverse to members of a protected class, and *causation* linking the two. (*Chin v Port Auth. of N.Y. & N.J.*, 685 F3d 135.) III. The court below correctly found the plaintiffs' claims to be justiciable.

Center for Educational Equality, Teachers College, Columbia University, New York City (*Michael A. Rebell* of counsel), and *Harvard Law School*, Cambridge, Massachusetts (*Michael Gregory* of counsel), for Center for Educational Equality, Teachers College, Columbia University, amicus curiae. I. The opportunity for a sound basic education includes adequate preparation for civic participation. (*Aristy-Farer v State of New York*, 29 NY3d 501; *Paynter v State of New York*, 100 NY2d 434; *New York Civ. Liberties Union v State of New York*, 4 NY3d 175; *Campaign for Fiscal Equity v State of New York*, 100 NY2d 893.) II. Civic preparation requires diverse school settings. (*Brown v Board of Education*, 347 US 483; *Parents Involved in Community Schools v Seattle School Dist. No. 1*, 551 US 701; *Grutter v Bollinger*, 539 US 306.)

OPINION OF THE COURT

Garcia, J.

Plaintiffs allege that the New York City public education system, through its admissions and screening policies, curriculum content, and lack of diversity among the teacher workforce, discriminates against and disproportionately affects Black and Latino students, leading to unequal educational opportunities and negative outcomes for those students. Plaintiffs further allege that these practices and policies deprive Black and Latino students of a sound basic education in contravention of the Education Article of the State Constitution (NY Const, art XI, § 1), denies them equal protection of the laws (NY Const, art I, § 11), and denies them access to educational facilities in violation of the New York State Human Rights Law (NYSHRL) (Executive Law § 296 [4]). Although plaintiffs identify troubling aspects of New York City's public education system, the claims as presented in the complaint fail as a matter of law.

I.

Plaintiffs, three student and parent organizations and 14 current and former New York City public school students, commenced this action against defendants, the New York State

and City actors responsible for overseeing New York City's public education system.[1] They allege that the New York City public school system is highly segregated, due in large part to Black and Latino students underperforming on admissions tests used for entry to the City's "prime educational opportunities," including the Gifted & Talented program, screened middle and high schools, and specialized high schools. Plaintiffs claim that these exams result in a majority of Black and Latino students attending inferior schools that are deficient in terms of physical facilities and instrumentalities of learning, resulting in poor educational outcomes. For example, plaintiffs allege that a majority of Black and Latino students attend schools where more than 75% of students are in poverty; in 2020, Black and Latino students received only 4.5% and 6.6% of admission offers at specialized high schools, although they composed a combined 70% of the school system as a whole; the graduation rates for Black and Latino students in 2020 were around eight and 10 percentage points lower than that of white students, respectively; only eight percent of Black students and 12% of Latino students obtained advanced Regents diplomas in 2018, compared to 50% of Asian and 35% of white students. Therefore, plaintiffs allege, said schools do not deliver a sound basic education as required by the Education Article.

These segregated students, according to the complaint, also receive less than a sound basic education because they are taught a "white and Eurocentric curriculum" rather than one that is "culturally responsive," and because defendants have "failed to recruit and support a diverse educator workforce" and otherwise failed to provide all teachers with "appropriate training . . . on how to deliver a racially equitable and culturally responsive education." With respect to this second argument, their premise that defendants' policies violate the Education Article rests not on a lack of adequate facilities or instrumentalities of learning, but rather on the belief that failure to implement other policies they perceive as essential to the success of those students constitutes a deprivation of a sound basic education.

Plaintiffs make additional claims alleging that defendants have intentionally maintained the admissions system for "prime educational opportunities" despite their knowledge of

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1. Supreme Court granted the motion of organizational defendant, Parents Defending Education, to intervene.

disparate outcomes, thereby denying plaintiffs equal protection of the laws (NY Const, art I, § 11), and alleging under the NYSHRL that defendants' policies unlawfully denied them use of educational facilities (Executive Law § 296 [4]). Plaintiffs, among other relief, seek a declaratory judgment and an injunction requiring defendants to eliminate the "admissions screens currently in use" in all New York City public schools and prohibiting "future such screens to the extent that they operate in a racially discriminatory manner."

Defendants and intervenor-defendant each moved to dismiss plaintiffs' amended complaint under CPLR 3211 (a) (2) and (7), contending that the court lacked subject matter jurisdiction, and that the complaint failed to state a cause of action. Supreme Court consolidated the motions and dismissed the complaint, holding that it lacked jurisdiction to grant the requested relief because doing so would involve the court in matters of education policy better suited for the legislature, thereby presenting "a nonjusticiable controversy" (2022 NY Slip Op 34736[U], *2 [Sup Ct, NY County 2022]). The Appellate Division modified, holding initially that the issues raised in the complaint are justiciable (228 AD3d 152, 161-162 [1st Dept 2024]).[2] The Court also held that the complaint states viable causes of action under the Education Article, the Equal Protection Clause, and as to the city defendants, under the NYSHRL (*id.* at 163-174).[3] The Appellate Division granted defendants leave to appeal, certifying the question of whether its order was properly made. We answer that question in the negative.

II.

Our role in considering the sufficiency of a pleading on a motion to dismiss for failure to state a cause of action under CPLR

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2. We agree with the Appellate Division that plaintiffs' claims are justiciable (228 AD3d at 161). While education matters often involve the "distribution of powers" between the branches of government, it is "the responsibility of the courts to adjudicate contentions that actions taken by the Legislature and the executive fail to conform to the mandates of the Constitutions" (*Board of Educ., Levittown Union Free School Dist. v Nyquist*, 57 NY2d 27, 39 [1982]), and additionally, "this Court is responsible for adjudicating the nature of" the duty to provide a "sound basic education" (*Campaign for Fiscal Equity v State of New York*, 100 NY2d 893, 902 [2003] [internal quotation marks omitted]).

3. The Appellate Division dismissed plaintiffs' NYSHRL claim as against the State and plaintiffs do not appeal that decision (*see* 228 AD3d at 171-172).

3211 (a) (7) is well-defined. We must determine only "whether, accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated" (*Aristy-Farer v State of New York*, 29 NY3d 501, 509 [2017] [internal quotation marks and citations omitted]). The pleadings should be "afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]), and "[p]laintiffs . . . are entitled to all favorable inferences that can be drawn from their pleadings" (*Aristy-Farer*, 29 NY3d at 509). While this pleading standard is a liberal one, "[a] pleading is not an empty formality" (*id.* at 517), and conclusory factual allegations do not provide the support necessary to survive a motion to dismiss even under the CPLR 3211 (a) (7) standard (*id.* at 516-517; *see Godfrey v Spano*, 13 NY3d 358, 373 [2009]).[4] Plaintiffs fail to meet that standard here.

A.

The Education Article mandates that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated" (NY Const, art XI, § 1). This provision contemplates "a State-wide system assuring minimal acceptable facilities and services" (*Board of Educ., Levittown Union Free School Dist. v Nyquist*, 57 NY2d 27, 47 [1982]). To satisfy this mandate, "the system in place must at least make available an 'education,' a term we interpreted to connote 'a sound basic education' " (*Campaign for Fiscal Equity v State of New York*, 86 NY2d 307, 315 [1995] [*CFE I*], quoting *Levittown*, 57 NY2d at 48).

This Court has established guidelines for assessing what constitutes a sound basic education, namely that education must "consist of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury" (*id.* at 316). Students must also be afforded the " 'opportunity for a meaningful high school education, one which prepares them to function productively as civic participants' and [to] 'compete for jobs that enable them to support themselves' "

4. The dissent concludes that although the complaint may be "inartful," "pathetically drawn," "prolix," "provocative," "reek of miserable draftsmanship" and display "*verbosity*," those flaws do not justify dismissal (dissenting op at 213 & nn 11, 12 [emphasis added]). Perhaps not. But nor do those faults somehow excuse the failure to meet our minimal pleading standard.

(*Aristy-Farer*, 29 NY3d at 505, quoting *Campaign for Fiscal Equity v State of New York*, 100 NY2d 893, 908, 906 [2003] [*CFE II*]). Certain "essentials" must also be provided:

> "Children are entitled to minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn. Children should have access to minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks. Children are also entitled to minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those subject areas" (*CFE I*, 86 NY2d at 317).

These requirements represent the "constitutional floor with respect to educational adequacy" (*id.* at 315).

A claim brought under the Education Article requires a showing of both "the deprivation of a sound basic education . . . and causes attributable to the State" (*New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 178-179 [2005] [*NYCLU*]). To adequately plead a violation, plaintiffs must sufficiently allege "first, that the State fails to provide [plaintiffs] a sound basic education in that it provides deficient inputs—teaching, facilities and instrumentalities of learning—which lead to deficient outputs such as test results and graduation rates" (*Paynter v State of New York*, 100 NY2d 434, 440 [2003]). Second, plaintiffs must sufficiently allege causation—that the deficient outputs are "causally connected" to the claimed input deficiencies (*id.*). While Education Article claims considered by this Court have in many cases alleged deficient funding (*see e.g. CFE I*, 86 NY2d at 312-313; *Levittown*, 57 NY2d at 47), "the Education Article does not require that there be a single cause in order for plaintiffs to state a claim" (*NYCLU*, 4 NY3d at 180). However, as in *NYCLU*, plaintiffs here have "failed to clearly allege even one" such cause (*id.* & n 2; *see also Paynter*, 100 NY2d at 440-441).

Two further limitations on Education Article claims merit reference here. First, the deficiencies complained of must represent a "district-wide failure" (*see NYCLU*, 4 NY3d at 181), that in turn causes students in that district to receive an education below the minimum acceptable floor. Second, the Education Article does not permit judges to micromanage matters of

educational policy, which are broadly entrusted to local control (*see Ware v Valley Stream High School Dist.*, 75 NY2d 114, 122 [1989] [noting that "the judiciary should not lightly intrude in the resolution of school conflicts" and that "(d)eference to the education decisions of State and local officials—particularly in matters of curriculum—embodies several important concerns"]; *Matter of New York City School Bds. Assn. v Board of Educ. of City School Dist. of City of N.Y.*, 39 NY2d 111, 121 [1976]). To avoid such intrusion, an Education Article claim requires allegations of a "gross and glaring inadequacy" in the quality of education being provided (*see Levittown*, 57 NY2d at 48-49; *Paynter*, 100 NY2d at 439).

Comparison of two prior cases assessing whether an Education Article claim was properly pleaded is instructive. In the first, *CFE I*, plaintiffs asserted that deficiencies in the State's educational financing scheme meant plaintiffs were

> "not receiving the opportunity to obtain an education that enables them to speak, listen, read, and write clearly and effectively in English, perform basic mathematical calculations, be knowledgeable about political, economic and social institutions and procedures in this country and abroad, or to acquire the skills, knowledge, understanding and attitudes necessary to participate in democratic self-government" (86 NY2d at 318-319).

The plaintiffs "support[ed] these allegations with fact-based claims of inadequacies" regarding deficient inputs, including statistical information concerning "physical facilities, curricula, numbers of qualified teachers, availability of textbooks, [and] library books" (*id.* at 319). The Court concluded that based on these allegations, the plaintiffs stated a cognizable Education Article claim because they alleged "gross educational inadequacies that, if proven, could support a conclusion that the State's public school financing system effectively fails to provide for a minimally adequate educational opportunity" (*id.*).

The Court reached a different result in *Paynter* (100 NY2d at 438). There, the plaintiffs alleged that their schools had "high levels of poverty concentration and racial isolation," which they argued "correlate[d] with substandard academic performance" and equated to a failure to deliver a sound basic education (*id.*). We rejected this claim because, unlike the plaintiffs in *CFE I,* the *Paynter* plaintiffs did not assert that the "terrible educational results" at their schools were "caused by any defi-

ciency in teaching, facilities or instrumentalities of learning, or any lack of funding" (*id.* at 440). Instead, the "deficient input" alleged by the plaintiffs was "the composition of the student body," and while we accepted as true the research cited by the plaintiffs "correlating concentrated poverty and racial isolation with poor educational performance," we held that the plaintiffs did not sufficiently allege causes attributable to the State and arising from its obligation to "provide minimally acceptable educational services" (*id.* at 441). The allegations in the present case, as in *Paynter*, are insufficient.

Plaintiffs first allege that "the City's unscreened schools" are deficient in terms of inadequate facilities and instrumentalities of learning. They claim that such schools are in poorly constructed and maintained buildings that suffer from neglect, where students are generally provided an insufficient number of dilapidated and outdated textbooks, lack basic classroom materials, such as working markers, paper, lab equipment, and toilet paper, and experience overcrowded hallways and classrooms. Second, plaintiffs allege that as the result of discriminatory standardized testing policies, Black and Latino students are relegated to these unscreened schools, rather than the "state-of-the-art facilities" with a "wide array of courses and extracurricular activities" offered at screened and specialized schools, and are therefore deprived of a sound basic education. Third, plaintiffs allege that they are deprived of a sound basic education because they are taught a "white and Eurocentric" curriculum and because defendants have "failed to recruit and support a diverse educator workforce" and otherwise failed to provide all teachers with "appropriate training . . . on how to deliver a racially equitable and culturally responsive education." These inadequate inputs, plaintiffs claim, cause Black and Latino students to experience lower graduation rates when compared to white students in the district, receive fewer admissions offers for the Gifted & Talented program, screened schools, and specialized high schools, and earn fewer advanced Regents diplomas when compared to Asian and white students.

[1] Initially, the claims of deficient inputs at unscreened schools—the more traditional allegations concerning the condition of facilities and tools for learning—are insufficient to state a cause of action for the "fundamental reason" that they "do not allege any district-wide failure" (*NYCLU*, 4 NY3d at 181). Plaintiffs identify a single school as an example of a "poorly maintained" facility and the remaining allegations regarding

unscreened schools are vague. By comparison, the *CFE* plaintiffs supported their allegations regarding teacher quality with data establishing that New York City schools had

> "the largest percentage of uncertified teachers (11.8% . . . compared to 7.3% statewide, and 4.6% in suburban districts), the least experienced teachers (13 years, compared to 16 years statewide, and 19 years for suburban districts) and the highest teacher turnover rate in the state (14% . . . , compared to a statewide average of 9% and a suburban average of 7%)" (complaint ¶ 45 in *CFE I*, 86 NY2d 307, available at 1993 WL 13159629).

Regarding instrumentalities of learning, the *CFE I* complaint offered data showing that New York City schools "on average had only one computer for every 19 students, compared to a statewide public school average of one computer for every 13 students" and "had an average of only 10.4 library books per pupil, compared with 20.9 in suburban areas, and 16.5 statewide" (*id.* ¶¶ 50, 54). The complaint also contained statistical information concerning overcrowding in schools, alleging that: "many students attend[ed] schools with an utilization rate of 170% or higher, and the average utilization rate for New York City high schools . . . was 119.9%" (*id.* ¶ 56).

Not only does the complaint here fail to allege a district-wide failure to put minimally adequate resources in classrooms, but the failures that it does allege are vague and conclusory. Plaintiffs claim that at unscreened schools, students have "[a]n insufficient number of textbooks, requiring a single textbook to be shared by up to three students," that they "[l]ack . . . basic classroom materials, such as working markers, paper, and lab equipment for science classes," they experience overcrowding "with as many as 40 students in a single classroom," and there are "[r]ecurrent leaks in school hallways," and "[n]o toilet paper in the bathroom." It is unclear from these general allegations whether the deficiencies extend to a few schools or are district-wide. Nor does the complaint provide any benchmarks from which to assess these allegations as the *CFE I* plaintiffs did by comparing access to supplies in New York City schools with schools statewide. While *CFE I* is not a minimum standard for Education Article complaints, it does demonstrate by comparison the complete failure to make the necessary showing in this otherwise lengthy complaint. The allegations here, which the Appellate Division held were "terse[ ] but adequate[ ]" (228

AD3d at 164), are neither and they cannot withstand a motion to dismiss.

Plaintiffs also fail to adequately allege that the education students receive at these unscreened schools is constitutionally deficient for the same reason we determined that the complaint in *Paynter* failed to state a cognizable Education Article claim—a lack of causation. Plaintiffs essentially argue that the negative educational outcomes experienced by Black and Latino students—lower graduation rates and conferral of advanced Regents diplomas—is the result of their relegation to "predominantly Black and Latinx" general educational programs, as opposed to the "predominantly white and Asian" Gifted & Talented programs or screened and specialized schools. As in *Paynter,* plaintiffs here do not assert "that these results are caused by any deficiency in teaching, facilities or instrumentalities of learning, or any lack of funding" (100 NY2d at 440).[5] Aside from the conclusory allegations of input deficiencies already described, plaintiffs have failed to establish a causal connection between the deficient outputs and any failure of defendants "to provide resources—financial or otherwise" to the unscreened schools (*NYCLU*, 4 NY3d at 180 [internal quotation marks omitted]). They do not claim, for example, that their teachers are inexperienced or uncertified—benchmarks used in the *CFE I* complaint to measure teacher quality—nor do they allege that the curriculum currently in place is not "reasonably up-to-date" in terms of "reading, writing, mathematics, science, and social studies" (*CFE I*, 86 NY2d at 317). As we made clear in *Paynter,* "allegations of academic failure alone, without allegations that the State somehow fails in its obligation to provide minimally acceptable educational services, are insufficient to state a cause of action under the Education Article" (100 NY2d at 441).

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5. The dissent makes no effort to grapple with the facts in *Paynter* (100 NY2d at 438 [discussing and rejecting the plaintiffs' claim that "poverty concentration and racial isolation . . . correlate with substandard academic performance" and therefore "by every measure of student achievement (the Rochester) schools do not deliver a sound basic education as required by the Education Article"]; *see id*. at 441). Rather, the dissent imports an equal protection construct into its Education Article analysis, citing to Judge Smith's dissent from the equal protection holding in *CFE I* (86 NY2d at 345, 347 [Smith, J., dissenting in part]), and referencing *Brown v Board of Education* (347 US 483 [1954]), when asserting, without any supporting authority, that "segregation on its own can constitute a violation of the Education Article" (*see* dissenting op at 216-217).

Finally, plaintiffs' novel input allegations regarding curriculum content and diversity hiring practices are also incapable of supporting their Education Article claim. Plaintiffs ask the Court to recognize these inputs as indispensable to a sound basic education because they could help to "disrupt the 'complex system of biases and structural inequities' " in society. The Appellate Division agreed, noting that "the State and City have acknowledged the importance of initiatives that enhance and encourage diversity, equity, and inclusion in the City's schools," and concluded that such initiatives "provide some support for plaintiffs' claims" (228 AD3d at 164-165, 165 n 10). But even if we accept, as we must at this stage of the proceedings, that these inputs bear on education quality, which in turn affects outcomes for Black and Latino students, plaintiffs must still allege that the current system of education does not "meet minimum constitutional standards" (*NYCLU*, 4 NY3d at 178), which requires only that defendants "put[ ] adequate resources into the classroom" (*Paynter*, 100 NY2d at 441). As laudable as the aspirations in the complaint may be, the standards plaintiffs propose "exceed notions of a minimally adequate or sound basic education" and may not be used "as benchmarks of educational adequacy" under the Education Article (*CFE I*, 86 NY2d at 317). As the Appellate Division acknowledged, "[n]o court has yet found that such inputs are necessary for a sound basic education" (228 AD3d at 164), and plaintiffs have offered nothing to support the proposition that "disrupt[ing] the 'complex system of biases and structural inequities in society' " through culturally sensitive curricula or faculty is a component of the Constitution's guarantee of a sound basic education. At best, plaintiffs' novel input allegations represent a policy disagreement rather than a "gross and glaring inadequacy" in the education being provided (*see Levittown*, 57 NY2d at 48).

Accordingly, as plaintiffs have failed to adequately plead that they were denied a sound basic education, the claim must be dismissed.[6]

B.

Plaintiffs claim that defendants' admissions policies violate the State Equal Protection Clause because the standardized

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6. The City and State each disclaim responsibility for ensuring that the City's public education system meets the constitutional standard. Because we hold that plaintiffs have failed to state a cognizable Education Article claim, we do not resolve that issue.

testing policies affect Black and Latino students more negatively and, according to the complaint, defendants "intentionally maintain and sanction this system despite their knowledge" of these disparate outcomes. As with their Education Article claim, the allegations supporting their Equal Protection Claim are insufficient as a matter of law.

The New York State Equal Protection Clause provides that "[n]o person shall be denied the equal protection of the laws of this state" and "[n]o person shall, because of race, . . . be subjected to any discrimination in their civil rights . . . by the state or any agency or subdivision of the state" (NY Const, art I, § 11 [a]). We have stated that this clause is "coextensive with the rights protected under the Federal Equal Protection Clause" (*Myers v Schneiderman*, 30 NY3d 1, 13 [2017] [citation omitted]) and plaintiffs raise no argument here that it should be interpreted differently as a matter of state constitutional law.

To state an equal protection claim based on disproportionate impact of a facially neutral action or policy, a plaintiff must show "[p]roof of racially discriminatory intent or purpose" (*Arlington Heights v Metropolitan Housing Development Corp.*, 429 US 252, 265 [1977]; *see CFE I*, 86 NY2d at 321 [recognizing that "an equal protection cause of action based upon a disproportionate impact upon a suspect class requires establishment of intentional discrimination"]). Determining intent "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available" (429 US at 266). While the disproportionate impact of an action "may provide an important starting point" (*id.*), it is well-established that such impact, even if "foreseeable and anticipated," "without more, do[es] not establish a constitutional violation" (*Columbus Bd. of Ed. v Penick*, 443 US 449, 464 [1979]). For this reason, "[a]dherence to a particular policy or practice, with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system[,] is one factor among many others which may be considered by a court" in determining discriminatory intent, but without additional proof is insufficient to establish an equal protection violation (*id.* at 464-465 [internal quotation marks and citation omitted]). Courts must also look to other evidence, which may include "[t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes," "[t]he specific sequence of events leading up to the challenged deci-

sion," and "[t]he legislative or administrative history . . . especially where there are contemporary statements by members of the decisionmaking body" (*Arlington Heights*, 429 US at 266-268 [citations omitted]). Here, the Appellate Division concluded that, although the allegations were "thin" and the Court considered it a "close question," the equal protection claim was sufficiently pleaded (228 AD3d at 169). We disagree.

The allegations of discriminatory intent identified fall into three categories: disparate impact, knowledge of that disparate impact, and the legislative history of the 1971 Hecht-Calandra Act (L 1971, ch 1212) (HCA), which mandated an admissions test for certain specialized high schools in New York City. The complaint alleges that the impact of the standardized testing policies bears more heavily on Black and Latino students when compared to white and Asian students and that the disproportionate impact is foreseeable. For the 2017-2018 school year, for example, plaintiffs allege that Black and Latino students were significantly underrepresented in the Gifted & Talented program, with Black and Latino students "receiv[ing] only 18 percent of G&T program offers" despite comprising "65 percent of kindergartners" in New York City public schools, whereas "Asian and white students comprised 18 and 17 percent of the kindergarten population . . . but received 42 and 39 percent of G&T program offers." Plaintiffs also cite a 2020 analysis of admissions to "27 of the City's top-performing screened (not specialized) high schools," which found that "[w]hite and Asian students were admitted at almost double the rates of Black and Latino students." Plaintiffs also allege that in that same year, Black and Latino students received only a handful of offers to Stuyvesant High School, one of the City's specialized high schools.

[2] With respect to the required element of intentional discrimination, allegations of disparate impact and foreseeability, standing alone, are insufficient to survive a motion to dismiss even where refusal to act in response to that impact is alleged (*see CFE I*, 86 NY2d at 321). In *CFE I*, we dismissed the plaintiffs' equal protection claim where the complaint made similar allegations of disparate impact, knowledge of that impact, and failure to address those known and foreseeable consequences (*id.* at 352-353 [Smith, J., dissenting from equal protection holding] [noting the allegation in the complaint that " 'despite knowledge' " of these impacts and " 'despite recommendations for major reforms in official reports issued by com-

missions created by the defendants themselves, the defendants have reenacted the inequitable state aid scheme without substantial modification to address the blatant inequities and their disproportionate impact on minority students' "], quoting complaint ¶ 71 in *CFE I*, 86 NY2d 307, available at 1993 WL 13159629). By comparison, in two of the cases cited by the Appellate Division, additional evidence of intent was provided by allegations of "affirmative acts" such as the implementation of "segregation-enhancing school zone realignments, race-based staff assignments, race-based placement of minorities in special classes" and "race-based decisions on school openings and closings" (*United States v Yonkers Bd. of Educ.*, 837 F2d 1181, 1227 [2d Cir 1987]), and implementation of discriminatory policies, including a "general practice of assigning black teachers only to those schools with substantial black student populations," and "the intentionally segregative use of optional attendance zones, discontiguous attendance areas, and boundary changes" (*Columbus* at 461-463; *see* 228 AD3d at 170). To make out an equal protection violation, plaintiffs' claim of intent must therefore be grounded in the passage of the HCA.

We disagree with the Appellate Division's conclusion that the "legislative history of the Hecht-Calandra Act, the timing of its enactment," and certain statements in the legislative history "support an inference of segregative intent" (228 AD3d at 169-170). The HCA provides that admission to the three specialized high schools then in operation and to "such similar further special high schools which may be established shall be [determined] solely and exclusively by taking a competitive, objective and scholastic achievement examination, which shall be open to each and every child in the city of New York" (L 1971, ch 1212, § 1; Education Law § 2590-h [1] [b]).[7] It also permits those schools "to maintain a discovery program to give disadvantaged students of demonstrated high potential an opportunity to" attend if they meet certain criteria (L 1971, ch 1212, § 1). The goal of the HCA was to "preserve the[ ] specialized high schools where excellence is the criteria" for admission (Assembly Mem in Support, Bill Jacket, L 1971, ch 1212 at 7).

On its face, the statute contains no requirement that a specific test be administered but requires only an examination

7. The HCA also requires candidates for admission to the Fiorello H. LaGuardia High School of Music and the Arts to "pass competitive examinations in music and/or the arts in addition to presenting evidence of satisfactory achievement" (L 1971, ch 1212, § 1).

that objectively assesses scholastic achievement. Plaintiffs do not allege that the City could use a test that objectively assesses scholastic achievement equally well but with less adverse impact. Nevertheless, the complaint speculates that more than a half century ago, the HCA was "enacted to thwart the City's investigation of the test's potential bias against Black and Puerto Rican students" that was being conducted by the Chancellor of New York City public schools. As evidence of intent, the complaint points to a letter in the bill jacket written by Mayor John Lindsay to Governor Nelson Rockefeller recommending that the Governor disapprove of the bill until the committee investigating the potential discriminatory nature of the proposed admissions test completed its report, and a letter from the City's Board of Education opposing the bill for the same reason (Letter from Mayor, June 14, 1971, Bill Jacket, L 1971, ch 1212 at 21-22; Bd of Educ of City of NY Mem in Opp, Bill Jacket, L 1971, ch 1212 at 29-30). At most, this history suggests that the HCA was passed with knowledge of, or "in spite of," the adverse effects that the version of the test then being administered had upon an identifiable group (*see e.g. Personnel Administrator of Mass. v Feeney*, 442 US 256, 279 [1979] [internal quotation marks omitted]). But there is no evidence that it was passed with the intent to exclude certain minorities from specialized high schools (*id.*). Notably, the legislative history shows that there were successful efforts to help reduce potential discriminatory effects, such as removing the original draft's percentage limitation on admission to the Discovery program (*see* Letter from Assembly Member Burton O. Hecht, June 4, 1971, Bill Jacket, L 1971, ch 1212 at 3). Ultimately, the allegations of foreseeable disparate impact and the fragments of legislative history showing awareness of the disparate impact of the test that was administered in 1971 are insufficient to establish discriminatory intent and plaintiffs' equal protection claim must be dismissed.

C.

Plaintiffs' third cause of action alleges a violation of the NYSHRL's provision making it "an unlawful discriminatory practice for an educational institution to deny the use of its facilities to any person otherwise qualified, or to permit the harassment of any student or applicant, by reason of his race" (Executive Law § 296 [4]). The complaint here alleges that "multiple members" of the organizational plaintiffs "are

academically qualified to succeed at a specialized high school; and have been deterred from applying to, or been rejected from, a specialized high school due to the [Specialized High Schools Admissions Test]." The complaint makes similar claims relating to "screened middle or high schools" and identifies an individual plaintiff who "applied to several high schools and was rejected by all of them."[8]

[3] The Appellate Division held that "plaintiffs sufficiently allege that they were denied access to the City's facilities 'by reason of [their] race' " although they were " 'otherwise qualified' for admission" based on their allegations of discriminatory intent and, intent aside, based on a disparate impact theory (228 AD3d at 173-174). Initially, we disagree that plaintiffs sufficiently allege discriminatory intent (*see* equal protection claim, *supra* at 192-194). Assuming, without deciding, that disparate educational outcomes alone could in some circumstances sustain such a claim, an issue we need not and do not reach today, plaintiffs' complaint fails to include allegations by individual students who were denied admission to a particular school or school program by an identified screening mechanism that is alleged to have a disparate impact, or that a specific screening mechanism lacks validity in predicting the ability of students to thrive in the curriculum offered at any particular screened school. Instead, the Appellate Division relied on plaintiffs' conclusory allegation that "but for the discriminatory admissions testing," Black and Latino students "would not have been excluded" (228 AD3d at 173). This legal conclusion—namely that certain unnamed members of the plaintiff organizations were "excluded" based on the alleged "discriminatory" testing process—is insufficient even under the liberal standard applied on a motion to dismiss (*see Martinez*, 84 NY2d at 87).

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We share the concerns of the lower courts and the parties over the issues raised by plaintiffs' complaint, and we acknowl-

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8. The Appellate Division dismissed the NYSHRL claim against the state defendants, finding that "the State is not an 'educational institution' as defined in the Executive Law," and dismissed the harassment portion of this claim against the city defendants because plaintiffs failed to "sufficiently plead" any "nonconclusory allegations" that the City permitted the harassment of students by reason of race or that the City "even knew about the[ ] incidents" identified in the complaint (228 AD3d at 171-172). Plaintiffs did not appeal that holding.

edge the ongoing efforts in other settings involving elected officials, school boards, parents, and students, among others, to address the disparities that plaintiffs identify.[9] Our role, however, is—as it has always been—to determine whether plaintiffs have presented a legally sufficient claim for resolution by the courts (*compare CFE I*, 86 NY2d 307, *CFE II*, 100 NY2d 893, *Campaign for Fiscal Equity, Inc. v State of New York*, 8 NY3d 14 [2006], *and Aristy-Farer*, 29 NY3d 501, *with Paynter*, 100 NY2d 434, *and NYCLU*, 4 NY3d 175). Here, as in *Paynter* and *NYCLU*, plaintiffs have not done so, and we must dismiss.

Accordingly, the order of the Appellate Division insofar as appealed from should be modified, without costs, in accordance with this opinion and, as so modified, affirmed, and the certified question answered in the negative.

RIVERA, J. (dissenting). Plaintiffs' allegations make out an utterly pathetic picture of public education for New York City's Black and Latino schoolchildren. Plaintiffs assert that the City's public education system is among the most racially segregated in the country, and that it functions as a pipeline that tracks Black and Latino students into inferior schools and substandard programs. According to plaintiffs, by design, defendants' policies and practices deny these students access on the basis of race, ethnicity, and economic status to the facilities

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9. *See e.g.* New York State Education Department, *Culturally Responsive-Sustaining Education Framework*, available at http://www.nysed.gov/common/nysed/files/programs/crs/culturally-responsive-sustaining-education-framework.pdf (providing recommendations on subjects including an inclusive curriculum, improving recruitment and retention of diverse teacher workforce, and providing teachers with diversity and inclusion training); 2018 NY Assembly Bill A11321 (establishing a culturally responsive education curriculum and standards); 2019 NY Senate Bill S5808-A (establishing a task force on educator diversity in New York State); Clifford Michel, *Council education committee passes diversity-reporting bill*, Politico, May 26, 2015, available at https://www.politico.com/states/new-york/city-hall/story/2015/05/council-education-committee-passes-diversity-reporting-bill-089624 (bill requiring the "Department of Education to report annually on efforts and progress made to increase diversity" in public schools); City of New York Office of the Mayor, Press Release, *Mayor de Blasio and Chancellor Carranza Announce Plan to Improve Diversity at Specialized High Schools*, June 3, 2018 (expanding Discovery program to 20% seats at each specialized high school); Lola Fadulu, *New York City to Expand Gifted and Talented Program but Scrap Test*, NY Times, Apr. 14, 2022, available at https://www.nytimes.com/2022/04/14/nyregion/nyc-gifted-talented.html (discussing Mayor Adams's plan to expand the gifted and talented program by adding seats to the kindergarten and third grade classes and by eliminating the admissions test for that program and replacing it with a lottery system).

and training necessary to compete on a level playing field with their White peers for academic and employment opportunities. Plaintiffs also claim that the public education system does not prepare students of color to participate fully in contemporary society, as it denies them the opportunity to learn how to engage critically within their communities on political and social issues. As a result, the public education system sends a message, internalized over time, that society does not value Black and Latino students. In other words, the public education system stamps these students with a badge of inferiority that stays with them for their entire lives.

Plaintiffs support these claims with factual assertions, based on state and city governmental reports, statistics, social science research, and the plaintiffs' experiences, that: (1) the public education system perpetuates and enhances the City's racial and economic segregation; (2) the school buildings are decrepit and some are vermin-infested; (3) classrooms are overcrowded and lack basic supplies and equipment; (4) textbooks are out of date and understocked; (5) the public education system tracks students of color by race and ethnicity into underachieving and neglected schools and subpar academic programs; (6) the adoption and continued use of unvalidated standardized screening tests has led to access disparities based on race and economic status in specialized schools; (7) teachers and leadership staff in schools do not reflect the demographics of the student body and the City; and (8) teachers are inadequately trained to address the academic needs and social realities of a diverse student body. According to plaintiffs, this two-tiered education system denies Black and Latino students the opportunities necessary to prepare them to critically engage in New York's richly diverse civic life as active participants in our democracy and to meaningfully compete for living-wage jobs in our modern society.

Under our liberal pleading standards—not the heightened standard adopted by the majority—plaintiffs have sufficiently pleaded causes of action for constitutional violations of the State Education Article and Equal Protection Clause, and a violation of the New York State Human Rights Law. Indeed, the entrenched segregated education system plaintiffs describe has no place in our society. Therefore, the Appellate Division correctly determined that plaintiffs should be permitted to proceed with their claims, and I would affirm.

I.

Plaintiffs' Allegations That New York City Public Schools Entrench a Racial and Ethnic Hierarchy through Segregated Substandard Facilities, Academically Deficient Instruction, and Inadequate Staff Training

A.

The individual plaintiffs are city public school students who identify as Black or of Puerto Rican, Dominican, Mexican, Vietnamese, Trinidadian, Turkish, or Bengali descent, and some are recent immigrants. The organizational plaintiffs are IntegrateNYC, Inc., a youth-led nonprofit membership corporation; Parents for Change at P.S. 132, an organization of parents and guardians of Public School 132 students; and the New York City Coalition for Educational Justice (CEJ), a citywide coalition of community-based organizations whose members include the parents of racially and ethnically diverse city public school students. The organizational plaintiffs' mission, broadly described, is to end racial inequality and promote educational equity in the public school system. Several of the organizational plaintiffs' student members aspire to attend a "screened middle or high school," which plaintiffs explain are schools that admit students based on selective academic criteria, often relying, at least in part, on standardized test scores. By contrast, an "unscreened school" has no selective academic requirements. Several of the organizations' student members also aspire to attend a "specialized high school," which plaintiffs define as the "eight elite schools for which admission is based [solely] on [a] rank-order score on a single standardized test, the Specialized High Schools Admissions Test (SHSAT)." Defendants are the State and City of New York, state and city governmental entities, and state and city officers charged with creating and maintaining the City's public school system.[1]

Plaintiffs' operative complaint does not mince words. It alleges that the public education system is racially and ethnically segregated, and that it tracks students of color, in particular Black and Latino students, into unsafe facilities and pedagogically unsound programs. The pleading summarizes

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1. Supreme Court granted intervenor status to Parents Defending Education, a nationwide, Virginia-based organization whose members include the parents of six city public school students.

the education system's alleged inequities and their illegal results, asserting that "New York City's public education system is suffused with and perpetuates . . . various forms of racism, in ways blatant or subtle, intended or willfully ignored and tolerated." It does so by: (1) "[m]aintaining a racialized pipeline to the City's prime educational opportunities, including its Gifted & Talented (G&T) programs and screened middle and high schools, that excludes many students of color, who are instead condemned to neglected schools that deliver inferior and unacceptable outcomes"; (2) "[a]llowing schools to teach a Eurocentric curriculum that centers [W]hite experience, marginalizing the experiences and contributions of people of color"; (3) "[f]ailing to recruit, retain, and support a racially diverse educator workforce to provide challenging and empathic instruction to all students"; and (4) "[f]ailing to provide sufficient training, support, and resources to enable administrators, teachers, and students to identify and dismantle racism." Plaintiffs allege that "[i]ndividually and collectively, these policies and practices . . . cause the denial of a sound basic education to New York City schoolchildren." The outcomes of defendants' conduct—"the systematic exclusion of students of color from adequate, much less prime, educational opportunities and the resulting denial of social and economic mobility; . . . and the continued subordination of racially marginalized communities—contravene New York law and subvert the core principles of American democracy and the purposes of the State educational system."

