SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 5, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Moskowitz, Acosta, Richter, JJ.

6307 The People of the State of New York, Respondent, Ind. 3047/07

-against-

Jeffrey Brazier,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered May 6, 2008, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 10 years, unanimously affirmed.

Regardless of whether defendant validly waived his right to appeal, his claim that the court should have conducted a hearing on the extent of his compliance with his plea agreement is unpreserved, and we decline to review it in the interest of justice. We find that the court made a thorough inquiry,

including giving defendant an opportunity to explain what happened, and then appropriately imposed an enhanced sentence. Under the terms of the agreement, defendant's inadequate compliance exposed him to an even longer sentence than the court actually imposed.

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

ENTERED: JANUARY 5, 2012

CLERK

Tom, J.P., Andrias, Acosta, Freedman, Richter, JJ.

5970 Cathy Daniels, Ltd., et al., Index 114942/09
Plaintiffs-Appellants,

-against-

Robin S. Weingast, et al.,
Defendants-Respondents,

Designs for Finance, Inc.,
Defendant.

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Goldberg Weprin Finkel Goldstein LLP, New York (Kevin J. Nash of counsel), for appellants.

Kaufman Dolowich Voluck & Gonzo LLP, Woodbury (Janene M. Marasciullo of counsel), for Weingast respondents.

Kelley Drye & Warren LLP, New York (Neil Merkl of counsel), for John Hancock Life Insurance Company of New York, respondent.

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Order, Supreme Court, New York County (Richard B. Lowe, III, J.), entered September 10, 2010, which granted the motions of defendants Robin S. Weingast and Robin S. Weingast & Associates, Inc. and John Hancock Life Insurance Company of New York to dismiss the complaint, unanimously modified, on the law, the cause of action for breach of contract reinstated as against the Weingast defendants, and otherwise affirmed, without costs.

Plaintiff Cathy Daniels, Ltd. is a women's clothing business owned and managed by plaintiffs Herbert L. Chestler, Daniel Chestler, and Steven M. Chestler. Defendants Robin S. Weingast

and Robin S. Weingast & Associates, Inc. (the Weingast defendants) are insurance agents authorized to sell insurance for defendant John Hancock Life Insurance Company of New York. At some point before June 15, 2005, plaintiffs engaged the Weingast defendants as their insurance advisors and consultants.

According to the complaint, the Weingast defendants told plaintiffs that a § 419(e) Single Employer Trust Employee Welfare Benefits Plan (BETA plan) would enable them to purchase life insurance where the premiums would be fully tax deductible. Plaintiffs, in alleged reliance upon the Weingast defendants' representations, purchased BETA plan life insurance policies from John Hancock.

On June 15, 2005, each of the individual plaintiffs signed a one-page Acknowledgment and Disclosure form; individual defendant Weingast signed the forms on behalf of John Hancock. Each form states:

> "John Hancock has not made a determination that this plan achieves any specific tax or other objectives . . . [I]t is important that you speak with your independent tax/legal advisors before you complete the purchase of the policy and go forward with your plan. (An Independent tax/legal advisor is one that is not provided, recommended, chosen or paid for by your John Hancock representative.) . . . John Hancock has not authorized its representatives to provide you with tax or legal advice, and you may not rely on any such advice provided by your John Hancock representative . . . By signing this form you are stating that you understand this information, and that you have obtained

> from your independent advisors whatever advice you deem necessary or appropriate concerning your plan's risks and benefits."

On September 15, 2005, the corporate plaintiff, Cathy Daniels, Ltd., signed a BETA Individual Employer Welfare Benefit Plan Waiver and Representation Agreement wherein it acknowledged and agreed that claims of deductibility may be subject to challenge by the Internal Revenue Service, that the BETA plan has not been ruled on by the IRS, and that any tax deductions taken in connection with participation in the Plan may be subject to challenge or disallowance. Several other forms signed that day included similar acknowledgments.

In October 2007, the IRS published a revenue ruling which, according to the complaint, effectively disallowed deductions for payment of premiums under the BETA plan. The IRS subsequently audited plaintiffs and disallowed all prior deductions made for payment of insurance premiums under the BETA plan. As a result, the individual plaintiffs became subject to federal and state tax adjustments on their personal tax returns. Plaintiffs allege that without the tax deductions, they were unable to afford the policies and were forced to sell them at a substantial loss.

