SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 31, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Andrias, DeGrasse, Richter, Abdus-Salaam, JJ.

6454 Josephine Mahinda, Index 117847/09
Petitioner-Appellant,

-against-

Board of Collective Bargaining, et al.,
Respondents-Respondents.

_____

Josephine Mahinda, appellant pro se.

John F. Wirenius, New York, for Board of Collective Bargaining and Marlene A. Gold, respondents.

Leonard A. Shrier, New York, for Organization of Staff Analysts, respondent.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for City of New York, respondent.

_____

Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered October 14, 2010, denying the petition and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

After an informal conference and "Step II" hearing, disciplinary charges against petitioner, a provisional employee, were substantiated, and her employment with the Department of Transportation was terminated, effective October 17, 2008. On

November 23, 2009, the Office of Collective Bargaining (OCB) denied petitioner's improper practice petition against her union, the Organization of Staff Analysts (OSA), finding that it was time-barred and that, in any event, petitioner failed to establish that OSA breached its duty of fair representation by failing to advance to arbitration the grievance arising out of her termination. Although petitioner commenced this article 78 proceeding, pro se, on or about December 21, 2009, within the applicable 30 day limitations period (Administrative Code of City of NY § 12-308[a]), she named only the Board of Collective Bargaining (the Board) and the "NYC Law Department" as respondents. Petitioner did not file an amended petition adding OSA and the City as respondents until on or about May 18, 2010. At that time she also asked the court, by order to show cause, to review the City's underlying decision to terminate her employment, and to reinstate her.

Pursuant to CPLR 1001(a), a person should be joined in an action or proceeding where necessary "if complete relief is to be accorded between the persons who are parties" thereto or where the person to be joined "might be inequitably affected by a judgment" therein (*see City of New York v Long Isl. Airports Limousine Serv. Corp.*, 48 NY2d 469, 475 [1979]). "These compulsory joinder provisions are intended 'not merely to provide

a procedural convenience but to implement a requisite of due process -- the opportunity to be heard before one's rights or interests are adversely affected'" (*Matter of 27th St. Block Assn. v Dormitory Auth. of State of N.Y.*, 302 AD2d 155, 160 [2002], quoting *Matter of Martin v Ronan*, 47 NY2d 486, 490 [1979]).

OSA and the City are necessary parties to this proceeding because affirmative relief is sought against OSA for the alleged violation of its duty of fair representation and against the City for its alleged improper termination of petitioner's employment. There is no possibility of an effective judgment without OSA and the City, since they are the only real parties in interest; nor does it appear that a protective provision in the judgment could avoid prejudice to them (CPLR 1001[b]; *see L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 10-11 [2007]). Because the amended petition was not filed until on or about May 18, 2010, by which time the 30 day limitations period had expired, petitioner's claims against the City and OSA are time-barred.

Petitioner cannot invoke the "relation back" doctrine to avoid dismissal, because the City and OSA are not united in interest with the Board (*see* CPLR 203[b]; *Emmett v Town of Edmeston*, 2 NY3d 817, 818 [2004]; *Mondello v New York Blood Ctr.-Greater N.Y. Blood Program*, 80 NY2d 219, 226 [1992]). The Board,

a neutral administrative agency, merely acted as an adjudicatory body, and is not liable for any improper representation practice by OSA or any improper termination practice by the City.

In any event, we find that the Board's determination is consistent with lawful procedures and is not arbitrary and capricious, or an unreasonable exercise of its discretion (*see Rosioreanu v New York City Off. of Collective Bargaining*, 78 AD3d 401 [2010], *lv denied* 17 NY3d 702 [2011]; *Matter of Levitt v Board of Collective Bargaining of City of N.Y., Off. of Collective Bargaining*, 79 NY2d 120, 128 [1992]).

The record supports the Board's determination that petitioner knew or should have known, before December 17, 2008, that OSA would not bring her grievance to arbitration. The Board credited OSA's assertion that as a result of the Court of Appeals' decision in *Matter of City of Long Beach v Civil Serv. Empls. Assn., Inc.-Long Beach Unit* (8 NY3d 465, 470 [2007]), it repeatedly advised petitioner that as a provisional employee she had no right to arbitrate and that it would be filing the request to arbitrate for the sole purpose of preserving her rights. This assertion was corroborated by petitioner's written acknowledgment that in August 2008 she was informed by OSA that provisional employees had no right to arbitrate and that any such requests pertaining to that group were "on hold." Nothing thereafter

tolled the statute of limitations, but petitioner's improper practice petition, which was based on the argument that OSA should have brought her grievance to arbitration, was not filed until April 17, 2009, by which time the applicable 4 month limitations period had expired (*see* Administrative Code of City of NY § 12-306[e]).

Petitioner has not established that an agreement as to provisional disciplinary procedures has been reached pursuant to § 65(5)(g) of the Civil Service Law, which was amended in the wake of *City of Long Beach* to authorize the City and other public employers to enter such agreements. She claims that District Council 37, AFSCME, AFL-CIO, which negotiates all grievance procedures for unions under a citywide contract, signed a Memorandum of Economic Agreement (MEA) with the City on October 31, 2008, for the period 2008-2010, which contains a letter extending, as is, the grievance procedures of the 1995-2001 contract pertaining to provisional employees with more than 24 months of service. However, the Board's determination that the MEA did not create arbitration rights has a rational basis. As the Board observed, "The 2008 MEA merely states in general terms that the provisions of the prior Citywide Agreement, which included a disciplinary grievance procedure for certain provisional employees, were to continue in full force and effect.

By its very terms, such language is limited to such terms and provisions as were in full force and effect." The grievance procedures that petitioner seeks to enforce predate and were abrogated by *City of Long Beach*. There is no specific language in the 2008 MEA that would indicate that the parties intended to enter an agreement to revive those procedures pursuant to Civil Service Law § 65(5)(g).

Further, the Board took administrative notice that Rules of City of New York Office of Collective Bargaining (61 RCNY) § 1-03(d) requires that every public employer entering into a written collective bargaining agreement with a public employee organization shall file copies of that agreement with OCB within 15 calendar days of the execution of the agreement. No evidence of the filing of any such agreement pursuant to the 2008 MEA was presented. Thus, there is no basis on which to grant petitioner's request to compel OSA to schedule an arbitration on her behalf.

Nor is there any basis for granting the request to review the City's underlying decision to terminate petitioner. As a provisional employee, petitioner could be terminated at any time, without a hearing, for almost any reason, or for no reason at all (*see Matter of Preddice v Callanan*, 69 NY2d 812 [1987]; *Matter of Lee v Albany-Schoharie-Schenectady-Saratoga Bd. of Coop. Educ.*

Servs., 69 AD3d 1289, 1290 [2010]). Petitioner has failed to demonstrate that, in terminating her employment, the City violated Civil Service Law § 65, which governs provisional appointments, or any other constitutional or statutory provision. Nor has she demonstrated that her employment was terminated in bad faith or that the termination was arbitrary and capricious.

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

ENTERED: JANUARY 31, 2012

CLERK

Friedman, J.P., Sweeny, Catterson, Renwick, Freedman, JJ.

374 & M-5394 The People of the State of New York, Respondent,

-against-

Makeda Davis,
Defendant-Appellant.

Ind. 6148/06

_____

Mark L. Freyberg, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (Susan Gliner of counsel), for respondent.

_____

Upon remittitur from the Court of Appeals (17 NY3d 633 [2011]), judgment, Supreme Court, New York County (Michael J. Obus, J., at dismissal motion; Edward J. McLaughlin, J., at jury trial and sentencing), rendered March 4, 2008, convicting defendant of assault in the first degree (two counts) and assault in the second degree, and sentencing her to an aggregate term of 9½ years followed by 5 years of postrelease supervision, unanimously modified, on the law, to the extent of vacating the conviction of assault in the second degree and dismissing the corresponding count of the indictment, and otherwise affirmed.

When this case was originally before us, we held, among other things, that the trial court had erred in denying defendant's motion to dismiss the indictment. We found that the indictment was unauthorized because the People, after withdrawing

the presentation of the case to the grand jury, failed to obtain court authorization pursuant to CPL 190.75(3) before re-presenting the case to a second grand jury. We dismissed the indictment but granted the People leave to apply for a court order permitting them to re-submit the charges to a third grand jury (72 AD3d 53 [2010]).

The Court of Appeals reversed, finding that under the circumstances of this case the People did not need court authorization before re-presenting it and remitted the case for our determination of the unresolved issues that defendant raised on the appeal to this Court (*People v Davis*, 17 NY3d 633 [2011]).

Except as to the conviction of assault in the second degree, which we find should be vacated for the reasons explained below, defendant's remaining claims are unavailing. We reject defendant's argument that the indictment should be dismissed on the grounds the People breached their duty of fair dealing by failing to introduce in the second grand jury proceedings the victim's purported "exculpatory" testimony from the first grand jury proceedings. Specifically, defendant asserts that the prosecutor should have introduced testimony from the first grand jury proceeding that included the statement that defendant held "some type of object in her hand," but the victim "really didn't see exactly what it was"; and that defendant "did not touch

[Walker] with [the object]."

We find that the testimony is not so radically different from the testimony given in the second grand jury proceeding that its omission from the second proceeding constitutes sufficient prejudice to defendant such as to render the proceeding defective (*see* CLP 210.20[1][c]; 210.35[5]). The statutory test for finding a proceeding defective is "very precise and very high" and is not satisfied by a showing of "mere flaw, error or skewing" of the evidence. (*People v Darby*, 75 NY2d 449, 455 [1990]).

