

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 15, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Tom, Marlow, Gonzalez, Malone, JJ.

1654 Kytel International Group, Inc., Index 601846/03
 Plaintiff-Respondent,

-against-

Total-Tel Carrier Services, Inc.,
also known as Covista Carrier Services,
Inc., et al.,
Defendants-Appellants.

- - - - -

1655 Kytel International Group, Inc.,
 Plaintiff-Appellant,

-against-

Total-Tel Carrier Services, Inc.
also known as Covista Carrier Services,
Inc., et al.,
Defendants-Respondents.

Todtman, Nachamie, Spizz & Johns, P.C., New York (Mathew E.
Hoffman of counsel), for respondent/appellant.

Michael Kalmus, New York, for appellants/respondents.

Order, Supreme Court, New York County (Karla Moskowitz, J.),
entered February 20, 2007, which, to the extent appealed from,
granted defendants' motion to dismiss the amended complaint as
barred by the statute of limitations, affirmed, with costs.
Appeal by defendants from order, same court and Justice, entered

April 13, 2006, to the extent it granted plaintiff leave to amend the complaint, dismissed as academic, without costs.

Construing the amended complaint liberally and giving it every favorable inference, that pleading still does not present factual allegations that would estop defendants from asserting the two-year statute of limitations (47 USC § 415[a]) as a defense. Those allegations state simply that defendants, during the two-year period following plaintiff's discovery that one of its customers was rerouting calls through plaintiff's network in order to achieve a more favorable rate, denied responsibility. They do not assert any affirmative steps by defendants to conceal their own responsibility for the rerouting in order to prevent plaintiff from bringing a timely action (*see Simcuski v Saeli*, 44 NY2d 442, 448-449 [1978]). Moreover, the allegations fail to establish that plaintiff acted with the requisite due diligence either in ascertaining who was responsible for the rerouting or in bringing the action once it purportedly discovered defendants' alleged responsibility (*Pahlad v Brustman*, 33 AD3d 518, 519-520 [2006], *affd* 8 NY3d 901 [2007]).

Plaintiff's backbilling of defendants in December 2002 did not commence a new limitations period. The time of the wrong from which accrual is measured was, at the latest, when plaintiff learned that calls were being rerouted (*see generally MCI Telecom. Corp. v Teleconcepts, Inc.*, 71 F3d 1086 [3d Cir 1995],

cert denied 519 US 815 [1996]).

Plaintiff offers no justification as to why the six-year statute of limitations for fraud should apply when it otherwise concedes that the case is governed by the two-year federal statute, which applies to "All actions at law by carriers for recovery of their lawful charges."

All concur except Marlow and Malone, JJ. who concur in a separate memorandum by Marlow, J. as follows:

MARLOW, J. (concurring)

Plaintiff Kytel International Group, Inc. is a long-distance telecommunications carrier that owns its own network and switching facilities in Manhattan. As a carrier, Kytel sells long-distance phone services to other carriers on a per-minute basis. Those carriers then transmit their long-distance phone traffic over Kytel's network to various locations around the world. Defendants Total-Tel Carrier Services and its successor in interest, Covista Communications, Inc. (collectively defendants), are long distance telecommunications carriers also engaged in the sale of long distance phone service to other carriers, which, in turn, transmit long distance phone traffic worldwide.

In June 1998, Kytel and Total-Tel entered into a carrier agreement, by which Kytel would provide defendants access to its network of facilities. Total-Tel was just one of several companies contracting with Kytel. Pursuant to the agreement, for all calls placed to destinations not specifically quoted therein, the rate was \$1.50 per minute. Calls placed to the United Kingdom were billed at 11 cents per minute.

As relevant to this appeal, Kytel sent weekly invoices to its customers, including defendants, for certain calls placed in September and October 2000 on a per-minute basis. A portion of those billings was for calls that had apparently been placed to

the United Kingdom. In November 2000, upon receipt of rebilling by its own provider, Kytel learned that certain calls made on its network had not been placed to the United Kingdom, but, rather, had been diverted to other destinations, not specifically identified in the agreement, such as Yemen, Pakistan and India.

According to the amended complaint, Kytel immediately inquired of all its carriers, including defendants, whether they had any knowledge or information about the diverted calls. They all denied diverting the calls. Kytel alleged that defendants, through their Vice President, continued to deny knowledge despite being questioned by Kytel between November 2000 and October 2002. Finally, according to Kytel, in November 2002, defendants' Vice President of Sales admitted responsibility for the rerouting. One month later, Kytel sent amended invoices to defendants, amounting to more than \$1.7 million in additional charges. Defendants refused to pay these additional charges.

Consequently, in June 2003, Kytel commenced this action to recover the additional charges. Defendants moved, *inter alia*, to dismiss the complaint as barred by the two-year statute of limitations provided by the Communications Act of 1934 (47 USC § 415[a]). As relevant to this appeal, Supreme Court referred the statute of limitations issue to an arbitrator, and, on appeal, this Court remanded on the ground that, under New York law, this threshold question was to be resolved by a court, not

an arbitrator (22 AD3d 250 [2005]). On remand, Supreme Court granted defendants' motion to dismiss the action as untimely, "without prejudice" to plaintiff's amending the complaint to allege a more detailed claim for backbilling.¹ In May 2006, Kytel served an amended complaint alleging that 1) between November 2000 and October 2002, it had inquired about the diverted calls of all its customers, including defendants, 2) defendants denied knowledge of the diverted calls, and 3) within one month of learning the identity of the offending customer, Kytel sent amended bills. Defendants moved again to dismiss the amended complaint as untimely. Supreme Court, *inter alia*, dismissed the complaint, finding that the cause of action had accrued, not, as plaintiff argued, in November 2002, when it discovered which customer had diverted the calls, but in November 2000, when it discovered that certain calls had been diverted.

We are being asked on this appeal to reward defendants for alleged dishonest and deceitful conduct. Indeed, at this pre-answer juncture of the litigation, plaintiff's allegations, which must be accepted as true (*see Nick v Greenfield*, 299 AD2d 172, 173 [2002]) and from which every possible favorable inference must be accorded (*see Tenuto v Lederle Labs. Div. of Am. Cyanamid*

¹Defendants appeal separately from this order, and the majority dismisses the appeal as academic. However, were plaintiff's action allowed to proceed, I would affirm this order.

Co., 90 NY2d 606, 609-610 [1997]), remain unanswered. In moving to dismiss, defendants maintain, in effect, that because Kytel did not catch them in their lie soon enough, it should be barred from recovering almost \$2 million in services that defendants have not denied diverting in order to circumvent the higher per-minute rate.

Assuming Kytel's allegations remain unchallenged, or are proven true, this is a case that cries out for equitable relief. Indeed, it is a basic tenet of our jurisprudence that "no man may take advantage of his own wrong"; this principle has frequently been applied in equity "to bar inequitable reliance on statutes of limitations" (*General Stencils v Chiappa*, 18 NY2d 125, 127-128 [1966], quoting *Glus v Brooklyn E. Dist. Term.*, 359 US 231, 232 [1959]; see also *Simcuski v Saeli*, 44 NY2d 442, 448 [1978] [fraudulent representations may provide a basis, in equity, for equitable estoppel, barring a defendant from invoking the statute of limitations as a defense]).

The statute of limitations at issue here is governed by federal statute. Fraudulent concealment is an equitable doctrine read into every federal statute of limitations (*Riddell v Riddell Washington Corp.*, 866 F2d 1480, 1491 [DC Cir. 1989]). Consequently, fraudulent concealment of a cause of action provides a basis to toll the running of the statute of limitations (see *Stone v Williams*, 970 F2d 1043, 1048 [2d Cir.

1992], *cert denied* 508 US 906 [1993]; *Barrett v United States*, 689 F2d 324, 327 [2d Cir 1982], *cert denied* 462 US 1131 [1983]).

To invoke the doctrine of fraudulent concealment, a plaintiff "must plead and prove (1) the wrongful concealment by the defendant of its actions, (2) the failure by the plaintiff to discover the operative facts underlying the action within the limitations period, and (3) the plaintiff's due diligence to discover the facts" (*Donahue v Pendelton Woolen Mills, Inc.*, 633 F Supp 1423, 1443 [SD NY 1986]). The burden is on the party pleading fraudulent concealment, and any delay relating to plaintiff's ignorance of the facts constituting a cause of action "must be consistent with the requisite diligence" (*id.*). Indeed, "time does not begin to run until plaintiff discovers, or by reasonable diligence could have discovered, the basis of the lawsuit" (*Barrett*, 689 F2d at 327, quoting *Fitzgerald v Seamans*, 553 F2d 220, 228 [DC Cir. 1977]). Once the duty of inquiry arises, "plaintiff is charged with whatever knowledge an inquiry would have revealed" (*Stone*, 970 F2d at 1049).