The cause of action for breach of fiduciary duty was properly dismissed. In the absence of a special relationship, a claim against an insurance agent or broker for breach of

fiduciary duty does not lie (*Bruckmann, Rosser, Sherrill & Co., L.P. v Marsh USA, Inc.*, 65 AD3d 865, 867 [2009]; *People v Liberty Mut. Ins. Co.*, 52 AD3d 378, 380 [2008]; *see Murphy v Kuhn*, 90 NY2d 266, 270 [1997]). Here, the allegations in the complaint establish that the parties had nothing more than a typical insurance agent-customer relationship. Even if a fiduciary relationship existed, the extensive disclaimers signed by plaintiffs make clear that defendants had no duty to provide tax advice concerning the BETA plan. For the same reason, the negligence claims were properly dismissed. In light of this disposition, we need not determine whether the negligence and breach of fiduciary duty claims are barred by the statute of limitations.

The disclaimer forms are also fatal to plaintiffs' fraud cause of action. To sustain a claim for fraud, a plaintiff must allege material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). The disclaimers here show that plaintiffs expressly acknowledged that defendants were not authorized to provide tax advice, and they would not rely on any such advice provided. Thus, the documentary evidence flatly contradicts plaintiffs' claim that they justifiably relied on any

tax information provided by defendants (*see KSW Mech. Servs., Inc. v Willis of N.Y., Inc.*, 63 AD3d 411, 412 [2009]).

In the breach of contract cause of action, plaintiffs allege that on November 13, 2006, several of the individual plaintiffs met with individual defendant Weingast. At that meeting, Weingast purportedly made an oral promise that she, her company and John Hancock would indemnify and reimburse plaintiffs if they suffered any losses as a result of disallowance of the tax deductions.

The motion court improperly concluded that the contract claim was barred by the statute of frauds. An oral agreement will not be enforceable when the agreement "[b]y its terms is not to be performed within one year from the making thereof" (General Obligations Law § 5-701[a][1]). The Court of Appeals has interpreted this provision "to encompass only those contracts which, by their terms, have absolutely no possibility in fact and law of full performance within one year. As long as the agreement may be fairly and reasonably interpreted such that it may be performed within a year, the Statute of Frauds will not act as a bar however unexpected, unlikely, or even improbable that such performance will occur during that time frame" (*Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998] [internal quotation marks and citations omitted]).

Here, Weingast's alleged promise to indemnify plaintiffs was capable of full performance within a year and thus did not violate the statute of frauds (*see Financial Structures Ltd. v UBS AG*, 77 AD3d 417, 418 [2010]). Defendants argue that the contract could not have been performed within a year because the IRS did not issue its disallowance ruling or complete its audit until more than a year after the agreement was made. However, the question is not what the actual performance of the contract was, but whether the contract required that it should not be performed within a year (*Foster v Kovner*, 44 AD3d 23, 26 [2007]). Defendants have not shown that there was "absolutely no possibility in fact and law" that the IRS could have issued its ruling and completed an audit within a year's time (*Cron*, 91 NY2d at 366).

Defendants argue that the contract claim is barred by the parol evidence rule and certain merger clauses contained in the documents underlying the transaction. However, the alleged oral promise was made more than a year after plaintiffs entered into the transactions. Neither the parol evidence rule nor the merger clauses preclude a breach of contract claim based on a subsequent

additional agreement (*see Getty Ref. & Mktg. v Linden Maintenance Corp.*, 168 AD2d 480 [1990]; *Local 50, Bakery, Confectionery & Tobacco Workers Union, AFL-CIO v American Bakeries Co.*, 73 AD2d 862 [1980]).

Nor is the contract claim foreclosed by a waiver of liability clause contained in one of the transaction documents. In that document, the corporate plaintiff agreed to hold harmless and waive liability against defendant Designs for Finance, Inc., its employees, agents, officers, directors or other persons it controls or is controlled by. In the absence of evidence of the relationship between Designs for Finance, Inc. and the other defendants, it cannot be said that this document conclusively establishes a waiver of plaintiffs' contract claim.

