SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 1, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Acosta, Richter, Román, JJ.

4551 MatlinPatterson ATA Holdings LLC, Plaintiff-Appellant, Index 602192/08

-against-

Federal Express Corporation, Defendant-Respondent.

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White & Case LLP, New York (Kenneth A. Caruso of counsel), for appellant.

R. Jeffery Kelsey, Memphis, TN, of the bar of the State of Tennessee, admitted pro hac vice, for respondent.

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Order, Supreme Court, New York County (Bernard J. Fried, J.), entered December 23, 2009, which, to the extent appealed from, granted defendant's motion to dismiss the complaint for failure to state a cause of action, unanimously affirmed, with costs.

This case arises from a business relationship between defendant Federal Express Corporation (FedEx) and nonparty ATA Airlines (ATA). ATA participated on FedEx's Team (to be discussed, infra) to fly charter missions for the United States Military. Over the years, ATA encountered financial difficulties, including Chapter 11 Bankruptcy, and plaintiff

MatlinPatterson ATA Holdings LLC (MP Holdings) invested and loaned ATA substantial sums to assist its financial health.

In 2008, FedEx terminated its agreement to keep ATA on its team for fiscal years 2006-2009, and ATA filed for bankruptcy. MP Holdings commenced this tort action against FedEx, alleging negligent misrepresentation and third-party promissory estoppel. Upon review of FedEx's CPLR 3211(a)(7) motion to dismiss the complaint, we find that even if MP Holdings, an investor in ATA, can be deemed to have standing, in its capacity as a lender to ATA, to bring an individual action against FedEx, it has not pleaded facts sufficient to support either of its claims. FedEx's breach of its agreement to ATA (the determination of the trial court in an action in another forum) does not give rise to tort liability in favor of MP Holdings. Moreover, MP Holdings and FedEx had absolutely no connection to each other extrinsic to their mutual relationships with ATA that gives rise to any independent duties or obligations between them.

The United States Department of Defense contracts with commercial airlines to provide a significant portion of its airlift requirements for military personnel. The complaint alleges that the Government's military charter business awards almost $2 billion a year to the airline industry. Smaller air carriers that specialize in charters, such as ATA, are well

suited to military charter missions because the cost of their services is significantly less than the rate paid by the Government. The Government allows smaller airlines to enter into "teaming arrangements" with other carriers. During the time-frame relevant to this dispute, FedEx handled contracts for a number of carriers (the FedEx Team). ATA was a member of the FedEx Team for most of the period between 1983 and 2008 (more than 20 years), and it split the majority of the FedEx Team's military passenger missions with one other member airline. FedEx renewed its contract with the military on an annual basis.

In October 2004, ATA filed for Chapter 11 voluntary reorganization in the United States Bankruptcy Court for the Southern District of Indiana. MP Holdings, an investor in the airline industry, committed $120 million to finance ATA's emergence from bankruptcy. As part of this investment, in December 2005, MP Holdings provided ATA with $30 million in debtor-in-possession (DIP) financing. On February 28, 2006, ATA was discharged from bankruptcy with a new parent corporation, New ATA Holdings, Inc. MP Holdings' $30 million DIP investment was converted to equity in New ATA Holdings, Inc. MP Holdings also made a $24 million loan to ATA and made an additional equity capital contribution of $45 million to New ATA Holdings, Inc. By February 2006, MP Holdings had become a 70% shareholder in New

ATA Holdings, Inc., which, in April 2007, was renamed Global Aero Linguistics, Inc. (GAL).

To raise additional capital for the acquisition of new aircraft for the military charter business, ATA sought written assurance from FedEx that it would remain on the FedEx Team. On September 7, 2006, FedEx supplied this assurance, in a letter signed by representatives from both FedEx and ATA (the FedEx letter), which stated:

> "The letter will serve as the agreement for the distribution between ATA and Omni [Int'l Airline] of both fixed and expansion for both wide and narrow body passenger business in the AMC Long Range International Contract for FY07 - FY09.
>
> "It is agreed that distribution for the above passenger segments will be fifty-fifty (50% - 50%) respectively for both wide and narrow body and for both fixed and expansion.
>
> "Please indicate your concurrence by signing as indicated below and returning to the undersigned.
>
> "We look forward to a continued successful relationship over the period."

Plaintiff alleges that "FedEx was aware that th[is] letter would be used to provide a limited group of institutional investors, such as and including MP Holdings, with written assurance that ATA would be distributed 50% of the FedEx Team's military passenger flights through at least FY09." Subsequent to the execution of the letter, ATA replaced some of its older aircraft with DC-10's. Thereafter, in the first quarter of 2007, ATA

obtained a $28 million bridge loan from MP Holdings to meet its cash needs, including purchasing and integrating the new aircraft into its fleet, maintaining the existing fleet, and training pilots.

In early 2007, New ATA Holdings and MP Holdings considered acquiring World Air Holdings, the parent company of World Airways and North American, two airlines that offered private and military passenger and cargo charters. With MP Holdings as prime investor, on August 14, 2007, GAL acquired World Air Holdings for $313 million. MP Holdings alleges that between the date of the FedEx letter and October 2007, it invested $186 million in ATA and its parent company.

On January 22, 2008, FedEx sent ATA a letter terminating it from the FedEx Team effective September 2008. On February 6, 2008, ATA and New ATA Holdings met with FedEx in an attempt to persuade FedEx to honor the 2006 agreement. FedEx refused, and, as a result of the loss of its military charter business, ATA ceased operations and again filed for bankruptcy in April of 2008. In June of that year, ATA brought an action against FedEx in federal district court in the Southern District of Indiana, alleging, inter alia, breach of contract based upon the FedEx Letter (*see ATA Airlines, Inc. v Federal Express Corp.*, 2010 WL 1754164, 2010 US Dist Lexis 39910 [SD Ind 2010]). ATA prevailed

in that action, and a judgment was rendered in its favor for lost profits of over $65 million (*see ATA Airlines, Inc. v Federal Express Corp.*, __ F Supp 2d __, 2010 WL 5579622 [SD Ind 2010]). At oral argument, FedEx stated that it has appealed the judgment.

In July of 2008, MP Holdings brought this action, alleging two causes of action, negligent misrepresentation and promissory estoppel. In November 2008, FedEx moved to dismiss the complaint pursuant to CPLR 3211(a)(7). The court granted FedEx's motion. It found that plaintiff lacked standing to assert a claim for negligent misrepresentation because there was insufficient evidence of the required "special relationship" between MP Holdings and FedEx. It also concluded that the unusual circumstances warranting the application of promissory estoppel to a third-party promisee did not exist in this case. We affirm.

On review of a pre-answer motion to dismiss a complaint for failure to state a cause of action (CPLR 3211[a][7]), the court must accept all of the allegations in the complaint as true, and, drawing all inferences from those allegations in the light most favorable to the plaintiff, determine whether a cognizable cause of action can be discerned therein, not whether one has been properly stated (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 634, 636 [1976]; *Dulberg v Mock*, 1 NY2d 54, 56 [1956]; *Hirschhorn v Hirschhorn*, 194 AD2d 768 [1993]). However, the complaint "must

contain allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory" (*Huntington Dental & Med. Co. v Minnesota Mining & Mfg. Co.*),__ F Supp2d __, 1998 WL 60954, at *3, 1998 US Dist LEXIS 1526, at *9 [SD NY 1998]).

As a threshold matter, corporations, such as ATA, exist independently from their shareholders, and in many cases, "an individual shareholder cannot secure a personal recovery for an alleged wrong done to a corporation" (*New Castle Siding Co. v Wolfson,* 97 AD2d 501 [1983], *aff'd,* 63 NY2d 782 [1984]; *see Elghanian v Harvey*, 249 AD2d 206, 207 [1998]; *EJS-Assoc Ticaret Ve Danismanlik, Ltd.,* 1993 WL 546675, 1993 US Dist LEXIS 18454 [SD NY 1993]; *Jones v Niagara Frontier Transp. Auth. (NFTA),* 836 F2d 731, 736 [2d Cir. 1987], *cert denied* 488 US 825 [1988]. This is true regardless of the level of the shareholders' interest in the corporation:

> "The fact that an individual closely affiliated with a corporation (for example, a principal shareholder, or even a sole shareholder), is incidentally injured by an injury to the corporation does not confer on the injured individual standing to sue on the basis of either that indirect injury or the direct injury to the corporation"

(*New Castle,* 97 AD2d 501, 502).

However, a shareholder can pursue a direct claim against a third party where "it appears that the injury to the shareholder

resulted from the violation of a duty owing to the shareholder from the wrongdoer, having its origin in circumstances independent of and extrinsic to the corporate entity" (*id.* at 502).

Here, MP Holdings argues that it has standing independent of ATA because it brings this suit not as a shareholder, but in a separate capacity as an institutional lender. It alleges that FedEx had a duty to it separate and apart from its duties to ATA, and that it suffered damages based upon FedEx's breach thereof. While there is sparse factual support for the conclusion that FedEx's failure to honor its letter agreement was the breach of a direct duty to MP Holdings, we nonetheless review the merits of the pleaded claims to determine whether, based upon the liberal standards applied upon review of a CPLR 3211(a)(7) motion, any recognizable cause of action can be discerned from this complaint.

The elements of a claim for negligent misrepresentation are: "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*JAO Acquisition Corp v Stavitsky*, 8 NY3d 144, 148 [2007]; *see Hudson River Club v Consolidated Edison Co. of New York*, 275 AD2d 218, 220 [2000]).

Plaintiff contends that under the standard set forth in *Kimmel v Schaefer* (89 NY2d 257 [1996]), it has established the requisite "special relationship" with FedEx, by alleging that FedEx knew that its letter would be used "to provide a limited group of institutional investors, such as and including MP Holdings, with written assurance that ATA would be distributed 50% of the FedEx Team's military passenger flights through at least FY09." FedEx counters that it had absolutely no duty to MP Holdings, an institutional investor, which seeks to circumvent the Bankruptcy Code by asserting what should be a shareholder derivative suit as a direct action in tort.

MP Holdings alleges that the FedEx letter was not a contract, but instead a false statement, and it seeks to recover damages (from both loans and equity investments) flowing to it from FedEx's failure to abide by the written assurance of business to ATA, i.e., participation on its team for military charter business through fiscal year 2009.

However, assuming, for purposes of this pre-answer motion to dismiss, the truth of plaintiff's allegations, plaintiff's claim for negligent representation still requires a showing of a duty running from FedEx to MP Holdings, or, stated otherwise, that MP Holdings was justified in its reliance upon FedEx's alleged false statement. The required inquiry includes:

> "[(1)] whether the person making the representation held or appeared to hold unique or special expertise; [(2)] whether a special relationship of trust or confidence existed between the parties; and [(3)] whether the speaker was aware of the use to which the information would be put and supplied it for that purpose."

(Kimmel, 89 NY2d at 264).

Reading the complaint as liberally as required, we find no support for the conclusion that there was a "special relationship of trust and confidence" between FedEx and MP Holdings (*United Safety of Am. v Consolidated Edison Co. of N.Y.*, 213 AD2d 283, 286 [1995]; *see Elghanian v Harvey*, 249 AD2d 206, 206 [1998], *supra*). The complaint alleges that, knowing that the FedEx letter was to be used to support investment decisions by "a small group of institutional investors, such as and including MP Holdings," FedEx had a duty to convey accurate statements to MP Holdings as to the true intended term of its agreement with ATA. However, the FedEx letter does not mention MP Holdings, it was signed by representatives from ATA and FedEx, and there is no allegation or evidence that MP Holdings received any separate representations or promises or had any other conversations or communications with FedEx regarding its plans to keep ATA on its team. In fact, MP Holdings does not allege the existence of any independent relationship with FedEx, and there is no evidence of any oral or written communication between them. Both MP holdings

and FedEx are large commercial entities, and both made decisions that invariably involved risks. That FedEx would terminate its agreement with ATA was a risk undertaken by MP Holdings. It does not give rise to an actionable claim of negligent misrepresentation.

Plaintiff's allegation of negligent misrepresentation also fails because there is no allegation and no view of the evidence that would support a conclusion that the FedEx letter was incorrect at the time it was drafted *(compare Suez Equity Investors v Toronto-Dominion Bank*, 250 F3d 87, 94 [2d Cir 2001] [as inducement to investment, defendants altered report requested by plaintiff investors, deleting all of the patently negative information bearing on the financial health of the target health care financing venture]). The complaint alleges that ATA and FedEx had a 20-year relationship. It also alleges that it is unclear why FedEx cancelled its agreement with ATA. The complaint does not allege, and there is no factual support for a conclusion that FedEx did not intend to honor the three-year agreement in September 2006 (*see Suez*, 250 F3d at 94). Plaintiff concedes that if the FedEx letter is considered a contract, it has no claim for negligent misrepresentation because the false statement element cannot be met. As we agree with the Indiana district court that there was a binding contract between ATA and

FedEx, we dismiss MP Holdings' claim for negligent misrepresentation.

The elements of a claim for promissory estoppel are: (1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance (*New York City Health & Hosps. Corp. v St. Barnabas Hosp.*, 10 AD3d 489, 491 [2004]; *Johnson & Johnson v American Red Cross*, 528 F Supp 2d 462, 463 [SD NY 2008]). Here, the alleged promise was that ATA would receive 50% of FedEx's military charter business through fiscal year 2009.