Plaintiffs claim that the public education system, as described, causes the subjugation of Black and Latino students. They assert that the City's public schools are "[a]n education system that reproduces, validates, and even exacerbates the artificial racial hierarchies that have long structured civic, commercial, and social life in the United States," and that the schools thereby "cannot prepare . . . students [of color] for meaningful democratic and economic participation in today's diverse society." According to plaintiffs, "if government's goal were to create a system of education that would replicate and in fact exacerbate pernicious racial inequality in the City, it would be challenging to design a more effective system than that which currently exists."

Plaintiffs assert three causes of action. First, plaintiffs claim that the public education system violates the State Constitution's Education Article because it fails to provide the plaintiff

students and other city public schoolchildren with a sound basic education. Second, plaintiffs allege that defendants violated the State Constitution's Equal Protection Clause by creating and maintaining an educational caste system that cements racial inequality and denies Black and Latino students equal access to the resources and programming afforded to other students. Third, plaintiffs assert that defendants' policies and practices violate the New York State Human Rights Law (NYSHRL) prohibition on discrimination in education facilities. Plaintiffs aver that defendants' policies and practices have maintained a segregated education system that relegates students of color to neglected schools and inferior educational opportunities. Further, plaintiffs claim that defendants employ admissions policies and practices, including standardized tests, that have a disparate impact on students of color, and thus "deny[ ] them access to facilities to which they have equal right."

B.

Plaintiffs' pleading relies on government reports, statistics, social science research, media publications, and legislative history, as well as the findings and observations of more than 10 plaintiffs' experts—researchers and scholars in the fields of education, psychology, sociology, and psychometrics. Based on these sources, the pleading states the following facts in support of plaintiffs' claims:

- City public schools are among the most racially segregated in the country: during the 2018-2019 school year, nearly 75% of Black and Latino students attended schools with less than 10% White students, and over 34% of White students attended schools with majority White populations, even though only 15% of city students are White;
- The public educational system compounds the City's existing racial segregation: city public schools are consistently less diverse than the neighborhoods in which they are located, even though most city elementary schools are zoned schools, which give priority to students who live in the neighborhood in which the school is located (*see* Citizens' Committee for Children of New York, *Back to School Part 2: Do NYC Schools Represent their Districts?* [Jan. 7, 2020], https://

cccnewyork.org/back-to-school-part-2-do-nyc-schools-represent-their-districts/ [accessed Oct. 7, 2025];[2] School Diversity Advisory Group, *Making the Grade: The Path to Real Integration and Equity for NYC Public School Students* at 68-69 [Feb. 2019], available at https://cdn.givingcompass.org/wp-content/uploads/2019/02/22123200/1c478c_4de7a85cae884c53a8d48750e0858172.pdf [accessed Oct. 7, 2025]; New York Appleseed, *Within Our Reach - Segregation in NYC District Elementary Schools and What We Can Do About It* [2020], available at https://www.nyappleseed.org/post/within-our-reach-2020 [accessed Oct. 7, 2025]);

- Racial and economic disparities are exacerbated early on for young elementary school students: G&T classrooms are often more homogenous than general education classrooms and more likely to exclude Black and Latino students and the economically disadvantaged altogether;
- Between 2008 and 2020, the City allocated places in G&T programs based on students' scores on a single standardized test, available to students entering kindergarten through third grade—which, according to plaintiffs' expert Dr. Allison Roda, the City has never demonstrated is pedagogically sound[3]—and such practices worsen and perpetuate racial disparities within G&T pro-

2. Plaintiffs cite to data published by the Citizens' Committee for Children of New York, a research organization focused on child and family well-being, indicating that during the 2018-2019 school year, 41% of city schools did not reflect their administrative district's demographics, with 55% of those schools being elementary schools. For instance, one school, P.S. 87, had a school population that was 65% White, 4% Black, and 14% Latino, while the population of the surrounding district was 27% White, 28% Black, and 32% Latino.

3. The complaint cites to additional expert research and news articles indicating that such practices may not be pedagogically sound (*see* Eliza Shapiro, *Should a Single Test Decide a 4-Year-Old's Educational Future?*, NY Times, Sept. 4, 2019, available at https://www.nytimes.com/2019/09/04/nyregion/nyc-gifted-talented-test.html [accessed Oct. 7, 2025] ["Experts say the single-exam admissions process for such young children is an extremely unusual practice that may be the only one of its kind nationwide"]; National Association for Gifted Children, *Identification*, https://www.nagc.org/identification [accessed Oct. 7, 2025] ["Identification needs to occur over time,

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grams;[4]

- Using standardized tests as a measure of "giftedness" creates a self-fulfilling feedback loop for privileged families where "students coming from high [socioeconomic status] homes are likely to have [meaningful educational] opportunities, which are likely to contribute to the fruition of their giftedness" (Donna Y. Ford et al., *Culturally and Linguistically Diverse Students in Gifted Education: Recruitment and Retention Issues*, 74 Exceptional Children 289, 298 [Apr. 2008]);
- Plaintiffs' expert Dr. Pedro Noguera observes that sorting students along racial lines into G&T programs sends a message of inferiority to students of color that tends to be self-reinforcing over time, as students internalize the labels assigned to them and consequently experience worse behavioral and academic outcomes (*see* Pedro A. Noguera, The Trouble With Black Boys: . . . And Other Reflections on Race, Equity, and the Future of Public Education [2009]). Other researchers have similarly found that students of color keenly perceive the unspoken messages of racial tracking and come to understand social and academic privileges as primarily the property of White students (*see* Joy Howard, *The White Kid Can Do Whatever He Wants: The Racial Socialization of a Gifted Education Program*, 54 Educ Studies 553, 563 [2018]);
- Diverse classrooms confer academic and social benefits on all students, including White stu-

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with multiple opportunities to exhibit gifts. One test at a specific point in time should not dictate whether someone is identified as gifted"]).

4. Plaintiffs cite to news reports and research finding that reliance on standardized test results for G&T programs leads to racial disparities within such programs (*see* Eliza Shapiro, *Should a Single Test Decide a 4-Year-Old's Educational Future?*, NY Times, Sept. 4, 2019, available at https://www.nytimes.com/2019/09/04/nyregion/nyc-gifted-talented-test.html [accessed Oct. 7, 2025]; Donna Y. Ford et al., *Culturally and Linguistically Diverse Students in Gifted Education: Recruitment and Retention Issues*, 74 Exceptional Children 289, 294 [Apr. 2008] [noting that researchers have demonstrated that "almost exclusive dependence on test scores for recruitment disparately impacts the demographics of gifted programs by keeping them disproportionately White and middle class"]; *id.* at 300 [explaining that relying on tests that require vocabulary and quantitative skills yields results that reflect a student's exposure to educational experiences prior to the test, mirroring and reproducing existing societal inequities]).

dents, because they facilitate learning across differences, which promotes creativity, motivation, deeper learning, critical thinking, and problem-solving skills (Amy S. Wells et al., *How Racially Diverse Schools and Classrooms Can Benefit All Students*, The Century Foundation at 14 [Feb. 2016], available at https://tcf.org/content/report/how-racially-diverse-schools-and-classrooms-can-benefit-all-students/ [accessed Oct. 7, 2025]; School Diversity Advisory Group, *Making the Grade: The Path to Real Integration and Equity for NYC Public School Students* at 68-69 [Feb. 2019], available at https://cdn.givingcompass.org/wp-content/uploads/2019/02/22123200/1c478c_4de7a85cae884c53a8d48750e0858172.pdf [accessed Oct. 7, 2025]);

- Defendants fail to provide the diverse classrooms, diverse teaching staff, and culturally responsive curricula necessary to prepare students of color to redress the immensely complex "public problems confronting the rising generation" (*Campaign for Fiscal Equity v State of New York*, 100 NY2d 893, 905 [2003] [internal quotation marks omitted]);
- The City's racialized education pipeline extends school segregation into middle and high schools. Screened middle and high schools are particularly unrepresentative of the populations of their districts as compared to unscreened schools (*see* Citizens' Committee for Children of New York, *Back to School Part 2: Do NYC Schools Represent their Districts?* [Jan. 7, 2020], https://cccnewyork.org/back-to-school-part-2-do-nyc-schools-represent-their-districts/ [accessed Oct. 7, 2025] [reporting that during the 2018-2019 school year 58% of screened middle schools, 53% of screened high schools, 33% of unscreened high schools, and 27% of unscreened middle schools were unrepresentative]),[5] and specialized high schools are not even remotely representative of

5. Plaintiffs also cite to an analysis of 2020 admissions data at 27 of the City's top-performing screened high schools, which found that "White and Asian students were admitted at almost double the rates of Black and Latino students" (Colin Lecher & Maddy Varner, *NYC's School Algorithms Cement Segregation. This Data Shows How*, The Markup, May 26, 2021, available at

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the City's schoolchildren, but instead have increasingly come to resemble an apartheid state;

- Admission to the City's eight specialized high schools is based solely on a student's SHSAT score, despite widespread consensus among psychometricians, including plaintiffs' experts Dr. Ezekiel Dixon-Román and Dr. Howard Everson, that standardized test scores should not be the sole factor in allocating admissions offers to elite schools. As a result of this admissions criteria, specialized high schools are among the most starkly segregated schools in the City;[6]
- Professional education research decries using test scores as the sole basis for specialized educational programming (*see* American Educational Research Association et al., *Standards for Educational and Psychological Testing* at 187 [2014], available at https://www.testingstandards.net/uploads/7/6/6/4/76643089/9780935302356.pdf [accessed Oct. 8, 2025] ["Test scores alone should never be used as the sole basis for including any student in . . . or excluding any student from" specialized educational programming]; *see id.* at 198 ["In educational settings, a decision or characterization that will have major impact on a student should take into consideration not just scores from a single test but other relevant information"]);
- The use of the SHSAT for admission to the City's specialized high schools is expressly mandated by the 1971 Hecht-Calandra Act, which was passed by the State Legislature five decades ago to stymie the schools Chancellor's efforts to commission a special study to investigate whether the test, as it then existed, was culturally biased, leading to public criticism that the law sought "to guard against increased numbers of [B]lack[ ] and Puerto Rican[ ]" students in the specialized

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https://themarkup.org/machine-learning/2021/05/26/nycs-school-algorithms-cement-segregation-this-data-shows-how [accessed Oct. 8, 2025]).

6. Plaintiffs cite to media publications reporting on admissions statistics for Stuyvesant High School, indicating that only 7, 10, and 8 Black students were admitted to the school in 2019, 2020, and 2021, respectively.

high schools;[7]

- Mayor John Lindsay opposed the Hecht-Calandra Act on the express grounds that "[i]t has been alleged that the competitive method for ascertaining admission to these schools discriminates against Black and Puerto Rican applicants," and that the Legislature should only enact reforms after completion of the Chancellor's committee report addressing whether the test discriminates against Black and Puerto Rican students (*see* Letter from Mayor Lindsay to Governor Rockefeller, June 14, 1971, Bill Jacket, L 1971, ch 1212 at 21);[8]
- In the more than 50 years since the passage of the Act, the City and State have never assessed whether the SHSAT is culturally biased, nor have they ever undertaken comprehensive validity testing of the SHSAT based on accepted profes-

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7. In support of these allegations, the pleading cites to media coverage of the Act's passage and long-standing consequences (*see* Francis X. Clines, *Assembly Votes High School Curb*, NY Times, May 20, 1971, available at https://www.nytimes.com/1971/05/20/archives/assembly-votes-high-school-curb-limits-city-boards-power-to-ease.html [accessed Oct. 8, 2025] ["Sponsored by a white cross section of (legislators), the bill was drawn to defend against a special study initiated by the city's school Chancellor, Dr. Harvey B. Scribner, to look into charges that the four (specialized high) schools were 'culturally biased' against (B)lack( ) and Puerto Rican( )" students]; Andrew H. Malcom, *Scribner to Name Unit to Study Special-School Entrance Tests*, NY Times, Feb. 24, 1971, available at https://www.nytimes.com/1971/02/24/archives/scribner-to-name-unit-to-study-specialschool-entrance-tests.html [accessed Oct. 8, 2025]; Jim Dwyer, *Decades Ago, New York Dug a Moat Around Its Specialized Schools*, NY Times, June 8, 2018, available at https://www.nytimes.com/2018/06/08/nyregion/about-shsat-specialized-high-schools-test.html [accessed Oct. 8, 2025] ["The unambiguous purpose (of the Act) was to cut off a study of whether the test should be changed" and "(a)nother effect was to stop an effort to expand the admission of (B)lack and Latino students (to specialized schools) that was underway during the administration of John V. Lindsay, the liberal mayor"]).

8. Plaintiffs also note that "[t]he New York City Board of Education strongly oppose[d] th[e] bill" (*see* Peter A. Piscitelli, Legis Representative, Bd of Educ of City of NY, Mem in Opp, May 4, 1971, Bill Jacket, L 1971, ch 1212 at 29-30; *see also* Letter from Assn of Bar of City of NY to Hon. Michael Whiteman, June 11, 1971, Bill Jacket, L 1971, ch 1212 at 45-46 [disapproving of the bill because "it attempts to establish, by legislative fiat and without prior investigation, an exclusive admission procedure whose intrinsic merit has been seriously questioned"]).

sional standards,[9] even though "[v]alidity is . . . the most fundamental consideration in developing . . . and evaluating tests" and "[e]vidence of the validity of a given interpretation of test scores for a specified use is a necessary condition for the justifiable use of the test" (American Educational Research Association et al., *Standards for Educational and Psychological Testing* at 11 [2014], available at https://www.testingstandards.net/uploads/7/6/6/4/76643089/9780935302356.pdf [accessed Oct. 8, 2025]);

- The City hired a private consulting firm to assess the validity of the SHSAT in 2013, but that study failed to assess bias, equity, and fairness in the test. Standardized testing research demonstrates that this assessment of the SHSAT's validity does not comport with accepted professional standards for validity testing (*see* American Educational Research Association et al., *Standards for Educational and Psychological Testing* at 49-50 [2014], available at https://www.testingstandards.net/uploads/7/6/6/4/76643089/9780935302356.pdf [accessed Oct. 8, 2025]). Additionally, while the City transitioned to a redesigned SHSAT in 2017, it did so without publishing any evidence of the redesigned test's validity;
- Testing experts, including plaintiffs' expert Dr. Howard Everson, recognize not only the need to demonstrate the validity of standardized tests, but also the heightened need for robust, peer-reviewed, and repeated validity studies where a single, high-stakes admissions test is at issue;
- Plaintiffs' experts Dr. Ezekiel Dixon-Román and Dr. Howard Everson explain that "standardized tests are neither designed nor intended to select students for specialized academic programs (the

9. Plaintiffs cite to a media publication in support of this allegation (*see* Winnie Hu, *Does Admissions Exam for Elite High Schools Measure Up? No One Knows*, NY Times, July 18, 2018, available at https://www.nytimes.com/2018/07/18/nyregion/shsat-new-york-city-schools.html [accessed Oct. 8, 2025] ["Unlike other high-stakes admission tests, . . . the SHSAT has not undergone an extensive vetting process known as predictive validity testing, which provides statistical evidence that a test is actually doing what it claims to do: In the case of the SHSAT, it would be identifying the students who can thrive in the accelerated academics of the specialized schools"]).

way they are utilized in admissions screens).” In addition, plaintiffs’ expert Dr. David E. Kirkland observes that the use of standardized tests “disadvantages Black and Latinx students, who face culturally biased test language and tasks”;

- Even certain programs intended to address disparities in access to specialized high schools nonetheless revolve around the SHSAT. For example, plaintiffs allege that candidates are identified for the Discovery program—which allows a limited number of students of low socioeconomic status to gain admission to specialized high schools after enrolling in a summer enrichment program—based on their proximity to the SHSAT cutoff scores;
- Plaintiffs IntegrateNYC and CEJ have multiple members who are, or whose children are, Black, Latino, Afro-Latino, or Asian city public school students who aspire to attend a specialized high school or a screened middle or high school, and are qualified for such schools, but have been deterred from applying to, or have been rejected from, those schools due to the standardized tests;
- Through specialized education programs such as G&T classrooms, screened middle and high schools, and specialized high schools, the State and City have sanctioned and employed admissions criteria relying on standardized testing, resulting in a profound disparate impact that discriminates against students of color by denying them access to facilities to which they have equal right;
- Across the city public school system, students of color are consistently and disproportionately relegated to schools with substandard conditions, including overcrowded classrooms; shoddy and insufficient numbers of textbooks; dilapidated or missing basic classroom materials, including working markers, paper, and laboratory equipment for science classes; limited academic and extracurricular opportunities; and unsanitary and poorly maintained buildings, some of which are former factories or close in proximity to major highways, and which experience recurrent leaks, lack toilet paper in bathrooms, or are

infested with vermin;

- As one example of a school with substandard conditions, plaintiffs describe Renaissance High School for Musical Theater and the Arts, located on the campus of Herbert H. Lehman High School in the Bronx. The school building abuts and extends over the Hutchinson River Parkway, with one wing built atop a bridge crossing the parkway, exposing students to high levels of vehicle pollution and leading students to struggle to focus and hear one another in class over the constant din of passing cars and trucks. The cafeteria is a windowless space in the basement, and many classrooms have no windows at all. Students frequently encounter vermin, including rats and cockroaches, in classrooms and hallways;
- Students of color rarely recognize themselves in the curriculum used in the city public school system because it excludes or only superficially includes the histories, achievements, and voices of historically marginalized people of color;
- Education experts agree that a curriculum that reflects students' identities, experiences, families, and communities enhances students' academic performance, increases their engagement with their coursework, and strengthens their self-image and their perceptions of their capacity to succeed and make positive change (*see* Brittany Aronson & Judson Laughter, *The Theory and Practice of Culturally Relevant Education: A Synthesis of Research Across Content Areas*, 86 Rev Educ Rsch 163 [Mar. 2016]);
- Plaintiffs' expert Dr. Mariana Souto-Manning further explains that implementing culturally responsive pedagogies "foment[s] critical consciousness" and "develop[s] young children as active civic participants who critically read the injustices that characterize their lives and worlds, and actively work to problematize, challenge, and change them" (Mariana Souto-Manning & Ayesha Rabadi-Raol, *[Re]Centering Quality in Early Childhood Education: Toward Intersectional Justice for Minoritized Children*, 42 Rev Rsch Educ 203, 214 [Mar. 2018]);
- Teachers and leadership staff in schools do not

reflect the demographics of the City's student body. For example, during the 2019-2020 school year, over 56% of city teachers were White (New York City Department of Education, *2019—2020 School Year Local Law 226 Report for the Demographics of School Staff—Ethnicity* [Dec. 2020], https://data.cityofnewyork.us/Education/2019-2020-School-Year-Local-Law-226-Report-for-the/2jg5-6hqv/about_data [accessed Oct. 8, 2025]);

- The State Department of Education recognizes that "[a] diverse teacher workforce benefits all students," both because of the "[r]ole model effect[,] [whereby] students see people of color in professional roles and positions of authority," and because educational disparities are linked to students of color holding "[n]egative perceptions of schools due to . . . [the] absence of teachers from similar backgrounds" (New York State Education Department, *NYSED Educator Diversity Briefing on Draft Report* at 5, 16 [Nov. 5, 2019], available at https://www.regents.nysed.gov/sites/regents/files/HE%20-%20NYSED%20Educator%20Diversity%20.pdf [accessed Oct. 8, 2025]; *see also* Hua-Yu Sebastian Cherng & Peter F. Halpin, *The Importance of Minority Teachers: Student Perceptions of Minority Versus White Teachers*, 45 Educ Researcher 407, 407-420 [Oct. 2016]);
- The State Department of Education's Culturally Responsive-Sustaining Education Framework states that teachers must be provided resources to enable them to "plan and implement culturally responsive-sustaining practices in their respective communities" (New York State Education Department, *Culturally Responsive-Sustaining Education Framework* at 53 [2019], available at https://www.nysed.gov/sites/default/files/programs/crs/culturally-responsive-sustaining-education-framework.pdf [accessed Oct. 8, 2025]);
- The City and State fail to provide teachers with the training, curriculum, and resources they need to deliver culturally responsive instruction;
- The City's graduation rates also reflect the educa-

tion system's racial disparities. In 2020, the graduation rate for Black students was 75.9%, nearly eight percentage points lower than that of White students. Latino students graduated at an even lower rate—74.1%, or close to 10 percentage points below White students;[10]

- These disparities are even more pronounced among advanced Regents diploma recipients: in 2018, 50% of Asian students and 35% of White students earned advanced Regents diplomas, as compared to only 8% of Black students and 12% of Hispanic students. Advanced Regents diplomas are considered a virtual key to the top colleges and universities;
- The egregious racial inequality of the City's public school system has long been publicly documented and decried, including by defendants themselves, yet the City and State have failed to take sufficient action and instead intentionally maintain and sanction the educational system despite their knowledge that it reproduces and further entrenches the City's existing racial hierarchy; and
- An educational system that segregates large swaths of students of color from their White peers, cements different and superior outcomes for White students, marks students of color with badges of inferiority, infrequently exposes students to adults of color in positions of power and stature, and presents students with a curriculum steeped in Eurocentrism and divorced from the modern, multiethnic city and world in which they live leaves students unfit to engage in meaningful civic and economic participation.

II.

Supreme Court granted defendants' respective motions to dismiss on the ground that the pleading was nonjusticiable (2022 NY Slip Op 34736[U] [Sup Ct, NY County 2022]). The Appellate Division unanimously modified on the law (228 AD3d

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10. Plaintiffs cite to a media publication in support of this allegation (*see* Christina Veiga, *NYC graduation rates tick upwards in 2020*, Chalkbeat, Jan. 14, 2021, available at https://www.chalkbeat.org/newyork/2021/1/14/22230843/nyc-graduation-rates-up-2020/ [accessed Oct. 8, 2025]).

152, 157, 174 [1st Dept 2024]). After concluding that plaintiffs' claims were justiciable, the Appellate Division held that the pleading sufficiently alleged cognizable claims under the Education Article, the State Equal Protection Clause with respect to the G&T test, the SHSAT, and other standardized tests used in screened middle and high schools, and the NYSHRL solely as against the city defendants based on denial of the use of their facilities (*id.* at 161-174).

The majority and I agree that the claims are justiciable (majority op at 183 n 2), and that deficient funding is not the only cause capable of supporting an Education Article claim (*id.* at 185). That is as far as my agreement with the majority goes.

As I discuss, infra, the pleading is legally sufficient because: (1) the sound basic education standard we have adopted for Education Article claims is intended to address the needs of a changing society; (2) that standard cannot be satisfied by an educational system that functions as a racialized pipeline excluding students of color from schools and programs indispensable to developing the skills necessary for meaningful civic participation and accessing the employment opportunities available to their White peers; (3) plaintiffs' equal protection claims sufficiently plead discriminatory intent when viewed against the historical backdrop of the Hecht-Calandra Act and the actions of government officials, including inadequate remedial efforts, which allegedly result in racial and ethnic disparities caused by unvalidated standardized tests; and (4) plaintiffs' NYSHRL claim is sufficiently pleaded against the city defendants based on plaintiffs' disparate impact allegations that otherwise qualified students are denied access to public education facilities.

III.

Pleading Standard

"In considering the sufficiency of a pleading subject to a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), our well-settled task is to determine whether, accepting as true the factual averments of the complaint, plaintiff[s] can succeed upon any reasonable view of the facts stated" (*Aristy-Farer v State of New York*, 29 NY3d 501, 509 [2017] [internal quotation marks and citation omitted], quoting *Campaign for Fiscal Equity v State of New York*, 86 NY2d 307, 318 [1995] [*CFE I*]). "On a motion to dismiss pursuant to CPLR

3211, the pleading is to be afforded a liberal construction" and we must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Eccles v Shamrock Capital Advisors, LLC*, 42 NY3d 321, 342 [2024] [same]; *see also Foley v D'Agostino*, 21 AD2d 60, 64-65 [1st Dept 1964] ["(E)very pleading question should be approached in the light of (CPLR 3026's statements) that pleadings shall be liberally construed" and that "(d)efects shall be ignored if a substantial right of a party is not prejudiced" (internal quotation marks omitted)]; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977] ["Initially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law"]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *Eccles*, 42 NY3d at 343; *see also Lam v Weiss*, 219 AD3d 713, 715 [2d Dept 2023] ["Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss" (internal quotation marks and citation omitted)]).

We have repeatedly "recognized the right of plaintiffs 'to seek redress . . . and not have the courthouse doors closed at the very inception of an action, where the pleading meets a minimal standard necessary to resist dismissal of a complaint' " (*CFE I*, 86 NY2d at 318, quoting *Armstrong v Simon & Schuster*, 85 NY2d 373, 379 [1995]). So long as "we determine that plaintiffs are entitled to relief on any reasonable view of the facts stated, our inquiry is complete and we must declare the complaint legally sufficient" (*id.*). In short, our task is to determine sufficiency alone, "without expressing our opinion as to whether [plaintiffs] can ultimately establish the truth of their allegations before the trier of fact" (*id.* [citations omitted]).

To the extent the majority suggests that the complaint is poorly drafted (*see* majority op at 184 n 4, 188-189), I disagree, but regardless, nonsubstantive drafting flaws are no basis to dismiss a pleading and are of no import when the minimal

pleading standard is satisfied and a cognizable cause of action may be gleaned from the express language of the complaint and the reasonable inferences to be drawn in the plaintiffs' favor therefrom (*Kain v Larkin*, 141 NY 144, 150-151 [1894] ["The pleading may be deficient in technical language or in logical statement, but . . . (it) will be deemed to allege whatever can be implied from its statements by fair and reasonable intendment"]). At this preliminary stage in the proceedings, we must "sustain the pleading when a cause of action may be discerned, *even if inartfully stated*, and [we should] make no effort to evaluate the ultimate merits of the case" (*Fischbach & Moore v Howell Co.*, 240 AD2d 157, 157 [1st Dept 1997] [emphasis added]).[11] Indeed, "[l]ooseness, verbosity[,] and excursiveness, must be overlooked on . . . a motion [to dismiss] if any cause of action can be spelled out from the four corners of the pleading" (*Foley*, 21 AD2d at 64-65, citing David D. Siegel, *Introducing: A Biannual Survey of New York Practice*, 38 St. John's L Rev 190, 205 [1963]).[12] Legal commentators have similarly noted that a complaint's inartful drafting and verbosity is no basis for dismissal (*see* Siegel, 38 St. John's L Rev at 205; Siegel & Connors, NY Prac § 208 [6th ed 2024]).

The burden is on defendants, as the movants, to establish that the pleading fails to articulate a viable claim (*Connolly v Long Is. Power Auth.*, 30 NY3d 719, 728 [2018]; *Jacobson v Chase Bank*, 34 Misc 3d 38, 41-42 [App Term, 2d Dept, 9th & 10th Jud Dists 2011]). This is a heavy burden (*cf. Leon*, 84 NY2d at 87-88; *Tax Equity Now NY LLC v City of New York*, 42 NY3d 1, 12 [2024]), which defendants cannot establish merely because a complaint is poorly drafted, prolix, or provocative. Nor does a pleading's academic tone or its assertion of a novel legal theory render it deficient at this early stage of litigation. What matters is whether the factual allegations and all inferences in favor of the plaintiff assert a cognizable cause of action. I conclude defendants have failed to carry their burden

11. *See also Foley*, 21 AD2d at 64-65 ("It [is] well settled . . . that a pleading will not be dismissed for insufficiency merely because it is inartistically drawn"); *Lam*, 219 AD3d at 715 ("Although inartfully pleaded, a claim should not be dismissed when the facts stated are sufficient to make out a cause of action").

12. " 'The pleading can be pathetically drawn; it can reek of miserable draftsmanship. That is not the inquiry on a motion under [CPLR] 3211 (a) (7). We want only to know whether it states a cause of action. If it does, a [CPLR] 3211 (a) (7) motion does not lie and the pleading is immune from it' " (*Foley*, 21 AD2d at 65 n 1, quoting Siegel, 38 St. John's L Rev at 205).

of establishing that the pleading fails to allege any cognizable cause of action.

IV.

Education Article Cause of Action

A.

The State Constitution's Education Article mandates that "[t]he [L]egislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated" (NY Const, art XI, § 1). The language of the Education Article is not aspirational but rather establishes a constitutional floor for a legislative duty "to offer all [New York's] children the opportunity of a sound basic education" (*CFE I*, 86 NY2d at 316). The constitutional standard "defines the contours of the requirement, against which the facts of a case may then be measured" (*Campaign for Fiscal Equity v State of New York*, 100 NY2d 893, 931 [2003] [*CFE II*]).

In *CFE I*, the Court provided "a template reflecting [its] judgment of what the trier of fact must consider in determining whether defendants have met their constitutional obligation" (86 NY2d at 317-318). That template is not static, but dynamic (*CFE II*, 100 NY2d at 931). The first iteration of the template set forth the essentials of a sound basic education:

> "Children are entitled to minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn. Children should have access to minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks. Children are also entitled to minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those subject areas" (*CFE I*, 86 NY2d at 317).

In short, a sound basic education "consist[s] of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury" (*id.* at 316). The Court

chose as benchmarks of the educational mandate a person's ability to vote and serve on a jury "because they are the civic responsibilities *par excellence* . . . [and] the statutory requirements for participation in those activities are aimed at being inclusive" (*CFE II*, 100 NY2d at 906-907).

In *CFE II*—a subsequent appeal in the same *CFE* litigation—the Court acknowledged that mere skills acquisition fails to comport with the Education Article mandate; more is required (*id.* at 905-906). As the Court explained:

> "[A] sound basic education conveys not merely skills, but skills fashioned to meet a practical goal: meaningful civic participation in contemporary society. This purposive orientation for schooling has been at the core of the Education Article since its enactment in 1894. As the Committee on Education reported at the time, the public problems confronting the rising generation will demand accurate knowledge and the highest development of reasoning power more than ever before" (*id.* at 905 [internal quotation marks and citation omitted]).

Taking into account contemporary demands, the *CFE II* Court further developed the template set out in *CFE I* to address a broader understanding of what is necessary "to function productively as [a] civic participant[ ]" in modern society (*id.* at 905-906). The Court recognized that a sound basic education must "prepare students to compete for jobs that enable them to support themselves," and that "for this purpose a high school level education is now all but indispensable" (*id.* at 906).

We have continued to acknowledge that "a sound basic education" must evolve to fit our ever-changing societal concepts of preparation for meaningful engagement in our democratic project (*see Aristy-Farer*, 29 NY3d at 505, quoting *CFE II*, 100 NY2d at 906, 908; *see also CFE II*, 100 NY2d at 908, 931 [expanding the definition of "a sound basic education" to encompass "the opportunity for a meaningful high school education," even if "a sound basic education back in 1894, when the Education Article was added, may well have consisted of an eighth or ninth grade education"]). Simply put, "[t]he definition of a sound basic education must serve the future as well as the case now before us" (*CFE II*, 100 NY2d at 931).

B.

To adequately plead a violation of the Education Article, a plaintiff must satisfy a two-pronged burden. The plaintiff must

first establish "deficient inputs—[in] teaching, facilities, and instrumentalities of learning—which lead to deficient outputs such as test results and graduation rates" (*Paynter v State of New York*, 100 NY2d 434, 440 [2003]; *CFE II*, 100 NY2d at 908). The existence of some differences in educational opportunities across schools is insufficient to establish a constitutional violation, as there must be a "gross and glaring inadequacy" (*Paynter*, 100 NY2d at 439, quoting *Board of Educ., Levittown Union Free School Dist. v Nyquist*, 57 NY2d 27, 48 [1982]; *CFE II*, 100 NY2d at 914). The plaintiff must also demonstrate causation—that the deficient outputs are "causally connected" to the claimed input deficiencies (*Paynter*, 100 NY2d at 440). Evidence that improved inputs yield better student performance and results can establish causation (*see CFE II*, 100 NY2d at 919). "[T]here may be many causal links to a single outcome," and a plaintiff need not "search for a single cause of the failure of [the] schools" (*id.* at 920 [internal quotation marks and citations omitted]). In *CFE I*, plaintiffs supported their allegations "with fact-based claims of inadequacies"—in other words, "deficient inputs"—"in physical facilities, curricula, numbers of qualified teachers, [and] availability of textbooks . . . [and] library books," and we concluded, "[o]n the basis of these factual allegations, and the inferences to be drawn therefrom," that plaintiffs "properly stated a cause of action sufficient to survive a motion to dismiss" (86 NY2d at 319).

C.

Here, the pleading asserts that New York City's segregated two-tier education system deprives Black and Latino students of a sound basic education because it relegates them to a perpetual underclass and precludes them from competing on a level playing field with students of other racial and ethnic backgrounds for access to public school resources. It alleges that defendants' deficient inputs—which include assigning students of color to segregated schools that are neglected and poorly maintained, forcing such students into overcrowded classrooms lacking sufficient textbooks and basic classroom equipment, instructing such students based on out-of-date curricula, and inadequately training teachers—result in starkly disparate outcomes for students of color. Those outputs include lower test scores and graduation rates and underrepresentation in the full scope of public school programming, such as

G&T programs and extracurricular activities. Thus, plaintiffs claim that defendants' policies and practices fail to provide sufficient opportunities for students of color to develop the skills and critical abilities necessary to meaningfully engage as civic participants in our modern society and compete for living-wage employment.

I disagree with the majority that the pleading utterly fails to assert a cognizable claim that defendants have not satisfied their constitutional duty to provide a sound basic education. The majority's conclusion is based on its application of a heightened pleading standard that is perilously close to the standard on summary judgment or the proof required at trial.

First, the majority ignores that a segregated school system has long been recognized to violate the rights of students of color (*see Brown v Board of Education*, 347 US 483, 493 [1954]; *CFE I*, 86 NY2d at 345 [Smith, J., dissenting in part] ["The Equal Protection Clauses of both the Federal and State Constitutions stand for the proposition that State action . . . cannot be used to condemn African-American, Latino or other children to an education which is inherently inferior"]). Nor does the State Constitution tolerate a segregated system characterized by unequal facilities, curricula, and teaching staff—exactly what plaintiffs claim here. Separate but equal is never equal, but here, plaintiffs allege that the educational opportunities available to students of color are not equal to those available to their White peers. Defendants' alleged conduct thus flies in the face of *Brown v Board of Education*'s promise of an integrated public education serving as a gateway to social and economic mobility. Here, the majority overlooks that school segregation on its own can constitute a violation of the Education Article (*see* majority op at 189 n 5). The fact that a particular action or inaction might violate one or more constitutional provisions is not controversial. Plaintiffs raised three different causes of action grounded in two different constitutional provisions and one statutory provision and alleged overlapping conduct in support of each claim. While plaintiffs' claims regarding segregation are clearly relevant to an equal protection analysis, that does not mean they cannot also support a violation of the Education Article. Indeed, our Court's reasoned interpretation of the Education Article requires nothing less.

Second, the majority fails to apply the Court's prior directive that the sound basic education standard must evolve to a changing society (*see CFE II*, 100 NY2d at 931). It is true that

plaintiffs chart new territory with their theories of an alleged racist pipeline that denies students of color the opportunities to benefit from the full offerings of the public school system. Still, much of what they assert has long been understood as an "input" (e.g. inadequate teacher training and certification) that can lead to an unconstitutional "output" (e.g. substandard teaching) (*id.* at 919). In any event, a novel theory can support a formerly recognized claim. Indeed, the Education Article standard anticipates continued reassessment through a fresh lens based on the contemporary demands of society. *CFE I* set forth the template establishing the "essentials" for a sound basic education, as the Court recognized them at that time (86 NY2d at 316), and *CFE II* expanded the standard to encompass employment opportunities (100 NY2d at 906).[13] Plaintiffs now argue for further reconsideration of the standard to address whether students of color can engage in civic life and compete on the job market if they are educated in a racially and ethnically segregated public school system that is designed to deny those students the same opportunities as other students to learn in safe and sanitary facilities, from properly trained staff, and in a manner that does not relegate them to an inferior status.[14] Unlike in *Paynter*, which involved wholly distinct underlying factual allegations, and contrary to the majority's assertion (*see* majority op at 189 & n 5), the pleading in the present case adequately alleges that the City public school system's deficient outputs—low test scores and graduation rates—are caused by deficiencies in teaching, facilities, and instrumentalities of learning (100 NY2d at 440-441). Plaintiffs may not ultimately prove these allegations, but I cannot agree that if they are true, we would conclude such a system provides a sound basic education within the meaning of the Education Article.

13. In *Paynter*, decided on the same day as *CFE II*, we recognized that "in *CFE I*[,] we . . . had no occasion to delineate the contours of all possible Education Article claims" (100 NY2d at 441).

14. Contrary to the majority's narrow reading of plaintiffs' allegations, in contravention of our liberal pleading standards, plaintiffs do not merely assert that "disrupt[ing] the 'complex system of biases and structural inequities' " in society through culturally sensitive curricula or faculty is a component of the constitutional standard for a sound basic education (*see* majority op at 190), but instead specifically allege that culturally competent curricula and a diverse teacher workforce that reflects students' identities, experiences, and communities improves students' academic performance, increases their engagement with their coursework, and prepares them for meaningful civic participation.

