SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 7, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

6974 Tate & Lyle Ingredients Americas, Inc., Index 600070/09
Plaintiff,

–against–

Whitefox Technologies USA, Inc., et al.,
Defendants.

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Whitefox Technologies USA, Inc., et al.,
Defendants-Counterclaim Plaintiffs-Respondents,

-against-

Tate & Lyle PLC,
Additional Defendant on Counterclaim-Appellant.

Winston & Strawn LLP, Chicago, IL (Terry M. Grimm of the bar of the State of Illinois, admitted pro hac vice, of counsel), for appellant.

Clifford Chance US LLP, Washington, DC (Stephen M. Nickelsburg of the bar of the District of Columbia, admitted pro hac vice, of counsel), for respondents.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered April 22, 2011, which, insofar as appealed from, denied Tate & Lyle PLC's (Tate PLC) motion to dismiss all counterclaims as against it for lack of personal jurisdiction, unanimously affirmed, without costs.

The court properly denied the motion to dismiss. The general rule under New York law is that parent corporations may not enforce, or have enforced against them, terms of a contract, including forum selection clauses, signed by their separately existing subsidiaries (*see Freeford Ltd. v Pendleton*, 53 AD3d 32, 38 [2008], *lv denied* 12 NY3d 702 [2009]).

There are three sets of circumstances where a nonsignatory can enforce a forum selection clause. First, a third-party beneficiary of the contract may enforce a forum selection clause. Second, parties to an integrated, global transaction, who are not signatories to a specific agreement within the transaction, may nonetheless benefit from a forum selection clause in one of the other agreements (*id.*, at 38-39). Neither the first or second circumstance are at issue in this case. As a third circumstance, *Freeford* states that "a nonparty that is 'closely related' to one of the signatories can *enforce* a forum selection clause" (*id.* at 39 [emphasis supplied]). We find this circumstance applicable here.

While there are many New York cases allowing a forum selection clause to be enforced by or against nonsignatory plaintiffs, Whitefox cites no case allowing enforcement against a nonsignatory defendant where that defendant is not an employee, successor or alter ego of the signatory. Nevertheless, the federal courts permit a forum selection clause to bind a nonsignatory defendant that has a sufficiently close relationship with the signatory *and* the dispute to which the forum selection clause applies (*see e.g. Hugel v Corporation of Lloyd's*, 999 F2d 206, 209 [1993]; *Manetti-Farrow, Inc. v Gucci Am. Inc*., 858 F2d 509, 514 n 5 [9th Cir 1988] ["(w)e agree with the district court that the alleged conduct of the non-parties is so closely related to the contractual relationship that the forum selection clause applies to all defendants"]; *see also Universal Grading Service v eBay, Inc*., 2009 WL 2029796, * 16, 2009 US Dist LEXIS 49841, *58 [2009] ["(t)he same standard applies to the determination whether non-signatory defendants are bound by a forum selections clause as applies to non-signatory plaintiffs"]). Delaware applies a similar test to evaluate whether a forum selection clause can be used to join a nonsignatory defendant into the action (*see e.g. Weygandt v Weco LLC*, 2009 WL 1351808 *5, 2009 Del Ch LEXIS 87, *18-19 [Del Ch 2009] ["(s)everal cases suggest that when a control person agrees to a forum, it is foreseeable that the entities controlled by that person which are involved in the deal will also be bound to that forum"]). The rationale behind binding closely related entities to the forum selection clause is to “promote stable and dependable trade relations” (*id.* [internal quotation marks omitted]). “[I]t would be inconsistent with that policy to allow the entities through which one of the parties chooses to act to escape the forum selection clause” (*id.*).

An important consideration in determining whether the nonsignatory is “closely related” to the signatory and the agreement from which the dispute arises is whether “the nonparty’s enforcement of the forum selection clause is foreseeable by virtue of the relationship between the nonparty and the party sought to be bound” (*Freeford Ltd. v Pendleton*, 53 AD3d at 40; *see also Dogmoch Intl. Corp. v Dresdner Bank*, 304 AD2d 396, 397 [2003]).

There is no dispute as to the corporate identities and relationships of the parties to this action. There is also no dispute that the only connection to New York is the choice of law and forum selection clause in the contract signed by plaintiff and defendant. The record amply demonstrates that additional counterclaim defendant Tate PLC, plaintiff’s parent company, was “closely related” to Tate & Lyle Ingredients Americas, Inc. (Tate USA), its wholly-owned subsidiary and a signatory to the licensing agreement, as well as to the dispute itself such that it was “reasonably foreseeable” that it would be bound by the forum selection clause (*see Indosuez Intl. Fin. v National.*

Reserve Bank, 304 AD2d 429 [2003]; *see also Hugel v Corp. of Lloyd's*, 999 F2d at 209; *International. Private Satellite Partners, L.P. v Lucky Cat Ltd.*, 975 F Supp 483, 485-486 [1997]).

Defendant sufficiently established that Tate PLC's involvement with Tate USA in many phases of the licensing agreement and the dispute arising from it, was such that the forum selection clause was properly asserted against it. At his deposition, the then Chief Executive Officer of Tate PLC, Iain Ferguson, unequivocally stated that he made the decision to institute the present litigation, despite the fact that Tate USA was the named plaintiff. He also made the board of directors of Tate PLC aware of this decision, which obviously concurred. Additionally, Mr. Ferguson testified he made the decision not to return defendant's technology when it demanded its return and it was also his decision to continue to use that technology at a Tate USA plant in order to meet "our obligations as Tate & Lyle would always do." While acknowledging that he did receive input from technical experts, Mr. Ferguson again unequivocally stated that the decision "would be ultimately made by me."

It is clear from Ferguson's deposition that the entities not only consulted with each other, but both were intimately involved in the decision making process from the inception of the licensing agreement through this litigation. Indeed, it is undisputed that Tate USA could not sign the licensing agreement on its own authority; it needed approval from Tate PLC. Moreover, Tate USA was directed by Tate PLC to commence the action against defendant. It continued to use defendant's technology and equipment at the direction of Tate PLC. These undisputed facts demonstrate that Tate PLC's involvement in this matter was far more than a parent company's mere approval of a contract. After making all the critical decisions for its subsidiary in this matter from the signing of the contract to the commencement of litigation, Tate PLC cannot seriously argue that it was not reasonably foreseeable that the forum selection clause in the contract it approved, would not be asserted against it.

We have considered Tate & Lyle PLC's remaining contentions and find them unavailing.

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

ENTERED: AUGUST 7, 2012

CLERK

Andrias, J.P., Saxe, Catterson, Renwick, Román, JJ.

7495-
7495A Kasowitz, Benson, Torres & Friedman, LLP., Plaintiff-Appellant, Index 101547/10

-against-

Duane Reade, et al.,
Defendants-Respondents.

Kasowitz, Benson, Torres & Friedman LLP, New York (Aaron H. Marks of counsel), for appellant.

McKenna, Long & Aldridge LLP, New York (Charles E. Dorkey III of counsel), for respondents.

Judgment, Supreme Court, New York County (Paul Wooten, J.), entered April 7, 2011, dismissing the complaint, affirmed, without costs. Appeal from order, same court and Justice, entered March 18, 2011, dismissed, without costs, as subsumed in the appeal from the judgment.

This is a dispute over whether plaintiff Kasowitz law firm is entitled to a success fee in addition to the flat $1 million fee it has already received in connection with its representation of defendant Duane Reade. The issues are whether the parties' e-mails established a binding fee agreement, and whether the fee was to be limited to the moneys Duane Reade received in settlement of the underlying Cardtronics litigation, or was to encompass all of the benefits Duane Reade received from the termination of its ATM placement contract with Cardtronics, including increased revenues from Duane Reade's new ATM contract with JP Morgan Chase (Chase).

“To establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound (22 NY Jur 2d, Contracts § 9)” (*Kowalchuk v Stroup*, 61 AD3d 118, 121 [2009]). An exchange of e-mails may constitute an enforceable agreement if the writings include all of the agreement's essential terms, including the fee, or other cost, involved (*see Mark Bruce Intl., Inc. v Blank Rome LLP*, 60 AD3d 550, 551 [2009]; *Williamson v Delsener*, 59 AD3d 291 [2009]; *see generally Cobble Hill Nursing Home v Henry & Warren Corp*., 74 NY2d 475, 482 [1989], *cert denied* 498 US 816 [1990]).

On September 8, 2006, Kasowitz (by attorney Goldberg) e-mailed a proposed fee arrangement to Duane Reade’s in house counsel, Bergman, which provided in relevant part:

> "We can do the Cardtronics case for a flat $1 million, payable over 10 months as you suggested (exclusive of disbursements), plus 20% of amounts recovered above some number, as opposed to a percentage payable from dollar one.
>
> “Based on the numbers we have, which obviously are approximations, we actually think the damages could be between $10 and $11 million over the life of the contract.

> So, I'm thinking of 20% of everything above $4 million as the success fee portion. Thus, if we get $10 million, the total fee would be $2.2 million (with you keeping $7.8 million obviously). That's $1 million in flat fee, plus $1.2 million in success fee.
>
> “That’s actually a bit lower than what I had previously suggested of a discount off of time plus 20%. That is, if we did 60% of time plus 20% contingency from dollar one, and we recover $10 million, our total fee would be $2.9 million (assuming our actual hourly would come to $1.5 million, 60% of which is $900,000; leaving $900,000 in time charges, plus $2 million in success fee). Even if the recovery is $5 million (settlement or what have you), the total fee would be $1.2 million, which still is a discount of a few hundred thousand based on ‘splitting the baby.’ What do I need to do to put you in a new lawsuit today?
>
> “By the way, as to our discussion about it being a ‘binary’ case of either we win it all or lose it all, though in large part that’s true, the damage question is not entirely irrelevant. We’re saying that we should get paid based on the actual amount of transactions; figuring that out likely will be disputed before we’re done.”

On September 19, 2006, Goldberg sent an e-mail to Bergman in which he stated, in relevant part, "I would love to have our fee arrangement in place by then so I can just tear into these guys.” In an e-mail response to Kasowitz that same day, Bergman wrote "Go.”

These three e-mails constitute an integrated fee agreement (*see Nolfi Masonry Corp. v Lasker-Goldman Corp.,* 160 AD2d 186, 187 [1990] ["a binding agreement may be assembled from more than one writing"]). By the plain language employed, they demonstrate that Kasowitz made an offer to represent Duane Reade in the Cardtronics case for a flat $1 million, plus a success fee equal to 20% of the amounts recovered above $4 million *in that litigation*, and that Duane Reade accepted that offer. Kasowitz is not entitled to a success fee under the terms of the fee agreement, since Duane Reade received total compensation of approximately $1.75 million – well below the $4 million threshold – as a result of the settlement of the Cardtronics action.

The dissent believes that the fee agreement is ambiguous as to the scope of the fee. The dissent reasons that the term “recover,” as used in the September 8, 2006 e-mail, may reasonably be interpreted to encompass noncash resolutions, i.e. any value received as a result of the settlement of the Cardtronics action. However, in adopting this position, the dissent fails to consider the term “recovered” or “recovery” in the context of the e-mail as a whole, and improperly relies on extrinsic evidence, including Bergman’s affidavits, in order to find ambiguity where none exists.