As ATA, not MP Holdings, was the direct recipient of this promise, plaintiff alleges third-party promissory estoppel (*Henneberry v Sumitomo Corp of America*, 2005 WL 991772, *5-*6, 2005 US Dist LEXIS 7475, *17 [SD NY 2005]). Under this theory, a third party to an unfulfilled promise may sue for damages suffered by reasonable reliance thereupon (*id.* at *5). The *Hennebery* plaintiff was the CEO of a company formed to provide an electronic ticketing promotion for Major League Baseball through Mastercard. In alleged reliance upon a number of investment promises made by a third party, including an unfulfilled promise to invest between $3 million and $5 million in the ticketing promotion, the plaintiff made 10 substantial personal loans to its corporation. However, unbeknownst to the plaintiff, the

defendant investor allegedly disparaged his management skills to clients and forged relationships with these same individuals that impinged upon the plaintiff's job as CEO. The plaintiff had a number of direct oral and written communications with the investor about these acts, and about problems with the venture, which ultimately failed. The district court denied defendant's Federal Rules of Civil Procedure rule 12(b)(6) motion to dismiss the plaintiff's claim for third-party promissory estoppel, stating that "at this stage of the proceeding the Court must only determine whether plaintiff has stated a claim which he should be allowed to support factually" (*compare Henneberry*, 2005 WL 991772 at *6, 2005 US Dist LEXIS 7475, *18).

The facts of this case are not analogous to those in *Henneberry*. There is only one promise at issue here, the three-year retainer contained in the FedEx letter, which was executed between FedEx and ATA exclusively. MP Holdings does not allege, and the evidence does not indicate, any contact between MP Holdings and FedEx, let alone any promises or inducements for loans.

Further, MP Holdings' claim for promissory estoppel is precluded because a breach of contract claim may not give rise to

tort liability unless a "legal duty independent of the contract -- i.e., one arising out of circumstances extraneous to, and not constituting elements of, the contract itself -- has been violated" (*Brown v Brown*, 12 AD3d 176, 176 [2004]). FedEx had no legal duty to MP Holdings extrinsic to the contract sued upon in Indiana.

Accordingly, even if we were to assume that MP holdings has standing to bring a direct claim against FedEx, its inability to allege any relationship between itself and FedEx extrinsic to the FedEx letter is fatal to its complaint. Moreover, to insulate MP Holdings, an institutional investor, from losses based upon failed loans and poor investments by imposing tort liability upon a third-party corporation that made a business decision to terminate a contract with the subject of the loans and investments would be dangerous precedent in the commercial context, which is supported and sustained by calculated risks. At this juncture, plaintiff's recovery appears to be limited to

its status in conformity with the absolute priority rules of the Bankruptcy Court in the Southern District of Indiana.

We have considered and rejected plaintiff's additional contentions.

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

ENTERED: SEPTEMBER 1, 2011

CLERK

Gonzalez, P.J., Tom, Andrias, Moskowitz, Freedman, JJ.

5057 GPH Partners, LLC, Index 111186/07
Plaintiff-Appellant,

-against-

American Home Assurance Company, et al.,
Defendants,

Admiral Insurance Company,
Defendant-Respondent.

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Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for appellant.

Coughlin Duffy, LLP, New York (Justin N. Kinney of counsel), for respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered January 26, 2010, which granted defendant-insurer, Admiral Insurance Company's (Admiral) motion for summary judgment declaring that it had no duty to defend or indemnify plaintiff with regard to the underlying personal injury action, unanimously reversed, on the law, with costs, the motion denied, and it is declared that defendant Admiral had a duty to indemnify plaintiff in the underlying action.

Supreme Court erred by considering only the language of the subject policy's wrap-up exclusion, without also examining whether Admiral timely asserted such exclusion as a basis for its disclaimer. "A disclaimer is unnecessary when a claim does not

fall within the coverage terms of an insurance policy . . . [but] a timely disclaimer pursuant to Insurance Law § 3420 (d) is required when a claim falls within the coverage terms but is denied based on a policy exclusion" (*Markevics v Liberty Mut. Ins. Co.*, 97 NY2d 646, 648-649 [2001] [citations omitted]; *A. Serdivone, Inc. v Commercial Underwriter's Ins. Co.*, 7 AD3d 942, 943-44 [2004], *lv dismissed* 3 NY3d 701 [2004]).

"[T]imeliness of disclaimer is measured from the time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage" (*see First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 68-69 [2003]). Thus, where an insurer "becomes sufficiently aware of facts which would support a disclaimer," the time to disclaim begins to run, and the insurer bears the burden of explaining any delay in disclaiming coverage (*see Hunter Roberts Constr. Group, LLC v Arch Ins. Co.*, 75 AD3d 404, 409 [2010]). Where the basis for the disclaimer was, or should have been, readily apparent before onset of the delay, the insurer's explanation for its delay fails as a matter of law (*id.*). Even where the basis for disclaimer is not readily apparent, the insurer has a duty to promptly and diligently investigate the claim (*see Those Certain Underwriters at Lloyds, London v Gray*, 49 AD3d 1, 3 [2007]; *City of New York v Welsbach Elec. Corp.*, 49 AD3d 322, 323 [2008]).

Admiral's May 1 and May 15, 2007 disclaimers were untimely as a matter of law. Via January 2007 emails, Admiral was on notice of plaintiff's claim for coverage. Grounds for disclaimer based on either delay in notice of the occurrence or the wrap-up exclusion should have been readily apparent to Admiral in January 2007, and, even if they were not, at a minimum, Admiral should have started an investigation at that time. Admiral's position that it only learned that plaintiff was making a coverage request via its attorney's April 23, 2007 letter requesting "confirmation" of coverage, and that it could not have known about the existence of the wrap-up policy until May 10, 2007, is not borne out by the record.

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

The Decision and Order of this Court entered herein on May 12, 2011 is hereby recalled and vacated (*see* M—2757 decided simultaneously herewith).

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

ENTERED: SEPTEMBER 1, 2011

CLERK

Friedman, J.P., Sweeny, DeGrasse, Abdus-Salaam, JJ.

4865 Jose Cabrera, Index 14555/98
Plaintiff-Appellant,

-against-

Sidney Hirth, et al.,
Defendants-Respondents,

Edwin Felix Cedeno, et al.,
Defendants,

City Marshal Martin Beinstock,
Nonparty Respondent.

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Pollack, Pollack, Isaac & DeCicco, New York (Michael H. Zhu of counsel), for appellant.

Goldberg & Carlton, PLLC, New York (Robert H. Goldberg of counsel), for Sidney Hirth, 1509 St. Nicholas Associates, Inc., and Proto Realty Management Corp., respondents.

Kenneth D. Litwack, Bayside, for Martin Beinstock, respondent.

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Order and judgment (one paper), Supreme Court, Bronx County (Alan J. Saks, J.), entered November 6, 2009, which awarded nonparty City Marshal Martin Beinstock judgment for poundage in the amount of $87,503.88, unanimously affirmed, without costs.

On September 24, 2004 a judgment in the amount of $1,923,009.09 was entered against the building defendants in favor of plaintiff. The judgment provided, inter alia, for payment to be made in a lump sum amount of $1,000,000, followed by nine years of periodic payments. These payments were to be

secured by the purchase of an annuity contract. Pursuant to CPLR 5043, the judgment gave the defendants 30 days to post security for 50% of the annuity payments. This judgment with notice of entry was not served on defendants until February 24, 2005, some five months after the judgment was entered.

However, on September 24, 2004, four days after the entry of judgment, without notice to defendants and well before the 30 day period to post security had expired, plaintiff's counsel retained nonparty defendant City Marshal to secure income executions in order to collect on the judgment. Significantly, on the same day, plaintiff's counsel wrote to the State Liquidation Bureau, the receiver for one of defendants' insurance carriers, asking that agency to forward its portion of the judgment ($1,000,000) to him. Plaintiff's counsel was thus aware that the initial $1,000,000 would be forwarded in due course. There is no evidence in the record that the Marshal was ever advised of this fact, or that he was advised not to levy on the full amount of the judgment. On September 30, the Marshal levied upon defendants' accounts at two banks and the New York City Housing Authority, Section Eight Division (NYCHA). A fourth account was levied on October 5.

Upon notice of the levy, defendants obtained an interim stay in this Court, pending determination of their motion for leave to

appeal to the Court of Appeals. This stay was lifted on November 9, 2004, when we denied leave. On November 11, 2004 defendants' carriers posted undertakings in the full amount of the judgment. Plaintiff's attorney was advised that the judgment was thus fully insured. In fact, on November 18, 2004, according to plaintiff, defendants' excess carrier faxed a general release and closing papers for a judgment amount over and above the $1,000,000 insured by the State Liquidation Bureau. There is no indication in the record that plaintiff took any steps to advise the Marshal of this fact. Indeed, plaintiff's own chronology of this matter clearly shows that counsel continued to provide the Marshal with information regarding defendants, such as EIN numbers, corporate names, etc. Notably, on November 19, 2004, eight days after defendants' insurers posted undertakings for the full amount of the judgment, and the day after defendants' excess carrier faxed the release, plaintiff, upon the Marshal's request, completed the necessary forms to extend the Marshal's collection efforts for an additional 60 days.

Plaintiff's counsel did notify the Marshal when the various stays were granted and again when they were vacated. On November 18, 2004, after being notified of the order vacating the stay, and after defendants' insurers posted the aforesaid undertakings, the Marshal collected $162,382.31 from the levy on one of

defendants' banks, retaining $8,646.62 as his poundage fee.

The building defendants then moved for leave to appeal directly to the Court of Appeals, simultaneously moving in Supreme Court for a stay of enforcement of the judgment pending appeal. Supreme Court issued a temporary restraining order and interim stay on November 22, 2004. After the Court of Appeals denied the motion for leave to appeal, Supreme Court denied defendants' motion for a full stay on March 9, 2005.

While the stays were in effect, the Marshal received funds pursuant to the levy from NYCHA. Plaintiff's counsel advised the Marshal to return those funds, which were in fact, returned to defendants.

Between April 19 and May 20, 2005, building defendants' primary and excess insurers paid to plaintiff a total settlement amount of $1,846,229.29.

On May 14, 2007, the Marshal moved to collect his poundage fee on the entire judgment amount of $1,923,009.90. He claimed he was entitled to $96,150.50, less the amount already received of $8,646.62, leaving a total balance owed of $87,503.88.

The motion court granted the Marshal's application in the amount requested, finding that the Marshal issued levies and other process as requested by plaintiff's counsel and collected certain funds belonging to defendants. The court acknowledged

that a number of stays pending appeal had been issued and, when the final amount due under the judgment was determined, defendants' insurers paid the full amount due directly to plaintiff's counsel. The court further found that since the Marshal's efforts to collect on the judgment were "thwarted by plaintiff and counsel", they are the parties responsible for payment of the poundage fee. Since the Marshal collected funds pursuant to his levy on defendants' accounts, and since there was no proof that the accounts levied upon contained assets that were less than the settlement amount, the Court determined that the Marshal was entitled to the full poundage of 5% of the judgment less amounts to be credited for poundage already collected.

A sheriff is entitled to poundage, which is a percentage commission awarded for the collection of money pursuant to a levy or execution of attachment, computed on the monies collected (CPLR 8012[b][1]; *see Kurtzman v Bergstol*, 62 AD3d 757, 757 [2009])[1].

Where the collection process has been commenced but has not

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[1]Article 16 of the New York City Civil Court Act designates Marshals as officers of the Civil Court of the City of New York. Collection duties normally performed by a sheriff are performed by a New York City Marshal and "all provisions of law relating to the powers, duties and liabilities of sheriffs in like cases and in respect to the taking and restitution of property" apply to the New York City Marshal (NY City Civ Ct Act § 1609[1][a]).

been completed, a sheriff may still be entitled to a poundage fee under three circumstances: (1) where "a settlement is made after a levy by virtue of an execution" (CPLR 8012[b][2]); (2) where the "execution is vacated or set aside" (CPLR 8012[b][2]); (3) where there has been an affirmative interference with the collection process, thus preventing a sheriff from actually collecting the assets (*Solow Mgt. Corp. v Tanger*, 10 NY3d 326, 330-331 [2008]; *see also Thornton v Montefiore Hosp.*, 117 AD2d 552, 553 [1986]).

In this action, where enforcement of the underlying judgment was settled with payment by the debtor defendants' insurance carriers directly to the creditor plaintiff after the Marshal had levied certain accounts, the Marshal is entitled to poundage (*see Kurtzman* at 758).

Traditionally, the amount of poundage is based on the value of the property levied upon (*see Considine v Pichler*, 72 AD2d 103, 104 [1979], *lv denied* 49 NY2d 701 [1980]). However, in this case, the poundage fee cannot be determined by reference to the value of the property levied. The settlement cut off the Marshal's ability to prove the value of the accounts levied upon. The motion court therefore properly exercised its discretion in using the settlement amount as a substitute for the unknown

actual value of the levied accounts.[2]

We turn now to the question of which party is responsible for payment of the poundage fee. In a situation such as this, where a settlement is made after a levy, CPLR 8012(b) is silent on this question. The cases which have addressed this issue turn on which of the three circumstances noted above are present in each particular case (*see generally* Weinstein-Korn-Miller, NY Civ Prac ¶ 8012.05, *et seq*. [2d ed]).

