SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 22, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Gonzalez, Moskowitz, Acosta, JJ.

3538-
3539 Ruth Kassover, etc., et al., Index 602464/05
Plaintiffs-Respondents-Appellants,

-against-

Prism Venture Partners, LLC, et al.,
Defendants-Appellants-Respondents.

Kucker & Bruh, LLP, New York (Catherine A. Helwig of counsel), for appellants-respondents.

Friedman Kaplan Seiler & Adelman LLP, New York (Edward A. Friedman of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Helen E. Freedman, J.), entered January 26, 2007, which, in this action arising out of a merger transaction, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the first cause of action to the extent it sought recovery of the "Assignment Consideration" and to the extent it was asserted against defendants Rosalie Erickson, Richard Baime and Lulu Kassover (the Board Defendants), and the second through seventh and ninth and tenth causes of action, and denied defendants' motion to dismiss the eighth cause of action alleging breach of contract against defendant R. Peyton Gibson, unanimously affirmed, with costs. Judgment, same court and Justice, entered October 9, 2007, dismissing defendants' counterclaims, unanimously affirmed, with costs.

Background

This case is part of a decades-long dispute among members of the Kassover family that has engendered seemingly endless litigation in this and many other courts, both state and federal. This particular litigation involves a merger between the Garden City Company (GCC), a closely-held real estate company of the Kassover family, and Prism Venture Partners (Prism or Buyer).

In May 1998, Lawrence Kassover (Lawrence), who was then owner of 5.66% of the shares of GCC, filed a petition for reorganization in United States Bankruptcy Court for the Southern District of New York. The bankruptcy court appointed defendant R. Peyton Gibson bankruptcy trustee (the Trustee) to pursue a sale of GCC, in order to maximize the value of Lawrence's shares.

On March 31, 2000, the Trustee filed a proposed Plan of Reorganization (the Plan). On April 4, 2000, plaintiff Philip Kassover (Philip) filed an objection to the Plan on the ground that it interfered with GCC's internal affairs in violation of a 1976 Shareholders Agreement among GCC shareholders. At a hearing on June 14, 2000, Philip withdrew his objections, reserving his rights under state law to object to any merger or sale. On the same date, the bankruptcy court confirmed the Plan for reorganization and entered a confirmation order.

In its confirmation order, the bankruptcy court declared the 1976 Shareholders Agreement void ab initio. It also expressly authorized the Trustee to make efforts to sell GCC. Philip did not appeal any portion of the confirmation order.

Apparently, after the Plan became effective, the Trustee tried to sell GCC, but Philip obstructed these efforts when he frustrated due diligence, prevented consultants the Trustee hired from updating engineering and environmental reports, and interfered with visits by prospective buyers to GCC properties. On November 30, 2001, the bankruptcy court issued an order enjoining Philip from interfering with the disposition of GCC, stating that the evidence suggested Philip had engaged in a "campaign of obstruction." The court noted that the Trustee had established the elements of a claim under New York law for tortious interference with contract and tortious interference with prospective contractual relations.

In July 2002, the Trustee, as agent for GCC, entered into a Stock Purchase Agreement and a proposed Merger Agreement with PVP-GCC Holding Co II, LLC, a company that Prism formed for the purpose of merging with GCC. Prism's principal owner is defendant Richard Sabella. The Merger Agreement provided that PVP would pay $2,000 per share to the GCC shareholders (the Merger Consideration) and required each shareholder to satisfy any "monetary obligations" to GCC as a "condition precedent" to the right to receive the per share Merger Consideration (Merger Agreement § 3.3[e]). The Merger Agreement does not define the term "monetary obligations."

The Merger Agreement also provided for additional compensation (the Assignment Consideration) of $525 per share contingent upon delivery by a date certain of an assignment of rights under "the Shareholders Agreement."

Section 3.2(a) of the Merger Agreement required PVP to deposit the Merger Consideration with "the Trustee, as trustee (the "Disbursing Agent"). . .as agent for the holders of shares of Garden City Stock." That section goes on to state, "[p]ending distribution pursuant to Section 3.2(b) hereof of the cash deposited with the Disbursing Agent, all cash shall be held in trust for the benefit of Garden City Shareholders. . ." However, section 15.2 contemplates a Garden City Shareholder's Representative who is different from the Trustee.

The Trustee signed the Merger Agreement as "R. Peyton Gibson the Court Appointed Liquidating Trustee of the Estate of Lawrence Kassover, as agent." Section 15.15 states that "[t]he Buyer understands and acknowledges that the Trustee is acting solely as agent of the Corporation and that the Trustee shall have no personal liability pursuant to this Agreement." Finally, section 15.11 states that the Garden City Shareholders are third-party beneficiaries under the Merger Agreement.

On July 26, 2002, a sufficient majority of GCC shareholders approved the merger over plaintiffs' objections. On July 29, 2002, the bankruptcy court held an evidentiary hearing, during which, according to plaintiffs, defendant Sabella represented that, in addition to the per share Merger Consideration and the Assignment Consideration set forth in the Merger Agreement, PVP would pay to the Trust and other GCC shareholders other consideration (Additional Consideration) worth $8.5 million (representing an additional $592 per share). Thus, according to plaintiffs, the consideration available to shareholders was: (1) the $2,000 per share Merger Consideration; (2) the $525 per share in Assignment Consideration and (3) the $592 per share in Additional Consideration.

After the hearing, the bankruptcy court issued an order authorizing the transaction (the Merger Order). The Merger Order stated, among other things, that the "Trustee has not breached any duty to [GCC] or its shareholders as a result of her execution of the [agreement]" and that Prism/PVP was a "good faith purchaser." The Merger Order also required that the offer to each of GCC's shareholders to purchase their shares be no less than $2,500 per share.

The merger of GCC with PVP closed in August 2002. Accordingly, pursuant to section 3.2(f) of the Merger Agreement, plaintiffs' interests in GCC ended. Philip appealed the Merger Order, but was not successful, apparently because he failed to exercise his appellate rights properly and seek a stay of the transaction (*see Kassover v Gibson*, 98 Fed Appx 30 [2d Cir 2004]).

On May 22, 2003, plaintiffs timely submitted their share certificates to defendant Gibson in her capacity as Disbursing Agent for the funds. Plaintiffs allege that Gibson, following the directions of Prism, refused to pay plaintiffs the Merger Consideration of $2,000 per share. In or about June 2003, Prism, PVP and Sabella asserted to Gibson that she should withhold the Merger Consideration from plaintiffs because of alleged "monetary obligations" plaintiffs owed to GCC.

Several months later, again allegedly following instructions from Prism, Gibson distributed $322 per share to the Estate and $169 per share to Philip. After plaintiffs filed this action, Gibson paid the balance of the Merger Consideration ($1,678 per share) to the Estate.