Third, the majority fails to persuade that the pleading does not sufficiently allege a district-wide failure (majority op at 187-189). Contrary to the majority's claim, plaintiffs did not limit their allegations to one school, but rather asserted deficiencies across the entire city public school system, while adding an example of what they allege are characteristics common throughout the unscreened public schools attended by students of color. Even now, the State and City do not contradict plaintiffs' narrative description. Similarly, the majority fails to adequately explain why plaintiffs' assertions—that unscreened schools are disproportionately composed of Black and Latino students, contain an insufficient number of textbooks, lack basic classroom materials, such as working markers, paper, and laboratory equipment for science classes, experience overcrowded classrooms, and expose students to neglected and unsanitary school buildings with recurrent leaks in school hallways and no toilet paper in bathrooms—are so "general" that it is unclear whether they apply district-wide (*id.* at 188-189). The pleading is crystal clear that these are the characteristics of the schools attended by students of color across the City. By every measure, the whole point of plaintiffs' claims is that the facilities, curricula, and staff in the segregated schools are deficient as compared to the facilities and programs provided to their White peers. The majority's claim that the pleading fails to provide "any benchmarks from which to assess these allegations" is more of the same application of the wrong heightened pleading standard (*id.* at 188). At the motion to dismiss stage, we accept the factual allegations as true and do not require plaintiffs to supply proof in accordance with the evidentiary burdens applied on a summary judgment motion or at trial.

The majority's failure to adequately assess the plaintiffs' complaint is, in part, a consequence of its comparison of this pleading to the *CFE I* complaint (*id.* at 188-189). Despite claiming that "*CFE I* is not a minimum standard for Education Article complaints" (*id.* at 188), the majority has essentially treated that complaint as the "liberal pleading" floor. However, *CFE I* does not state that the factual assertions made in that case were the bare minimum required by CPLR 3211 and our case law, or that the pleading sufficiency question was "close" (86 NY2d at 317-319). The pleading belies the majority's conclusion that plaintiffs do not assert even a single claim that the education system, as plaintiffs describe it, fails to provide a sound basic education for students of color.

V.

Equal Protection Cause of Action

The New York State Equal Protection Clause provides that "[n]o person shall be denied the equal protection of the laws of this state," and "[n]o person shall, because of race . . . be subjected to any discrimination in their civil rights . . . by the state or any agency or subdivision of the state" (NY Const, art I, § 11 [a]). Equal Protection claims based on the disproportionate impact of a facially neutral action or policy must show "[p]roof of racially discriminatory intent or purpose" (*Arlington Heights v Metropolitan Housing Development Corp.*, 429 US 252, 265 [1977]; *see CFE I*, 86 NY2d at 321 [holding that "an equal protection cause of action based upon a disproportionate impact upon a suspect class requires establishment of intentional discrimination"]). The discriminatory intent or purpose need not be the sole cause, but simply a "motivating factor" for the alleged conduct (*Arlington Hgts.*, 429 US at 265-266).

In determining intent, courts look to disparate impact as well as other relevant considerations, including "[t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes," "[t]he specific sequence of events leading up to the challenged decision," and "[t]he legislative or administrative history . . . especially where there are contemporary statements by members of the decisionmaking body" (*id.* at 266-268 [citations omitted]). "The foreseeability of a segregative effect, or adherence to a particular policy or practice, with full knowledge of the predictable effects of such adherence upon racial imbalance, is a factor that may be taken into account in determining whether acts were undertaken with segregative intent" (*United States v Yonkers Bd. of Educ.*, 837 F2d 1181, 1226-1227 [2d Cir 1987] [internal quotation marks, citations, and brackets omitted] [finding discriminatory intent where, among Yonkers's 25 elementary schools, 61% of all students were White, more than 75% of the schools were either more than 80% minority or more than 80% White, and 92% of minority students attended just 10 of the 25 schools]; *see also Personnel Administrator of Mass. v Feeney*, 442 US 256, 279 n 25 [1979] ["This is not to say that the inevitability or foreseeability of consequences of a neutral rule has no bearing upon the existence of discriminatory intent"]).

The fact that a government actor was "on notice" of a disparate impact and did nothing to ameliorate it is relevant to

an equal protection claim (*see Davis v City of New York*, 959 F Supp 2d 324, 362-363 [SD NY 2013] [crediting allegations that the City "was fully aware of residents' public complaints about its racially discriminatory trespass enforcement activities . . . but failed to take sufficient steps to address those complaints, leading to an inference that it intended for the racially discriminatory practices to continue" (internal quotation marks omitted)]). As the Appellate Division concluded below, "even when remedial efforts are taken, it is still possible to infer intent based on 'the inadequacy' of those efforts" (228 AD3d at 171, citing *Floyd v City of New York*, 813 F Supp 2d 417, 452-453 [SD NY 2011] [relying on statistics showing extreme disparate impact in finding a fact issue as to discriminatory intent with respect to the City's stop and frisk policies]).

Plaintiffs claim that "Black and Latinx students[ ] are denied the equal protection of the laws" by the educational system's separation of students into two groups: one largely White and economically privileged, and the other largely students of color and economically disadvantaged. According to plaintiffs, defendants have "intentionally adopted and adhered to a range of admissions, screening[,] and other policies that facilitate such inequality." Plaintiffs' assertions sufficiently plead a viable equal protection claim based on the State and City's use of the G&T test, the SHSAT, and other standardized tests used in screened middle and high schools.

Under our liberal pleading standards, we must accept as true plaintiffs' allegations that the G&T test, the SHSAT, and other standardized tests used in screened schools are unsound and unvalidated for their asserted purpose of identifying qualified students for such programs and schools. Plaintiffs allege that the SHSAT was historically used to exclude Black and Puerto Rican students from specialized high schools, that the Hecht-Calandra Act was passed to ensure the continued use of the test just as city officials were about to launch a critical assessment of its potential bias,[15] that defendants have failed to take action to evaluate the validity of the test ever since, that

15. In support of this allegation, plaintiffs cite to the Act's legislative history (*see* Mem in Support, June 4, 1971, Bill Jacket, L 1971, ch 1212 at 5 ["The purpose of this bill is to preserve and save the four specialized high schools in the City of New York"]; Letter from Mayor Lindsay to Governor Rockefeller, June 14, 1971, Bill Jacket, L 1971, ch 1212 at 21; Peter A. Piscitelli, Legis Representative, NY City Bd of Educ, Mem in Opp, May 4, 1971, Bill Jacket, L 1971, ch 1212 at 29-30; Letter from Assn of Bar of City of NY

(n. cont'd)

expert findings indicate the test is not appropriately designed to measure students' abilities to succeed academically, and that defendants' continued reliance on the test as the sole admissions criterion for its specialized high schools results in the disproportionate exclusion of Black and Latino students from those schools. The state and city defendants do not deny any of these allegations, but they claim that the allegations fail to establish intent as a matter of law. The majority agrees, relying on cases based on the proof required to establish intent at trial (*see* majority op at 193), engaging in a revisionist reading of the pleading which expressly alleges that the SHSAT lacks validity (*see id.* at 195), and accepting defendants' factual assertions as true (*see id.* at 194). But that approach contravenes our mandate to accept *plaintiffs'* factual assertions, accord *plaintiffs* the benefit of every possible favorable inference, and determine only whether plaintiffs' facts as alleged fit within *any* cognizable legal theory.

Contrary to the majority's contention, plaintiffs are not required, at this stage, to show "evidence" that the Act was passed with discriminatory intent (*see id.*). Indeed, the law does not require direct evidence of intent. Plaintiffs allege a damning historical context of the mandatory adoption of a gatekeeping high-stakes test that defendants have yet to validate, which continues to have a disproportionate adverse impact based on race and ethnicity, denying Black and Latino students equal access to the City's schools and educational programming, and which defendants continue to implement in the face of ongoing concerns that it is biased and not pedagogically sound. Plaintiffs also claim that the passage of the Hecht-Calandra Act itself was motivated, at least in part, by discriminatory intent, and they do not have to prove that this was the sole motivation. That is enough. Therefore, defendants have failed to establish that plaintiffs' allegations are legally insufficient at this threshold stage of the litigation.

VI.

New York State Human Rights Law Cause of Action

Executive Law § 296 (4) of the NYSHRL provides that it is "an unlawful discriminatory practice for an educational institution to deny the use of its facilities to any person otherwise

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to Honorable Michael Whiteman, Executive Chamber, June 11, 1971, Bill Jacket, L 1971, ch 1212 at 45-46).

qualified, . . . by reason of [their] race." In 2019, the Legislature made explicit that the NYSHRL "shall be construed liberally for the accomplishment of the remedial purposes thereof, regardless of whether federal civil rights laws, including those laws with provisions worded comparably to the provisions of this article, have been so construed" (Executive Law § 300). Further, "[e]xceptions to and exemptions from" the NYSHRL "shall be construed narrowly in order to maximize deterrence of discriminatory conduct" (*id.*). Thus, we have stated that "[c]ourts must construe the [NYSHRL] broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible," to maximally achieve the statute's remedial antidiscrimination purposes (*Syeed v Bloomberg L.P.*, 41 NY3d 446, 451 [2024] [internal quotation marks and citations omitted]; *see Matter of Clifton Park Apts., LLC v New York State Div. of Human Rights*, 41 NY3d 326, 332 [2024] [referencing the "legislative directive to construe the (NYSHRL) liberally to eliminate discrimination in this state"]).

For the reasons explained in the equal protection analysis, supra, section V, the pleading adequately alleged discriminatory intent in support of plaintiffs' NYSHRL claim. In addition, the pleading adequately asserts a claim based on disparate impact.

The Court has already recognized a viable NYSHRL employment discrimination claim under a disparate impact theory (*see People v New York City Tr. Auth.*, 59 NY2d 343, 348-349 [1983] ["(A)n employment practice neutral on its face and in terms of intent which has a disparate impact upon a protected class of persons violates the (NYSHRL) unless the employer can show justification for the practice in terms of employee performance"]). I agree with the Appellate Division that there is no reason to limit the education discrimination provision at issue here to claims based on discriminatory intent (228 AD3d at 174). Such a narrow interpretation of the NYSHRL is contrary to the legislative mandate that we broadly interpret the entire statute. And we must assume that the Legislature was aware of our prior employment discrimination case law when it amended the NYSHRL without expressly limiting its scope to intentional education discrimination claims.

Plaintiffs assert that defendants' policies and practices violate the NYSHRL prohibition on discriminatory exclusion from educational facilities. According to plaintiffs, "[s]tudents are segregated by race and class from the moment they enter

the City school system[ ] and indeed are more segregated in their schools than in the already highly segregated communities in which they live." Plaintiffs allege that, by design, students of color are "disproportionately relegated to neglected schools and inferior educational opportunities." Plaintiffs further claim that defendants maintain this system by continuing to use unvalidated standardized tests that have an adverse disproportionate impact on students of color. The pleading asserts that the organizational plaintiffs have multiple members who are city public school students of color who aspire to attend a screened middle or high school or a specialized high school and are qualified to attend such schools but have been deterred from applying or rejected due to the standardized tests.

Plaintiffs have sufficiently pleaded disparate impact based on the city defendants' alleged policies and practices that result in the disproportionate denial to Black and Latino students of equal access to the use of city facilities, namely specialized high schools, screened middle and high schools, and G&T programs. Here, the majority improperly concludes that the pleading did not sufficiently allege facts regarding individual students of color who were denied access to screened middle or high schools or specialized high schools as a result of the allegedly discriminatory standardized tests used to determine admission to those schools, even where those students were otherwise qualified to succeed at the schools (majority op at 195-196). The majority overlooks that when the only barrier to admission is an allegedly biased and pedagogically unsound test that plaintiffs assert is not appropriately designed to measure students' abilities to succeed academically, the students are otherwise qualified for those schools as City public school students. Accordingly, I would hold that plaintiffs stated a claim under the NYSHRL.

VII.

Conclusion

Plaintiffs allege that the New York City public school system maintains a racial and ethnic educational pipeline designed to subordinate and deny opportunities to students of color, particularly Black and Latino students. That pipeline runs throughout a segregated school system, described as a network of dilapidated and unsanitary physical infrastructures that are

inadequately equipped, and where insufficiently trained staff deliver curricular programming that tracks students onto one of two paths. One path offers the majority of students of color an unsound and ineffective education and sets them in the direction of diminished expectations and dreams unfulfilled. The other path offers the majority of their White or well-resourced peers increased opportunities for academic and financial success and social status. Plaintiffs may not prove these allegations at trial, but that is not the question before us. We need only determine whether defendants have established that the pleading fails to allege *any* viable cause of action. Defendants have failed to do so with the limited exceptions noted by the Appellate Division. While the majority improperly reaches the merits (*see* majority op at 194, 196), whether plaintiffs can ultimately prevail is not part of the calculus in determining a motion to dismiss.

Every child in New York State has the right to an education in accordance with the constitutional and statutory guarantees of equality and access to opportunity. The law seeks to prepare future generations to meet the demands of our ever-changing society, so that they may engage meaningfully in the civic life of New York and compete on a level playing field for jobs. The pleading is a stunning indictment of the New York City public education system. And its allegations compel us to question whether education is the great leveler or whether it instead entrenches inequality. Plaintiffs' claims are more than "troubling" (*id.* at 181). They implicate discriminatory governmental practices and policies antithetical to an open, civilized, and diverse democracy.

I dissent.

Chief Judge WILSON and Judges SINGAS, CANNATARO, and HALLIGAN concur. Judge TROUTMAN dissents in part and votes to modify the order insofar as appealed from by dismissing the cause of action under the Education Article of New York State Constitution for the reasons stated in section II.A of Judge Garcia's majority opinion and to otherwise affirm for the reasons stated in sections V and VI of Judge Rivera's dissenting opinion. Judge RIVERA dissents in an opinion.

Order insofar as appealed from modified, without costs, in accordance with the opinion herein and, as so modified, affirmed and certified question answered in the negative.

REPORTS OF CASES

DECIDED IN THE

APPELLATE DIVISION

OF THE

SUPREME COURT

OF THE

STATE OF NEW YORK

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[246 NYS3d 47]

In the Matter of ROLLYN GUECO MALIG, an Attorney, Respondent. ATTORNEY GRIEVANCE COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT, Petitioner.

First Department, December 2, 2025

PROCEDURAL SUMMARY

JOINT MOTION pursuant to 22 NYCRR 1240.8 (a) (5) by the Attorney Grievance Committee for the First Judicial Department and respondent for discipline on consent. Respondent was admitted to the bar on January 20, 2011, at a term of the Appellate Division of the Supreme Court in the Third Judicial Department.

HEADNOTE

Attorney and Client — Disciplinary Proceedings — Public Censure

Respondent attorney was guilty of professional misconduct stemming from her misdemeanor criminal contempt conviction for violating a protection from abuse order issued in her favor but requiring her to refrain from contact with her former domestic partner. A public censure—requested by consent of the parties pursuant to 22 NYCRR 1240.8 (a) (5)—was warranted in light of respondent's admitted misconduct, the total lack of malice in the contents of her text and email communications, and the mitigating and aggravating factors presented. Respondent had no prior disciplinary history; she fully cooperated with the Attorney Grievance Committee's (AGC) investigation; her misconduct arose out of the mistaken view that she as the protected party was allowed to send communications; and she expressed remorse for her conduct, conviction, and failure to report her conviction to the AGC, an aggravating factor. In addition, respondent submitted two references attesting to her good character.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Attorneys at Law §§ 29, 40, 44, 86, 91.
CARMODY-WAIT 2d Officers of Court §§ 3:249, 3:258, 3:273, 3:325–3:326, 3:329.
22 NYCRR 1240.8 (a) (5).
NY JUR 2d Attorneys at Law §§ 511, 518, 520, 524–525.

ANNOTATION REFERENCE

See ALR Index under Attorneys; Discipline and Disciplinary Actions; Labor and Employment.

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Query: public! /3 censur! /p (cooper! /3 investigat!) or (demonstrat! or express! /3 remors!) or (lack or no /3 (disciplin! /3 histor!) or malic!) & (misdemeanor or "serious crime")

APPEARANCES OF COUNSEL

Jorge Dopico, Chief Attorney, Attorney Grievance Committee, New York City (*Louis J. Bara* of counsel), for petitioner.

Rollyn Gueco Malig, respondent pro se.

OPINION OF THE COURT

Per Curiam.

Respondent Rollyn Gueco Malig was admitted to the practice of law in the State of New York by the Third Judicial Department on January 20, 2011. Respondent maintains a registered address in the First Judicial Department.

By August 25, 2025 unpublished order, this Court deemed respondent's March 17, 2025 misdemeanor criminal contempt conviction in Pennsylvania for violating 23 PA Statutes § 6114 (a) a "serious crime" as defined by Judiciary Law § 90 (4) (d) and, pursuant to Judiciary Law § 90 (4) (g) and Rules for Attorney Disciplinary Matters (22 NYCRR) § 1240.12 (c) (2), appointed a referee to conduct a sanction hearing. Respondent's conviction stems from her violation of a protection from abuse order (i.e., an order of protection) in her favor.

The parties now jointly move under 22 NYCRR 1240.8 (a) (5) for discipline by consent and ask this Court to impose a public censure. As required by 22 NYCRR 1240.8 (a) (5) (i) and (iii), the parties have submitted a stipulation of facts, respondent's affidavit, in which she conditionally admits to the facts set forth in the stipulation of facts, and factors in aggravation and mitigation. Further, respondent consents to the agreed upon discipline of a public censure.

The parties stipulate that respondent sought and obtained an order of protection against her now former partner following a domestic dispute that resulted in her former partner's arrest. Although the order of protection was in respondent's favor, it also required respondent to refrain from contact.

A little more than a month after the incident, respondent sent her former partner two text messages and one email in an attempt to repair their relationship. Respondent was then arrested and criminally charged as the communications consti-

tuted a violation of the order of protection. Respondent was convicted after a bench trial of violating 23 PA Statutes § 6114 (a), and this Court deemed the conviction as one for a "serious crime" under Judiciary Law § 90 (4) (d).

On May 14, 2025, respondent appeared before the Attorney Grievance Committee (AGC) for an examination under oath. As to her conviction, respondent testified that it was not clear to her that she was forbidden from sending the communications, since she was the one who had obtained the order of protection. Respondent has, however, expressed remorse for her conviction, including stating that she regrets sending the communications and understands that she should not have sent them.

Respondent conditionally admits that her conduct and criminal conviction violated the New York Rules of Professional Conduct (22 NYCRR 1200.0).

The parties agree that a factor in aggravation is respondent's failure to notify the AGC of her criminal conviction within 30 days thereof as required by Judiciary Law § 90 (4) (c) and 22 NYCRR 1240.12 (a). The parties also stipulated to the following mitigation: respondent has no disciplinary history; she fully cooperated with the AGC's investigation from its inception; respondent's misconduct arose out of the mistaken view that she, as the protected party, was allowed to send the communications, but she understands that this view was incorrect and self-serving; respondent's messages contained no threats of violence or retribution of any kind; and respondent expressed remorse for her conduct, conviction, and failure to report. In addition, respondent submitted two references attesting to her good character.

The parties' joint motion asks that a public censure be imposed. They maintain that a public censure represents an appropriate sanction because, inter alia, the communications—though wrongful in violating the order of protection—contained no threats or other malicious content whatsoever. The parties maintain that their public censure request is thus supported by precedent involving comparable misconduct (*see Matter of Arkun*, 119 AD3d 111 [1st Dept 2014]; *see also Matter of Samuel*, 103 AD3d 134 [1st Dept 2013]; *Matter of Kunstler*, 194 AD2d 233 [1st Dept 1993]). The parties note that this Court has also previously imposed suspension for misconduct related to contempt, but the facts in such cases are distinguishable given the presence of more significant aggravation (*see e.g.*

Matter of Perry, 241 AD3d 34 [1st Dept 2025]; *Matter of Miller*, 241 AD3d 30 [1st Dept 2025]).

Accordingly, in light of respondent's admitted misconduct, the total lack of malice in the contents of the communications, and the aggravating and mitigating factors presented, the parties' motion should be granted and respondent publicly censured.

Kapnick, J.P., Shulman, Rodriguez III, Pitt-Burke and Higgitt, JJ., concur.

Wherefore, it is ordered that the parties' joint motion for discipline by consent pursuant to 22 NYCRR 1240.8 (a) (5) is granted, and respondent, Rollyn Gueco Malig, is publicly censured.

[247 NYS3d 23]

In the Matter of STEVEN CULLEN BENNETT, an Attorney, Respondent. ATTORNEY GRIEVANCE COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT, Petitioner.

First Department, December 18, 2025

PROCEDURAL SUMMARY

APPLICATION by respondent pursuant to 22 NYCRR 1240.10 to resign as an attorney and counselor-at-law. Respondent was admitted to the bar on June 25, 1991, at a term of the Appellate Division of the Supreme Court in the Third Judicial Department.

HEADNOTE

Attorney and Client — Disciplinary Proceedings — Resignation

Inasmuch as resignor's proffered resignation complied with the requirements of 22 NYCRR 1240.10 in that his affidavit attested that the resignation was submitted voluntarily, without coercion or duress, and with full awareness of the consequences, and he acknowledged that the Court's approval of the application would result in the entry of an order disbarring respondent, and that he could not successfully defend himself against charges of professional misconduct if they were predicated upon the matters under investigation, including that he failed to answer to a grievance complaint in Connecticut, failed to submit to an audit, and failed to attend three hours of continuing legal education, which resulted in respondent's resignation from the practice of law in Connecticut, resignor's resignation was accepted and he was immediately disbarred.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Attorneys at Law §§ 29, 31, 37.
CARMODY-WAIT 2d Officers of Court §§ 3:244, 3:334.
22 NYCRR 1240.10.
NY JUR 2d Attorneys at Law §§ 495, 497, 511.

ANNOTATION REFERENCE

Propriety of attorney's resignation from bar in light of pending or potential disciplinary action. 54 ALR4th 264.

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Query: AGC or "grievance committee" & resign! /s investigat! & affidavit /p 1240.10

APPEARANCES OF COUNSEL

Jorge Dopico, Chief Attorney, Attorney Grievance Committee, New York City (*Gina M. Patterson* of counsel), for petitioner.

Steven Cullen Bennett, respondent pro se.

OPINION OF THE COURT

Per Curiam.

Respondent Steven Cullen Bennett was admitted to the practice of law in the State of New York by the Third Judicial Department on June 25, 1991. At all times relevant to this proceeding, he has maintained an address within the First Judicial Department.

Respondent now seeks an order, pursuant to Rules for Attorney Disciplinary Matters (22 NYCRR) § 1240.10, accepting his resignation as an attorney and counselor-at-law licensed to practice in the State of New York. The Attorney Grievance Committee (AGC) supports respondent's application.

In support of the relief sought respondent submitted his affidavit of resignation which conforms to the format set forth in 22 NYCRR part 1240, Appendix A (22 NYCRR 1240.25).

Respondent attests that he is currently the subject of an investigation conducted by the AGC involving allegations of professional misconduct that resulted in respondent's resignation from the practice of law in Connecticut, effective June 30, 2025. Specifically, respondent acknowledges that the allegations include that he failed to file an answer to a grievance complaint in Connecticut, failed to submit to an audit, and failed to attend three hours of continuing legal education.

Respondent further attests that he cannot successfully defend against the allegations under investigation based upon the facts and circumstances of his professional conduct as described herein.

Respondent also attests that his resignation is freely and voluntarily rendered, without coercion or duress by anyone, and with full awareness of the consequences, including that the Court's acceptance and approval shall result in the entry of an order of disbarment striking his name from the roll of attorneys and counselors-at-law. Respondent attests that the allegations do not include allegations of misappropriation or misapplied money and acknowledges that his resignation is submitted subject to any future application that may be made by a committee to any department of the Appellate Division for

an order under Judiciary Law § 90 (6-a) directing that he make restitution or reimburse the Lawyers' Fund for Client Protection, and he consents to the continuing jurisdiction of the Appellate Division to make such an order.

Respondent acknowledges and agrees that pending issuance of an order accepting his resignation, he will not undertake to represent any new clients or accept any retainers for future legal services to be rendered, and that there will be no transactional activity in any fiduciary account to which he has access, other than for payment of funds held therein on behalf of clients or others entitled to receive them.

Respondent further understands that, should the Court accept his resignation, the order resulting from his application and the records and documents filed in relation to the aforementioned allegations, including his affidavit, shall be deemed public records in accordance with Judiciary Law § 90 (10).

As respondent's affidavit conforms with 22 NYCRR 1240.10, the Court accepts his resignation (*see Matter of Darby*, 244 AD3d 133 [1st Dept 2025]).

Accordingly, the motion should be granted, and respondent's name stricken from the roll of attorneys and counselors-at-law in the State of New York, effective nunc pro tunc to October 17, 2025, the date of his affidavit.

Webber, J.P., Friedman, Pitt-Burke, Rosado and O'Neill Levy, JJ., concur.

Wherefore, it is ordered that the application of respondent, Steven Cullen Bennett, to resign as an attorney and counselor-at-law pursuant to 22 NYCRR 1240.10 is granted, and respondent is disbarred and his name stricken from the roll of attorneys and counselors-at-law in the State of New York, effective nunc pro tunc to October 17, 2025, and until further order of this Court; and

It is further ordered that, pursuant to Judiciary Law § 90, respondent, Steven Cullen Bennett, is commanded to desist and refrain from (1) the practice of law in any form, either as principal or agent, clerk or employee of another, (2) appearing as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law; and

It is further ordered that, respondent, Steven Cullen Bennett, shall comply with the rules governing the conduct of

disbarred or suspended attorneys (*see* 22 NYCRR 1240.15), which are made part hereof; and

It is further ordered that if respondent, Steven Cullen Bennett, has been issued a secure pass by the Office of Court Administration, it shall be returned forthwith.

[247 NYS3d 30]

In the Matter of Alejandro R. Hernandez Jr., an Attorney, Respondent. Attorney Grievance Committee for the First Judicial Department, Petitioner.

First Department, December 18, 2025

PROCEDURAL SUMMARY

Disciplinary proceedings instituted by the Attorney Grievance Committee for the First Judicial Department. Respondent was admitted to the bar on October 6, 2021, at a term of the Appellate Division of the Supreme Court in the Third Judicial Department.

HEADNOTE

Attorney and Client — Disciplinary Proceedings — Disbarment

Pursuant to the reciprocal disciplinary provision of 22 NYCRR 1240.13, respondent was disbarred based upon orders of disbarment imposed upon him in Texas for failure to keep clients reasonably informed of the status of their matters despite reasonable requests for information; neglect of clients' matters, and upon termination of the representation, failure to take steps to the extent reasonably practicable to protect the clients' interests including surrendering papers and property to which the clients were entitled and refunding any unearned fees; improper settlement of a legal malpractice claim with a client; improper division of legal fees; and failure to properly supervise subordinate lawyers. Respondent associated with outside attorneys as a purported "virtual law office" within respondent's firm, and approved the use of retainer agreements which stated that clients were hiring respondent's firm and did not list the names of any other attorneys or law firms, nor did the agreements outline any division of legal fees. An aggravating factor that weighed in favor of the sanction of disbarment was respondent's failure to self-report the Texas disbarments and prior suspension, as well as his failure to report his reciprocal disbarments from the Bureau of Immigration Appeals and New Mexico Supreme Court to the Attorney Grievance Committee and/or to the Appellate Division, First Department.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

Am Jur 2d Attorneys at Law §§ 38, 44, 58, 60–61, 66–67.

Carmody-Wait 2d Officers of Court §§ 3:256, 3:260, 3:276–3:277, 3:286, 3:288. 3:334.

22 NYCRR 1240.13.

NY Jur 2d Attorneys at Law §§ 402, 405, 436, 440, 446, 449, 451, 510, 512, 525.

ANNOTATION REFERENCES

Disbarment for failure to account for money of client. 43 ALR 54.

Failure to communicate with client as basis for disciplinary action against attorney. 80 ALR3d 1240.

Disbarment or suspension of attorney in one state as affecting right to continue practice in another state. 81 ALR3d 1281.

Reciprocal Discipline of Attorneys—Noncriminal Misconduct Towards Clients Not Involving Client Funds. 44 ALR6th 75.

Reciprocal Discipline of Attorneys—Commingling or Other Mishandling of Client Funds. 45 ALR6th 175.

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Query: disbar! & ((reciprocal /s disciplin!) or (1240.13 /5 NYCRR)) & status & supervis! & report or self-report

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APPEARANCES OF COUNSEL

Jorge Dopico, Chief Attorney, Attorney Grievance Committee, New York City (*Diana Neyman* of counsel), for petitioner.

Alejandro R. Hernandez Jr., respondent pro se.

OPINION OF THE COURT

Per Curiam.

Respondent Alejandro R. Hernandez Jr. was admitted to the practice of law in the State of New York by the Third Judicial Department on October 6, 2021, and to the State Bar of Texas in 1995. At all times relevant to this proceeding, respondent maintained a registered address in the First Judicial Department. By an order dated June 12, 2024, the State Bar of Texas suspended respondent from the practice of law for five years and then by two orders issued on July 12, 2024, the State Bar of Texas disbarred him.

Between April and July 2024, the Texas Commission for Lawyer Discipline brought proceedings against respondent based on nine client complaints. The matters were referred to an Evidentiary Panel of the Grievance Committee of the State Bar of Texas for hearings. Respondent was served, appeared, defended himself against the charges and testified at the hearings while being represented by counsel.

The first hearing took place between April and May 2024 and was based on complaints filed by three clients that retained respondent's law office. Respondent was the sole owner and member of his law firm, which operated under the name The

Law Offices of Alex R. Hernandez, Jr., PLLC. Respondent and attorney Gary Magnuson associated with outside attorneys as a purported "virtual law office" within respondent's firm. The associated attorneys were paid by The Law Offices of Gary A. Magnuson, PLLC. Respondent had direct supervisory authority over the attorneys working with his firm. The retainer agreements with the clients stated that the clients were hiring respondent's firm and did not list the names of any other attorneys or law firms, nor did the agreements outline any division of legal fees. Nevertheless, respondent associated with lawyers not in his firm and arranged to divide legal fees with them. Furthermore, the division of legal fees was not in proportion to the professional services rendered by each attorney, nor did these attorneys assume joint responsibility for the representation of these clients. The clients did not consent in writing to the terms of the fee division prior to the associations or referrals.

During the course of the clients' representation, respondent failed to keep the clients reasonably informed of the status of their matters despite their reasonable requests for information. The clients' matters were neglected, and upon termination of the representation, respondent failed to take steps to the extent reasonably practicable to protect the clients' interests, including surrendering papers and property to which the clients were entitled and refunding any unearned fees. Additionally, respondent settled a client's liability claim against respondent when the client was not independently represented, and respondent did not first advise the client in writing that independent representation was appropriate in connection therewith. Furthermore, as the partner or supervising lawyer, respondent ordered, encouraged, or knowingly permitted disciplinary violations by other lawyers in connection with the representations.

The Evidentiary Panel found that respondent's conduct as described above violated Texas Disciplinary Rules of Professional Conduct rules 1.01 (b) (1) (neglect of a legal matter entrusted to the lawyer); 1.03 (a) (failure to keep a client reasonably informed about the status of a matter and failure to promptly comply with reasonable requests for information); 1.04 (f) (1) (i), (ii); (2) (i)-(iii); (g) (1), (2) (improper division of legal fees); 1.08 (g) (improperly settling legal malpractice claim with a client); 1.15 (d)—now 1.16 (d) (upon termination of representation failure to take steps to extent reasonably practic-

able to protect client's interests); and 5.01 (a) (failure to properly supervise subordinate lawyers).

As to sanction, the Evidentiary Panel ordered that respondent be actively suspended from the practice of law for a period of five years, beginning September 1, 2024, and ending August 31, 2029. Respondent initially appealed the suspension to the Texas Board of Disciplinary Appeals (BDA), but he later moved to dismiss the appeal, and by November 13, 2024 order, the BDA granted his motion.

Between May and July 2024, additional hearings were held in connection with six additional complaints by clients which concerned, inter alia, the same complaints as the previous three. The Evidentiary Panel additionally found that respondent failed to properly communicate with his clients; neglected clients' matters; failed to promptly deliver funds or other property to a client which they were entitled to receive; upon termination of the representation, failed to take steps to the extent reasonably practicable to protect the interests of the six clients; and as a partner or supervising lawyer he ordered, encouraged, or knowingly permitted other lawyers to commit disciplinary violations in connection with the representation of the six clients.

In its two July 12, 2024 decisions, the Evidentiary Panel found that by engaging in the aforementioned conduct respondent violated Texas disciplinary rules 1.01 (b) (1); 1.03 (a), (b) (failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation); 1.04 (f) (1) (i), (ii); (2) (i)-(iii); 1.14 (b)—now 1.15 (b) (failure to promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive); 1.15 (d)—now 1.16 (d); and 5.01 (a). As to sanction, the Evidentiary Panel disbarred respondent, effective nunc pro tunc to July 10, 2024.

By November 22, 2024 order, the U.S. Department of Justice's Board of Immigration Appeals (BIA) imposed reciprocal discipline based on respondent's disbarment in Texas and disbarred him from practice before the BIA, Immigration Courts, and the Department of Homeland Security, effective nunc pro tunc to October 10, 2024. By January 9, 2025 order, the Supreme Court of the State of New Mexico imposed reciprocal discipline based on respondent's Texas disbarment and disbarred him from the practice of law in that state.

Respondent did not report his suspension and disbarment in Texas, nor the reciprocal disbarments imposed by the BIA and

the New Mexico Supreme Court, to this Court or the Attorney Grievance Committee (AGC) as required by 22 NYCRR 1240.13 (d). By November 18, 2024 letter, the Texas State Bar informed the Office of Court Administration (OCA) of respondent's suspension and disbarment; and OCA forwarded the letter to the AGC on or about December 4, 2024. The AGC now moves for an order pursuant to 22 NYCRR 1240.13 (b) and the doctrine of reciprocal discipline to disbar respondent for the underlying misconduct.

In a proceeding seeking reciprocal discipline, as here, pursuant to 22 NYCRR 1240.13 (b), respondent may raise the following defenses: (1) lack of notice or opportunity to be heard in the foreign jurisdiction constituting a deprivation of due process; (2) an infirmity of proof establishing the misconduct; or (3) that the misconduct for which the attorney was disciplined in the foreign jurisdiction does not constitute misconduct in this state (*see Matter of Milara*, 194 AD3d 108, 110 [1st Dept 2021]).

None of the aforementioned enumerated defenses are available to respondent. Respondent received notice of the allegations against him and, represented by counsel, he appeared, defended himself against the charges, and testified at the Texas evidentiary hearings; the Texas Evidentiary Panel's misconduct findings against him are sufficiently supported by the record; and respondent's misconduct in Texas would constitute misconduct in New York in violation of Rules of Professional Conduct (22 NYCRR 1200.0) rules 1.3 (b), (c); 1.4 (a) (3), (4); (b); 1.5 (g) (1), (2); 1.15 (c) (1), (3), (4); 1.16 (e); and 5.1 (b), (d).

Respondent asserts as mitigation that he has practiced law for over 20 years with no discipline, that he acted promptly once he was aware of Magnuson's misconduct, and Magnuson absconded with law firm money and disappeared. In response, the AGC maintains that the Texas disciplinary proceedings do not support the position that Magnuson was solely responsible for the misconduct at issue because, inter alia, three complainants testified at the evidentiary hearing that they hired respondent's law firm to represent them; the record included their signed retainer agreements with respondent's firm; they were under the impression that respondent was managing the firm and handling their cases, and they did not know who Magnuson was. Additionally, the AGC cites the fact that respondent testified, inter alia, that he entered into a virtual law practice with Magnuson and approved the use of the retainer

agreements which reflected that the complainants entered into an attorney-client relationship with his firm. Moreover, the AGC maintains that an aggravating factor that weighs in favor of disbarment is respondent's failure to self-report the Texas disbarments and prior suspension, as well as his failure to report his disbarments from the BIA and New Mexico to the AGC and/or to this Court.

As a general rule, this Court defers to the sanction imposed by the jurisdiction in which the charges were originally brought because the foreign jurisdiction has the greatest interest in fashioning sanctions for misconduct (*see Matter of Milara*, 194 AD3d at 111; *Matter of Tabacco*, 171 AD3d 163 [1st Dept 2019]; *Matter of Blumenthal*, 165 AD3d 85 [1st Dept 2018]). Disbarment, as requested by the AGC, is the appropriate sanction herein as it is commensurate with the discipline imposed in Texas and is in general accord with precedent involving arguably comparable misconduct (*see Matter of Nguyen*, 241 AD3d 95 [1st Dept 2025]; *Matter of Tarter*, 156 AD3d 157 [1st Dept 2017]; *Matter of Sirkin*, 88 AD3d 165 [1st Dept 2011]; *Matter of Anschell*, 11 AD3d 56 [1st Dept 2004]).

Accordingly, AGC's motion should be granted and respondent disbarred and his name stricken from the roll of attorneys and counselors-at-law in the State of New York, effective immediately.

Moulton, J.P., Scarpulla, Gesmer, Mendez and Chan, JJ., concur.

Wherefore, it is ordered that the motion by the Attorney Grievance Committee for the First Judicial Department for reciprocal discipline, pursuant to Judiciary Law § 90 (2) and 22 NYCRR 1240.13, is granted, and respondent, Alejandro R. Hernandez Jr., is disbarred, and his name stricken from the roll of attorneys and counselors-at-law in the State of New York, effective immediately, and until further order of this Court; and

It is further ordered that, pursuant to Judiciary Law § 90, respondent, Alejandro R. Hernandez Jr., is commanded to desist and refrain from (1) the practice of law in any form, either as principal or agent, clerk or employee of another, (2) appearing as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law; and

It is further ordered that respondent, Alejandro R. Hernandez Jr., shall comply with the rules governing the conduct of disbarred or suspended attorneys (*see* 22 NYCRR 1240.15), which are made part hereof; and

It is further ordered that if respondent, Alejandro R. Hernandez Jr., has been issued a secure pass by the Office of Court Administration, it shall be returned forthwith.