In the circumstance where a settlement is made after a levy and the order of attachment is vacated (CPLR 8012[b][3]), the courts have interpreted this to cover the situations where "the attachment was invalid at the outset or the action was dismissed in defendant's favor." In those cases, the party responsible for payment of the poundage is usually the plaintiff (*see* Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C8012:1). Where, as here, the order of attachment is "otherwise discharged" (CPLR 8012 [b][3]), "the party liable for poundage is the one who obtains the discharge - usually the defendant." (*id.*;

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[2]The statute has been amended (L2008, ch 441) to change the formula for the computation of poundage where there has been post-levy settlements. The traditional "value of the property levied" basis for computation of poundage fees has been replaced in cases of post-levy settlements by computing poundage as a percentage of "the judgment or settlement amount, whichever is less" (CPLR 8012[b][2] & [3]).

see Liquifin Aktiengesellschaft v Brennan, 446 F Supp 914, 922 [SD NY 1978]).

There is a judicially created exception to this latter rule of thumb in cases where a party affirmatively interferes with collection of the money (*see* Weinstein-Korn-Miller, NY Civ Prac ¶ 8012.04 [2d ed]). In those situations, the party who actively interferes with the collection process may be held responsible for payment of poundage fees.

We note in this regard that, contrary to plaintiff's and the Marshal's contentions, defendants' actions in pursuing their rights to appeal, as well as obtaining stays of the enforcement of the judgment, do not constitute affirmative interference with collection, thus rendering them responsible for the payment of poundage (*Solow Mgt. Corp.* at 331-332).

The motion court correctly determined that plaintiff and counsel are the parties responsible for payment. While the motion court did not elaborate on how plaintiff and counsel "thwarted" the Marshal's efforts, such a finding is warranted based upon the record of this case.

Initially, the fact that plaintiff agreed to take payment directly from the debtor "is an affirmative act interfering with collection by the [Marshal]" (*Greenfield v Tripp*, 23 Misc 2d 1088, 1089 [1960]). It is uncontroverted that the matter was

settled when the defendants' insurers paid the full amount of the judgment to plaintiff's counsel after the Marshal had levied and collected funds from defendants' bank accounts. There is no question that plaintiff's counsel, rather than adhering to the terms of the judgment and waiting the stated 30 days for defendants' insurance carriers to post undertakings, called upon the Marshal's assistance to levy upon defendants' bank accounts or other assets within four days of the entry of the judgment and some five months prior to serving the judgment with notice of entry on defendants. It has long been customary that where a sheriff levies against defendant's property and the matter is thereafter settled, the judgment creditor is liable to the sheriff for the payment of poundage fees as the party who invoked the Sheriff's services (*see County of Westchester v Riechers*, 6 Misc 3d 584 [2004]*; Matter of Associated Food Stores v Farmer's Bazaar of Long Is.*, 126 Misc 2d 541, 542 [1984]; *Matter of Intl. Distrib. Export Co., Inc.*, 219 F Supp 412 [SD NY 1963]; *Seymour Mfg. Co. v Tarnopol*, 20 Misc 2d 210 [1959]; *Zimmerman v Engel*, 114 NYS2d 293 [1952]; *Flack v State of New York*, 95 N.Y. 461, 466 [1884]; *Campbell v Cothran*, 56 NY 279 [1874]; *Adams v Hopkins*, 5 Johns 252 [Sup Ct, NY County 1810]). That is especially appropriate here as plaintiff, as early as November 11, 2004, knew that the entire amount of the judgment was insured, and that

defendants' carriers had posted undertakings for the full amount of the judgment. Plaintiff had the opportunity on November 19 to terminate the Marshal's efforts to collect this judgment by declining to sign the 60 day extension as requested by the Marshal. Plaintiff ultimately settled directly with the defendants' insurance carriers rather than follow the court-ordered payment schedule as provided for in the judgment. The record does not show any attempt to advise the Marshal that the carriers posted security or that plaintiff's counsel made his own demand upon those carriers for payment.

As a result, the motion court properly determined that plaintiff and counsel "thwarted" the efforts of the Marshal to collect on this judgment, thus rendering them responsible for payment of the Marshal's poundage fee.

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

ENTERED: SEPTEMBER 1, 2011

CLERK

Saxe, J.P., Friedman, Freedman, Richter, JJ.

4954 The People of the State of New York, Respondent, Ind. 2673/07

-against-

Christian Yancey, Defendant-Appellant.

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The Legal Aid Society, New York (Steven Banks of counsel), and Paul, Weiss, Rifkind, Wharton & Garrison, LLP, New York (Kenneth Meyer of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Brian J. Reimels of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Denis J. Boyle, J.), rendered March 10, 2009, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 6 years, unanimously affirmed.

The court correctly determined that an overriding interest warranted a closure of the courtroom during the testimony of two undercover officers (*see Waller v Georgia*, 467 US 39 [1984]; *People v Ramos*, 90 NY2d 490, 497 [1997], *cert denied sub nom. Ayala v New York*, 522 US 1002 [1997]). The People made a sufficiently particularized showing that the officers had an ongoing connection with narcotics operations in the vicinity of the courthouse, which was also the location of defendant's

arrest. Both officers testified that they had active narcotics investigations and cases involving lost subjects in the area around the courthouse, and that they had been threatened in the past as a result of performing undercover operations. Accordingly, the court properly found that the officers' safety and effectiveness would be jeopardized by testifying in an open courtroom.

The court permitted several of defendant's relatives to be present for the undercover officers' testimony, and properly exercised its discretion in excluding three other relatives, all of whom both resided a few blocks from the courthouse and had drug-related arrests. Given the officers' ongoing connection to the courthouse area, the excluded family members could have compromised the officers' safety and effectiveness (*see People v Campbell*, 16 NY3d 756 [2011]).

The court properly exercised its discretion in denying defendant's mistrial motion made after a police witness briefly

referred to an uncharged crime. The offending testimony caused little or no prejudice in the context of the case, and the court took prompt curative action by immediately striking the testimony (*see People v Santiago*, 52 NY2d 865, 866 [1981]).

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

ENTERED: SEPTEMBER 1, 2011

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Renwick, DeGrasse, JJ.

5089 Jet Acceptance Corporation, Index 602789/08
Plaintiff-Respondent,

-against-

Quest Mexicana S.A. de C.V., et al.,
Defendants-Appellants.

_____

Dewey & LeBoeuf LLP, New York (John M. Nonna of counsel), for appellants.

King & Spalding, New York (Richard A. Cirillo of counsel), for respondent.

_____

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered June 25, 2010, which granted plaintiff's motion for summary judgment as to liability for breach of contract, unanimously affirmed, without costs.

Plaintiff, an aircraft leasing company, entered into four separate lease agreements with defendant Quest Mexicana S.A. de C.V (Quest), a Mexican entity. Quest intended to use the four aircraft in connection with a well established tourism business run by its parent company and guarantor, defendant Lomas Group S.A. de C.V. The leases, all identical in their operative terms, established a system for plaintiff to present the planes to Quest for inspection in Canada, where they were stored. The purpose of Quest's inspection was to verify that the planes were in "Delivery Condition," that is, that they materially conformed to

the specifications in the leases. Pursuant to the leases, if Quest was satisfied with the condition of each plane, it would be required to execute an "Acceptance Certificate." The language of the certificate had been negotiated simultaneously with the leases themselves, and a blank copy was annexed to each lease. The form Acceptance Certificates provided, in pertinent part:

> "Immediately before Delivery, our technical experts inspected the Aircraft and Aircraft Documents and found that they conformed fully with the Agreement, except as noted in the Delivery Reservations Agreement attached to this certificate (if any). We confirm that the Aircraft meets all of the requirements necessary for us to accept Delivery, and that the Lessor has carried out all of its obligations under the Agreement concerning Delivery. We acknowledge that the Aircraft has been delivered to us 'as is-where is'."

If Quest determined, upon inspection, that the aircraft were not in Delivery Condition, then plaintiff would correct the defects (termed "reservations" by the leases) and offer the aircraft again for delivery. This was only necessary if the reservations "prejudice[d the aircraft's] airworthiness or safety," or if the defect "materially affect[ed] the performance, economic operation or maintenance of the [a]ircraft." The leases provided that if Quest determined that a plane had a reservation that did not rise to that level but that the parties agreed was "important," Quest would execute the Acceptance Certificate,

noting the problem as a "Reservation Requiring Action" in the Delivery Reservations Agreement annexed to the certificate. Plaintiff and Quest would then "agree [to] a programme for their correction as soon as reasonably possible after Delivery." Reservations that were agreed to be "minor" could be noted in the Delivery Reservations Agreement as "Reservations Not Requiring Action," and Quest would not be responsible for them before it redelivered the aircraft when the lease expired. If any reservations were noted in the Delivery Reservations Agreement, the leases provided:

> "Any obligations assumed by the Lessor under the Delivery Reservations Agreement shall be in full and final settlement of all claims or actions which the Lessee may have against the Lessor of any nature in respect of the condition of the Aircraft at Delivery. The Lessor shall not be liable to the Lessee or any other party in respect of any Loss arising out of or connected with any actual or purported difference between the condition of the Aircraft on Delivery and the Delivery Condition."

Finally, each lease contained a "Hell or High Water" provision, which provided:

> "The Lessee's obligation to pay Rent and to perform all of its other obligations under this Agreement on time is absolute and unconditional in all respects, regardless of the occurrence of any supervening events or circumstances (whether or not . . . fundamental in the context of the

> arrangements contemplated by this Agreement). The Lessee must continue to perform all of its obligations under this Agreement in any event and notwithstanding any defence, set-off, counterclaim, recoupment or other right of any kind or any other circumstance, except as otherwise expressly set forth in this Agreement."

Plaintiff presented the first airplane to Quest for inspection in November 2007. Quest inspected the aircraft and performed a test flight. Upon completion of the inspection, it executed the Acceptance Certificate. The parties executed a Delivery Reservations Agreement that listed a single Reservation Requiring Action. However, the action required by the reservation was to be performed not by plaintiff, but by Quest:

> "Lessee is yet to furnish Lessor with required Conditions Precedent documentation. Lessor is unable to de-register aircraft until such time as Conditions Precedent are in place. Aircraft has been accepted as being eligible for Export Certificate of Airworthiness. Export Certificate of Airworthiness will be issued subject to Condition Precedent obligations being satisfied."

The condition precedent at issue was Quest's obtaining insurance on the airplane. That requirement was delineated in Schedule 6 of each lease, which stated, in pertinent part:

> "The Lessee shall keep the Aircraft covered by the following insurance:
>
> "(a) **Hull and Spares All Risks Insurance** (can be

in separate policies)

> "This insurance shall cover the Aircraft for not less than its Agreed Value on an agreed value basis and shall cover Parts for their replacement cost, against all risks of loss or damage. "

Quest was also required to keep the aircraft covered by "Hull and Spares War and Allied Perils Insurance," and Schedule 6 explicitly provided that any deductible on the two policies could not contain a deductible greater than $50,000 for hull claims and $10,000 for spares claims.

Quest initially presented proof of insurance that did not include spare parts coverage, and this was deemed satisfactory by plaintiff. However, plaintiff changed course shortly thereafter and demanded that Quest obtain insurance that covered spare parts. Quest failed to provide proof of the insurance, so plaintiff, asserting that Quest had failed to comply with the Delivery Reservations Agreement, did not deregister the aircraft or procure an export certificate of airworthiness, which would have permitted Quest to fly the airplane from Canada to Mexico. Nevertheless, Quest made the $60,500 rental payment on the first airplane required for November 2007. It also paid the rent in December 2007.

Also in December 2007, plaintiff presented the second

airplane to Quest for inspection. Quest, after having the plane inspected, determined that it was not in Delivery Condition, thereby triggering plaintiff's obligation to address the deficiencies. Plaintiff attempted to fix the problems, and, in January 2008, re-presented the second aircraft to Quest for inspection. Quest refused to go to Canada to reinspect the second plane until plaintiff deregistered the first plane and presented Quest with an export certificate of airworthiness for the first plane. Further, Quest refused to make the rent payment that became due in January 2008 on the first airplane, and made no further payments.

Plaintiff also presented the third airplane for inspection in January 2008. Again, Quest declined to perform an inspection until the outstanding issues concerning the first aircraft were resolved. Plaintiff declared Quest in default of all three leases. As for the fourth airplane, plaintiff did not present it to Quest for inspection. Rather, it declared Quest in default of the fourth lease pursuant to cross-default provisions contained in all of the leases.

Plaintiff commenced this action for breach of contract, alleging that Quest was in violation of all four leases. After some discovery, plaintiff moved for summary judgment, asserting that it had performed all of its own obligations and that Quest

had breached the leases by not paying rent and by not complying with the delivery provisions in the leases. In opposition to the motion, Quest contended that the leases were unconscionable since Quest was a small, commercially unsophisticated company that was new to the world of aviation and that did not have equal bargaining power with plaintiff, and since all of the "Events of Default" related to its conduct, and none related to plaintiff's conduct. Additionally, Quest maintained that the leases unfairly permitted the predicament it found itself in to arise, that is, having to pay millions of dollars in rent for airplanes that were not airworthy.

In addition to these legal arguments, Quest submitted an affidavit by Fabian Romero, its former director of maintenance, who stated that he participated in the inspection of the first aircraft. Romero averred that there were material discrepancies between the actual condition of the aircraft and the condition in which the lease required that the aircraft be delivered. However, he stated, instead of exercising Quest's right to have plaintiff address the problems and to reinspect the aircraft, he executed the Acceptance Certificate, because plaintiff orally represented that it would still rectify all outstanding issues.