Although plaintiffs have sufficiently pleaded a breach of contract claim against the Weingast defendants, the claim was properly dismissed as against John Hancock. The complaint fails to sufficiently allege that individual defendant Weingast had actual or apparent authority to bind John Hancock to an agreement to indemnify the losses, particularly in light of a provision in the policies to the contrary.

The motion court's dismissal of the GBL § 349 cause of action was proper. The complaint contains insufficient allegations of a broad impact on consumers at large (*see Bhandari v Ismael Leyva Architects, P.C.*, 84 AD3d 607, 608 [2011]).

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

ENTERED: JANUARY 5, 2012

CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Renwick, Abdus-Salaam, JJ.

6018 Gerasimos Tzilianos, Index 102570/07
Plaintiff-Appellant,

-against-

New York City Transit Authority,
Defendant-Respondent.

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Paul G. Vesnaver, PLLC, Baldwin (Victor A. Carr of counsel), for appellant.

Wallace D. Gossett, Brooklyn (Anita Isola of counsel), for respondent.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered June 17, 2010, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff allegedly sustained personal injuries when he fell while exiting a train at the 59th Street subway station. Defendant argued that the measurements of the horizontal and vertical gaps between the train and the platform did not exceed the six-inch maximum standard set forth in its internal operating rules, and thus, it was not negligent, as a matter of law. Defendant failed to establish either that compliance with its six-inch gap standard proves that it was not negligent or that it is entitled to qualified immunity.

In support of its argument that it is entitled to qualified

immunity, defendant submitted only a self-generated internal memorandum regarding the maximum permissible gap without citing any basis for the six-inch standard contained therein. This memo from the NYCTA's former president does not set forth what if any study was conducted to determine what is safe for the traveling public before adopting the six-inch gap standard, and thus, it cannot be relied upon by the NYCTA (*Sanchez v City of New York*, 85 AD3d 580 [2011]; *see Jackson v New York City Tr. Auth.*, 30 AD3d 289 [2006]). In *Jackson*, this Court enunciated that, "[i]n order to establish entitlement to qualified immunity, the defendant must demonstrate that a public planning body considered and passed upon the same question of risk as would go to a jury" (*id.* at 290). Five years later, we again held that the Transit Authority had failed to demonstrate "its entitlement to qualified immunity since it submitted only its own memorandum stating that the maximum permissible horizontal gap . . . is six inches . . . Defendant presented no evidence that a 'public planning body considered and passed upon the same question of risk' that would go to a jury" (*Sanchez*, 85 AD3d at 580, quoting *Jackson* at 290).

Contrary to defendant's argument, we did not hold in *Glover v New York City Tr. Auth.* (60 AD3d 587 [2009], *lv denied* 13 NY3d 706 [2009]), that defendant's compliance with its own internal six-inch gap standard established non-negligence as a matter of

law. In that case, the issue was whether the plaintiff produced competent evidence of the size of the gap (*Glover* at 587-588). The determination of the Court, namely reversal and dismissal of the complaint, was based upon the speculative and insufficient evidence of the width of the gap presented by the plaintiff in an attempt to show that the gap exceeded the six-inch standard. The Court, however, did not hold that compliance with the six-inch gap policy established the NYCTA's non-negligence as a matter of law.

In any event, even if we assumed defendant's gap standard is reflective of an industry standard or a generally accepted safety practice, the fact that it complied with its own internal operating rule constitutes some evidence that it exercised due care, but is not conclusive on the issue of liability. A jury must be satisfied with the reasonableness of the common practice, as well as the reasonableness of the behavior that adhered to the

practice (*see Trimarco v Klein*, 56 NY2d 98, 105-107 [1982]). Therefore, defendant's compliance with its own internal standard is not a sufficient basis, standing alone, upon which to grant summary judgment in its favor.

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

ENTERED: JANUARY 5, 2012

CLERK

Andrias, J.P., Friedman, DeGrasse, Freedman, Manzanet-Daniels, JJ.

6036 The People of the State of New York, Respondent, Ind. 5441/08

-against-

Joseph Montimaire, Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Lorca Morello of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

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Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered July 10, 2009, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him to a term of 5 years, unanimously affirmed.

The verdict 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]). An emergency room doctor's testimony established the element of serious physical injury.