While I reluctantly concur with the ultimate result, I must disagree with the majority's conclusion that defendants failed to take affirmative steps to conceal their own responsibility for the rerouting, thus failing to satisfy the first prong of the fraudulent-concealment pleading requirement. Defendants did not merely remain silent or engage in passive conduct (*see generally*

Donahue at 1443). Rather, Kytel alleges that defendants affirmatively lied to Kytel, repeatedly and over the course of two years, about their role in the diversion of services (*cf. Hobson v Wilson*, 737 F2d 1, 34-35 [DC Cir. 1984], *cert. denied sub nom Brennan v Hobson*, 470 US 1084 [1985] [deception may be as simple as a single lie where the defendant conceals its involvement and the conduct itself]).

I also take issue with Supreme Court's conclusion that the cause of action accrued when plaintiff first discovered that phone calls were being diverted to appear as though their ultimate destination was one with a significantly lower per-minute rate. At that time, plaintiff would have had no idea which customer to sue nor, for the same reason, would it have been able to make a sufficient showing to obtain pretrial discovery. Surely, Kytel could not, nor should have been, expected to sue all its customers, based on a mere hope that the guilty party would "shake out" during the litigation process. Rather, it makes far more sense - and in my judgment it is only fair - to calculate Kytel's time to commence the action from the date it became aware of the identity of the entity against which it could allege a viable cause of action. This, in turn, raises the question whether Kytel exercised due diligence to identify the offending customer.

The question whether Kytel timely commenced the action based

on the later accrual date thus depends on what efforts Kytel made or could have made during the period beginning when it first discovered the diversion until the time it discovered the culprit. However, the record is devoid of any allegations that would inform us of the practicality or difficulty of obtaining this information. I am forced to agree that Kytel's opposing papers, even affording it every favorable inference, fail to allege sufficiently that Kytel acted with due diligence to ascertain the identity of the offending customer. Specifically, Kytel fails to outline what steps, if any, it undertook to ascertain the identity of the wrongdoer, or on what basis it was unduly burdensome, impracticable, or impossible to ascertain this information earlier than the moment defendants admitted their guilt. This omission, in my opinion, renders it impossible to save Kytel's complaint from dismissal.

Kytel's complaint also would have survived, as it presently stands, under the markedly different - and in my view better - approach taken by the United States Court of Appeals for the District of Columbia Circuit. That court stated that when the statute of limitations is tolled because a defendant has concealed the cause of action, defendant has "the burden of coming forward with any facts showing that the plaintiff could have discovered [defendant's] involvement or the cause of action

if he had exercised due diligence" (*Richards v Mileski*, 662 F2d 65, 71 [DC Cir. 1981]; see also *Hobson*, 737 F2d at 35; *Riddell*, 866 F2d at 1491). Even though Kytel was aware at an early date that it had been defrauded, there was more than one customer in a position to be the offending party. Kytel clearly had a cause of action for breach of the agreement and, in my view, sufficiently pleaded that defendants wrongfully concealed their actions, causing Kytel to be unable to discover the facts underlying the action within the limitations period. However, the record is barren of any indication of what avenues, if any, were reasonably available to plaintiff to ferret out the offending party in the face of all its customers' denials. Even at this early pre-discovery stage of the litigation, that gap in the record, most unfortunately in my opinion, redounds to Kytel's detriment.

I would therefore favor a policy that would shift the burden on the issue of due diligence to a defendant alleged to have actively and repeatedly denied its fraudulent conduct in a situation like this, where it was not the only possible culprit.

Such a policy would better serve a goal of equity to protect a defrauded plaintiff by placing the burden on the party that ought to bear it, i.e., the alleged concealing and deceitful wrongdoer.

THIS CONSTITUTES THE DECISION AND ORDER
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demonstrate by clear and convincing evidence that his health problems would minimize his risk of reoffending.

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following his release from prison and properly concluded that factor was outweighed by the circumstances of the crime.

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Lippman, P.J., Buckley, Gonzalez, Sweeny, JJ.

2531 The People of the State of New York, Index 51726/06
 ex rel. Steven Jude,
 Petitioner-Appellant,

-against-

Warden, Rikers Island Correctional
Facility, et al.,
Respondents-Respondents.

Susanna DeLaPava, New York, for appellant.

Andrew M. Cuomo, Attorney General, New York (Carol Fischer of
counsel), for New York State Division of Parole, respondent.

Order, Supreme Court, Bronx County (Denis J. Boyle, J.),
entered October 25, 2006, which denied the petition for a writ of
habeas corpus, unanimously affirmed, without costs.

Petitioner asserts that the official who prepared the
violation report was simply a "parole revocation specialist," and
not a "parole officer" within the meaning of 9 NYCRR 8004.2(a)
and Executive Law § 259-i(3)(a)(I). The duties of a parole
officer include "representation of the Division of Parole at
preliminary and final revocation hearings" (9 NYCRR 8000.2[j]).
It is uncontested that the parole revocation specialist also
performed that duty. Moreover, the Division's interpretation of
its own regulation, if not irrational or unreasonable, is
entitled to deference (*Matter of Gaines v New York State Div. of
Hous. & Community Renewal*, 90 NY2d 545, 548-549 [1997]). Even if
a parole revocation specialist is not a parole officer, this

regulation involves no more than "procedural housekeeping" and does not present a substantive violation of petitioner's statutory or due process rights (see *People ex rel. Cooper v Brunelle*, 229 AD2d 1007 [1996], *lv denied* 88 NY2d 814 [1996]; *People v Dyle*, 142 AD2d 423, 441 [1988], *lv denied* 74 NY2d 808 [1989]). Petitioner does not argue that he did not receive proper notice of the charged violations under 9 NYCRR 8005.3 (see *People ex rel. Washington v Ekpe*, 38 AD3d 1100 [2007], *lv denied* 9 NY3d 802 [2007]), or that he was denied an opportunity to be heard. His arguments regarding bad faith are purely speculative, especially in the absence of convincingly articulated prejudice.

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application for resentencing (*see People v Gonzalez*, 29 AD3d 400 [2006], *lv denied* 7 NY3d 867 [2006]).

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: JANUARY 15, 2008

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Lippman, P.J., Buckley, Gonzalez, Sweeny, JJ.

2534 Gordon Jacques Kahn, et al.,
 Plaintiffs-Appellants,

Index 108569/02

-against-

Jeffrey D. Taub, et al.,
 Defendants-Respondents,

Charlotte Deutsch, et al.,
 Defendants.

Morris Duffy Alonso & Faley, New York (Barry M. Viuker of
counsel), for appellants.

Callan, Koster, Brady & Brennan, LLP, New York (Michael P.
Kandler of counsel), for respondents.

Order, Supreme Court, New York County (Richard F. Braun,
J.), entered September 12, 2006, which granted the motion of
defendants Jeffrey D. Taub, Meyer Greenawalt, and Taub & Wild,
LLP (the Taub defendants) for summary judgment dismissing the
complaint as against them, unanimously reversed, on the law,
without costs, the motion denied, and the complaint reinstated.

Plaintiffs allege, inter alia, legal malpractice stemming
from the Taub defendants' representation of them in a real estate
transaction in which they were the purchasers. Although they
could have interposed their claims as cross claims in a prior
action in which they and the Taub defendants were co-defendants,
they were not required to do so either by rule (see CPLR 3011) or
by the doctrines of collateral estoppel and res judicata. The
only issue litigated in the prior action, in which tenants of the

premises purchased by plaintiffs herein alleged that they had a valid right of first refusal to purchase the premises, was whether the tenants could enforce that purported right. While plaintiffs' claims of legal malpractice and violations of the Code of Professional Responsibility and the Judiciary Law arose from the sale of the premises, they relate solely to the legal representation plaintiffs received and whether their attorney and his law firm were negligent or unethical in the handling of the matter due to an alleged conflict of interest. There is no identity of issue that was necessarily decided in the prior action and is decisive of the instant action, as is required to invoke collateral estoppel; nor do plaintiffs' claims arise solely from the single transaction that was at issue in the prior litigation, as is required to bar the instant litigation on res judicata grounds (see *Lanzano v City of New York*, 202 AD2d 378, 379 [1994], *lv denied* 83 NY2d 760 [1994]).