Quest also submitted an affidavit by Richard Hatcher, a consultant it retained to assess, for litigation purposes,

whether the four aircraft met the Delivery Conditions required under the leases at the time that plaintiff presented the aircraft for inspection. Hatcher did not inspect the planes until March 2009. He claimed, however, that he was able to evaluate the planes' histories by studying the detailed records plaintiff was required to maintain. Based on the inspections, Hatcher concluded that the aircraft were not airworthy at the time plaintiff presented them to Quest for inspection. He averred that none of the planes could legally have been flown for the purposes intended through at least February 6, 2008.

Quest also submitted an affidavit by Matthew Ellis, an aviation insurance broker. Ellis opined that the leases were ambiguous as to whether Quest was required to furnish spares insurance for the four airplanes because the reference to spares insurance appeared only under headings describing the insurance required, and the descriptions of the required insurance were not consistent with spares insurance.

The motion court granted plaintiff's motion. With respect to the first aircraft, it held that the relevant documents, particularly the Acceptance Certificate and Delivery Reservations Agreement, unequivocally and unambiguously established that Quest was satisfied with the airplane and was obligated to pay rent on it. The court also rejected Quest's argument that it satisfied

the insurance condition, finding that Schedule 6 of the leases clearly called for the provision of spares coverage. The court further found that plaintiff properly declared Quest in default for not having adhered to the delivery procedures for the second and third airplanes, and that it was entitled to rely on the cross-default provisions with respect to the fourth airplane. Finally, the court held that the leases were not unconscionable, noting that Quest was represented by sophisticated counsel and stating that Quest failed to establish that the circumstances in which it entered the leases had deprived it of "meaningful choice."

It is axiomatic that "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). Extrinsic evidence may not be introduced to create an ambiguity in an otherwise clear document (*id.* at 163). Here, the Acceptance Certificate that Quest signed after its inspection of the first airplane was unequivocal. By executing it, Quest expressly confirmed that plaintiff had fully performed all of its obligations up to that point, including the furnishing of an aircraft that materially conformed to the lease. The affidavit by Fabian Romero, Quest's director of maintenance, which states that he executed the Acceptance Certificate in

reliance on plaintiff's oral representation that it would make further repairs, is exactly the type of extrinsic evidence that may not be used to cast doubt on the import of the otherwise clear Acceptance Certificate.

Even if we were to consider Quest's assertion that plaintiff made oral representations concerning the condition of the airplane, we would not find that an estoppel arose from those representations. Quest cannot be said to have justifiably relied on an oral representation when that very representation conflicted with the terms of a contract Quest executed (*see Daily News v Rockwell Intl. Corp.*, 256 AD2d 13, 14 [1998] *lv denied* 93 NY2d 803 [1999]; *A-Pix, Inc. v SGE Entertainment Corp.*, 222 AD2d 387, 389-390 [1995]). Similarly, the inspection recounted in the affidavit by Hatcher, Quest's aviation expert, is of no help. Once Quest executed the Acceptance Certificate, it effectively waived any claim that the airplane was not in condition for delivery.

It is true that the Acceptance Certificate for the first airplane must be read in conjunction with the Delivery Reservations Agreement. However, the latter document is also clear that plaintiff's obligation to deregister the aircraft and tender the Export Certificate of Airworthiness was contingent on Quest's fulfilling the condition precedent of furnishing proof of

insurance. Quest's argument that the lease is ambiguous as to whether spares insurance was required falls short. The language "[t]he Lessee shall keep the Aircraft covered by . . . (a) **Hull and Spares All Risks Insurance**" is anything but ambiguous. The words in boldface are not, as Quest contends, merely a "heading," but rather are operative language expressing the parties' intentions. Moreover, the material that follows the bolded words in no way suggests that the parties did not actually intend to require that Quest provide spares insurance. Indeed, that the parties specifically agreed in Schedule 6 to limit the amount of any deductible in a spares policy to $10,000 (as opposed to $50,000 for hull insurance) severely undermines Quest's position that Schedule 6 did not impose a requirement on Quest to provide that type of insurance.

Because plaintiff fully performed under the lease, Quest was not justified in failing to pay rent on the first aircraft after December 2007. Indeed, plaintiff did not even have to rely on the "Hell or High Water" clause. That provision contemplates that Quest has a legitimate "defence, set-off, counterclaim [or] recoupment," none of which Quest has established here. Further, because Quest's decision not to perform under the second and third leases was entirely contingent on its position with respect to the first lease, plaintiff properly declared it in default

under those leases, as well as under the fourth lease, based on the cross-default provisions in the leases. We note, again, that the affidavit by Quest's aviation expert, which asserts that none of the aircraft were in flying condition when presented to Quest, is insufficient to defeat summary judgment insofar as the second and third aircraft are concerned. The leases established a method for Quest to object to the condition of the aircraft, at the time they were presented, before accepting delivery. Quest chose not to assert its rights under those provisions. The time for Quest to identify deficiencies in the aircraft was the time that plaintiff presented them to it, not after plaintiff had moved for summary judgment.

Finally, the leases were not unconscionable. Quest's principals, while perhaps new to the world of aircraft leasing, were sophisticated businesspeople, and they were represented by experienced counsel. The leases were negotiated by the parties, not presented to Quest as a take-it-or-leave-it proposition. Even if plaintiff was more experienced than Quest in the business of aircraft leasing, that is insufficient to vitiate the agreement; Quest was sophisticated and sufficiently able to protect its own interests. Indeed, the doctrine of unconscionability rarely applies in a commercial setting, where the parties are presumed to have equal bargaining power (*see*

Gillman v Chase Manhattan Bank, N.A., 135 AD2d 488, 491 [1987], *affd* 73 NY2d 1 [1988]). We find similarly that the leases were not substantively unconscionable. Again, the leases provided Quest with the right to refuse to accept the aircraft until plaintiff established that they were airworthy. Quest finds itself in default not because the agreements were stacked against it, but because it chose not to avail itself of that right.

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

ENTERED: SEPTEMBER 1, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, Renwick, Richter, JJ.

5233-
5234 Index 114745/08

In re Keith Douglas,
Petitioner-Appellant,

-against-

New York City Board/Department of Education,
Respondent-Respondent.

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Kousoulas & Associates, P.C., New York (Antonia Kousoulas of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Deborah A. Brenner of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Marcy S. Friedman, J.), entered August 14, 2009, which granted respondent's cross motion to dismiss the petition brought pursuant to, inter alia, CPLR article 75 seeking to vacate a post-hearing award sustaining specifications of sexual misconduct and imposing a penalty of termination of petitioner's employment as a New York City schoolteacher, affirmed, without costs.

The gravamen of petitioner's argument is that the testimonies of the students were incredible as a matter of law due to inconsistencies the Hearing Officer ignored. Contrary to petitioner's contention, however, the Hearing Officer carefully considered all of the testimony and resolved any inconsistencies in favor of the students, as she was entitled to do (*see Lackow v*

Department of Educ. (or "Board") of City of N.Y., 51 AD3d 563, 568 [2008]). Petitioner offers no basis for disturbing those findings, that relied not only upon a finding that the students were credible, but also upon a finding that petitioner's testimony was not credible (*see Matter of Mercado v Kelly*, 54 AD3d 654, 654 [2008]).

The dissent's view that Specification III is not supported by adequate evidence is unfounded. Although another student did confirm that petitioner told Student D to sit up in class because she was slouching in her chair, that other student did not confirm petitioner's version of the events either. The Hearing Officer, who heard the actual testimony from the witnesses, was entitled to weigh the testimony and make independent findings (*see Matter of D'Augusta v Bratton*, 259 AD2d 287, 288 [1999] ("[t]o the extent that petitioner presented a different account of the events, we note that credibility determinations are the province of the hearing officer").

The penalty of termination does not shock our sense of fairness. Petitioner's unacceptable behavior compromised his ability to function as a teacher and the school's position in the community. Further, "[a]cts of moral turpitude committed in the course of public employment are an appropriate ground for termination of even long-standing employees with good work

histories" (*Matter of Chaplin v New York City Dept. of Educ.*, 48 AD3d 226, 227 [2008]).

We have considered petitioner's remaining arguments, including that the arbitration hearing was not in accord with due process, and find them unavailing.

All concur except Andrias, J.P. who dissents in a memorandum as follows:

ANDRIAS, J.P. (dissenting)

Because I believe that Specification III is not supported by adequate evidence and must be vacated, I would remand the matter to the Department of Education for reconsideration of the penalty of termination imposed on petitioner, which was not mandatory or warranted in this case.

Petitioner is charged with conduct unbecoming a teacher. Specification I alleges that on May 14, 2007, he asked Student A whether she liked anyone or had a boyfriend; told her that she was dressing sexy lately; asked her to touch her breast and demonstrated how he wanted her to do that; and touched his genitals in front of her. Specification II alleges that on February 14, 2007, petitioner simulated a woman's breast with a balloon, which he squeezed while stating words to the effect that "we got some chemistry going on," and that Student D had "sweet stuff." Specification III alleges that on May 17, 2007, petitioner said to Student D words to the effect that the way she sat in class was sexy and turned him on. The Hearing Officer sustained Specifications I (except to the extent it was based on the allegation that petitioner asked Student A if she liked anyone) and Specification III, and dismissed Specification II.

Education Law § 3020-a(5) provides that judicial review of a hearing officer's findings must be conducted pursuant to CPLR

7511. However, where, as here, the parties are subjected to compulsory arbitration, judicial scrutiny is greater than when parties voluntarily arbitrate and "[t]he determination must be in accord with due process and supported by adequate evidence, and must also be rational and satisfy the arbitrary and capricious standards of CPLR article 78" (*Lackow v Department of Educ.* (or "Board") *of City of N.Y.*, 51 AD3d 563, 567 [2008]). The Court of Appeals has defined arbitrary and capricious as "action . . . without sound basis in reason and . . . generally taken without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]).

As respondent concedes, the Hearing Officer correctly dismissed Specification II based on the long delay in reporting the alleged incident, the inconsistencies in the evidence, and the fact that none of the other students in the lab class confirmed that the incident occurred. While Student D was identified in the Specification and bill of particulars as the person to whom petitioner's actions were directed, she in fact had no firsthand knowledge of the incident, and testified that the conduct was directed at Student C, who told her about it after class.

Once the Hearing Officer dismissed Specification II based in

part on Student D's admission that her statements to an investigator employed by the Special Commissioner of Investigation for the New York City School District and to the school's principal that she was the victim of the conduct underlying Specification II were false, the evidence was inadequate to sustain Specification III. Student D's material false statements as to Specification II rendered her testimony as to Specification III incredible. While, I am cognizant that the "maxim [o]f falsus in uno falsus in omnibus" is permissive, not mandatory (*see People v Barrett,* 14 AD3d 369 [2005], quoting *People v Becker,* 215 NY 126, 144 [1915]), as with Specification II, Student D's testimony was not corroborated by any of the other students in the class that the investigator questioned, and the one student who was called as a witness at the hearing testified that petitioner told Student D to sit up in class because she was slouching in her chair.

Because Specification III should have been dismissed, the matter should be remanded for the imposition of a new penalty.

Education Law § 3020-a(4)(a) provides, in relevant part:

> "The written decision shall include the hearing officer's findings of fact on each charge, his or her conclusions with regard to each charge based on said findings and shall state what penalty or other action, if any, shall be taken by the employing board . . . In those cases where a penalty is imposed, such penalty may be a written reprimand, a fine, suspension for a

> fixed time without pay, or dismissal. In addition to or in lieu of the aforementioned penalties, the hearing officer, where he or she deems appropriate, may impose upon the employee remedial action including but not limited to leaves of absence with or without pay, continuing education and/or study, a requirement that the employee seek counseling or medical treatment or that the employee engage in any other remedial or combination of remedial actions."

Where a punishment has been imposed, the test is "whether such punishment is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness" (*Matter of Pell*, 34 NY2d at 233 [internal quotation marks omitted]). A sanction is shocking to one's sense of fairness if it "is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct, incompetence, failure or turpitude of the individual, or to the harm or risk of harm to the agency or institution . . ." (*id.* at 234).

Here, petitioner is being punished as if he were involved in a course of repetitive conduct when in fact the Hearing Officer dismissed Specification II and should have dismissed Specification III, which was not corroborated by any other student present and was based solely on the allegations of the discredited complaining witness who had lied about Specification II (*compare Lackow v Department of Educ.* (*or "Board"*) *of City of N.Y.*, 51 AD3d 563, 569 [2008] *supra*, [based on the prior warnings

and the repetitive nature of the teacher's conduct, the penalty of dismissal was not so disproportionate as to shock the conscience]; *Matter of Watt v E. Greenbush Cent. School Dist.*, __ AD3d __, ___, 2011 NY Slip Op 4795, *2-3 [3d Dept 2011] [termination was not shocking or disproportionate where the petitioner's disciplinary record included several prior situations where he was warned or disciplined for making inappropriate comments to students]).