[247 NYS3d 27]

In the Matter of MARK JONATHAN NUSSBAUM, an Attorney, Respondent. ATTORNEY GRIEVANCE COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT, Petitioner.

First Department, December 18, 2025

PROCEDURAL SUMMARY

DISCIPLINARY PROCEEDINGS instituted by the Attorney Grievance Committee for the First Judicial Department. Respondent was admitted to the bar on May 6, 2009, at a term of the Appellate Division of the Supreme Court in the Second Judicial Department.

HEADNOTE

Attorney and Client — Disciplinary Proceedings — Resignation

Inasmuch as resignor's proffered resignation complied with the requirements of 22 NYCRR 1240.10 in that his affidavit attested that the resignation was submitted voluntarily, without coercion or duress, and with full awareness of the consequences, and he acknowledged that the Court's approval of the application would result in the entry of an order disbarring respondent, and that he could not successfully defend himself against allegations of professional misconduct if they were predicated upon the matters under investigation concerning his handling of funds in his Interest on Lawyer Account, resignor's resignation was accepted and he was immediately disbarred.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Attorneys at Law §§ 31, 37, 62.
CARMODY-WAIT 2d Officers of Court §§ 3:284, 3:312, 3:314, 3:334.
22 NYCRR 1240.10.
NY JUR 2d Attorneys at Law §§ 437–438, 497, 511.

ANNOTATION REFERENCE

Propriety of attorney's resignation from bar in light of pending or potential disciplinary action. 54 ALR4th 264.

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Query: AGC or "grievance committee" & resign! & (handl! or mishandl! /3 fund or "interest on lawyer account" or IOLA)

APPEARANCES OF COUNSEL

Jorge Dopico, Chief Attorney, Attorney Grievance Committee, New York City (*Kevin P. Culley* of counsel), for petitioner.

Michael S. Ross for respondent.

OPINION OF THE COURT

Per Curiam.

Respondent Mark Jonathan Nussbaum was admitted to the practice of law in the State of New York by the Second Judicial Department on May 6, 2009. At all times relevant to this proceeding, he maintained a law office within the First Judicial Department. Respondent is also admitted to practice in the Southern and Eastern Districts of New York.

Respondent moves for an order accepting his resignation as an attorney and counselor-at-law licensed to practice in the State of New York. Respondent also consents to the entry of an order by the Court directing respondent to make monetary restitution as directed by this Court. Respondent maintains that his resignation is "freely and voluntarily rendered, without coercion or duress by anyone, and with full awareness of the consequences."

In support of his application, respondent attests that he is the subject of an investigation by the Attorney Grievance Committee (AGC) related to allegations of professional misconduct regarding his "handling of funds in [his] IOLA account," and that he cannot successfully defend against these allegations. Respondent acknowledges that acceptance and approval of his resignation shall result in the entry of an order of disbarment striking his name from the roll of attorneys and counselors-at-law and will result in his application materials being deemed public records pursuant to Judiciary Law § 90 (10). He further acknowledges that his resignation is subject to any further application by a committee to any department of the Appellate Division requiring him to make restitution or reimburse the Lawyers' Fund for Client Protection. He consents to the continuing jurisdiction of the Appellate Division to make such an order.

Although the AGC has not filed disciplinary charges or sought respondent's interim suspension, it opposes the motion. Specifically, the AGC argues that respondent's affidavit fails to identify or acknowledge the specific acts of professional misconduct alleged against him as explicitly required under

Rules for Attorney Disciplinary Matters (22 NYCRR) §§ 1240.10 (a) and 1240.25 (Appendix A). The AGC notes that it was advised by the Lawyers' Fund for Client Protection in January 2025 of a shortfall in respondent's Interest on Lawyer Account (IOLA) escrow account, and thereafter, in May 2025, respondent was indicted by a grand jury on felony charges stemming from respondent's alleged theft of more than $1,000,000. The AGC understands respondent's desire to avoid self-incrimination in connection with pending criminal charges, but it maintains that respondent's description of the charges or allegations under investigation by AGC is insufficient. The AGC asserts that it conferred with respondent's counsel to resolve this apparent deficiency, but respondent has declined to amend his submission.

Upon due consideration, the Court accepts respondent's resignation. Respondent has been indicted for conduct that is the subject of an ongoing AGC investigation, and he now seeks to resign pursuant to 22 NYCRR 1240.10. He acknowledges that he cannot defend against the allegations against him and is willing to resign and accept the resulting order of disbarment. Although the AGC challenges respondent's description of the alleged misconduct under investigation, the affidavit does state that the investigation relates to respondent's "professional misconduct . . . concerning [his] handling of funds in [his] IOLA account." This description sufficiently identifies the "specific nature" of the allegations against respondent and therefore satisfies the plain language of 22 NYCRR 1240.10. Notably, nothing in this rule requires a recitation of factual particulars or evidence in addition to identifying the "specific nature" of allegations, particularly in circumstances where providing additional detail would risk self-incrimination in a parallel criminal prosecution.

Accordingly, respondent's motion for an order accepting his resignation as an attorney and counselor-at-law licensed to practice in the State of New York should be granted, and respondent's name stricken from the roll of attorneys and counselors-at-law in the State of New York, effective nunc pro tunc to July 9, 2025, the date of his affidavit of resignation.

Kern, J.P., Kennedy, Rodriguez III, Higgitt and Chan, JJ., concur.

Wherefore, it is ordered that the application of respondent, Mark Jonathan Nussbaum, to resign as an attorney and counselor-at-law pursuant to 22 NYCRR 1240.10 is granted,

and respondent is disbarred and his name stricken from the roll of attorneys and counselors-at-law in the State of New York, effective nunc pro tunc to July 9, 2025, and until further order of this Court; and

It is further ordered that, pursuant to Judiciary Law § 90, respondent, Mark Jonathan Nussbaum, is commanded to desist and refrain from (1) the practice of law in any form, either as principal or agent, clerk or employee of another, (2) appearing as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law; and

It is further ordered that, respondent, Mark Jonathan Nussbaum, shall comply with the rules governing the conduct of disbarred or suspended attorneys (*see* 22 NYCRR 1240.15), which are made part hereof; and

It is further ordered that if respondent, Mark Jonathan Nussbaum, has been issued a secure pass by the Office of Court Administration, it shall be returned forthwith.

[247 NYS3d 602]

In the Matter of MARK STEVEN BARNES, an Attorney, Respondent. GRIEVANCE COMMITTEE OF THE FIFTH JUDICIAL DISTRICT, Petitioner.

Fourth Department, December 23, 2025

PROCEDURAL SUMMARY

DISCIPLINARY PROCEEDINGS instituted by the Grievance Committee of the Fifth Judicial District. Respondent was admitted to the bar on January 24, 1989, at a term of the Appellate Division of the Supreme Court in the Third Judicial Department.

HEADNOTE

Attorney and Client — Disciplinary Proceedings — Suspension

Respondent attorney failed to seek the lawful objectives of a client through reasonably available means, failed to act with reasonable diligence and promptness, failed to comply in a prompt manner with a client's reasonable requests for information, commingled personal funds with client funds, and engaged in conduct that adversely reflected on his fitness as a lawyer (Rules of Prof Conduct [22 NYCRR 1200.0] rule 1.1 [c] [1]; 1.3 [a], [b]; 1.4 [a] [4]; 1.15 [a]; 8.4 [d], [h]). Under the totality of the circumstances, including respondent's admitted misconduct, which caused harm or prejudice to several clients, and his failure to cooperate in the grievance investigation or participate in the disciplinary proceeding, which evinced a disregard for his fate as an attorney, respondent was suspended from the practice of law for a period of three years.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Attorneys at Law §§ 29–30, 37–38, 40, 44, 53, 58, 62, 64, 66, 68.

CARMODY-WAIT 2d Officers of Court §§ 3:247–3:248, 3:254, 3:258, 3:285, 3:330–3:331, 3:334.

22 NYCRR 1200.0, rules 1.1 (c) (1); 1.3 (a); (b); 1.4 (a) (4); 1.15 (a); 8.4 (d); (h).

NY JUR 2d Attorneys at Law §§ 362–364, 402, 405, 409, 437–438, 511, 525–526.

ANNOTATION REFERENCES

Failure to communicate with client as basis for disciplinary action against attorney. 80 ALR3d 1240.

Attorney's commingling of client's funds with his own as ground for disciplinary action—modern status. 94 ALR3d 846.

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Query: “grievance committee” & suspen! & commingl! & (diligence OR prompt!) & ((cooperate OR participate) /s (proceeding! OR investigation)) & (communicat! OR information)

APPEARANCES OF COUNSEL

Mary E. Gasparini, *Principal Counsel*, *Fifth Judicial District Grievance Committee*, Syracuse, for petitioner.

Mark Steven Barnes, Waterville, respondent pro se.

OPINION OF THE COURT

Per Curiam.

Respondent was admitted to the practice of law by the Appellate Division, Third Department, on January 24, 1989. During the time period relevant to this matter, he maintained an office in Waterville. The Grievance Committee filed a petition alleging six charges of professional misconduct against respondent, including neglecting client matters, commingling personal funds with client funds, and failing to cooperate in the grievance investigation. Although respondent was served with the petition in May 2025, he failed to file an answer thereto or to request from this Court an extension of time in which to do so. The Grievance Committee thereafter filed a motion for an order pursuant to 22 NYCRR 1240.8 (a) (6), inter alia, finding respondent in default. Although the motion was personally served upon respondent on September 15, 2025, and respondent’s personal appearance was required on the return date thereof pursuant to 22 NYCRR 1020.8 (c), respondent neither filed a response to the motion nor appeared on the return date. Consequently, by order entered October 28, 2025, this Court granted the Grievance Committee’s motion, found respondent in default, deemed admitted the charges of misconduct, and imposed a deadline for respondent to file written materials in mitigation. Although the Grievance Committee filed proof that respondent was served with that order by hand delivery on November 11, 2025, he failed to file any written materials in mitigation or otherwise contact this Court.

With respect to charge one, respondent admits that, in early 2023, he accepted $5,000 to represent several siblings in a legal matter, without having executed a retainer agreement or letter of engagement that specified the scope of the representation or the fee for which the clients would be responsible. Respondent admits that he subsequently failed to respond in a

timely manner to numerous inquiries from the clients about the matter, prompting them to file a grievance complaint in August 2023.

With respect to charge two, respondent admits that, in September 2022, he agreed to represent several siblings in relation to their father's estate. Respondent admits that he failed to respond in a timely manner to numerous inquiries from the clients. Although respondent eventually resumed communicating with the clients and accepted legal fees from them in the amount of $2,900 in June 2023, he subsequently ceased all communication, prompting them to file a grievance complaint in October 2023.

With respect to charge three, respondent admits that he failed to respond to numerous inquiries from the Grievance Committee in a timely manner regarding the grievance complaints giving rise to charges one and two.

With respect to charge four, respondent admits that, in 2019, he agreed to represent a client in a domestic relations matter, without having executed a retainer agreement. Respondent also admits that he failed to send any billing statements to the client. Respondent admits that, after receiving proceeds from the sale of the client's marital residence, he withheld $2,500 for his purported legal fee. Respondent admits that he thereafter failed to respond to several inquiries from the client about the status of the matter and the propriety of the purported fee. Respondent further admits that, after the client filed a grievance complaint in February 2024, he failed to respond to numerous inquiries from the Grievance Committee regarding the matter.

With respect to charge five, respondent admits that, in August 2022, he agreed to represent several siblings in relation to their father's estate, at which time he accepted $2,500 for his legal fee and $1,941.76 for anticipated costs and disbursements. Respondent admits that, beginning in September 2023, the clients sent him numerous inquiries about certain notices received from the County Clerk requiring that the estate file a list of its assets. Respondent admits that he neither responded to those inquiries nor filed the list of assets on behalf of the estate, prompting the clients to file a grievance complaint in March 2024. Respondent admits that he subsequently failed to respond to numerous inquiries from the Grievance Committee regarding the matter or to comply with a subpoena issued by this Court directing him to produce certain documents to the Committee.

With respect to charge six, respondent admits that, in December 2022, the Grievance Committee issued a confidential admonition to him upon a finding that he violated certain rules governing attorney trust accounts by, inter alia, failing to account to clients regarding their funds and commingling personal funds with client funds. Respondent admits that, when the admonition was issued, the Committee considered, in mitigation, his statement that he would remove personal funds from the account and remit any unclaimed client funds to the Lawyers' Fund for Client Protection. Respondent admits that, as of September 2024, he failed to take action to resolve those issues.

We find respondent guilty of professional misconduct and conclude that he has violated the following provisions of the Rules of Professional Conduct (22 NYCRR 1200.0):

rule 1.1 (c) (1)—failing to seek the lawful objectives of a client through reasonably available means;

rule 1.3 (a)—failing to act with reasonable diligence and promptness in representing a client;

rule 1.3 (b)—neglecting a legal matter entrusted to him;

rule 1.4 (a) (4)—failing to comply in a prompt manner with a client's reasonable requests for information;

rule 1.15 (a)—commingling personal funds with client funds;

rule 8.4 (d)—engaging in conduct that is prejudicial to the administration of justice; and

rule 8.4 (h)—engaging in conduct that adversely reflects on his fitness as a lawyer.

In determining an appropriate sanction, we have considered the nature of respondent's admitted misconduct, which caused harm or prejudice to several clients. We have also considered his failure to cooperate in the grievance investigation or participate in the disciplinary proceeding before this Court, which evinces a disregard for his fate as an attorney (*see Matter of Maio*, 230 AD3d 145, 148 [4th Dept 2024]). Accordingly, we conclude that respondent should be suspended from the practice of law for a period of three years and until further order of this Court. In addition, in the event that respondent applies to this Court for reinstatement to the practice of law, his application must sufficiently explain the circumstances of his default in this matter.

CURRAN, J.P., BANNISTER, MONTOUR, GREENWOOD and HANNAH, JJ., concur.

Order of suspension entered.

REPORTS OF SELECTED CASES

DECIDED IN THE

APPELLATE TERM

OF THE SUPREME COURT

AND OTHER COURTS

OF THE

STATE OF NEW YORK

OTHER THAN THE

COURT OF APPEALS AND THE APPELLATE DIVISION
OF THE SUPREME COURT

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91 People v King (Jason), 2026 NY Slip Op 50670(U). Crimes—Right to Speedy Trial—Accusatory Instrument—Certification of Facial Sufficiency. (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, Feb. 20, 2026)

92 People v Ali (Ricardo), 2026 NY Slip Op 50671(U). Motor Vehicles—Operating Vehicle while Under Influence of Alcohol or Drugs—Sufficiency of Accusatory Instrument. (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, Feb. 20, 2026)

93 Royal Rehab, Inc. v MVAIC, 2026 NY Slip Op 50672(U). Insurance—Motor Vehicle Accident Indemnification Corporation—Notice of Intention to File Claim. (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, Feb. 20, 2026)

94 Burke Physical Therapy, P.C. v State Farm Mut. Auto. Ins. Co., 2026 NY Slip Op 50673(U). (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, Feb. 27, 2026)

95 Burke Physical Therapy, P.C. v State Farm Mut. Auto. Ins. Co., 2026 NY Slip Op 50674(U). (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, Feb. 27, 2026)

96 People v Reyes (Seanpaul), 2026 NY Slip Op 50675(U). Crimes—Obstructing Governmental Administration—Sufficiency of Accusatory Instrument. Crimes—Trespassing—Sufficiency of Accusatory Instrument. (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, Feb. 27, 2026)

97 Burke 2 Physical Therapy, P.C. v State Farm Mut. Auto. Ins. Co., 2026 NY Slip Op 50676(U). (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, Feb. 27, 2026)

98 Health Value Med., P.C. v Country-Wide Ins. Co., 2026 NY Slip Op 50677(U). Interest—Computation—Settlement. (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, Feb. 27, 2026)

99 Elite Psychological Servs., P.C. v Country-Wide Ins., 2026 NY Slip Op 50678(U). (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, Feb. 27, 2026)

100 Biotech Surgical Supply, Inc. v Country Wide Ins. Co., 2026 NY Slip Op 50679(U). (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, Feb. 27, 2026)

101 Orthotics & Professional Supply, Ltd. v Country-Wide Ins. Co., 2026 NY Slip Op 50680(U). (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, Feb. 27, 2026)

102 Burke Physical Therapy, P.C. v State Farm Mut. Auto. Ins. Co., 2026 NY Slip Op 50681(U). (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, Feb. 27, 2026)

103 J&R Broadway, LLC v 1165 Fresh Produce Corp., 2026 NY Slip Op 50682(U). Parties—Intervention—Commercial Holdover Proceeding. (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, Feb. 27, 2026)

104 Berenblit v Country Wide Ins. Co., 2026 NY Slip Op 50683(U). Compromise and Settlement—Enforcement—Unsigned Proof of Settlement. Stipulations—Enforcement—Time Limit. (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, Feb. 27, 2026)

105 Air Plus Surgical Supply, Inc. v Country Wide Ins. Co., 2026 NY Slip Op 50684(U). Compromise and Settlement—Enforcement. (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, Feb. 27, 2026)

106 Biofeedback & Psychological Servs. v Country-Wide Ins. Co., 2026 NY Slip Op 50685(U). (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, Feb. 27, 2026)

107 Health Value Med., P.C. v Country Wide Ins. Co., 2026 NY Slip Op 50686(U). (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, Feb. 27, 2026)

108 Elite Psychological Servs., P.C. v Country-Wide Ins. Co., 2026 NY Slip Op 50687(U). Compromise and Settlement—Prompt Payment Following Settlement—Actual Receipt of General Release and Stipulation of Discontinuance. (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, Feb. 27, 2026)

109 New Life Acupuncture, P.C. v Country-Wide Ins. Co., 2026 NY Slip Op 50688(U). (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, Feb. 27, 2026)

110 Smith v Tormos, 2026 NY Slip Op 50689(U). Disclosure—Penalty for Failure to Disclose—Striking of Answer. (App Term, 2d Dept, 9th & 10th Jud Dists, Mar. 19, 2026)

111 Giacobbe v City of New Rochelle, 2026 NY Slip Op 50690(U). Municipal Corporations—Notice of Street Defect—Prior Written Notice. Courts—Small Claims—Substantial Justice. (App Term, 2d Dept, 9th & 10th Jud Dists, Mar. 19, 2026)

112 Azteca Fence, Inc. v Prato, 2026 NY Slip Op 50691(U). Courts—City Court—Commercial Claims—Substantial Justice. (App Term, 2d Dept, 9th & 10th Jud Dists, Mar. 19, 2026)

113 Jieying Pan v Ying Ying Chen, 2026 NY Slip Op 50692(U). (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, Mar. 20, 2026)

114 Newmont Props., LP v Callender, 2026 NY Slip Op 50693(U). Landlord and Tenant—Rent Regulation—Primary Residence. (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, Mar. 20, 2026)

115 Stephenson v Lucenti, 2026 NY Slip Op 50694(U). Landlord and Tenant—Summary Proceedings—Nonpayment—Oral Month-to-Month Agreement. (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, Mar. 20, 2026)

116 Tibta v 156 E. 21, LLC, 2026 NY Slip Op 50695(U). Landlord and Tenant—Summary Proceedings—Illegal Lockout—Constructive Possession. (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, Mar. 20, 2026)

117 Abosi v Pierre, 2026 NY Slip Op 50696(U). Courts—Small Claims—Substantial Justice. (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, Mar. 20, 2026)

118 People v Blank (Sean), 2026 NY Slip Op 50697(U). Crimes—Disclosure—Automatic Discovery—Due Diligence. Crimes—Aggravated Harassment—Sufficiency and Weight of Evidence. (App Term, 2d Dept, 9th & 10th Jud Dists, Mar. 20, 2026)

119 People v Valentin (Chopin), 2026 NY Slip Op 50698(U). Crimes—Disclosure—Remedies or Sanctions for Noncompliance—Dismissal. (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, Apr. 17, 2026)

120 People v Francis (Robert), 2026 NY Slip Op 50699(U). Crimes—Trespassing—Sufficiency and Weight of Evidence. (App Term, 2d Dept, 9th & 10th Jud Dists, Apr. 30, 2026)

121 People v Klein (Christian), 2026 NY Slip Op 50700(U). Crimes—Criminal Contempt—Knowledge of Provisions of Order of Protection. (App Term, 2d Dept, 9th & 10th Jud Dists, Apr. 30, 2026)

122 People v Barrington (Antoine), 2026 NY Slip Op 50701(U). Crimes—Sex Offenders—Sex Offender Registration Act—Downward Departure. (App Term, 2d Dept, 9th & 10th Jud Dists, Apr. 30, 2026)

123 People v Falls (Raiquan), 2026 NY Slip Op 50702(U). Crimes—Right to Representation Pro Se—Searching Inquiry. Crimes—Larceny—Petit Larceny—Sufficiency and Weight of Evidence. (App Term, 2d Dept, 9th & 10th Jud Dists, Apr. 30, 2026)

124 People v Albelo (Valerie), 2026 NY Slip Op 50703(U). Crimes—Sentence—Reparation—Cost of Victim Therapy Sessions. (App Term, 2d Dept, 9th & 10th Jud Dists, Apr. 30, 2026)

125 People v Eisen (Joshua), 2026 NY Slip Op 50704(U). Crimes—Right to Speedy Trial—Excludable Time. Crimes—Aggravated Harassment—Telephone Call. (App Term, 2d Dept, 9th & 10th Jud Dists, Apr. 30, 2026)

126 People v Eisen (Joshua), 2026 NY Slip Op 50705(U). Crimes—Right to Speedy Trial—Excludable Time. (App Term, 2d Dept, 9th & 10th Jud Dists, Apr. 30, 2026)

127 Cabrera v Holguin, 2026 NY Slip Op 50706(U). (App Term, 2d Dept, 9th & 10th Jud Dists, Apr. 30, 2026)

128 Chiarella v Board of Mgrs. of Fox Hill Condominium, 2026 NY Slip Op 50707(U). Courts—Small Claims—Substantial Justice. (App Term, 2d Dept, 9th & 10th Jud Dists, Apr. 30, 2026)

129 People v Telfair (Donald), 2026 NY Slip Op 50708(U). Crimes—Appeal—Waiver. (App Term, 2d Dept, 9th & 10th Jud Dists, Apr. 30, 2026)

130 People v Telfair (Donald), 2026 NY Slip Op 50709(U). (App Term, 2d Dept, 9th & 10th Jud Dists, Apr. 30, 2026)

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132 People v Telfair (Donald), 2026 NY Slip Op 50711(U). (App Term, 2d Dept, 9th & 10th Jud Dists, Apr. 30, 2026)

133 People v Telfair (Donald), 2026 NY Slip Op 50712(U). (App Term, 2d Dept, 9th & 10th Jud Dists, Apr. 30, 2026)

134 People v Telfair (Donald), 2026 NY Slip Op 50713(U). (App Term, 2d Dept, 9th & 10th Jud Dists, Apr. 30, 2026)

135 Hampton v Maujer, LLC, 2026 NY Slip Op 50714(U). Landlord and Tenant—Summary Proceedings—Illegal Lockout—Documentary Evidence. (App Term, 2d Dept, 2d, 11th & 13th Jud Dists, May 1, 2026)

136 Boyar v Floors Decors & More, Inc., 2026 NY Slip Op 50715(U). Courts—Small Claims—Substantial Justice. (App Term, 2d Dept, 9th & 10th Jud Dists, May 7, 2026)

137 Capital One, N.A. v Quartararo, 2026 NY Slip Op 50716(U). Judgments—Default Judgment—Vacatur—Proper Service. (App Term, 2d Dept, 9th & 10th Jud Dists, May 7, 2026)

[243 NYS3d 894]

THE PEOPLE OF THE STATE OF NEW YORK v TOMMY GRANT, Defendant.

Criminal Court of the City of New York, Bronx County, September 22, 2025

HEADNOTES

Crimes — Disclosure — Validity of Certificate of Compliance — People's Demonstration of Good Faith and Due Diligence in Discharge of Discovery Obligations

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RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Depositions and Discovery §§ 258–261, 266–269, 271–273, 283–288, 290.

CARMODY-WAIT 2d Discovery §§ 187:19, 187:21, 187:25, 187:27, 187:29–187:34, 187:38–187:40, 187:42–187:43, 187:47, 187:57–187:58, 187:60–187:61.

LAFAVE, ET AL., CRIMINAL PROCEDURE (4th ed) §§ 18.3, 20.3, 24.3.

NY JUR 2d Criminal Law: Procedure §§ 1685–1686, 1688–1690, 1695–1697, 1699, 1701, 1703, 1706, 1717, 1739, 1749, 1766, 1924.

ANNOTATION REFERENCE

Right of accused in state courts to inspection or disclosure of evidence in possession of prosecution. 7 ALR3d 8.

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Query: ((“certificate of compliance” OR “COC”) /5 (valid! OR invalid!)) & (People's /s ((disclosure OR discovery) /s “due diligence” /s “good faith” /s obligation!)) & criminal

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APPEARANCES OF COUNSEL

Giovanni L. Escobedo for defendant.

Darcel D. Clark, District Attorney (*Sabrina Fincher* of counsel), for the People.

OPINION OF THE COURT

DAVID L. GOODWIN, J.

Defendant Tommy Grant contends that the People did not comply with their discovery obligations, and thus violated his

speedy trial rights, because they failed to disclose (1) a clear version of a surveillance video, which was instead turned over only in the form of a poor-quality, off-line copy recorded by police officers; and (2) certain complete and unredacted impeachment materials for the two testifying officers. As an alternative to dismissal, Grant seeks hearings and other omnibus relief.

As explained below, dismissal on speedy trial grounds is not warranted because the People demonstrated due diligence and good faith overall in connection with their discovery obligations. A *Wade/Dunaway* hearing is ordered. All other requests for relief are referred to the trial court or denied. *The People are directed to extend the order of protection through the current adjourn date of October 2, 2025, upon issuance of this decision.*

I. Background

Case Initiation to the Filing of the COC

Via a December 14, 2024 accusatory instrument, Grant was charged with petit larceny (Penal Law § 155.25) and fifth-degree criminal possession of stolen property (Penal Law § 165.40), both class A misdemeanors, based on allegations that he stole two boxes of diapers from a Dollar General store.[1] According to an identification notice (*see* CPL 710.30 [1] [b]), Grant was identified by a complaining witness after a show-up procedure.

The People filed their discovery compliance materials 75 days after arraignment, on February 27, 2025. According to their certificate of compliance (COC), the People had disclosed approximately 36 different categories of material, including an item denominated as the "[v]ideo of incident," body cameras, activity logs, and *Giglio* materials for Officers Urman and Sanchez, both of whom were designated as witnesses for the People at the eventual trial. (People's response, exhibit A at 2-3.) The People certified more broadly that they had "disclosed and made available to the defendant all known material and information that is subject to [automatic] discovery" after "exercising due diligence and making reasonable inquiries" to learn of the existence of discoverable material. (*Id.* at 1.)

The court action sheet for the first post-COC appearance reflects that the People maintained their readiness. Defense

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1. An additional weapons charge was dismissed on the People's motion in December 2024.

counsel objected to that declaration of readiness and to the People's COC. (*See* action sheet for Mar. 19, 2025.) The case was then adjourned for a May 7 discovery conference. However, the action sheet does not reflect either the substance of the defense's objections or whether the parties were ordered to confer on outstanding discovery issues.

Defense Discovery Objections

Through counsel, Grant emailed objections to the People the morning of the scheduled May 7 discovery conference. Grant identified two alleged deficiencies. First, he cited the People's failure to obtain and disclose the original copy of the location's surveillance footage. Instead, they had disclosed a "poor and blurry" recording "of a screen playing the video." (People's response, exhibit E at 2 [pdf pagination].) Second, he objected to the scope and thoroughness of the People's *Giglio* impeachment disclosures:

> "- **GIGLIO**: the prosecution failed to provide all Giglio material deemed to be within its possession
>
> "• **ALL GIGLIO Including**: IAB log; Internal Case Management System Worksheet/ Internal Affairs Log; IA Reports; Internal Case Management and Tracking Worksheet/Allegation Finding (ICMT); documents from the NYPD Legal Bureau; CCRB Allegation History; CCRB CTS; and CPI (disciplinary file including incidents investigated and where no action taken)
>
> "• The Prosecution provided improperly redacted Giglio material
>
> "• **UNDERLYING GIGLIO MATERIAL**: all PDF attachments, photographs, media files and other attachments" (*id.* at 1 [pdf pagination] [footnote call omitted, formatting as in original]).

The People did not have time to review counsel's objection before the court appearance later in the day, at which this motion schedule was set. Grant filed his motion in early July 2025. Briefing was complete by mid-September.

II. The Defense Motion

Grant's Arguments

In his counseled motion, Grant contends that the People violated his statutory and constitutional speedy trial rights. (*See* defense's mot at 1; *see also* defense's aff ¶¶ 15-50, 55.)

As a threshold issue, Grant argues that he was not required to promptly inform the People of the defects in their COC because "[i]t is not the Defense's job to point out the prosecutor's omissions, lack of due diligence or missing material." (Defense's aff ¶ 31.) A requirement to the contrary, Grant asserts, would conscript defense counsel into the prosecution of his client. (*Id.*)

On substance, Grant contends that the People's COC was defective at the time it was filed. The People were required to obtain and produce all media associated with the case, but did not even try to obtain a clear copy of the original surveillance video shown to law enforcement on the arrest date. (*See id.* ¶¶ 51-54, citing, among others, CPL 245.20 [1] [j].) The People also were obligated to disclose the relevant *Giglio* material for Officers Urman and Sanchez, such as IA (internal affairs) reports, internal case management worksheets, central personnel indices, and underlying media referenced with the *Giglio* material. (*See id.* ¶¶ 39-50.)

Because the People were aware of these *Giglio* defects—the *Giglio* redactions, Grant avers, were made under "the prosecution's policy"—the broader COC certification of full and complete disclosure was false, evincing the People's lack of good faith. (*Id.* ¶¶ 34-35.) And since the People's COC was invalid, more than 90 days of charged time has elapsed, requiring dismissal in a misdemeanor case like this one. (*See id.* ¶¶ 55-60.)

Although Grant invokes both the statutory speedy trial time limit of CPL 30.30 and "the Sixth and Fourteenth Amendments to the United States Constitution" (*id.* ¶ 60), he does not raise any arguments in connection with any alleged constitutional speedy trial violation. He also does not request an order requiring disclosure of any of the *Giglio* material that (he alleges) has not yet been disclosed in complete form. Grant otherwise seeks *Wade*/*Dunaway* hearings connected to the showup identification—to which the People consent (*see* People's response at 18)—along with (among other things) *Sandoval*/*Ventimiglia*/*Molineux* hearings and leave to file additional motions if warranted. (*See id.* ¶¶ 61-74.)

The People's Response

The People respond by raising a procedural objection to Grant's motion, citing recent statutory amendments to the

discovery law that require a defendant to confer in good faith with the People before moving to dismiss. (*See* CPL 245.50 [4] [c].) According to the People, emailing objections 69 days after the filing of a COC falls short of "timely efforts to resolve the discovery dispute in good faith" under the new law. (People's response at 14-16.) However, the People do not address what (if any) objections were made during the March 2025 appearance, or suggest that the court itself required the parties to diligently confer on that day.

On substance, the People respond that they exercised due diligence and good faith throughout the discovery process, detailing extensive outreach in December 2024, along with two final requests for outstanding material in February 2025. (*See* People's aff ¶¶ 6 [2]-14; *see also* People's response, exhibit D [reflecting email requests and NYPD responses].) Because the original surveillance video was never in their possession, either directly or constructively through the NYPD, the People disclosed the only copy of the video they actually had, in satisfaction of their statutory obligation. (*See* People's response at 8-9.) The People provided all *Giglio* material that related to the subject matter of the case; any redactions related to civilian information or other nondiscoverable material, and the People were not responsible for redactions made by the CCRB (Civilian Complaint Review Board). (*See id.* at 9-14.) In any event, once the People reviewed the defense objections, they obtained in August and disclosed in September less-redacted versions of the IAB (internal affairs bureau) logs. (*See id.* ¶ 16.)

As to the omnibus relief, the People consent to *Wade/Dunaway* hearings but generally oppose Grant's other requests.

Grant's Reply

In his short reply, Grant does not dispute that his first outreach to the People was 69 days after the People certified their discovery compliance—that is, he also does not address what transpired during the March 2025 court date—and instead argues that the relevant revisions to the discovery law do not apply here, either with regard to this issue of good-faith negotiations or more generally. (Defense's reply aff ¶¶ 26-37.) Regarding the surveillance video, Grant relies for the first time on *People v Guzman* (75 Misc 3d 132[A], 2022 NY Slip Op 50445[U] [App Term, 2d Dept, 9th & 10th Jud Dists 2022]) for the proposition that the People were required to attempt to obtain the original copy of the surveillance video from the

scene. (Defense's reply aff ¶ 6.) Grant otherwise reiterates his arguments.

III. Legal Standard

When the highest count charged is a class A misdemeanor, the People are required to be ready for trial within 90 days of commencement. (*See* CPL 30.30 [1] [b].) The People must comply with their discovery obligations before declaring readiness for trial. (*See id.* § 30.30 [5].) If the People certify that they have complied with their discovery obligations, yet that certification is later deemed invalid, any declaration of readiness is deemed illusory and the speedy trial clock continues to run, requiring dismissal if over 90 days have elapsed. (*See People v Bay*, 41 NY3d 200, 213 [2023].)

Under both the current and pre-August-2025 revisions to New York's discovery laws, the validity of the People's COC rises and falls on whether the People can demonstrate good faith and due diligence in discharging their discovery obligations. (*See Bay*, 41 NY3d at 211-212; CPL 30.30 [5] [b] [Aug. 2025]; 245.50 [5] [Aug. 2025].) Factors relevant to diligence are fact- and case-specific, and include the People's efforts to comply with their obligations, the volume of discovery provided, the complexity of the case, and the People's response to objections from the defense (or, if applicable, whether the People fixed any omissions on their own initiative). (*See Bay*, 41 NY3d at 212; CPL 30.30 [5] [b]; 245.50 [5] [a].)[2]

The People bear the burden of demonstrating that they exercised due diligence. However, there is no "strict liability" rule for dismissal; the discovery statute does not require perfect compliance. (*Bay*, 41 NY3d at 212-213.)

IV. Discussion

a. The new defense obligations to diligently confer and to affirm that timely, good-faith efforts were made to resolve any discovery disputes cannot be used to procedurally bar motions filed before the August 2025 effective date of the revised article 245.

The People invoke Grant's delay in objecting to their COC, and in filing the motion now under consideration, solely by

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2. While the revised statute allows consideration of the prejudice caused by discovery defects or delays (*see* CPL 245.50 [5] [a]), this decision focuses on factors applicable under both the old and new tests, under which Grant's challenge fares the same.

way of reference to the recent amendments to article 245. Specifically, the People assert that Grant did not "make timely efforts to resolve the discovery dispute in good faith" before sending objections and filing his motion; and, while not explicitly stated, the People presumably intend to suggest that Grant's motion is procedurally defective. (*See* People's response at 15-16.)

On these facts, however, this new procedural obligation cannot be retroactively applied to bar Grant's motion, which was filed before the August 2025 effective date of the statute, by rendering it procedurally defective so as to prevent consideration on the merits. Treating the new obligation as a procedural bar in this context would extinguish a substantive right previously possessed—and there is no indication that the Legislature intended such an outcome. Accordingly, the presumption against statutory retroactivity prevents the urged retroactive application of the new rule.

While courts should generally apply the law in effect at the time a decision is rendered, the usual rule is that a statute should not be given truly retroactive effect if doing so would impair the substantive rights of a party, increase liability for past conduct, or impose new duties for already completed transactions—at least, absent legislative directive to the contrary. (*See Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332, 365 [2020]; *Landgraf v USI Film Products*, 511 US 244, 270, 273, 280 [1994] [discussing retroactive application when a new law attaches "new legal consequences to events completed before (the statute's) enactment"].) A clear legislative intent can be evinced from, for instance, a directive that a remedial statute take effect immediately. (*Matter of C.C. [D.C.]*, 246 AD3d 84, 88 [1st Dept 2025].)

However, true retroactive effect is different from simply applying a new law in a case "arising from conduct antedating the statute's enactment" or upsetting "expectations based in prior law," neither of which is subject to the presumption against retroactivity. (*Landgraf*, 511 US at 269.)

Before the new version of article 245 went into effect in early August 2025, CPL 245.50 (4) (b) and (c) required COC objections and motions to be lodged "as soon as practicable," but contained no explicit requirement that the parties confer and resolve issues prior to the defense moving to dismiss. Instead, courts were empowered by CPL 245.35 (1) to streamline

discovery litigation by issuing *discretionary* orders for parties to confer about discovery issues before seeking a court ruling. (*See e.g. People v Morales*, 86 Misc 3d 523, 525 [Crim Ct, Kings County 2025, Fong-Frederick, J.] [referencing a court directive to diligently confer under section 245.35 (1)].)