In July 2005, plaintiffs commenced this action, alleging that they did not receive their full entitlement under the Merger Agreement.[1] Plaintiffs have stated they are not challenging the Merger itself. Specifically, plaintiffs allege defendants improperly withheld part of the $2,000 per share consideration by accusing plaintiffs of having "monetary obligations" to GCC. Plaintiffs claim that defendants unreasonably denied them the $525 per share Assignment Consideration, although plaintiffs concede they never filed the Assignment of Claims that would have entitled them to receive the Assignment Consideration. Finally, plaintiffs contend that all other shareholders received $592 per share in Additional Consideration that plaintiffs also should have received.

The complaint asserted 12 causes of action: violation of Business Corporation Law § 501(c) against Prism, PVP, GCC, Sabella and the Board Defendants; breach of fiduciary duty against the Board Defendants; fraud against Prism, PVP, GCC and Sabella; constructive trust and unjust enrichment against Prism, PVP, GCC and Sabella; breach of the 1963 Shareholders Agreement against various defendants; breach of fiduciary duty against

[1] In August 2005, defendants removed this case to federal court that referred it to the bankruptcy court. In January 2006, the bankruptcy court remanded the action to state court.

Gibson; breach of contract against Gibson; aiding and abetting breach of fiduciary duty against Prism, PVP, GCC and Sabella; tortious interference with contract and injunctive relief against Prism, PVP, GCC and Sabella; and action on judgments and claims against GCC. Plaintiffs are not appealing the dismissal of these final two causes of action.

Defendants asserted counterclaims accusing Philip of various acts of mismanagement of GCC for a period spanning ten years. The counterclaims did not rely on Philip's obstructionist conduct that nearly derailed merger efforts.

On January 19, 2007, the court dismissed all of plaintiffs' claims except for a portion of the first cause of action and the eighth cause of action. On September 25, 2007, the court granted plaintiffs' motion and dismissed defendants' counterclaims in their entirety.

Discussion

Defendants appeal the January 19, 2007 order to the extent it sustained plaintiffs' eighth cause of action and a portion of the first cause of action. Plaintiffs cross appeal from so much of the order that dismissed the first cause of action against the Board Defendants as well as most of the other causes of action the court dismissed in its decision. Defendants also appeal the order dismissing their counterclaims.

I. <u>The January 19, 2007 Order</u>

The court was correct when it held that plaintiffs state a valid cause of action under Business Corporation Law § 501(c), alleging that defendants failed to pay them the full $2,000 per share Merger Consideration and the additional $592 per share that the other shareholders received (*see Beaumont v American Can Co.*, 160 AD2d 174 [1990]). However, plaintiffs concede that they did not timely submit the assignment that the Merger Agreement required shareholders to deliver in order to receive the Assignment Consideration. Therefore, plaintiffs are not eligible to receive the Assignment Consideration.

To the extent plaintiffs' cause of action for breach of fiduciary duty relies upon alleged "self-dealing acts" of the Board Defendants to engineer the merger, the bankruptcy court's approval of the merger is a binding rejection of those claims (*see Loving v Abbruzzese*, 298 AD2d 749, 751 [2002]). Further, plaintiffs admit they are not challenging the merger itself and the Board no longer existed at the time the acts plaintiffs complain of occurred. Therefore, under these circumstances, there is no cause of action against the Board Defendants for breach of fiduciary duty.

Plaintiffs have also alleged that certain of defendant shareholders breached a 1963 Shareholders Agreement by agreeing to sell their shares to Prism and PVP before the merger. Plaintiffs make this claim despite repeatedly insisting that they are not challenging the merger itself. These two positions appear to contradict themselves and are tantamount to challenging the merger through the backdoor. Nevertheless, plaintiffs should have raised this issue in the bankruptcy proceedings. In failing to challenge any of this in the bankruptcy court, plaintiffs have waived their challenge at this point.

It was also proper to dismiss plaintiffs' causes of action for unjust enrichment and constructive trust because the Merger Agreement covers the same subject matter (*see EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 23 [2005]; *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382 [1987]). The fraud cause of action similarly must fail in the face of the express terms of the Merger Agreement (*see Rivas v AmeriMed USA, Inc.*, 34 AD2d 250 [2006]). Moreover, because Sabella qualified that the amount of the Additional Consideration depended upon external factors such as taxes, the alleged misrepresentations about the Additional Consideration plaintiffs point to were in the nature of mere predictions or expectations. These are not actionable (see ESBE Holdings, Inc. v Vanquish Acquisition Partners, 50 AD3d 397 [2008]; *Naturopathic Labs. Intl. Inc. v SSL Ams., Inc.*, 18 AD3d 404 [2005]). However, as discussed above, to the extent other shareholders actually received Additional Consideration, plaintiffs have stated a claim due to disparate treatment.

The cause of action for breach of fiduciary duty against Gibson duplicates the breach of contract claim against her. Therefore, it was proper for the court to have dismissed it. Because the breach of fiduciary duty claim fails, there can be no cause of action for aiding and abetting breach of that fiduciary duty. However, the motion court properly sustained the eighth cause of action for breach of contract against Gibson. Plaintiffs are express third-party beneficiaries under the Merger Agreement with the right to enforce its terms. The Merger Agreement places on Gibson the obligation to hold all cash "in trust for the benefit of the Garden City Shareholders." To the extent that Gibson did not do so in that she failed to disburse to plaintiffs the $2,000 per share for their stock, she can be sued for breach of contract. Defendants' argument based on section 15.15 that Gibson has no personal liability under the Merger Agreement is unavailing because that section refers only to personal liability to the "Buyer," i.e. Prism.

The court properly dismissed the tenth cause of action for tortious interference with contract against defendants Prism, PVP GCC and Sabella because, as plaintiffs readily admit, these parties were not strangers to the Merger Agreement (*see Koret, Inc. v Christain Dior, S.A.*, 161 AD2d 156, 157 [1990], *lv denied*, 76 NY2d 714 [1990]). Nor have plaintiffs made allegations sufficient to overcome these defendants' clear economic interest in the merged entity (*see Barrett v Toroyan*, 39 AD3d 366 [2007]).

II. The Counterclaim Order

We affirm the order dismissing the counterclaims. Defendants describe corporate action spanning a period of more than 10 years and allege that Philip breached his obligations to GCC in engaging in those activities, such as renting out properties at a discount or failing to facilitate building projects to obtain higher rents. Defendants claim that as a result of the many poor decisions that Philip made, GCC was damaged to the tune of millions of dollars. However, defendants fail to allege bad faith, a conflict of interest or the self-dealing necessary to overcome the business judgment rule (*see Auerbach v Bennett*, 47 NY2d 619, 629 [1979]). Defendants' claims are all the more amorphous given the near complete lack of dates surrounding Philip's alleged malfeasance. Thus, the court was correct in dismissing the first and second counterclaims because of the business judgment rule.

The single paragraph (¶ 119) that alleges Philip engaged in a "premeditated campaign" to drive down the value of GCC, presumably to purchase it for himself at a discount, contains no facts to support this scheme. Although the bankruptcy court did indicate that Philip may have obstructed the sale of GCC by, inter alia, preventing the inspection of properties, defendants do not incorporate allegations surrounding these events into their counterclaims.