Accepting that petitioner is guilty of Specification I, there was no evidence of pressure or physical contact. Unlike *Lackow* and *Watt*, petitioner, a tenured teacher, has a 17-year unblemished record and has always received satisfactory evaluations. In addition to teaching chemistry, he served as a college advisor and taught honors classes, as well as the Davinci program, involved herein. Petitioner also assisted students with the Intel Science Competition, coordinated Cardozo's Science Fair, supervised the Chemistry Regents Exams and hosted Cardozo's Annual Davinci Open House, seeking to recruit honor students to the school. Petitioner's principal and assistant principal noted that petitioner was an "asset, not only to this [chemistry] department, but also to this school." Given these circumstances, the penalty of termination shocks the conscience (*compare City School Dist. of City of N.Y. v McGraham* 75 AD3d 445 [2010]

[penalty of 90 day suspension without pay and reassignment to a different school was reinstated where a female teacher had engaged in ongoing inappropriate behavior with a male student]. *lv. denied* 16 NY3d 735 [2011]; *Nreu v New York City Dept. of Educ.*, 25 Misc 3d 1209[A] [2009] [one-year suspension was upheld where a male teacher engaged in ongoing inappropriate behavior with a female student]).

Lastly, while I am constrained to agree that, giving deference to the Hearing Officer's credibility determinations vis-à-vis Student A and petitioner, Specification I must be sustained, I note that the evidence is weak. The complaining witness had a motive to lie and to seek retribution. Petitioner had told her she was at risk of being dismissed from the Chemistry Honors (Davinci) program. There was no independent evidence that the incident occurred, although it is alleged to have taken place in an open, public area with students and faculty constantly going in and out. One witness, Ms. Rita Falkenstein, a biology lab specialist, came into the chemistry lab area where petitioner was tutoring Student A and sat at the same table with them for a long period of time. Testimony from her and other individuals who were present during this tutoring session failed to corroborate anything that would raise any suspicions that anything out of the ordinary had occurred. While

corroboration is not required, the lack of it here is particularly troubling. As to the sequence of events, the complaining witness told two diametrically different versions -- at one point saying the petitioner rubbed himself while he made his offending comments and at another point saying that he rubbed himself sometime later when the session was about to end.

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

ENTERED: SEPTEMBER 1, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, Renwick, Richter, JJ.

5238 Cannon Point North, Inc., Index 101157/04
Plaintiff-Appellant-Respondent,

-against-

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

State of New York,
Defendant.

- - - - -

5239 Cannon Point North, Inc.,
Plaintiff-Appellant,

-against-

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

State of New York,
Defendant.

- - - - -

5240 Cannon Point South, Inc., Index 120652/03
Plaintiff-Appellant,

-against-

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

- - - - -

5241 Cannon Point South, Inc.,
Plaintiff-Appellant-Respondent,

-against-

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

_____

Bracewell & Giuliani LLP, New York (Rachel B. Goldman of counsel), for Cannon Point North, Inc., appellant-respondent/appellant.

Gibbons P.C., New York (Robert J. MacPherson of counsel), for Cannon Point South, Inc., appellant/appellant-respondent.

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross and Bob Bailey of counsel), for respondents-appellants/respondents.

_____

Order, Supreme Court, New York County (Judith J. Gische, J.), entered July 2, 2010, which, insofar as appealed from as limited by the briefs, granted the municipal defendants' (collectively, the City) motion for summary judgment dismissing the second, eighth, and thirteenth causes of action and, in part, the fifth, ninth and twelfth causes of action, denied the City's motion for summary judgment dismissing the third cause of action, and denied plaintiff Cannon Point South, Inc.'s (CPS) cross motion for summary judgment in its favor on the second, third and thirteenth causes of action, and the second affirmative defense, and for summary judgment dismissing the third counterclaim, unanimously modified, on the law, to grant in part CPS's cross motion for summary judgment on its third cause of action and declare that it is entitled to perform repairs and maintenance during the usual business hours of the day, when no overtime would be charged, and otherwise affirmed, without costs. Order, same court and Justice, entered July 2, 2010, which, insofar as appealed from as limited by the briefs, granted the City's motion for summary judgment dismissing the fifth cause of action, in

part, and the sixth, ninth and nineteenth causes of action, granted plaintiff Cannon Point North, Inc.'s (CPN) cross motion for summary judgment, in part, on each of the seventh and eighth causes of action, denied both the City's motion and CPN's cross motion for summary judgment as to the second, third and twelfth causes of action, denied the City's motion for summary judgment dismissing the seventh and eighth causes of action, denied CPN's cross motion for summary judgment on its fourth, fifth, sixth, ninth and nineteenth causes of action and, upon a search of the record, awarded the City summary judgment dismissing the fourth cause of action, and denied CPN's cross motion for summary judgment in its favor on the second and third counterclaims, unanimously modified, on the law, to grant in part CPN's cross motion for summary judgment on its second cause of action and declare that it is entitled to perform repairs and maintenance during the usual business hours of the day, when no overtime would be charged, and otherwise affirmed, without costs. Orders, same court and Justice, entered October 21 and 22, 2010, which denied, in part, CPS's and CPN's respective motions to strike the City's demand for a jury trial, unanimously reversed, on the law, without costs, the motions granted and the jury demands struck in their entirety.

Plaintiffs Cannon Point North, Inc. (CPN) and Cannon Point

South, Inc. (CPS) are the owners of apartment buildings located respectively at 25 and 45 Sutton Place South. Part of the buildings rest upon a platform above the FDR Drive between East 54th Street and East 56th Street. The platform consists of two horizontal concrete slabs and steel columns encased in concrete; the upper slab forms the bottom of the buildings, while the lower slab forms the ceiling over the FDR Drive. This structure allows the buildings to sit atop the FDR with vehicular traffic passing underneath.

At issue in these actions, consolidated for appeal, is whether the City or plaintiffs are responsible for maintenance and repair of the structure.[1] In 2002 and 2003, inspections uncovered cracks in the concrete above the FDR and below the buildings, which posed a danger of concrete falling onto passing vehicles. In August 2003, the New York City Department of Buildings issued an emergency declaration, informing plaintiffs that unless they took immediate action to abate the violation, the City would perform the work and bill them. Because

[1] In an earlier appeal, this Court concluded that CPN is the owner of the understructure of its building, including the supporting columns (*Cannon Point N., Inc. v City of New York*, 46 AD3d 146, 154 [2007]). The Court, however, found issues of fact as to who is responsible for maintenance and repair (*id.*). Although not a party to that appeal, CPS agrees that it is bound by the Court's decision in that case.

plaintiffs did not correct the condition, the City hired contractors who performed the repairs between January and February, 2004.

In April 2005, the New York City Department of Transportation issued another emergency declaration, which warned that the continued deterioration of the buildings' understructure constitutes an emergency condition in need of immediate repair and is a threat to public safety. The declaration stated that despite prior emergency repairs performed by the City, the structure would present a hazard to the public until comprehensive repairs were made. In 2005 and 2006, the City retained an engineering firm and construction contractor to inspect and repair the structure; the work was performed in 2006 and 2007. These contracts were awarded through the City's emergency procurement rules thus bypassing the normal competitive bidding process.

Plaintiffs brought these actions alleging, inter alia, violations of due process, wrongful taking, trespass and breach of contract. Plaintiffs also sought declaratory relief, including declarations that the contracts entered into pursuant to the 2005 emergency declaration were illegal, and that plaintiffs are entitled to perform repairs and maintenance during the usual business hours of the day, when no overtime would be

charged. The City asserted counterclaims, including one seeking recoupment of the costs to repair the structure. Plaintiffs asserted various affirmative defenses, one of which averred that because the repair contracts were illegal, the City could not seek reimbursement. All parties moved for summary judgment and the motion court granted the motions in part and denied them in part. These appeals followed.

Plaintiffs seek summary judgment dismissing the City's counterclaim for recoupment of the costs of repairs made pursuant to the 2005 emergency declaration. Plaintiffs maintain that the contracts entered into between the City and its contractors were illegal because the City violated procurement procedures requiring competitive bidding. Since the contracts were illegal, plaintiffs argue, the City cannot recover any of the funds spent on the repairs. The City opposes summary judgment and contends that emergency procurements were necessary due to the dangerous condition of the structures.[2]

Plaintiffs maintain there was no emergency sufficient to circumvent competitive bidding. In support, plaintiffs point to evidence that the City was aware of the progressive deterioration of the understructure long before the emergency contracts were

[2] The City does not seek summary judgment in its favor on these counterclaims.

entered into. Plaintiffs also note that although the emergency was declared in 2005, the repair work did not begin until the following year. In response, the City submitted affidavits showing that it had ample reason to believe that the matter presented a danger to the public and needed repair as quickly as possible. There was evidence in the record that the failure to replace the concrete likely would lead to greater deterioration, creating a high probability of danger to motorists traveling on the FDR Drive. In addition, the City contends that the remedial work here was complicated and would have required multiple procurements to obtain engineering services and a construction contractor, leading to further delay.

In light of the interests at stake — not only property but also life and safety — we conclude that the record below presents issues of fact as to whether an emergency existed and whether the scope of the work performed was necessary to remediate the emergency (*see e.g. Matter of 4M Holding Co., Inc. v Diamante*, 215 AD2d 383, 384 [1995] [town did not improperly bypass competitive bidding procedures where an urgent health and safety hazard existed on the petitioner's property]). Because of these issues of fact, we need not decide whether, if the contracts were illegal, the City would be barred from seeking any reimbursement

at all.[3]

The claim alleging that the emergency declaration procedures violate due process on their face was properly dismissed. Likewise, the court was correct in dismissing the substantive due process claims. To succeed on a substantive due process claim, a plaintiff must demonstrate that the challenged action was "arbitrary, conscience-shocking, or oppressive in a constitutional sense," rather than merely "incorrect or ill-advised" *(Kaluczky v City of White Plains*, 57 F3d 202, 211 [2d Cir 1995] [internal quotation marks omitted]). The City's actions in this case do not rise to that level. Even if the condition of the concrete did not create an emergency sufficient to bypass the necessity for competitive bidding, there is no dispute that the understructure was, in fact, in poor condition and in need of repair. Thus, the record presents no genuine issue of fact on whether the City's actions were arbitrary or shocking to the conscience (*see Catanzaro v Weiden*, 188 F3d 56, 64 [2d Cir 1999]).

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[3] Those causes of action seeking a declaratory judgment that the contracts entered into pursuant to the 2005 emergency declaration were illegal were properly dismissed on statute of limitations grounds. Plaintiffs' complaints were brought long after the four-month period for challenging the City's decision to award the contracts (*see* CPLR 217), and plaintiffs have failed to show that the claims relate back to earlier complaints.

Plaintiffs also assert that the actions taken by the City pursuant to the 2003 and 2005 emergency declarations violated due process as applied and constituted a wrongful taking of property. The motion court properly found that, to the extent these causes of action arise from the 2003 declaration, they are time-barred.[4] There is no merit to plaintiffs' contention that the claims relate back to earlier complaints. Nor have plaintiffs sufficiently alleged a continuing pattern of activity so as to toll the statute of limitations. Neither plaintiffs nor the City is entitled to summary judgment on these causes of action to the extent they relate to the 2005 emergency declaration. For the reasons stated earlier, issues of fact exist as to whether the City properly exercised its emergency powers.

The motion court correctly found that, under the relevant agreements, plaintiffs have the right to perform repairs and maintenance during the usual business hours of the day, when no overtime would be charged. The court, however, denied plaintiffs' cross motions for summary judgment so declaring.

[4] The City does not assert that the statute of limitations bars the claims insofar as they relate to the 2005 declaration.

Thus, we modify to grant the cross-motions in part and to declare accordingly. We find the City's argument on this issue unpersuasive. The agreements are clear (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162-163 [1990]).

By separate motions, each plaintiff moved to strike the City's demand for a jury trial on its counterclaims and plaintiffs' main claims. The City's first counterclaim seeks a declaratory judgment that plaintiffs are the owner of the understructure. The second counterclaim seeks a declaration that plaintiffs are responsible for the maintenance and repair of the understructure. The third counterclaim is for money damages and seeks recoupment of the costs to repair the understructure. The motion court found that the City had waived a jury trial on these three counterclaims.[5]

The motion court should have granted plaintiffs' motions to strike the City's jury demand on the main legal claims. "[W]here [a] plaintiff brings a claim triable by jury and the defendant asserts a related counterclaim not triable by jury, defendant thereby waives a jury trial in all respects, including on the

[5] The City has not appealed from the motion court's ruling on this issue.

main claim" (*Hudson View II Assoc. v Gooden*, 222 AD2d 163, 167 [1996]). The motion court applied an incorrect standard in determining that the City's counterclaims were not related to the main legal claims. The test is not whether the equitable counterclaims are inconsistent with plaintiffs' claims, but rather, whether they arise from the same alleged wrong as the legal claims (*see Zimmer-Masiello, Inc. v Zimmer, Inc.*, 164 AD2d 845, 846 [1990]). Here, the City's counterclaims, which seek a declaration as to ownership and maintenance responsibilities, are related to and arise from the same transactions as plaintiffs' remaining causes of action. Plaintiffs' claims and the counterclaims, some of which are equitable in nature, all arise out of the 1941 and 1957 agreements and the repairs undertaken by the City. For example, plaintiffs' contention that the City trespassed and wrongfully took their property cannot be separated from the City's counterclaims that plaintiffs own the property and must maintain it. Thus, because the City has asserted counterclaims that arise out of the same transaction as

plaintiffs' main legal claims, it has waived its right to a jury trial on all claims.

We have considered the parties' remaining requests for affirmative relief and find them without merit.

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

ENTERED: SEPTEMBER 1, 2011

CLERK

Saxe, J.P., DeGrasse, Freedman, Abdus-Salaam, Manzanet-Daniels, JJ.

5255 In re Mikhail Bashmet, Index 104836/09
Petitioner-Appellant,

-against-

Tino Hernandez, etc.,
Respondent-Respondent.