"The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties’ intent, [and that] [t]he best evidence of what parties to a written agreement intend is what they say in their writing" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002] [internal quotation marks and citation omitted]). "Whether a contract is ambiguous is a question of law and extrinsic evidence may not be considered unless the document itself is ambiguous" (*South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 278 [2005]; *see RM Realty Holdings Corp. v Moore*, 64 AD3d 434, 437 [2009]). A contract is unambiguous if the language it uses has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978]). "Mere assertion by one that contract language means something to him, where it is otherwise clear, unequivocal and understandable when read in connection with the whole contract, is not in and of itself enough to raise a triable issue of fact" (*Unisys Corp. v Hercules Inc.*, 224 AD2d 365, 367 [1996] [internal quotation marks omitted]).

The language in the fee agreement does not contain any ambiguity, since it states the precise fee arrangement and explains the specific limited circumstances under which Kasowitz would be compensated by Duane Reade for legal services provided in the Cardtronics action. As evidenced by the examples set forth in the September 8, 2006 e-mail, the only reasonable interpretation of the language employed is that Kasowitz based its fee proposal on the expected recovery or potential earnings of $10 million from the surcharge fees that Cardtronics had withheld and would owe over the "life of the contract" between Duane Reade and Cardtronics. Indeed, Kasowitz clearly stated that “[w]e're saying that [Duane Reade] should get paid based on the actual amount of transactions."

There is no basis for attributing to plaintiff the value of the termination of the ATM agreement, given the fee agreement's silence on that issue (*see Greenfield v Philles Records*, 98 NY2d at 569). The fee agreement makes no reference to any new or potential agreement that Duane Reade might thereafter enter into with Chase or any other entity if the Cardtronics Agreement was terminated, nor does it indicate that the success fee would be based on any such agreement. As Supreme Court found, “[i]f Kasowitz wanted to ensure that it would be receiving a contingency fee based on any developments with any other ATM machine providers, Kasowitz should have explicitly written such in its contingency fee.” An omission or even a mistake in a contract does not constitute an ambiguity (*see Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001]); *Gladstein v Martorella*, 71 AD3d 427, 429 [2010]).

The existence of the valid and enforceable fee agreement precludes the causes of action sounding in quasi contract (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]).

We have considered plaintiff's remaining contentions and find them without merit.

All concur except Saxe and Catterson, JJ. who dissent in a memorandum by Catterson, J. as follows:

CATTERSON, J. (dissenting)

I am compelled to dissent because I believe that the contingent fee agreement is ambiguous and that there are issues of fact over the intent of the parties. The brief exchange of e-mails that formed the substance of the fee agreement is susceptible to more than one interpretation. Thus, I believe that summary judgment is particularly inappropriate in this case.

Plaintiff law firm Kasowitz, Benson, Torres & Friedman, LLP (hereinafter referred to as “Kasowitz”) commenced this action to recover contingent fees allegedly owed as a result of legal services it performed for defendants Duane Reade and Duane Reade, Inc. (hereinafter collectively referred to as “Duane Reade”). In order to put the fee dispute in context, a recitation of the facts is warranted.

In August 2003, Duane Reade entered into an agreement with Cardtronics, an operator of automated teller machines, for the placement, maintenance and management of ATMs in Duane Reade’s stores. The agreement entitled Duane Reade to half of all transaction surcharges collected from customers using the ATMs. In December 2003, the parties amended their agreement to reflect “bank branding” of Cardtronics ATM machines by a “large well-known financial institution” and to extend the term to December 2014 (the “Cardtronics Agreement”).

In March 2005, Cardtronics entered into a branding agreement with JP Morgan Chase to place Chase’s name and trademark on the ATMs in Duane Reade’s stores. Prior to the branding, all customers paid a surcharge for each ATM transaction. As a result of the branding, Chase customers were no longer required to pay the user transaction surcharge. To compensate Duane Reade for the surcharge fees lost as a result of the branding, Cardtronics agreed to pay Duane Reade using a different calculation method.

Sometime thereafter, a fee dispute arose over Duane Reade’s claim of underpayment of the surcharge fees under the Cardtronics Agreement. Cardtronics sought to pay Duane Reade based on a fixed number of transactions for the remaining life of the contract, whereas Duane Reade sought to determine the amount of transactions on a month-to-month basis.

In March 2006, Michelle D. Bergman, Esq., Duane Reade’s senior vice president and general counsel, asked Daniel P. Goldberg, an attorney with Kasowitz, to represent Duane Reade in an action against Cardtronics to recover the surcharge fees.
On September 8, 2006, Goldberg e-mailed Bergman a proposed fee arrangement by which Kasowitz would charge a flat fee of $1 million, payable in 10 installments, plus disbursements, for the potential Cardtronics litigation. The e-mail also provided for a “success fee,” which was a contingency fee equal to 20% of the

damages Duane Reade recovered against Cardtronics “over the life of the [Cardtronics contract]” in excess of $4 million (hereinafter referred to as the “Fee Agreement”). The e-mail, in part, stated:

> “We can do the Cardtronics case for a flat $1 million, payable over 10 months as you suggested (exclusive of disbursements), plus 20% of amounts recovered above some number, as opposed to a percentage payable from dollar one.
>
> “Based on the numbers we have, which obviously are approximations, we actually think the damages could be between $10 and $11 million over the life of the contract. So, I’m thinking of 20% of everything above $4 million as the success fee portion. Thus, if we get $10 million, the total fee would be $2.2 million (with you keeping $7.8 million obviously). That’s $1 million in flat fee, plus $1.2 million in success fee.
>
> “That’s actually a bit lower than what I had previously suggested of a discount off of time plus 20%. That is, if we did 60% of time plus 20% contingency from dollar one, and we recover $10 million, our total fee would be $2.9 million (assuming our actual hourly would come to $1.5 million, 60% of which is $900,000; leaving $900,000 in time charges, plus $2 million in success fee). Even if the recovery is $5 million (settlement or what have you), the total fee would be $1.2 million, which still is a discount of a few hundred thousand based on ‘splitting the baby.’ What do I need to do to put you in a new lawsuit today?
>
> “By the way, as to our discussion about it being a ‘binary’ case of either we win it all or lose it all, though in large part that’s true, the damage question is not entirely irrelevant. We’re saying that we should get paid based on the actual amount of transactions; figuring that out likely will be disputed before we’re done.”

Bergman responded that it was an “interesting proposal,” and that she would talk to Rick (referring to Duane Reade's then-CEO, Rick Dreiling).

On September 19, 2006, Goldberg sent an e-mail to Bergman in which he stated, in relevant part, "I would love to have our fee arrangement in place by then so I can just tear into these guys." In an e-mail response to Kasowitz that same day, Bergman wrote "Go." These e-mails are the total written communication of the parties concerning the fee agreement prior to the commencement of the representation.

In October 2006, Kasowitz filed a new complaint on Duane Reade's behalf seeking damages from Cardtronics for its miscalculation and underpayment of the surcharge fees; it did not seek rescission or termination of the Cardtronics Agreement. On September 21, 2007, the court granted Cardtronics' motion to dismiss and denied Duane Reade's motion for summary judgment (Duane Reade, Inc. v Cardtronics, LP, 17 Misc. 3d 1101(A) (Sup. Ct. N.Y. County 2007)). Kasowitz filed an appeal on behalf of Duane Reade in which it stated in its appellate brief that the Cardtronics action was "a straight-forward commercial dispute over the meaning of discrete contractual language." We reversed the motion court's order dismissing the Cardtronics action, finding that the provision at issue in the Cardtronics Agreement was ambiguous (54 AD3d 137 (1st Dept. 2008)). In October 2007, Duane Reade made its final $100,000 installment payment to Kasowitz, completing payment of the $1 million flat fee.

In September 2008, Duane Reade sought Kasowitz's legal advice on whether the Cardtronics Agreement could be terminated. In an e-mail dated September 18, 2008, Kasowitz stated that it had reviewed the Cardtronics Agreement "in search of any provisions that Duane Reade might utilize to cancel the Cardtronics relationship." In that e-mail, Kasowitz advised that the complaint would need to be amended in order to terminate the Cardtronics Agreement through the lawsuit.

By letter dated October 24, 2008, Duane Reade advised Cardtronics that it was in default under the terms of the Cardtronics Agreement, and that it would "pursue ... its right to terminate the ATM Placement Agreement" unless Cardtronics remedied its defaults.

In November 2008, Duane Reade replaced Bergman as general counsel. The new general counsel began negotiating directly with Cardtronics on matters concerning the parties' relationship, including a possible reassignment of the ATM machines to Chase. It is undisputed that Kasowitz was not involved in these negotiations.

On February 13, 2009, Duane Reade and Cardtronics agreed to settle the Cardtronics litigation. The terms of the settlement included payment by Cardtronics of $1 million to Duane Reade by March 2009, dismissal of the pending Cardtronics action, and termination of the Cardtronics Agreement. Although Kasowitz was not involved in the settlement negotiations, Duane Reade contacted Kasowitz and requested that it draft the final settlement agreement.

On February 18, 2009, Goldberg e-mailed Duane Reade’s general counsel the draft settlement documents. He also inquired about the “success fee” that Kasowitz was to receive, indicating that the litigation had been used to effect the result of termination and that Duane Reade’s direct deal with Chase was “far more profitable” than the Cardtronics deal. On March 23, 2009, general counsel e-mailed Goldberg, informing him that Duane Reade still did not have a deal with Chase, and that the litigation was being settled on the basis of the $1 million payment from Cardtronics to Duane Reade, as agreed to on February 13, 2009.

On May 8, 2009, Duane Reade and Cardtronics finalized their settlement agreement and, on the same date, entered into a third amendment of the Cardtronics Agreement, which created a five-month transition period for the removal of Cardtronics’ ATM machines from Duane Reade’s stores. During this five-month period, the ATM surcharges for non-Chase users were increased from $0.99 to $1.99, and Duane Reade received $1 per ATM transaction, as opposed to its previous receipt of $0.50 per transaction.

In addition, on May 8, 2009, Duane Reade and Chase entered into an ATM License Agreement by which Chase would place its own ATMs in Duane Reade stores, in place of Cardtronics' ATMs. Under the terms of the new agreement, Duane Reade received $3 million as the first installment of the "Initial Term License Fee," and would receive $3.5 million in the sixth year, a license fee for the five-year renewal term of $3.5 million inflated by either the CPI or 3% each year, and monthly payments of a fee equal to the product of $0.99 multiplied by all "Allpoint Network Withdrawals" made each month at "Agreement ATMs." Thus, the original agreement with Cardtronics was entirely supplanted by an agreement between Duane Reade and Chase.

Ultimately, Kasowitz demanded that Duane Reade compensate Kasowitz for a portion of the success fee and Duane Reade refused. This litigation ensued. Both parties moved for summary judgment and the motion court ruled in favor of Duane Reade. The motion court concluded that there was a success fee agreement between the parties and that the action was settled in Duane Reade's favor. Furthermore, the settlement entitled Duane Reade to the $1 million in cash and termination of the original

Cardtronics agreement. The court also agreed with Kasowitz that Kasowitz was responsible for achieving that result. The court found that Kasowitz was not entitled to a success fee on the grounds that the $4 million threshold described in the original e-mail from Goldberg to Bergman was simply not reached.

The motion court reasoned that "Kasowitz argues that it should be compensated for the 'packaged deal' between Duane Reade, Chase and Cardtronics that occurred as a result of Duane Reade terminating with Cardtronics." The motion court rejected the argument that the Chase agreement was part and parcel of the Cardtronics agreement and thus denied Kasowitz any success fee attributable to the Chase Agreement. Unfortunately, in my view, the motion court and the majority misapprehend Kasowitz's argument. Such confusion requires reversal.