More troubling are the allegations in paragraph 151 of the counterclaims accusing Philip of taking $50,000 in advances from GCC. However, defendants go on to state that "[p]laintiffs were and may still be indebted to [GCC]" for this amount. Mere speculation cannot support a cause of action for corporate waste or breach of fiduciary duty. Moreover, it would appear that the decision in *Kassover v Fiedler*, (Sup Ct NY County, Apr 11, 2006, James J., Index No. 123407/2000), has discharged at least a portion of the specific debt about which defendants complain.

The third counterclaim alleges monetary obligations based on the same 10-year span of misconduct in which Philip allegedly engaged. While we do not necessarily take as restrictive a view of the term "monetary obligations" as the motion court did, because the alleged "monetary obligations" claim relies on the same course of conduct that the business judgment rule protects, this claim must fail as well.

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

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

ENTERED: JULY 22, 2008

CLERK

Tom, J.P., Mazzarelli, Gonzalez, McGuire, JJ.

856 The People of the State of New York, Respondent, Ind. 5715/04

-against-

Steve Rosado, Defendant-Appellant.

Feldman and Feldman, Uniondale (Steven A. Feldman of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Robert H. Straus, J.), rendered August 30, 2005, convicting defendant, after a jury trial, of rape in the second degree (four counts), rape in the third degree (four counts), and endangering the welfare of a child (two counts), and sentencing him, as a second felony offender, to an aggregate term of 4⅓ to 11 years, unanimously affirmed.

Pursuant to our remand directing further proceedings to allow the People an opportunity to offer ethnicity-neutral reasons for their exercise of peremptory challenges (45 AD3d 508 [2007]), Supreme Court held a hearing at which the prosecutor proffered reasons for the subject challenges that the court concluded were facially neutral and not pretextual. The court's findings at the hearing, which rested upon its assessment of the prosecutor's credibility, are entitled to great deference (*People v Frederick*, 48 AD3d 382 [2008]; *People v Garcia*, 47 AD3d 428 [2008], *lv denied* 10 NY3d 708 [2008]), and we discern no reason to disturb them.

With respect to its *Sandoval* ruling, Supreme Court providently exercised its discretion in permitting the People to ask defendant, in the event he testified, if he had been convicted of possession of a sexual performance by a child, i.e., possessing child pornography (Penal Law § 263.16), without permitting them to inquire as to the underlying facts of the conviction or the fact that defendant was on probation (*see People v Bailey*, 50 AD3d 343 [2008]; *see also People v Hayes*, 97 NY2d 203 [2002]; *People v Bennette*, 56 NY2d 142, 148 [1982] [defendant's prior conviction for sodomy relevant on issue of his veracity; "[a] person ruthless enough to sexually exploit a child may well disregard an oath and resort to perjury if he perceives that to be in his self-interest"]).

Similarly, Supreme Court providently exercised its discretion in limiting the scope of defendant's cross-examination of the complainant with respect to a complaint she made to the Administration for Children's Services against her father containing accusations "of a sexual nature." The only argument advanced by defendant in support of this line of cross-examination was that a shared history of abuse -- defendant claimed that he, too, had been abused -- made it more likely that his relationship with the underage victim was nonsexual. The court, however, reasonably concluded that the limited probative value of cross-examination on this subject was outweighed by the possibility that it would confuse the main issue in the case, i.e., whether defendant and the complainant had intercourse, and mislead the jury (*see People v Corby*, 6 NY3d 231 [2005]). With respect to the ruling barring cross-examination about the letters the complainant wrote to defendant, defendant repeatedly indicated that he was not seeking to cross-examine the complainant about the content of the letters. Accordingly, the court properly concluded that the proposed cross-examination was not relevant. With respect to the ruling barring cross-examination about statements the complainant made on her Internet blog, we note that defendant never claimed that this cross-examination -- or, for that matter, cross-examination about the complaint to ACS or the letters -- would have tended to establish that the complainant had a motive to fabricate her testimony. Moreover, defendant was given sufficient latitude to test the complainant's credibility and impeach her testimony (*see id.*; *People v Edwards*, 19 AD3d 170 [2005], *lv denied* 5 NY3d 828 [2005]). In any event, any error in limiting the scope of defendant's cross-examination of the complainant was harmless since the evidence of his guilt -- the testimony of the complainant and the testimony of several other witnesses corroborating material events testified to by the complainant -- is overwhelming.

We reject defendant's contention that Supreme Court erred in discharging one of the jurors for engaging in gross misconduct of a substantial nature (*see* CPL 270.35). Upon learning that the juror had made comments about the complainant's testimony during her cross-examination and had passed a note to a court officer inquiring as to the identity of the person who had made the anonymous phone call to the police leading to defendant's arrest, the court conducted an inquiry into the juror's conduct. After hearing from the prosecutor, the prosecutor's intern, a court officer, the juror in question and two other jurors, the court concluded that the juror had, notwithstanding the court's instructions to the contrary, already formed an opinion as to both the credibility of the complainant and the "guilt or nonguilt" of defendant. Based upon the juror's responses to the court's questions and her demeanor, the court discharged her for gross misconduct. The record developed by the court's probing inquiry supports its conclusion that the juror possessed a state of mind that prevented her from rendering an impartial verdict (*see People v Rodriguez*, 71 NY2d 214, 219 [1988] ["The Trial Judge generally is accorded latitude in making the findings necessary to determine whether a juror is grossly unqualified under CPL 270.35, because that Judge is in the best position to assess partiality in an allegedly biased juror"]).

Defendant's contentions regarding the People's rebuttal evidence of telephone calls between defendant and the complainant are unpreserved for review and we decline to review them in the interest of justice. As an alternative holding, we conclude that they are meritless. Defendant's assertions that the supplemental sex offender victim fee and DNA database fee components of his sentence should be vacated are without merit.

M-1401 - *People v Steve Rosado*

Motion to reargue and renew prior motions seeking leave to file pro se brief and to obtain copies of certain transcripts denied.

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

ENTERED: JULY 22, 2008

CLERK

Tom, J.P., Saxe, Friedman, Gonzalez, McGuire, JJ.

2858 Daniela Mañas, Index 602150/06
Plaintiff-Respondent,

-against-

VMS Associates, LLC, doing business as Violy and Company, et al.,
Defendants-Appellants.

Vandenberg & Feliu, LLP, New York (Mark R. Kook of counsel), for appellants.

Sheppard, Mullin, Richter & Hampton, LLP, New York (James J. McGuire of counsel), for respondent.

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered April 5, 2007, which, insofar as appealed from, denied those portions of defendants' motion seeking dismissal of the second, sixth and seventh causes of action, unanimously reversed, on the law, without costs, those portions of the motion granted and the second, sixth and seventh causes of action dismissed.