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In any event, we reject defendant's arguments concerning that assessment.

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ENTERED: JANUARY 15, 2008

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Lippman, P.J., Buckley, Gonzalez, Sweeny, JJ.

2536 Gabriela Coronel, et al.,
Plaintiffs-Appellants,

Index 402395/05

-against-

The New York City Health and
Hospitals Corporation, et al.,
Defendants-Respondents.

Simonson Hess & Leibowitz, P.C., New York (Paul Simonson of
counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Ann E.
Scherzer of counsel), for respondents.

Order, Supreme Court, New York County (Alice Schlesinger,
J.), entered December 7, 2006, which granted defendants' motion
for summary judgment dismissing the complaint, unanimously
affirmed, without costs.

Defendants made a prima facie case of entitlement to summary
judgment dismissing this medical malpractice action by submitting
an affirmation from a medical expert establishing that the
treatment provided to the injured plaintiff prior to and during
the delivery of her baby comported with good and accepted
practice. In response, plaintiffs failed to raise a triable
factual issue, as the affirmation from their expert set forth
general conclusions, misstatements of evidence and unsupported
assertions, which were insufficient to demonstrate that
defendants failed to comport with accepted medical practice, or
that any such failure was the proximate cause of plaintiff's

injuries (see *Ramirez v Columbia-Presbyterian Med. Ctr.*, 16 AD3d 238 [2005]; *Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]).

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

ENTERED: JANUARY 15, 2008

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Lippman, P.J., Buckley, Gonzalez, Sweeny, JJ.

2539-
2539A-
2539B

Tracy Russek,
Plaintiff-Appellant,

Index 110180/05

-against-

Dag Media Inc.,
Defendant-Respondent.

Robert Grodd, New York, for appellant.

Ofeck & Heinze, LLP, New York (Mark F. Heinze of counsel), for
respondent.

Judgment, Supreme Court, New York County (Faviola A. Soto,
J.), entered May 3, 2006, awarding defendant the principal sum of
\$8,055 in attorney fees following dismissal of the amended
complaint, unanimously affirmed, without costs. Judgment, same
court and Justice, entered August 15, 2006, awarding defendant an
additional principal sum of \$2,062.50 in attorney fees after
denial of plaintiff's motion for reargument and renewal,
unanimously affirmed, without costs. Appeal from order, same
court and Justice, entered June 28, 2006, which, to the extent
appealable, denied plaintiff's motion for renewal, unanimously
dismissed, without costs, as subsumed in the appeal from the
August 15 judgment.

Plaintiff commenced this action on July 22, 2005, alleging
defendant had terminated her employment on July 18, 2003, in
retaliation for her refusal to commit illegal and unethical acts.

Defendant moved under Labor Law § 740 to dismiss the complaint as barred by the one-year statute of limitations and for failure to state a claim, together with a request for attorneys fees. In response, plaintiff served an amended complaint clarifying that the action was "strictly for prima facie tort and no other cause of action," i.e., the commission of willful acts without reasonable or probable cause or legal or social justification. Defendant then moved to dismiss the amended complaint on the same grounds as originally asserted.

As New York does not recognize a tort for wrongful discharge from an employment at will (see *Horn v New York Times*, 100 NY2d 85 [2003]; *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 305 [1983]), and no discriminatory motive is alleged, the only possibly viable claim was one for retaliatory discharge under Labor Law § 740. Despite plaintiff's failure to reference the Labor Law in her complaint, the intent to bring a whistleblower action is clear. But because this action was commenced more than a year after plaintiff's termination, the complaint was properly dismissed as time-barred (Labor Law § 740[4][a]).

Plaintiff's recasting of her pleadings could not revive her claim, inasmuch as no cause of action for prima facie tort is available in a wrongful discharge context (see *Murphy*, 58 NY2d at 303-304; *Ullmann v Norma Kamali, Inc.*, 207 AD2d 691 [1994]). Moreover, a cause of action for prima facie tort is governed by a

one-year statute of limitations and thus would also be time-barred under these circumstances (see *Havell v Islam*, 292 AD2d 210 [2002]). As both complaints were without basis in law and fact, the court acted within its discretion in awarding reasonable attorneys' fees and costs (Labor Law § 740[6]).

The renewal motion was properly denied as plaintiff did not offer reasonable justification for her initial failure to submit documentation (see CPLR 2221[e][3]), which would not have cured the untimely commencement in any event.

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

ENTERED: JANUARY 15, 2008

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Lippman, P.J., Buckley, Gonzalez, Sweeny, JJ.

2540 Ruza Barbul, et al.,
Plaintiffs-Appellants,

Index 18309/00

-against-

Matsia Properties, Corp.,
Defendant-Respondent.

Robert D. Rosen, Garden City, for appellants.

London Fischer LLP, New York (Michael J. Carro of counsel), for
respondent.

Judgment, Supreme Court, Bronx County (Anne E. Targum, J.),
entered March 15, 2005, upon a jury verdict in defendant's favor,
unanimously affirmed, without costs.

The trial court properly precluded plaintiffs' expert from
referring to the New York City Building Code (Administrative Code
of City of New York, Title 27), since there was no proof of the
year the subject building and ramp were constructed and thus no
foundation for the applicability of different versions of the
Code and its individual provisions (*Ross v Manhattan Chelsea
Assoc.*, 194 AD2d 332, 333 [1993]). In any event, the expert
testified concerning his examination of the ramp and opined that
its slope was "excessive" by "industry standards." That opinion,
coupled with the court's missing witness charge following
defendant's failure to call its own engineer, rendered harmless
any error in the preclusion of reference to the Building Code.

Moreover, the weight of the evidence supports the jury's

verdict. The injured plaintiff, who had traveled up and down the ramp countless times, testified that she slipped and lost her balance because of the sandals she was wearing, and her husband testified that he threw those sandals out because they brought his wife bad luck. Plaintiffs had never complained about the slope of the ramp to their son-in-law, the superintendent of the building, and continued to use the ramp after the accident when visiting their daughter. The son-in-law testified that he used the ramp "at least a hundred times a day," that it was not dangerously steep, and that it was obvious to him that plaintiff slipped because of her shoes.

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

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fact that his point score was nearly enough for a level three adjudication.

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ENTERED: JANUARY 15, 2008

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Lippman, P.J., Buckley, Gonzalez, Sweeny, JJ.

2544 Matthew Marlon Parris,
Plaintiff-Respondent,

Index 121678/03

-against-

Port of New York Authority,
Defendant,

Otis Elevator Company,
Defendant-Appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, White Plains
(Jennifer Alampi of counsel), for appellant.

Krinsky & Musumeci, New York (Carmine V. Musumeci of counsel),
for respondent.

Order, Supreme Court, New York County (Rolando T. Acosta,
J.), entered July 24, 2007, which denied defendant Otis
Elevator's motion for summary judgment dismissing the complaint,
unanimously reversed, on the law, without costs, and the motion
granted. The Clerk is directed to enter judgment in favor of
defendant Otis Elevator Company dismissing the complaint against
it.

Plaintiff alleges he was injured when the escalator he was
riding at the Port Authority Bus Terminal suddenly and violently
"jerked" and "pulled," causing him to fall backward and strike
his head. Although the escalator had safety devices designed to
cause it to stop in the event of mechanical malfunction, this
escalator did not stop but continued to carry plaintiff to the
bottom, where he was found unconscious and having a seizure.

On their motion for summary judgment, defendants met their prima facie burden with evidence that, even assuming a mechanical defect, they were not negligent because there was no record of prior complaints about the escalator, Otis performed regular bi-monthly preventative maintenance, and no problems were indicated in the service maintenance records it kept (see *Gjonaj v Otis El. Co.*, 38 AD3d 384 [2007]; *Kelly v Old Navy*, 11 AD3d 345 [2004]). However, the court did err in finding that plaintiff raised an issue of fact as to Otis's negligence by submitting an affidavit of a certified mechanical engineer. Without even conducting an on-scene inspection, this expert asserted that the escalator could have jerked due to deterioration or wearing of various parts, and inferred that Otis had not performed necessary maintenance by replacing certain parts. These suggestions were speculative and unsupported by any evidentiary foundation, thus rendering the expert's opinion of no probative force and insufficient to withstand summary judgment (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; see *Vale v Poughkeepsie Galleria Co.*, 297 AD2d 800, 801 [2002]).