Indeed, while the prosecutor "owes a duty of fair dealing to the accused and candor to the courts" (*People v Pelchat*, 62 NY2d 97, 105 [1984]), "[t]he People generally enjoy wide discretion in presenting their case to the Grand Jury and are not obligated to search for evidence favorable to the defense or to present all evidence in their possession that is favorable to the accused" (*People v Lancaster*, 69 NY2d 20, 25-26 [1986] [internal citation omitted]).

In any event, defendant was not prejudiced by the People's failure to disclose the purportedly exculpatory statements. Even without the victim's testimony, the second grand jury had sufficient evidence to indict defendant. Indeed, the victim's friend testified that she observed defendant attacking the victim

with a razor, and the treating physician indicated that the victim's lacerations had been caused by "a sharp instrument" and would result in permanent scarring.

Defendant's objection as to the legal sufficiency of the evidence establishing that the victim sustained permanent disfigurement pursuant to Penal Law § 120.10(2) is unpreserved, and we decline to review it as a matter of discretion in the interest of justice. Defendant merely moved below "to have the case against her dismissed for failure by the People to prove a prima facie case" and her objection was not specifically directed at the alleged insufficiency (*see* CPL 470.05[2]; *People v Gray*, 86 NY2d 10, 19 [1995]). Likewise, defendant's objection as to the court's jury instructions with respect to the "injury" elements of the first-degree assault counts is unpreserved since she did not, at any time, object to any of the jury instructions. We decline to review this issue in the interest of justice as well (*see* CPL 470.05[2]; *see generally People v Robinson*, 36 NY2d 224, 228 [1975] [the defendant failed to preserve his arguments regarding the trial court's jury instruction]).

Finally, because we uphold defendant's conviction for assault in the first degree pursuant to Penal Law § 120.10(2), as the People correctly concede, her conviction of assault in the second degree pursuant to Penal Law § 120.05(2) should be vacated

and that count of the indictment dismissed because it is an inclusory concurrent count (*see People v Allen*, 147 AD2d 352 [1989], *lv denied* 73 NY2d 1010 [1989]; *People v Ridout*, 46 AD2d 643 [1974]; *see also* CPL 300.40[3][b]; *People v Grier*, 37 NY2d 847, 848 [1975] [if a verdict is comprised of inclusory concurrent counts, a verdict of guilty on the greatest count is deemed a dismissal of every lesser count]).

M-5394 - *People v Makeda Davis*

Motion for judicial notice of certain letters and documents denied.

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

ENTERED: JANUARY 31, 2012

CLERK

Saxe, J.P., Friedman, Renwick, DeGrasse, Freedman, JJ.

6189 Luxus Aviation, LLC, et al., Index 652247/10
Plaintiffs-Appellants,

-against-

Kerwin Media LLC, et al.,
Defendants-Respondents.

_____

Kane Kessler, P.C., New York (Jeffrey H. Daichman of counsel), for appellants.

Graham Curtin, P.A., New York (Robert W. Mauriello, Jr. of counsel), for respondents.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered April 25, 2011, which granted defendants' motion to dismiss the complaint pursuant to CPLR 3211, unanimously modified, on the law, and the motion denied with the respect to the fourth cause of action for misappropriation of trade secrets that occurred after February 27, 2009, and otherwise affirmed, without costs.

This action arises from the December 2007 purchase by plaintiff UMI of defendant Kerwin Media's membership interest in plaintiff Luxus, a New Jersey limited liability company which advertises goods and services to consumers through displays in private jet terminals. Kerwin Media and UMI had each held a 50% interest in Luxus before UMI bought out its business partner for about $ 1.3 million, payable in installments.

Plaintiffs commenced this action in January 2011. The complaint's factual claims shall be accepted as true while evaluating defendants' CPLR 3211 motion (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). It alleges that in March 2006, the individual defendants, who are Kerwin Media principals or former Luxus employees, had formed defendant company Roaring Thunder Media, and that shortly after the Luxus membership sale, Roaring Thunder Media began competing directly against Luxus by mimicking its business model and soliciting its customers and business partners, while exploiting confidential information which the individual defendants had obtained while they were employed by or affiliated with Lexus.

The complaint asserts a cause of action against Kerwin Media for breach of contract, on the ground that the company had violated the December 2007 sale agreement setting forth the terms of the transaction. The agreement is governed by New Jersey law pursuant to its choice of law provision. Plaintiffs do not claim that Kerwin Media violated an explicit term of the agreement, but instead contend that the company breached its implied covenant of good faith and fair dealing, as well as an implied restrictive covenant "to refrain from soliciting or otherwise interfering with the business relationships possessed by Luxus and purchased by UMI."

Plaintiffs also seek a judgment against Kerwin Media declaring that its alleged wrongdoing discharges plaintiffs from paying the unpaid balance of the contract purchase price (about $ 317,000). The complaint next asserts a claim against the individual defendants for tortious interference with the sale agreement, and claims against all defendants for misappropriation of trade secrets and tortious interference with Luxus's business relationships with third parties.

In lieu of answering, defendants moved for an order of dismissal under CPLR 3211(a)(5) and (7), arguing both that plaintiffs' claims were barred by a release in an amendment to the sale agreement, dated February 27, 2009 and also governed by New Jersey law, and that the complaint fails to state a cause of action. The motion court granted the motion and dismissed this case on the ground that the causes of action in the complaint entirely fell within the scope of the release, under which plaintiffs and their affiliates waived "any and all claims . . . of any nature that [plaintiffs and their affiliates] may have or ever has had to and including the date of this [amendment] against [defendants and their affiliates] arising out of alleged breaches of fiduciary duty, confidentiality and obligations relating to their affiliation with Luxus." In addition, the motion court declined to read non-compete and non-solicitation

covenants into the sale agreement and amendment and pointed out that plaintiffs could have sought to include express covenants, "but opted not to do so even after they became aware of defendants' allegedly wrongful conduct."

We modify, but only as to the misappropriation of trade secrets claim for alleged conduct that occurred after the date of the release. The other claims are barred by the release and the terms of the sale agreement. The breach of contract, declaratory judgment, and tortious interference with the Luxus sale agreement allegations in the complaint fail to make out viable causes of action.

Turning first to the breach of contract claim, neither the sale agreement nor the amendment contains a non-compete or non-solicitation covenant, and implied covenants cannot be read into the contracts. The agreements were negotiated at arm's length and with the assistance of counsel, and while plaintiffs could have negotiated for and included restrictive covenants in the agreements, they chose not to even after they allegedly learned of Roaring Thunder Media's direct competition with Luxus. Under New Jersey law, a court cannot supply terms for a contract to which the parties have not agreed (*Schenck v HJI Assoc.*, 295 NJ Super 445, 450, 685 A2d 481, 484 [App Div 1996], *cert denied* 149 NJ 35, 692 A2d 48 [1997]).

Moreover, the implied covenant of good faith and fair dealing in the contracts cannot supply non-compete and non-solicitation provisions because the implied covenant can only be invoked to include terms that "the parties must have intended . . . because they are necessary to give business efficacy" (*New Jersey Bank v Palladino*, 77 NJ 33, 46, 389 A2d 454, 461 [1978]). The case upon which plaintiffs rely, *Graziano v Grant* (326 NJ Super 328, 741 A2d 156 [App Div 1999]), is inapposite. In *Graziano*, where the court found an implied non-compete covenant in a contract by which a dentist sold his practice, the agreement expressly contemplated the dentist's retirement after the sale. In contrast, the agreements in this case give no indication that Kerwin Media or the individual defendants were expected to withdraw from the advertising business or refrain from directly competing with Luxus.

Both the second cause of action for a declaratory judgment and the third cause of action for tortious interference with contract presume that Kerwin Media breached the sale agreement. Since no underlying breach has been asserted, these ancillary claims cannot be maintained.

The claim for misappropriation of trade secrets survives for actions that postdate the release. To prevail in New Jersey upon a claim for misappropriation of trade secrets, the plaintiff must

establish that a trade secret exists, the secret was disclosed to an employee in confidence, the employee breached that confidence by disclosing the secret, a competitor acquired the secret while knowing that it derived from the employee's breach of confidence, the competitor used the secret to the plaintiff's detriment, and the plaintiff had taken precautions to conceal the trade secret (*Rycoline Prods. Inc. v Walsh*, 334 NJ Super 62, 71, 756 A2d 1047, 1052 [App Div 2000], *lv denied* 165 NJ 678, 762 A2d 659 [2000]). Moreover, New Jersey recognizes that a defendant's use of a plaintiff's misappropriated trade secrets to gain a competitive advantage over it "is contrary to the notion of free competition that is fair" (*Lamorte Burns & Co. v Walters*, 167 NJ 285, 309, 770 A2d 1158, 1172 [2001]). The complaint, if viewed in the light most favorable to plaintiffs and not barred by the release, sufficiently alleges the elements of a claim for misappropriation of trade secrets.

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

ENTERED: JANUARY 31, 2012

CLERK

Andrias, J.P., Saxe, Sweeny, Acosta, JJ.

6287N- Index 650320/10
6287NA Denver Employees Retirement Plan,
Plaintiff-Respondent,

-against-

JPMorgan Chase Bank, N.A.,
Defendant-Appellant.

_____

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Jonathan H. Hurwitz of counsel), for appellant.

Grant & Eisenhofer P.A., Wilmington, DE (Megan D. McIntyre of the bar of the State of Delaware, admitted pro hac vice, of counsel), for respondent.

_____

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered July 1, 2011, which denied defendant's request to compel plaintiff to produce certain documents, unanimously affirmed, without costs. Order, same court, Justice, and date, which refused to give effect to one of defendant's deposition notices, unanimously affirmed, without costs.