Plaintiff was hired as an analyst by an investment banking firm, Violy, Byorum & Partners Holdings (VBP), operated by defendant Violy McCausland-Seve. VBP, however, experienced financial losses and began winding down its affairs in 2003. Around the time VBP began winding down its affairs, McCausland-Seve opened a new investment firm, defendant Violy & Co. (Violy), and offered a position in this new firm to plaintiff.

According to the allegations in her complaint, plaintiff, while interested in the new position, was concerned about the compensation she would receive if she accepted the position; in 2002 and 2003 her salary at VBP was cut and she did not receive a year-end bonus in either of those years. Moreover, McCausland-Seve had promised creditors of VBP that 20% of certain fees generated by Violy would be used to pay off VBP's debt. Thus, plaintiff "demanded assurances from [McCausland-Seve] that [plaintiff] would receive adequate compensation for past and future services. [Plaintiff] also demanded assurances from [McCausland-Seve] that Violy would not suffer the same financial mismanagement as VBP." Plaintiff asserted that McCausland-Seve "made the following representations and promises to [plaintiff] regarding compensation and management at [Violy]":

> "(a) <u>The Short-term Compensation Plan</u>: At first, [plaintiff] would earn the same base salary earned at the time VBP closed its doors (which reflected pay cuts). She would also not receive bonuses in connection with the closing of a few small, initial deals that were carried over from VBP. Proceeds from those deals would be used to start-up Violy . . . and pay off past liabilities. After that initial period, [McCausland-Seve] would then compensate [plaintiff] for her financial losses and her ongoing performance in executing deals by, at a minimum, restoring her salary to the highest point at VBP and paying her bonuses *at the time certain deals closed in amounts unprecedented by past VBP standards* (emphasis in original).

"(b) <u>The Long-Term Compensation Plan</u>: After the short-term compensation plan expired, [plaintiff] would be paid bonuses for closing deals on a semi-annual basis.

"(c) <u>Firm Management</u>: Violy['s] . . . budget would be monitored and controlled to engender transparency and prevent the type of overspending and mismanagement that resulted in VBP's financial unsustainability and employees' lost earnings."

Plaintiff claimed that she relied "upon these promises and terms" in accepting in October 2003 a position as a vice-president of Violy.

According to plaintiff, during Violy's first year of operation she requested that McCausland-Seve "crystalize specific numbers regarding [plaintiff's] short and long-term bonus compensation structures." In response to plaintiff's requests, McCausland-Seve allegedly told plaintiff that Violy was using money to pay off past debt and repay loans drawn on the firm's working capital line of credit. Thus, McCausland-Seve could not determine the amount or structure of plaintiff's bonuses.

In "mid-2004" McCausland-Seve appointed another vice-president, Fernanda, "to finalize [plaintiff's] bonus structures." "Fernanda compiled charts proposing specific numbers for the short and long-term compensation plans and frequently discussed the tenets of th[o]se plans with [plaintiff]." Each bonus under the short and long-term compensation plans was based on different factors that Fernanda outlined to plaintiff; however, each bonus was based in some measure on "deals closed" on which plaintiff worked. "Fernanda represented that [McCausland-Seve] had approved" the information in the charts.

Violy "closed" entire deals and phases of other deals on which plaintiff worked, thereby generating fees that were to be distributed to plaintiff as bonuses under either the short or long-term compensation plans. Yet, despite numerous requests by plaintiff to McCausland-Seve that she clarify Violy's bonus policies and pay plaintiff bonuses on deals on which plaintiff worked that had been entirely or partially closed, plaintiff received only one bonus under the short-term compensation plan. In addition to alleging that McCausland-Seve "placated [plaintiff] with assurances that her concerns [regarding bonus payments] would be addressed or claimed that [Violy] lacked sufficient funds to pay bonuses," plaintiff claimed that McCausland-Seve squandered Violy's income by taking personal cash advances, purchasing an expensive personal automobile and funding projects unrelated to Violy. Ultimately, plaintiff's employment with Violy was terminated in April 2006.

Plaintiff commenced this action against Violy and McCausland-Seve, asserting seven causes of action. Defendants jointly moved under CPLR 3211(a)(7) to dismiss all of the causes of action except the first, which is for breach of contract, i.e., Violy's failure to pay plaintiff salary and bonuses in accordance with the short and long-term compensation plans. Supreme Court granted the motion to the extent of dismissing the cause of action for promissory estoppel and plaintiff's claim for punitive damages, and plaintiff does not challenge those determinations. And defendants, for their part, do not seek review of the court's denial of those portions of the motion seeking dismissal of the causes of action for unjust enrichment and quantum meruit. Thus, this appeal is limited to whether Supreme Court correctly denied those portions of the motion seeking dismissal of the causes of action for fraudulent inducement, fraud and defamation.

A fraud-based cause of action is duplicative of a breach of contract claim "when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract" (*First Bank of the Ams. v Motor Car Funding*, 257 AD2d 287, 291 [1999]). A fraud-based cause of action may lie, however, where the plaintiff pleads a breach of a duty separate from a breach of the contract (*id.*). Thus, where the plaintiff pleads that it was induced to enter into a contract based on the defendant's promise to perform and that the defendant, at the time it made the promise, had a "preconceived and undisclosed intention of not performing" the contract, such a promise constitutes a representation of present fact collateral to the terms of the contract and is actionable in fraud (*Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986] [internal quotation marks omitted]; *see First Bank of the Ams.*, *supra*).

Here, plaintiff does allege with respect to the cause of action for fraudulent inducement that "[a]t the time [d]efendants made the [alleged] representations [regarding the short and long-term compensation plans], [d]efendants did not intend to compensate [plaintiff] in conformity with their promises." Similarly, with respect to her cause of action for fraud, plaintiff alleges that "[d]efendants did not intend to compensate [plaintiff] in conformity with the[] promises and assurances [concerning the short and long-term compensation plans]." However, these allegations are not sufficient. Rather, because they are merely "[g]eneral allegations that defendant[s] entered into a contract while lacking the intent to perform it[, the allegations] are insufficient to support [the fraud-based] claim[s]" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]). Thus, the causes of action for fraudulent inducement and fraud must be dismissed.

Additionally, the fraud-based causes of action must be dismissed for another, independent reason. Causes of action for breach of contract and fraud based on the breach of a duty separate from the breach of the contract are designed to provide remedies for different species of damages: the damages recoverable for a breach of contract are meant "to place the nonbreaching party in as good a position as it would have been had the contract been performed" (*Brushton-Moira Cent. School Dist. v Thomas Assoc.*, 91 NY2d 256, 261 [1998]); the damages recoverable for being fraudulently induced to enter a contract are meant to "indemnify for the loss suffered through that inducement" (*Deerfield Communications Corp.*, 68 NY2d at 956 [internal quotation marks and brackets omitted]), e.g., damages for foregone opportunities (*see Coppola v Applied Elec. Corp.*, 288 AD2d 41, 42 [2001]). Here, plaintiff did not allege that she sustained any damages that would not be recoverable under her breach of contract cause of action; she seeks to recover salary and bonuses to which she claims she is entitled under the short and long-term compensation plans. Thus, the fraud-based causes of action are duplicative of the breach of contract cause of action.