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William E. Leavitt, New York, for appellant.

Sonya M. Kaloyanides, New York (Seth E. Kramer of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Jane S. Solomon, J.), entered February 5, 2010, which denied the petition to annul New York City Housing Authority's (NYCHA) determination, dated December 3, 2008, denying petitioner's grievance seeking to succeed to the tenancy of his deceased grandmother as a remaining family member (RFM), and dismissed this proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

NYCHA's determination that petitioner does not qualify for RFM status has a rational basis and is not affected by an error of law (*see* CPLR 7803[3]). NYCHA occupancy standards do not permit an additional person, not part of a domestic union, to join a household in a one-bedroom apartment. Thus, even if management had given the tenant the relevant form to request

permission for petitioner's residence, such request would nonetheless have been denied based on the occupancy standards.

Petitioner failed to preserve his arguments that the matter should be remanded for a determination as to whether NYCHA should have offered his grandmother a transfer to a larger apartment or whether the apartment was large enough for him and his grandmother, because he did not raise them at the administrative hearing (*see Matter of Torres v New York City Hous. Auth.*, 40 AD3d 328, 330 [2007]). In any event, a remand is not warranted; because petitioner's grandmother denied that petitioner occupied the apartment, NYCHA had no reason to consider the apartment's size or offer a transfer to a larger apartment.

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

ENTERED: SEPTEMBER 1, 2011

CLERK

Tom, J.P., Catterson, Moskowitz, Freedman, Richter, JJ.

5338 The People of the State of New York, Respondent, Ind. 5516/08

-against-

Robert Thomas, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered October 22, 2009, convicting defendant, after a jury trial, of assault in the first degree (two counts), assault in the second degree, and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 43 years, unanimously modified, on the facts, to the extent of vacating the convictions of assault in the first and second degrees and dismissing those counts of the indictment, and otherwise affirmed.

The assault convictions were against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant was charged with assault in the first and second degrees (Penal Law §§ 120.10[4]; 120.05[6]) solely on the theory that "[i]n the course of and in furtherance of the commission" of

the felony of second-degree weapon possession, he caused serious physical injury or physical injury to the complainants.

The evidence at trial established that defendant fired several shots for no known reason, and apparently at random. Defendant wounded three persons on the street who were strangers to him, and walked away. The evidence did not establish that defendant shot the victims "in furtherance" of the underlying crime of weapon possession (*see People v Williams*, 255 AD2d 610 [1998], *lv denied* 93 NY2d 880 [1999]; *see also Langston v Smith*, 630 F3d 310, 315-320 [2d Cir 2011]). There was no evidence that defendant shot the victims to prevent them from disarming him, or that the shooting otherwise "furthered" the weapon possession.

We perceive no basis for reducing the sentence on the weapon possession conviction.

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

ENTERED: SEPTEMBER 1, 2011

CLERK

Tom, J.P., Catterson, Moskowitz, Freedman, Richter, JJ.

5351 Albert Rodriguez, Index 300032/09
Plaintiff-Appellant,

-against-

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

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Tracie A. Sundack & Associates, L.L.C., White Plains (Albert Pizzirusso of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about May 12, 2010, which dismissed the complaint for failure to state a claim, unanimously affirmed, without costs.

The complaint alleges that plaintiff slipped and fell on a wet floor at the Anna M. Kross Center correctional facility on Rikers Island, where he was incarcerated. Plaintiff also alleges that the dangerous condition that led to his accident was caused by defendants' "protracted" failure to repair leaks in the roof, ceiling, and pipes of the Center, and that defendant Valerie Oliver, the Warden of the Center, knew about the leaks but failed to address them. Plaintiff claims that defendants were deliberately indifferent to these "conditions of confinement which imposed a substantial risk of serious injury to plaintiff."

Moreover, plaintiff alleges, defendants failed to provide him with immediate medical attention after he slipped and fell, thereby causing him additional pain and suffering. As a result, plaintiff claims, defendants violated his civil rights under the Eighth and Fourteenth Amendments to the United States Constitution.

The motion court correctly found that plaintiff fails to state a cause of action under 42 USC § 1983, which provides a civil claim for damages against a person who, acting under color of state law, deprives another of a right, privilege or immunity secured by the Constitution (*see Gomez v Toledo*, 446 US 635, 638 [1980]). "[T]o state a civil rights claim under [section] 1983, a complaint must contain specific allegations of fact which indicate a deprivation of constitutional rights . . ." (*Alfaro Motors, Inc. v Ward*, 814 F2d 883, 887 [2d Cir 1987]). The Eighth Amendment to the Constitution, which applies to the States through the Due Process Clause of the Fourteenth Amendment, prohibits the imposition of cruel and unusual punishment and guarantees prisoners humane conditions of confinement (*see Farmer v Brennan*, 511 US 825, 832 [1994] ["The Constitution does not mandate comfortable prisons, but neither does it permit inhumane ones . . ."] [internal quotation marks and citation omitted]).

An inmate must meet two requirements to state a claim under section 1983 that a prison official violated his or her Eighth Amendment rights (*Farmer*, 511 US at 834). First, the inmate must allege a deprivation that is, objectively, "sufficiently serious" (*id.* [internal quotation marks omitted]). A claim for failure to prevent harm is sufficiently serious if the inmate alleges an "unquestioned and serious deprivation of basic human needs" or denial of "the minimal civilized measure of life's necessities" (*Rhodes v Chapman*, 452 US 337, 347 [1981]). Second, the inmate must also show that the defendants acted with "deliberate indifference," which requires more than a showing of mere negligence (*see Farmer*, 511 US at 834-835 [internal quotation marks omitted]; *see also Cuoco v Moritsugu*, 222 F3d 99, 106 [2d Cir 2000]).

The complaint fails to set forth allegations of fact which indicate that plaintiff was deprived of a constitutional right. Courts have regularly held that a prisoner cannot base a section 1983 claim on the allegation of a wet or slippery prison floor because that condition does not constitute a sufficiently serious deprivation (*e.g. Johnson v New York City [Corp. Counsel]*, 2011 WL 1795284, *4-5, 2011 US Dist LEXIS 47679, *12-13 [SD NY 2011] [dismissing claim brought by inmate at Anna M. Kross Center, who alleged that he slipped and fell twice on a floor that was

"always" wet from water leaking for five months]; *Carr v Canty*, 2011 WL 309667, *2, 2011 US Dist LEXIS 5120, *5-6 [SD NY 2011] [inmate at Anna M. Kross Center]; *Sylla v City of New York*, 2005 WL 3336460, *3, 2005 US Dist LEXIS 31817, *9-10 [ED NY 2005] [inmate at Rikers Island]). Moreover, "courts have held that allegations of wet conditions leading to a slip-and-fall will not support a [s]ection 1983 claim even where . . . the plaintiff . . . alleges that the individual defendants had notice of the wet condition but failed to address it" (*see Edwards v City of New York,* 2009 WL 2596595, *3, 2009 US Dist LEXIS 74940, *7-8 [SD NY 2009] [citing cases]).

We do not discern any factual allegations that conditions at the Center were inhumane or unreasonably risky. At best, the complaint states a cause of action under State law for negligence, which plaintiff concedes is time-barred and which, in any event, is insufficient to support a section 1983 claim (*see Jennings v Horn,* 2007 WL 2265574, *5, 2007 US Dist LEXIS 57941, *18 [SD NY 2007]). Plaintiff's claim that defendants were deliberately indifferent to the slippery condition of the floor amounts to a legal conclusion that is not supported by any allegations of fact. Finally, the allegation that defendants failed to provide plaintiff with immediate medical attention to treat his unspecified injuries does not support either an

inference that "the failure to treat [his] condition could [have] result[ed] in further significant injury or the unnecessary and wanton infliction of pain" (*Chance v Armstrong*, 143 F3d 698, 702 [2d Cir 1998] [internal quotation marks omitted]), or that "prison officials intentionally denied or delayed access to medical care" (*Pappanikolaou v New York City*, 2005 WL 1661649, *12, 2005 US Dist LEXIS 39201, *36 [ED NY 2005]).

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

ENTERED: SEPTEMBER 1, 2011

CLERK

Andrias, J.P., Friedman, Renwick, Richter, Manzanet-Daniels, JJ.

3323 Ophelia Johnson, Index 7582/99
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant.

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Wallace D. Gossett, Brooklyn (Lawrence Heisler of counsel), for appellant.

Alexander J. Wulwick, New York, for respondent.

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Judgment, Supreme Court, Bronx County (Howard H. Sherman, J.), entered March 25, 2009, reversed, on the law, without costs, the judgment vacated and the matter remanded for a new trial limited to the issue of plaintiff's comparative negligence.

Opinion by Richter, J. All concur except Andrias, J.P. and Friedman, J. who dissent in part in an Opinion by Friedman, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David Friedman
Dianne T. Renwick
Rosalyn H. Richter
Sallie Manzanet-Daniels, JJ.

3323
Index 7582/99

_____x

Ophelia Johnson,
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of the Supreme Court, Bronx County (Howard H. Sherman, J.), entered March 25, 2009, upon a jury verdict, and bringing up for review orders, same court and Justice, entered September 10, 2007 and on or about July 16, 2008, which, inter alia, denied defendant's posttrial motion to dismiss for failure to make out a prima facie case and, after a hearing, denied defendant's application for a collateral source offset pursuant to CPLR 4545(a).

Wallace D. Gossett, Brooklyn (Lawrence Heisler and Lawrence A. Silver of counsel), for appellant.

Alexander J. Wulwick, New York, for respondent.

RICHTER, J.

On the morning of May 20, 1998, plaintiff, then a 14-year veteran of the New York City Police Department Transit Bureau, was assigned to conduct a Train Order Maintenance Sweep (TOMS) of subway cars entering the 143rd Street station in the Bronx. A TOMS sweep consists of looking into each car of the train and checking for suspicious packages. After the train pulled into the station, plaintiff approached the conductor and told him that she and two other officers would be conducting a TOMS sweep. Plaintiff proceeded to the rear of the train while her fellow officers went to the front and middle.

Plaintiff testified that she was trained to check each car by standing with her left foot on the train, her right foot on the platform and her back against the doorway. She was in this stance inspecting the last car when the conductor closed the doors. As the doors were closing, plaintiff waited a second to see if the conductor was going to open them. She then put her left hand across her chest, closed her eyes, and pulled herself out of the doorway, falling into the wall or chair on the platform. During the incident, the train never moved.

Plaintiff brought this negligence action against defendant New York City Transit Authority, and the case proceeded to trial. At the close of the evidence, the trial court denied defendant's

request to instruct the jury on comparative negligence. The jury found defendant liable and awarded plaintiff $700,000 for past and future pain and suffering, $500,000 for past loss of earnings and $1,200,000 for future loss of earnings. After the trial, defendant moved, inter alia, to dismiss the complaint for failure to make out a prima facie case. The trial court denied the motion and also denied, after a hearing, defendant's application for a collateral source reduction of the jury's damages award. Defendant now appeals from the judgment, arguing that the evidence at trial did not establish a prima facie case of negligence, that the court should have instructed the jury on comparative negligence, and that the court should have granted a collateral source offset.

We find that plaintiff submitted sufficient proof to make out a prima facie case that the accident was caused by the conductor's negligence. Plaintiff alerted the conductor of the TOMS sweep, yet the conductor closed the doors before the sweep was concluded and without any signal or announcement. Accordingly, the jury could have found that the conductor, aware that plaintiff was still in the process of conducting the sweep, should have checked or given some announcement before closing the doors (*see Khalona v New York City Tr. Auth.,* 215 AD2d 630 [1995]).

However, the court erred in declining to instruct the jury on comparative negligence. A charge on comparative fault should be given "if there is a valid line of reasoning and permissible inferences from which rational people can draw a conclusion of [the plaintiff's] negligence on the basis of the evidence presented at trial" (*Bruni v City of New York*, 2 NY3d 319, 328 [2004]). "[W]hether a plaintiff is comparatively negligent is almost invariably a question of fact and is for the jury to determine in all but the clearest cases" (*Shea v New York City Tr. Auth.*, 289 AD2d 558, 559 [2001]).

Here, a reasonable jury could have inferred from plaintiff's own testimony that she failed to exercise due care and that her actions, even to a minimal degree, increased the risk of injury to herself in the station. Plaintiff testified that as the doors closed, instead of immediately moving out of the way, she waited for a second to see if the conductor would open the doors. Plaintiff offered no testimony explaining why she believed this would occur or why she did not immediately step onto the platform or into the train, either of which would have been a logical response. Thus, a jury could have reasonably found that plaintiff's delay contributed to her getting caught in the doors.

Plaintiff also testified that she closed her eyes before pulling herself out of the doorway. Based on this testimony, a

jury could find that she was at least partially at fault for not being more attentive in the face of imminent danger. A jury could also conclude that the fact that plaintiff's eyes were closed contributed in some manner to her falling down against the wall or chair on the platform. Furthermore, at no time did plaintiff try to alert the conductor or her fellow officers that she needed help. She did not call out to them, nor did she try to wave them down with her right hand, which, according to her testimony, was outside the train.[1]

Plaintiff's argument that, as a matter of law, the jury could not have found comparative negligence rests on her testimony that she was trained to conduct a TOMS sweep by standing in the doorway in the particular manner she used here. Her training did not, however, address the prudence of her response once she realized the doors were beginning to close. Moreover, the jury was not required to accept in its entirety plaintiff's testimony about her training, especially because she offered only generalities about it. Since the record does not reflect a total absence of comparative negligence as a matter of law, the trial court should have submitted that issue to the jury

[1] Nor did plaintiff explain how, if she had enough room to move her left arm from her side up to her chest, she did not have enough clearance to step sideways and put her left leg onto the platform.