The question presented by the appeal is twofold: whether the exchange of e-mails constitutes a unitary agreement, and, if the exchange does indeed constitute a unitary agreement, are the terms of that agreement unambiguous?

I agree with the motion court and the majority on the former question that the exchange of e-mails constitutes a unitary fee agreement. The original September 8th e-mail proposed a flat fee of $1 million payable in installments by Duane Reade, "plus 20% of amounts recovered above some number, as opposed to a a [sic] percentage payable from dollar one." Bergman's response, although not referenced to the September 8 e-mail, was a simple "Go." Bergman submitted an affidavit in support of Kasowitz's motion for summary judgment wherein she stated that "Go" was tantamount to Duane Reade's acceptance of Kasowitz's proposed terms. It must be recognized that at the very outset, it was necessary to resort to extrinsic evidence to establish that "Go" constituted Duane Reade's acceptance. The majority posits that I have "improperly reli[ed] on extrinsic evidence, including Bergman's affidavits, in order to find ambiguity where none exists." There are several problems with this contention. First, as pointed out above, Bergman's affidavit is necessary to interpret the monosyllabic command "Go." [1] There is no other way to attribute "Go" to acceptance of Goldberg's e-mails. Only Bergman, the author of "Go" could establish that "Go" constituted Duane Reade's acceptance.

Secondly, when read together as Bergman's affidavit and Duane Reade's argument on appeal propose, the e-mails evince an intent on the part of both parties to be bound to some fee for

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[1]It is also interesting to note that Duane Reade originally argued to the motion court that the agreement was ambiguous. On appeal, however, Duane Reade now argues that the agreement is "a clear, complete and unambiguous statement of the intent of the parties." In part, I agree.

legal services. Based on the actual text of the e-mails, the scope of that fee is, in my view, uncertain because the language is ambiguous. The key term at issue is “recover.” Kasowitz urges that “the term is not limited to monetary recovery alone and expressly contemplates equivalent value achieved as a result of a settlement or otherwise.” In support of this contention, Kasowitz cites a series of decisions permitting a contingent fee as against noncash resolutions. See e.g. Beatie v. DeLong, 164 A.D.2d 104, 561 N.Y.S.2d 448 (1st Dept. 1990) (contingent fee arrangement for vindicating rights to five different patents).

Kasowitz also relies on the Bergman affidavit submitted in support of Kasowitz’s summary judgment motion. In that affidavit, Bergman maintained that Duane Reade understood that the value of the termination of the Cardtronics litigation was more than simply getting out of its contractual obligations. Bergman stated that the “actual value of such termination ... would hinge on the deal we were able to obtain to replace the Cardtronics agreement.” Further, Bergman stated that the actual value would be “worked out and calculated at the appropriate time, if a termination ended up being part of a resolution.”

The motion court rejected the Bergman affidavit as “self-serving.” In my view, this was clear error for many reasons. It is undisputed that Bergman was not only Duane Reade’s general counsel and senior vice president at the time the agreement was negotiated, but she was also the sole employee of Duane Reade who negotiated the very agreement at issue. Bergman was the only person on Duane Reade's side with personal knowledge who was involved in the transaction. Bergman's first affidavit was provided pre-litigation and the second affidavit, which was submitted in support of the motion for summary judgment, reaffirmed Bergman's view of the elements of the agreement.

It is beyond dispute that Bergman's affidavit cannot be categorized as "self-serving." Bergman is not a party to the action, is not employed by either party, and on the facts of this record, has no interest in the outcome of the litigation, financial or otherwise. Most importantly, Duane Reade has offered no sworn testimony from anyone to contradict either Bergman affidavit. The only evidence put forward by Duane Reade was the affirmation of its own counsel which was not based on personal knowledge; counsel's first involvement with the case was over three years after the agreement was negotiated. At the very least, it is reversible error to have refused to consider the Bergman affidavits because of the characterization of them as "self-serving."

Finally, on the question of the veracity of the Bergman affidavits, it is hornbook law that Bergman's credibility can only be tested through a trial, not on a motion for summary judgment where, as here, factual averments are uncontested. Santos v. Temco Serv. Indus., 295 A.D.2d 218, 744 N.Y.S.2d 20 (1st Dept. 2002).

The majority's only possible justification for rejecting Bergman's affidavits is the contention that the terms of the contingent fee agreement were unambiguous. The motion court found that Goldberg's use of the expressions "numbers" and "life of the contract" could only refer to "damages based purely on litigating with Cardtronics to enforce the contract with Duane Reade and Cardtronics in Duane Reade's favor."

The majority adopts this analysis, holding that "it states the precise fee arrangement." There is simply nothing in the Goldberg e-mails that is "precise." Once again, the language of the e-mails is important. What is "precise" about the e-mail exchange is that neither Goldberg nor the monosyllabic Bergman ever settled on what would be the basis for the contingent fee. Goldberg wrote about calculating the fee based on damages to Duane Reade, not simply the amount claimed in the contract action. Indeed, after discussing various calculations based on different "recovery" scenarios, Goldberg asked, "What do I need to do to put you in a new lawsuit today?" That question, as well as the permutations on the contingent fee question, was answered by “Go.”

Even were I to agree with the motion court and the majority that “numbers” and “life of the contract” were susceptible of only one meaning, Kasowitz persuasively argues that “recovery” can mean many things. In Kass v. Kass, 91 N.Y.2d 554, 566, 673 N.Y.S.2d 350, 356, 696 N.E.2d 174, 180 (1998)(internal quotation marks omitted), the Court of Appeals cautioned that we must examine “the entire contract and consider the relation of the parties and the circumstances under which it was executed.” Furthermore, in parsing the actual words used by the parties, we must necessarily consider the written word “in light of the obligation as a whole and the intention of the parties as manifested thereby.” Kass, 91 N.Y.2d at 566, 673 N.Y.S.2d at 357. Thus, a dispute over the meaning of “recovery” can only be resolved through the prism of the parties’ intent at the time.

Bergman’s and Goldberg’s affidavits, when read in conjunction with the disjointed language of the e-mails, create issues of fact that surely survive a motion for summary judgment.

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

ENTERED: AUGUST 7, 2012

CLERK

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

7578 In re Ariel R.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

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

Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about November 12, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of sexual abuse in the first and third degrees, and placed him on probation for a period of 18 months, unanimously reversed, on the law, without costs, the order vacated, and the matter remitted to Family Court for new suppression and fact-finding hearings and determinations.

The presentment agency charged appellant, then 13 years old, with acts that, if committed by an adult, would constitute the crimes of sexual abuse in the first and third degrees. In addition to the sworn deposition of the mother of the five-year-old victim, the petition was supported by the deposition of

Detective Robert Arbusio. Arbusio testified that appellant gave a statement in which he admitted that he was in a room at his grandmother's house playing video games with the victim and that he and the victim engaged in a sex act.

Appellant moved to suppress the statement. At the suppression hearing, Arbusio testified that after speaking with the victim and his mother, he called appellant's mother and arranged for her to bring appellant to the station house for an interview. He informed her that appellant would be arrested after the interview for sexually abusing the victim. Arbusio further testified that when appellant and his parents arrived, the parents told him that appellant was in the seventh grade, in special education because of a "learning problem," and that he did not take medication. Arbusio recalled that he asked the parents if appellant would understand him, and they said that he would.

Arbusio testified that before he began his questioning of appellant, he read him and his mother *Miranda* warnings. He said he used a sheet designed for juveniles, with more simple terminology and additional explanatory phrases. He told appellant and his mother that they each had to respond to him independently and had to tell him if they had any questions. He testified that after each warning appellant and his mother individually confirmed that they understood and that neither had any questions.

First, the detective said that he told appellant that he had the right to remain silent, which meant that he did not have to say anything. Next, Arbusio testified, he said that anything appellant said "can and will be used against you in a court of law. That means what you say or write can be used to prove what you may have done." Detective Arbusio further told appellant and his mother that appellant had the right to talk to a lawyer, which meant "that a lawyer can be with you at all times" and may "tell you what the lawyer wants you to do or say"; and that if he wanted a lawyer and could not afford one, "the cost of having a lawyer will be paid by someone else if you cannot afford to pay for it."

Finally, Arbusio testified, he told appellant and his mother that they could refuse to answer any or all questions at any time or choose to have a lawyer during further questioning, adding, "Do you understand that I have to stop talking to you at any time you want to wait for a lawyer?," to which appellant and his mother each answered yes. Arbusio stated that he read to appellant and his mother the concluding paragraph of the juvenile *Miranda* sheet, which stated, "I have been given my rights as read to me, I understand each of them. I have been asked if I have any questions and I do not have any. I am right now willing to give a statement and to answer questions and to give up my right to have a lawyer present." The paragraph also confirmed that no promises or threats had been made and that appellant understood that he could change his mind at any time.

Arbusio stated that appellant appeared a little nervous as he read him the warnings, but was listening and seemed to understand, because he answered all of the questions. Arbusio further recalled that neither appellant nor his mother ever indicated that they did not understand and that appellant's mother did not ask the detective to explain anything in more detail for appellant. After appellant and his mother signed the *Miranda* sheet, Arbusio stated, he told appellant that he wanted to talk about what happened at his grandmother's house. Appellant, preferring to speak, rather than write, his statement, said that he engaged in "a sexual act" with the victim that was initiated by the victim.

Arbusio testified that he directed his questions directly to appellant, although appellant's mother appeared to be following the conversation and was crying and upset. The mother did not ask any questions. Arbusio stated that he had explained to her that he would be directing his questions to appellant and that he had directed her not to answer or help during the questioning.

However, he stated that he never told the mother that she could not talk to her son at all during the interview.

Appellant’s mother testified that her son was in the seventh grade and had been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). After having had to repeat kindergarten, he had progressed each year to the next grade. According to his mother, appellant had difficulty understanding tasks at home and homework assignments. Every day, she stated, she had to explain to him how to put on his school uniform and take a shower, drawing a picture of a boy to “show him where to wash well.” She stated that sometimes when she asked him to shower or get dressed, he appeared to be completely unfocussed. Further, when she explained something to her son, he was unable to accurately repeat the explanation to her.

Regarding the interview with Arbusio, appellant’s mother testified that Arbusio did not ask her if she understood the rights as he was reading them to appellant, and in fact never spoke to her directly or asked her any questions at all. She stated that because he answered the detective with “okay” instead of “yes,” she knew that appellant had not understood his rights. However, she was not concerned that appellant had not understood the detective’s questions to him about the incident itself.

Appellant called Dr. Matias Verna, his treating psychiatrist. After testifying that he had been board-certified in psychiatry about one year, had maintained a caseload of at least 40 cases in general child and adolescent psychiatry, and had been a practitioner and supervisor at Columbia-Presbyterian Hospital in general child and adolescent psychiatry for 14 months, the court qualified him as an expert. During voir dire by counsel for the presentment agency, Dr. Verna was asked whether he had experience in evaluating children and adolescents for competency in waiving *Miranda* rights, and whether he had ever used a so-called "*Miranda* competency test." He responded in the negative to each of those questions.

Dr. Verna testified that appellant had been referred to him for an evaluation and needs assessment and to determine if medication would be appropriate for appellant's symptoms of inattentiveness, impulsivity and hyperactivity. He saw appellant 10 to 12 times. Dr. Verna stated that he confirmed appellant's pediatrician's diagnosis of ADHD, "combined type," which is a learning disorder, and preliminarily confirmed a diagnosis of mixed expressive receptive language disorder. He also diagnosed an "adjustment disorder with mixed disturbance of emotions and conduct," with "extreme reactions to seemingly small stressors."