Regarding the cause of action for defamation, plaintiff did not plead in the complaint the specific words allegedly used by McCausland-Seve, as required by CPLR 3016(a), and has offered no excuse for her failure to do so. Instead, plaintiff appears to have paraphrased the allegedly defamatory statements. Thus, "[s]ince the actual defamatory words were never pleaded with particularity, but were only paraphrased in a manner such that the actual words were not evident from the face of the complaint, the long-standing rule is that dismissal is required" (*Murganti v Weber*, 248 AD2d 208, 208-209 [1998] [citations omitted]; *see American Preferred Prescription v Health Mgt.*, 252 AD2d 414, 420 [1998]; *Gardner v Alexander Rent-A-Car*, 28 AD2d 667, 667 [1967]).

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

ENTERED: JULY 22, 2008

CLERK

JUL 22 2008

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Jonathan Lippman,	P.J.
Luis A. Gonzalez	
John W. Sweeny, Jr.	
James M. Catterson,	JJ.

3118
Index 102715/04

____x

Lorilynn Fabiano, etc., et al.,
Plaintiffs-Respondents,

-against-

Philip Morris Inc., etc., et al.,
Defendants-Appellants,

Liggett & Myers Tobacco Company, et al.,
Defendants.

____x

Defendants Philip Morris USA Inc., Brown & Williamson Tobacco Corporation, R.J. Reynolds Tobacco Company and Lorillard Tobacco Company appeal from an order of the Supreme Court, New York County (Charles E. Ramos, J.), entered August 3, 2007, which, to the extent appealed from, denied so much of their motion as sought summary judgment dismissing the punitive damages claim.

Greenberg Traurig, LLP, New York (Alan Mansfield, Israel Rubin, Robert J. Kirshenberg and Stephen L. Saxl of counsel), for Lorillard Tobacco Company, appellant.

Winston & Strawn LLP, New York (Thomas J. Quigley of counsel), for Philip Morris USA Inc., appellant.

Chadbourne & Parke LLP, New York, and Jones Day, New York (Stephen J. Kaczynski and Harold K. Gordon of counsel), for Brown & Williamson Tobacco Corporation and R.J. Reynolds Tobacco Company, appellants.

Douglas & London, P.C., New York (Michael A. London and Gary Douglas of counsel) and Kenneth Chesebro, Cambridge, MA, for respondents.

LIPPMAN, P.J.

Maureen Fabiano died in 2002 after a bout with lung cancer. In this action brought by her estate and her surviving spouse, it is alleged that her cancer was caused by carcinogens she ingested by smoking cigarettes, an activity in which she engaged over a 36-year period, beginning in 1956 when she was 14 years of age. It is further alleged that defendants, the manufacturers of the cigarettes smoked by Ms. Fabiano, by dint of a carefully orchestrated and sustained campaign of advertising and misinformation directed particularly at young people, were instrumental in inducing Ms. Fabiano to begin smoking and to persist in the activity, even while they were in possession of information showing that cigarette smoking was addictive and seriously deleterious to health. The complaint, on various theories, seeks compensatory damages on Maureen Fabiano's behalf, and an award for her surviving spouse for loss of consortium. This appeal, however, poses no issue bearing upon plaintiffs' claims of entitlement to compensation for personal injury. Rather, what is at issue is the viability of plaintiffs' separate claim seeking an assessment of punitive damages. The issue is raised not by reason of any deficiency in the allegations detailing defendants' misconduct, but in light of the circumstance that the very conduct and transactions complained of have already been the subject of an action, and the final judgment entered in that action is now alleged by defendants to bar plaintiffs' claim under the doctrine of res judicata.

The action upon which defendants premise their assertion of res judicata was brought by the New York State Attorney General in 1997 "in parens patriae on behalf of the People of the State of New York, in order to protect their welfare." It is not disputed that the course of conduct by defendants detailed in the Attorney General's complaint, beginning in the 1950s and extending into the succeeding decades, notably involving defendants' targeting of young people in their advertising and marketing of cigarettes, was materially indistinguishable from the course of conduct alleged against these same defendants in the instant action. Nor, even if it were essential to our res judicata analysis, which it is not, is it disputable that the Attorney General's complaint sought, as does the present complaint, "punitive or exemplary damages in an amount . . . sufficient to punish defendants and to deter future unlawful conduct."

In November 1998, the Attorney General's action was settled when the New York State Attorney General along with the attorney generals of 45 other states entered into a Master Settlement Agreement. As is here relevant, that agreement expressly provided for the release of claims "for past conduct . . . in any way related . . . to (A) the use, sale, distribution, manufacture, development, advertising, marketing or health effects of, (B) the exposure to, or (C) research, statements, or warnings regarding, Tobacco Products," and defined claims expansively, specifically including within the definition "punitive damages . . . accrued or unaccrued." Also expansive was the Agreement's definition of those who were deemed to be releasing claims thereunder. Pursuant to the Agreement, releasors of claims included, in addition to the states, "persons or entities acting in a parens patriae . . . private attorney general . . . or any other capacity, whether or not any of them participate in this settlement" insofar as such persons or entities sought "relief on behalf of or generally applicable to the general public in such Settling State or the people of the State, as opposed solely to private or individual relief for separate and distinct injuries."

In December 1998, the Master Settlement Agreement was reduced to a consent decree and final judgment, and shortly thereafter the proposed judgment was judicially approved, finally concluding the Attorney General's action on the merits (*State of New York v Philip Morris, Inc.*, 179 Misc 2d 435 [1998], *affd* 263 AD2d 400 [1999]).

Under the doctrine of res judicata, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]), and, as noted, the transactions giving rise to this action and the concluded 1997 action do not materially differ. Plaintiffs, however, were not parties to the 1997 action and may not be bound by the judgment concluding it, unless, of course, their interests were represented in the prior proceeding so that they may be deemed privies of the plaintiffs in that proceeding (*see Green v Santa Fe Indus.,* 70 NY2d 244, 253 [1987]). It is plaintiffs' contention that although the prior proceeding was brought by the Attorney General in parens patriae on behalf of all the residents of the State, including plaintiffs' decedent and her surviving spouse, the interests plaintiffs seek to vindicate in this action nonetheless went unrepresented in the earlier proceeding because that proceeding, in distinction to this one, sought redress not for particularized personal injury but for harm to the State and its residents generally. The State, plaintiffs point out, would have had no standing to assert parens patriae claims premised simply on personal injuries sustained by private citizens. Agreeing with these contentions, the motion court, in denying summary judgment dismissing plaintiff's punitive damages claims on the ground of res judicata, observed, "the Fabianos are asking for punitive damages in relation to Mrs. Fabiano's personal injuries, and subsequent death caused by cigarette smoking. Plaintiffs in this action are pursuing a private claim which by definition cannot be encompassed within the *parens patriae* umbrella."