(*see Delemos v White*, 173 AD2d 353 [1991]).

Because the court failed to instruct the jury on comparative fault, the matter should be remanded for a new trial. However, the new trial shall be limited to that issue. In *Wright v Riverbay Corp*. (82 AD3d 444 [2011]), a case directly on point, this Court recently reversed a judgment because the lower court failed to charge the jury on comparative negligence. Instead of ordering an entirely new trial, we remanded the matter for a trial limited to the issue of whether plaintiff was comparatively negligent (*see also Delemos*, 173 AD2d at 353). We reach the same result here.

Citing *Thoma v Ronai* (82 NY2d 736 [1993]), the dissent argues that the matter should be remanded for an entirely new trial and that defendant should be given a second chance to contest its liability. However, *Thoma* arose in an entirely different procedural context and addressed only the question of whether the plaintiff had satisfied her burden on summary judgment. Here, in contrast, a full trial was held, and the jury concluded that defendant was negligent and that defendant's negligence was a substantial factor in bringing about plaintiff's injuries. Because we now find that the evidence at trial was sufficient to make out a prima facie case of defendant's negligence, there is no reason for a new trial to revisit this

issue. The dissent's contention that the evidence "raises issues concerning [defendant's] fault" and that "a triable issue exists as to defendant's negligence" fails to recognize the jury's finding that defendant was negligent. The only triable issue remaining here is the extent to which, if at all, plaintiff's own negligence may reduce the damages awarded by the jury.

Lopez v Garcia (67 AD3d 558 [2009]), which also arises in the summary judgment context, presents a different legal issue and, in any event, is inconsistent with this Court's more recent precedent in *Gonzalez v ARC Interior Constr.* (83 AD3d 418 [2011]). In *Gonzalez*, we affirmed the motion court's grant of partial summary judgment to the plaintiff on the issue of the defendant's liability. We held that because comparative negligence is not a complete bar to recovery, the plaintiff was entitled to summary judgment as to defendant's negligence even though there were issues of fact as to her own culpable conduct (*id.* at 419; *see also Strauss v Billig*, 78 AD3d 415 [2010], *lv dismissed* 16 NY3d 755 [2011]; *Tselebis v Ryder Truck Rental, Inc.*, 72 AD3d 198, 200 [2010]).

In finding that an entirely new trial is necessary, the dissent argues that the court's failure to charge comparative negligence was plaintiff's fault and that it would be unfair to preclude defendant from challenging its own liability. However,

the proper scope of the new trial has nothing to do with which party bears responsibility for the court's error. As for fairness, the dissent fails to appreciate that granting an entirely new trial would be unfair to plaintiff because it would give defendant, which already lost on this question at a jury trial, an unwarranted second chance to contest its liability. We do not share the dissent's concern that the playing field will be unfairly tilted by charging the jury at the new trial that defendant's negligence has already been determined. Any potential prejudice to defendant can be easily averted by an appropriate jury instruction that makes clear that the extent of defendant's liability and plaintiff's comparative fault are for the jury to decide. Furthermore, special interrogatories, carefully tailored to the circumstances of this case, will avoid any prejudice to defendant. Finally, at a comparative negligence trial, defendant will have ample opportunity to show, if it can, that the accident was primarily plaintiff's fault.

After the trial, the court held a hearing on defendant's application, pursuant to CPLR 4545(a), to offset the jury's loss of earnings award by the amount of plaintiff's disability pension.[2] The evidence at the hearing established that plaintiff

[2] At the time of trial, the relevant language in subdivision (a) was included in subdivision (c). The statute was

joined the police force in July 1984. In April 2002, approximately two years before she would have been entitled to a regular service retirement pension, she was granted an accidental disability retirement pension based on her line-of-duty injury. Plaintiff's disability pension was equivalent to three quarters of her salary, was not subject to state or federal taxes, and, like the regular service retirement pension, was payable for life. In a written decision, the trial court denied the application, finding that defendant did not satisfy its burden of showing that the disability pension replaced the loss of earnings award.

In a personal injury action, the court must reduce the damages award "if . . . any element of the economic loss encompassed in the award was or will be replaced, in whole or in part, from a collateral source" (*Oden v Chemung County Indus. Dev. Agency*, 87 NY2d 81, 83-84 [1995]; CPLR 4545[a]).[3] An offset is permitted "only when the collateral source payment represents reimbursement for a particular category of loss that corresponds

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subsequently renumbered and partially amended.

[3] The defendant must also show a high probability that the plaintiff will continue to be eligible for the collateral source payment in question. The trial court concluded that defendant met its burden in this regard, a finding not challenged on this appeal.

to a category of loss for which damages were awarded" (*id.* at 84). In other words, there must be a match between the item of economic loss awarded by the jury and the collateral source payment. Because CPLR 4545(a) is in derogation of the common law, its provisions must be strictly construed (*id.* at 86), and the defendant has the burden of establishing entitlement to a collateral source offset by clear and convincing evidence (*Kihl v Pfeffer*, 47 AD3d 154, 163-64 [2007]; *Young v Knickerbocker Arena*, 281 AD2d 761, 764 [2001]).

The trial court correctly found that defendant did not meet its burden of showing that the loss of earnings award should be offset by the amount of plaintiff's accidental disability retirement pension. Defendant does not dispute that under *Oden* it bears the burden of showing that there is a "direct correspondence" between an item of economic loss awarded by the jury and a collateral source payment (87 NY2d at 87). Defendant argues, however, that a disability pension can only be construed as a replacement for the wages plaintiff would have earned if she had not been injured and had remained on the police force.

However, *Oden* rejected such a broad rule and declined to allow the disability pension there to offset the jury's lost earnings award. The mere fact that the benefit at issue here is termed a disability pension does not end the inquiry; *Oden*

requires that there be a direct match between the benefit and the loss of earnings award. Here, there was insufficient evidence in the record to meet defendant's burden of establishing that this particular disability pension was meant to replace plaintiff's lost earnings. Nor does defendant identify any statute or legislative history to show that the pension received by plaintiff was intended to be a substitute for lost earnings as opposed to an early retirement benefit conferred upon police officers accidentally injured in the line of duty. Although certain sections of the Administrative Code of the City of New York relate to disability pensions for New York City police officers (*see e.g.* §§ 13-252 and 13-254), neither the briefs in the trial court nor the briefs submitted to this Court identify these statutes as governing plaintiff's disability pension. We cannot assume that these provisions are applicable, and, in the absence of any citation to them by defendant, we decline to speculate.

Although this Court must take judicial notice of statutes, defendant has not explained which of the myriad pension provisions applies to this plaintiff. The judicial notice question here is particularly complex in light of the fact that plaintiff was previously employed as a transit police officer by the New York City Transit Authority. Thus, it is not clear which

pension provisions of the Administrative Code or other statutes might apply here.

We reached the same conclusion and found that the defendant had failed to meet its burden of showing that the disability pension replaced the jury's lost earnings award in *Gonzalez v Iocovello* (249 AD2d 143 [1998], *affd on other grounds* 93 NY2d 539 [1999]). To the extent this Court's decision in *Iazzetti v City of New York* (216 AD2d 214 [1995], *appeal after remand* 256 AD2d 140 [1998], *revd on other grounds* 94 NY2d 183 [1999]) purports to stand for the broad proposition that disability retirement benefits always constitute an offset of a lost earnings award, it is inconsistent with *Oden*, which is the controlling precedent.

We do not hold that *Oden* sets forth a general rule that disability pensions can never be a substitute for lost earnings. We merely conclude that, in this case, defendant did not meet its heavy burden to show its entitlement to an offset. *Oden* instructed that "[t]he problem of matching up a collateral source to an item of loss is simply a matter of proof and factual analysis" (87 NY2d at 89). Here, defendant's proof falls far short of the clear and convincing evidence necessary to support a collateral source offset in this case (*see id.* at 88-89; *Gonzalez*, 249 AD2d at 144).

Accordingly, the judgment, Supreme Court, Bronx County

(Howard H. Sherman, J.), entered March 25, 2009, upon a jury verdict, awarding plaintiff the principal sums of $700,000 for past and future pain and suffering, $500,000 for past loss of earnings and $1,200,000 for future loss of earnings, and bringing up for review orders, same court and Justice, entered September 10, 2007 and on or about July 16, 2008, which, inter alia, denied defendant's posttrial motion to dismiss for failure to make out a prima facie case and, after a hearing, denied defendant's application for a collateral source offset pursuant to CPLR 4545(a), should be reversed, on the law, without costs, the judgment vacated and the matter remanded for a new trial limited to the issue of plaintiff's comparative negligence.

All concur except Andrias, J.P. and Friedman, J. who dissent in part in an Opinion by Friedman, J.

FRIEDMAN, J. (dissenting in part)

I agree with the majority that the trial court erred in failing to submit to the jury the issue of plaintiff's comparative negligence. In my view, however, at the new trial to be held on remand, both defendant's liability and plaintiff's comparative negligence should be at issue. That is to say, one jury should consider, afresh and in a single deliberation, each party's responsibility, if any, for the accident. The previous jury's determination of defendant's liability, rendered without consideration of plaintiff's conduct, should play no role. Where fault must be apportioned between two or more parties, the issue of each party's liability is inextricably intertwined with the apportionment itself. Moreover, it can reasonably be anticipated that the jurors at the new trial will be subtly prejudiced against defendant if they are instructed to begin by assuming that defendant was at fault and only then to consider whether plaintiff herself bears any degree of responsibility for her injuries. By the same token, it is reasonable to infer that a liability verdict against defendant was rendered more likely at the first trial by the court's decision not to submit for the jury's consideration the issue of plaintiff's comparative negligence. Since the evidence raises issues concerning each party's fault, fairness demands that the liability phase of this

matter in its totality -- encompassing defendant's liability, plaintiff's comparative negligence, and the parties' relative culpability -- be submitted to the same factfinder at one trial.[1]

Further, I cannot see that plaintiff should be heard to complain of the supposed inefficiency of retrying the issue of defendant's liability. Plaintiff herself bears a significant measure of responsibility for that inefficiency, as no retrial would have been needed but for the erroneous ruling at the first trial, made at plaintiff's behest, that the jury would not be charged on comparative negligence. In any event, as a practical matter, the new jury will not be able to apportion fault between the parties unless it is presented with evidence of defendant's conduct. In other words, the parties' relative fault cannot be determined by consideration of plaintiff's conduct alone. Given the interdependency of the proofs bearing on the issues of liability and apportionment, withholding the issue of defendant's liability from the jury apportioning fault will not realize any significant judicial economy.[2]

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[1]I do not share the majority's confidence that "[a]ny potential prejudice to defendant" at the new trial can be "easily averted" by an unspecified "appropriate jury instruction" and similarly unspecified "special interrogatories."

[2]I note that this panel is in unanimous agreement that there is no need to retry the issue of damages, which does yield a considerable judicial economy and savings to the parties.

Contrary to the majority's assertion, I do not "fail[] to recognize" the first jury's liability finding against defendant. Rather, I consider that finding to be tainted by the court's legal error in withholding the comparative negligence issue from the jury. I respectfully disagree with the majority's apparent assumption that the error in failing to issue a comparative fault charge had no effect on the jury's consideration of defendant's liability. Further, the majority's concern that it would somehow be "unfair" to plaintiff to order a retrial of the issue of defendant's liability overlooks the fact that a new trial is required because of a legal error that the trial court made at plaintiff's behest (that is, the court ruled that comparative fault would not be charged upon plaintiff's objection to defendant's request for such a charge). In cases where a legal error has occurred at a trial (usually, as here, at the behest of the winning party), appellate courts routinely give the losing party, notwithstanding that it "already lost on [the] question at a jury trial," a "second chance" to make its case at a new trial. I see nothing unfair or unusual in following the same practice in this case.

In my view, this case is controlled by the Court of Appeals' affirmance of this Court's decision in *Thoma v Ronai* (189 AD2d 635 [1993], *affd* 82 NY2d 736 [1993]), which we recently followed

in *Lopez v Garcia* (67 AD3d 558 [2009]) and which is followed as binding precedent in the Second Department (*see e.g. Roman v A1 Limousine, Inc.*, 76 AD3d 552, 553 [2010]). In the incident underlying *Thoma*, the defendant's van struck the plaintiff, a pedestrian, as she was crossing an intersection. This Court affirmed the denial of the plaintiff's summary judgment motion, stating:

> "Although defendant did not dispute plaintiff's averment that she was lawfully in the crosswalk when he struck her with his van as he turned left, summary judgment was properly denied since a failure to yield the right of way does not ipso facto settle the question of whether the other party was herself guilty of negligence" (182 AD2d at 635-636).

The Court of Appeals affirmed this Court's order with the following explanation:

> "The submissions to the nisi prius court . . . demonstrate that [plaintiff] may have been negligent in failing to look to her left while crossing the intersection. Plaintiff's concession that she did not observe the vehicle that struck her raises a factual question of her reasonable care. Accordingly, plaintiff did not satisfy her burden of demonstrating the absence of any material issue of fact and the lower courts correctly denied summary judgment" (82 NY2d at 737).