Plaintiff's reliance on the doctrine of res ipsa loquitur is unavailing because he failed to demonstrate that the escalator,

which was subject to extensive public contact on a daily basis, was in defendant's exclusive control (see *Ebanks v New York City Tr. Auth.*, 70 NY2d 621 [1987]).

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

ENTERED: JANUARY 15, 2008

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Lippman, P.J., Buckley, Gonzalez, Sweeny, JJ.

2545 In re Jose B.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

Tamara A. Steckler, The Legal Aid Society, New York (Marcia Egger of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Alan Beckoff of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Juan M. Merchan, J.), entered on or about July 5, 2007, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he committed an act which, if committed by an adult, would constitute the crime of assault in the third degree, and placed him on probation for a period of 12 months, unanimously modified, on the law, to the extent of reducing the finding to attempted assault in the third degree, and otherwise affirmed, without costs.

Appellant approached the victim in the hallway of their high school and hit him several times on the arm and back. Shortly thereafter, appellant entered the classroom in which the victim was sitting and, again, hit him several times, with a closed fist, on the arm and shoulder. The victim testified that he felt pain in his arm and back for several days thereafter, which

interfered with his performance of some household chores. The victim, who apparently did not miss any school, first sought medical attention the day after the incident. The medical records indicated only a diagnosis of minor soft tissue trauma, for which Motrin was prescribed, without any bruising, reduction in range of motion, or other indication of injury.

By repeatedly punching the victim, and following him into a classroom to continue the attack, appellant demonstrated his intent to cause physical injury (see *Matter of Eric C.*, 281 AD2d 543 [2001]). However, the evidence does not establish that the victim suffered impairment of physical condition or substantial pain (see Penal Law § 10.00[9]; *People v Baksh*, 43 AD3d 1072 [2007]). The victim's testimony, viewed in light of the objective circumstances, does not warrant an inference of physical injury (compare *People v Chiddick*, 8 NY3d 445 [2007]). Accordingly, the evidence supports a finding of attempted, but not completed, third-degree assault.

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ENTERED: JANUARY 15, 2008

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Lippman, P.J., Buckley, Gonzalez, Sweeny, JJ.

2546 Francesco C. Clark,
 Plaintiff-Respondent,

Index 101464/04

-against-

F. Cappy Kaplan, et al.,
 Defendants,

Island Properties Real Estate &
Management Corp.,
 Defendant-Appellant.

[And a Third-Party Action]

Baxter Smith Tassan & Shapiro, P.C., White Plains (Sim R. Shapiro
of counsel), for appellant.

Pollack, Pollack, Isaac & DeCicco, New York (Jillian Rosen of
counsel), for respondent.

Order, Supreme Court, New York County (Sherry Klein
Heitler, J.), entered on or about February 5, 2007, which, to the
extent appealed from as limited by the briefs, denied the motion
of defendant Island Properties Real Estate & Management Corp. for
summary judgment dismissing the complaint as against it,
unanimously reversed, on the law, without costs, and the motion
granted. The Clerk is directed to enter judgment in favor of
said defendant dismissing the complaint as against it.

Defendant, the managing agent of real property on which
plaintiff sustained personal injuries diving into a swimming
pool, established its entitlement to summary judgment by
tendering evidence demonstrating that its unwritten property

management services agreement was not comprehensive and exclusive, so as to entirely displace the owner's duty to maintain the premises, or the pool alone, in a reasonably safe condition (see *Jackson v Board of Educ. of City of New York*, 30 AD3d 57, 65 [2006]; *Hopper v Regional Scaffolding & Hoisting Co., Inc.*, 21 AD3d 262, 263 [2005], *lv denied* 6 NY3d 806 [2006]), and that it did not have "complete and unfettered authority" to repair the defective underwater pool light (*Tushaj v Elm Mgt. Assoc.*, 293 AD2d 44, 48 [2002]). Pursuant to the agreement, defendant had a duty to report complaints from tenants to the owner, but lacked the broad authority to make all necessary repairs or to resolve tenant complaints without a special arrangement with the owner, and the owner retained the primary duty to make repairs and safely maintain the premises. The record demonstrates that defendant fulfilled its contractual obligation by informing the owner of tenant complaints about the defective pool light, and that the owner told defendant she was

working on having the light repaired and did not believe it was defendant's responsibility to do so.

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

ENTERED: JANUARY 15, 2008

CLERK

Lippman, P.J., Buckley, Gonzalez, Sweeny, JJ.

2547N Jericho Group, Ltd.,
Plaintiff-Respondent,

Index 113274/04

-against-

Midtown Development, L.P.,
Defendant-Appellant.

Phillips Nizer LLP, New York (George Berger of counsel), for
appellant.

Herzfeld & Rubin, P.C., New York (David B. Hamm of counsel), for
respondent.

Order, Supreme Court, New York County (Charles E. Ramos,
J.), entered February 20, 2007, which, insofar as appealed from,
granted plaintiff's motion to vacate a judgment of dismissal
entered at the direction of this Court, unanimously reversed, on
the law, without costs, and the motion denied. The Clerk is
directed to re-enter judgment in favor of defendant dismissing
the complaint.

The prior action dismissed by this Court sought damages and
specific performance in connection with a contract for the
purchase of real estate, after plaintiff buyer had cancelled the
contract and defendant seller had returned the down payment. In
reversing the motion court and dismissing the amended complaint,
this Court held, inter alia, that plaintiff had no cause of
action for fraud based on defendant's alleged failure to produce
certain documents requested by plaintiff at the end of the

contractual due diligence period (32 AD3d 294, 300). Plaintiff now claims that in disclosure proceedings conducted during the pendency of the prior appeal, defendant produced, or admitted the nonexistence, of documents that it had previously represented it did not have, and thereby committed a fraud on the court. Such claim, however, goes to defendant's compliance with its contractual obligation to produce documents, i.e., the underlying transaction, not to "the very means by which the judgment was procured," and therefore does not avail to vacate the judgment pursuant to CPLR 5015(a)(3) (*Cofresi v Cofresi*, 198 AD2d 321, 321 [1993] [internal quotation marks omitted]). In any event, plaintiff fails to show fraud in the underlying transaction.

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

ENTERED: JANUARY 15, 2008

CLERK

Lippman, P.J., Buckley, Gonzalez, Sweeny, JJ.

2548N Jeffrey Ritzer,
Plaintiff-Appellant,

Index 112308/05

-against-

6 East 43rd Street Corp., et al.,
Defendants-Respondents.

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

Chesney & Murphy, LLP, Baldwin, (Stephen V. Morello of counsel), for respondents.

Order, Supreme Court, New York County (Marcy Friedman, J.), entered September 7, 2006, which, in an action by a construction worker against the construction site's owner and general contractor for personal injuries allegedly sustained in a fall from a scaffold, denied plaintiff's motion for a default judgment as against the site owner, and granted defendants' cross motion to compel plaintiff's acceptance of their amended answer, unanimously affirmed, without costs.

Plaintiff's affidavit in support of his motion for a default judgment, which states only that "I was caused to fall from an elevated work location, sustaining serious injuries," is plainly insufficient "to enable a court to determine that a viable cause of action exists" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]; see *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 288-289 2003]). Plaintiff's complaint, which was

verified by his attorney, may not be considered as proof of the facts constituting his claims (*Beltre v Babu*, 32 AD3d 722, 723 [2006]), and in any event is similarly deficient. Concerning defendants' cross motion, it appears that both defendants were served on September 12, 2005 pursuant to Business Corporation Law § 306; proof of service was filed on September 15, 2005; the general contractor served an answer on December 5, 2005; plaintiff moved for the default judgment against the site owner on May 22, 2006; and an amended answer joining the site owner was served on May 23, 2006. We note a letter dated April 10, 2006, written on behalf of the site owner, purporting to confirm an oral agreement, made by a paralegal in plaintiff's attorneys' office, to extend the site owner's time to answer until April 24, 2006. According to defendants' attorney, the general contractor's answer was amended to join the site owner because both were entitled to a defense from plaintiff's employer pursuant to an indemnification clause in the latter's contract with the general contractor, and that most of the delay in answering on behalf of the site owner was due to delay on the part of its insurer in tendering its defense to the employer's insurer. As there is no reason to doubt the latter representation, and in the absence of a showing of prejudice caused plaintiff by the site owner's delay in answering, it was a proper exercise of discretion to compel plaintiff's acceptance of

defendants' amended answer (see *Barajas v Toll Bros.*, 247 AD2d 242 [1998]; *St. Paul Fire & Mar Ins. Co. v Eastmond & Sons*, 244 AD2d 294 [1997]; *Heskel's W. 38th St. Corp. v Gotham Constr. Co. LLC*, 14 AD3d 306 [2005]).