The motion court providently exercised its discretion by refusing to compel plaintiff to respond to an untimely document request for "All Documents Concerning investments by or for the benefit of [plaintiff], direct or indirect, in securities issued by Lehman" (*see Kingsgate Assoc. v Advest, Inc.*, 208 AD2d 356, 357 [1994]). The circumstances presented herein do not warrant exercise of our own independent discretion to reverse this order.

Likewise, we find no reason to disturb the exercise of the court's "broad discretion" in denying defendant's deposition notice (*see Brooklyn Union Gas Co. v American Home Assurance Co.*, 23 AD3d 190, 190 [2007]). This notice called for the production of "a person designated by [plaintiff] regarding any and all investments in securities issued or guaranteed by Lehman . . . that were purchased, held, and/or sold by or for the benefit of [plaintiff] from January 1, 2007 to September 30, 2008, excluding investments made through the JPMorgan Securities Lending Program," i.e., the program at issue in this litigation. Defendant essentially attempted to obtain the same material that the court previously found to be untimely and irrelevant. Plaintiff's litigation concerns investments with defendant in Lehman medium term notes (MTNs). Defendant seeks information about plaintiff's investments in other Lehman securities that plaintiff made at different times and that are unrelated to the MTNs. The court correctly determined that investment decisions

concerning other, unrelated investments purchased for different accounts that have different investment goals, are not relevant to the account in question (*cf. Matter of Clark*, 257 NY 132, 135 [1931]).

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

ENTERED: JANUARY 31, 2012

CLERK

Tom, J.P., Friedman, DeGrasse, Richter, Manzanet-Daniels, JJ.

6599 23 East 10 L.L.C., etc., et al., Index 110796/07
Plaintiffs-Respondents,

-against-

Albert Apartment Corp.,
Defendant-Appellant.

_____

Cantor Epstein & Mazzola, LLP, New York (Gary S. Ehrlich of counsel), for appellant.

Moses & Singer LLP, New York (Jay R. Fialkoff of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Joan A. Madden, J.), entered October 25, 2010, which, to the extent appealed from as limited by the briefs, denied defendant-landlord's motion for summary judgment dismissing plaintiffs' second cause of action for declaratory and injunctive relief, granted the cross motion of plaintiff-tenant and plaintiff-subtenant for summary judgment as to their second cause of action, and adjudged and declared that the sidewalk entrance, vault space and basement corridors constituted an appurtenance, and that plaintiffs could resume usage of these areas, enjoined the landlord from interfering with plaintiffs' right to use and access the sidewalk entrance, vault space and basement corridors, and directed the landlord to provide plaintiff-tenant with keys to the sidewalk entrance to the basement of the building,

unanimously modified, on the law, to the extent of granting, upon a search of the record, the landlord summary judgment dismissing, as moot, the sixth cause of action, for reformation of the parties' proprietary lease, and otherwise affirmed, with costs to be paid by defendant.

The landlord's argument that the sidewalk hatch that accesses the basement portion of the premises is a "mere convenience" and is "not essential" to its use as a restaurant is unavailing. As the motion court found, uncontroverted deposition testimony from the subtenant pizzeria's owner established that the daily use by the pizzeria of the hatch entrance for deliveries and garbage removal, and the added expense incurred by the pizzeria for extra worker hours needed due to the impractical and inconvenient use of the pizzeria's internal stairwell for all restaurant functions, established that the sidewalk access hatch to the basement, where the premises' kitchen and storage area is located, was a necessary appurtenance to the leasehold (*see Second on Second Café, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255, 267 [2009]). The landlord's further argument, that plaintiffs should be bound by their own unilateral mistake for not incorporating the hatch-use language from the 1994 modified commercial lease into the new proprietary lease, is unavailing. As the motion court appropriately found, the parties previously

agreed to plaintiffs' use of the sidewalk hatch access and, unless specially reserved, the appurtenant right passes to the tenant along with the demised premises (*see Fabrycky, Inc. v Nad Realty Corp.*, 261 App Div 268, 269 [1941]). Further, plaintiffs continued to use the sidewalk hatch access for more than a year after the proprietary lease was executed, without interference from the landlord. Additionally, inasmuch as the premises was subleased continuously as a restaurant since the initial 1995 sublease was entered into, everything that was necessary to the use and enjoyment of the demised premises, and which had enabled the pizzeria to reasonably function, must be implied where it is not expressed in the lease (*see Second on Second Café, Inc.*, 66 AD3d at 256).

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

ENTERED: JANUARY 31, 2012

CLERK

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

6640 The People of the State of New York, Ind. 4235/06
Respondent,

-against-

Russell Hart,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Megan R. Roberts of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Eugene Oliver, J. at plea; Efrain Alvarado, J. at sentencing), rendered September 10, 2010, convicting defendant of assault in the second degree, and sentencing him to a term of three years, unanimously affirmed.

Defendant, who did not move to withdraw his guilty plea, did not preserve his challenge to his plea allocution, and we decline to review it in the interest of justice. The narrow exception to the preservation rule explained in *People v Lopez* (71 NY2d 662, 665-666 [1988]) does not apply because the allocution did not

cast doubt on defendant's guilt. As an alternative holding, we find that defendant's plea was knowing, intelligent and voluntary (*see People v Goldstein*, 12 NY3d 295, 300-301 [2009]).

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

ENTERED: JANUARY 31, 2012

CLERK

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

6641 In re SP 141 E 33 LLC, Index 111227/10
Petitioner-Appellant,

-against-

New York State Division of
Housing and Community Renewal, et al.,
Respondents-Respondents.

- - - - -

Community Housing Improvement Program,
Amicus Curiae.

_____

Belkin Burden Wenig & Goldman LLP, New York (Magda L. Cruz of counsel), for appellant.

Gary R. Connor, New York (Sandra A. Joseph of counsel), for New York State Division of Housing and Community Renewal, respondent.

Collins, Dobkin & Miller LLP, New York (Seth A. Miller of counsel), for 141 East 33rd Street Tenants' Association and Nancy Birnbaum, respondents.

Horing Welikson & Rosen, P.C., Williston Park (Niles C. Welikson of counsel), for amicus curiae.

_____

Judgment, Supreme Court, New York County (Anil C. Singh, J.), entered January 6, 2011, denying the petition to annul a determination of respondent Division of Housing and Community Renewal (DHCR), dated June 24, 2010, which revoked petitioner's major capital improvement (MCI) rent increase, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

DHCR's determination to revoke petitioner's MCI rent

increase was rationally based in the record and was not arbitrary and capricious (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of 370 Manhattan Ave. Co., L.L.C. v New York State Div. of Hous. & Community Renewal*, 11 AD3d 370, 372 [2004]; *Matter of West Vil. Assoc. v Division of Hous. & Community Renewal*, 277 AD2d 111, 114 [2000]). The determination was based on the facts that the 15-year useful life of the pointing and waterproofing for which a building-wide MCI rent increase was granted in 1999 had not yet expired when petitioner applied for the subject MCI rent increase in 2006 and that petitioner did not seek a waiver of the useful life requirement before the subject work was commenced in 2003 (*see* Rent Stabilization Code [9 NYCRR] §§ 2522.4[a][2][i][d], [e]).

Petitioner argues that it was not required to obtain a useful-life waiver because the 2003 pointing work was done on a different part of the building from the part on which the 1998 pointing work was done. This argument is unavailing. To warrant a rent increase, an MCI must, inter alia, be "an improvement to the building . . . which inures . . . to the benefit of all tenants, and which includes the same work performed in all similar components of the building or building complex" (9 NYCRR

2522.4[a][2][i][c]) and must meet the useful life requirement set forth in 9 NYCRR 2522.4(a)(2)(i)(d). In the 1999 application by the previous owner for an MCI rent increase, the pointing and waterproofing general contractor stated, as required by DHCR, that he had examined "all exposed facades of the premises" and that the work "was done in all necessary areas." This statement meant that there would be no need for pointing work on any part of the building for the next 15 years. Thus, without a waiver of the useful life requirement, no MCI rent increase would be allowed for any pointing work performed during that period (*see West Vil. Assoc.* 277 AD2d at 114; *Matter of Equity Props. v Division of Hous. & Community Renewal*, 288 AD2d 117, 117 [2001], *lv denied* 98 NY2d 606 [2002]).

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

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

ENTERED: JANUARY 31, 2012

CLERK

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

6642 In re Dominick S.,

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 (Suzanne K. Colt of counsel), for presentment agency.

_____

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about January 11, 2011, 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 criminal sexual act in the first degree, sexual abuse in the first degree, and sexual misconduct, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility.

The court properly permitted the seven-year-old victim to give sworn testimony. The victim's voir dire responses

established that she sufficiently understood the difference between truth and falsity, the significance of an oath, and the wrongfulness and consequences of lying (*see People v Nisoff*, 36 NY2d 560, 565-566 [1975]; *People v Cordero*, 257 AD2d 372 [1999], *lv denied* 93 NY2d 968 [1999]).

The court properly exercised its discretion in adjudicating appellant a juvenile delinquent and placing him on probation for a period of 18 months. This was the least restrictive alternative consistent with the needs of appellant and the community (*see Matter of Katherine W.*, 62 NY2d 947 [1984]) in light of, among other things, the seriousness of the offense and the recommendations by the Probation Department and a psychiatrist.

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

ENTERED: JANUARY 31, 2012

CLERK

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

6643-
6644 Index 115034/07

Alexander Ashkenazi, etc.,
Plaintiff-Appellant,

-against-

AXA Equitable Life Insurance Company,
Defendant-Respondent.

_____

Schindel, Farman, Lipsius, Gardner & Rabinovich LLP, New York (Phillip M. Manela of counsel), for appellant.