While this appeal, unlike *Thoma*, is taken from a judgment after trial, the implication of *Thoma* for this case is that defendant's liability should be retried. The majority's remand for a new trial solely as to comparative negligence yields the

same result found unacceptable in *Thoma* -- submission of liability and apportionment issues to the factfinder in bits and pieces rather than as an integrated whole. Indeed, in this case, where it is undisputed that a triable issue exists as to defendant's negligence, there is even less justification for trying comparative negligence in isolation than in *Thoma*, where the pretrial record established the defendant's negligence as a matter of law.

The cases the majority relies upon in limiting the new trial to the issue of comparative negligence do not support its refusal to follow *Thoma*. To the extent the majority's position is consistent with *Delemos v White* (173 AD2d 353 [1991]), any precedential authority of *Delemos* on this issue is substantially vitiated by the Court of Appeals' intervening *Thoma* decision. Similarly, I would respectfully decline to follow our decisions in *Strauss v Billig* (78 AD3d 415 [2010], *lv dismissed* 16 NY3d 755 [2011]) and *Tselebis v Ryder Truck Rental, Inc.* (72 AD3d 198 [2010]) on this issue on the ground that *Strauss* and *Tselebis* simply cannot be reconciled with *Thoma*.[3] Finally, in each of our two decisions of this year on which the majority relies, the

[3]In fact, the Second Department in *Roman v A1 Limousine* (*supra*) specifically noted the conflict between *Thoma* and *Tselebis* on this issue and determined to follow the former (76 AD3d at 553).

precise issue of whether the existence of a triable issue as to the plaintiff's comparative fault required a trial on the issue of the defendant's liability was not even presented by the parties for resolution on the appeal.[4]

Turning to the matter of the amount of recoverable damages, I concur with the majority insofar as it affirms the trial court's order denying defendant's application for a collateral source offset against the award of economic damages pursuant to CPLR 4545(c) (now CPLR 4545[a]) based on plaintiff's receipt of a line-of-duty accident disability retirement pension equal to three quarters of her last annual salary (*see* Administrative Code

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[4]An examination of the briefs in *Wright v Riverbay Corp.* (82 AD3d 444 [2011]) shows that the *Wright* defendant, in appealing to this Court, never argued that the trial court's erroneous failure to charge comparative negligence required a new trial on the issue of defendant's liability as well as on the issue of comparative negligence. Given that the *Wright* defendant was not requesting a new trial as to its own liability, the majority is simply incorrect in asserting that *Wright* is "directly on point." In *Gonzalez v ARC Interior Constr.* (83 AD3d 418 [2011]), it was the plaintiff, not the defendants, who took the appeal from an order that, while granting her summary judgment as to liability, directed that the damages trial encompass the issue of comparative fault. Since the *ARC Interior* defendants had not filed a notice of appeal, there would have been no basis to grant them affirmative relief on this issue even if they had requested it (*see e.g. 61 W. 62 Owners Corp. v CGM EMP LLC*, 16 NY3d 822, 823 n [2011]; *Hecht v City of New York*, 60 NY2d 57, 61-62 [1983]). Accordingly, the statement in *ARC Interior* approving the *Tselebis* holding (83 AD3d at 419) concerned an issue that was not before the Court.

of City of N.Y. §§ 13-252, 13-258[3]).[5] I arrive at this conclusion, however, by a route different from that taken by the majority.

In *Oden v Chemung County Indus. Dev. Agency* (87 NY2d 81 [1995]), the Court of Appeals established the rule that an offset against economic damages under CPLR 4545 is available only where "the collateral source payment represents reimbursement for a particular category of loss that corresponds to a category of loss for which damages were awarded" (*id.* at 84). The majority apparently believes that *Oden*, by itself, dictates the result on the collateral source issue in this case. I disagree. Although the Court of Appeals held that the private-sector disability pension benefits received by the plaintiff in *Oden* could not be set off against the jury's lost-earnings award (but were properly set off against the award for lost ordinary pension benefits), the holding was based on the particular characteristics of that pension. Specifically, the Court of Appeals found that the pension in *Oden* "d[id] not necessarily correspond to any future

[5]I refer to the governing provision by its former designation (CPLR 4545[c]) because the Legislature specified that the amendment redesignating the provision as CPLR 4545(a) applies only to cases commenced on or after the amendment's effective date (*see* L 2009, ch 494, pt F, § 9). In any event, the amendment did not effect any change in the substantive law applicable to this case.

earning capacity plaintiff might have had" because, inter alia, the plaintiff "would have been free to earn income from his labor in other capacities without loss of his disability retirement pension benefits" (87 NY2d at 88-89).[6]

Oden did not set forth any general rule that disability pensions do not compensate for lost earning capacity; did not require a defendant seeking to use disability pension benefits as an offset to present testimony about the subjective intent of the founders or administrators of the pension system; and did not concern a New York City municipal accident disability pension such as the one at issue here.[7] In fact, the police accident disability retirement pension at issue in this case is readily

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[6]In a case decided about three and a half years after *Oden*, the Court of Appeals noted that the City of New York had raised the issue of "whether a direct correspondence exists between plaintiff's [municipal] accident disability retirement pension and his future lost earnings" so as to justify offsetting the pension benefits against future lost earnings, but found it unnecessary to reach that issue (*Iazzetti v City of New York*, 94 NY2d 183, 191 [1999]).

[7]Moreover, a review of the briefs on which the Court of Appeals decided *Oden* reveals that the appellant, which argued for its entitlement to a collateral source offset, said nothing at all about whether the *Oden* disability pension compensated for lost earnings. Rather, the *Oden* appellant devoted its entire argument to the contention (which the Court of Appeals rejected) that a collateral source payment need not match a category of damages awarded by the jury in order to qualify as an offset. Thus, *Oden* casts little light on the kind of showing necessary to establish a correspondence between a collateral source payment and a category of damages included in a jury award.

distinguishable from the private-sector disability pension at issue in *Oden* in that plaintiff's police disability pension benefits are required by law to be reduced in the event she actually earns, or manifests the ability to earn, a level of income exceeding a defined maximum amount (*see* Administrative Code § 13-254).[8] Arguably, this provision demonstrates that plaintiff's police accident disability pension is intended to replace the salary she would have earned but for the disability resulting from her service-connected injury.[9]

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[8]At the collateral source hearing, the expert witness called by defendant gave testimony describing the effect of Administrative Code § 13-254, although he did not cite the statute.

[9]That the jury awarded plaintiff damages for lost earnings in an amount exceeding the police salary she lost as a result of the early retirement compelled by her injuries is irrelevant to the question of whether the disability pension should be set off against the portion of her damages based on the loss of her police salary. Plainly, the disability pension benefits (constituting three quarters of plaintiff's last annual police salary) could be used as an offset only against damages for the loss of the police salary. In other words, if an offset were to be applied based on the disability pension, the lost-earnings award would be reduced to the extent of the pension benefits received, or to be received in the future, during the period in which plaintiff would have been earning a police salary but for her disability (i.e., through the date she had planned to retire before she incurred the disability). To the extent plaintiff was awarded damages for the loss of the opportunity to earn overtime compensation in addition to her regular salary, the offset for the pension (which is three quarters of her regular salary) would not reach the portion of the damages award based on the loss of overtime. Moreover, if any component of the disability pension is based on plaintiff's contributions to the pension plan, that

Nonetheless, and notwithstanding that *Oden* is not dispositive of the issue as presented in this case, I conclude, on constraint of this Court's decision in *Gonzalez v Iocovello* (249 AD2d 143 [1998], *affd on other grounds* 93 NY2d 539 [1999]), that plaintiff's accident disability pension cannot be offset against her award for lost earnings. In *Iocovello*, we held that the City of New York was not entitled to an offset under CPLR 4545 against a former police officer's lost earnings awards based on his accident disability pension because "the City failed to demonstrate with reasonable certainty that the accident retirement benefits at issue will replace those awards" (249 AD2d at 144).[10] A review of the briefs on which this Court decided *Iocovello* reveals that the City in that case made arguments very similar to those made by defendant herein for reducing the jury's lost earnings award by the amount of the police accident disability pension the plaintiff received (like plaintiff herein) pursuant to Administrative Code § 13-252. Further, in *Iocovello* as in this case, the arguments offered for deeming the pension a

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component of the pension would have to be excluded from the offset.

[10]It appears that the collateral source issue was not raised on the appeal to the Court of Appeals in *Iocovello*. Rather, on its appeal to the Court of Appeals, the City chose to focus on its claim that the lawsuit was not authorized by General Municipal Law § 205-e.

replacement for lost earnings were based chiefly on the construction of the statutes establishing the pension (although in this case defendant offered evidence on the way the statutes operate, without citing them). Finally, in *Iocovello*, as here, the plaintiff's argument for not applying an offset was essentially that the defense failed to establish that the purpose of the pension was to replace lost earnings. In sum, *Iocovello* cannot be distinguished from this case insofar as the collateral source issue is concerned.

While I might have reached a different conclusion if we were writing on a clean slate, the fact is that this Court has already spoken to the collateral source issue presented in this case, and a majority of this bench has determined to adhere to that precedent. Still, it cannot be denied that our resolution of this issue in *Iocovello* is subject to reasonable criticism on the ground that it, in effect, bestows on a plaintiff receiving a municipal accident disability pension the windfall of double compensation for a portion of his or her economic loss. Significantly, the Second Department has held that a New York City firefighter's line-of-duty accident disability pension benefits (which clearly parallel the instant plaintiff's police pension benefits) "correspond directly with the jury's award for future lost wages" (*Terranova v New York City Tr. Auth.*, 49 AD3d

10, 19 [2007], *lv denied* 11 NY3d 708 [2008]) and therefore qualify as "a collateral source within the meaning of CPLR 4545(c) that must be set off against the amount of the verdict" (49 AD3d at 20). It is also noteworthy that this Court's resolution of the collateral source issue in *Iocovello* appears to be inconsistent with the result we reached earlier in *Iazzetti v City of New York* (216 AD2d 214 [1995], *appeal after remand* 256 AD2d 140 [1998], *revd on other grounds* 94 NY2d 183 [1999]), where we said that a former city employee's accident disability pension "should be offset against his recovery for postverdict loss of earnings, otherwise he will benefit from precisely the kind of double recovery that the Legislature sought to eliminate" (216 AD2d at 215).[11]

I am at a loss to understand the majority's assertion that, because defendant has not cited the statutes governing plaintiff's police accident disability pension (although defendant did present testimony accurately describing the operation of those statutes), "[w]e cannot assume that these provisions are applicable, and, in the absence of any citation to

[11]As noted, however, our 1995 decision in *Iazzetti* was ultimately reversed, albeit on other grounds, when the case came before the Court of Appeals in 1999. In any event, where there is a conflict between our own precedents, the more recent decision should be followed.

them by defendant, we decline to speculate." It is undisputed that plaintiff is receiving an accident disability pension from the police pension fund, which, unquestionably, must be authorized by statute. The majority, while it asserts that "it is not clear which pension provisions of the Administrative Code or other statutes may apply here," does not suggest any statutes other than those I have cited that might govern plaintiff's pension. The Court of Appeals itself has recognized the Administrative Code provisions governing pensions of this kind (*see Matter of Starnella v Bratton*, 92 NY2d 836, 838 [1998]), and cases involving such pensions routinely come before this Court (*see e.g. Matter of Kelly v Kelly*, 82 AD3d 544 [2011]). Even if this were a more obscure area of the law, we would be obligated to consider those Administrative Code provisions, because we are *required* to "to take judicial notice without request of the . . . public statutes of the United States and of every state . . . and of all local laws" (CPLR 4511[a]). To the extent any doubt might remain, both the Court of Appeals and this Court have recognized that the Administrative Code of the City of New York is entitled to judicial notice (*see Andy Assoc. v Bankers Trust Co.*, 49 NY2d 13, 23 [1979]; *Howard Stores Corp. v Pope*, 1 NY2d 110, 115 [1956]; *Sweeney v Bruckner Plaza Assoc., LP*, 20 AD3d 371, 372 n 1 [2005]; *Chanler v Manocherian*, 151 AD2d 432, 433 [1989]; *see also*

Administrative Code § 1-104[a] ["All courts shall take judicial notice of all laws contained in the code" of the City of New York]).

Our decision today requires defendant to pay damages for lost earnings for which plaintiff apparently is already receiving (or has received) compensation in the form of an accident disability pension. The statutory framework of New York City's pension system, no less than common sense, points to this conclusion. While I join the majority in affirming the denial of a collateral source offset based on plaintiff's pension, I find it troubling that existing law in this Department leads to this outcome. My concern is heightened by the majority's further decision -- from which I dissent -- to exclude from the scope of the new trial on comparative fault the issue of defendant's liability and to instruct the new jury that, in considering whether plaintiff was at fault, it should assume at the outset, not as a matter of law but based on a fact-finding made by the previous jury, that defendant was negligent and that its negligence was a proximate cause of the accident. It seems to me that this will have the unintended effect of unfairly "tilting the playing field" against defendant at the new trial by tending to influence the jury to minimize plaintiff's fault or to exonerate her altogether. In my view, fairness dictates that the

parties be placed on an even footing at the new trial, meaning that the new jury should be asked to determine anew both defendant's liability and plaintiff's comparative fault.

For the foregoing reasons, I respectfully dissent insofar as the majority excludes the issue of defendant's liability from the scope of the new trial to be held upon remand, and otherwise concur in the majority's disposition of the appeal.

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

ENTERED: SEPTEMBER 1, 2011

CLERK