The revised section 245.50 (4) (c), by contrast, imposes (by implication) affirmative conferral and affirmation requirements. The new version of the statute requires that "any challenges" to a COC be accompanied by an affirmation that the moving party timely conferred (or tried to do so) before filing a challenge. (CPL 245.50 [4] [c].) The statutory change in question—part of a broader overhaul of article 245—was enacted in May 2025, but did not take effect until 90 days later on August 7. (*See People v Rubio*, 88 Misc 3d 614, 615-616 & n [Crim Ct, Bronx County 2025, Sorrentino, J.].) The Legislature directed that the revised article 245 "shall apply to all criminal actions pending on such date and all actions commenced on or after such date." (L 2025, ch 56, § 1, part LL, § 8.) But the Legislature also specified that all new "time limitation[s] to challenge a certificate of compliance" would instead run from the effective date of the new revisions. (*Id.*)

Because the People wish to use Grant's failure to confer and to certify as a procedural bar—that is, to block consideration of the merits of his motion—the question is whether the new conferral and certification requirements apply retroactively to COC-challenge motions filed before the effective date of the amendments to render those motions procedurally defective. The answer to that question, as explained below, is "no."

Applying the conferral and affirmation requirements retroactively here would have the effect of rendering defective all motions filed and pending on August 7, where the defense did not confer, even though there was no statutory obligation to do so at the time (and so long as no court directed otherwise).[3] Cast in the requested light, the statutory change is not merely

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3. While it is possible that the court did direct the parties to confer back in March, the People have not suggested as much or provided the minutes of that appearance, so this discussion assumes that the parties were not directed to confer.

Relatedly, Grant's argument about the ethical problems presented by a conferral requirement is well-taken, at least to a point. New York's revised discovery regime was "part of a broader criminal justice reform package aimed at creating a more transparent and equitable criminal justice system by restructuring disclosure obligations and compliance mechanisms in criminal cases," intended to "create transparency" by "affording those charged

(n. cont'd)

procedural—regulating "secondary rather than primary conduct" (*Landgraf*, 511 US at 275)—but substantive, imposing a previously nonexistent new conferral and certification requirement and (arguably) diminishing substantive rights if that requirement were not followed. (*See Regina Metro*, 35 NY3d at 366.) In other words, the requested application is a true retroactive application that would extinguish or impair preexisting rights.

And while the Legislature directed that the revised article 245 apply to all cases pending at the time of its effective date, the Legislature did not evince an intent, either explicit or implicit, to implement its new procedural requirements in a way that would undermine motions pending as of early August. In fact, to the contrary, the Legislature both (1) deferred the effective date of the entire law and (2) specifically directed that the new timeframes would apply only going forward. The Legislature's attention to the new timeframes, in particular, suggests

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with the ability to make informed decisions and create a greater opportunity for accurate justice and an even playing field." (*People v Coley*, 240 AD3d 122, 131 [2d Dept 2025].) But because discovery reform was tethered to statutory speedy trial obligations and section 30.30's penalty of mandatory dismissal for noncompliance (*see People v Labate*, 42 NY3d 184, 190 [2024]), the Legislature created a system with incentives very much unlike those in civil litigation, where dismissal is far from the first remedy for discovery issues. (*See e.g. Arbor Realty Funding, LLC v Herrick, Feinstein LLP*, 145 AD3d 624, 625 [1st Dept 2016] [imposing a lesser sanction than dismissal given partial discovery compliance and "the strong public policy in favor of disposing of cases on the merits"]; *Guggenheim Capital, LLC v Birnbaum*, 722 F3d 444, 450-451 [2d Cir 2013] [describing dismissal and like remedies as "severe sanctions" for discovery noncompliance in federal cases that may be appropriate in "extreme situations"]; *see also National Hockey League v Metropolitan Hockey Club, Inc.*, 427 US 639, 643 [1976 per curiam] [describing dismissal as "the most severe" civil discovery sanction].)

For a criminal defendant, obtaining all the discovery needed to make informed decisions and achieve equal justice is the *second*-best outcome. The best outcome, and one that is far from a sanction of last resort, is total dismissal of the case. And because defense counsel is ethically charged with "the single-minded, zealous representation of the client" (*People v Hawkins*, 11 NY3d 484, 492 [2008]), amicable resolution of discovery issues is in arguable tension with ensuring "that the client receives the most favorable outcome possible" in the form of a total dismissal (William J. Genego, *The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation*, 22 Am Crim L Rev 181, 200 [1984]).

In some ways, the new conferral requirement may reduce this tension. Because remaining silent can no longer lead to dismissal under section 30.30, that pathway is now closed. But the new conferral requirement also now asks counsel to navigate the lower boundary of good-faith conferral, always with the goal of dismissal in mind. It remains to be seen how the law will treat conferrals that are alleged to fall short of good faith.

that there was no desire for any of the new statutory revisions to procedurally bar any already filed motions.

Thus, the conferral requirement should affect only "steps taken after [the statute's] enactment" rather than imposing a new obligation that did not exist before. (*MTGLQ Invs., L.P. v Gross*, 79 Misc 3d 353, 359 [Sup Ct, Westchester County 2023, Greenwald, J.]; *cf. People v King*, 42 NY3d 424, 428 [2024] [concluding that applying the COC requirement to invalidate readiness statements made prior to the enactment of article 245 amounted to a "plainly retroactive" effect].) The conferral and certification requirements cannot be fairly applied to Grant's motion.

To be clear, the above should not be taken to imply that other parts of the revised statute, or even these specific conferral and certification requirements, cannot be applied to preexisting motions or cases in a way that would not create an impermissible retroactive effect. None of that is at issue here, and any such retroactivity concerns can be addressed by a future case. The discussion above relates *only* to the use of these new mechanisms as a procedural bar in cases where no conferral was previously ordered.

Moreover, even the old version of section 245.50 (4) required discovery challenges to be made as soon as practicable. The People might have had a colorable argument that the objections here were not filed as soon as practicable. (*See People v Seymour*, 84 Misc 3d 23, 25 [App Term, 2d Dept, 9th & 10th Jud Dists 2024] [concluding that objections filed 72 days post-COC were not lodged as soon as practicable].) But the People have not made that argument. Accordingly, the People forfeited any argument that Grant's motion was not filed as soon as practicable.

In sum, because the conferral requirement does not apply here, Grant's motion is not defective. The court will reach the merits.

b. The People met their burden of showing good faith and due diligence, because the alleged defects in their COC are far outweighed by the material disclosed in this otherwise straightforward case.

Evaluated on its merits, however, the branch of the motion seeking dismissal is nevertheless denied. The People's COC passes muster and withstands Grant's motion to dismiss.

As an initial matter, Grant's challenge to the People's good faith is unpersuasive. He highlights that the COC purported to

reflect disclosure of "all known material and information" despite the People's allegedly erroneous redaction of *Giglio* material and incomplete disclosure of same. (Escobedo aff ¶ 34.) But the certification in question pertains to the disclosure of all *discoverable* material; and, as the People make clear, it is their position that the redacted *Giglio* material was either provided in that form (meaning the People never possessed the unredacted versions) or is not actually discoverable. This is not enough to show a lack of good faith on the particular record presented here.

As to due diligence, that record reflects both frequent outreach from the People to their discovery liaison *and* that extensive discovery was ultimately provided in what appears to be a relatively straightforward retail theft case. (*See Bay*, 41 NY3d at 212.) Weighed against the People's proffer, the two deficiencies that Grant identifies do not persuasively call into question the People's diligent execution of their discovery obligations.

Regarding the surveillance video, Grant objects to the low-quality and off-line version apparently provided by the People, as opposed to the better-quality source maintained by the store.[4] As neither party has attached the video, its quality cannot be directly evaluated. But there also appears to be no question that neither the People nor the NYPD possessed the source video, which was instead held by the retail establishment and could have been obtained by defense counsel. (*See People v Polanco*, 83 Misc 3d 1287[A], 2024 NY Slip Op 51235[U], *5 [Crim Ct, Bronx County 2024, González-Taylor, J.] ["(T)he People have no duty to disclose evidence which does not exist, and which would not have been within their control"].) And while it certainly would have been better for the People to try to obtain the original video if the copy is indeed of low quality, other trial courts have generally declined to invalidate COCs on similar facts. (*See e.g. People v Perkins*, 83 Misc 3d 1221[A], 2024

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4. Grant argues in his reply that the off-line video was also incomplete, as surveillance showing the register area "was not provided" even though it was "available." (Escobedo reply aff ¶ 39.) He does not appear to have raised this issue either in his objections to the People or in his initial motion, and arguments raised for the first time in a reply need not be considered. (*See People v Ford*, 69 NY2d 775, 777 [1987] ["This contention was improperly raised for the first time in appellant's reply brief to this court"]; *People v Walls*, 87 Misc 3d 28, 30 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2025] ["(A)ny issue raised for the first time in reply papers was not properly before the motion court"].)

NY Slip Op 50770[U], *4 [Sup Ct, Queens County 2024, Yavinsky, J.] ["Compared to the voluminous discovery provided, the Court declines to find that the sole item missing—surveillance video which was never in the People's possession—would constitute a lack of due diligence"]; *cf. People v McClain*, 53 AD3d 556, 556-557 [2d Dept 2008] [concluding there was no *Brady* violation when the People did not obtain surveillance video].) And while Grant relies to the contrary on the Appellate Term's decision in *People v Guzman*, the missing video in that case appears to have been from a police dash cam—an item in the possession of the NYPD and, by extension, the People, unlike the video at issue here. (*See Guzman*, 2022 NY Slip Op 50445[U], *1-2, *4-5.)

The *Giglio* material is more difficult to evaluate. While Grant challenges improper redactions and alleged incomplete disclosures, the record does not quite clarify what *was* provided, or whether the material that Grant seeks is even still outstanding after the People's supplemental September 2025 *Giglio* disclosure.[5] Taking the screenshots provided in defense exhibit B at face value, the People appear to have decided against disclosing attachments to several IAB logs for both Officer Urman and Officer Sanchez. While very little context is provided for any of the attachments—at least one of the IABs is identified as substantiated, and another says "Failure to review surveillance video" (defense's mot, exhibit B at 4 [pdf pagination])—nothing about them suggests shortcomings that would invalidate the COCs. And the People otherwise represent that they disclosed materials associated with all substantiated, unsubstantiated, and pending allegations for each officer, as well as lawsuit information. (People's response at 10.) Those efforts appear to have met the statutory requirements in the context of this case.

Finally, while Grant invokes constitutional speedy trial guarantees and cites CPL 30.20, he confines his actual arguments to section 30.30, not the constitutional test of *People v Taranovich* (37 NY2d 442, 445 [1975] [establishing five-factor test]), and *Barker v Wingo* (407 US 514, 530 [1972] [establish-

5. Although one of the factors relevant to diligence is the People's response when apprised of missing or incomplete discovery (*see Bay*, 41 NY3d at 212), Grant does not address the otherwise-unexplained gap between May 2025 and September 2025, or argue that it diminished the People's diligence. Even if he had, though, the People's diligence was not fatally undermined by this delay, although a swifter response would have been better.

ing the equivalent four-factor federal test]). Regardless, the relevant constitutional factors do not favor him. In particular, he has not shown that any delay has been extensive or egregious, or that he has been prejudiced by any of the delay in the case, to the extent that delay could even be attributable to the People. (*See Taranovich*, 37 NY2d at 442.)

Accordingly, the motion to dismiss is *denied*. While Grant does not specifically request disclosure of the various IAB attachments, the People are nevertheless *ordered* to disclose them to the defense, and may apply to the court for a protective order if there are any concerns about their contents. (*See* CPL 245.30 [3]; 245.35 [4].)

* * *

For the reasons set forth above, the motion to dismiss is *denied*. The People are *ordered* to disclose the various IAB attachments sought by Grant. *Wade/Dunaway* hearings are *ordered*. All *Sandoval/Molineux/Ventimiglia* issues are referred to the trial court. Grant's request to file additional motions is *denied*, except that he may make a more-specific application for disclosure of additional *Giglio* materials that he believes should be disclosed.

All other requests for relief are denied. Because the order of protection has not yet been extended, *the People are directed to extend the order of protection through the current adjourn date of October 2, 2025, when this decision is issued.*

[244 NYS3d 439]

LINDA TRIBUZIO, Plaintiff, v KINGSBOROUGH COMMUNITY COLLEGE et al., Defendants.

Civil Court of City of New York, Kings County, July 29, 2025

HEADNOTES

Labor — Termination from Employment — Retaliation Claim against City University of New York Community College

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RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Colleges and Universities § 15; AM JUR 2d Public Officers and Employees § 10; AM JUR 2d Wrongful Discharge § 77.

NY JUR 2d Civil Rights § 62; NY JUR 2d Civil Servants and Other Public Officers and Employees §§ 2–3; NY JUR 2d Employment Relations § 797; NY JUR 2d Schools, Universities, and Colleges §§ 792, 805.

ANNOTATION REFERENCES

Who are "Public Employers" or "Public Employees" Within the Meaning of State Whistleblower Protection Acts. 90 ALR5th 687.

What Constitutes Activity of Public or State Employee Protected Under State Whistleblower Protection Statute Covering Employee's "Report," "Disclosure," "Notification," or the Like of Wrongdoing—Nature of Activity Reported. 37 ALR6th 137.

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APPEARANCES OF COUNSEL

Muriel Goode-Trufant, Corporation Counsel (*Brandon Weisman* of counsel), for defendants.

Bantle & Levy LLP (*Robert L. Levy* of counsel) for plaintiff.

OPINION OF THE COURT

CARMEN A. PACHECO, J.

After oral arguments held April 9, 2025, defendants' motion

to dismiss the complaint against Kingsborough Community College and Stuart Parker is determined as follows:

Procedural and Factual Determinations

Plaintiff Linda Tribuzio commenced this action alleging a violation of New York Labor Law against defendants Kingsborough Community College (Kingsborough) and Dr. Stuart Parker (Dr. Parker) by filing of a summons and complaint on July 22, 2024. Instead of filing an answer, defendants filed the instant motion to dismiss under CPLR 3211 (a) (7) for failure to state a cause of action.

Plaintiff was employed as an adjunct assistant professor at Kingsborough within the Behavioral Sciences Department. Plaintiff was also a research associate on the Computing Integrated Teacher Education (CITE) program. Neither party defined the CITE Initiative.

Dr. Parker serves as the chair of the Behavioral Sciences Department at Kingsborough. Kingsborough is a community college within the City University of New York (CUNY) system. Plaintiff is no longer employed by Kingsborough, which is the subject of this litigation.

In the complaint, plaintiff alleges that she was terminated after raising concerns about nonpayment of wages for her work in the CITE Initiative. For a period of five months, plaintiff brought the nonpayment issue to Dr. Parker, the Kingsborough Department of Human Resources, and Dr. Aankit Patel—the CITE program director.

On or about June 13, 2023, Dr. Parker informed plaintiff that due to her complaints about nonpayment of wages, he would preclude plaintiff from continuing to participate in the CITE program. Thereafter, Dr. Patel confirmed Dr. Parker's decision in a written communication, which stated that Dr. Patel "must recognize Dr. Parker's decision to bar plaintiff from further work with CITE" (*see* complaint ¶ 27). Thereafter, in his capacity as chair of the Behavioral Sciences Department, Dr. Parker did not renew plaintiff's position as an adjunct faculty professor for the 2023-2024 academic year. Thus, plaintiff's preclusion from participation in the CITE program and subsequent removal from her position constituted retaliatory actions taken by Dr. Parker and, by its acquiescence, his actions were imputed to Kingsborough.

Defendants in their motion argue that plaintiff cannot establish any predicate Labor Law violation based on the facts set

forth in the complaint. Moreover, plaintiff is exempt from New York Labor Law protections since she is a professional employee. Additionally, plaintiff is barred from bringing a retaliation claim against Kingsborough, as Kingsborough is a New York State government agency.

Discussion

Standard of Review

It is well settled that, in considering a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Cabrera v Deadwood Constr., Inc.*, 226 AD3d 743, 743-744 [2d Dept 2024].) "When assessing the adequacy of a complaint in light of a CPLR 3211 (a) (7) motion to dismiss, the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff . . . 'the benefit of every possible favorable inference' " (*see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005], citing *Leon v Martinez*, 84 NY2d 83, 87 [1994]). Moreover, "[t]he motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.' " (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002], quoting *Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001]; *Frank v DaimlerChrysler Corp.*, 292 AD2d 118 [1st Dept 2002] [court's role is limited to defining whether a cause of action was stated in complaint].)

New York's pleading standard requires that statements be "sufficiently particular" to give the court and parties notice of the occurrences intended to be proved and the material elements of each cause of action (CPLR 3013). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005].) It is important to note that "on a motion to dismiss the court merely examines the adequacy of the pleadings" rather than assessing the sufficiency of the parties' evidence. (*Davis v Boeheim*, 24 NY3d 262, 268 [2014] [internal quotation marks omitted].)

New York Labor Law: Pleading Standard

Labor Law § 215 prohibits retaliating against an employee for complaining about a violation of the Labor Law or order of

the Commissioner of Labor. Labor Law § 215 (1) provides, in relevant part:

> "1. (a) No employer . . . shall . . . in any other manner discriminate or retaliate against any employee (i) because such employee has made a complaint to his or her employer . . . that the employer has engaged in conduct that the employee, reasonably and in good faith, believes violates any provision of this chapter, or any order issued by the commissioner (ii) because such employer or person believes that such employee has made a complaint to his or her employer . . . . [or] (iii) because such employee has caused to be instituted or is about to institute a proceeding under or related to this chapter . . .
>
> "An employee complaint or other communication need not make explicit reference to any section or provision of this chapter to trigger the protections of this section. . . .
>
> "(c) This section shall not apply to employees of the state or any municipal subdivisions or departments thereof" (Labor Law § 215 [1] [a], [c]).

To establish a claim of retaliation under Labor Law § 215, plaintiff must allege: (1) participation in protected activity known to defendant; (2) an employment action disadvantaging plaintiff; and (3) a causal connection between the protected activity and the adverse action (*Diluglio v Liberty Mut. Group, Inc.*, 230 AD3d 643, 645 [2d Dept 2024]; *Higueros v New York State Catholic Health Plan, Inc.*, 526 F Supp 2d 342, 347 [ED NY 2007] [pleadings must adequately show that while employed, plaintiff complained that employer violated New York Labor Law, and such complaint resulted in termination or otherwise being penalized, discriminated against, or subjected to adverse employment action]).

Defendants' reliance on *Epifani v Johnson* (65 AD3d 224, 226 [2d Dept 2009] [abrogated by Labor Law § 215 as stated in *Reyes v Seaqua Delicatessen, Inc.* (234 AD3d 88, 94-95 [2d Dept 2024])]) is unavailing. In *Reyes v Seaqua Delicatessen, Inc*. (234 AD3d 88, 93-96 [2d Dept 2024]), the Second Department determined that *Epifani* had been effectively overruled by the Court of Appeals decision in *Webb-Weber v Community Action for Human Servs., Inc.* (23 NY3d 448 [2014]).

In *Reyes*, plaintiffs brought claims against their former employer under Labor Law § 215 (234 AD3d at 89). The

employer-defendant moved to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), on the grounds that plaintiffs had "failed to plead that their employment was terminated because they complained . . . about a violation of the New York Labor Law" (*Reyes*, 234 AD3d at 91). However, in *Webb-Weber*, the Court of Appeals held "for pleading purposes, the complaint need not specify the actual law, rule or regulation violated, although it must identify the particular activities, policies or practices in which the employer allegedly engaged" (23 NY3d at 453).

Webb-Weber referred specifically to Appellate Division cases such as *Epifani*, noting that "[t]o the extent that Appellate Division authority can be read as requiring a plaintiff to plead the actual law, rule or regulation the employer violated, it should no longer be followed for that proposition" (*Webb-Weber*, 23 NY3d at 453). Therefore, the *Reyes* Court determined that *Epifani* had been effectively "overruled by the Court of Appeals, and it was further abrogated by the amendment to Labor Law § 215" (*Reyes*, 234 AD3d at 96; *see Webb-Weber v Community Action for Human Servs., Inc.*, 23 NY3d 448 [2014]; *see also* L 2010, ch 564, § 10).*

It is sufficient that plaintiff pleaded the "particular activities, policies, or practices" in which defendant allegedly engaged (*Webb-Weber*, 23 NY3d at 453). Namely, plaintiff claims that defendant Dr. Parker told her that due to her complaints, she would be precluded from future participation in the CITE program. Subsequently, at the direction of Dr. Parker, plaintiff was not invited to participate in the CITE program (*Phillips v Bowen*, 278 F3d 103, 109 [2d Cir 2002] ["(a)dverse employment actions include discharge, refusal to hire, refusal to promote, demotion, reduction in pay, and reprimand"]).

Thus, defendants' allegation that plaintiff's complaint failed to state a claim is without merit. Defendants do not challenge that termination under these facts qualifies as an adverse employment action under Labor Law § 215. Rather, defendants

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* *Epifani* was decided prior to an amendment to Labor Law § 215 in 2010, which added the provision that " '[a]n employee complaint or other communication need not make explicit reference to any section or provision of this chapter to trigger the protections of this section' and . . . provide[d] for retaliation claims based upon violations of 'any order issued by the commissioner,' in addition to complaints of statutory violations" (*Reyes*, 234 AD3d at 95, quoting L 2010, ch 564, § 10).

argue that plaintiff is barred from bringing this action because plaintiff falls within the "professional" exemption and that Kingsborough Community College is a government agency.

Accordingly, plaintiff has met the specific pleading standards for a claim brought under Labor Law § 215.

Professional Exemption

A professional exemption applies to matters concerning minimum wage disputes and orders issued by the Department of Labor (12 NYCRR ch II, subch B [Minimum Wage Orders]). The Minimum Wage Orders define a professional to be, in pertinent part:

> "(iii) Professional. Work in a bona fide . . . professional capacity means work by an individual:
>
> "(a) whose primary duty consists of the performance of work: requiring knowledge of an advanced type in a field of science . . . and the result of which depends primarily on the invention, imagination or talent of the employee; and
>
> "(b) whose work requires the consistent exercise of discretion and judgment in its performance; or
>
> "(c) whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical or physical work) and is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time" (12 NYCRR 142-2.14 [c] [4] [iii]).

Effectively, the exemption may be read to mean that "any person employed in a bona fide professional capacity may not maintain a minimum wage . . . violation" (*Volpe v American Language Communication Ctr., Inc.*, 2021 NY Slip Op 34300[U], *3 [Sup Ct, NY County 2021]).

Here, plaintiff does not allege minimum wage violations or unauthorized deductions from wages pursuant to Labor Law § 193. Her claims are based on retaliation for complaining about nonpayment of wages (*see* plaintiff complaint ¶ 24). However, whether plaintiff falls under any professional exemption exclusion is premature pending completion of discovery.

Labor Law and Kingsborough Community College

Under Labor Law article 6 (§ 190 *et seq.*), an "employer . . . shall not include a governmental agency" (Labor Law § 190 [3] [internal quotation marks omitted]). "In 1979, the State Legislature reorganized the existing public senior and com-

munity colleges of the City University as an independent corporation known as the 'City University of New York' " (*Matter of Perez v Giuliani*, 182 Misc 2d 398, 402 [Sup Ct, NY County 1999]). "CUNY is a State-created independent entity, not an agency or subdivision of City government" (*id.* at 405). Kingsborough, defined as a community college within the CUNY corporation, is not a governmental agency (*see* Education Law §§ 6202 [4]; 6301 [2]). Further, CUNY is independently governed and administered by its board of trustees (*see Matter of Perez v Giuliani*, 182 Misc 2d 398, 402 [Sup Ct, NY County 1999]).

Additionally, Labor Law § 215 "shall not apply to employees of the state or any municipal subdivisions or departments thereof" (Labor Law § 215 [1] [c]). The question is then whether Kingsborough is to be considered part of the "state," which is notably "a case-by-case determination" (*Matter of Apollon v Giuliani*, 246 AD2d 130, 135 [1st Dept 1998]). *Matter of Apollon v Giuliani*, read in conjunction with *Clissuras v City Univ. of N.Y.* (359 F3d 79 [2d Cir 2004]), establishes a dividing line between CUNY senior and community colleges: the former are treated as state agencies, and the latter treated as city agencies (*see Tongring v Bronx Community Coll. of City Univ. of N.Y. Sys.*, 2014 WL 463616, *3 n 2, 2014 US Dist LEXIS 14099, *9 n 2 [SD NY, Feb. 4, 2014, No. 12 Civ. 6854 (ALC)(FM)]).

In *Clissuras v City Univ. of N.Y.* (359 F3d 79 [2d Cir 2004]), former CUNY employees brought suit against CUNY, alleging constitutional and state law violations. The Second Circuit was thus prompted to consider whether a CUNY senior college was entitled to Eleventh Amendment sovereign immunity as an "arm of the state" (*id.* at 81). *Clissuras* emphasized two factors in making this determination: "(1) 'the extent to which the state would be responsible for satisfying any judgment that might be entered against the defendant entity,' and (2) 'the degree of supervision exercised by the state over the defendant entity' " (*id.* at 82, quoting *Pikulin v City Univ. of N.Y.*, 176 F3d 598, 600 [2d Cir 1999 per curiam]; *see also Rosa R. v Connelly*, 889 F2d 435, 437 [2d Cir 1989] [Courts must "examine the degree to which the entity is supervised by the state and the entity's source of funds for satisfying judgments rendered against it" to determine whether defendant is an arm of the state enjoying Eleventh Amendment immunity], *cert denied* 496 US 941 [1990]; *see also* Education Law § 6205 [2] [e] ["The city of New York shall indemnify and save harmless employees

of the community colleges of the city university in the amount of any judgment obtained against such employees in any state or federal court"]). The Second Circuit determined that CUNY senior colleges were an arm of the state because, first, "the state is responsible for paying money judgments entered against CUNY senior colleges," and second, " 'ultimate control over how CUNY is governed and operated' rests with the state" (*id.*, quoting *Becker v City Univ. of N.Y.*, 94 F Supp 2d 487, 490 [SD NY 2000] [referring to the CUNY senior colleges]).

In contrast, in *Apollon*, the Appellate Division, First Department determined that a community college under the CUNY umbrella was not a state agency, considering similar factors (246 AD2d at 134-135). The *Apollon* Court focused on ultimate responsibility for money judgments, finding that "the City defends and indemnifies community college employees in tort or civil rights cases, while the State defends and indemnifies senior college employees in the same circumstances" (*id.* at 135 [citations omitted]). Further, the "degree of supervision exercised by the state" over CUNY is minimal for purposes of the *Clissuras* analysis (359 F3d 79, 82 [2d Cir 2004]). The legislature "explicitly vested the CUNY Board with independent powers to 'govern and administer the city university' " (*Matter of Perez v Giuliani*, 182 Misc 2d 398, 403 [Sup Ct, NY County 1999], quoting Education Law § 6204 [1]). "As a 'separate and distinct body corporate,' CUNY is not formally part of the State *or* the City" (*Matter of Apollon v Giuliani*, 246 AD2d at 134-135, citing Education Law § 6203).

Therefore, since Kingsborough is a community college as defined in Education Law § 6202 (4), it is not a governmental agency that would be shielded from liability under Labor Law § 215. Thus, this court determines that although CUNY is an agency of the State, community colleges of CUNY are distinct from senior colleges (*Encore Coll. Bookstore, Inc. v City Univ. of N.Y.*, 2008 NY Slip Op 33294[U], *13 [Sup Ct, NY County 2008], citing *Pikulin v City Univ. of N.Y.*, 176 F3d 598 [2d Cir 1999]). As such, Kingsborough is to be treated as a city agency. Consequently, a cause of action in Labor Law § 215 is permissible against Kingsborough Community College.

For the reasons stated above, the court determines that defendants' motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7) is denied.

[— NYS3d —]

Irving H. Picard, Petitioner, v Malcolm H. Sage et al., Respondents.

Supreme Court, New York County, October 7, 2025

HEADNOTES

Creditors' Suits — Exemption of Homestead — Combined Condominium Units

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RESEARCH REFERENCES

By the Publisher's Editorial Staff

Am Jur 2d Execution and Enforcement of Judgments §§ 118–119; Am Jur 2d Homestead §§ 24, 29, 32–33, 55, 64; Am Jur 2d Judgments § 337.

Carmody-Wait 2d Enforcement of Judgments §§ 64:25, 64:27–64:28.

NY Jur 2d Enforcement and Execution of Judgments §§ 60, 90; NY Jur 2d Exemptions § 53.

Siegel, NY Prac (6th ed) § 490.

ANNOTATION REFERENCES

Inclusion of different tracts or parcels in homestead. 73 ALR 116.

Estate or interest in real property to which a homestead claim may attach. 89 ALR 511.

Estate or interest in real property to which a homestead claim may attach. 74 ALR2d 1355.

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Query: (judgment /3 debtor or creditor) & (exempt! /3 homestead)

APPEARANCES OF COUNSEL

Ariel Berschadsky, New York City, for petitioner.

Malcolm Sage and another, respondents pro se.

OPINION OF THE COURT

Paul A. Goetz, J.

In this declaratory judgment proceeding, petitioner, Irving H. Picard, as trustee for the substantively consolidated liquida-

tion of Bernard L. Madoff Investment Securities LLC (BLMIS), seeks a declaratory judgment that certain condominium units owned by respondents Malcolm Sage and Lynne Sage are not subject to a homestead exemption, and directing the sheriff to execute on the sale of the units. Petitioner seeks the declaratory judgment and subsequent sale for apartments 14B and 14C located at 45 Christopher Street, New York, New York, 10014. Respondents argue that these two units, along with apartment 14A, also owned by respondents, were combined to make one unit in 1995 and the combined unit is their primary residence and thus subject to the CPLR 5206 homestead exemption. Petitioner argues that respondents are only entitled to the homestead exemption for unit 14A and the combined unit can be separated, and 14B and 14C can then be sold. Respondents cross-move seeking a protective order vacating all judgment enforcement proceedings against them.

Malcolm Sage was a general partner in Sage Associates and Sage Realty, two partnerships that held investment accounts at BLMIS between 1978 and 2008 (NY St Cts Elec Filing [NYSCEF] Doc No. 1 ¶ 6). Petitioner commenced proceedings against Malcolm Sage, Sage Realty, and Sage Associates to recover fraudulent transfers made by BLMIS to Sage Associates and Sage Realty, totaling $16,880,000 (*id.* ¶ 7). Following trial, the United States District Court for the Southern District of New York (SDNY) entered two money judgments both against Malcolm Sage and others, jointly and severally, for $13,510,000.00 and for $3,370,000.00 totaling $16,880,000 (*id.* ¶ 8; NYSCEF Doc No. 4). The entire judgment remains unpaid and due (NYSCEF Doc. No 1 ¶ 12).

Respondents purchased apartment 14B in 1992 (*id.* ¶ 14). In 1993 respondents purchased apartment 14A and in 1995 they purchased apartment 14C, and combined all three apartments into one where they have lived since (*id.* ¶¶ 13-16). The three apartments retain their original, distinguishable block and lot numbers (*id.* ¶ 17).

Discussion

CPLR 5206 provides:

> "(a) Exemption of homestead. Property of one of the following types, not exceeding one hundred fifty thousand dollars for the counties of . . . New York, . . . in value above liens and encumbrances, owned and occupied as a principal residence, is exempt from application to the satisfaction of a money judg-

> ment, unless the judgment was recovered wholly for the purchase price thereof:
>
> "1. a lot of land with a dwelling thereon,
>
> "2. shares of stock in a cooperative apartment corporation,
>
> "3. units of a condominium apartment, or
>
> "4. a mobile home . . .
>
> "(e) . . . A judgment creditor may commence a special proceeding in the county in which the homestead is located against the judgment debtor for the sale, by a sheriff or receiver, of a homestead exceeding one hundred fifty thousand dollars for the counties of . . . New York . . . The court may direct that the notice of petition be served upon any other person. The court, if it directs such a sale, shall so marshal the proceeds of the sale that the right and interest of each person in the proceeds shall correspond as nearly as may be to his right and interest in the property sold. Money, not exceeding one hundred fifty thousand dollars for the counties of . . . New York . . . is exempt for one year after the payment, unless, before the expiration of the year, he acquires an exempt homestead, in which case, the exemption ceases with respect to so much of the money as was not expended for the purchase of that property; and the exemption of the property so acquired extends to every debt against which the property sold was exempt."

The purpose of the homestead exemption is to protect the family of a judgment debtor by exempting their home from execution on an outstanding judgment if it falls below a monetary threshold, or if the property exceeds that value, exempting some of the proceeds from the sale to allow the debtor to purchase an exempt property (*see CFCU Community Credit Union v Hayward*, 552 F3d 253 [2d Cir 2009]; *see also Matter of Sklar v Gestetner*, 190 AD3d 750 [2d Dept 2021]). "In order to claim a homestead exemption under New York law, a debtor must show actual physical occupancy on a regular basis and an intent to reside permanently" (*In re Issa*, 501 BR 223, 226 [SD NY 2013] [internal quotation marks omitted]).

Here, petitioner argues that respondents are only entitled to claim the homestead exemption for apartment 14A, and that the sheriff should be directed to proceed with an execution of

the sale of apartments 14B and 14C as exempt from CPLR 5206 (e). There are no cases directly on point whether two or more combined condominiums or cooperatives qualify collectively for the homestead exemption. However, in *In re Flatt* (160 BR 497 [ND NY 1993]) the United States Bankruptcy Court for the Northern District of New York considered an analogous issue. The issue before the court in *Flatt* was whether two parcels of land—one with the dwelling and the second across the street and vacant—together acquire the status of homestead property (*id.* at 498-499). The court reasoned that a "nearly identical issue arises in the context of determining severance damages incident to an appropriation of real property in eminent domain" (*id.* at 501). The court noted that in the context of eminent domain "separate parcels will generally be considered as comprising a single unit only when three requirements are met: i) there is unity of title or ownership, ii) unity of use and iii) the parcels are contiguous" (*id.*; *see also Matter of Village of Port Chester [Bologna]*, 95 AD3d 895, 896 [2d Dept 2012] ["To establish the propriety of valuing two separate parcels of property as a single economic unit for the purpose of awarding condemnation damages, 'the property owner must show that the subject parcels are contiguous, and that there is a unity of use and of ownership' "]).

Here, it is undisputed that all three of the elements are satisfied. There is unity of title and ownership in that Malcolm and Lynne Sage have owned the three apartments by a tenancy in the entirety since 1995 (*see* NYSCEF Doc Nos. 6-8).[*] Further, petitioner acknowledges that the three apartments have been combined into one contiguous apartment which is used for respondents' primary home (*see* NYSCEF Doc No. 1 ¶ 11). Therefore, the three combined apartments may be treated as one solitary homestead property, and the petition must be denied. While CPLR 5206 (e) provides that a judgment creditor may commence a special proceeding to direct the sale of a debtor's homestead property, and as stated above, if such a sale is directed must exempt an amount of the sale proceeds to allow the debtors an opportunity to acquire a fully exempt property, petitioner did not request this relief here. Since petitioner only seeks a declaratory judgment, declaring apartments 14B and 14C are not subject to the homestead exemption, the petition must be denied.

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* Even if petitioner's legal theory was accepted, it is unclear why the proper remedy would be to direct a sale of apartments 14B and 14C, considering that 14B was the first apartment purchased by respondents.

As for respondents' cross-motion, petitioner correctly notes a fatal procedural defect in that it does not contain a notice of cross-motion (*Matter of Briger*, 95 AD2d 887, 888 [3d Dept 1983]). However, notwithstanding the procedural defect, respondents are not entitled to a vacatur of the money judgments against them. Respondent Malcolm Sage has already exhausted all appeals of the judgment and has provided no evidence that the judgments were obtained by fraudulent means. Furthermore, respondents "proffered no evidence that permitting the [petitioner] to enforce the judgment would cause unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice" (*Castle Restoration & Constr., Inc. v Castle Restoration, LLC*, 155 AD3d 678, 682 [2d Dept 2017]). Therefore, the cross-motion will be denied.

Accordingly, it is ordered and adjudged that the petition and the cross-motion are denied, and the Clerk is directed to enter judgment accordingly with costs and disbursements to respondents as taxed by the Clerk.

[— NYS3d —]

East Sunrise Management Inc., Plaintiff, v Nison Badalov et al., Defendants.

Supreme Court, Kings County, October 10, 2025

HEADNOTES

Contracts — Construction — Assignment of Real Property Auction Bid — Vacatur of Foreclosure Auction and Sale

RESEARCH REFERENCES

By the Publisher's Editorial Staff

Am Jur 2d Auctions and Auctioneers §§ 20, 23; Am Jur 2d Contracts § 447.

Carmody-Wait 2d Judicial Sales §§ 88:17, 88:26.

New York Contract Law (2d ed) § 11:2.

NY Jur 2d Auctions and Auctioneers § 22; NY Jur 2d Contracts § 325; NY Jur 2d Real Property Sales and Exchanges §§ 1, 36.

Williston on Contracts (4th ed) §§ 1.1, 38:7, 74:1, 74:10, 74:12.

ANNOTATION REFERENCE

See ALR Index under Auctions; Bids and Bidding; Conditions Precedent; Contracts; Sale or Transfer of Property.

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APPEARANCES OF COUNSEL

Anderson Bowman PLLC (*Dustin Bowman* of counsel) for plaintiff.

Stern & Stern, Esqs. (*David Lyle Stern* of counsel) for defendants.

OPINION OF THE COURT

Katherine A. Levine, J.

Factual and Procedural Background

In this action arising from the parties' alleged mutual

breaches of an assignment agreement for the successful auction bid to purchase a previously-foreclosed-upon property in Kings County, plaintiff moves for summary judgment pursuant to CPLR 3212: (1) cancelling and rescinding the assignment agreement at issue; and (2) directing defendants to return plaintiff's down payment, which was paid to defendants upon execution of said agreement, in consideration for the assignment of the successful auction bid.