Krantz & Berman LLP, New York (Larry H. Krantz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered January 21, 2010, which, inter alia, granted defendant AXA Equitable Life Insurance Company's (AXA) motion for summary judgment dismissing plaintiff's breach of contract claim and granted defendant summary judgment on its second counterclaim for rescission, unanimously modified, on the law, to the extent of denying defendant's motion as premature without prejudice to renew at the completion of discovery, remanding for further discovery in accordance with this decision, and otherwise affirmed, without costs. Order, same court and Justice, entered May 14, 2010, adhering to the prior decision upon a partial grant of reargument, unanimously dismissed, without costs, as academic.

In this stranger owned life insurance case, plaintiff

Alexander Ashkenazi, as Trustee of the Zablidowsky Life Insurance Trust (the Trust), sued defendant AXA, alleging breach of contract and seeking payment on two life insurance policies, for $5 million and $3 million, respectively. The Trust was the owner and beneficiary of both policies, each of which insured the life of Estelle Zablidowsky, an elderly woman of modest means. AXA moved for summary judgment prior to the completion of discovery, seeking dismissal of the complaint and rescission of the policy.

Summary judgment is premature at this juncture since there are issues of fact as to whether the decedent's net worth and the existence of another life insurance policy were material to AXA's decision to issue the policy (*Alaz Sportswear v Public Serv. Mut. Ins. Co.*, 195 AD2d 357, 358 [1993]). Based on the submitted excerpts of the trial transcripts in *Settlement Funding, LLC v AXA Equitable Life Ins.* (2010 WL 3825735, 2010 US Dist LEXIS 104451 [SD NY 2010]), and other submissions, plaintiff demonstrated that further discovery is warranted on the issues of whether AXA's submitted underwriting guidelines are complete, whether AXA routinely ignored its own requirement to confirm an insured's financial net worth via an inspection report, and whether the financial information or any additional existing policies was material to AXA's underwriting decisions regarding similarly situated applicants. Thus, proof of defendant's

underwriting practices with respect to applicants with similar histories is required.

Plaintiff's request for a premium refund, submitted for the first time in his motion to renew and reargue, however, was properly denied (CPLR 2221[e]; *William P. Pahl Equip. Crop. v Kassis*, 182 AD2d 22, 27 [1992], *lv denied* 80 NY2d 1005 [1992]). In any event, a request for return of the premiums paid is premature in light of our determination that the propriety of the rescission cannot be resolved without further discovery.

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

ENTERED: JANUARY 31, 2012

CLERK

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

6646 Julio Quintana, Index 108649/08
Plaintiff-Appellant,

-against-

New York City Housing Authority, et al.,
Defendants-Respondents.

_____

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

Cullen and Dykman LLP, Brooklyn (Joseph Miller of counsel), for NYCHA, respondent.

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for municipal respondent.

_____

Order, Supreme Court, New York County (Karen S. Smith, J.), entered on or about April 26, 2010, which, insofar as appealed from as limited by the briefs, granted defendant New York City Housing Authority's (NYCHA) motion for summary judgment dismissing the complaint and all cross claims against it, unanimously affirmed, without costs.

Dismissal of the complaint as against NYCHA was appropriate in this case where plaintiff alleges that he was injured when he slipped and fell while attempting to climb over a mound of snow created along the curb of the sidewalk by NYCHA's snow plow. Contrary to plaintiff's assertion, the record does not establish that the mound of snow impeded access to the crosswalk and

prevented pedestrians from safely crossing the street. In the absence of evidence that the mound obstructed the crosswalk or was of such magnitude at the corner that it was more reasonable for a pedestrian to cross the street where plaintiff made his attempt, NYCHA could not reasonably have foreseen that a person in the circumstances in which plaintiff found himself would have acted as he did. Moreover, even assuming that an issue of fact exists as to whether the crosswalk was blocked by the mound, plaintiff was not in an "emergent situation," and had other, albeit less convenient options for crossing the street, including walking back down the block, rather than crossing over the mound outside of the crosswalk (*Guida v 154 W. 14th St. Co.*, 13 AD2d 695, 696 [1961], *affd* 11 NY2d 731 [1962]).

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

ENTERED: JANUARY 31, 2012

CLERK

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

6647 Visual Arts Foundation, Inc., Index 603078/08
Plaintiff-Appellant,

-against-

Louis A. Egnasko,
Defendant-Respondent,

Shari Egnasko, etc., et al.,
Defendants.

_____

Trokie Landau LLP, New York (James K. Landau of counsel), for appellant.

Louis A. Egnasko, respondent pro se.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered February 8, 2011, which, insofar as appealed from as limited by the briefs, upon plaintiff's motion for summary judgment, directed that judgment be entered in the amount of $304,262 in favor of plaintiff as against defendant Louis A. Egnasko on the causes of action for fraud, breach of fiduciary duty, faithless servant liability, and conversion, directed that the amount of the judgment to be entered as against defendants Shari Egnasko (individually and as administratrix of the Estate of Charles Egnasko) and Gold Leaf Travel Center, Inc. be determined at trial, and denied plaintiff's request for attorneys' fees and costs, unanimously modified, on the law, to direct that the judgment in the amount of $304,262 be entered

against all defendants jointly and severally on the causes of action for fraud, breach of fiduciary duty, and conversion, to direct that a judgment be entered in the amount of $68,507.80 as against defendant Louis A. Egnasko on the faithless servant cause of action, and to remand the matter for a hearing on plaintiff's request for sanctions, and otherwise affirmed, without costs.

Having demonstrated its entitlement to summary judgment on its cause of action under the faithless servant doctrine, plaintiff is entitled to damages on that cause of action. An employee "forfeits his right to compensation for services rendered by him if he proves disloyal" (*Lamdin v Broadway Surface Adv. Corp.*, 272 NY 133, 138 [1936]; *Coastal Sheet Metal Corp. v Vassallo*, 75 AD3d 422 [2010]; *Matter of Marceca*, 40 AD3d 318 [2007]). Plaintiff's evidence of the amount of compensation defendant Louis Egnasko, the disloyal employee, was paid during the relevant period was unrebutted.

Having been found liable on the aiding and abetting claims, Egnasko's co-defendants are jointly and severally liable for the damages resulting from Egnasko's fraud and breaches of fiduciary duty (*see Merrill Lynch, Pierce, Fenner & Smith v Arcturus Bldrs.*, 159 AD2d 283, 284-285 [1990]; *American Tr. Ins. Co. v Faison*, 242 AD2d 201 [1997]).

The motion court improperly denied plaintiff's request for

sanctions in its entirety. The court is directed to conduct a hearing to quantify the damages that plaintiff incurred from those aspects of defendants' litigation conduct that were "frivolous," including, impending discovery, the filing of meritless counterclaims and conduct which was "undertaken primarily to delay or prolong the resolution of the litigation" (22 NYCRR 130-1.1[c][2]). We note that, as Louis Egnasko is presently incarcerated, the hearing may be conducted through written submissions (*see* 22 NYCRR 130-1.1[d]).

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

ENTERED: JANUARY 31, 2012

CLERK

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

6648 The People of the State of New York, Ind. 4500/09
Respondent,

-against-

Alvin Peterson,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jonathan M. Kirshbaum of counsel), and Chadbourne & Parke LLP, New York (Stacey Trimmer of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered April 12, 2010, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the seventh degree, and sentencing him to a term of one year, unanimously affirmed.

The prosecutor's summation did not deprive defendant of a fair trial (*see generally People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]), and the court properly exercised its discretion in denying defendant's mistrial motions directed at the prosecutor's summation. Although defendant claims that the prosecutor engaged in improper bolstering or vouching for police witnesses, the remarks at issue

were permissible responses to defense attacks on the officers' credibility (*see e.g. People v Rivera*, 223 AD2d 445 [1996], *lv denied* 88 NY2d 883 [1996], *People v Ortiz*, 217 AD2d 425 [1995], *lv denied* 86 NY2d 799 [1995]). Although the prosecutor made some inappropriate attacks on a defense witness's credibility, there was nothing so egregious as to warrant reversal. Under the circumstances of the case, the fact that defendant was acquitted of all felony charges is a strong indication that the challenged remarks did not cause any prejudice.

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

ENTERED: JANUARY 31, 2012

CLERK

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

6649 The People of the State of New York, Respondent, Ind. 1545/10

-against-

Reginald McClure, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered on or about June 23, 2010, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: JANUARY 31, 2012

CLERK

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

6654- Index 101850/10
6655 Sterling National Bank,
Plaintiff-Respondent,

-against-

American Elite Properties Inc., etc., et al.,
Defendants-Appellants,

Rotot Realty, Inc., et al.,
Defendants.

_____

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

Platzer, Swergold, Karlin, Levine, Goldberg & Jaslow, LLP, New York (Steven D. Karlin of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered June 20, 2011, in an action to recover the balance due under an equipment finance lease, awarding plaintiff the total amount of $101,463.77, and bringing up for review an order, same court and Justice, entered February 18, 2011, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for summary judgment, and denied defendants-appellants' cross motion for leave to serve an amended answer and for summary judgment dismissing the complaint as against them, unanimously affirmed, with costs. Appeal from the aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Supreme Court providently exercised its discretion in denying that portion of the cross motion seeking leave to serve an amended answer, as the proposed amendment to add the affirmative defense of release lacked merit. The release upon which the amended pleading was premised did not pertain to the equipment at issue (*see* CPLR 3025[b]; *360 W. 11th LLC v ACG Credit Co. II, LLC*, ___ AD3d ___, 2011 NY Slip Op 09191 [1st Dept 2011]; *Nab-Tern Constructors v City of New* York, 123 AD2d 571, 572-573 [1986]; *compare Anoun v City of New York*, 85 AD3d 694, 695 [2011]).