Dr. Verna testified that he observed some attentional difficulties in his meetings with appellant. For example, he had to ask questions of appellant in very straightforward sentences to elicit a meaningful answer. He further explained that appellant’s impaired ability to process received language made it difficult for appellant to follow the logical links in complex sentences. In particular, Dr. Verna opined that questions with conditionals or double negatives, or that required attention to be applied throughout the question, would become difficult. He also said that straightforward questions without conditionals or double negatives tended to be far more comprehensible for appellant. Dr. Verna further stated that appellant’s IQ was just 63 when he was 11 years old and that his language processing skills were equivalent to a person who was 6-1/2 years old. Dr. Verna diagnosed mild mental retardation, and opined that appellant’s low IQ had likely contributed to his learning difficulties.

Appellant’s counsel asked Dr. Verna to render an opinion as to whether appellant could have understood the juvenile *Miranda* warnings read to him. However, the presentment agency objected, based on the fact that Dr. Verna did not perform any tests on appellant that were specifically designed to determine appellant’s competency to waive *Miranda*. The court sustained the objection. Before the court issued its suppression ruling, appellant moved in writing for leave to reargue the ruling on the objection, and sought to recall the doctor to render an expert opinion concerning whether appellant was able to understand juvenile *Miranda* warnings in light of his receptive language delay. Appellant also made an offer of proof that Dr. Verna would, if permitted, testify that appellant was unable to understand the *Miranda* warnings issued by Arbusio.

The court again sustained the objection on the procedural ground that no prior motion had been decided, and further stated that “Dr. Verna was qualified as an expert in psychiatry. He testified extensively concerning respondent’s psychiatric condition, including his aptitudes and deficits. Dr. Verna also testified concerning his personal experience of respondent’s communication skills. Dr. Verna admitted that he has not concluded any testing of respondent that would have direct bearing on respondent’s capacity to waive his *Miranda* rights. As such, the Court agrees with the Presentment Agency that any testimony proffered by this witness on this subject would be entirely speculative.”

Notwithstanding the court’s refusal to allow his expert to opine directly on appellant’s ability to comprehend the *Miranda* warning, appellant argued that the evidence nevertheless demonstrated that the severity of his cognitive and developmental delays prevented him from understanding his rights.

Additionally, he contended that his statement was not knowing, intelligent and voluntary, because Arbusio deprived him of the parental guidance to which he was entitled by leading his mother to believe that she could not participate during the questioning. The presentment agency responded that suppression should be denied because appellant's statement was made voluntarily, knowingly and intelligently, in his mother's presence. The agency maintained that appellant failed to meet his burden of proving that he lacked the mental capacity to waive his rights.

The court denied the suppression motion. It found that appellant and his mother understood the *Miranda* warnings, that appellant understood the questions asked of him, and answered appropriately, suggesting that his language skills were sufficient for him to have understood the warnings. Therefore, the court determined that appellant understood that he did not have to speak to the police, that any statements might be used to his disadvantage, and that an attorney's assistance would be provided, upon request, at any time and before the questioning continued. Accordingly, the court concluded that, under the totality of the circumstances, appellant's statement was voluntarily made after he and his mother knowingly and intelligently waived his *Miranda* rights.

The admissibility and bounds of expert testimony are addressed primarily to the sound discretion of the trial court. "It is for the trial court in the first instance to determine when jurors are able to draw conclusions from the evidence based on day-to-day experience, their common observation and their knowledge, and when they would be benefitted by the specialized knowledge of an expert witness" (see *People v Cronin*, 60 NY2d 430, 433 [1983]). The court must exercise its discretion in determining whether to admit an expert's opinion, even where it pertains to the "ultimate question" for the factfinder (*id.*). Here, the issue is not whether the proffered testimony by Dr. Verna was within the ken of the ordinary finder of fact, but whether the doctor was competent to offer it. Again, the agency contends that he was not, because he never tested appellant's *specific* ability to comprehend *Miranda* warnings.

A situation analogous to the facts here is presented in *People v Miller* (91 NY2d 372 [1998]). In that case, the defendant argued that the People's expert on forensic pathology should not have been permitted to opine on the time of the victim's death, because she had only reviewed records such as an autopsy report, photographs and the statement of a paramedic who responded to the scene of the subject homicide. The Court of Appeals held that the expert's testimony was not speculative, even though the expert had not actually performed the autopsy, because “[t]he expert could draw her conclusions from the record evidence despite the fact that she had not personally examined the corpus delicti” (91 NY2d at 380). Here, just as the expert in *Miller* did not herself perform the autopsy, Dr. Verna did not perform tests that the presentment agency argues would have specifically addressed the theory he intended to advance from the witness stand. Nevertheless, as in *Miller*, the evidence before him, such as his evaluations of appellant’s receptive communication skills and IQ, was sufficient to enable him to form an opinion as to the ultimate question of whether appellant had adequate language and cognitive skills to understand the *Miranda* warnings.

It is noted that *People v Casiano* (40 AD3d 528 [2007], *lv denied* 9 NY3d 990 [2007]), on which the presentment agency relies, is devoid of any indication of the nature of the expert’s testimony, which this Court rejected. Here, by contrast, Dr. Verna’s testimony was unquestionably rooted in his scientific training. It is further noted that the presentment agency did not offer any expert testimony of its own to establish that the so-called “Miranda competency test” was the only conclusive diagnostic tool for determining a person’s inability to appreciate the warnings and that such a determination could never be conclusively established through evidence of general language deficits.

In this case, any deficiencies in Dr. Verna's testing of appellant's specific ability to comprehend the *Miranda* warnings went only to the weight of the testimony, rather than to its admissibility. Thus, the court abused its discretion in not permitting it. Moreover, the uncontested testimony before the court established that appellant was at least somewhat mentally retarded, was less than half his chronological age in terms of his mental functioning, and suffered from significant processing delays. Further, his mother, who was present when the warnings were administered, and described his difficulties in following basic directions and understanding simple explanations, testified that appellant did not appear to understand them. Accordingly, the circumstances were such that an opinion by Dr. Verna regarding appellant's ability to appreciate the *Miranda* warnings would have been particularly relevant.

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

ENTERED: AUGUST 7, 2012

CLERK

Tom, J.P., Andrias, Moskowitz, Acosta, Abdus-Salaam, JJ.

7890N 1010 Tenants Corp., Index 602966/09
Plaintiff-Appellant,

-against-

Barbara Hubshman,
Defendant-Respondent.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Judith J. Gische, J.), entered on or about February 16, 2012,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated June 29, 2012,

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

ENTERED: AUGUST 7, 2012

CLERK

Saxe, J.P., Catterson, Acosta, DeGrasse, Richter, JJ.

7906 The People of the State of New York, Ind. 953/08
Respondent,

-against-

Robert Harris,
Defendant-Appellant.

Joseph A. Bondy, New York, for appellant.

Robert T. Johnson, District Attorney, Bronx (T. Charles Won of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Peter J. Benitez, J.), rendered April 11, 2011, as amended April 27, 2011, convicting defendant, after a jury trial, of criminal sexual act in the first degree, sexual abuse in the second degree, and endangering the welfare of a child, and sentencing him to an aggregate term of eight years, unanimously affirmed.

The verdict was not repugnant, and the court properly denied defendant’s application to resubmit the case to the jury for further deliberations. The jury’s acquittal of defendant of course of sexual conduct against a child in the first degree (count one) and course of sexual conduct against a child in the second degree (count two), while convicting him of sexual abuse in the second degree (count three) and criminal sexual act in the first degree (count four), was not repugnant.

“If there is a possible theory under which a split verdict could be legally permissible, it cannot be repugnant, regardless of whether that theory has evidentiary support in a particular case” (*People v Muhammad*, 17 NY3d 532, 539 [2011]). Regardless of whether a verdict lacks an evidentiary basis, “factual repugnancy — which can be attributed to mistake, confusion, compromise or mercy — does not provide a reviewing court with the power to overturn a verdict” (*id*. at 545). Here, the counts at issue had different requirements regarding defendant’s age, and any evidence presented at trial as to defendant’s actual age is immaterial (*see People v Richardson*, 92 AD3d 408, 409 [2012]).

The jury charges for counts one, two, and four all required the People to prove that defendant was at least 18 years old during certain time periods. However, the time period pertaining to count four was May 14, 2007 to May 17, 2007, while counts one and two required proof of conduct spanning at least three months during September 1, 2005 to May 17, 2007. In the abstract, the jury could have consistently found that defendant was 18 years old in the period applicable to count four, but had not yet reached that age in the period applicable to counts one and two, given that the latter period must have included dates prior to May 2007. Furthermore, the acquittals on counts one and two were consistent with the conviction on count three, since the charge on count three did not include any element regarding defendant’s age.

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

ENTERED: AUGUST 7, 2012

CLERK

Andrias, J.P., Friedman, Sweeny, Manzanet-Daniels, Román, JJ.

7950 R & L Realty Associates, Index 104662/11
Petitioner-Respondent,

-against-

205 West 103 Owners Corp.,
Respondent-Appellant.

Law Offices of Charles J. Siegel, New York (Jack L. Cohen of counsel), for appellant.

Kaufman Friedman Plotnicki & Grun, LLP, New York (Stanley M. Kaufman of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Marcy S. Friedman, J.), entered June 16, 2011, which, in this article 78 proceeding to compel respondent 205 West 103 Owners Corp. to perform ministerial duties, granted the petition to the extent of ordering respondent to prepare, execute and deliver at the real estate closing for the bulk sale of the subject apartments: 1) new executed and sealed stock certificates and proprietary leases for each of the subject apartments being sold; 2) a letter from respondent stating that petitioner has fully paid its maintenance and all other charges due for the apartments through the date of the closing, with certain specified funds to be held in escrow; 3) a UCC-3 termination statement terminating the UCC-1 financing statement that respondent filed against apartment 6A; and 4) such other documents as may be reasonably required in connection with petitioner's sale of the apartments; and ordering and adjudging that petitioner may inspect respondent's books and records, unanimously affirmed, without costs.

Petitioner owns 25 apartments in the subject building and in a related proceeding was previously ordered by the court to sell them in a bulk sale. Since petitioner has a clear legal right to sell the apartments, the court properly directed respondent to engage in the ministerial act of issuing stock certificates and removing other obstacles to the sale (CPLR 7803[1]; *Matter of Guzman v 188-190 HDFC*, 37 AD3d 295, 296-297 [2007], *lv denied* 9 NY3d 801 [2007]).

Respondent's refusal to cooperate in the sale of the apartments, and its obstruction of the sale, are not protected by the business judgment rule, which does not apply when a coop board acts outside the scope of its authority or violates its own governing documents (*see 40 W. 67th St. v Pullman*, 100 NY2d 147, 153 [2003]; *Wirth v Chambers-Greenwich Tenants Corp.*, 87 AD3d 470, 472 [2011]). Pursuant to the proprietary lease, respondent does not have the right to object to petitioner's sale of either unsold shares or any other shares. Further, of particular significance is the fact that in the related proceedings it was specifically determined that petitioner had the right to sell the apartments in a bulk sale and the court directed it to do so.

Contrary to respondent’s contention, it was not necessary to conduct an evidentiary hearing as none of the factual issues raised were material to the issue of the bulk sale (CPLR 7804[h]).