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

ENTERED: JANUARY 15, 2008

CLERK

Lippman, P.J., Buckley, Gonzalez, Sweeny, JJ.

2549N Terenzio G. al-Cantara,
Plaintiff-Appellant,

Index 103144/06

-against-

Nicole Tausend, et al.,
Defendants-Respondents.

Terenzio G. al-Cantara, appellant pro se.

Landman Corsi Ballaine & Ford P.C., New York (William G. Ballaine of counsel), for respondents.

Appeal from order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered August 10, 2007, which, insofar as appealed from as limited by the briefs, deemed certain discovery responses by defendants to be sufficient, unanimously dismissed, without costs, as taken from a nonappealable order.

The preliminary conference order at issue is not appealable as of right because it does not decide a motion made upon notice (CPLR 5701[a][2]; see *Castadot v Palmer*, 266 AD2d 169 [1999]; *McHenry v 1020 Park Ave.*, 249 AD2d 110 [1998]), and we decline to

grant leave to appeal in light of the inadequate record before
this Court.

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

ENTERED: JANUARY 15, 2008

CLERK

Nardelli, J.P., Gonzalez, Sweeny, McGuire, Kavanagh, JJ.

1740 In re Joshua R., and Another,

Dependent Children Under
Eighteen Years of Age, etc.,

Samuel R.,
Respondent-Appellant,

Maria R.
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

Nancy Botwinik, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of
counsel), for ACS respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Mitchell
Katz of counsel), Law Guardian.

Order of disposition, Family Court, New York County (Rhoda
J. Cohen, J.), entered on or about August 3, 2005, which, upon a
finding that respondent father neglected and abused Joshua R.,
and derivatively neglected and abused Isabella R., placed
respondent under the supervision of petitioner Administration for
Children's Services for a period of 12 months, directed him to
comply with therapy, barred him from residing at home, and
awarded him weekly supervised visits with the children, modified,
on the law and the facts, the findings of abuse and derivative
abuse vacated, and otherwise affirmed, without costs.

The finding that respondent father neglected nine-year-old Joshua was established by a preponderance of the evidence. Following the child's refusal to eat food, respondent shoved the food into his mouth, causing him to vomit, and slapped him in the face with such force as to bloody his nose and bruise his left eye (see Family Court Act § 1012[f][i][B]; *Matter of Sheneika V.*, 20 AD3d 541 [2005]; *Matter of Shawn BB.*, 239 AD2d 678 [1997]). The finding of derivative neglect was also appropriate inasmuch as respondent's behavior demonstrated such an impaired level of parental judgment as to create a substantial risk of harm for any child in his care (*Matter of Vincent M.*, 193 AD2d 398, 404 [1993]).

However, we modify the order to the extent of vacating the findings of abuse and derivative abuse. Family Court was presented with evidence that respondent believed his behavior in striking Joshua was not excessive. Although not condoning such conduct, we note that the evidence does not support a finding that respondent inflicted an injury to Joshua "which cause[d] or create[d] a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ" (Family Court Act § 1012[e][i]; see *Matter of Rosina W.*, 297 AD2d 639 [2002]).

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

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

SWEENY, J. (dissenting in part)

While I concur with the majority on the issue of neglect, I cannot agree that the injuries suffered by Joshua did not constitute abuse.

The evidence adduced at the fact-finding hearing revealed that Hyon Baek, an ACS caseworker, was assigned to investigate a report of suspected abuse called in by Joshua's school counselor. He went to respondent's home on November 3, 2004 and the parents, respondents Samuel and Maria, and Joshua and his sister Isabella were present. Samuel denied he had intentionally hit Joshua, claiming he had been "rough playing" and accidentally bumped his head into Joshua's head. Samuel refused to allow Baek to speak to Joshua alone and became belligerent, demanding that Baek "get the f**k out of the house."

Baek left but re-entered a short time later with the police. While he spoke with Joshua, Baek heard Samuel yelling and screaming in the background. Joshua told Baek that the previous evening Samuel cooked dinner. When Joshua said he did not want to eat, Samuel shoved food into his mouth and began screaming and yelling at him repeatedly to eat and to swallow. Joshua gagged and then vomited, causing Samuel to become further enraged. He then struck Joshua with his "open fist" (as per medical report), causing Joshua's nose to bleed and his left eye to become swollen and lacerated. Joshua later denied that his father hit him, but

said that he often was angry and yelled. Joshua also related that two years prior to this incident, Samuel hit him with a belt. Baek observed a "circular mark around [Joshua's] left eye which colored the whole left eye" as well as "reddish . . . linear marks" on the left side of his face.

Baek also spoke with Isabella who stated she was taking a nap with her mother Maria at the time of the incident. She woke up because she heard Joshua crying and Samuel screaming. She saw that Joshua's nose was bleeding and there was a towel on the floor with blood on it. Isabella said she heard her father say he had hit Joshua because he did not eat his food, and told Baek that "her father yells at them whenever he smacks them" but refused to elaborate on those statements.

In Baek's second interview with Samuel, he admitted slapping Joshua because he did not eat his food but denied shoving food into Joshua's mouth. Samuel did not believe his behavior was excessive and "showed no remorse whatsoever." He also denied hitting the children in the past or having used a belt to discipline them.

Maria testified that she was taking a nap and was awakened when she heard Samuel "screaming" and "yelling" at Joshua. She asked Joshua what happened and he told her "his father hit him because he wasn't eating his broccoli." Joshua told her that he vomited when his father "pushed him into - pressured him into

eating his broccoli . . . he said eat, eat, eat, eat.”

Neither Samuel nor Maria took Joshua for medical attention that day. However, certified records from Bellevue Hospital Center, dated November 3, 2004, revealed that Joshua suffered a black left eye with a 1x1 centimeter ecchymosis (a visible extravasation of blood just below the skin surface) above the eyelid and a 2x2 centimeter mark below the eyelid. The records also indicated that Joshua had a nosebleed after being hit by his father.

Samuel was arrested as a result of this incident, and criminal charges were pending at the time of the fact-finding hearing. He was granted visitation, supervised by ACS, on November 16. On January 20, 2005, ACS sought an order suspending visitation because of Samuel's repeated belligerence toward ACS caseworkers, sometimes in front of the children, causing them to cry. The court granted ACS's petition.

In an oral decision after the hearing, the court determined that ACS had proven by a preponderance of the evidence that Samuel had slapped Joshua “hard enough to cause a bloody nose, bruising around his left eye and two linear marks on the side of his face,” and that Samuel had pushed food into Joshua's mouth while yelling at him to swallow. The court categorized Samuel's behavior as “totally out of control . . . expos[ing] Joshua to the danger of a very serious injury and it's fortunate that

Joshua wasn't more seriously injured . . . Based on the description that I have heard of this man and based upon his behavior in my courtroom and based upon the observations of him during visitation I think there is something very seriously wrong with this man." The court went on to state that Samuel "could have caused [Joshua] very, very severe injuries . . . all because the boy didn't eat his broccoli."

Although there was no formal dispositional hearing, the mental health services report ordered by the court described Samuel as "insulting" and "hostile." Recesses were required during the interview to allow him to regain his composure. Samuel rationalized his behavior in hitting Joshua by saying he had "never gone over the line" and that there were "worse people out there." Eventually, the interview was terminated due to his inability to control his anger.

Family Court Act § 1012(e) (i) defines child abuse as when a parent "inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ."

A single incident may support a finding of abuse (*Matter of Pierre M.*, 239 AD2d 262 [1997]). Moreover, "the child need not sustain a serious injury for a finding of abuse as long as the evidence demonstrates that the parent sufficiently endangered the child by creating a substantial risk of serious injury" (*Matter of Angelique H.*, 215 AD2d 318, 319 [1995]). In *Angelique H.*, *supra*, the child's mother intentionally burned her four-year-old's hand by placing it over a lit stove burner to "teach him a lesson" for playing with matches. The child suffered second degree burns, which were treated at the emergency room. Although there was no permanent injury, we held Family Court erred in its finding that no abuse could be made in the absence of medical testimony that the child sustained an injury causing or creating a substantial risk of protracted disfigurement or impairment. This was parental conduct that "could easily result in serious or protracted disfigurement" and such conduct creating the risk of serious injury can result in a finding of abuse, even if the child does not actually suffer the injury.