The general release explicitly references lease schedule number 728-177-101 and only applies to claims preceding the release. The equipment at issue in this action is the equipment pertaining to lease schedule number 728-177-105, which is entirely distinct. Moreover, the lease schedule at issue here was not executed until a year after the general release was

executed. Accordingly, the release cannot, by its own terms, apply to the equipment at issue.

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

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

ENTERED: JANUARY 31, 2012

CLERK

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

6656-
6657 Index 400902/10

In re Maria M. Peña,
Petitioner-Appellant,

-against-

New York City Housing Authority,
Respondent-Respondent.

_____

Alberto Torres, Bronx, for appellant.

Sonya M. Kaloyanides, New York (Andrew M. Lupin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan B. Lobis, J.), entered December 6, 2010, which, upon renewal and reargument, adhered to its order and judgment (one paper), entered September 3, 2010, denying the petition to annul respondent New York City Housing Authority's determination, dated December 7, 2009, to deny petitioner's application to vacate a default that resulted in the termination of her tenancy, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs. Order, same court and Justice, entered June 20, 2011, which, to the extent appealed from as limited by the briefs, denied petitioner's motion to vacate the 2010 orders, unanimously affirmed, without costs.

Respondent's determination that petitioner failed to apply to open her default within a reasonable time, give a reasonable

excuse for missing her hearing, and set forth a meritorious defense to the charges against her, has a rational basis (*see Matter of Daniels v Popolizio*, 171 AD2d 596, 597 [1991]). Contrary to petitioner's contention, in order to vacate her default, she was required to demonstrate a meritorious defense and a reasonable excuse, which she failed to do (*see id.*; *Matter of Barnhill v New York City Hous. Auth.*, 280 AD2d 339 [2001]).

The court had no basis for treating petitioner's motion to vacate the court's 2010 orders pursuant to CPLR 5015 as having been made under CPLR 317; the latter statute applies to judicial proceedings, not proceedings before an agency.

Petitioner's remaining contentions are either unpreserved or without merit.

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

ENTERED: JANUARY 31, 2012

CLERK

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

6660 Lester Gonzalez, Index 102659/08
Plaintiff-Appellant,

-against-

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

George Alvarez, et al.,
Defendants.

_____

Weiner & Strauss, LLP, Nanuet (Neil S. Weiner of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Mordecai Newman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered February 10, 2011, which granted defendants-respondents' motion for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion denied.

Defendant Duffy was driving a fire truck to the scene of an emergency when the truck collided with a van, injuring plaintiff, a passenger in the van. The record shows that Duffy had stopped on Third Avenue and was turning right onto 68th Street, with the traffic light in his favor, when the fire truck hit the van. Duffy was not engaged in any of the specific conduct that the driver of an authorized emergency vehicle in an emergency

operation is permitted by Vehicle and Traffic Law § 1104(b). He was not stopping, standing or parking in violation of the rules of the road, proceeding past a red signal or stop sign, speeding, or proceeding in the wrong direction or making an unlawful turn. Thus, his conduct is governed not by the reckless disregard standard of care in Vehicle and Traffic Law § 1104(e) but by ordinary negligence principles (*Kabir v County of Monroe*, 16 NY3d 217 [2011]; *Tatishev v City of New York*, 84 AD3d 656, 657 [2011]).

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

ENTERED: JANUARY 31, 2012

CLERK

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

6662- Index 650690/10
6662A CARI, LLC,
Plaintiff-Appellant,

-against-

415 Greenwich Fee Owner, LLC, et al.,
Defendants-Respondents.

_____

Bryan Cave LLP, New York (Noah M. Weissman of counsel), for appellant.

Kramer Levin Naftalis & Frankel LLP, New York (Ronald S. Greenberg and Scott Ruskay-Kidd of counsel), for respondents.

_____

Orders, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered June 16, 2011, which granted defendants' motion to dismiss the first amended complaint and denied plaintiff's motion for leave to file a second amended complaint, unanimously affirmed, with costs.

The contracts' termination provision provided that plaintiff could cancel the agreement for any reason and obtain the return of its deposit with interest, so long as it provided written notice to defendant sponsor no later than 10 days before closing. The court correctly determined that the termination provision rendered the contracts unenforceable for lack of mutual consideration (*see Dorman v Cohen*, 66 AD2d 411, 415, 418 [1979]).

The obligation to provide written notice of termination does not constitute consideration where, as here, termination occurs immediately upon notice, and not after some specified period of time (*see Allen v WestPoint-Pepperell, Inc.*, 1996 WL 2004, *3 n 5, 1996 US Dist LEXIS 6, *8 n 5 [SD NY 1996]; *cf. Dorman*, 66 AD2d at 419, citing *McCall Co. v Wright*, 133 App Div 62, 68 [1909], *affd* 198 NY 143 [1910]). The termination provision is enforceable and cannot be severed, even though it renders the contracts void (*see Ying-Qi Yang v Shew-Foo Chin*, 42 AD3d 320 [2007], *lv denied* 9 NY3d 812 [2007]). Plaintiff's promissory estoppel claim fails because it does not allege "a duty independent of the [contracts]" (*Celle v Barclays Bank P.L.C.*, 48 AD3d 301, 303 [2008]).

The court properly denied leave to file a second amended complaint, where the proposed amendment "suffers from the same fatal deficiency as the original claims" — namely, the lack of

mutual consideration (*"J. Doe No. 1" v CBS Broadcasting Inc.*, 24 AD3d 215, 216 [2005]).

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: JANUARY 31, 2012

CLERK

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

6663 In re Brian O'Neill, Index 101385/11
Petitioner,

-against-

John Doherty, as Commissioner of
The Department of Sanitation of
the City of New York,
Respondent.

_____

Kirschner & Cohen, P.C., Great Neck (Steven B. Kirschner of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Julie Steiner of counsel), for respondent.

_____

Determination of respondent, dated October 12, 2010, which terminated petitioner's employment as a sanitation worker, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Alice Schlesinger, J.], entered April 15, 2011), dismissed, without costs.

Respondent's finding that petitioner violated the rule against loading trade waste in excess of six bags without authorization is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). Petitioner and his partner matched the physical description of the sanitation workers a member of the public complained were picking up construction debris from a

private house under renovation. It was also undisputed that petitioner and his partner were in the vicinity of the house at the time of the complaint, and when their truck was dumped, construction debris in violation of the trade-waste rule was found. Moreover, a deputy chief in the Department of Sanitation testified that carpet and tiles in the truck matched the distinctive pattern he saw in the garbage at the house.

The penalty imposed does not shock our sense of fairness. The record shows that petitioner was employed for less than three years at the time of the violation and he had multiple prior disciplinary infractions for misconduct (*see Matter of Williams v Doherty*, 13 AD3d 185 [2004]).

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

ENTERED: JANUARY 31, 2012

CLERK

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

6665 The People of the State of New York, Ind. 4719/01
Respondent,

-against-

Anthony James,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Alexandra Keeling of counsel), for appellant.

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

_____

Judgment of resentence, Supreme Court, New York County (Richard D. Carruthers, J.), rendered December 16, 2009, resentencing defendant to a term of 10 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: JANUARY 31, 2012

CLERK

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

6666N Blank Rome, LLP,
Plaintiff-Appellant,

Index 601809/05
590823/10

-against-

Karl M. Parrish,
Defendant-Respondent.

- - - - -

Blank Rome, LLP,
Third-Party Plaintiff-Appellant,

-against-

Bouchard Margules & Friedlander, P.A., et al.,
Third-Party Defendants-Respondents.

_____

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

Osborn Law, P.C., New York (Daniel A. Osborn of counsel), for Parrish respondent.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered October 13, 2011, which, insofar as appealed from, upon defendant's motion to amend the parties' Stipulation and Order for the Production and Exchange of Confidential Information (Stipulation), directed that documents produced by nonparty Storch Amini & Munves, P.C. be turned over to the court, and precluded the parties from use of the subject documents in discovery related to the claims, counterclaims and defenses in this action, unanimously modified, on the law, to grant the parties access to and permission to use the documents produced by

Storch Amini, and otherwise affirmed, without costs.

Defendant agreed in the so-ordered stipulation that "any attorney-client privilege applicable to his communications with attorneys representing him is waived for the purposes of this action." By this clear and express provision, defendant waived his attorney-client privilege with respect to the privileged documents produced by Storch Amini to the extent the documents involve matters relevant to the claims and defenses in this action (*see DLJ Mtge. Capital Corp., Inc. v Fairmont Funding, Ltd.*, 81 AD3d 563, [2011]; *Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]; *Koren-DiResta Constr. Co. v New York City School Constr. Auth.*, 293 AD2d 189, 195 [2002]).

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

ENTERED: JANUARY 31, 2012

CLERK

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

6667 Ind. 4852/09

[M-4809] In re Mary Jiminez,
Petitioner,

-against-

Hon. Eric T. Schneiderman, etc., et al.,
Respondents.

_____

Denis Patrick Kelleher, PLLC, New York (Denis Patrick Kelleher of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Jodi A. Danzig of counsel), for Attorney General, respondent.

_____

Application for an order pursuant to article 78 of the Civil Practice Law and Rules denied and the petition dismissed, without costs or disbursements. All concur. No opinion. Order filed.

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

6668 Ind. 4794/09

[M-4089] In re William Hamel, et al.,
Petitioners,

-against-

Hon. Eric T. Schneiderman, etc., et al.,
Respondents.

_____

Newman & Greenberg, New York (Richard A. Greenberg of counsel), for William Hamel, petitioner.