Respondent never argued that the sale of the 25 apartments was not a bulk sale and the argument may not be considered for the first time on appeal (*see Gavin v Catron*, 35 AD3d 354 [2006]). In any event, the argument lacks merit.

We have considered respondent’s additional arguments and find them unavailing.

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

ENTERED: AUGUST 7, 2012

CLERK

Sweeny, J.P. Catterson, Acosta, Freedman, Román, JJ.

7977 US Bank National Association as Trustee of the Banc of America Funding 2006-A Trust,
Plaintiff-Appellant, Index 402881/10 T402881/10

-against-

William Lieberman, et al.,
Defendants,

Joanne Omark Lieberman,
Defendant-Respondent.

[And a Third-Party Action]

Fidelity National Law Group, New York (Anthony F. Prisco of counsel), for appellant.

Jones, LLP, Scarsdale (Stephen J. Jones of counsel), for respondent.

Order, Supreme Court, New York County (Ellen Gesmer, J.), entered July 8, 2011, which, to the extent appealed from, in a mortgage foreclosure action, granted defendant Johanna Omark Lieberman's (sued herein as Joanne Omark Lieberman) motion for summary judgment dismissing the complaint as against her, denied plaintiff's cross motion for summary judgment, and denied plaintiff's motion to extend the time for discovery and the submission of certain documents, unanimously affirmed, without costs.

Defendants, a husband and wife embroiled in a divorce action, had purchased a residence by personally signing the contract of sale and conducting the remainder of the transaction by power of attorney. The deed vested title in both spouses, but the note and mortgage executed on their behalf named only the husband as borrower. Although the matrimonial court had directed the husband to make payments on the mortgage obligation, he defaulted, and plaintiff sought to foreclose on the property. However, because the property was held by the still married defendants as a tenancy by the entirety, and would only be subject to partition after the divorce decree became final (*see Goldman v Goldman*, 95 NY2d 120, 122 [2000]; *Freigang v Freigang*, 256 AD2d 539 [1998]), plaintiff sought reformation to correct the inconsistency between the deed and the mortgage to add defendant wife’s name as a mortgagor.

The motion court correctly granted defendant’s motion for summary judgment insofar as the affidavits and documents she submitted in support of her motion established her prima facie entitlement to such relief. Specifically, defendant established that upon closing (1) she acquired one-half undivided interest in the property at issue, which she holds with her husband as a tenant by the entirety; (2) that she was not a signatory to either the note or mortgage on the property; and (3) that having never applied for a mortgage, she never had any contact, let alone a relationship, with plaintiff or its assignor. Since plaintiff seeks to foreclose on the property pursuant to the mortgage, a contract authorizing foreclosure upon the mortgagor's failure to make the required payments, it must establish, inter alia, that defendant was a party to the mortgage and that she breached the same (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [2010] [the essential elements of a cause of action for breach of contract are the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages]; *JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2010]). Here, nothing submitted by plaintiff establishes that defendant was a party to the mortgage, let alone that she breached its terms. Accordingly, plaintiff failed to raise an issue of fact so as to preclude summary judgment in defendant's favor.

Plaintiff's cross motion for summary judgment was properly denied inasmuch as plaintiff failed to establish entitlement to reformation of the mortgage or the imposition of an equitable lien upon the property. "Reformation is not granted for the purpose of alleviating a hard or oppressive bargain, but rather to restate the intended terms of an agreement when the writing that memorializes that agreement is at variance with the intent of both parties" (*George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 219 [1978]). It is thus presumed that a deliberately prepared and executed document manifests the true intentions of the parties such that the proponent of reformation is required to proffer evidence, which in no uncertain terms, evinces fraud or mistake and the intended agreement between the parties (*Chimart Assoc. v Paul*, 66 NY2d 570, 574 [1986]). Reformation on grounds of mutual mistake requires proof, by clear and convincing evidence, that an agreement does not express the intentions of either party (*Migliore v Manzo*, 28 AD3d 620, 621 [2006]). Reformation based upon a scrivener's error requires proof of a prior agreement between parties, which when subsequently reduced to writing fails to accurately reflect the prior agreement (*Harris v Uhlendorf*, 24 NY2d 463, 467 [1969]). Here, beyond pointing to documents related to the purchase of the property which defendant either directly executed or which were executed by her attorney-in-fact, plaintiff fails to proffer any evidence establishing any intent that defendant was to be a party to and/or be bound by the mortgage. The absence of such evidence thus precludes the conclusion urged by plaintiff, namely that defendant's failure to execute the mortgage was a mutual mistake or a scrivener's error. In fact, the very evidence proffered by plaintiff militates against such a conclusion, inasmuch as neither the mortgage nor the note, prepared by plaintiff's

assignor, had defendant’s name preprinted on it, as was her husband’s, neither document was executed by defendant’s attorney-in-fact on her behalf; he executed them solely on behalf of defendant’s husband. Plaintiff’s evidence thus supports the conclusion that it was both defendant, her husband and plaintiff’s assignor’s intent that defendant not be a party to the mortgage.

“[A]n equitable lien is dependent upon some agreement express or implied that there shall be a lien on specific property” (*Teichman v Community Hosp. of W. Suffolk*, 87 NY2d 514, 520 [1996][internal quotation marks omitted]). The proponent of an equitable lien on property must establish the existence of “a clear intent between the parties that such property be held, given or transferred as security for an obligation” (*Ryan v Cover*, 75 AD3d 502, 502 [2010] [internal quotation marks omitted]) As noted above, beyond defendant’s execution of other documents related to the purchase of the property, plaintiff failed to tender any evidence establishing that defendant agreed or intended to have plaintiff's assignor place a lien on the property.

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

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

ENTERED: AUGUST 7, 2012

CLERK

Mazzarelli, J.P., Andrias, Friedman, Catterson, Freedman, JJ.

6168N-
6169N-
6169NA

Index 603041/06

546-552 West 146th Street LLC, et al.,
Plaintiffs-Respondents-Appellants,

Harlem I LLC, et al.,
Plaintiffs,

-against-

Rachel L. Arfa, et al.,
Defendants-Appellants-Respondents,

Gadi Zamir, et al.,
Defendants.

Schlam Stone & Dolan LLP, New York (David J. Katz of counsel), for appellants-respondents.

Balber Pickard Maldonado & Van Der Tuin, P.C., New York (Jane Y. Ginns of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered April 7, 2010, affirmed, without costs. Orders, same court and Justice, entered June 15, 2011 and July 14, 2011, modified, on the facts, to confirm the report of the Judicial Hearing Officer, and otherwise affirmed, without costs.

Opinion by Andrias, J. All concur except Catterson, J. who dissents in part in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Richard T. Andrias
David Friedman
James M. Catterson
Helen E. Freedman, JJ.

6168N-6169N-6169NA
Index 603041-06

546-552 West 146th Street LLC, et al.,
Plaintiffs-Respondents-Appellants,

Harlem I LLC, et al.,
Plaintiffs,

-against-

Rachel L. Arfa, et al.,
Defendants-Appellants-Respondents,

Gadi Zamir, et al.,
Defendants.

Cross appeals from an order of the Supreme Court, New York County (Charles E. Ramos, J.), entered April 7, 2010, which denied appellants' motion for attorneys' fees incurred in obtaining indemnification under certain limited liability company operating agreements, and orders of the same court and Justice, entered June 15, 2011 and July 14, 2011, which rejected in part a Judicial Hearing Officer's report determining the reasonable amount of attorney fees incurred in defending this action, denied prejudgment interest on the fees awarded, and denied a stay of the award.

Schlam Stone & Dolan LLP, New York (David J. Katz and Michael C. Marcus of counsel), for appellants-respondents.

Balber Pickard Maldonado & Van Der Tuin, P.C., New York (Jane Y. Ginns and John Van Der Tuin of counsel), for respondents-appellants.

ANDRIAS, J.

In this appeal, we first consider whether defendants-appellants are entitled to attorneys' fees incurred in obtaining indemnification under the applicable limited liability company operating agreements. We conclude that Supreme Court properly denied fees on fees.

Defendants Rachel L. Arfa, Alexander Shpigel and Gadi Zamir were the sole members when plaintiff limited liability companies were formed. Outside investors later purchased interests in the LLCs and their investments were used to purchase real property. In 2006, the LLCs commenced this action alleging that defendants-appellants Arfa, Shpigel and American Elite Properties (AEP), which Arfa and Shpigel controlled, concealed the fact that property sellers and mortgage brokers directly or indirectly paid them commissions, which inflated the prices that the LLCs paid for the properties.

This Court affirmed the dismissal of the complaint on the ground that the LLCs lacked standing to sue (54 AD3d 543 [2008], *lv dismissed in part, denied in part* 12 NY3d 840 [2009]). In a subsequent appeal (70 AD3d 512 [2009]), we held that defendants-appellants were entitled to indemnification from the LLCs under the parties' operating agreements, regardless of the fact that claims for the same alleged wrongdoing were still pending in a parallel action brought by the investors. We declined to address whether the indemnified legal expenses should include those incurred in filing the motion for indemnification or in prosecuting that appeal, because the issue was not fully briefed.

Supreme Court denied defendants-appellants' request for the legal fees incurred in seeking indemnification and referred the issue of the reasonableness of the remaining fees to a special referee/judicial hearing officer to hear and report. The JHO found that $132,176.88 of the expenses sought by defendants-appellants was reasonable. Supreme Court reduced the award by $34,608.15, and denied prejudgment interest and the LLCs' request for a stay. Thereafter, the parties submitted a consent order directing the escrow agent to release $94,051.23, the amount confirmed by the court, with defendants-appellants reserving their rights to appeal and enforcement of the order stayed pending this Court's determination.

In New York, "an award of fees on fees must be based on a statute or on an agreement" (*Sage Realty Corp. v Proskauer Rose*, 288 AD2d 14, 15 [2001], *lv denied* 97 NY2d 608 [2002]). Arfa and Shpigel, as managers, and AEP, as Arfa and Shpigel's agent, seek indemnification for fees on fees pursuant to Section 6.8 of the LLCs' operating agreements, which state in relevant part:

> "The Company shall indemnify and hold

> harmless each Manager and its or his direct or indirect agents . . . from and against all claims and demands to the maximum extent permitted under the Act [New York Limited Liability Company Law § 420], except to the extent that such claims or demands result from the willful misconduct or gross negligence of the Manager seeking such indemnification."

Limited Liability Company Law § 420 provides:

> "Subject to the standards and restrictions, if any, set forth in its operating agreement, a limited liability company may, and shall have the power to, indemnify and hold harmless, and advance expenses to, any member, manager or other person, or any testator or intestate of such member, manager or other person, from and against any and all claims and demands whatsoever; provided, however, that no indemnification may be made to or on behalf of any member, manager or other person if a judgment or other final adjudication adverse to such member, manager or other person establishes (a) that his or her acts were committed in bad faith or were the result of active and deliberate dishonesty and were material to the cause of action so adjudicated or (b) that he or she personally gained in fact a financial profit or other advantage to which he or she was not legally entitled."