Matter of Rosina W. (297 AD2d 639 [2002]) does not compel a different result. There an argument between the 17-year-old daughter and her father escalated when the daughter pushed her father and he retaliated by slapping her in the face, causing swelling and a bloodshot eye. The Second Department found that the age of the victim, the nature of the injuries and the

isolated nature of the incident did not sustain a finding of abuse.

Here, the nine-year-old child was struck hard enough to cause bruising to the eye and lacerations around the eye. Moreover, food was forcibly shoved into the child's mouth, causing him to gag and eventually vomit. Nor was this apparently an isolated incident, as the record is replete with references to Samuel's uncontrollable temper and belligerence (*cf. Matter of P. Children*, 272 AD2d 211 [2000], *lv denied* 95 NY2d 770 [2000]). It is not hard to envision what may have happened to Joshua had he fallen after being hit or if food was lodged in his throat or esophagus during this incident. Coupled with the lack of immediate medical treatment and the ongoing verbal abuse heaped upon both children by Samuel, it is patently clear that Joshua was "subjected to a substantial risk of physical injury which would be likely to cause serious or protracted disfigurement, or protracted impairment of his physical or emotional health (*Matter of C. Children*, 183 AD2d 767, 768 [1992]).

It is "well settled that credibility determinations by the Family Court must be accorded due deference since it is in the

best position to assess the witnesses" (*Matter of Nasir J.*, 35 AD3d 299 [2006]). The record before us offers ample evidence justifying the finding of abuse, and there is no reason to disturb that determination.

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

ENTERED: JANUARY 15, 2008

CLERK

Saxe, J.P., Marlow, Williams, Sweeny, Malone, JJ.

1770 The Insurance Company of New York, Index 604210/04
 et al.,
 Plaintiffs-Appellants,

-against-

 Central Mutual Insurance Company, et al.,
 Defendants-Respondents.

Gold, Stewart, Kravatz, Benes & Stone, LLP, Westbury (Robert J. Stone, Jr. of counsel), for appellants.

Rivkin Radler LLP, Uniondale (Jason B. Gurdus of counsel), for respondents.

Order, Supreme Court, New York County (Carol Edmead, J.), entered June 28, 2005, which granted defendants' motion for summary judgment to the extent of dismissing the claims of plaintiff Calleo, and denied plaintiffs' cross motion for summary judgment and to amend the caption with respect to plaintiff calleo, unanimously modified, on the law, without costs, Calleo's claims reinstated, the matter remanded for consideration of the cross motion to amend the caption, and otherwise affirmed.

On January 23, 2004, a personal injury action was brought by an employee of plaintiff Calleo Construction Corp. for injuries sustained during the course of his employment at a construction site owned by plaintiff Congregation Or Zarua. Calleo was the general contractor on the site. Defendant S&S Construction Group was one of Calleo's subcontractors on that site. The personal injury action named the Congregation, Calleo and S&S as

defendants.

On December 15, 2004, the Congregation, Calleo and their liability insurer, plaintiff Insurance Corporation of New York, commenced the instant action seeking a declaration that defendant Central Mutual Insurance, S&S's liability insurer, was obligated to defend and indemnify the Congregation and Calleo in connection with the personal injury action. The complaint alleged that the contract between Calleo and S&S required Calleo to purchase a commercial general liability insurance policy, naming as additional insureds the owner, design consultants and their respective partners, directors, officers, employees, agents and representatives, and that it also required S&S to obtain insurance covering the Congregation and Calleo.

The insurance contract between S&S and Central contained an endorsement entitled "Additional Insured - Owners, Lessees or Contractors - Automatic Status when Required in Construction Agreement with You," which defined an insured as "any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy." S&S did obtain a Certificate of Liability Insurance, dated January 29, 2001 (three days after the incident that injured Calleo's employee), naming S&S as the Insured and Calleo as the Certificate Holder. The Certificate

contained the following language: "This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below." It thereafter named the holder as an additional insured on the policy.

Defendants moved for summary judgment dismissing the complaint and seeking declarations that S&S's insurance contract with Central did not obligate Central to defend or indemnify Calleo or the Congregation, and that the subcontract did not obligate S&S to procure additional insurance coverage for either. They further argued that the certificate of insurance naming Calleo as a certificate holder did not confer coverage on either Calleo or the Congregation.

Plaintiffs opposed the motion and cross moved for summary judgment declaring either that the Congregation and Calleo were additional insureds on Central's policy or were entitled to coverage pursuant an indemnification clause in the subcontract between Calleo and S&S. In support of their motion, plaintiffs submitted the affidavit of Gino Calleo, president of Calleo Development Corp., averring that it was always the intent of the subcontract between Calleo and S&S that the latter would obtain liability insurance naming both Calleo and the Congregation as additional insureds.

The IAS court granted defendants' motion for summary judgment declaring that the insurance contract between Central and S&S did not obligate Central to defend or indemnify Calleo in the underlying personal injury action, and the contract entered into between Calleo and S&S did not obligate S&S to procure additional insurance for Calleo. It found that Calleo was obligated to name Zarua as an additional insured on its policy, but there was an issue of fact as to whether the subcontract imposed the same obligation on S&S. However, the court found that the subcontract, including the attachment setting forth S&S's insurance obligation to the owner, contained no written agreement by S&S to name Calleo as an additional insured on its policy.

A contract should be "read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose" (*Empire Props. Corp. v Manufacturers Trust Co.*, 288 NY 242, 248 [1941], quoting what is now treated in 11 Lord, Williston on Contracts § 32:5 [4th ed]).

Here the court determined there was an issue of fact as to whether the subcontract imposed an obligation on S&S to obtain insurance for the Congregation, and then went on to find no issue of fact with respect to S&S's obligation to obtain insurance for the contractor. The subcontract, however, contained at least one

page that was taken in toto from the contract between the Congregation and Calleo with respect to the purchase of insurance coverage. Moreover, a plain reading of the contract provisions between Calleo and S&S concerning insurance mirror, in some cases, those in the contract between Zarua and Calleo and thus raise an issue of fact as to the intent of the parties concerning which entities should be included as additional insureds. On a defendant's motion for summary judgment, the evidence should be liberally construed in a light most favorable to the plaintiff (*Ansonia Assoc. Ltd Partnership v Public Serv. Mut. Ins. Co.*, 257 AD2d 84, 98, [1999], *lv denied*, 96 NY2d 715 [2001]). Moreover, it is axiomatic that on a motion for summary judgment, issue-finding, rather than issue-determination, is the key to the procedure and the motion should not be granted where is any doubt as the existence of a genuine factual issue (*Millerton Agway Coop. v Briarcliff Farms*, 17 NY2d 57 [1966]).

In this case, there is an issue of fact as to whether the contract between Calleo and S&S required S&S to name Calleo and

the Congregation as additional insureds and hence, defendants' motion for summary judgment should have been denied in its entirety.

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

ENTERED: JANUARY 15, 2008

CLERK

Tom, J.P., Friedman, Gonzalez, Sweeny, Kavanagh, JJ.

1955 Daniel Gorgoglione, Index 103623/05
Plaintiff-Appellant,

-against-

Amy Gillenson,
Defendant-Respondent,

Jeffrey L. Wechsler, etc.,
Defendant.

Sperber Denenberg & Kahan, P.C., New York (Jacqueline Handel-Harbour of counsel), for appellant.

Cantor, Epstein & Degenshein, LLP, New York (Dale J. Degenshein of counsel), for respondent.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered March 2, 2007, which, to the extent appealed from, upon renewal and reargument, denied plaintiff's motion for summary judgment on his first cause of action seeking a declaration of his entitlement to the return of his \$85,000 deposit on the purchase price for a cooperative apartment, and granted defendant Gillenson's cross motion for summary judgment on her counterclaim seeking a declaration of her entitlement to such deposit, unanimously reversed, on the law, with costs, plaintiff's motion granted, Gillenson's cross motion denied, it is declared that Gorgoglione is entitled to the deposit and any interest accrued thereon, and Gillenson's counterclaim dismissed.