In November 2017, pursuant to a separate foreclosure action in Kings County Supreme Court, index No. 23602/2008 (foreclosure action), an auction occurred for the property located at 9 Holmes Lane, Brooklyn, NY 11236, Block 8241, Lot: 153 (subject property). The defendant in the action before *this* court, Nison Badalov (Badalov), successfully bid on the subject property on behalf of 9 Holmes DBNB 2018 LLC (LLC), another defendant in this action, with the final bid totaling $475,000. (*Id.*) As consideration for the bid, our defendants deposited $47,500 into an escrow account controlled by the court-appointed referee for the subject property, Helene Blank, Esq. (*Id.*)

Later, Badalov and the LLC assigned their successful bid for the subject property to the plaintiff in this action, East Sunrise Management Inc. (East Sunrise), for $105,000 (assignment agreement), and plaintiff simultaneously deposited a down payment of $47,500 with codefendant Balisok & Kaufman PLLC (Balisok), serving as escrow agent. The assignment agreement was premised on the successful bid in the foreclosure action, and it stipulated that "[East Sunrise] is fully responsible to the terms of sale index no: 23602/2008 and [Badalov] is fully responsible for assigning the bid and the LLC to [East Sunrise] legally at closing." (*Id.*) The agreement also contained a proviso stipulating that, "[i]n the event that [the] transaction is cancelled due to no fault of the purchaser, the seller shall return the down-payment in full." (*Id.*)

Over the following year and a half, the parties in the foreclosure action discovered an issue with the legal description on the deed of the subject property, which clouded its title. Though the plaintiff in the foreclosure action later successfully moved for an order amending the subject property's legal description in April 2019, "[d]ue to the time and expense involved in resolving the legal description," the parties in the foreclosure action were unable to come to mutually agreeable terms regarding the closing. Based on these facts, the foreclosure action plaintiff

successfully moved for an order, entered October 28, 2019 (October 28 order), vacating the entire foreclosure auction and sale a year and a half after it was effectuated, and ordering the foreclosure action referee to return to our defendants their $47,500 deposit.

Throughout the litigation and negotiation of those issues in the foreclosure action, the parties in *this* action continued to negotiate a potential closing date for the subject property. These conversations stalled, seemingly due to factors unrelated to the title-clouding deed issues in the foreclosure action, but neither side declared the deal dead until the October 28 order was entered in the foreclosure action, vacating the November 2017 auction. As a result, plaintiff in this action, East Sunrise, requested that defendants return its $47,500 deposit, on the basis that the deal could no longer move forward because the assignment agreement had assigned a bid in an auction that had been vacated, and therefore no longer had legal effect on the subject property itself. The defendants refused to return the deposit, arguing to East Sunrise that they had negotiated a potential side deal with the plaintiff in the foreclosure action to sell the subject property, regardless of the failure of the previous auction. Defendants argued to plaintiff that they would still be able to successfully purchase the subject property, and that the assignment agreement still required East Sunrise to complete its original obligation to then purchase it from defendants, even though the auction had been vitiated.

Plaintiff then brought this action, seeking return of its down payment, and following discovery, moved for summary judgment seeking the return of its down payment from defendants. Defendants opposed, arguing that East Sunrise had anticipatorily breached or repudiated the contract even before the October 28 order was entered because they refused to close, and that defendants were keeping plaintiff's $47,500 as liquidated damages, because defendants allegedly would have made even more money on the subject transaction had plaintiff not repudiated the agreement.

Legal Standard

The proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Trustees of Columbia Univ. in the City of N.Y. v D'Agostino Supermarkets, Inc.*, 36 NY3d 69, 73-74 [2020] [internal quotation marks omitted]; *Pullman v*

Silverman, 28 NY3d 1060, 1062 [2016]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. (*Pullman*, 28 NY3d at 1062; *Midwood Lumber & Millwork, Inc. v New York Constr. & Renovation Inc.*, 2023 NY Misc LEXIS 49962, *4 [Sup Ct, Kings County, Feb. 10, 2023, No. 511185/2019].) If the moving party proffers the required evidence, the burden shifts to the nonmoving party "to establish the existence of material issues of fact which require a trial of the action." (*Trustees of Columbia Univ.*, 36 NY3d at 74.)

It is the primary rule of construction of contracts that the "intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and the parties' reasonable expectations." (*Geothermal Energy Corp. v Caithness Corp.*, 34 AD3d 420, 424 [2d Dept 2006].) "Where possible, a contract should be interpreted to avoid inconsistencies and to give meaning to all of its provisions." (*Zullo v Varley*, 57 AD3d 536, 537 [2d Dept 2008].)

"[W]hen parties set down their [contract] in a clear, complete document, their writing should . . . be enforced according to its terms." (*Consedine v Portville Cent. School Dist.*, 12 NY3d 286, 293 [2009].) The Court of Appeals has recognized "this rule's special import in the context of real property transactions, where commercial certainty is a paramount concern, and where . . . the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length." (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004] [internal quotation marks omitted].) In such circumstances, "courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include." (*Id.*) "[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing." (*Id.*)

Analysis

As a matter of basic contract interpretation, plaintiff's summary judgment motion must be granted, because it correctly interpreted the one-page assignment agreement at issue. Plaintiff has shown entitlement to summary judgment for the return of its down payment, because: (1) the assignment agree-

ment in evidence was plainly tied to, and conditioned upon, the enforceability of the auction bid in the underlying foreclosure action; (2) the auction bid was vacated and made a nullity through no fault of plaintiff; and (3) the assignment agreement specifically directed the return of plaintiff's down payment in exactly this situation. In response, defendants failed to raise a triable issue of fact, and they failed to show their own entitlement to retention of the down payment as a form of liquidated damages.

The Parties' Assignment Agreement

In its preamble, the assignment agreement between defendant Badalov and plaintiff East Sunrise states plainly that it was made "for the assignments of *bid* for 9 Holmes Ln, Brooklyn, New York 11236." (Emphasis added.) In the only "WHEREAS" paragraph laying out the condition giving rise to the agreement, it states "[Badalov] *is the successful bidder* of the subject property." (Emphasis added.)

As to the specific obligations of the parties, the agreement stipulates that "[Badalov] shall lawfully assign the LLC and *the bid* of the Subject Property *which [Badalov] acquired for $475,000.00* to [East Sunrise] for $105,000 *above the successful bid*." (*Id.* [emphasis added].) The agreement also states that "[East Sunrise] is *fully responsible to the terms of sale index no: 23602/2008*," which undoubtedly refers to the terms of sale used as an advertisement for the original 2017 auction in the foreclosure action. (Emphasis added.)

Finally, the agreement cautions that "[n]o waiver of any provisions of this agreement shall be valid unless in [w]riting," and then includes an unequivocal integration clause, stating "[t]his agreement constitutes the entire Agreement and understanding between the parties [i]n relation to the subject property and there are no promises, representation[s], conditions, provisions or terms related thereto other than those set forth in this Agreement."

The assignment agreement is crystal clear that the item of value assigned by Badalov to East Sunrise was its "successful bid" on the subject property. While Badalov also assigned the LLC, the LLC was valuable only to the extent it legally possessed, on paper, the successful bid. The item East Sunrise covenanted to pay $105,000 for (part of which was then actually given as the subject down payment) was the "successful bid."

The "transaction" referenced in paragraph 2 of the assignment agreement was the transfer of the "successful bid." When the foreclosure court vacated the auction, it retroactively declared the "successful" bid to be an unsuccessful nullity. As a result, defendants had nothing of value to assign to East Sunrise, and the transaction was cancelled. The court views this situation as essentially the same set of circumstances the parties anticipated when they addressed the possibility of the transaction being "cancelled due to no fault of the purchaser" in the clear language of the agreement.

Anticipatory Repudiation

In opposition, defendants argue that plaintiff had already anticipatorily breached or repudiated the assignment agreement by the time the court in the foreclosure action vacated the auction and defendants' winning bid. Defendants base this argument on numerous text and email conversations between counsel for the parties from August to November 2019, when the parties in this action were struggling to schedule and finalize terms of closing for the subject property. They argue that plaintiff was stalling in that negotiation, breaching the vague time-is-of-the-essence language in the assignment agreement, and changing their negotiating positions with respect to the closing.

Defendants allege that plaintiff most likely had buyer's remorse, and that plaintiff was now attempting to raise artificial impediments and barriers to the actual closing as a fig leaf excuse to relieve them of their obligation to follow through on the remainder of the assignment agreement. While that may or may not be true, the plain fact is that the parties' closing would have been cancelled regardless of plaintiff's actions after August 2019 because the foreclosure action court soon thereafter vacated the auction bid, rendering the transaction in the assignment agreement without effect. In fact, the foreclosure action plaintiff had already moved to vacate the auction in July of 2019, which clearly, and reasonably, impacted East Sunrise's willingness to consummate a closing it had clear notice was likely to be rendered impossible.

Further Possible Negotiation with Foreclosing Bank

Defendants additionally argue that, even after the auction was vacated, "Defendant and the foreclosing bank continued to negotiate and the foreclosing bank made it clear that it was

still willing to close with Defendant which meant that Defendant could still close with Plaintiff." (Defendants' improper surreply at 16.) But this argument misses the crucial fact that such a transaction would not have been governed by the assignment agreement. Regardless of whether defendants could have still negotiated a separate deal with the foreclosing bank in the foreclosure action, the terms of the assignment agreement make clear that the only transaction contemplated by it was the assignment of Badalov's successful bid in the auction.

In arguing that plaintiff was still obligated to negotiate a separate sale of the property with defendants and the foreclosing bank outside of the nullified auction bid assignment, defendants ask the court to write into the assignment agreement terms and understandings which were not contemplated by plaintiff at the time of the agreement's execution. The agreement is very short and highly specific about the nature of the transaction. The court cannot, on its own, rewrite the terms of the assignment agreement to make it an all-purpose, omnibus contract governing any possible future sale and negotiation of the subject property. The court is unable to force plaintiff to abide by terms of a contract that it did not sign, especially in the presence of the assignment agreement's integration clause.

Conclusion

Plaintiff has shown, as a matter of law, that they are entitled to the return of their down payment, and that defendants have, at least in some part, breached the assignment agreement by refusing to do so. For their part, defendants have failed to raise a triable issue of fact as to the meaning of the clear terms of the assignment agreement, the unequivocal effect of the October 28 order, and plaintiff's alleged obligation to purchase the subject property following the nullification of the transaction at the heart of the assignment agreement.

Therefore, plaintiff's motion for summary judgment (mot seq 3) is granted in its entirety.

[248 NYS3d 904]

TODD R. et al., Individually and as Guardians Ad Litem to B.R., an Infant, Plaintiffs, v RENSSELAER CITY SCHOOL DISTRICT et al., Defendants.

Supreme Court, Rensselaer County, December 17, 2025

HEADNOTES

Schools — Students — Injury to Student — Disclosure of Video Recordings of Incident

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RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Depositions and Discovery § 68; AM JUR 2d Freedom of Information Acts § 262; AM JUR 2d Municipal, County, School, and State Tort Liability §§ 432, 516–519; AM JUR 2d Schools §§ 174, 274–275, 300–301, 307, 310, 338.

CARMODY-WAIT 2d Disclosure § 42:301.

DOBBS LAW OF TORTS (2d ed) §§ 418, 583.

NY JUR 2d Disclosure § 228; NY JUR 2d Government Tort Liability §§ 257–258; NY JUR 2d Records and Recording § 36; NY JUR 2d Schools, Universities, and Colleges §§ 336, 338, 340–343, 899.

ANNOTATION REFERENCE

See ALR Index under Discovery; Privacy; Records and Recording; Schools and Education.

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APPEARANCES OF COUNSEL

Maynard, O'Connor, Smith & Catalinotto, LLP (*Robert A. Rausch* of counsel) for defendants.

Law Office of Ian H. Silverman, Esq. (*Ian H. Silverman* of counsel) for plaintiffs.

OPINION OF THE COURT

NOEL MENDEZ, J.

In this civil action alleging various forms of tortious conduct, defendants Rensselaer City School District (School District), Joseph Kardash, in his official capacity as Superintendent of Schools (Superintendent), Jeffery Palmer, in his official capacity as Principal (Principal), Amy Prabhakaran (Prabhakaran), Catherine Barber (Barber), and Chris Johnson (Johnson) (collectively, defendants) move this court for an order partially dismissing the verified complaint for failure to state a cause of action, insofar as dismissing the causes of action for assault, battery, and intentional infliction of emotional distress in their entirety; dismissing all causes of action as alleged against the Superintendent, the Principal, and Prabhakaran; and dismissing the claims for punitive damages and attorneys' fees.

Defendants also move for a protective order either striking a demand for the disclosure of certain videos relating to the action, or, alternatively, limiting the disclosure of said videos and shielding them from re-disclosure; and for an order placing limited restrictions on public statements concerning the alleged incident giving rise to the lawsuit and the lawsuit itself.

Plaintiffs Todd R. (Todd R.) and Lark R. (Lark R.) (together, parents), individually and as guardians ad litem to minor B.R. (B.R.) (collectively, plaintiffs), oppose both motions.

Based on the parties' submissions for an order partially dismissing the verified complaint, the court denies the branch of defendants' motion seeking dismissal of the causes of action for assault, battery, and intentional infliction of emotional distress; grants in part the branch of defendants' motion seeking dismissal of the causes of action for assault, battery, intentional infliction of emotional distress, negligent infliction of emotional distress, and false imprisonment as asserted against the Superintendent, the Principal, and Prabhakaran, but denies in part this branch of defendants' motion due to a remaining claim of negligence as asserted against them; grants the branch of defendants' motion seeking dismissal of the claim for intentional infliction of emotional distress as asserted against the School District; and grants the branch of defendants' motion seeking dismissal of plaintiffs' claims for punitive damages and attorneys' fees.

Based on the parties' submissions with respect to the motion seeking, inter alia, a protective order, the court denies in part the branch of defendants' motion seeking a protective order striking plaintiffs' request for the disclosure of the videos, but grants in part this branch of defendants' motion to the extent

of granting disclosure with certain conditions; and denies the branch of defendants' motion seeking an order limiting plaintiffs' speech concerning the lawsuit, without prejudice.

Facts and Procedural History

As alleged by plaintiffs in their verified complaint, the parents reside in the City of Rensselaer with their minor child, B.R., who was born in 2014. The parents discovered when B.R. was approximately 2½ years old that B.R. suffered from a delay in speech. B.R. received some form of early intervention services from the Rensselaer County Department of Health. In 2019, B.R. was diagnosed with both Level 1 Autism Spectrum Disorder and Sensory Processing Disorder. B.R. struggles with communication insofar as they are sometimes unable to generate speech and describe what transpires throughout the school day. B.R. also struggles with physical contact insofar as contact for B.R. can be overwhelming and painful. Given these difficulties, B.R. sometimes becomes physically defensive. This occurs when B.R. is unable to communicate at any given moment or when subjected to "unwelcome touching."

The parents enrolled B.R. for school within the School District when B.R. became eligible for the prekindergarten program in September of 2018—some time before B.R. was diagnosed with Level 1 Autism Spectrum Disorder and Sensory Processing Disorder. Upon enrollment, the School District tracked B.R.'s progress and developed an Individualized Education Program for B.R.'s benefit. B.R. would go on to attend Van Rensselaer Elementary School. During the 2023-2024 academic year, B.R. was in fourth grade. He was placed in a class having both a general education teacher and a special education teacher. At the time, B.R. was receiving speech therapy and counseling through the School District. According to the parents, the School District knew about B.R.'s diagnoses.

On Friday, February 9, 2024, at approximately 3:00 p.m., as students were being dismissed from school, Barber, the school psychologist and Chairperson of the Committee on Special Education, and Johnson, the school Social Media Counselor, allegedly forced B.R. to the ground repeatedly and restrained B.R. against their will. Given their speech limitations, B.R. was unable to communicate what happened to their parents. The Principal called the parents shortly after the incident to inform them that B.R. would be suspended the following

Monday for one day. Lark R. asked for an explanation, but the Principal told Lark R. to speak to their child. Approximately two days later, the parents spoke over the phone with the Superintendent, who indicated that it was unusual for the School District to suspend an elementary school student, but that he did not have any additional information regarding the incident. Todd R. and Lark R. spoke to multiple school officials, including Prabhakaran, to no avail. The parents were finally able to view videos of the incident approximately 25 days after it had occurred.

According to the parents' description, the videos—of which there are 14—revealed that on the afternoon of the alleged incident, B.R. was being escorted off the premises for dismissal by Barber, Johnson, and one other school employee, Chelsea Carbone (Carbone). The three adults walked next to, in front of, and behind of B.R., respectively. B.R. attempted to join another group of students. Barber grabbed B.R. across the latter's body and around the neck, dragging B.R. to the ground. Barber and Johnson then seemingly squatted next to B.R. as B.R. laid there. B.R. got up on his hands and knees, started crawling across the school hallway, and stood up, only to fall to his knees. B.R. then crawled to a wall for support, got up a second time, and began walking down the hallway. It was at this moment that another, unnamed adult got in front of B.R. to impede B.R.'s progress. B.R. attempted to move around that person, but Johnson grabbed B.R. by the backpack, pulling B.R. backwards and onto the ground. Plaintiffs claim that Johnson pulled B.R. one more time to the ground as B.R. neared the school exit. B.R. found himself surrounded by three other adults before being allowed to exit the school alone, without supervision, and into an area outside the school where school buses and other vehicles congregate.

Plaintiffs claim B.R.'s physical and emotional health began to deteriorate. B.R. was unable to attend school on a full-time basis because of debilitating headaches and certain physical illnesses resulting from the alleged incident. B.R. stopped attending school regularly after Memorial Day of 2024. Plaintiffs allege that B.R. suffered a brain injury due to defendants' conduct and now has post-concussion syndrome.

Plaintiffs filed a notice of claim pursuant to General Municipal Law § 50-e, dated May 1, 2024, and the parents were subsequently examined pursuant to General Municipal Law § 50-h in July of that year. Plaintiffs have now commenced this

lawsuit, alleging causes of action for assault, battery, negligent infliction of emotional distress, intentional infliction of emotional distress, and false imprisonment, suing the participants of the alleged incident, as well as others in their official capacities, and arguing liability under a theory of respondeat superior as against the School District. Defendants interposed a general denial with numerous affirmative defenses. Defendants now move for partial dismissal of the verified complaint, as well as for an order striking plaintiffs' demand for disclosure of the videos or otherwise limiting the disclosure of the videos, and an order limiting plaintiffs from making public statements about the case.

Analysis

I.

First, defendants move for an order partially dismissing the verified complaint. Specifically, they seek to dismiss, for failure to state a cause of action, the causes of action for assault, battery, and intentional infliction of emotional distress, all in their entirety; all causes of action as asserted against the Superintendent, the Principal, and Prabhakaran; and the claims for punitive damages and attorneys' fees. In their motion papers, defendants do not dispute that Barber and Johnson, who at the time was a mental health specialist and not a Social Media Counselor, were escorting B.R. on the date and time in question. Indeed, defendants claim that Barber and Johnson were escorting B.R. throughout the building during dismissal, and that there were several incidents where B.R. began to move and run away from them. Defendants maintain that contact with B.R. was minimal yet necessary to prevent the child from fleeing their supervision and possibly hurting themselves. The parents were allowed to view the videos and testified as to what they saw during defendants' examination of them, which was undertaken pursuant to section 50-h of the General Municipal Law. Defendants cite to the transcripts of these examinations in support of their motion to dismiss the verified complaint under CPLR 3211 (a) (7), claiming, inter alia, that Todd R.'s statement, made during the examination, concerning lack of knowledge as to Barber and Johnson's intent supports the dismissal of all the causes of action where intent is an element. Defendants essentially assert that the causes of action requiring proof of intent—specifically, assault, battery, and

intentional infliction of emotional distress—should be dismissed because Todd R. testified during the 50-h examination that they did not know what Barber and Johnson had intended when restraining B.R. Defendants further argue that plaintiffs failed to state causes of action as against the Superintendent, the Principal, and Prabhakaran, and that plaintiffs' claims for punitive damages and attorneys' fees must be dismissed due to existing case law.

In opposition, plaintiffs claim that intent for all the claims requiring proof thereof can be inferred from Barber and Johnson's conduct, and that the claim for intentional infliction of emotional distress should not be dismissed prematurely, even as the claim pertains to the School District. In that regard, plaintiffs claim that the School District should be held liable under the theory of respondeat superior. Insofar as the Superintendent, the Principal, and Prabhakaran are concerned, plaintiffs maintain that their refusal to tell the parents what happened resulted in a delay in B.R. receiving immediate medical attention. Plaintiffs concede they are unable to recover punitive damages against governmental entities but nevertheless seek punitive damages as against the individual defendants.

The court notes at the outset that the notice of claim served upon defendants conforms to the requirements of the General Municipal Law, to the extent that the notice provides the School District and defendants with information sufficient to enable them to investigate the matter (*see generally Rosenbaum v City of New York*, 8 NY3d 1, 10-11 [2006], quoting *Brown v City of New York*, 95 NY2d 389, 393 [2000]; *see also Matter of Cook v Maine-Endwell Cent. Sch. Dist.*, 236 AD3d 1167, 1169 [3d Dept 2025] [noting that the primary purpose of a notice of claim—to provide a municipal corporation with notice to allow for an efficient, timely investigation—was satisfied in that case]; *Fontaine v City of Amsterdam*, 172 AD3d 1602, 1603 [3d Dept 2019] [upholding Supreme Court's denial of a motion to dismiss where the notice of claim had not specified certain claims but nevertheless identified possible culpable conduct]).

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the court must liberally construe the pleading, insofar as it must accept the facts as alleged in the verified complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged therein fit within any cogniz-

able legal theory (*see Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994], *see also Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.*, 37 NY3d 169, 175 [2021], quoting *Leon*, 84 NY2d at 87-88). However, allegations consisting merely of bare legal conclusions are not entitled to such consideration (*see Connaughton*, 29 NY3d at 141-142, quoting *Simkin v Blank*, 19 NY3d 46, 52 [2012]). Dismissal under CPLR 3211 (a) (7) is warranted if plaintiffs fail to assert facts in support of an element of the claim or if the factual allegations and inferences to be drawn therefrom do not allow for an enforceable right of recovery (*see Connaughton*, 29 NY3d at 142; *see also Horowitz v Fallon*, 204 AD3d 1177, 1178 [3d Dept 2022]). Nevertheless, the court's sole criterion is whether the pleading states a cause of action (*see People v Coventry First LLC*, 13 NY3d 108, 115 [2009], quoting *Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001]). If the facts alleged within the four corners of the pleading manifest any cause of action cognizable at law, a motion for dismissal will fail (*see Coventry First LLC*, 13 NY3d at 115, quoting *Polonetsky*, 97 NY2d at 54; *see also Shephard v Friedlander*, 195 AD3d 1191, 1192 [3d Dept 2021] ["On such a motion, the court must determine 'whether, from the pleading's four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law' " (citation omitted)]).

To allege a cause of action for assault, a plaintiff must demonstrate that the defendant intentionally placed them in apprehension of imminent harmful or offensive contact (*see Calkins v Dernlan*, 234 AD3d 1088, 1090 [3d Dept 2025], quoting *A.M.P. v Benjamin*, 201 AD3d 50, 56 [3d Dept 2021]; *see also Rivera v State of New York*, 34 NY3d 383, 389 [2019], quoting *Jeffreys v Griffin*, 1 NY3d 34, 41 n 2 [2003], and citing *Wende C. v United Methodist Church, N.Y. W. Area*, 4 NY3d 293, 298 [2005] [discussing battery]).

Battery exists where a person intentionally touches another without the latter's consent (*see Wende C.*, 4 NY3d at 298; *see also Cicci v Chemung County*, 122 AD3d 1181, 1183 [3d Dept 2014] ["A battery occurs where a defendant intentionally engages in offensive bodily contact without plaintiff's consent" (internal quotation marks and brackets omitted)], *lv dismissed in part & denied in part* 25 NY3d 1062 [2015]).

To maintain a claim for intentional infliction of emotional distress, a plaintiff must demonstrate that the alleged conduct

was extreme and outrageous, and that the alleged perpetrator acted with the intent to cause severe emotional distress or with a disregard for the substantial probability that their conduct would cause severe emotional distress (*see Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 56 [2016], quoting *Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]). Moreover, a plaintiff must establish a causal connection between the conduct alleged and the injury itself (i.e., severe emotional distress) (*see Chanko*, 27 NY3d at 56, quoting *Howell*, 81 NY2d at 121). Liability exists only where the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency (*see Chanko*, 27 NY3d at 56, quoting *Howell*, 81 NY2d at 121). In this regard, the conduct alleged must be regarded as atrocious and utterly intolerable in a civilized community (*see Chanko*, 27 NY3d at 56, quoting *Howell*, 81 NY2d at 121; *see also Loch Sheldrake Beach & Tennis Inc. v Akulich*, 141 AD3d 809, 814 [3d Dept 2016] [discussing the elements of the claim], *lv dismissed* 28 NY3d 1104 [2016]; *Hyman v Schwartz*, 127 AD3d 1281, 1283-1284 [3d Dept 2015] [same]; *Cusimano v United Health Servs. Hosps., Inc.*, 91 AD3d 1149, 1152 [3d Dept 2012] [same], *lv denied* 19 NY3d 801 [2012]).

A cause of action for negligent infliction of emotional distress requires the plaintiff to show a breach of a duty owed to them which unreasonably endangered their physical safety or caused them to fear for their own physical safety (*see Calkins*, 234 AD3d at 1089-1090, quoting *Doe v Langer*, 206 AD3d 1325, 1331 [3d Dept 2022]; *see also Dolgas v Wales*, 215 AD3d 51, 56-57 [3d Dept 2023], *lv denied* 41 NY3d 904 [2024], *rearg denied* 42 NY3d 959 [2024]). As relevant here, school districts have a duty to adequately supervise their students, and the standard of care applicable to a school's oversight of its students is that degree of supervision which a parent of ordinary prudence would undertake in comparable circumstances (*see Renwick v Oneonta High School*, 77 AD3d 1123, 1124 [3d Dept 2010], citing *Mirand v City of New York*, 84 NY2d 44, 49 [1994]).

A plaintiff asserting a common-law claim for false imprisonment must establish that the defendant intended to confine the plaintiff, the plaintiff was conscious of the confinement and did not consent to such confinement, and the confinement was not otherwise privileged (*see Martinez v City of Schenectady*, 97 NY2d 78, 85 [2001]; *see also Parvi v City of Kingston*, 41 NY2d

553, 556 [1977], quoting *Broughton v State of New York*, 37 NY2d 451, 456 [1975]; *Barkley v Lisbon Cent. Sch. Dist.*, 220 AD3d 1089, 1090 [3d Dept 2023], quoting *Guntlow v Barbera*, 76 AD3d 760, 762 [3d Dept 2010], *appeal dismissed* 15 NY3d 906 [2010]).

Finally, a school district, like any other employer, may be held vicariously liable under the doctrine of respondeat superior for a tort committed by an employee during the course of the performance of their duties (*see Mary KK. v Jack LL.*, 203 AD2d 840, 841 [3d Dept 1994], citing *Murray v Watervliet City School Dist.*, 130 AD2d 830, 830 [3d Dept 1987]). Liability for respondeat superior, however, does not lie where the tortfeasor committed a tort outside of the scope of their employment that was wholly personal in nature and unrelated to the furtherance of the school district's business (*see Murray*, 130 AD2d at 830-831; *Mary KK.*, 203 AD2d at 841).

Liberally construing the verified complaint and according plaintiffs the benefit of every possible favorable inference, the court finds that the facts alleged manifest the five stated causes of action as against Barber and Johnson, given their direct involvement in the incident and the nature of the facts as presented. Defendants claim that the causes of action relating to assault, battery, and intentional infliction of emotional distress must be dismissed in their entirety at this very early stage in the litigation because plaintiffs cannot establish the element of intent inherent in these claims. However, intent is a mental operation that can be inferred from the facts and circumstances and ascertained by considering circumstantial evidence (*see Staples v Sisson*, 274 AD2d 779, 781 [3d Dept 2000]). Given the facts as alleged in the verified complaint and the liberal construction that must be afforded to a pleading on a motion to dismiss, the court finds that the verified complaint is not defective insofar as intent can be inferred and ascertained from the facts and circumstances as described by plaintiffs. Defendants point to the parents' 50-h hearing testimony to claim that plaintiffs cannot prove intent, but the court's role on a motion to dismiss is to ascertain whether the facts as alleged in the pleading fit within a cognizable legal theory. In this regard, the court is limited to an examination of the verified complaint to determine whether plaintiffs stated a cause of action, the language of CPLR 3211 (c) notwithstanding (*see Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]). Even when applying CPLR 3211 (c), it is entirely reasonable to

interpret the language cited by defendants to mean that Todd R. did not know what was in the minds of the individual defendants when they were restraining B.R. As in *Miglino*, this case is not currently in a posture to be resolved on a motion to dismiss (*see id.*). As a result, the court denies this branch of defendants' motion.

Defendants also seek to have all claims dismissed as against the Superintendent, the Principal, and Prabhakaran, arguing that plaintiffs failed to state any claims against them. The court agrees insofar as plaintiffs' stated causes of action involve Johnson and Barber rather than the Superintendent, the Principal, and Prabhakaran. The court, however, finds that plaintiffs have alleged facts within the four corners of the pleading tending to manifest a claim against these three defendants. Specifically, plaintiffs allege in the verified complaint that the Superintendent, the Principal, and Prabhakaran owed a duty of care to B.R. due to his developmental issues yet failed to timely inform the parents of what happened to B.R. that day. This delay, according to plaintiffs, resulted in B.R. not receiving immediate medical treatment. Thus, the facts—as alleged in the verified complaint, which must be liberally construed at this early stage in the litigation—manifest a claim sounding in negligence (*see generally Nellenback v Madison County*, 44 NY3d 329, 331-332 [2025] [discussing that a plaintiff bringing a cause of action for negligence must allege duty, breach, causation, and damages]; *Moore Charitable Found. v PJT Partners, Inc.*, 40 NY3d 150, 157 [2023] [same]). As a result, the court grants in part this branch of defendants' motion insofar as the five stated causes of action as alleged against the Superintendent, the Principal, and Prabhakaran are hereby dismissed, but denies in part the branch of this motion as it relates to the claim sounding in negligence.

To the extent defendants seek dismissal of the claim of intentional infliction of emotional distress, the court grants the branch of defendants' motion and dismisses this claim as against the School District itself (*see Matter of Lynch v State of New York*, 2 AD3d 1002, 1003 [3d Dept 2003]).

Finally, plaintiffs concede that punitive damages may not be recovered against the School District (*see generally Mackey v Lawrence Union Free Sch. Dist.*, 225 AD3d 683, 686 [2d Dept 2024]) but nevertheless seek punitive damages as against the individual defendants. Generally, "[t]he imposition of punitive damages generally requires conduct that evidences a high

degree of moral culpability, is so flagrant as to transcend simple carelessness, or constitutes willful or wanton negligence or recklessness so as to evince a conscious disregard for the rights of others" (*Evans v Stranger*, 307 AD2d 439, 440 [3d Dept 2003]). However, defendants correctly point out that "a municipality is not liable for punitive damages flowing from its employees' misconduct in the absence of express legislative authorization to the contrary" (*Krohn v New York City Police Dept.*, 2 NY3d 329, 336 [2004]). Likewise, plaintiffs are not entitled to attorneys' fees in the absence of malice (*Mastic Fuel Serv. v Van Cook*, 55 AD2d 599, 599 [2d Dept 1976] ["Attorneys' fees are recoverable as a measure of damages in tort actions where malice is an element of the tort"]). As a result, the court grants this branch of defendants' motion.

II.

Defendants move for a protective order either striking plaintiffs' demand for the disclosure of the videos or limiting the extent to which they ought to be disclosed and preventing re-disclosure. Defendants also move for an order restricting plaintiffs' ability to comment publicly about the lawsuit. Plaintiffs oppose. The court addresses each claim in turn.

As relevant here, protective orders are governed by CPLR 3103. That provision allows courts to issue, whether sua sponte or on motion by one of the parties, orders preventing abuse during the discovery process (*see* CPLR 3103 [a]). Courts may deny, limit, condition, or regulate the use of any discovery device (*id.*). Orders under this provision are meant to protect against unreasonable annoyance, expense, embarrassment, disadvantage, or prejudice to any person or the courts (*id.*). Courts have broad discretion in fashioning appropriate remedies where abuses are threatened under subdivision (a) of this provision (*see Lipin v Bender*, 84 NY2d 562, 570 [1994]).

Defendants cite to, inter alia, the Family Educational Rights and Privacy Act in seeking a protective order concerning the videos, claiming that disclosure of the videos at issue in this case would violate the privacy rights of nonparty students appearing in said videos. This federal law—codified at 20 USC § 1232g—prohibits public school districts from releasing or disclosing the records of students unless written consent is obtained from an appropriate parent or guardian, or an order is issued mandating their disclosure (*see Matter of Newfield Cent. School Dist. v New York State Div. of Human Rights*, 66

AD3d 1314, 1317 [3d Dept 2009]). Plaintiffs oppose, arguing that the nonparty students are "merely background" and thus not protected in this instance by federal law. Given the court's broad discretion under CPLR 3103 (a), the court denies in part defendants' motion for a protective order, to the extent defendants seek an order striking plaintiffs' request for disclosure, but grants defendants' motion in part, to the extent of granting disclosure subject to certain conditions. Specifically, the court orders that the videos be disclosed to plaintiffs' counsel for purposes of this lawsuit under the following conditions:

- Copies of the videos are to be disclosed to plaintiffs' counsel solely for the purposes of this action, and for no other purpose;
- Counsel for plaintiffs are ordered to take reasonable steps in ensuring that the videos are kept in a confidential manner and inaccessible to anyone other than counsel and their legal staff;
- The videos are not to be reproduced, distributed, or disseminated to anyone for any reason or under any circumstances, including for plaintiffs;
- Plaintiffs are to be afforded reasonable access to the videos for purposes of viewing them in person within the law office of plaintiffs' counsel and under the supervision of plaintiffs' counsel;
- Under no circumstances are plaintiffs to be given copies of the videos, nor are they to record or be allowed to record the videos using any device, including a smartphone; and
- Counsel for plaintiffs may grant their legal staff access to the videos to the extent necessary for prosecuting the lawsuit, but said staff are also subject to the requirements set forth in this decision and order.

Any other issues arising from the disclosure of these videos—including the return or destruction of said videos upon conclusion of the lawsuit—will be brought to the court's attention at that time. The court declines to address the consequences for violating these terms, except to remind the parties that the court has broad authority in crafting remedies for violations of CPLR 3103 (c) (*see Lipin*, 84 NY2d at 570).

Finally, defendants seek to limit plaintiffs' speech concerning the lawsuit, citing, inter alia, certain social media posts made by the parents concerning the litigation and the parents' purported conversations with local news media. Defendants

claim such communications are "inappropriate," "false," and "inflammatory," and ask the court for an order enjoining plaintiffs from further communication regarding the lawsuit. Defendants also ask that plaintiffs be enjoined from further communication with defendants or employees of the School District.

Defendants cite to several instances concerning Todd R.'s communications on social media and in other contexts but neglect to include in their memorandum in support any legal authority discussing the "well-settled" principles governing the depravation of a person's fundamental constitutional right to free speech under these circumstances. As such, the court denies this branch of defendants' motion without prejudice.

Conclusion

Based on all of the foregoing, it is ordered that defendants' motion for an order partially dismissing the verified complaint is granted in part and denied in part; and it is further ordered that the causes of action for assault, battery, intentional infliction of emotional distress, negligent infliction of emotional distress, and false imprisonment are dismissed as asserted against the Superintendent, the Principal, and Prabhakaran; and it is further ordered that the cause of action for intentional infliction of emotional distress is dismissed as asserted against the School District; and it is further ordered that the claims for punitive damages and attorneys' fees are dismissed; and it is further ordered that defendants' motion for a protective order is granted in part and denied in part; and it is further ordered that the parties are to abide by the terms and conditions set forth in this decision and order regarding the disclosure and re-disclosure of the videos relevant to this lawsuit; and it is further ordered that defendants' motion for an order precluding plaintiffs from discussing the lawsuit publicly is denied.

[249 NYS3d 364]

MARVIN ESPANA VENTURA, Plaintiff, v CHRISTINE BUETI, Defendant.

Supreme Court, Putnam County, December 10, 2025

HEADNOTES

Disclosure — Material Exempt from Disclosure — Criminal Records Sealed under CPL 160.50

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Courts §§ 27–28; AM JUR 2d Witnesses § 20.
CARMODY-WAIT 2d Disclosure §§ 42:169, 42:373; CARMODY-WAIT 2d Disposition of Records and Property §§ 208:11, 208:20.
MCKINNEY'S, CPL 160.50.
NY JUR 2d Criminal Law: Procedure §§ 3776–3777, 3779, 3781; NY JUR 2d Disclosure § 250; NY JUR 2d Evidence and Witnesses § 727.
SIEGEL, NY PRAC (6th ed) §§ 344–345, 354, 362.

ANNOTATION REFERENCES

Practice or procedure for testing validity or scope of the command of subpoena duces tecum. 130 ALR 327.

Restricting access to judicial records. 175 ALR 1260.

Right of exonerated arrestee to have fingerprints, photographs, or other criminal identification or arrest records expunged or restricted. 46 ALR3d 900.

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Query: (subpoena /p testimony or EBT) & ((criminal /s records /s seal!) or (CPL /3 160.50))

APPEARANCES OF COUNSEL

Martyn, Smith, Murray & Yong, Esqs. (*Marc E. Stiefeld* of counsel) and *Law Office of Thomas Martyn* (*Jeffrey P. Yong* of counsel) for defendant.