While it is undoubtedly true that plaintiffs' private claims seeking compensation for personal injury could not have been prosecuted by the Attorney General "within the *parens patriae* umbrella" (*see Alfred L Snapp & Son, Inc. v Puerto Rico*, 458 US 592, 600, 607 [1982]), the claim asserted by them for punitive damages is not similarly disqualified, for punitive damages claims are quintessentially and exclusively public in their ultimate orientation and purpose (*see Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613 [1994]), and in that respect peculiarly appropriate for prosecution by the Attorney General in parens patriae. Such claims do not, even when asserted in the context of a personal injury action, essentially relate to individual injury. They are allowed, "not to compensate the injured party but rather to punish the tortfeasor and to deter th[e] wrongdoer and others similarly situated from indulging in the same conduct in the future" (*Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489 [2007]). Indeed, the courts of this State have been so adamant that punitive damages are "a social exemplary 'remedy,' [and] not a private compensatory remedy," that the imposition of such damages for private purposes has been held to violate public policy (*Garrity v Lyle Stuart, Inc.*, 40 NY2d 354, 358 [1976]).

A claim for punitive damages may, of course, be rooted in personal injury, but for such a claim to succeed the injury must be shown to be emblematic of much more than individually sustained wrong. It must be shown to reflect pervasive and grave misconduct affecting the public generally (*see Walker v Sheldon*, 10 NY2d 401 [1961]), to, in a sense, merge with a serious public grievance, and thus merit punitive, indeed quasi-criminal sanction (*see Cooper Indus., Inc., v Leatherman Tool Group, Inc.*, 532 US 424, 432 [2001]; *and see Home Ins. Co. v American Home Prods. Corp.*, 75 NY2d 196, 203 [1990]) by the State. As Chief Judge Breitel observed in *Garrity*, punitive damages are in their true aspect a prerogative reserved to the State for the accomplishment of social purposes (40 NY2d at 358), and it is thus fitting that those who pursue such damages in the context of private actions should be viewed as acting in the State's behalf, as "private attorneys general" (*see e.g. Jackson v Johns-Manville Sales Corp.*, 781 F2d 394, 403 [1986], *cert denied* 478 US 1022 [1986]; *In re Air Crash Disaster Near Chicago, Ill.*, 644 F2d 594, 623 [1981], *cert denied sub nom. Lin v American Airlines Inc.*, 454 US 878 [1981]). Indeed, it was precisely to such a role that plaintiffs evidently aspired when, in drafting their complaint, they, like the New York State Attorney General before them, sought "[p]unitive and exemplary damages for the . . . acts of the Defendants who demonstrated a complete disregard . . . [for] the safety and welfare of the general public." However, a claim by a private attorney general to vindicate what is an essentially public interest in imposing a punitive sanction cannot lie where, as here, that interest has been previously and appropriately represented by the State Attorney General in an action addressed, on behalf of all of the people of the State, including plaintiffs and the decedent, to the identical misconduct. Relitigation of the claim is, under these circumstances, barred under the doctrine of res judicata (*see Clinton v Brown & Williamson Holdings, Inc.*, 498 F Supp 2d 639, 652-653 [SD NY 2007] and *Brown & Williamson Tobacco Corp. v Gault*, 280 Ga 420, 627 SE2d 549 [2006] [both holding that judgments entered upon the Master Settlement Agreement bar subsequent claims for punitive damages premised upon the conduct addressed in the underlying actions brought by the state attorneys general]).

Plaintiffs' arguments in responding to the appeal do not merit extensive additional comment, not only because they are in their specifics newly raised at this late juncture, but also because they proceed from the premise, which we have already rejected as fundamentally untenable under New York law, that punitive damages are properly awarded to remediate "harms done to private individuals," i.e., that there is some significant private interest to be vindicated by a claim for punitive damages, that necessarily went unrepresented by the Attorney General in the prior action. A claim for punitive damages is not, as plaintiffs contend, merely an appendage to or an element of a claim for personal injury, sharing the underlying compensatory claim's private character and remedial objectives. Although punitive damages claims depend upon the existence of an underlying cause of action for compensatory relief, and are for that reason described as "parasitic" (*see Rocanova v Equitable Life Assur. Socy.of U.S.*, 83 NY2d at 616), they are nonetheless distinct claims, seeking relief upon a vastly different evidentiary predicate than that which would suffice to support a claim for personal injury, and are justified as a matter of policy for public ends essentially removed from the redress of private harm (*see e.g. New York Univ. v Continental. Ins. Co.*, 87 NY2d 308, 315-316 [1995]).

In view of the decidedly public nature of the interests properly vindicated by a punitive damages claim, plaintiffs' argument that the Master Settlement Agreement limits the preclusive effect of the ensuing judgment is manifestly without merit. While a judgment's preclusive effect may be limited by provisions in an underlying settlement agreement splitting a claim and specifically saving a severed portion of the claim from release (*see e.g. Keith v Aldridge*, 900 F2d 736, 740 [1990], *cert denied sub nom Keith v Rice*, 498 US 900 [1990]; *and see* Restatement [Second] of Judgments § 26[1][a]), no such limitation applicable to claims for punitive damages is discernible from the Master Settlement Agreement. Indeed, the Agreement acknowledges the survival only of claims "for private or individual relief for separate and distinct injuries" and specifically releases claims "seeking relief on behalf of or generally applicable to the general public," expressly including within its enumeration of released claims, claims for "punitive damages . . . accrued or unaccrued."

Also untenable in light of the ultimately distinct and public nature of the subject punitive damages claim and the just quoted language from the Master Settlement Agreement, is plaintiffs' contention that the claim had not accrued before the Master Settlement Agreement was executed and thus could not have been released by it or have been precluded by the ensuing judgment. It is true that plaintiffs' claims for personal injury may not have accrued before the Master Settlement Agreement was executed and judgment entered thereon, the decedent having become symptomatic only in 2000, some three years after execution of the Master Settlement Agreement. However, the claim plaintiffs would now assert for punitive damages, based upon defendants' course of conduct in connection with the marketing of tobacco products over a period of decades encompassing the decedent's use of such products (which ceased in 1992), most certainly had accrued. Indeed, that claim, ultimately premised upon public, not personal, injury, had not only accrued but had also been interposed and prosecuted by the Attorney General on behalf of all New York residents, including plaintiffs and the decedent, in the litigation concluded in the Master Settlement Agreement and ensuing judgment. This being the case, the claim may not now be relitigated by plaintiffs; it is res judicata.

Accordingly, the order of the Supreme Court, New York County (Charles E. Ramos, J.), entered August 3, 2007, which, to the extent appealed from, denied so much of the motion by Philip Morris USA (f/k/a defendant Philip Morris, Inc.), Brown &

Williamson Holdings (f/k/a defendant Brown & Williamson Tobacco, individually and as successor by merger to defendant American Tobacco Company), and defendants R.J. Reynolds and Lorillard as sought summary judgment dismissing the punitive damages claim, should be reversed, on the law, without costs, and the motion granted to the extent of dismissing that claim.