The dissent believes that § 6.8 of the operating agreements encompasses fees on fees because it employs the term "all claims and demands to the maximum extent permitted by the Act," and Limited Liability Company Law § 420 does not prohibit an award of fees on fees. The dissent finds that the Court of Appeals' decision in *Baker v Health Mgt. Sys., Inc.* (98 NY2d 80 [2002]), which held that Business Corporation Law § 722(a) does not encompass an award of fees on fees, is inapposite because § 722(a) limits attorneys fees to those “actually and necessarily incurred as a result of such action or proceeding,” whereas Limited Liability Company Law § 420 encompasses “any and all claims and demands whatsoever.” Thus, the dissent would adopt the rationale of the Delaware Courts, which have interpreted statutory language similar to § 420 as authorizing an award of fees on fees in indemnification proceedings (*see e.g. Stifel Fin. Corp. v Cochran*, 809 A2d 555 [Del 2002]).

Although the dissent is correct that *Baker* did not create a per se rule against “fees on fees” in all cases (*see Posner v S. Paul Posner, 1976 Irrevocable Family Trust*, 12 AD3d 177 [2004]), an analysis of § 6.8 of the operating agreements and Limited Liability Company Law § 420, under the applicable principles of statutory and contractual interpretation, and in light of the public policy of the State of New York, does not support the award of fees on fees in this case.

Indemnification statutes are strictly construed (*see Baker*, 98 NY2d at 88). In *Baker,* the Court of Appeals refused to award fees on fees absent explicit statutory authority, stating in part that “even if . . . the ‘incurred as a result of’ language of section 722 (a) [of the Business Corporation Law] could arguably support an implied right of indemnification for fees on fees, the ‘American Rule’ . . . would militate against adoption of that interpretation” (*id.*).

While the language “any and all claims and demands whatsoever” in Limited Liability Company Law § 420 may be broader than Business Corporation Law § 722(a), it does not explicitly provide for an award of fees on fees. Nor does the dissent point to anything in the legislative history that would support such an award. Thus, as in *Baker*, while the language may arguably support an implied right of indemnification, the American Rule militates against that interpretation.

Furthermore, the statutory language is permissive and does not per se create a legal duty to indemnify. Rather, it empowers a limited liability company to tailor an indemnity clause in accordance with its own “standards and restrictions,” subject to the limitations specified in the statute. When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487 [1999]; *Flores v Las Americas Communications,* 218 AD2d 595 [1995]).

In *Hooper*, the Court of Appeals explained:

> "Inasmuch as a promise by one party to a contract to indemnify the other for attorney's fees incurred in litigation between them is contrary to the well-understood rule that parties are responsible for their own attorney's fees, the court should not infer a party's intention to waive the benefit of the rule unless the intention to do so is *unmistakably clear* from the language of the promise"(74 NY2d at 492 [emphasis added]).

Section 6.8 of the operating agreements does not contain unambiguous language providing for the recovery of fees on fees. While including the broad "any and all" and "to the maximum extent permitted by the Act" language, the provisions are also limited in that they authorize indemnification only with respect to "claims and demands" and do not specifically authorize expenses or legal fees incurred in obtaining indemnification. Thus, it is not "unmistakably clear" that fees on fees were contemplated (*see Klock v Grosodonia*, 251 AD2d 1050 [1998]; *see also Bridgestone/Firestone, Inc. v Recovery Credit Servs., Inc.*, 98 F3d 13, 20-21 [2d Cir 1996] [concluding that contract provision provided no "unmistakably clear statement" that fees on fees were intended]). We note that in contrast, the indemnity clause in favor of members contained in section 7.2(a) of the operating agreements expressly states that it covers "any and all losses, claims, damages, liabilities, expenses (including legal fees and expenses) . . .”

Insofar as Delaware cases have interpreted similar statutory language to allow fees on fees, defendants have not shown that the language used in the applicable operating agreements in those cases was similar to the language used in § 6.8. Further, although the interpretation of the Delaware Courts may be instructive, it is by no means binding on this Court (*see Ficus Invs., Inc. v Private Capital Mgt., LLC*, 61 AD3d 1, 9 [2009]).

In *Weaver v ZeniMax Media, Inc*. (2005 WL 243163, *7, 2004 Del C. LEXIS 10, *27 [2004]), the Delaware Court of Chancery explained that the *Stifel* holding as to fees on fees was not dependent upon the “full extent” language in an indemnification bylaw, but rather, among other things, upon the conclusion that indemnification rights would be incomplete without the ability to obtain litigation costs incurred to vindicate these rights. This view was rejected in *Baker* and conflicts with New York's general policy that a party is not entitled to contractual indemnification for those attorney's fees and costs incurred in establishing its right to indemnification. There is no countervailing public policy that would warrant the award of fees on fees in this case involving a dispute between LLCs and their managers.

The court properly directed a reference as to the reasonable amount of the attorneys' fees to be indemnified. Our prior decision (70 AD3d 512 [2009], *supra*) did not constitute law of the case because we did not rule on the merits of the amount to be awarded (*see Thompson v Cooper*, 24 AD3d 203, 205 [2005]). Nor was there a clear manifestation of an intent to waive the right to challenge the reasonableness of the fees (*see generally Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006]); in any event, the court could have raised the reasonableness of the fees on its own (*see Solow Mgt. Corp. v Tanger*, 19 AD3d 225, 226 [2005]).

Prejudgment interest on the fee award was also properly denied (*see Ficus Invs., Inc. v Private Capital Mgt., LLC*, 71 AD3d 591, 592 [2010]; *see also Wells Fargo Fin., Inc. v Fernandez*, 2001 WL 58010, *2, 2001 US Dist LEXIS 414, *8 [SD NY 2001]). A stay of the indemnified attorneys' fee award was unwarranted because, among other reasons, a delay in payment would improperly circumvent this Court's order.

However, the motion court should have confirmed the report of the JHO, since the law firm's block billing did not render the invoiced amounts per se unreasonable and the allocations of work billed between this case and related cases were adequately explained by the billing attorney's unrebutted and credible testimony and the spreadsheet he prepared to assist in understanding the invoices.

Accordingly, the order of the Supreme Court, New York County (Charles E. Ramos, J.), entered April 7, 2010, which denied appellants' motion for attorneys' fees incurred in obtaining indemnification under certain limited liability company operating agreements, should be affirmed, without costs. The orders of the same court and Justice, entered June 15, 2011 and July 14, 2011, which rejected in part a Judicial Hearing Officer's report determining the reasonable amount of attorney fees incurred in defending this action, denied prejudgment interest on the fees awarded and denied a stay of the award, should be modified, on the facts, to confirm the report of the Judicial Hearing Officer, and otherwise affirmed, without costs.

All concur except Catterson, J. who dissents in part in an Opinion.

CATTERSON, J. (dissenting in part)

Because I believe the defendants are entitled to recoup the fees incurred in litigating their right to indemnification, I must respectfully dissent in part. The language of the indemnification clauses in the LLC operating agreements permits recovery up to the statutory limit, and the Limited Liability Company Law, unlike the Business Corporation Law, authorizes indemnification “from and against any and all claims and demands whatsoever.”

The plaintiffs in this case are limited liability companies that purchased various properties. Defendants Arfa, Shpigel and Zamir were the LLCs’ sole members, and outside investors were solicited to purchase interests in the LLCs. Arfa and Shpigel also controlled defendant-appellant American Elite Properties (hereinafter referred to as “AEP”). The plaintiffs brought an action alleging that the defendants misrepresented or failed to disclose to the plaintiffs and investors that they had received commissions from the sellers of the properties.

The motion court dismissed the action on the ground that the LLCs lacked standing, and this Court affirmed. 54 AD3d 543, 863 N.Y.S.2d 412 (1st Dept. 2008), lv. dismissed in part, denied in part, 12 N.Y.3d 840, 881 N.Y.S.2d 13, 908 N.E.2d 921 (2009). During the time between the motion court’s dismissal and perfection of the appeal, the investors brought a separate action (Roni LLC v. Arfa, Index No. 601224/2007) against the same defendants as in this case.

In September 2008, the defendants moved for indemnification of their expenses. Arfa and Shpigel sought indemnification in their capacities as managers of the LLCs and AEP sought indemnification as their agent pursuant to § 6.8 of four LLC operating agreements. The defendants sought approximately $177,000 in fees, which included both attorneys' fees expended in defense of the underlying litigation and the fees incurred in litigating their indemnification rights. The court denied the motion on the ground that it was premature. The motion court reasoned that the resolution of Roni LLC v. Arfa, brought by the LLC investors against the same defendants in this case, could result in a finding that the defendants had engaged in misconduct, which would preclude indemnification.

On appeal, this Court reversed, granted the motion, and remanded for calculation of legal expenses. 70 A.D.3d 512, 894 N.Y.S.2d 427 (1st Dept. 2010). We found that the pendency of the parallel investor action did not render indemnification premature and that requiring the defendants to wait for resolution of all of the related claims "would eviscerate the right to indemnification." 70 A.D.3d at 512, 894 N.Y.S.2d at 428. We expressly declined to address whether indemnification should include fees incurred in moving for indemnification or in prosecuting the appeal (hereinafter referred to as “fees on fees”) because that issue was not fully briefed.

On February 25, 2010, the defendants moved in Supreme Court for an order directing the escrow agent holding the funds securing the indemnification obligations to release $177,144.18 for 1) expenses for defending the action, 2) expenses for seeking indemnification and obtaining it on appeal, 3) prejudgment interest on the amount indemnified, 4) expenses for moving for release of the escrow, and 5) prejudgment interest thereon. The defendants attached redacted legal invoices in support of the motion.

In an April 7, 2010 order, the motion court denied the defendants’ request for fees on fees and referred the issue of the reasonableness of the remaining fees to a special referee/judicial hearing officer to hear and report. At the hearing, defendants sought $139,395 in attorneys’ fees and $10,760 in disbursements. Because the motion court denied its request for fees on fees, defendants submitted no proof on those fees.

The judicial hearing officer (hereinafter referred to as “JHO”) found $132,176.88 of the expenses reasonable and indemnifiable, and recommended an award in that amount and prejudgment interest. The plaintiffs moved to reject the JHO's recommendation. The defendants opposed and cross-moved to confirm. The motion court confirmed in part, rejected in part, and modified the report, finding that the JHO's findings were not supported by the record. Shortly thereafter, the parties submitted a consent order directing the escrow agent to release $94,051.23, the amount confirmed by the June 15, 2011 order. The defendants reserved their right to appeal the motion court's decision, and enforcement of the order was stayed pending appeal.

I agree with the majority that the motion court should have confirmed the JHO's report in its June 15 order. However, in my opinion, the motion court's denial of the defendants' fees on fees should be reversed. For the reasons set forth below, we should instead remand for a calculation of reasonable expenses incurred by the defendants in successfully litigating their rights to indemnification.

It is well established that "an award of fees on fees must be based on a statute or on an agreement." Sage Realty Corp. v. Proskauer Rose, 288 A.D.2d 14, 15, 732 N.Y.S.2d 162, 163 (1st Dept. 2001), lv. denied, 97 N.Y.2d 608, 739 N.Y.S.2d 98, 765

N.E.2d 301 (2002). In this case, § 6.8 of the LLC operating agreements states in relevant part:

> "The Company Shall indemnify and hold harmless each Manager and its or his direct or indirect agents ... *from and against all claims and demands to the maximum extent permitted under the [New York Limited Liability Company Law]*, except to the extent that such claims or demands result from the willful misconduct or gross negligence of the Manager seeking such indemnification" (emphasis added).