Law Office of Edward Gabel (*Edward A. Gabel* of counsel) for plaintiff.

OPINION OF THE COURT

ANTHONY R. MOLÉ, J.

Motion made by defendant Christine Bueti for an order, pur-

suant to CPLR 2304, to quash the so-ordered nonparty judicial subpoena directed to Deputy Christopher Tompkins of the Putnam County Sheriff's Office (which was so ordered by this court on Sept. 12, 2025); for a protective order, pursuant to CPLR 3103, barring any further attempt by plaintiff Marvin Espana Ventura to obtain defendant's sealed criminal records in the Justice Court of the Town of Southeast, to preclude taking the testimony of Deputy Tompkins, and to preclude any mention of defendant Christine Bueti's alleged intoxication and arrest; in addition to other ancillary relief sought by defendant Christine Bueti in her motion.

Upon review of the papers,[1] the court finds, holds, and determines as follows:

I. Background

This is a tort action to recover damages for personal injuries allegedly sustained by plaintiff in a motor vehicle accident on May 31, 2024, involving the parties. The accident occurred on Route 22 in the Village of Brewster, within the Town of Southeast, when plaintiff was operating his motorcycle heading northbound and collided with defendant's vehicle who was heading southbound. Plaintiff commenced this action, on July 29, 2024, by filing a summons and complaint. He claims that defendant was negligent in causing the underlying accident since she failed to yield the right-of-way by prematurely making an improper left turn. Plaintiff alleges in the complaint that defendant "was impaired or intoxicated at the time of the collision having recently ingest[ed] alcohol" immediately prior to the underlying accident (NYSCEF Doc No. 1, verified complaint, ¶ 15).

On September 9, 2024, defendant interposed an answer asserting six affirmative defenses, including, as relevant here, that plaintiff is comparatively negligent and wholly or partially at fault. Couched as her first affirmative defense, it states as follows: "[t]hat the accident of occurrence referred to in the Plaintiff's Complaint and the injuries claimed were *caused in whole or in part* by the carelessness, contributory negligence[,] or the assumption of risk of the Plaintiff and the answering

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1. The court also takes judicial notice of the filings in this action on the New York State Courts Electronic Filing (NYSCEF) system (*see Kazantzis v Cascade Funding RM1 Acquisitions Grantor Trust*, 217 AD3d 410, 411 [1st Dept 2023]).

Defendant demands that the Plaintiff's damages be accordingly diminished or denied" (NYSCEF Doc No. 3, verified answer, ¶ 5 [emphasis added]).

After a preliminary conference held before the court on September 12, 2025,[2] the court so ordered plaintiff's proposed "non[ ]party judicial subpoena," directing Christopher Tompkins, a deputy with the Putnam County Sheriff's Office, to give testimony at an examination before trial (hereinafter EBT) on behalf of plaintiff and to "produce [the] accident scene photographs, the accident reconstruction report[,] any and all police documents underlying the arrest of defendant." After some back-and-forth letter correspondences between the parties' attorneys that prompted court responses, defendant, on October 20, 2025, filed a motion to quash the aforesaid subpoena that is at issue here, in addition to seeking other associated relief. Plaintiff, in turn, filed opposition papers on November 10, 2025. Defendant filed reply papers on November 18, 2025. Defendant's motion is thus fully submitted and ripe for decision.

II. Legal Analysis and Discussion

A. Discovery Standards

We first begin with the fundamental purpose of discovery in civil actions. It is axiomatic that full disclosure is necessary with respect to relevant and material issues to narrow the issues at trial (*see* CPLR 3101). Discovery in civil actions is governed by CPLR 3101 (a), which directs that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof."

The New York Court of Appeals has expressed that "[w]hat is 'material and necessary' is left to the sound discretion of the [trial court] and includes any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 746 [2000] [some internal quotation

2. The proposed subpoena was initially uploaded by plaintiff's counsel on August 30, 2025, along with a brief letter in connection with the request (*see* NYSCEF Doc Nos. 11-13, letter correspondence, exhibit A, in *Ventura v Bueti*, Sup Ct, Putnam County, index No. 501302/2024). Despite defendant's objection, the court executed and so ordered the subpoena at issue on September 12, 2025, after addressing it with the attorneys at the preliminary conference.

marks and citation omitted]). "The test is one of usefulness and reason" (*id.*). "A party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is 'material and necessary'—i.e., relevant—regardless of whether discovery is sought from another party or a nonparty" (*Forman v Henkin*, 30 NY3d 656, 661 [2018] [citation omitted]; *see Lurie v Lurie*, 226 AD3d 992, 994-995 [2d Dept 2024]).

CPLR 3101 "embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise" (*Forman v Henkin*, 30 NY3d at 661 [internal quotation marks and citation omitted]). That said, "[t]he right to disclosure, although broad, is not unlimited" (*id.*). With these principles in mind, we now turn to defendant's motion.

B. Defendant's Motion to Quash the Subpoena Pursuant to CPLR 2304

Relying largely on section 160.50 of the Criminal Procedure Law, defendant argues that the subpoena at issue should be quashed because the criminal/vehicular charges against her in connection with the subject accident were dismissed, and her arrest record was expunged, and because an order was entered by the criminal court judge sealing her criminal records relative to her arrest and all documents related thereto, after the charges against her were dismissed. According to defendant, she is the "sole and exclusive holder" of such records and without her waiver under the sealing statute, she enjoys unfettered privilege to have them remain sealed pursuant to the sealing order.

Defendant maintains that irrespective of this civil action commenced by plaintiff, the sealing order trumps the so-ordered subpoena at issue, the police's official records and reports are not subject to disclosure, plaintiff is not entitled to such records, and Deputy Tompkins is prohibited from testifying about them in this particular case. Defendant posits that the sealing order bars production of all of the records generated and created by the Putnam County Sheriff's Office in connection with defendant's arrest, including any accident scene photographs, an accident reconstruction report, and/or all documents pertaining to her arrest on or about May 31, 2024.

Defendant argues that given what transpired, this matter does not present as a special or extraordinary circumstance requiring production of the police records in connection with

her arrest and none of the six narrowly defined exceptions delineated in CPL 160.50 (1) (d) apply here. Defendant surmises that the parties can simply testify about how the underlying accident occurred without mentioning defendant's arrest or alleged intoxication, since those matters are precluded by the sealing order. Defendant thus insists that she maintains her statutory privilege under CPL 160.50 (1) (c) to have the arrest records kept under seal; consequently, plaintiff's nonparty subpoena directed at Deputy Tompkins must be quashed, and a protective order be issued to bar his testimony at an EBT, to bar plaintiff from attempting to obtain the sealed criminal records, and to preclude any mention of her alleged intoxication and arrest.

In addition, defendant maintains that she has not expressly waived the privilege and protections afforded to her by CPL 160.50 in connection with the sealed criminal records. On this point, defendant asserts that plaintiff, not her, has affirmatively placed her conduct at issue by commencing this civil action and that she did not bring this civil lawsuit, but she is compelled to defend the claims against her.

Plaintiff, in opposition, contends that defendant cannot use the sealing order as a "shield and a sword" in this case and that termination of her criminal case has no bearing on the evidence that should be available to the parties in this civil action. Plaintiff presses that he is claiming here that defendant was negligent because she simultaneously violated Vehicle and Traffic Law §§ 1141 and 1192 (1) based on her alleged failure to yield to his right-of-way at the intersection where the underlying accident occurred and due to defendant's operation of a motor vehicle while she was allegedly impaired by alcohol at the time of the accident.[3] As to the latter, plaintiff points out that defense counsel volunteered in open court during the preliminary conference that defendant's blood alcohol content (BAC) level was .06% at the time of the accident, which constitutes a waiver of defendant's rights under CPL 160.50; and therefore,

3. Vehicle and Traffic Law § 1192 (1) provides that "[n]o person shall operate a motor vehicle while the person's ability to operate such motor vehicle is impaired by the consumption of alcohol." "A person is 'impaired' whenever, 'by voluntarily consuming alcohol, [he or she] has actually impaired, *to any extent*, the physical and mental abilities which he or she is expected to possess in order to operate a vehicle as a reasonable and prudent driver' " (*People v Lebrecht*, 13 Misc 3d 45, 51 [App Term, 2d Dept, 9th & 10th Jud Dists 2006] [some brackets omitted and emphasis added], quoting *People v Cruz*, 48 NY2d 419, 427 [1979]).

defendant should not be allowed to "cherry pick" certain sealed documents that are favorable to her, while trying to block disclosure of the remaining records. Plaintiff further asserts that because defendant's alleged traffic violations occurred concurrently, the police records in connection with defendant's arrest are relevant and material to establish liability on defendant's part and prove that she was negligent at the time of the accident. Also, plaintiff advances that because defendant has raised a claim that he was comparatively negligent based on the first affirmative defense raised in her answer, her pleading negates "whatever protection she seeks from [CPL] 160.50"; and so, she cannot use it as a sword against him in this action.

1. Application of CPL 160.50

"In matters of statutory interpretation, our primary consideration is to discern and give effect to the Legislature's intention" (*Matter of Albany Law School v New York State Off. of Mental Retardation & Dev. Disabilities*, 19 NY3d 106, 120 [2012] [citation omitted]). To that end, the statutory text "is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning" (*Matter of DaimlerChrysler Corp. v Spitzer*, 7 NY3d 653, 660 [2006]). In addition, courts should also consider "the spirit and purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history" (*Nostrom v A.W. Chesterton Co.*, 15 NY3d 502, 507 [2010] [internal quotation marks and citations omitted]). The court thus begins with examining the statutory text at play here.

CPL 160.50 mandates sealing of records where a criminal proceeding has been terminated in favor of the accused. "[T]he purpose of CPL 160.50 is to protect accused individuals from the unauthorized use of their records" (*Green v Montgomery*, 95 NY2d 693, 701 [2001]).

Criminal Procedure Law § 160.50—entitled "Order upon termination of criminal action in favor of the accused"—provides that when an action has been terminated in favor of the accused, "the record of [an] action or proceeding shall be sealed" (CPL 160.50 [1]). The statute further specifies that where a criminal action or proceeding terminates in favor of the accused,

> "*all official records and papers*, *including* judgments and orders of a court . . . relating to the arrest or prosecution, *including* all duplicates and

> copies thereof, on file with the division of criminal justice services, *any court, police agency*, or prosecutor's office *shall be sealed and not made available* to any person or public or private agency" (CPL 160.50 [1] [c] [emphasis added]).

"The statute 'serves the laudable goal of insuring that one who is charged but not convicted of an offense suffers no stigma as a result of his [or her] having once been the object of an unsustained accusation' " (*Leah W. v Keith W.*, 246 AD3d 68, 70 [1st Dept 2025], quoting *Matter of Hynes v Karassik*, 47 NY2d 659, 662 [1979]; *see Matter of Joseph M. [New York City Bd. of Educ.]*, 82 NY2d 128, 132 [1993]). "[T]he legislative objective was to remove any 'stigma' flowing from an accusation of criminal conduct terminated in favor of the accused, thereby affording protection (i.e., the presumption of innocence) to such accused in the pursuit of employment, education, professional licensing[,] and insurance opportunities" (*People v Patterson*, 78 NY2d 711, 716 [1991]).

"By its plain terms, CPL 160.50 seals official court records pertaining to the arrest and prosecution" (*Kokoska v Joe Tahan's Furniture Liquidation Ctrs., Inc.*, 243 AD3d 15, 21 [3d Dept 2025]).

> "In addition to the accused and the accused's designated agent, a court may make sealed records available only: to (1) a 'prosecutor in any proceeding in which the accused' has moved for an adjournment in contemplation of dismissal in a case involving marijuana charges below felony grade (CPL 160.50 [1] [d] [i]); (2) 'a law enforcement agency upon ex parte motion in any superior court, if such agency demonstrates to the satisfaction of the court that justice requires' release (CPL 160.50 [1] [d] [ii]); (3) state or local gun licensing agencies when the accused applies for a gun license (*see* CPL 160.50 [1] [d] [iii]); (4) the Division of Parole when the arrest occurred while the accused was under parole supervision (*see* CPL 160.50 [1] [d] [iv]); (5) the prospective employer of a police officer or peace officer, so long as the applicant is provided with a copy of all records and given an opportunity to explain (*see* CPL 160.50 [1] [d] [v]); and (6) any probation department responsible for the accused's supervision at the time of his or her arrest (*see* CPL 160.50 [1] [d] [vi])" (*People v Isaacs*, 239 AD3d 183, 188 [2d Dept 2025]).

"However, a former defendant's interest in preventing the disclosure of official records and papers is not absolute. The Legislature has acknowledged the existence of countervailing considerations to the sealing of such records and papers as reflected in express statutory exceptions set forth in CPL 160.50 (1) (d)" (*People v Isaacs*, 239 AD3d at 187 [internal quotation marks, brackets, ellipses, and citations omitted]). Moreover, "a party who 'affirmatively places the underlying conduct at issue by bringing a civil suit' waives the statutory protection afforded by CPL 160.50, which 'may not be used as a sword to gain an advantage in a civil action' " (*Matter of Jeffrey O. v New York State Off. of Children & Family Servs.*, 207 AD3d 900, 904 [3d Dept 2022], quoting *Green v Montgomery*, 95 NY2d at 701). "[N]ot all documents or records constitute 'official records' under CPL 160.50" (*Leah W. v Keith W.*, 246 AD3d at 70; *see Matter of Harper v Angiolillo*, 89 NY2d 761, 766 [1997]). "Although the statute 'specifies judgments and orders of a court as items "included" in the category of official records and papers, the statute is otherwise silent on the nature of such "official" material' " (*Leah W. v Keith W.*, 246 AD3d at 70, quoting *Matter of Harper v Angiolillo*, 89 NY2d at 765-766).

In support of her motion, defendant submits, among other things, a document titled "CPL 160.50 Seal Order" that is signed by a court clerk, reflecting it was issued out of the Justice Court of the Town of Southeast, Putnam County (Gregory L. Folchetti, J.). The document, dated September 16, 2025, is addressed to the Putnam County Sheriff's Office and states that the criminal case "was terminated in favor of the defendant" (referring to the same defendant in this civil action). It includes the criminal case number of one of the traffic infractions which defendant was ordered to pay "fine[s]/fee[s]," the date of defendant's arrest being May 31, 2024, and the date of adjudication of her criminal matter as September 12, 2024—the same date when the four other charges were apparently dismissed and sealed.

Also relevant here, that document reflects that defendant pleaded guilty to violating Vehicle and Traffic Law § 1141 (entitled "Vehicle turning left") in relation to the underlying accident.[4] The court notes that a violation of this statute under tort principles usually constitutes negligence per se (*see Peels v*

4. Vehicle and Traffic Law § 1141 provides that "[t]he driver of a vehicle intending to turn to the left within an intersection . . . shall yield the right of way to any vehicle approaching from the opposite direction which is within

(n. cont'd)

Elsayed, 241 AD3d 575, 576 [2d Dept 2025]; *Katikireddy v Espinal*, 137 AD3d 866, 867 [2d Dept 2016]). The document concludes by advising the Sheriff's Office that "[p]ursuant to CPL 160.50[,] you are hereby ordered to follows all of the steps outlined in the [that section] . . . to seal and return the appropriate records for [this] case."

"The Supreme Court has broad discretion in supervising disclosure and in resolving discovery disputes" (*Tyson v Diallo*, 238 AD3d 932, 934 [2d Dept 2025] [internal quotation marks, brackets, and citation omitted]).

> "CPLR 3101 (a) (4), concerning disclosure from nonparties to an action, provides that there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by . . . any other person, upon notice stating the circumstances or reasons such disclosure is sought or required. Under that statute, the party who served the subpoena has an initial minimal obligation to show that the nonparty was apprised of the circumstances or reasons that the disclosure is sought. Once that is satisfied, it is then the burden of the person moving to quash a subpoena to establish either that the requested disclosure is utterly irrelevant to the action or that the futility of the process to uncover anything legitimate is inevitable or obvious. Should the movant meet this burden, the subpoenaing party must then establish that the discovery sought is material and necessary to the prosecution or defense of the action" (*Dorman v Luva of NY, LLC*, 243 AD3d 632, 634 [2d Dept 2025] [internal quotation marks, brackets, ellipses, and citations omitted]; *see* CPLR 2304; *Nunez v Peikarian*, 208 AD3d 670, 670-671 [2d Dept 2022]).

Here, the parties do not dispute that plaintiff established that he provided defendant with adequate notice of the circumstances and reasons requiring the disclosure of the defendant's sealed criminal records vis-à-vis the so-ordered judicial subpoena at issue, thereby shifting the burden to defendant to

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the intersection or so close as to constitute an immediate hazard." "The Vehicle and Traffic Law further provides that a driver may not make the turn 'unless and until such movement can be made with reasonable safety' " (*Peterson v Garnsey*, 227 AD3d 1249, 1250 [3d Dept 2024], quoting Vehicle and Traffic Law § 1163 [a]).

establish that the disclosure sought was irrelevant to the action. The court holds that defendant satisfied her burden by demonstrating that her criminal records are sealed and not subject to automatic disclosure because she has not waived the statutory privilege conferred by CPL 160.50.

2. Defendant has not waived her statutory privilege under CPL 160.50.

"Where a party puts into issue in a civil action elements [that are] common both to the civil action and to a criminal prosecution, that party waives the privilege conferred by CPL 160.50" (*Lundell v Ford Motor Co.*, 120 AD2d 575, 576 [2d Dept 1986]; *accord Taylor v New York City Tr. Auth.*, 131 AD2d 460, 462 [2d Dept 1987]). The protections of CPL 160.50 "may not be used . . . to gain advantage in a civil action" (*Kalogris v Roberts*, 185 AD2d 335, 336 [2d Dept 1992]; *see Green v Montgomery*, 95 NY2d at 701). "The privilege of CPL 160.50 may not be used as a sword to gain an advantage in a civil action" (*Green v Montgomery*, 95 NY2d at 701 [internal quotation marks and citation omitted]).

> "The well-established purpose of the CPL 160.50 record sealing provision for persons acquitted of criminal charges is to ensure confidentiality and to protect the individual from the potential public stigma associated with a criminal prosecution. However, it is clear that this benefit, which is considered a statutory privilege, is not absolute; it is subject to specific statutory exceptions and can be abrogated in situations where a court in its discretion determines that the interest of justice so requires. This protection is also capable of being waived by the individual. One such recognized instance of waiver occurs where the protected individual commences a civil action or proceeding and, in so doing, affirmatively places in issue elements that are common or related to the prior criminal action" (*Matter of Abrams v Skolnik*, 185 AD2d 407, 408 [3d Dept 1992] [citations omitted]).

Upon careful examination of the motion papers, and the record as presently constructed, the court grants, in part, defendant's motion to quash the subpoena at issue. The court holds that plaintiff is authorized to depose Deputy Tompkins at an EBT. However, Deputy Tompkins need not bring or produce any of the documents listed in the subpoena, including "the accident scene photographs, the accident reconstruction report[,]

any and all police documents underlying the arrest of defendant" since those documents are still sealed pursuant to the order of the Justice Court of the Town of Southeast.

The protection of CPL 160.50 may not be waived if the person who is protected by the sealing statute did not commence the civil action (*see Wilson v City of New York*, 240 AD2d 266, 267-268 [1st Dept 1997]; *compare Prag v Prag*, 161 AD3d 1364, 1364-1365 [3d Dept 2018]).[5] "[W]here an individual commences a civil action and affirmatively places the information protected by CPL 160.50 into issue, the privilege is effectively waived. The privilege, which is intended to protect the accused, may not be used as a sword to gain advantage in a civil action" (*Kalogris v Roberts*, 185 AD2d at 336 [citations omitted]).

Applying the governing legal principles, there is no question that plaintiff—not defendant—commenced this lawsuit by bringing this negligence action seeking monetary damages from her. There is no dispute defendant did not commence or bring this civil action (*see Green v Montgomery*, 95 NY2d at 701; *Best v 2170 5th Ave. Corp.*, 60 AD3d 405, 405-406 [1st Dept 2009]; *see also Commercial Union Ins. Co. v Jones*, 216 AD2d 967, 967-968 [4th Dept 1995]). Thus, the court concludes that defendant has maintained, not waived, her statutory privilege accorded by CPL 160.50.

The court cites *Rodriguez v Ford Motor Co.* (301 AD2d 372 [1st Dept 2003]), as a case of relevance, where the First Department affirmed the motion court's finding that a defendant driver "affirmatively put the circumstances surrounding the driver's arrest and indictment in issue[ ] and thus waived the protection afforded by CPL 160.50" "by denying that intoxication caused the [defendant] driver to lose control of the car" (*id*. at 372). Importantly, the nuance in *Rodriguez* was that the defendant-appellants also asserted a cross-claim against the car manufacturer by "seeking to put the blame for the accident on the car manufacturer" (*id*.). But as the First Department noted in *Rodriguez*, the appellants "effectively made themselves 'plaintiffs' by asserting a cross claim against the [car] manufacturer" (*id.*; *see* CPLR 3019 [d]; *Doe v D'Angelo*, 154 AD3d 1300, 1301 [4th Dept 2017]).

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5. The Second Department has opined that the party who ultimately commences the civil action may not be determinative (*see State Farm Fire & Cas. Co. v Bongiorno*, 237 AD2d 31, 39-40 [2d Dept 1997, Goldstein, J., dissenting]; *cf. Yung-Fu Chow v Boonyam*, 240 AD2d 737, 738 [2d Dept 1997]).

In short, case law reveals that a party affirmatively waives the statutory protection afforded by CPL 160.50 when the person protected by that sealing statute commences an action and proceeding or asserts a counterclaim or a cross-claim in a civil action or proceeding (*see* CPLR 3019; *see also Doe v D'Angelo*, 154 AD3d at 1301 [statutory privilege found to be waived when asserting a cross-claim against another codefendant]; *Pink v Ricci*, 74 AD3d 1773, 1774 [4th Dept 2010] [statutory privilege waived when asserting a counterclaim against a plaintiff]; *Rodriguez v Ford Motor Co.*, 301 AD2d at 372 [statutory privilege deemed waived when asserting a cross-claim against another codefendant]; *Lundell v Ford Motor Co.*, 120 AD2d at 576 [statutory privilege waived when commencing an action to recover damages for personal injuries]).

Here, Ms. Bueti—as the sole defendant in this action—has not asserted any counterclaim against plaintiff. Defendant therefore maintains her statutory privilege of confidentiality under the sealing statute (*see Pink v Ricci*, 74 AD3d at 1774; *see also* CPL 160.50). That being said, the court is compelled to note that defendant has "denie[d]" in her answer (NYSCEF Doc No. 3, verified answer, ¶ 3) the specific allegation in plaintiff's complaint that she allegedly "was impaired or intoxicated at the time of the collision having recently ingest[ed] alcohol" prior to the accident (NYSCEF Doc No. 1, verified complaint, ¶ 15). Notwithstanding this general denial in her answer, the court finds that defendant has not "affirmatively place[d] the information protected by CPL 160.50 into issue" and "effectively waived" her privilege under that sealing statute (*Kalogris v Roberts*, 185 AD2d at 336; *Wright v Snow*, 175 AD2d 451, 452 [3d Dept 1991], *appeal dismissed* 79 NY2d 822 [1991]; *Lundell v Ford Motor Co.*, 120 AD2d at 576). Likewise, it also cannot be said that defendant is utilizing her statutory privilege as "a sword to gain advantage" in this negligence action because she was brought into this lawsuit at the behest of plaintiff to defend the claims lodged against her (*Kalogris v Roberts*, 185 AD2d at 336).[6] This is further confirmed by the fact that defendant has not asserted a counterclaim against plaintiff (*see* NYSCEF Doc No. 3, verified answer).

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6. Parenthetically, "[t]here may well be instances where a defendant affirmatively raises issues, be they financial or otherwise, so as to waive the protections afforded by CPL 160.50, but more than simply denying the allegations in the complaint is required" (*Prag v Prag*, 161 AD3d 1364, 1365 [3d Dept 2018] [internal quotation marks and citation omitted]).

If anything, defendant is using her statutory privilege as a "shield" to protect her confidential information from being disclosed, which the law apparently allows. Therefore, the court concludes that defendant has not affirmatively waived her statutory privilege under CPL 160.50, despite a general, blanket denial of being intoxicated and her boilerplate affirmative defense in her answer which is grounded, in part, upon her claim that she was not responsible or entirely at fault in causing the accident (*see* NYSCEF Doc No. 3, verified answer, ¶¶ 3, 5).

In the court's view, based on this limited record, there is no reason that the EBT of Deputy Tompkins cannot go forward where he can ably testify about matters involving the underlying accident to the best of his recollection—subject to any viable objections as to any questions that may directly concern defendant's sealed criminal records. To the extent that the so-ordered subpoena at issue directs Deputy Tompkins to produce "accident scene photographs," "the accident reconstruction report," and "any and all police documents underlying the arrest of defendant" in connection with her sealed criminal case in the Justice Court of the Town of Southeast, that portion is struck and denied. Accordingly, the court grants that branch of defendant's motion, in part, to quash the subpoena, as is expressly determined herein.

C. Plaintiff's Purported Cross-Motion to Unseal Defendant's Criminal Records

Plaintiff purportedly cross-moves to unseal "all records" in connection with defendant's arrest and prosecution in the Justice Court of the Town of Southeast for purposes of Deputy Tompkins' EBT and reproduction of those documents by the parties. His application in this regard is defective and denied in its entirety.

As a preliminary matter, plaintiff did not properly file a cross-motion as required by CPLR 2215 since he failed to formally notice the application to defendant that he would be cross-moving in accordance with the CPLR for affirmative relief by requesting a court order to unseal defendant's criminal records (*see* CPLR 2214 [b]; 2215). If he followed the correct procedure, plaintiff would have been required to pay a $45 filing fee by properly filing his cross-motion with the court (*see* CPLR 8020 [a]; *Doe v State of New York*, 11 AD3d 579, 579 [2d Dept 2004]; *cf. Rodriguez v 2526 Valentine LLC*, 133 AD3d 528, 528 [1st Dept 2015]). "The express language of CPLR 2215 is clear

that cross-motions are solely for seeking relief against the initial moving party" (*Pizzo v Lustig*, 216 AD3d 38, 43 [2d Dept 2023]).

In any event, the court declines to excuse plaintiff's mistake and denies the ultimate relief sought in his purported cross-motion (*see* CPLR 2001). The court underscores the legal principle that "[t]he right to disclosure, although broad, is *not unlimited* and competing interests must always be balanced" (*Estate of Gilbert v Hackett*, 183 AD3d 654, 656 [2d Dept 2020] [internal quotation marks omitted and emphasis added]; *see Vargas v Lee*, 170 AD3d 1073, 1076 [2d Dept 2019]). "Although New York's discovery provisions have been liberally construed to favor disclosure, 'litigants are not without protection against [their] unnecessarily onerous application' " (*Andon v 302-304 Mott St. Assoc.*, 94 NY2d at 746-747, quoting *Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d 952, 954 [1998]).

The court recites the applicable statute here which mandates that the sealed records constitute privileged material. When a criminal action or proceeding is terminated in favor of an accused, "all official records and papers . . . relating to the arrest or prosecution . . . on file with the division of criminal justice services, any court, police agency, or prosecutor's office shall be sealed and not made available to any person or public or private agency" (CPL 160.50 [1] [c]). "The statute specifies only six narrow, 'precisely drawn' exceptions to the general proscription against releasing official records and papers once they are sealed" (*Matter of City of Elmira v Doe*, 39 AD3d 942, 943 [3d Dept 2007], *affd* 11 NY3d 799 [2008], quoting *Matter of Katherine B. v Cataldo*, 5 NY3d 196, 203 [2005]). The Court of Appeals has reiterated as much. "These six statutory exceptions are precisely drawn. This underscores the Legislature's commitment to prohibiting disclosure of sealed records—once initial sealing has not been forestalled by the court in the interests of justice—except where the statute explicitly provides otherwise" (*Matter of Katherine B. v Cataldo*, 5 NY3d at 203).[7]

The court adds that "the list of parties permitted to seek the unsealing of records under CPL 160.50 (1) (d) has been

7. Furthermore, the Court of Appeals has pronounced that "the interest of justice ground set forth in CPL 160.50 (1) only applies when the People [of the State of New York] seek to stay the sealing of records, not to unseal them" (*People v Anonymous*, 34 NY3d 631, 641 [2020]; *Matter of Katherine B. v Cataldo*, 5 NY3d at 203).

expanded in extraordinary circumstances upon a showing of a compelling demonstration that disclosure [is] necessary" (*Matter of James v Donovan*, 130 AD3d 1032, 1036 [2d Dept 2015], *lv denied* 26 NY3d 1048 [2015] [internal quotation marks and citations omitted]). Importantly though, the Second Department has explained that such is "not intended by this Court . . . to expand access . . . to make 'unsealing of records the rule rather than a narrowly confined exception' " (*People v Isaacs*, 239 AD3d at 189, quoting *Matter of New York State Commn. on Jud. Conduct v Rubenstein*, 23 NY3d 570, 581 [2014]; *see Matter of New York State Police v Charles Q.*, 192 AD2d 142, 145 [3d Dept 1993]; *Matter of James v Donovan*, 130 AD3d at 1036). More specifically, the Court of Appeals has expressed that "courts have inherent authority to unseal criminal records in rare and extraordinary circumstances when necessary to serve fairness and justice," but it has "confined that authority to the 'Appellate Division's responsibility for discipline of attorneys pursuant to Judiciary Law § 90,' a responsibility [which is clearly] not implicated in this case" (*Matter of City of Elmira v Doe*, 39 AD3d 942, 944 [3d Dept 2007], quoting *Matter of Katherine B. v Cataldo*, 5 NY3d at 203; *see Matter of Joseph M. [New York City Bd. of Educ.]*, 82 NY2d at 134).

Here, plaintiff clearly does not qualify as one of the persons or entities listed in CPL 160.50 (1) (d) who may be entitled to unseal defendant's criminal records. Nor does plaintiff even squarely argue that defendant's sealed criminal records may be made available by the Putnam County Sheriff's Office, pursuant to CPL 160.50 (1) (d) (ii), which permits release to "a law enforcement agency . . . if such agency demonstrates to the satisfaction of the court that justice requires that such records be made available to it" (*cf. Matter of City of Elmira v Doe*, 39 AD3d at 943). Plaintiff's purported cross-motion to unseal defendant's criminal records in connection with her 2024 arrest is, in effect, foreclosed by CPL 160.50 (1) (d). It cannot be interpreted on this scant record that defendant, expressly or implicitly, waived her privacy protections under CPL 160.50 (1) in this action.

Similarly, the court does not find that plaintiff has demonstrated extraordinary circumstances exist by showing a compelling need for the disclosure sought of defendant's criminal records (*see People v Anonymous*, 34 NY3d 631, 644-645 [2020]; *People v Isaacs*, 239 AD3d at 188-189; *People v Alexander*, 67

Misc 3d 620, 622-623 [Sup Ct, Queens County 2020]). Thus, the interests of justice do not clearly outweigh the protections afforded to defendant under CPL 160.50, since that authority seems to be confined to attorney disciplinary matters and other extraordinary circumstances, which are not present here (*see Matter of New York State Commn. on Jud. Conduct v Rubenstein*, 23 NY3d at 580; *Fernandez v State of New York*, 79 Misc 3d 1235[A], 2023 NY Slip Op 50807[U], *3 [Ct Cl 2023]; *compare e.g. Matter of Abrams v Skolnik*, 185 AD2d at 408-409 [where the Third Department found that the protected individual waived his privacy rights under CPL 160.50 by commencing a civil tax action, thereby affirmatively placing in issue elements common or related to his prior criminal tax indictment]). Based on this limited record, defendant, herself, has not affirmatively placed in issue elements that are common or related to her prior criminal case involving a traffic infraction.

The court lastly adds that plaintiff's purported cross-motion is overly broad (*cf. Matter of City of Elmira v Doe*, 39 AD3d at 945). For these reasons, the court denies plaintiff's purported cross-motion to unseal defendant's criminal records (*see Matter of New York Times Co. v District Attorney of Kings County*, 179 AD3d 115, 121-124 [2d Dept 2019]; *Matter of City of Elmira v Doe*, 39 AD3d at 943-944; *Matter of People [Clark]*, 87 Misc 3d 1207[A], 2025 NY Slip Op 51492[U], *22 [Sup Ct, Oneida County 2025]).

D. Defendant's Motion for a Protective Order

Next, the court denies that branch of defendant's motion, made pursuant to CPLR 3103, barring any further attempt by plaintiff to obtain the sealed records, to preclude taking the testimony of Deputy Tompkins, and to preclude any mention of defendant's alleged intoxication and arrest. Pursuant to CPLR 3103 (a), "[t]he court may . . . make a protective order denying, limiting, conditioning[,] or regulating the use of any disclosure device." "For a protective order to be issued, the party seeking such an order must make a factual showing of 'unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice' " (*Nunez v Peikarian*, 208 AD3d at 671 [some internal quotation marks omitted], quoting CPLR 3103 [a]; *Hartheimer v Clipper*, 288 AD2d 263, 263 [2d Dept 2001]).

> "Trial courts are vested with broad discretion to issue appropriate protective orders to limit discovery. This discretion is to be exercised with the competing interests of the parties and the truth-finding

> goal of the discovery process in mind. The supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court" (*C.B. v Park Ave. Pub. Sch.*, 172 AD3d 980, 981 [2d Dept 2019] [internal quotation marks, brackets, ellipses, and citations omitted]).

Applying the governing legal principles, the court finds that defendant failed to make the requisite showing, pursuant to CPLR 3103 (a), to warrant the issuance of a protective order to forever bar plaintiff's attempt to obtain the sealed records, to preclude taking the testimony of Deputy Tompkins, and to preclude any mention of defendant's alleged intoxication and arrest. Defendant's criminal records remain sealed at this time and plaintiff may investigate whether he has any other avenues available to unseal defendant's criminal records in the Justice Court of the Town of Southeast. Under the circumstances of this case, the court holds that defendant failed to make the requisite showing pursuant to CPLR 3103 (a) to warrant the issuance of a protective order (*see Nunez v Peikarian*, 208 AD3d at 671; *Cascardo v Cascardo*, 136 AD3d 729, 729-730 [2d Dept 2016]; *Hartheimer v Clipper*, 288 AD2d at 263). The EBT of Deputy Tompkins should continue until completion; and he should, at minimum, be permitted to testify about what he recollects, subject to objections regarding the sealed criminal records.

Defendant's remaining contention regarding summary dismissal of plaintiff's claim for punitive damages is not properly before this court in the context of her discovery motion (*see generally* CPLR 2214, 3212). Thus, the court declines to address it at this time and denies any relief associated with such claim.

To the extent not specifically mentioned herein, the parties' remaining arguments have been examined and determined to be without merit. Any other relief requested that is not squarely addressed herein is either rendered academic or denied based on this decision. Accordingly, it is hereby ordered that the underlying motion of defendant Christine Bueti for an order, pursuant to CPLR 2304, to quash the so-ordered nonparty judicial subpoena directed to Deputy Christopher Tompkins of the Putnam County Sheriff's Office (so ordered by this court on Sept. 12, 2025), is granted in part, as expressly determined herein; and it is further ordered that the EBT of

the nonparty, Deputy Christopher Tompkins, may proceed forward where he shall be permitted to testify about matters involving the underlying accident only, but not regarding any records and papers in connection with defendant Christine Bueti's arrest and prosecution in the Justice Court of the Town of Southeast; and it is further ordered that the nonparty, Deputy Christopher Tompkins, should not bring or produce any "official records and papers" that are sealed pursuant to the order of the Justice Court of the Town of Southeast in connection with defendant Christine Bueti's prior criminal case, including, but not limited to, the accident scene photographs, the accident reconstruction report, and any and all police documents underlying the arrest of defendant Christine Bueti; and it is further ordered that that branch of defendant Christine Bueti's motion, made pursuant to CPLR 3103, for a protective order barring any further attempt by plaintiff to obtain the sealed records and to preclude taking the testimony of Deputy Tompkins and any mention of defendant's alleged intoxication and arrest is denied in its entirety; and it is further ordered that plaintiff Marvin Espana Ventura's purported cross-motion to unseal defendant Christine Bueti's prior criminal records is denied in its entirety; and it is further ordered that plaintiff Marvin Espana Ventura may submit a proposed amended judicial subpoena to be so ordered in connection with the EBT of Deputy Christopher Tompkins (of the Putnam County Sheriff's Office) that is not inconsistent with this decision and order.

[250 NYS3d 370]

SHOREVIEW HOLDINGS, LLC, Petitioner, v MARIA FERNANDEZ et al., Respondents.

Civil Court of the City of New York, Queens County, December 22, 2025

HEADNOTES

Limited Liability Companies — Capacity to Sue — Compliance with Limited Liability Company Law Publishing Requirements

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RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Limited Liability Companies §§ 1–3, 48; AM JUR 2d Parties § 28.

CARMODY-WAIT 2d Parties § 19:3; CARMODY-WAIT 2d Pretrial Motions to Dismiss § 38:75.

NY JUR 2d Business Relationships §§ 2094, 2098–2099, 2112, 2122, 2124–2129, 2311, 2340; NY JUR 2d Parties §§ 7–9.

ANNOTATION REFERENCE

See ALR Index under Limited Liability Companies; Nunc Pro Tunc; Parties.

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APPEARANCES OF COUNSEL

New York Legal Assistance Group, New York City, for Maria Fernandez, respondent.

JSS Law, P.C., New York City, for petitioner.