Morton Katz, New York, for Prabhudial Balkaran, petitioner.

David S. Greenfield, New York, for Felix De Los Santos, petitioner.

Joshua Dratel, New York, for Gladys Diaz, petitioner.

Eric T. Schneiderman, Attorney General, New York (Jodi A. Danzig and Roberta L. Martin of counsel), for Attorney General, respondent.

_____

Application for an order pursuant to article 78 of the Civil Practice Law and Rules denied and the petition dismissed, without costs or disbursements. All concur. No opinion. Order filed.

Tom, J.P., Saxe, Catterson, Moskowitz, Manzanet-Daniels, JJ.

5121N VOOM HD Holdings LLC, Index 600292/08
M-1748 & Plaintiff-Respondent,
M-1833

-against-

EchoStar Satellite L.L.C.,
Defendant-Appellant.

- - - - -

Lawyers for Civil Justice,
Amicus Curiae.

_____

Simpson Thacher & Bartlett LLP, New York (Roy L. Reardon of counsel), for appellant.

Gibson, Dunn & Crutcher LLP, New York (Orin Snyder of counsel), for respondent.

Goldberg Segalla LLP, Buffalo (John J. Jablonski of counsel), for amicus curiae.

_____

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered November 9, 2010, affirmed, with costs.

M-1748 - Motion for leave to file amicus curiae brief granted.

M-1833 - Motion for leave to respond to amicus curiae brief granted.

Opinion by Manzanet-Daniels, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David B. Saxe
James M. Catterson
Karla Moskowitz
Sallie Manzanet-Daniels, JJ.

5121N
M-1748 & M-1833
Index 600292/08

_____x

VOOM HD Holdings LLC,
Plaintiff-Respondent,

-against-

EchoStar Satellite L.L.C.,
Defendant-Appellant.

- - - - -

Lawyers for Civil Justice,
Amicus Curiae.

_____x

Defendant appeals from an order of the Supreme Court, New York County (Richard B. Lowe III, J.), entered November 9, 2010, which, insofar as appealed from, granted plaintiff's motion to impose sanctions against defendant for the spoilation of evidence and to bar defendant from calling nonparty Avram Tucker as an expert witness at trial and from introducing his expert report.

Simpson Thacher & Bartlett LLP, New York (Roy L. Reardon, Blake A. Bell and Ryan A. Kane of counsel), and Morrison & Foerster LLP, New York (Charles L. Kerr, Ronald G. White and J. Alexander Lawrence of counsel), for appellant.

Gibson, Dunn & Crutcher LLP, New York (Orin Snyder and Alma Asay of counsel), for respondent.

Goldberg Segalla LLP, Buffalo (John J. Jablonski of counsel), for amicus curiae.

MANZANET-DANIELS, J.

This case requires us to determine the scope of a party's duties in the electronic discovery context, and the appropriate sanction for failure to preserve electronically stored information (ESI). We hold that in deciding these questions, the motion court properly invoked the standard for preservation set forth in *Zubulake v UBS Warburg LLC* (220 FRD 212 [SD NY 2003]; *Pension Comm. of the Univ. of Montreal Pension Plan v Banc of Am. Sec., LLC.*, 685 F Supp 2d 456, 473 [SD NY 2010]), which has been widely adopted by federal and state courts. In *Zubulake*, the federal district court stated, "Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents" (*Zubulake*, 220 FRD at 218). The *Zubulake* standard is harmonious with New York precedent in the traditional discovery context, and provides li tigants with sufficient certainty as to the nature of their obligations in the electronic discovery context and when those obligations are triggered.

VOOM HD is a Delaware limited liability company owned by Rainbow Media Holdings LLC, which, in turn, is owned by the public company Cablevision Systems Corporation. EchoStar is a provider of direct broadcast satellite television services

through its "DISH Network," using a satellite distribution system to deliver to subscribers digital television programming licensed from owners of programming services.

On November 17, 2005, Voom and EchoStar entered into an "affiliation agreement," a 15-year contract whereby EchoStar agreed to distribute Voom's television programming. The agreement required EchoStar to include the Voom channels "as part of its most widely distributed package of HD programming services" — i.e., EchoStar could not "tier" the channels and charge its customers more for Voom than the standard fee charged to customers for HD. EchoStar had the right to terminate the agreement if Voom failed to spend $100 million on the "service" in any calendar year, and retained the right to audit Voom's expenses and investments.

Voom contends that in mid-2007 EchoStar determined that the deal was disadvantageous, and therefore decided to falsely claim that Voom had fallen short of its financial commitment in 2006 or had failed to meet its programming content obligations. EchoStar allegedly sought to terminate the contract or to "tier" Voom's channels; under either scenario, Voom insists it stood to lose billions of dollars. Voom also charges that EchoStar made the related decision in mid-2007 to remove Voom's channels from its most widely distributed HD channel package.

At a meeting in June 2007, Carl Vogel, EchoStar's vice chairman, purportedly stated that the high cost of Voom "did not fit Echostar's market position as the low-cost video provider," and that the deal was a "mistake" by prior senior management. Eric Sahl, senior vice-president of programming called the agreement a "lead balloon," noting that Voom's cost was outweighing its value because Voom was not driving enough HD subscribers to justify Voom's high price.

On June 19, 2007, Carl Vogel, EchoStar's Vice Chairman, told his subordinates: "If [Voom doesn't] give us the free programming can we tier them? What are the breach remedies? I need a full summary of what we can do today." "Trigger the audit now. Given their balance sheet there is no way they've met the commitment . . . Prepare the breach notice."

On June 19, 2007, Kevin Cross, EchoStar's senior corporate counsel, sent a letter advising Voom of its intent "to avail itself of its audit right[s]."

The following day, June 20, 2007, Cross sent a second letter to Voom, expressing EchoStar's "belie[f] that Voom failed to spend $100 million on the Service in calendar year 2006," and that "EchoStar is thus entitled to terminate the Agreement," and reserving EchoStar's "rights and remedies."

On July 10, 2007, Vogel directed an EchoStar executive to

"[d]raft the breach letter."

On July 11, 2007, Voom sent EchoStar an "Analysis," showing its expenditure of $102,959,000 in 2006. On July 12, 2007, Carolyn Crawford, EchoStar's vice president for programming, forwarded Voom's breakdown of its spending to Vogel and Sahl, describing it as "indicat[ing] a $102.9 m spend for 2006," and reported that EchoStar "will likely need to lean on the audit lever to accomplish either termination rights . . . or tiering rights."

On July 13, 2007, Cross sent letters to Voom claiming "material breaches" of contractual programming content requirements, and reserving EchoStar's "rights and remedies in equity or at law."

On July 23, 2007, according to EchoStar's own privilege log, EchoStar's executives began consulting with in-house litigation counsel, Jeffrey Blum, regarding the agreement and the dispute with Voom.

On July 27, 2007, Cross sent another letter rejecting Voom's compliance with content provisions, accusing Voom of "material breaches" of the agreement, and reserving EchoStar's "rights and remedies in equity or at law."

By July 31, 2007, Voom became "extremely concerned" that the matter was going to be litigated and implemented a litigation

hold, including automatically preserving e-mails.

On September 27, 2007, Vogel reminded his executives of the "need to declare [Voom] in default on the content covenants as well [as the $100 million investment]." Crawford responded by advising Vogel that "[w]e are using both the content covenant breach and the concern about the $100m investment requirement as leverage to get a tiering deal done."

During October 2007, EchoStar conducted an audit of Voom's 2006 investment in the service. On October 26, 2007 EchoStar's own auditor concluded, in an e-mail sent to Crawford, that "[e]verything at Voom looks fine . . . these guys are clean . . . very organized, forthcoming, and from an accounting perspective run a good shop."

On October 23, 2007, days earlier, EchoStar executives began discussing "potential litigation" with Blum. According to EchoStar's privilege log, these conversations continued through the date that Voom filed suit.

Undeterred by the findings of its own auditor, EchoStar, on November 16, 2007, sent another breach letter, threatening "to terminate the Agreement, effective immediately" if Voom did not agree that, "beginning February 1, 2008, . . . ongoing carriage would be on a 'tiered' basis, as determined by EchoStar in its discretion." On December 4, 2007, Voom responded, "[W]e don't

agree with your claims/assertions of breach/proposed actions" and suggested a meeting to resolve the issue. Voom maintained that the contemplated re-tiering, without its consent, was a plain violation of the parties' agreement.

On January 23, 2008, Crawford sent an e-mail to Sahl stating that EchoStar was proceeding with "the plan for a full termination."

By letter dated January 28, 2008, Voom protested that EchoStar had no right to terminate the affiliation agreement and rejected EchoStar's proposed re-tiering.

On January 30, 2008, EchoStar formally "terminate[d] the Agreement effective February 1, 2008." Voom commenced this action the next day. EchoStar did not implement a litigation hold until after Voom filed suit. Yet this purported "hold" did not suspend EchoStar's automatic deletion of e-mails. Thus, any e-mails sent and any e-mails deleted by an employee were automatically and permanently purged after seven days. It was not until June 1, 2008 – four months after the commencement of the lawsuit, and nearly one year after EchoStar was on notice of anticipated litigation – that EchoStar suspended the automatic deletion of relevant e-mails.

The e-mails described above, from September 27, 2007 and January 23, 2008 - reflecting EchoStar's intention to terminate

the agreement unless Voom agreed to be tiered - were only produced due to the fortunate circumstance that they were captured in unrelated "snapshots" of certain executives' e-mail accounts taken in connection with *other litigations*. Voom moved for spoliation sanctions, arguing that EchoStar's actions and correspondence demonstrated that it should have reasonably anticipated litigation prior to Voom's commencement of this action.