All concur.

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

ENTERED: JULY 22, 2008

CLERK

JUL 22 2008

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.,
John T. Buckley
John W. Sweeny, Jr.
Karla Moskowitz, JJ.

3029
Index 109559/06

FCI Group, Inc.,
Plaintiff-Respondent,

-against-

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

Defendants appeal from an order of the Supreme Court, New York County (Paul G. Feinman, J.), entered June 4, 2007, which denied their motion for summary judgment dismissing the cause of action for breach of contract and granted plaintiff's cross motion for summary judgment dismissing the first affirmative defense of failure to state a cause of action.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman, Francis F. Caputo and Susan Smollens of counsel), for appellants.

Sol Kodsi, New York, for respondent.

TOM, J.P.

In this action for the balance due under a construction contract, defendants City of New York and the Department of Citywide Administrative Services (DCAS) contend that plaintiff forfeited its right to further payment by engaging in unlawful conduct, specifically, the attempted bribery of two City employees, while plaintiff contends that public policy bars defendants from effecting a forfeiture. This Court concludes that plaintiff is bound by the contract's forfeiture provision and that its enforcement by the City does not offend public policy. We reject, however, defendants' alternative theory that this dispute falls within the contract's narrow alternative dispute resolution clause so as to require dismissal of this action in favor of arbitration.

Plaintiff contractor was retained by defendants to perform general construction work at Brooklyn's Borough Hall. The work is alleged to have been substantially, if not totally, completed by November 30, 2005. The following month, a complaint was received that two DCAS employees with oversight responsibility for plaintiff's contract work had received money from plaintiff's president and secretary, Choon Won Lee (also known as James Lee). The employees both told interviewers from the Inspector General's

Office that envelopes containing $3000 and a Christmas card had been left on their desks.[1] One of the envelopes also contained a copy of an August 2005 change order request in the amount of $101,708.82, which was awaiting the employee's approval for payment. The Department of Investigation obtained Lee's admission that he had left the payments, and he ultimately entered a guilty plea to a reduced charge of attempted giving of unlawful gratuities (Penal Law §§ 110, 200.30).

This action was commenced after plaintiff received notice from DCAS that the contract had been canceled as a result of Lee's misconduct and that the City would cease making any further payments in connection with the work. The complaint seeks recovery in the amount of $260,928.37, the balance alleged to remain unpaid under the contract.

Defendants' answer asserts, as the first affirmative defense, Section 01000 of the General Conditions of the Contract. Article 1, paragraph (K), requires compliance with the safeguards contained in the New York City Charter with respect to conflicts of interest. It provides, in relevant part:

> "1. No employee or person whose salary is

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[1]Both employees immediately turned the envelopes over to their supervisors, and, that same day, the DCAS Inspector General brought the envelopes to the Department of Investigation headquarters.

> payable in whole or in part from the City treasury . . . shall accept any valuable gift . . . from any person, firm or corporation which to his knowledge is interested directly or indirectly in any manner whatsoever in business dealings with the City; and
>
> "2. Any violation of . . . this section shall at the option of the Comptroller, render forfeit and void the Contract, work, business, sale or transaction affected."

Section 71.1 recites that the contract is subject to provisions of the City Charter, the Administrative Code and the Penal Law governing conflicts of interest (New York City Charter § 2604) and expressly provides that "under certain circumstances, penalties may be invoked against the donor as well as the recipient of any form of valuable gift." Section 5.2 declares that the contract is also subject to the rules of the New York City Procurement Policy Board (PPB). PPB Rules (9 RCNY) § 1-03(a)(3) provides:

> "Vendors and their representatives have a responsibility to deal ethically with the City and its employees, and to respect the ethical duties of City employees. Information provided by vendors to the City must be complete and accurate. Vendors must at all times avoid conduct that is in restraint of competition. Vendors must not request City employees to engage in conduct that would violate the law, these Rules, or the principles set forth in this section."

Article 27 of the contract provides that "[a]ll disputes between the City and the Contractor of the kind delineated in this article that arise under, or by virtue of, this Contract" shall be determined in accordance with PPB rules, which provide for alternative dispute resolution (ADR). The procedure requires the contractor to submit the action or determination subject to dispute to the Commissioner and provides for review of his determination by the Comptroller and, ultimately, by the Contract Dispute Resolution Board, whose determination is subject to review under CPLR article 78. Application of the ADR procedure, however, is expressly limited "to disputes about the scope of work delineated by the Contract, the interpretation of Contract documents, the amount to be paid for Extra Work or disputed work performed in connection with the Contract, the conformity of the Contractor's Work to the Contract, and the acceptability and quality of the Contractor's Work."

As pertinent to this appeal, defendants moved for summary judgment on the grounds that plaintiff is constrained to seek relief under the ADR provisions of the contract and that, in any event, plaintiff's unlawful conduct bars recovery in accordance with the contract's forfeiture provision. Supreme Court held that the ADR procedure is inapplicable because "[t]he dispute does not involve the quality of plaintiff's work," and that recovery is not precluded as a matter of public policy because the wrongdoing is only indirectly related to performance of the contract and not "an integral part of the *procuring* or *performing* of the contracts at issue" (citing *McConnell v Commonwealth Pictures Corp.*, 7 NY2d 465, 471 [1960]).

On appeal, defendants maintain that this controversy is subject to alternative dispute resolution because, by its terms, the procedure encompasses "the interpretation of Contract documents," the contract itself is such a document, and the dispute concerns the scope of the forfeiture provision. This argument is disingenuous because it fails to acknowledge the limited scope accorded to ADR by the parties.

Arbitration and other alternative procedures for resolving disputes are creatures of contract, and while the law favors such alternatives to litigation (*Matter of Nationwide Gen. Ins. Co. v Investors Ins. Co. of Am.*, 37 NY2d 91, 95 [1975]), a party will not be denied judicial resolution of a controversy unless it falls within the governing ADR provision (*compare Rio Algom v Sammi Steel Co.*, 168 AD2d 250 [1990], *lv denied* 78 NY2d 853 [1991] *with Lopez v 14th St. Dev., LLC*, 40 AD3d 313 [2007]). The constitutional right to seek redress before the courts cannot be waived by implication but must be relinquished in a clear and unequivocal manner (*Matter of Waldron [Goddess]*, 61 NY2d 181, 183-184 [1984]).