OPINION OF THE COURT

SHORAB IBRAHIM, J.

After argument heard on December 2, 2025, the court finds as follows:

Relevant Facts and Procedural History

The petitioner in this holdover proceeding alleges it is a small landlord as defined in the Good Cause Eviction Law (GCEL) and that it served a 90-day notice terminating respondents'

right to occupy the subject premises (*see* NY St Cts Elec Filing [NYSCEF] Doc No. 1). Only respondent Fernandez has appeared. She now moves to dismiss the proceeding on several grounds.

First, respondent argues that petitioner, a limited liability company (LLC), failed to comply with the Limited Liability Company Law requiring publication of articles of organization and filing proof of same with the Department of State. This failure, respondent argues, means that petitioner cannot maintain this proceeding.

Next, respondent argues that the property sought to be recovered is not properly identified. Respondent alleges she rents a single room in the basement space and other occupants rent other rooms in the basement.

Respondent also argues that petitioner does not comply with GCEL's requirement that a "small landlord" provide the name of each owner of the subject premises and the number of other units (and their addresses) by each owner.

Finally, respondent argues that petitioner does not qualify for the "small landlord" exception to GCEL because its principal owns at least 11 units.

Petitioner submits an affidavit of publication that states that the LLC met the publication requirement in December 2024 (*see* NYSCEF Doc No. 18). As to description of the subject basement apartment, petitioner's agent (Vaughn) states it is *one* basement apartment, and the named respondents reside there. Vaughn also states petitioner owns just eight units in total, listing each address and number of units therein. Finally, petitioner avers that it provided all information required by GCEL in the predicate notice and pleadings (*see* NYSCEF Doc No. 22).

In reply, respondent argues that petitioner filed proof of publication with the Department of State in August 2025, well after it commenced this case. Respondent reiterates its other arguments and argues that the court must disregard the Vaughn affirmation for its failure to comply with CPLR 2106.

Discussion

Failure to Comply with the Limited Liability Company Law

New York's Limited Liability Company Law requires that the LLC publish notice of formation and file proof of such publication with the Department of State (*see* Limited Liability

Company Law § 206 [a]). Failure to timely comply "suspend[s]" the LLC's ability "to carry on, conduct or transact any business in" New York and precludes the LLC from maintaining a special proceeding (*see id.*; *Small Step Day Care, LLC v Broadway Bushwick Bldrs., L.P.*, 137 AD3d 1102, 1103 [2d Dept 2016]).

Critically, section 206 (a) also states, in relevant part,

> "If, *at any time* following the suspension of a limited liability company's authority to carry on, conduct or transact business in this state pursuant to this subdivision, such limited liability company shall cause proof of publication in substantial compliance with the provisions (other than the one hundred twenty day period) of this subdivision, consisting of the certificate of publication of the limited liability company with the affidavits of publication of the newspapers annexed thereto, to be filed with the department of state, such suspension of such limited liability company's authority to carry on, conduct or transact business *shall be annulled*" (emphasis added).

Annulment is "[t]he act of nullifying or making void" (Black's Law Dictionary [7th ed 1999], annulment). In a marriage context, where the term is most used, an annulment voids the marriage from inception, making it as though the couple never married (*see Rubin v Joseph*, 215 App Div 91, 94 [2d Dept 1926]).

When something is nullified, it is made void or invalid (Black's Law Dictionary [7th ed]). Something annulled or voided has no legal effect (*see id.*; *Sang Moo Cho v North Shore Flushing*, 107 Misc 2d 1098, 1100 [Civ Ct, Queens County 1981]).

It follows that when an LLC eventually complies with the filing requirement, all suspensions, including the ability to maintain a civil proceeding, are voided.

To hold otherwise would render the legislature's use of the word "annulled" superfluous. Doing so would run afoul of basic statutory construction.

"It is well settled that in the interpretation of a statute we must assume that the Legislature did not deliberately place a phrase in the statute which was intended to serve no purpose and each word must be read and given a distinct and consistent meaning" (*Matter of Rodriguez v Perales*, 86 NY2d 361, 366 [1995] [ellipsis omitted]). Furthermore, where language "is

clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used" (*see Buchbinder Tunick & Co. v Tax Appeals Trib. of City of N.Y.*, 100 NY2d 389, 393 [2003]).

Per the affidavit of publication, petitioner was formed on or about June 27, 2022, and publication not completed until more than two years later on December 4, 2024 (*see* NYSCEF Doc No. 18). Thus, petitioner clearly published (very) late. Filing with the Department of State occurred even later.

Respondent cites to several cases where the court dismissed the proceeding for petitioner's failure to comply with section 206 publishing requirements.

In *109 Equities LLC v Smit* (2022 WL 17589545, 2022 NY Misc LEXIS 89520 [Civ Ct, Queens County, Nov. 22, 2022, No. L&T 73592/2019]), the court cited to section 206 (a), and to *Small Step Day Care, LLC v Broadway Bushwick Bldrs., L.P.* (137 AD3d 1102 [2d Dept 2016]), but did not grapple with what it means when something is "annulled."

Similarly, the petitioner in *Hull Unique Equities LLC v Boone* (83 Misc 3d 1297[A], 2024 NY Slip Op 51311[U] [Civ Ct, Kings County 2024]) provided no proof of (late) compliance with the publication requirement and the court did not address the statute's use of "annulled."

In *One Stone Lending LLC v Alta Operations, LLC* (2020 NY Slip Op 30722[U] [Sup Ct, NY County 2020]), the plaintiff cured after the case commenced. The court focused on not wanting to set bad precedent by allowing post case commencement cure. It did not address the statute's "annulled" language.

Other courts have held the failure to publish is curable and, in fact, subsequent compliance with section 206 "warrants nunc pro tunc application averting dismissal" (*2004 McDonald Ave. Realty, LLC v 2004 McDonald Ave. Corp.*, 25 Misc 3d 1204[A], 2007 NY Slip Op 52638[U], *3 [Sup Ct, Kings County 2007], *affd* 50 AD3d 1021 [2d Dept 2008]; *Acquisition Am. VI, LLC v Lamadore*, 5 Misc 3d 461, 462 [Civ Ct, NY County 2004]).

Recently, Judge Cohen similarly held, drawing a parallel between section 206 and Business Corporation Law § 1312 (a) (*see Rogers Realty LLC. v Phillip*, 87 Misc 3d 1227[A], 2025 NY Slip Op 51705[U], *2 [Civ Ct, Kings County 2025]).

Business Corporation Law § 1312 (a) states that, in relevant part,

> "[a] foreign corporation doing business in this state

> without authority shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state and it has paid to the state all fees and taxes imposed under the tax law or any related statute."

Courts have found that noncompliance with the Business Corporation Law is not a jurisdictional impediment and that the proper course is to allow a cure (*see e.g. Horizon Bancorp v Pompee*, 82 AD3d 935, 936 [2d Dept 2011]; *Lew Beach Co. v Carlson*, 77 AD3d 1127, 1128 [3d Dept 2010]; *Tri-Terminal Corp. v CITC Indus.*, 78 AD2d 609, 609 [1st Dept 1980]).

Similarly, foreign LLCs are barred from maintaining proceedings unless they have received certificate of authority to do business in New York (*see* Limited Liability Company Law § 808 [a]).

These noncompliant foreign LLCs can also cure *after* commencement of a case (*see Matter of Mobilevision Med. Imaging Servs., LLC v Sinai Diagnostic & Interventional Radiology, P.C.*, 66 AD3d 685, 686 [2d Dept 2009] [petitioner "entitled to a reasonable opportunity to cure its noncompliance with the statute before dismissal of the proceeding should be considered"]; *Basile v Mulholland*, 73 AD3d 597, 597 [1st Dept 2010] ["plaintiff LLC's failure to obtain a certificate of authority to do business in New York before initiating the action is not a fatal jurisdictional defect and such certificate has since been obtained"]; *OCFBrook Holdings, LLC v TKS Brooklyn Ctr. Holding, LLC*, 84 Misc 3d 1234[A], 2024 NY Slip Op 51611[U] [Sup Ct, New York County 2024]).

Smit, *Boone* and *Alta*, of course, are not binding precedent. *Small Step Day Care, LLC*, cited in *Smit*, is another matter. There, the Appellate Division, Second Department held that the failure to comply with Limited Liability Company Law § 206 precluded bringing the action (*see* 137 AD3d at 1103). In *Small Step*, however, there was not even late compliance with the publication requirement (*see* mem of law in opp of defendant's mot to dismiss in *Small Step Day Care, LLC v Broadway Bushwick Bldrs., L.P.*, 137 AD3d 1102 [2d Dept 2016], available at 2014 WL 12968136).[1]

1. Small Step's argument was that while the publication never happened, the defect should be excused because of unclean hands (alleging that one of the defendants was responsible to carry out the publication).

The *only* case cited in *Small Step* is *Barklee Realty Co. v Pataki* (309 AD2d 310 [1st Dept 2003]). In upholding the constitutionality of section 206 filing requirements, *Barklee* mentions Business Corporation Law § 1312, the foreign Limited Liability Company Law, both noted above, and other statutes that require administrative compliance for businesses to have access to the courts.

Upon compliance, the courts have allowed cases to continue even where the business was not in compliance at commencement.

General Business Law § 130, also noted in *Barklee*, requires any business doing business under an assumed name fulfill several filing requirements. Section 130 (9) bars access to the courts if the business fails to comply. However, "[t]he certificate is not jurisdictional, and may be amended prior to entry of any judgment" (*Cohen v OrthoNet N.Y. IPA, Inc.*, 19 AD3d 261, 261 [1st Dept 2005]; *see also Pat Pellegrini Flooring Corp. v Serota*, 20 Misc 3d 138[A], 2008 NY Slip Op 51555[U] [App Term, 2d Dept, 2d & 11th Jud Dists 2008]).

These regulations all purport to bar noncompliant businesses from accessing the courts. Time and again, however, the courts have held that compliance can be accomplished after the fact (of commencing a case). If the goal is compliance, this makes perfect sense. Indeed, in *Barklee*, the Court notes that section 206, "which conditions the maintenance of an action or special proceeding on compliance with the publication requirement, provides an *incentive* to ensure that the required disclosure will be made" (*see* 309 AD2d at 316 [emphasis added]).

In other words, once the compliance goal is reached, businesses should face no further penalty, including having to recommence proceedings.

This concept is not foreign to the Housing Court. Multiple Dwelling Law § 325 and Administrative Code of the City of New York § 27-2097 require a current multiple dwelling registration (MDR) for a landlord to recover rent. (*see* Multiple Dwelling Law § 325 [2]; *151 Daniel Low, LLC v Gassab*, 43 Misc 3d 134[A], 2014 NY Slip Op 50637[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2014]).

In *Chan v Adossa* (195 Misc 2d 590, 593 [App Term, 2d Dept 2003]), the court notes that the legislative intent of barring the recovery of rent during the period of noncompliance "was to foster compliance." Thus, the lack of registration, even at com-

mencement of a nonpayment proceeding, does *not* require dismissal, so long as the goal of compliance is achieved (*see id.*).

As petitioner has both published and filed proof of same with the Department of State, it has the capacity to maintain this proceeding and the case can move forward (*see* NYSCEF Doc No. 18). Dismissal on this ground is denied.

Failure to Comply with CPLR 2106

Before moving on to respondent's other arguments in favor of dismissal, the court must first address respondent's claim that the Vaughn affirmation (*see* NYSCEF Doc Nos. 17, 22) should be disregarded for its noncompliance with CPLR 2106.

Section 2106 requires certain language in affirmations submitted in lieu of an affidavit. It is undisputed that the initial Vaughn affirmation does not have this language (*see* NYSCEF Doc No. 17). As such, it is a nullity (*see Great Lakes Ins. SE v American S.S. Owners Mut. Protection & Indem. Assn. Inc.*, 228 AD3d 429, 429 [1st Dept 2024]; *Lewis v Hibbert*, 87 Misc 3d 129[A], 2025 NY Slip Op 51592[U], *1 [App Term, 1st Dept 2025]).

Petitioner, however, has moved to correct this error (*see* NYSCEF Doc Nos. 20-22). Prevailing case law allows correction by amendment or in reply (*see Kallo v Kane St. Synagogue*, 241 AD3d 522, 524 [2d Dept 2025] [CPLR 2001 allows court to overlook initial noncompliance with CPLR 2106 if correction made in reply]). Consequently, petitioner's motion to correct the Vaughn affirmation so that it complies with CPLR 2106 is granted.[2]

At this point the court must mention that *respondent's* own affirmation runs afoul of section 2106 requirements. Indeed, while respondent submitted two affirmations,[3] both submissions are noncompliant with section 2106 (*see* NYSCEF Doc

2. On another note, the court cautions counsel that client affirmations should state facts. They should not make legal arguments with citations, as the Vaughn affirmation does (*see Matter of County of Essex [Golden Ring Intl., Inc.]*, 195 AD3d 1187, 1187 [3d Dept 2021], citing *Taylor v African M. E. Church*, 265 App Div 858, 858 [2d Dept 1942]). However, this may be overlooked (*see e.g. Wider v Heritage Maintenance, Inc.*, 14 Misc 3d 963, 966 [Sup Ct, NY County 2007]; *ZVUE Corp. v Bauman*, 23 Misc 3d 1111[A], 2009 NY Slip Op 50705[U], *17 [Sup Ct, NY County 2009]).

3. The first is unsigned.

Nos. 10, 16). As such, it is respondent's affirmation that was, and remains, a nullity.[4]

Misdescription of the Premises

There being no admissible affirmation from respondent, the allegation that the premises are misdescribed has no support. If the court were to overlook the section 2106 violation, the outcome is the same. Respondent's allegation of independent tenancies in the basement is entirely conclusory and self-serving, with no independent proof of same (*see* NYSCEF Doc No. 16). Petitioner, on the other hand, affirms that the premises are one basement apartment. At best this is a triable issue.

The court notes that nowhere does respondent claim that the description of the premises in the pleadings misled her. In any event, this type of alleged misdescription, if true, is amendable (*see 191 Chrystie, LLC v Sonnier*, 21 Misc 3d 144[A], 2008 NY Slip Op 52513[U] [App Term, 1st Dept 2008] [misdescription amendable where tenant not materially misled, confused, or hindered in the preparation of his defense]; *see also 179 St Realty LLC v Morales*, 83 Misc 3d 1201[A], 2024 NY Slip Op 50624[U], *2 [Civ Ct, Queens County 2024] [description of "Apartment Basement" when there were two basement apartments could be amended]).[5]

Petitioner Owns More than 10 Units

To take advantage of the "small landlord" exception to GCEL, a landlord cannot own more than 10 units in New York (*see* Real Property Law § 211 [3] [a]; *Munjal v Ziebke*, 87 Misc 3d 956 [Civ Ct, NY County 2025]). The argument that petitioner owns more than 10 units rests on respondent's unsupported allegation that the subject premises have five independent units (*see* NYSCEF Doc No. 16). Thus, even if the court were to consider the defective affirmation, respondent does not establish that petitioner owns more than 10 units.

Petitioner's principal affirms that he owns a total of eight units, including the subject basement unit. At best, this is a

4. This is an appropriate moment to heed the words of Professor Siegel: "[D]efendants and respondents are warned that if they want to capitalize on technicalities they must mind their own procedures" (Siegel, New York Practice § 63 at 94 [4th ed]; *Harris v Niagara Falls Bd. of Educ.*, 6 NY3d 155, 159 [2006]).

5. There is insufficient proof that a city marshal would not be able to identify the subject unit when executing the warrant (*see generally US Airways, Inc. v Everything Yogurt Brands, Inc.*, 18 Misc 3d 136[A], 2008 NY Slip Op 50279[U] [App Term, 2d Dept, 2d & 11th Jud Dists 2008]).

triable issue (*see Sokol v Leader*, 74 AD3d 1180, 1182 [2d Dept 2010] [affidavits "will almost never warrant dismissal under CPLR 3211 unless they 'establish conclusively that (the plaintiff) has no cause of action' "], quoting *Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]; *Lawrence v Graubard Miller*, 11 NY3d 588, 595 [2008]; *Bianco v Law Offs. of Yuri Prakhin*, 189 AD3d 1326 [2d Dept 2020]).

Failure to Name All Owners and Their Properties

When a petitioner claims the "small landlord" exception to GCEL, they are required to provide the name of each owner of the subject property, the number of other units owned and the address of these other units (*see* Real Property Law § 214 [1]; *Parco v Fisch*, 87 Misc 3d 1231[A], 2025 NY Slip Op 51752[U] [Civ Ct, Kings County 2025]).

Here, the predicate notice and the petition both do not provide this additional information, while claiming the exception. Respondent insists that dismissal is required because the information was not in the predicate notice, citing to two unpublished cases (*see* NYSCEF Doc No. 11 para 47).

These cases are distinguishable.[6] *Charles v Green* (index No. 001620-24/KI) is not relevant. The order dismissing the case is two sentences long (*see* NYSCEF Doc No. 7, dismissal order, in *Charles v Green*, Civ Ct, Kings County, index No. 001620-24/KI). It appears that there was no claimed exception to GCEL in that case and that no GCEL required rider was served (*see* NYSCEF Doc No. 2, hold-over petition, in *Charles v Green*, Civ Ct, Kings County, index No. 001620-24/KI). *66-86 80th St. LLC v Robles* (index No. LT-315174-24/QU) is also of little use as the predicate notice there does not claim any exception to GCEL (*see* NYSCEF Doc No. 5, predicate notice, in *66-86 80th St. LLC v Robles*, Civ Ct, Queens County, index No. LT-315174-24/QU).

The gravamen of respondent's argument is that the predicate notice must list the required additional information. The court, however, will not read into the statute words that are not there (*see People v Corr*, 42 NY3d 668, 673 [2024]). The legislature saw fit to amend RPAPL 741 to require that the additional information be incorporated or appended to petitions (*see* RPAPL 741 [5-b]), but was not similarly unequivocal about predicate notices.

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6. Generally, copies of these decisions ought to be provided to the court if they are to be considered.

As such, the failure to include this additional information in the predicate notice is not grounds for dismissal.[7]

Respondent also moves to dismiss for petitioner's failure to include the additional information in the petition.

A petition that fails to comply with GCEL's pleading requirements *can* be amended (*see Inga v Revenco*, 86 Misc 3d 1210[A], 2025 NY Slip Op 50911[U], *4-5 [Civ Ct, Kings County 2025]; *Sin Hang Lau v Yun He Zheng*, 86 Misc 3d 859, 863-864 [Civ Ct, Kings County 2025]; *Barretta v Parilla*, 85 Misc 3d 1222[A], 2025 NY Slip Op 50253[U], *2 [Civ Ct, Queens County 2025]; *Parco v Fisch*, 87 Misc 3d 1231[A], 2025 NY Slip Op 51752[U]). Even sua sponte amendment after trial has been endorsed (*see 47-05 Ctr. SPE L.L.C. v Hack*, 87 Misc 3d 787, 789 n 1 [Civ Ct, Queens County 2025]).

Here, petitioner has provided the additional information, albeit late. In the absence of any prejudice this is allowed.[8] Respondent, for her part, does not claim any prejudice, even if the court were to credit her affirmation (*see 37-20 104th St. v Sanchez*, 76 Misc 3d 23, 25-26 [App Term, 2d Dept, 2d, 11th, & 13th Jud Dists 2022] [finding no prejudice where the tenant was prepared to litigate issues]).

To the extent that amendment is required, the court may deem a petition amended (*see e.g. Shahid v Guzman*, 2 Misc 3d 1, 3 [App Term, 2d Dept, 2d & 11th Jud Dists 2003] [petition "deemed" amended to plead rent stabilization]).

Conclusion

Based on the foregoing, respondent's motion to dismiss the proceeding is denied in all respects. Petitioner's motion to file an amended affirmation that complies with CPLR 2106 is granted. The court sua sponte amends the petition to reflect the other properties owned by petitioner and their addresses.

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7. *But see e.g.* Real Property Law § 231-c.

8. Here, the represented respondent was able to identify petitioner's other properties by ACRIS (automated city register information system) searches (*see* NYSCEF Doc No. 11 paras 51-55).

[248 NYS3d 450]

YORKVILLE PLAZA ASSOCIATES LLC, Petitioner, v LANA GUO et al., Respondents.

Civil Court of the City of New York, New York County, December 26, 2025

HEADNOTES

Landlord and Tenant — Eviction — Good Cause Eviction Law — Nonpayment of Rent

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RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Landlord and Tenant §§ 245–247, 263, 621–625, 809, 813, 825–826, 839.

CARMODY-WAIT 2d Summary Proceedings to Recover Possession of Real Property §§ 90:11, 90:37, 90:39–90:40, 90:44, 90:223.

DOLAN, RASCH'S NEW YORK LANDLORD AND TENANT, INCLUDING SUMMARY PROCEEDINGS (5th ed) §§ 28:1.25, 32:1–32:6, 32:8–32:9, 32:13, 32:15.

NY JUR 2d Landlord and Tenant §§ 350, 907–908; NY JUR 2d Real Property—Possessory and Related Actions §§ 47–55, 57–58, 97–99, 113, 172–173, 179, 189.

SIEGEL, NY PRAC (6th ed) §§ 572, 576, 578.

ANNOTATION REFERENCE

Requirement of Good or Just Cause for Eviction Under State or Local Law. 107 ALR7th Art. 3.

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APPEARANCES OF COUNSEL

Manhattan Legal Services, New York City (*Thomas Honan* of counsel), for Lana Guo, respondent.

Tarter Krinsky & Drogin LLP, New York City (*Shari S. Laskowitz* of counsel), for petitioner.

OPINION OF THE COURT

CLINTON J. GUTHRIE, J.

The decision and order on respondent's motion and petitioner's cross-motion, consolidated for determination herein, is as follows.

Procedural History

This summary holdover proceeding based upon a 90-day notice of termination and nonrenewal of tenancy (90-day notice) was filed in June 2024. Counsel appeared for respondent in September 2024 and later submitted an answer in February 2025. Thereafter, respondent moved to dismiss on the basis that petitioner did not adequately plead a ground for nonrenewal under the Good Cause Eviction Law (GCEL) (L 2024, ch 56, § 1, part HH). Petitioner opposed the motion and cross-moved to amend the petition. The court heard argument on both motions on April 29, 2025.

Discussion

The court first addresses respondent's motion to dismiss. Respondent seeks dismissal on the basis that petitioner lacks a cause of action under the GCEL, specifically Real Property Law § 216 (1) (a) (i), which permits removal of a tenant where the tenant has failed to pay rent due and owing, provided the rent due and owing did not result from a rent increase which is unreasonable. Respondent asserts that as a month-to-month tenant without a lease, petitioner cannot maintain an eviction proceeding predicated upon the nonpayment of rent. Respondent also claims that the petition is defective because petitioner claims a lump sum of rent is due and did not allege that the rents due did not result from a rent increase that was unreasonable. Petitioner opposes the motion in all respects, though it also seeks amendment of the petition, to plead the months of rent allegedly due and to assert that "the rent due and owing, or any part thereof, did not result from a rent increase which is unreasonable." (*See* NY St Cts Elec Filing [NYSCEF] Doc No. 16 [proposed amended petition].)

On a motion to dismiss for failure to state a cause of action, the petition "must be construed in the light most favorable to [petitioner] and all factual allegations must be accepted as true" (*Burrows v 75-25 153rd St., LLC*, 44 NY3d 74, 83 [2025]). Nonetheless, dismissal will result when the plaintiff or petitioner "has not stated a claim cognizable at law" (*Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 136 [1st Dept 2014]; *see also Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

There is no dispute that the instant proceeding was commenced after the enactment of the GCEL on April 20, 2024 (*see*

QN St. Albans Holdings LLC v Sands, 85 Misc 3d 275, 277 [Civ Ct, Queens County 2024]). While the GCEL's notice requirements did not take effect until August 18, 2024, "the remaining portions of GCEL 'take effect immediately and shall apply to actions and proceedings commenced on or after such effective date [Apr. 20, 2024]' (L 2024, ch 56, § 1, part HH, § 7)." (*Sands*, 85 Misc 3d at 277.) Thus, petitioner was required to plead and demonstrate a good cause for removal on/after April 20, 2024, if the tenancy was subject to the GCEL (*id.*; *see also Emerald Green Phase II L.P. v Rivera*, 86 Misc 3d 1211[A], 2025 NY Slip Op 50916[U] [Civ Ct, Kings County 2025]).

Petitioner does not dispute that respondent's tenancy is subject to the GCEL. Petitioner also does not concede that its original petition is defective. However, it seeks amendment to specifically state the months of rent alleged to be due and to state that the rents due did not result from an unreasonable increase. While not fully dispositive as to respondent's motion, the court finds that petitioner has set forth a sufficient basis to amend its petition to amplify the GCEL-related allegations at this juncture without causing respondent undue prejudice or surprise (*see Badesch v Fort 710 Assoc., L.P.*, 233 AD3d 604, 604 [1st Dept 2024], citing CPLR 3025 [b]; *Sin Hang Lau v Yun He Zheng*, 86 Misc 3d 859, 864 [Civ Ct, Kings County 2025] [permitting amendment to comply with GCEL pleading requirements]). Petitioner's cross-motion to amend the petition is granted accordingly and the proposed amended petition (NYSCEF Doc No. 16) is deemed served and filed.

Upon amendment, the court will assess respondent's remaining argument, that petitioner cannot maintain a proceeding based on Real Property Law § 216 (1) (a) (i) resulting from nonpayment of rent, as respondent is a month-to-month tenant without a written rental agreement in effect. Respondent's argument tracks the First Department appellate case law applicable to summary nonpayment proceedings, which has held that such proceedings may only be maintained where there is a rental agreement in effect for the rents sought (*see 7 E. 14, LLC v Libson*, 81 Misc 3d 130[A], 2023 NY Slip Op 51261[U] [App Term, 1st Dept 2023]; *West 152nd Assoc., L.P. v Gassama*, 65 Misc 3d 155[A], 2019 NY Slip Op 51926[U], *1 [App Term, 1st Dept 2019]; *6 W. 20th St. Tenants Corp. v Dezertzov*, 75 Misc 3d 135[A], 2022 NY Slip Op 50529[U] [App Term, 1st

Dept 2022]).[1] This requirement in nonpayment proceedings arises from language in RPAPL 711 (2), which allows for a proceeding to be maintained where the tenant has "defaulted in the payment of rent, *pursuant to the agreement under which the premises are held*" (emphasis added). Generally, at least in the First Department, a month-to-month rental agreement will not suffice as the source for a nonpayment proceeding (*see Gassama*, 2019 NY Slip Op 51926[U], *2 ["(T)here was no agreed rental amount for any month ensuing after tenant ceased paying rent"]; *Krantz & Phillips, LLP v Sedaghati*, 2003 NY Slip Op 50032[U] [App Term, 1st Dept 2003]).[2]

The instant proceeding is not brought pursuant to RPAPL 711 (2). Instead, it is a holdover proceeding based on nonrenewal pursuant to a ground permitted by the GCEL. To be certain, there are similarities between these two types of proceedings, as described by Judge Logan J. Schiff in *1719 Gates LLC v Torres* (85 Misc 3d 906 [Civ Ct, Queens County 2024]). However, nothing in Real Property Law § 216 (1) (a) (i) requires a default in rent "pursuant to the agreement under which the premises are held," as is the case with a summary nonpayment proceeding. Nonetheless, rent is distinguishable from use and occupancy, since the obligation to pay the former flows from a rental agreement, whether express or implied (*Stern v Equitable Trust Co. of N.Y.*, 238 NY 267, 269 [1924]; *Rochdale Vil., Inc. v Chadwick*, 73 Misc 3d 131[A], 2021 NY Slip Op 50958[U], *2 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2021]). The amended petition here describes an initial written lease dated April 20, 2008, petitioner's acceptance of ERAP (Emergency Rental Assistance Program) funds during the COVID-19 period, and respondent's continuance in possession thereafter as a month-to-month tenant. It also states that

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1. The Appellate Term, Second Department has imposed the additional requirement that a rental agreement must be in effect upon commencement of the nonpayment proceeding (*see Fairfield Beach 9th, LLC v Shepard-Neely*, 77 Misc 3d 136[A], 2022 NY Slip Op 51351[U], *4 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2022]; *265 Realty, LLC v Trec*, 39 Misc 3d 150[A], 2013 NY Slip Op 50974[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2013]). This court discussed these issues in detail in *UFH Apts. Inc. v Vyskovsky* (88 Misc 3d 888 [Civ Ct, NY County 2025]).

2. In the Second Department, there is some support for a month-to-month agreement being a sufficient basis for a nonpayment proceeding, excepting rent-stabilized tenancies (*see Alice Formey Irrevocable Trust v Edwin*, 86 Misc 3d 136[A], 2025 NY Slip Op 51178[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2025]; *Tricarichi v Moran*, 38 Misc 3d 31, 34 [App Term, 2d Dept, 9th & 10th Jud Dists 2012]).

"rent and/or use and occupancy" is due in the amount of $129,311.87 for the period running from November 2022 through April 2025.

Based on the plain statutory language of Real Property Law § 216 (1) (a) (i), the court does not find that the legislature intended to create a basis for nonrenewal under the GCEL solely for nonpayment of use and occupancy (*see Riley v County of Broome*, 95 NY2d 455, 463 [2000] ["(T)he words of the statute are the best evidence of the Legislature's intent"]). Only nonpayment of rent at an amount not resulting from an unreasonable increase is sufficient as a basis for nonrenewal. While the amended petition is inartful in its conflation of rent and use and occupancy, in construing the amended petition in the light most favorable to petitioner, the court does not find that dismissal is warranted at this juncture. Petitioner has pleaded sufficient facts to make out a cause of action under Real Property Law § 216 (1) (a) (i). The court stresses, however, that petitioner will ultimately have to prove the elements of Real Property Law § 216 (1) (a) (i), including the existence of *rent* due and owing, to be afforded relief in this summary eviction proceeding (*see Matter of 200 Claremont Ave. Hous. Dev. Fund Corp. v Estate of Lewis*, 244 AD3d 569 [1st Dept 2025]; *1646 Union, LLC v Simpson*, 62 Misc 3d 142[A], 2019 NY Slip Op 50089[U], *2 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2019]).

Conclusion

Based on the foregoing determinations, respondent's motion to dismiss is denied and petitioner's cross-motion to amend the petition is granted. Upon the amendment of the petition, the court will permit respondent to interpose an amended answer by January 15, 2026 (*see* CPLR 3025 [d]).[3]

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3. No prejudice shall result from the failure to file an amended answer.

664 Sanchez v WC 28 Realty LLC, 2025 NY Slip Op 52229(U). Labor—Safe Place to Work—Fall from Closed A-Frame Ladder That Moved. (Sup Ct, Bronx County, Dec. 29, 2025, Crawford, J.)

665 Schurz Beach LLC v U.S. Bank N.A., 2025 NY Slip Op 52230(U). Quieting Title—Determination of Claim to Real Property—Pending Mortgage Foreclosure Action. (Sup Ct, Bronx County, Dec. 29, 2025, Crawford, J.)

666 Lopez v Evergreen Terrace LLC, 2026 NY Slip Op 50649(U). Landlord and Tenant—Rent Regulation—Defenses to Proceeding to Compel Repairs Following Vacate Order. (Civ Ct, Kings County, May 6, 2026, Schiff, J.)

667 Bourbiaux v Probst, 2026 NY Slip Op 50650(U). Contempt—Civil Contempt—Noncompliance with Disclosure Orders. (Sup Ct, NY County, May 6, 2026, Reed, J.)

668 Dorman v LuVa of NY, LLC, 2026 NY Slip Op 50651(U). Negligence—Duty—Legal Duty Independent of Parties' Agreement. (Sup Ct, Kings County, Apr. 6, 2026, Rivera, J.)

669 D'Angelo v Feijoo-Nickell, 2026 NY Slip Op 50652(U). Replevin—Recovery of Chattel—Possession of Dog during Pendency of Action. (Sup Ct, Kings County, May 4, 2026, Rivera, J.)

670 People v Carrillo (Rene), 2026 NY Slip Op 50653(U). Crimes—Disclosure—Certificate of Compliance—Duty to Disclose—Hospital Records and Potential Witness Contact Information. (Sup Ct, Kings County, May 7, 2026, Cesare, J.)

671 People v Dixon (R.), 2026 NY Slip Op 50654(U). Crimes—Disclosure—Automatic Discovery—Due Diligence in Providing Body-Worn Camera Footage. (Crim Ct, Bronx County, May 4, 2026, Goodwin, J.)

672 Sloan v 216 Bedford Kings Corp., 2026 NY Slip Op 50655(U). Disclosure—Discovery and Inspection—Discovery Relating to Expert Testimony. (Sup Ct, Kings County, May 7, 2026, Maslow, J.)

673 E.E.V. v L.A.V., 2026 NY Slip Op 50656(U). Parent, Child and Family—Custody—Derivative Abuse. Husband and Wife and Other Domestic Relationships—Equitable Distribution. (Sup Ct, Westchester County, Apr. 29, 2026, Hyer, J.)

674 22 Tomahawk Dr. LLC v Hiser-Chason, 2026 NY Slip Op 50657(U). Escrows—Breach of Agreement—Substantial Performance. (Sup Ct, Westchester County, May 7, 2026, Giacomo, J.)

675 Fotinos v SSW Funding LLC, 2026 NY Slip Op 50658(U). Fraud—Factual Misrepresentation—Property Transaction. Equity—Unjust Enrichment. (Sup Ct, Kings County, Mar. 23, 2026, Rivera, J.)

676 Hoffman & Hoffman LLC v Smith, 2026 NY Slip Op 50659(U). Motions and Orders—Motion Papers—Admissibility of Attorney Affirmation. Attorney and Client—Withdrawal from Representation. (Sup Ct, Kings County, Apr. 6, 2026, Rivera, J.)

677 People v Robinson (Lansville), 2026 NY Slip Op 50660(U). Crimes—Disclosure—Automatic Discovery—Good Faith and Due Diligence. (Crim Ct, Bronx County, Mar. 20, 2026, Wolf, J.)

678 Sloan v 216 Bedford Kings Corp., 2026 NY Slip Op 50661(U). Witnesses—Expert Witness—Determination of Preclusion. Witnesses—Expert Witness—Timeliness of Disclosure. (Sup Ct, Kings County, May 6, 2026, Maslow, J.)

679 People v Austin (Stefon), 2026 NY Slip Op 50662(U). Crimes—Jurisdiction of Offenses—Location of Offense—Electronic Communications. (Just Ct of the Town of Somers, Westchester County, Mar. 23, 2026, Marra, J.)

680 Rahman v Santos, 2026 NY Slip Op 50663(U). Dismissal and Nonsuit—Failure to Enter Default Judgment within One Year—Sufficient Cause. (Sup Ct, Kings County, May 8, 2026, Maslow, J.)

681 People v Valeriano (Steven), 2026 NY Slip Op 50664(U). Crimes—Disclosure—Automatic Discovery—Due Diligence. (Crim Ct, Bronx County, Apr. 17, 2026, Moore, J.)

682 Sloan v 216 Bedford Kings Corp., 2026 NY Slip Op 50665(U). Disclosure—Penalty for Failure to Disclose—Timeliness of Demand. (Sup Ct, Kings County, May 7, 2026, Maslow, J.)

683 Portillo v Jorayev, 2026 NY Slip Op 50666(U). Courts—Jurisdiction—Long-Arm Jurisdiction. (Sup Ct, Kings County, May 8, 2026, Maslow, J.)

684 Randall v Town of Irondequoit, 2026 NY Slip Op 50667(U). Municipal Corporations—Notice of Claim—Late Notice. (Sup Ct, Monroe County, May 8, 2026, Bringewatt, J.)

685 Designer Stone Source, Inc. v Dograa, 2026 NY Slip Op 50668(U). Torts—Diversion of Corporate Opportunities. Equity—Unjust Enrichment. (Sup Ct, Richmond County, Apr. 13, 2026, Castorina, Jr., J.)

686 People v Merceda (Gegauff), 2026 NY Slip Op 50669(U). Crimes—Disclosure—Automatic Discovery—Good Faith and Due Diligence. Crimes—Assault—Physical Injury. (Crim Ct, NY County, May 11, 2026, Coleman, J.)

687 People v Rosado (Luz), 2025 NY Slip Op 52231(U). Crimes—Disclosure—Automatic Discovery—Good Faith and Due Diligence. (Crim Ct, Bronx County, Dec. 5, 2025, Wolf, J.)

688 Molokwu, Matter of, v NYC Health & Hosps. Corp., 2026 NY Slip Op 50717(U). Municipal Corporations—Notice of Claim—Late Notice—Medical Malpractice. (Sup Ct, Kings County, May 11, 2026, Mallafre Melendez, J.)

689 People v Verdejo (Cristobal), 2026 NY Slip Op 50718(U). Crimes—Right to Counsel—Effective Representation—Nonacceptance of Plea Offer. (Sup Ct, NY County, Apr. 24, 2026, Morales, J.)

690 O'Shea v Capolongo, 2026 NY Slip Op 50719(U). Physicians and Surgeons—Dentists—Orthodontic Malpractice. Limitation of Actions—Continuous Treatment Doctrine—Phases of Orthodontic Treatment. (Sup Ct, NY County, May 12, 2026, King, J.)

691 LK John Doe 1 v County of Saratoga, 2026 NY Slip Op 50720(U). Counties—Liability for Actions of Sheriff and Deputies—Negligent Operation of County Jail—Sexual Abuse by Correction Officer. (Sup Ct, Saratoga County, May 11, 2026, Kupferman, J.)

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