Section 202(k) of the Limited Liability Company Law (hereinafter referred to as "LLC Law") authorizes an LLC to "indemnify a member or manager or any other person" "[u]nless the articles of organization provide otherwise and subject to any limitations provided in this chapter or any other law of this state." Section 420 provides that:

> "Subject to the standards and restrictions, if any, set forth in its operating agreement, a limited liability company may, and shall have the power to, *indemnify and hold harmless, and advance expenses to, any member, manager or other person ..., from and against any and all claims and demands whatsoever*; provided, however, that no indemnification may be made to or on behalf of any member, manager or other person if a judgment or other final adjudication adverse to such member, manager or other person establishes (a) that his or her acts were committed in bad faith or were the result of active and deliberate dishonesty and were material to the cause of action so

> adjudicated or (b) that he or she personally gained in fact a financial profit or other advantage to which he or she was not legally entitled" (emphasis added).

Under the expansive language of the LLC agreements, the defendants are to be indemnified for "all claims and demands" including legal expenses, up to the statutory limitations. Other than the exceptions contained in (a) and (b), there are no statutory limitations on such indemnification.

Where "the statutory language is clear and unambiguous" and "describes the particular situation in which it is to apply, 'an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded.'" Matter of Schultz Mgt. v. Board of Stds. & Appeals of City of N.Y., 103 A.D.2d 687, 689, 477 N.Y.S.2d 351, 354 (1st Dept. 1984) (internal quotations marks omitted), citing McKinney's Cons. Laws of N.Y., Book, Statutes § 240, aff'd, 64 N.Y.2d 1057, 489 N.Y.S.2d 902, 479 N.E.2d 247 (1985). It would appear then that under LLC Law § 420, there is no limitation on attorneys' fees.

Indeed, the language differs starkly from that in Business Corporation Law (hereinafter referred to as the "BCL") § 722(a), which limits attorneys' fees to those that are "actually and necessarily incurred as a result of such action or proceeding." The Court of Appeals' decision in Baker v. Health Mgt. Sys., (98

N.Y.2d 80, 745 N.Y.S.2d 741, 772 N.E.2d 1099 (2002)), therefore should be found inapplicable in this case. In Baker, the Court held that § 722(a) does not require that an officer or director of a corporation receive fees on fees after successfully litigating contractual indemnification rights in the absence of a specific provision in the corporation's bylaws requiring that such fees be paid in an indemnification dispute. Section 722(a) states, in pertinent part,

> "[a] corporation may indemnify any person made, or threatened to be made, a party to an action or proceeding (other than one by or in the right of the corporation to procure a judgment in its favor), whether civil or criminal ... by reason of the fact that [the person] ... was a director or officer of the corporation ... against judgments, fines, amounts paid in settlement and reasonable expenses, *including attorneys' fees actually and necessarily incurred as a result of such action or proceeding*, or any appeal therein, if such director or officer acted, in good faith, for a purpose ... believed to be in ... the best interests of the corporation" (emphasis added).

The Court determined that the phrase "'attorneys' fees *actually and necessarily* incurred *as a result* of such action or proceeding' (emphasis in original)," requires a "reasonably substantial nexus between the expenditures and the underlying suit,"(98 N.Y.2d at 85, 745 N.Y.S.2d at 744), and rejected the plaintiff's claim for fees on fees as too attenuated from the underlying action. The Court rejected the plaintiff's expansive "but for" test, concluding that there was nothing "indicating that the Legislature intended to provide coverage for fees on fees." 98 N.Y.2d at 87, 745 N.Y.S.2d at 745-746.

LLC Law 420, on the other hand, states that "a limited liability company may, and shall have the power to, indemnify and hold harmless, and advance expenses to, any member, manager or other person ..., *from and against any and all claims and demands whatsoever*" (emphasis added). The statutory language is virtually identical to Delaware's Limited Liability Company Act, which states that "a limited liability company may, and shall have the power to, indemnify and hold harmless any member or manager or other person *from and against any and all claims and demands whatsoever*." 6 Del. C. § 18-108 (emphasis added). There is no statute or binding precedent in New York that expressly prohibits the recovery of fees on fees under section 420, and the plaintiffs advance no compelling reason to infer such a limitation. As we observed in Ficus Invs., Inc. v. Private Capital Mgt., LLC, 61 A.D.3d 1, 9, 872 N.Y.S.2d 93, 99 (1st Dept. 2009), "Delaware courts have had ample opportunity to address these issues of indemnification for and advancement of expenses and, although not binding as to ... New York law, their holdings can be instructive." As such, I would adopt the rationale of the

Delaware courts, which have long awarded fees on fees in indemnification proceedings brought by LLC officers and directors for the reasons articulated in Stifel Fin. Corp. v. Cochran, 809 A.2d 555 (Del. Ch. 2002). See e.g., Sodano v. American Stock Exch. LLC, 2008 WL 2738583, at *17, 2008 Del. Ch. LEXIS 92, *61-62 (Del. Ch. 2008); DeLucca v. KKAT Mgmt., L.L.C., 2006 WL 4762856, at *16, 2006 De. Ch. LEXIS 19, *51-52 (Del. Ch. 2006); Senior Tour Players 207 Mgt. Co. LLC v. Golftown 207 Holding Co., LLC, 853 A.2d 124 (Del. Ch. 2004).

In Stifel Fin. Corp., the court observed that “the indemnification statute should be broadly interpreted” to include fees on fees in order to effectuate the remedial purpose of the statute. 809 A.2d at 561. See also Gagne v. Maher, 594 F.2d 336, 344 (2d Cir. 1979) (a fee on fee is compensable under the Civil Rights Attorney’s Fees Awards Act of 1976; to “deny[] attorneys’ fees for the time spent in obtaining them would dilute the value of a fees award”) (internal quotations and citations omitted), aff’d, 448 U.S. 122, 100 S.Ct. 2570 (1980). Otherwise, an attorney representing a member or manager who is litigating statutorily authorized indemnification must seek compensation from the member or manager or remain uncompensated, a result that is clearly contrary to the express purpose of the statute to protect members and managers from personal liability for LLC expenses. "[W]ithout an award of attorneys' fees for the indemnification suit itself, indemnification would be incomplete." Stifel Fin. Corp., 809 A.2d at 561. As the Delaware courts have reasoned, fees on fees are recoverable in "recognition to the reality that the [LLC] itself is responsible for putting the [officer or] director through the process of litigation" and because doing so "prevents [an LLC] from using its 'deep pockets' to wear down a former [officer or] director with a valid claim to indemnification, through expensive litigation." See Stifel Fin. Corp., 809 A.2d at 561.

Moreover, this Court has explicitly rejected the "argument that Baker v. Health Mgt. Sys. [...] created a per se rule against fees on fees." Posner v. S. Paul Posner 1976 Irrevocable Family Trust, 12 A.D.3d 177, 179, 784 N.Y.S.2d 509, 511-512 (1st Dept. 2004). To the contrary, we have found that "persuasive if not binding authority strongly suggests that statutes creating a right to attorneys' fees are served by [the] allowance [of fees on fees]." Kumble v. Windsor Plaza Co., 161 A.D.2d 259, 261, 555 N.Y.S.2d 290, 292 (1st Dept. 1990), lv. denied, 76 N.Y.2d 709, 561 N.Y.S.2d 913, 563 N.E.2d 284 (1990) (finding that a "fee on a fee" was authorized under Real Property law § 234, the fee-shifting statute in landlord-tenant litigation); see e.g. Posner, 12 A.D.3d at 179, 784 N.Y.S.2d at 511-512 (fees on fees awarded where recovery of attorneys' fees was permitted under Debtor and Creditor Law § 276–a).[1]

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

ENTERED: AUGUST 7, 2012

CLERK

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[1] The following courts have also awarded fees on fees where the award of attorneys' fees was permitted by statute: Podhorecki v. Lauer's Furniture Stores, 201 A.D.2d 947, 607 N.Y.S.2d 818)(4th Dept. 1994) (recovery of fees on fees was permitted when an award of attorneys' fees was authorized under General Business Law § 396–u[7]); see also Matter of Hargett v. Town of Ticonderoga, 31 Misc.3d 443, 916 N.Y.S.2d 750 (Sup. Ct., Essex County 2010) (recovery of fees on fees permitted where the Eminent Domain Procedure Law § 702(B) provides for fees incurred "because of the acquisition procedure"); Sidney K. v. Ambach, 144 A.D.2d 874, 535 N.Y.S.2d 468 (3d Dept. 1988), lv. dismissed 75 N.Y.2d 765, 551 N.Y.S.2d 906, 551 N.E.2d 107 (1989) (fee on fee permitted where Handicapped Children's Protection Act authorizes an award of counsel fees to parents who prevail in actions); Alfonso v. Rosso, 137 Misc.2d 915, 522 N.Y.S.2d 813 (Civ. Ct. 1987) (fees on fees permitted where attorneys' fees were recoverable under Judiciary Law Section 773).

Tom, J.P., Friedman, Sweeny, Moskowitz, DeGrasse, JJ.

6903 Martin D. Yudell, et al., Index 600404/08
Plaintiffs-Appellants,

-against-

Jerrold Gilbert, etc., et al.,
Defendants-Respondents,

Baldwin Harbor Associates,
Defendant.

Schwartz & Silverstein, LLP, New City (Mark D. Lefkowitz of counsel), for appellants.

Frydman LLC, New York (David S. Frydman of counsel), for Jerrold Gilbert and Jerrold Morgulas, respondents.

D'Agostino Levine, Landesman & Lederman LLP, New York (George Tzimopoulos of counsel), for Susan W. Finley, Wendy W. Chayet and Stanley Weiser, respondents.

Appeal from order, Supreme Court, New York County (Bernard J. Fried, J.), entered May 3, 2010, deemed an appeal from a judgment, same court and Justice, entered August 30, 2010, and as so considered, affirmed, with costs.

Opinion by Moskowitz, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David Friedman
John W. Sweeny, Jr.
Karla Moskowitz
Leland G. DeGrasse, JJ.

6903
Index 600404/08

Martin D. Yudell, et al.,
Plaintiffs-Appellants,

-against-

Jerrold Gilbert, etc., et al.,
Defendants-Respondents,

Baldwin Harbor Associates,
Defendant.

Plaintiffs appeal from the order of the Supreme Court, New York County (Bernard J. Fried, J.), entered May 3, 2010, which insofar as appealed from as limited by the briefs, granted the motions of defendants Jerrold Gilbert (individually), Susan W. Finley, Wendy W. Chayet, and Stanley Weiser, as trustees of the Weiser Family Trust, and Jerrold Gilbert and Jerrold Morgulas, as trustees of the Irene Psaty Trust, to dismiss the first, second, third, fourth, and sixth causes of action of the complaint.

Schwartz & Silverstein, LLP, New City (Mark D. Lefkowitz, Leonard J. Sklerov and Jonathan E. Antone of counsel), for appellants.

Frydman LLC, New York (David S. Frydman of counsel), for Jerrold Gilbert and Jerrold Morgulas, respondents.

D'Agostino Levine, Landesman & Lederman LLP, New York (George Tzimopoulos of counsel), for Susan W. Finley, Wendy W. Chayet and Stanley Weiser, respondents.

MOSKOWITZ, J.

This appeal, from the grant of a motion to dismiss the complaint, requires us to analyze the difference between direct and derivative claims. New York has lacked a clear approach for determining this difference. Instead, our jurisprudence consists of case by case analyses, that are sometimes difficult to apply to new fact patterns. Therefore, in this case, we adopt the test the Supreme Court of Delaware developed in *Tooley v Donaldson, Lufkin & Jerette, Inc.* (845 A2d 1031, 1039 [Del 2004]). The *Tooley* test is consistent with New York law and has the added advantage of providing a clear and simple framework to determine whether a claim is direct or derivative.