The motion court granted Voom's motion for spoliation sanctions. The court found that "EchoStar's concession that termination would lead to litigation, together with the evidence establishing EchoStar's intent to terminate, its various breach notices sent to VOOM HD, its demands and express reservation of rights, all support the conclusion that EchoStar must have reasonably anticipated litigation prior to the commencement of this action." The court, citing *Zubulake*, concluded that EchoStar should have reasonably anticipated litigation no later than June 20, 2007, the date Kevin Cross, its corporate counsel, sent Voom a written letter containing EchoStar's express notice of breach, a demand, and an explicit reservation of rights. The court found that EchoStar's subsequent conduct also demonstrated that it should have reasonably anticipated litigation prior to the filing of the complaint, citing correspondence during the

summer and fall of 2007, and EchoStar's own privilege log, which showed that EchoStar designated documents as "work product" relating to "potential litigation" with Voom as early as November 16, 2007, the date of the EchoStar breach letter to Voom.

The court observed that in addition to failing to preserve electronic data upon reasonable anticipation of litigation, no steps whatsoever had been taken to prevent the purging of e-mails by employees during the four-month period after commencement of the action. EchoStar continued to permanently delete employee e-mails for up to four months after the commencement of the action, relying on employees to determine which documents were relevant in response to litigation, and to preserve those e-mails by moving them to separate folders. As the court put it: "EchoStar's purported litigation hold failed to turn off the automatic delete function and merely asked its employees – many of whom, presumably were not attorneys – to determine whether documents were potentially responsive to litigation, and to then remove each one from EchoStar's pre-set path of destruction."

Since some of the e-mail exchanges had surfaced in other, unrelated EchoStar litigation, but were otherwise unrecoverable in this action, the court concluded that relevant documents had been destroyed by EchoStar.

The court noted that even if the duty to preserve arose only

upon the filing of the complaint, EchoStar still violated the duty since it had lost, at a minimum, e-mails from January 24 through January 28, 2008 as the result of the seven-day automatic purge policy.

The court rejected EchoStar's argument that since the parties were seeking an "amicable business solution," no reasonable anticipation of litigation existed, stating "EchoStar's argument ignores the practical reality that parties often engage in settlement discussions before and during litigation, but this does not vitiate the duty to preserve. EchoStar's argument would allow parties to freely shred documents and purge e-mails, simply by faking a willingness to engage in settlement negotiations."

The motion court found that EchoStar's failure to preserve electronic data was more than negligent; indeed, it was the same bad faith conduct for which EchoStar had previously been sanctioned (*see Broccoli v EchoStar Communications Corp.*, 229 FRD 506 [D Md 2005]). EchoStar had been on notice of its "substandard document practices" at least since the *Broccoli* decision, yet continued those very same practices. The court determined that EchoStar's conduct, at a minimum, constituted gross negligence. The court found that Voom had demonstrated that the destroyed evidence was relevant to its claims; in any

event, relevance is presumed when a party demonstrated gross negligence in the destruction of evidence. The court ruled that a negative, or adverse inference against EchoStar at trial was an appropriate sanction, rather than striking EchoStar's answer, since other evidence remained available to Voom, including the business records of EchoStar and the testimony of its employees, to prove Voom's claims.[1]

We agree with the motion court that an adverse inference was warranted because EchoStar's spoliation of electronic evidence was the result of gross negligence at the very least, and now affirm.

In *Zubulake*, the court stated that "[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents" (220 FRD at 218). As has been stated, "[I]n the world of electronic data, the preservation obligation is not limited simply to avoiding affirmative acts of destruction. Since computer systems generally have automatic deletion features that periodically purge electronic documents such as e-mail, it is

[1]The court noted that had this other evidence not been available, it would have imposed the harsher standard of striking the answer, based on the egregiousness of EchoStar's conduct.

necessary for a party facing litigation to take active steps to halt that process" (*Convolve, Inc. v Compaq Computer Corp.*, 223 FRD 162, 175-76 [SD NY 2004]). Once a party reasonably anticipates litigation, it must, at a minimum, institute an appropriate litigation hold to prevent the routine destruction of electronic data[2] (*see Pension Comm. of the Univ. of Montreal Pension Plan*, 685 F Supp 2d at 473). Regardless of its nature, a hold must direct appropriate employees to preserve all relevant records, electronic or otherwise, and create a mechanism for collecting the preserved records so they might be searched by someone other than the employee. The hold should, with as much specificity as possible, describe the ESI at issue,[3] direct that routine destruction policies such as auto-delete functions and rewriting over e-mails cease, and describe the consequences for failure to so preserve electronically stored evidence. In certain circumstances, like those here, where a party is a large company, it is insufficient, in implementing such a litigation hold, to vest total discretion in the employee to search and

[2]While it is the best practice that this litigation hold be writing, we recognize that there might be certain circumstances, for example, a small company with only a few employees, in which an oral hold would suffice.

[3]For example, ESI may exist on employees' home computers, on flash drives or Blackberries, in a cloud computing infrastructure or off-site on a remote server or back-up tapes.

select what the employee deems relevant without the guidance and supervision of counsel (*id.*).[4]

Zubulake's reasonable anticipation trigger for preservation has been widely followed. It has been adopted by courts in all four federal districts of the State (*see Piccone v Town of Webster*, 2010 WL 3516581, *5, 2010 US Dist LEXIS 92409, *13 [WD NY]; *Field Day, LLC v Cnty. of Suffolk*, 2010 WL 1286622, *3, 2010 US Dist LEXIS 28476, *10 [ED NY]; *Burgess v Goord*, 2005 WL 1458236, *4 [ND NY]), and by courts throughout the country (*see e.g. Victor Stanley, Inc. v Creative Pipe, Inc.*, 269 FRD 497, 521 [D Md 2010]). Significantly, the Delaware Court of Chancery has adopted the "reasonably anticipated" standard: "Counsel are reminded, however, that the duty to preserve potentially relevant ESI is triggered when litigation is commenced or when litigation is 'reasonably anticipated,' which could occur before litigation is filed" (Court of Chancery Guidelines for Preservation of Electronically Stored Information).

Just recently in *Ahroner v Israel Discount Bank of New York* (79 AD3d 481 [2010]), this Court adopted the *Zubulake* standard when reviewing a motion for spoliation sanctions involving the

---

[4]*See* Shira A. Scheindlin & Daniel J. Capra, The Sedona Conference, *Electronic Discovery and Digital Evidence: Cases and Materials* 147-49 (West 2009).

destruction of electronic evidence. While in *Ahroner* we did not have occasion to address the issue of when a party reasonably anticipates litigation, we cited *Zubulake* favorably in affirming the motion court's determination that a party's destruction of a hard drive was the result of either intentional conduct or gross negligence, warranting an adverse inference.

EchoStar and amicus urge this court to reject the *Zubulake* standard requiring a litigation hold "[o]nce a party reasonably anticipates litigation." EchoStar and amicus insist this standard is vague and unworkable because it provides no guideline for what "reasonably anticipated" means. Instead, EchoStar and amicus believe that "in the absence of 'pending litigation' or 'notice of a specific claim,' defendant should not be sanctioned for discarding items in good faith and pursuant to normal business practices." We disagree. To adopt a rule requiring actual litigation or notice of a specific claim ignores the reality of how business relationships disintegrate. Sides to a business dispute may appear, on the surface, to be attempting to work things out, while preparing frantically for litigation behind the scenes. EchoStar and amicus's approach would encourage parties who actually anticipate litigation, but do not yet have notice of a "specific claim" to destroy their documents with impunity.

EchoStar's arguments that the *Zubulake* standard represents a departure from settled law or that the standard is unworkable are manifestly without merit. The "reasonable anticipation of litigation," as discussed by *Zubulake* and its progeny, is such time when a party is on notice of a credible probability that it will become involved in litigation.

The Sedona Conference has issued guidelines concerning preservation obligations and legal holds *(see The Sedona Conference, Commentary on Legal Holds: The Trigger and The Process*, 11 Sedona Conf. J. 265 (Fall 2010) (the *Sedona Legal Hold Guidelines*). These guidelines expressly state that preservation obligations arise "at the point in time when litigation is *reasonably anticipated* whether the organization is the initiator or the target of the litigation" (*id.* at 267). Guideline 1 of the Sedona Legal Hold Guidelines further elaborates:

> "[A] reasonable anticipation of litigation arises when an organization is on notice of a credible probability that it will become involved in litigation, seriously contemplates initiating litigation, or when it takes specific actions to commence litigation."

(*Id.* at 269).

Under any variant of the standard, EchoStar should have reasonably anticipated litigation as of June 20, 2007, the date it sent a letter to Voom demanding an audit and threatening

termination of the contract based on allegations that Voom failed to spend $100 million on the service in 2006. This was especially so given Blum's testimony that EchoStar knew that Voom would sue if EchoStar terminated the agreement.

Further, commencing in June 2007 and continuing through late January 2008, EchoStar repeatedly threatened to terminate the agreement unless Voom tiered its channels. Accordingly, EchoStar should have reasonably anticipated litigation in June 2007, when it advised Voom that it was entitled to terminate the agreement; in November 2007 when EchoStar sent another breach letter, threatening "to terminate the Agreement, effective immediately" if Voom did not tier its channels; on January 28, 2008 when Voom rejected the demand and disputed that EchoStar had a right to terminate the agreement; and, at a minimum, on January 30, 2008, when it formally terminated the agreement.

However, EchoStar did not issue a litigation hold on electronic evidence until *after* this action was commenced. Further, it did not take a snapshot of the relevant e-mail accounts until four days after this action was commenced, and did not cease the automatic destruction of e-mails until four months after this action was commenced.