Article 27 of the subject contract applies only to specified disputes; thus, it is a narrow, not a broad, ADR provision (*compare Lopez*, 40 AD3d at 314, *with Sea Trade Mar. Corp. v Hellenic Mut. War Risks Assn. [Bermuda]*, 7 AD3d 289 [2004], *lv dismissed* 3 NY3d 766 [2004]). For example, we have held that application of this provision of the City's contract "is limited by the parties' agreement to claims arising out of disputed work, a category that does not include delay damages" (*CAB Assoc. v City of New York*, 32 AD3d 229, 232 [2006], citing *Gemma Constr. Co. v City of New York*, 246 AD2d 451, 453 [1998]). It is dispositive that the dispute at bar does not involve an item of the work performed but the interpretation of a contract provision concerning conflicts of interest that, likewise, does not fall within the purview of the limited ADR provision.

Defendants' contention that Article 27 applies to "the interpretation of Contract documents" neither construes that language in context nor accords respect to the parties' stated intent to limit application of the ADR procedure (*see L.A. Wenger Contr. Co., Inc. v Kreisler Borg Florman Gen. Constr. Co., Inc.*, 43 AD3d 305, 306 [2007] [noting that a virtually identical ADR provision in a City contract is not "a typical, broadly worded arbitration clause"]). In the context of the performance of a construction contract, the term "contract documents" generally refers to "architectural plans, drawings, surveys, specifications, engineering reports, change orders, and the like . . . applicable to the work to be performed" (*Bussanich v 310 E. 55th St. Tenants*, 282 AD2d 243, 244 [2001]; *see also Greater Johnstown School Dist. v Frontier Ins. Co.,* 252 AD2d 615, 617 [1998] ["'drawings, specifications, or other Contract Documents'"]). The Court of Appeals has noted that a provision for the submission of disputes concerning the interpretation of contract documents to an architect reflected the parties' recognition that "this provision should be held to relate only to the substantive provisions of the contract documents as to which the architect might be expected to have a special competence" (*Matter of County of Rockland [Primiano Constr. Co.]*, 51 NY2d 1, 10 n 4 [1980]).

The interpretation of Article 27 urged by defendants transforms a procedure that is expressly afforded limited scope by the parties into an ADR provision with universal application. It is axiomatic that a contract dispute will implicate the terms of the agreement; if all that is required for a dispute to come within the ambit of the provision is that its resolution requires reference to the contract terms, then any dispute will be subject to alternative resolution because the provisions of the parties' agreement is the best indication of their intent (*see Slamow v Del Col*, 79 NY2d 1016, 1018 [1992]). Such an interpretation, moreover, renders the language limiting the scope of the ADR provision mere surplusage, in contravention of the settled rule that a contract is to be construed so as to give effect to each and every part (*see Two Guys from Harrison-N.Y. v S.F.R. Realty Assoc.*, 63 NY2d 396, 403 [1984]). As stated in *Laba v Carey* (29 NY2d 302, 308 [1971], quoting *Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42, 46 [1956]), "a court should not 'adopt an interpretation' which will operate to leave a 'provision of a contract . . . without force and effect.'" It is likewise settled that a court should not "rewrite the terms of an agreement under the guise of interpretation" (*85th St. Rest. Corp. v Sanders*, 194 AD2d 324, 326 [1993]).

As to the merits, as a general rule, "parties should be free to chart their own contractual course" unless public policy is offended (*Welsbach Elec. Corp. v MasTec N. Am., Inc.*, 7 NY3d 624, 629 [2006]). In this case, plaintiff agreed to conduct itself ethically in its performance of the contract with the City and consented to the imposition of penalties for violating the contractual prohibition against dispensing monetary inducements to City workers. The strong disincentive against bribery contained in the agreement promotes public policy. It has the salutary effect of deterring corruption and illegality that could otherwise impair the quality of the work performed, compromise its safety, endanger the public, and increase the overall cost of construction to the taxpayer.

To constitute a valid defense to an action on a contract, the alleged illegality must be "central to or a dominant part of the plaintiff's whole course of conduct in performance of the contract" (*McConnell v Commonwealth Pictures Corp.*, 7 NY2d 465, 471 [1960], *supra; see also Ross Bicycles v Citibank,* 178 AD2d 388, 390 [1991]). Here, defendants allege a statutory violation. "'If the statute does not provide expressly that its violation will deprive the parties of their right to sue on the contract, and the denial of relief is wholly out of proportion to the requirements of public policy . . . the right to recover will not be denied'" (*Benjamin v Koeppel*, 85 NY2d 549, 553 [1995], quoting *Rosasco Creameries v Cohen*, 276 NY 274, 278 [1937]).

The illegal conduct at issue here has a direct connection to the obligation sued upon since it concerned a significant portion of the outstanding balance remaining due on the contract. While the work had been substantially completed, payment for the outstanding balance still had to be approved by DCAS (*see Koren-DiResta Constr. Co. v New York City School Constr. Auth.*, 293 AD2d 189, 195 [2002]). The two DCAS employees Lee attempted to bribe were responsible for approving change order requests. At the time, change order requests for $101,708.82 were awaiting approval, and a balance of $260,928.37 remained due under the contract. A material amount of the contract consideration was at risk, and it is apparent that Lee's attempted bribe was intended to influence the agency's decision. Thus, Lee's corruption was not merely incidental or collateral to plaintiff's performance under the contract.

That the contract here was not induced by fraud does not change the result. "[C]ontracts, although legal in their inducement and capable of being performed in a legal manner, which have nonetheless been performed in an illegal manner, will not be enforced" (*Prote Contr. Co. v Board of Educ. of City of N.Y.*, 230 AD2d 32, 40 [1997]). In *Prote*, a window installation contractor bribed a City employee to render an interpretation, favorable to the contractor, that the contract's specifications did not require the use of a glazing technique known as "back puttying" (230 AD2d at 33). This Court held that if the bribery were proved at trial, dismissal of the complaint seeking payment for the contract balance would be required. We noted that

> "the conduct alleged on the part of plaintiff in offering a bribe to a key [City] employee as to a determination bearing on the issue of performance, if established, would be of a kind so gravely illegal and immoral and so inextricably connected with the contested question of performance under the contracts as to bar recovery thereunder as a matter of public policy" (*id.* at 41).

Here, Lee pleaded guilty to attempting to bribe two City employees, and the issue of bribery is not in dispute. As the Court of Appeals stated in *McConnell* (7 NY2d at 469), "Proper and consistent application of a prime and long-settled public policy closes the doors of our courts to those who sue to collect the rewards of corruption" (*see also R.A.C. Group, Inc. v Board of Educ. of City of N.Y.*, 21 AD3d 243, 249 [2005], *lv denied* 6 NY3d 702 [2005]).

Accordingly, the order of the Supreme Court, New York County (Paul G. Feinman, J.), entered June 4, 2007, insofar as it denied defendants' motion for summary judgment dismissing the cause of action for breach of contract, should be reversed, on the law, without costs, the motion granted, and the complaint dismissed in its entirety. Appeal from that part of the order that granted plaintiff's cross motion for summary judgment dismissing the first affirmative defense of failure to state a cause of action should be dismissed, without costs, as academic in view of the foregoing. The Clerk is directed to enter judgment accordingly.

All concur.

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

ENTERED: JULY 22, 2008

CLERK