Plaintiff Gorgoglione and defendant Gillenson entered into a written agreement, dated December 30, 2004, for the sale of

Gillenson's cooperative apartment to Gorgoglione for a purchase price of \$850,000, \$85,000 of which was paid into escrow as a deposit upon execution. The agreement provided that the sale was contingent on the unconditional consent of the cooperative corporation (the co-op). The agreement also provided that Gorgoglione's obligation to purchase was contingent on the issuance to him, by January 25, 2005, of a loan commitment in the amount of "\$425,000 for a term of 30 years or such lesser amount or shorter term as applied for or acceptable to [him]" (the Financing Terms). Gorgoglione initially obtained a loan commitment in the amount of \$425,000, but rejected it and then obtained a second commitment, dated January 19, 2005, for a loan in the amount of \$552,000. Thereafter, the co-op, by letter dated January 28, 2005, denied the parties' request for its consent to the transaction.

Upon the co-op's denial of consent, Gorgoglione gave notice that he was cancelling the transaction and requested that the escrow agent return his \$85,000 deposit to him. However, by letter dated February 1, 2005, Gillenson took the position that she was entitled to the deposit on the ground that Gorgoglione breached his contractual obligations by rejecting the \$425,000 loan commitment and applying for a loan in an amount greater than contemplated by the agreement's Financing Terms. This action ensued. In the order appealed from, the motion court rendered

summary judgment determining that Gillenson is entitled to the deposit. We now reverse.

Gillenson, relying on the Second Department cases of *Post v Mengoni* (198 AD2d 487 [1993]) and *Silva v Celella* (153 AD2d 847 [1989]), argues that Gorgoglione's rejection of the \$425,000 loan commitment and his application for a loan in a greater amount constituted a breach of his obligation under paragraph 18.2 of the agreement "diligently and in good faith . . . [to] apply for a loan on the Financing Terms . . . [and to] accept a Loan Commitment Letter meeting the Financing Terms." We need not determine whether this contention is correct because it is undisputed that Gorgoglione succeeded in obtaining a loan commitment in the higher amount he requested (\$552,000), which commitment conformed to the Financing Terms in all other respects. Since Gorgoglione obtained the financing he deemed necessary and, but for the co-op's refusal of consent, would have been prepared to close on the sale, any deviation of his application from the agreement's Financing Terms does not provide grounds for declaring him in default, as it was not a cause of the failure of the transaction. Significantly, Gillenson has presented no evidence that the co-op's refusal of consent was in any way related to the amount of the loan commitment, which was well within the co-op's guidelines allowing up to 75% financing. Where a purchaser applies for financing on terms different from

those contemplated by the financing contingency clause in the contract of sale, but the transaction fails for reasons unrelated to the financing terms for which the purchaser applied, the financing terms applied for are not deemed to have put the purchaser in breach of his or her obligation to make a good faith effort to obtain financing, and, assuming all other obligations have been fulfilled, the purchaser is entitled to the return of any deposit (see *Markovitz v Kachian*, 28 AD3d 358 [2006], citing *Katz v Simon*, 216 AD2d 270 [1995]; see also *Marx v Shustek*, 226 AD2d 351 [1996]).

In any event, to the extent Gillenson argues that, notwithstanding the foregoing considerations, paragraph 18.3 of the agreement entitles her to hold Gorgoglione liable for breach based on the nonconforming loan commitment, this argument has been waived. Although paragraph 18.3 gave Gillenson a right to cancel the agreement based on a failure to produce a loan by January 25, 2005, the provision required Gillenson to exercise that right "within 5 days after" January 25, 2005, i.e., on or before January 30, 2005. Since Gillenson failed to act in this regard within the time frame provided, she waived any right to the deposit based on the nonconforming loan commitment. As was expressly stated in paragraph 18.3 of the agreement: "Failure by

either Purchaser or Seller to deliver notice of Cancellation as required by this ¶18.3 shall constitute a waiver of the right to cancel under this ¶18.3.”

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

ENTERED: JANUARY 15, 2008

CLERK

Tom, J.P., Friedman, Gonzalez, Sweeny, Kavanagh, JJ.

1970-

1971 Fausto Herrera,
Plaintiff-Appellant,

Index 570108/04

-against-

Aaron Braunstein,
Defendant-Respondent.

William J. Rita, New York, for appellant.

Gerald M. Hertz & Associates, P.C., Long Island City (Gerald M. Hertz of counsel), for respondent.

Order of the Appellate Term of the Supreme Court of the State of New York, First Department, entered January 6, 2006, which modified an amended judgment of the Civil Court, New York County (Delores J. Thomas, J.), entered October 5, 2003, awarding plaintiff, after a jury trial and a decision on defendant's posttrial motion, \$100,000 compensatory damages and \$100,000 punitive damages, to the extent of vacating the amended judgment's damages awards and unconditionally directing a new trial on the issue of damages only, unanimously modified, on the facts, to direct that the new trial on the issue of damages be held unless, within 30 days of service of a copy of this order, plaintiff stipulates to an award of \$30,000 compensatory damages and \$10,000 punitive damages and to entry of a further amended judgment in accordance therewith, and otherwise affirmed, without costs.

Plaintiff appeals from Appellate Term's order vacating the aggregate \$200,000 award of damages to which he stipulated (reduced from the jury's verdict of \$600,000) and directing a new trial on the issue of damages only. We agree with Appellate Term that the award, even as reduced by Civil Court, cannot stand in view of plaintiff's failure to present any expert testimony to support his allegations of physical and psychological injuries, which are the only damages he claims to have suffered as the result of the subject incident. We find, however, that, in view of the reprehensible nature of defendant's conduct in this matter as found by the jury, an award of the amounts of compensatory and punitive damages indicated would constitute reasonable compensation (see CPLR 5501[c]). We note that defendant did not seek leave to appeal from Appellate Term's affirmance of the amended judgment on the issue of liability.

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

ENTERED: JANUARY 15, 2008

CLERK

Lippman, P.J., Mazzairelli, Marlow, Catterson, Kavanagh, JJ.

2186

[M-4943] In re Daniel Capellan,
Petitioner,

Ind. 3576/06

-against-

Hon. Lewis Bart Stone, etc., et al.,
Respondents.

- - - - -

2187

[M-4942] In re Julio Santos,
Petitioner,

Ind. 3576/06

-against-

Hon. Lewis Bart Stone, etc., et al.,
Respondents.

Mark Jankowitz, New York, for Daniel Capellan, petitioner.

Steven Banks, The Legal Aid Society, New York (Justine Luongo of
counsel), for Julio Santos, petitioner.

Robert M. Morgenthau, District Attorney, New York (Olivia Sohmer
of counsel), for Robert M. Morgenthau, respondent.

Separate petitions for a writ of prohibition granted, on the
law and the facts, without costs, and respondents prohibited from
retrying petitioners Daniel Capellan and Julio Santos on the
indictment.

Opinion by Marlow, J. All concur.

Order filed.

THE FOLLOWING MOTION ORDERS
WERE ENTERED AND FILED ON
JANUARY 15, 2008

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

M-12 People v Myers, Jamar

M-6746 People v Rodriguez, Freddy

M-6751 People v Carvey, Eric

 Appeals withdrawn.

Lippman, P.J., Mazzarelli, Saxe, Nardelli, Buckley, JJ.

M-6441 Santoli v 475 Ninth Avenue Associates, LLC
 (And a second third-party action)

 Appeal deemed withdrawn.

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

M-41 Granados v H.M. Decatur Realty Corp.

 Appeal, previously perfected for the January 2008 Term,
withdrawn.

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

M-15 Yan v Viacom, Inc.

 Appeal, previously perfected for the March 2008 Term,
withdrawn.

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

M-6634 People v Aitken, Geraldo
M-6635 People v Hopkins, Antonio
M-6637 People v Orridge, Carl
M-6638 People v Rabb, Reginald
M-6639 People v Rodriguez, Rafael
M-6640 People v Watts, Andrew

Leave to prosecute appeals as poor persons granted, as indicated.

Lippman, P.J., Nardelli, Buckley, Gonzalez, Sweeny, JJ.

M-5779 In the Matter of M., Shirley, also known as
C-M., Cherly, M., Melanie, also known as C-M., Melanie
-- The Administration for Children's Services

Leave to prosecute appeal as a poor person granted, as indicated.

Lippman, P.J., Mazzarelli, Saxe, Nardelli, Buckley, JJ.