It is well settled that a party must suspend its automatic-deletion function or otherwise preserve e-mails as part

of a litigation hold (*see e.g. Convolve, Inc. v Compaq Computer Corp.*, 223 FRD 162, 176 [SD NY 2004]). Indeed, as noted by the motion court, EchoStar was found guilty of "gross spoliation" of evidence for failing to do so in a prior case (*see Broccoli*, 229 FRD 506). It is notable that even after EchoStar had been sanctioned for similar conduct in *Broccoli*, EchoStar, in this case, continued on the same "pre-set path of destruction." It is further notable that the e-mail retention policy in *Broccoli* was three times longer in duration than in this case. Thus, incredibly, EchoStar *reduced* the duration of its automatic deletion function in the years following *Broccoli*, deleting e-mails after only 7 days instead of after 21 days.

EchoStar points out that it took a snapshot of e-mail accounts four days after the complaint was filed. However, e-mails sent between January 24, 2008 and January 28, 2008 were destroyed without being captured. Moreover, e-mails continued to be automatically deleted for four months after the action was commenced.

In this case, EchoStar's reliance on its employees to preserve evidence "does not meet the standard for a litigation hold" (*see Pension Comm. of the Univ. of Montreal Pension Plan*, 685 F Supp 2d at 473; *see also Einstein v 357 LLC*, 2009 NY Slip Op 32784[U] [Sup Ct, NY County 2009] [finding that the failure to

suspend deletion policy or to investigate the basic ways in which e-mail was stored constituted a "serious discovery default" rising to the level of gross negligence or willfulness entitling party to an adverse inference; "[Director of IT's] testimony incredibly demonstrates that when litigation commences, the Corcoran IT department takes no steps to prevent users, even those named as parties to such litigation, from deleting potentially relevant emails, relying instead solely upon the discretion of such users to select which emails to save and which to delete"]).

A party seeking sanctions based on the spoliation of evidence must demonstrate: (1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a "culpable state of mind"; and finally, (3) that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense (*see Zubulake*, 220 FRD at 220). A "culpable state of mind" for purposes of a spoliation sanction includes ordinary negligence (*id.*; *see also Treppel v Biovail Corp.*, 249 FRD 111, 121 [SD NY 2008]). In evaluating a party's state of mind, *Zubulake* and its progeny provide guidance. Failures which support a finding of gross negligence, when the duty to preserve

electronic data has been triggered, include: (1) the failure to issue a written litigation hold, when appropriate; (2) the failure to identify all of the key players and to ensure that their electronic and other records are preserved; and (3) the failure to cease the deletion of e-mail (*see Pension Comm. of the Univ. of Montreal Pension Plan v Banc of Am. Sec., LLC.*, 685 F Supp 2d at 471).

The intentional or willful destruction of evidence is sufficient to presume relevance, as is destruction that is the result of gross negligence; when the destruction of evidence is merely negligent, however, relevance must be proven by the party seeking spoliation sanctions (*id.*).

However, a presumption of relevance is rebuttable:

> "When the spoliating party's conduct is sufficiently egregious to justify a court's imposition of a presumption of relevance and prejudice, or when the spoliating party's conduct warrants permitting the jury to make such a presumption, the burden then shifts to the spoliating party to rebut that presumption. The spoliating party can do so, for example, by demonstrating that the innocent party had access to the evidence alleged to have been destroyed or that the evidence would not support the innocent party's claims or defenses. If the spoliating party demonstrates to a court's satisfaction that there could not have been any prejudice to the innocent party, then no jury instruction will be warranted, although a lesser sanction might still be required."

(Pension Comm. at 468-469).

An adverse inference was a reasonable sanction in light of

EchoStar's culpability and the prejudice to Voom. The record shows that EchoStar acted in bad faith in destroying electronically stored evidence. The motion court appropriately considered the *Broccoli* case in determining whether EchoStar was grossly negligent (*see Thibeault v Square D Co.*, 960 F2d 239, 245-246 [1st Cir 1992] [in the course of ordering preclusion, a court should consider all the circumstances surrounding the alleged violation, "includ[ing] events which did not occur in the case proper but occurred in other cases and are, by their nature, relevant to the pending controversy"; to ignore a "pattern of misbehavior . . . would be blinking reality"]). The *Broccoli* case demonstrates that EchoStar was well aware of its preservation obligations and of the problems associated with its automatic deletion of e-mails that could be relevant to litigation to which it was a party. The destruction of e-mails during the critical time when the parties' business relationship was unquestionably deteriorating reflects, at best, gross negligence. Further, the destruction of e-mails after litigation had been commenced, when EchoStar was unquestionably on notice of its duty to preserve, was grossly negligent, if not intentional (*see Zubulake*, 220 FRD at 221).

Since EchoStar acted in bad faith or with gross negligence in destroying the evidence, the relevance of the evidence is

presumed and need not have been demonstrated by Voom (*see Sage Realty Corp. v Proskauer Rose LLP,* 275 AD2d 11, 16-17 [2000]), *lv dismissed* 96 NY2d 937 [2001] [dismissal of complaint pursuant to CPLR 3126 warranted where party willfully destroyed evidence; noting "it is the peculiarity of many spoliation cases that the very destruction of the evidence diminishes the ability of the deprived party to prove relevance directly"]; *see also Einstein*, 2009 Slip Op. 32784[U] ["when a party establishes gross negligence in the destruction of evidence, that fact alone suffices to support a finding that the evidence was unfavorable to the grossly negligent party"] [citations omitted]).

In any event, the record shows that the destroyed evidence was relevant. The "snapshot" e-mails reviewed by the motion court "demonstrat[ed] EchoStar's intention to declare various breaches by Voom" as an excuse for terminating the agreement. These e-mails – a handful only fortuitously recovered, and highly relevant – certainly permitted the inference that the unrecoverable e-mails, of which the snapshots were but a representative sampling, would have also been relevant.

Moreover, the missing evidence prejudiced Voom. EchoStar argues that the missing e-mails were merely cumulative of other evidence, asserting that since Voom had other means to prove its case, it could not have suffered prejudice from the destruction

of e-mails that occurred. This is insufficient to rebut the presumption. Although Voom may have other evidence to point to, the missing evidence is from a crucial time period during which EchoStar appears to have been searching for a way out of its contract. EchoStar's internal communications undoubtedly concerned issues about what it understood the contract to mean, a contract that the motion court has now found to be ambiguous. Evidence from this vital time period is not entirely duplicative of other evidence. The court's imposition of an adverse inference, a lesser sanction than striking of the answer, factored this overlap into account, and reflects an appropriate balancing under the circumstances (*see Ahroner v* 79 AD3d at 482; *see also E.W. Howell Co. v S.A.F. La Sala Corp.*, 36 AD3d 653, 654 [2007] [negative inference charge was appropriate sanction "where loss does not deprive the opposing party of the means of establishing a claim or a defense"]; *Melendez v City of New York*, 2 AD3d 170 [2003] [abuse of discretion to strike defendant's answer where the absence of documents was not fatal to plaintiff's case; more appropriate sanction would have been a missing document charge, permitting jurors to draw an inference against defendants on the issue of notice]).

In sum, the motion court's spoliation sanction was appropriate and proportionate. While the court appropriately

inferred that the destroyed e-mails would have been relevant to Voom's claims, and that EchoStar's conduct merited a presumption of prejudice, it also recognized that Voom had other available evidence to prove its case.

To the extent that EchoStar was actually negotiating in good faith, which the evidence suggests is doubtful, that does not vitiate the duty to preserve evidence. As the motion court stated, "the practical reality" is that "parties often engage in settlement discussions before and during litigation" and accepting EchoStar's argument "would allow parties to freely shred documents and purge e-mails, simply by faking a willingness to engage in settlement negotiations" (*see also Rutgerswerke AG v Abex Corp.*, 2002 WL 1203836, *13, 2002 US Dist LEXIS 9965, *44 [SD NY 2002][duty to preserve documents exists at time of pre-litigation settlement discussions]).

Accordingly, the motion court properly determined that EchoStar should have reasonably anticipated litigation as early as June 2007 and certainly no later than February 1, 2008, the date the complaint was filed; that EchoStar was grossly negligent in failing to implement a litigation hold until after litigation had already been commenced; that EchoStar did not implement an appropriate litigation hold until June 2008, approximately four months after litigation had been commenced; that such failures

entitle a finder of fact to presume the relevancy of the destroyed electronic data; and that an adverse inference charge was an appropriate spoliation sanction in light of the above.

No discrete appeal lies from the part of the order that granted Voom's motion to preclude Avram Tucker from testifying as an expert at trial and from introducing his expert report (*Santos v Nicolas*, 65 AD3d 941 [2009]). In any event, it is clear from Tucker's initial report and deposition testimony that he was not going to offer any opinions that he was qualified to offer that were entirely independent of the opinion of Roger Williams, an expert withdrawn by EchoStar on the eve of his deposition.

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

Accordingly, the order of the Supreme Court, New York County (Richard B. Lowe III, J.), entered November 9, 2010, which, insofar as appealed from, granted plaintiff's motions to impose sanctions against defendant for the spoliation of evidence and to

bar defendant from calling nonparty Avram Tucker as an expert witness at trial and from introducing his expert report, should be affirmed, with costs.

Voom HD Holdings LLC v EchoStar Satellite LLC.

M-1748 - Motion for leave to file amicus curiae brief granted.

M-1833 - Motion for leave to respond to amicus curiae brief granted.

All concur.

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

ENTERED: JANUARY 31, 2012

CLERK