At issue on this appeal are claims by trustees of one member of a joint venture against: (1) the managing agent of the joint venture's sole asset, a shopping center in Long Island, (2) the other members of the joint venture and (3) the joint venture as a nominal defendant.

In 1965, plaintiff Martin D. Yudell, Julius Yudell,[1] Joseph J. Weiser, and I. Roy Psaty formed Baldwin Harbor Associates (BHA). Each of the Yudells had a one-sixth interest, while Weiser and Psaty each had a one-third interest. Martin and

[1] One set of plaintiffs is Martin D. Yudell and Donald M. Spanton as trustees of the Julius Yudell Trust.

Julius's interests were later reconfigured so that the Yudell Trust had a 1/3 interest in the joint venture. Julius Yudell, Joseph Weiser and I. Roy Psaty are deceased.

The purpose of the joint venture was to construct and manage a shopping center. Pursuant to a 1991 management agreement, BHA hired defendant Jerrold Gilbert as the managing agent for the shopping center. Prior to that time, Gilbert had no legal connection to the joint venture. Subsequently, Gilbert became one of two trustees of the Psaty Trust, the successor venture partner to I. Roy Psaty. One of the beneficiaries of the Psaty Trust is Gilbert's wife. Gilbert's compensation as the managing agent is 3% of the gross rentals of the shopping center. His responsibilities as manager include billing and collecting rents and providing for maintenance and repair of the premises.

In 2008, plaintiffs brought this action against Gilbert individually, the other members of the joint venture and BHA as a nominal defendant. The complaint purported to bring both derivative and direct claims and pleaded demand futility as follows:

> "Plaintiff Yudell Trust is bringing this action in both its individual capacity, and as a derivative action on behalf of BHA [i.e., the joint venture Baldwin Harbor Associates]. In view of the acts, practices and courses of conduct on the part of the

> defendants as alleged herein, a demand upon the joint venture partners of BHA to take action against the individual defendants would be futile."

The complaint alleged, on information and belief, that Gilbert had "failed to timely, and in a regular manner, bill for and collect appropriate additional rents and charges at the Shopping Center, including but not limited to real estate tax escalation reimbursement (the Tax Obligations), and common area maintenance (CAM) charges, all required by the terms of the leases." The complaint specified:

> "(a) upon information and belief, Waldbaum's, Inc. . . . accrued a total of approximately $1,200,000 in unpaid Tax Obligations owed to BHA during the period of 1991 through 2007 and has also accrued a total of approximately $375,000 in unpaid CAM charges owed to BHA during the period of 1991 through 2007;
>
> (b) upon information and belief, CVS/Caremark Corporation ('CVS') has accrued a total of approximately $340,000 in unpaid Tax Obligations owed to BHA during the period of 2001 through 2007;
>
> (c) with the approval of [the Weiser and Psaty defendants], and over the objection of the Plaintiff, Gilbert has unilaterally granted . . . purportedly 'temporary' rent concessions to various tenants, . . . which have continued for years and have significantly reduced the revenues of the Shopping Center;
>
> (d) during the past 17 years, Gilbert . . . failed to preserve the legal claims of

> BHA against Waldbaum’s and CVS and other tenants for unpaid Tax Obligations, CAM and rent more than six (6) years old . . .;
>
> (f) Upon information and belief, Gilbert has hired third party real estate brokers to obtain tenants for the Shopping Center for compensation without having entered into written agreements with such brokers, and without having obtained the required unanimous consent of the Venture Partners.”

The complaint further alleged:

> “Upon information and belief, Gilbert’s failure to collect the Tax Obligations and CAM . . . and preserve the BHA legal claims against Waldbaum’s . . . had the effect of . . . vesting Waldbaum’s with superior bargaining power in the . . . negotiation . . . in November 2007 for a 20-year . . . lease extension and expansion of its space in the Shopping Center . . . This superior bargaining power . . . resulted in Waldbaum’s obtaining an under-market rent from BHA for the next 20 years . . .”

The complaint also alleged that Gilbert had failed “to properly repair, upgrade and maintain the Shopping Center facilities during [the past 17] years . . . The deterioration of the Shopping Center has resulted in BHA’s inability to obtain rents anywhere near the average market level for such a shopping center in its territory.”

The complaint additionally alleged, “Since in or about April 2002, Gilbert . . . has continually failed to send to Plaintiffs, on a regular basis and in a timely manner, the monthly operating statements with respect to the Shopping Center, and other material documents." For example, Gilbert allegedly "failed and/or refused to provide the Plaintiffs . . . with the revised year-end compilations for 2005 and 2006, the bank lease extension documentation, and monthly statements for August, September and December 2006, and October 2007." However, an exhibit to the complaint included the October 2007 monthly recap for the shopping center.

The first cause of action alleged that Gilbert had "squandered, mismanaged and wasted joint venture partnership funds and property, causing the joint venture partnership to suffer great loss." It also alleged that Gilbert had "failed properly to account to the joint venture partners." It sought damages in an "amount determined by an independent accounting."

The second cause of action alleged that Gilbert had breached the management agreement. It sought damages in an "amount determined by an independent accounting."

The third cause of action alleged that Gilbert, Weiser, and the Psaty defendants "owed a fiduciary duty to BHA and each of the joint venture partners" that they allegedly breached, causing "injury and damages to the Plaintiffs, including all additional, incidental and consequential amounts as shall be determined prior to trial" and sought damages "in an amount determined by the court." The alleged breach of fiduciary duty the Weiser and

Psaty defendants committed was “their de facto alliance with Gilbert in support of [Gilbert’s] exclusive management and control of virtually every BHA transaction during the past 17 years, and Gilbert’s opposition to the exercise of the partnership rights of the Yudell Trust.”

The fourth cause of action was against Gilbert for negligence. The sixth cause of action alleged that Gilbert breached the joint venture agreement. It specified, “Gilbert’s unauthorized hiring of third party real estate brokers . . . without written agreements, has placed BHA in risk of being subject to claims from the third party real estate brokers for excessive commissions and expenses which are not limited by written agreements.” Plaintiffs did not oppose dismissal of the fifth cause of action and did not appeal from the dismissal of the seventh cause of action.

Defendants answered and moved to dismiss the complaint. The Psaty defendants also moved to amend their answer to add the defenses of documentary evidence, release, and lack of a necessary party because plaintiffs had not effectuated service upon BHA, the joint venture.

The motion court determined that the first six causes of action were derivative in nature and granted defendants’ motions to dismiss these causes of action for failure to plead demand futility with the requisite particularity. On appeal, plaintiffs contend this was error because, according to plaintiffs, not every aspect of causes of action one through six was derivative in nature. In particular, plaintiffs contend the third cause of action for breach of fiduciary duty was a direct claim.

A plaintiff asserting a derivative claim seeks to recover for injury to the business entity. A plaintiff asserting a direct claim seeks redress for injury to him or herself individually. Sometimes whether the nature of the claim is direct or derivative is not readily apparent. New York does not have a clearly articulated test, but approaches the issue on a case by case basis depending on the nature of the allegations. For instance, where shareholders suffer solely through depreciation in the value of their stock, the claim is derivative, (*Lewin v Lipper Convertibles*, 756 F Supp 2d 432, 441 [SD NY 2010] [internal quotation marks omitted]), even if the diminution in value derives from a breach of fiduciary duty (*Hahn v Stewart*, 5 AD3d 285, 286 [2004] [internal quotation marks omitted]). Allegations of mismanagement or diversion of corporate assets also plead a wrong to the corporation *(see Abrams v Donati*, 66 NY2d 951, 952 [1985]; *Albany-Pittsburgh United Corp. v Bell*, 307 AD2d 416, 419 [2009], *lv dismissed and denied* 1 NY3d 620 [2004]), as is a diversion of a corporate opportunity (*see Glenn v Hoteltron*

Systems, Inc., 74 NY2d 386, 393 [1989]).

Delaware law, however, provides a framework to determine whether a claim is direct or derivative:

> "[a] court should look to the nature of the wrong and to whom the relief should go. The stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation."

(*Tooley v Donaldson, Lufkin & Jerette, Inc.*, 845 A2d 1031, 1039 [Del 2004]). Thus, under *Tooley*, a court should consider "(1) who suffered the alleged harm (the corporation or the stockholders); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders individually)" (*id*. at 1035).

Applying this common sense approach, plaintiffs' claim for breach of fiduciary duty is derivative, because any pecuniary loss plaintiffs suffered derives from a breach of duty and harm to the business entity, BHA. Plaintiffs' allegations of breach of fiduciary duty involve failure to collect rent, back taxes and common charges that tenants would have owed to BHA. Paragraph 17 of the complaint highlights the derivative nature of plaintiffs' claims when it refers to: "Gilbert's *failure to preserve BHA's rights* to collect the unpaid tax obligations, CAM and rent . . ."

It is only through loss to BHA that plaintiffs suffer a loss at all. Although plaintiffs may own a minority interest in the joint venture, all members suffer losses from the failure to collect rents and other obligations owed the joint venture. Moreover, *Tooley* suggests that we consider looking at who would receive the benefit of any recovery or other remedy, the joint venture or the members individually. Accordingly, here, any recovery would represent the value of lost rent, CAM charges and the like that inure to the benefit of the joint venture. Only if and when the joint venture receives this compensation would plaintiffs then be entitled to receive their proportionate share. Thus, plaintiffs' claims are derivative.

But, even if some of plaintiffs' claims were direct, "[a] complaint the allegations of which confuse a shareholder's derivative and individual rights will . . . be dismissed" (*Abrams v Donati*, 66 NY2d 951, 953 [1985]). To the extent, if any, that plaintiffs have asserted direct claims, they are embedded in an otherwise derivative claim for partnership waste and mismanagement. Accordingly, the motion court correctly determined that plaintiffs' causes of action are derivative and properly dismissed them because the complaint fails to plead demand futility with the requisite particularity (*see e.g. Bansbach v Zinn*, 1 NY3d 1, 8-9, 11 [2003]; *Marx v Akers*, 88 NY2d 189, 198, 200-202

[1996]). None of the grounds for excusing demand appear in the complaint. The complaint fails to allege that any of the defendants had some self-interest in the transactions, or in Gilbert's alleged neglect. The complaint does not allege that defendants "failed to inform themselves to a degree reasonably necessary about the [challenged] transaction[s]" (*Marx*, 88 NY2d at 198). Nor does the complaint allege that the challenged transactions were so egregious on their face that they could not have been products of sound business judgment.

Because the dismissal below was not with prejudice (*cf. Tico, Inc. v Borrok*, 57 AD3d 302 [2008]), it is not necessary for us to reach plaintiffs' argument on appeal that they should be allowed to amend their complaint.

Accordingly, the appeal from the order of the Supreme Court, New York County (Bernard J. Fried, J.), entered May 3, 2010, that, insofar as appealed from as limited by the briefs, granted the motions of defendants Jerrold Gilbert (individually), Susan W. Finley, Wendy W. Chayet, and Stanley Weiser, as trustees of the Weiser Family Trust, and Jerrold Gilbert and Jerrold Morgulas, as trustees of the Irene Psaty Trust, to dismiss the first, second, third, fourth, and sixth causes of action of the complaint, should be deemed an appeal from the judgment, same court and Justice, entered August 30, 2010, dismissing the complaint, and, as so considered, said judgment should be affirmed, with costs.

All concur.

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

ENTERED: AUGUST 7, 2012

CLERK