M-5932 In the Matter of Lassiter v New York City Housing
Authority

Leave to prosecute appeal as a poor person granted to
the extent indicated; stay denied.

Lippman, P.J., Mazzarelli, Saxe, Nardelli, Buckley, JJ.

M-6285 In the Matter of S., Greta v Administration for
Children's Services

Leave to prosecute appeal as a poor person denied.

Lippman, P.J., Mazzairelli, Saxe, Nardelli, Buckley, JJ.

M-6253 People v Sanchez, Zaida

Notice of appeal deemed timely filed; leave to prosecute appeal as a poor person granted, as indicated.

Lippman, P.J., Saxe, Buckley, Gonzalez, JJ.

M-6567 People v Torres, William

Notice of appeal deemed timely filed; leave to prosecute appeal as a poor person denied, with leave to renew, as indicated.

Lippman, P.J., Saxe, Buckley, Gonzalez, JJ.

M-6587 In the Matter of J., Baby Girl, also known as D., Pathjrie, also known as J., Pjetrit -- Lutheran Social Services of Metropolitan New York, Inc.

Time to perfect appeal enlarged to the May 2008 Term.

Lippman, P.J., Saxe, Buckley, Gonzalez, JJ.

M-6698 Omansky v Whitacre
(And a third-party action)

Time to perfect appeal enlarged to the May 2008 Term, as indicated.

Lippman, P.J., Mazzairelli, Saxe, Nardelli, Buckley, JJ.

M-6373 People v Hernandez, Carlos

Time to perfect appeal enlarged to the June 2008 Term.

Lippman, P.J., Saxe, Nardelli, Williams, Moskowitz, JJ.

M-6359 Behagan v L & L Painting Co., Inc.

Stay of trial granted.

Lippman, P.J., Mazzarelli, Saxe, Nardelli, Buckley, JJ.

M-5983 14 Penn Plaza LLC v Cruz

Stay denied.

Lippman, P.J., Andrias, Williams, Malone, JJ.

M-6120 D'Esposito v Gusrae, Kaplan & Bruno PLLC

Reargument or other relief denied.

Lippman, P.J., Mazzarelli, Saxe, Nardelli, Buckley, JJ.

M-6475 Miller v Staples The Office Superstore East, Inc.,
doing business as Staples
(And a third-party action)

Enlargement of record on appeal granted; appeal
adjourned to the April 2008 Term.

Lippman, P.J., Mazzarelli, Saxe, Nardelli, Buckley, JJ.

M-6304 Estate of Burr
Burr v Burr - Abrams

Leave to substitute administratrix denied, with leave
to renew, as indicated; appeal adjourned to the April 2008 Term.

Tom, J.P., Andrias, Friedman, Williams, Gonzalez, JJ.

M-6529 People v Abdus-Samad, Saifuddin

Leave to prosecute appeal as a poor person granted, as indicated.

Tom, J.P., Friedman, Williams, McGuire, Kavanagh, JJ.

M-5574 In the Matter of C., Aisha -- Commissioner of the Administration for Children's Services of the City of New York

Leave to prosecute appeal as a poor person granted, as indicated.

Tom, J.P., Saxe, Friedman, Williams, JJ.

M-6208 People v Mendez, Pedrito

Leave to prosecute appeal as a poor person denied, with leave to renew, as indicated.

Tom, J.P., Andrias, Friedman, Williams, Gonzalez, JJ.

M-6273 People v Melendez, Edward

Notice of appeal deemed timely filed; leave to prosecute appeal as a poor person granted, as indicated.

Tom, J.P., Saxe, Friedman, Williams, JJ.

M-6201 People v Adames, Hermis

Notice of appeal deemed timely filed; leave to prosecute appeal as a poor person granted, as indicated.

Tom, J.P., Andrias, Friedman, Williams, Gonzalez, JJ.

M-6387 People v Bowlding, Joseph

Notice of appeal deemed timely filed; leave to prosecute appeal as a poor person denied, with leave to renew, as indicated.

Tom, J.P., Andrias, Friedman, Williams, Gonzalez, JJ.

M-6436 People v Jones, Quantrell

Enlargement of time to file notice of appeal and other relief denied.

Tom, J.P., Saxe, Friedman, Williams, JJ.

M-6187 Unique Laundry Corp. v Hudson Park NY LLC

M-6361

Time to perfect appeal enlarged to the May 2008 Term; stay continued, as indicated. Cross motion granted to the extent indicated.

Tom, J.P., Saxe, Friedman, Williams, JJ.

M-6221 Caltenco v The City of New York

Time to perfect appeal enlarged to the May 2008 Term.

Tom, J.P., Andrias, Friedman, Williams, Gonzalez, JJ.

M-6476 Kim v Amaya

Time to perfect appeal enlarged to the May 2008 Term.

Tom, J.P., Andrias, Friedman, Williams, Gonzalez, JJ.

M-6732 Kinder Morgan Energy Partners, L.P. v Ace American
Insurance Company

Time to perfect appeal enlarged to the May 2008 Term.

Tom, J.P., Saxe, Friedman, Buckley, JJ.

M-6666 Gulf Insurance Company v Transatlantic Reinsurance
Company

Stay of trial granted on condition appeal perfected for
the May 2008 Term, as indicated.

Tom, J.P., Saxe, Friedman, Williams, JJ.

M-6239 Madison Avenue Parking Corp. v 1532 Madison, LLC

Stay denied; interim relief granted by order of a
Justice of this Court, dated November 30, 2007, vacated, as
indicated.

Tom, J.P., Mazzairelli, Saxe, Williams, Malone, JJ.

M-5398 Tydings v Greenfield, Stein & Senior, LLP

Reargument denied; leave to appeal to the Court of
Appeals granted, as indicated.

Tom, J.P., Williams, McGuire, Malone, Kavanagh, JJ.

M-6278 Crawford v Liz Claiborne, Inc.

Reargument denied; leave to appeal to the Court of
Appeals granted, as indicated.

Andrias, J.P., Buckley, Catterson, Malone, Kavanagh, JJ.

M-3519 People v Isquierdo, Erick, also known as
M-4333 Izquierdo, Eric

Appeal deemed withdrawn; leave to prosecute appeal as a poor person and related relief deemed withdrawn.

Andrias, J.P., Nardelli, Gonzalez, Sweeny, Malone, JJ.

M-5715 People v Brown, Venice

Leave to prosecute appeal as a poor person granted to the extent indicated.

Andrias, J.P., Marlow, Williams, Buckley, Malone, JJ.

M-5526 In the Matter of J., Tonisha v P., Paul

Leave to prosecute appeal as a poor person granted, as indicated.

Andrias, J.P., Nardelli, Gonzalez, Sweeny, Malone, JJ.

M-5833 Costigan & Company, P.C. v Costigan

Time to perfect appeal enlarged to the May 2008 Term, as indicated.

Saxe, J.P., Marlow, Sweeny, McGuire, Kavanagh, JJ.

M-6309 People v Toppy, Cherese

Leave to prosecute appeal as a poor person granted, as indicated.

Friedman, J.P., Nardelli, Gonzalez, McGuire, Malone, JJ.

M-5205 Flores v Parkchester Preservation Company, L.P. -
Parkchester South Condominium
Reargument or other relief denied.

Buckley, J.P., Gonzalez, Sweeny, Kavanagh, JJ.

M-6104 Committee to Save St. Bridgid's Inc. v Egan
Reargument or other relief denied.

Mazzarelli, J.P., Saxe, Nardelli, Williams, Malone, JJ.

In the Matter of Attorneys Who Are in Violation
of Judiciary Law Section 468-a:

M-6286 Cindy Newman, admitted on 10-20-90,
at a Term of the Appellate Division,
First Department

Respondent reinstated as an attorney and counselor-at-
law in the State of New York, effective the date hereof. No
opinion. All concur.

**The Following Order Was Entered And Filed On January 10, 2008,
as Corrected January 14, 2008:**

Andrias, J.P., Marlow, Williams, Buckley, JJ.

M-5670 People v McLaurin, Albert
Counsel substituted.

The Following Order Was Entered And Filed On January 11, 2008:

Tom, J.P., Saxe, Friedman, Williams, JJ.

M-6406 Arts4All, Ltd. v Hancock

M-6407 (And a third-party action)

In the Application of Hancock v Arts4All, Ltd.,
also known as A4A Mobile, Ltd.

Leave to strike and direct the redaction of segments of
certain filings denied, as indicated.