Defendant inflicted a stab wound that caused profuse bleeding. This caused the victim's blood pressure to fall to a dangerous level, so that he urgently required a massive blood transfusion and saline irrigation to stabilize his blood pressure and heart rate. The doctor testified that she acted extraordinarily quickly because she was concerned that the victim

might lose so much blood as to endanger his life. The evidence warranted the conclusion that the injury created a substantial risk of death (*see e.g. People v Jones*, 38 AD3d 352, *lv denied* 9 NY3d 846 [2007]; *People v Almonte*, 7 AD3d 324, *lv denied* 3 NY3d 670 [2004]; *People v Gordon*, 257 AD2d 533 [1999], *lv denied* 93 NY2d 899 [1999]), even though the doctor never used that particular language.

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

ENTERED: JANUARY 5, 2012

CLERK

Andrias, J.P., Saxe, Sweeny, Acosta, Manzanet-Daniels, JJ.

6270 Cristina Miller,
Petitioner-Respondent,

-against-

Kevin S. Miller,
Respondent-Appellant.

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Kevin S. Miller, appellant pro se.

Cristina Miller, respondent pro se.

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Order, Family Court, New York County (Jody Adams, J.), entered on or about October 5, 2010, which denied respondent father's objection to an order, same court (Ann Marie Loughlin, Support Magistrate), entered on or about May 7, 2010, dismissing his petition for a downward modification of child support obligation, unanimously affirmed, without costs.

By so-ordered stipulation dated April 8, 2008, respondent father agreed to pay child support for the parties' two children in the amount of $977.07 per month. Less than a year later, by petition dated January 26, 2009, he sought a downward modification based on a "change of circumstances." At an April 27, 2009 hearing, the father testified that after he was laid off as a home inspector on January 10, 2009, he supported himself working three part-time jobs, but that his income was not enough to meet his child support obligation. One of those jobs was at

Best Buy, where the father had worked since 2008.

The record supports the Support Magistrate's determination that the father failed to meet his burden of demonstrating a substantial and unanticipated change in circumstances warranting a downward modification of his child support obligation (*see Basile v Wiggs*, 82 AD3d 921, 922 [2011]; *Matter of Virginia S. v Thomas S.*, 58 AD3d 441 [2009]).

At the time the 2008 stipulation was entered, the father represented that his gross income from all sources for 2007 was approximately $22,176. Nevertheless, he agreed that "whenever a calculation is to be made in the future utilizing [his] gross income, the parties shall utilize the greater of: (1)[his] actual gross income from all sources for the prior Calendar year; or (2) $50,000." Although the parties agreed that the father could petition the court for modification of the stipulation, in accord with the provisions of the Child Support Standards Act (Domestic Relations Law § 240[1-b]) should he "become disabled and or unemployed," the record demonstrates that while the father was no longer engaged in the home inspection business, he was still employed, albeit on a part-time basis, when he filed his modification petition.

Regardless of whether, as the Support Magistrate found, the father had unexplained foreign income, his 2008 income tax

return, filed jointly with his wife, reported total income of $138,230. On the record before us, we cannot determine the portion of that income that was attributed to him individually (*see* Family Court Act § 413[1][b][5][i]). His 2009 return, filed individually, reported total income of $86,659, of which $19,732 was wages and $1,704 was business income, an amount substantially similar to the $22,176 per year he claimed to be earning when the 2008 stipulation was entered. Moreover, the father did not demonstrate that he diligently sought to obtain employment commensurate with his earning capacity (*see Matter of Mera v Rodriguez*, 74 AD3d 974 [2010]).

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

ENTERED: JANUARY 5, 2012

CLERK

Andrias, J.P., Saxe, Sweeny, Acosta, Manzanet-Daniels, JJ.

6278 The People of the State of New York, Respondent, Ind. 3998/06

-against-

Benjamin Santiago, Defendant-Appellant.

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

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

_____

Order, Supreme Court, New York County (Lewis Bart Stone, J.), entered on or about January 14, 2010, which denied defendant's CPL 440.20 motion to set aside a sentence of the same court (James A. Yates, J.), imposed June 26, 2007, as amended August 24, 2007, unanimously reversed, the motion granted, defendants' second violent felony offender adjudication and sentence vacated, and the matter remanded for resentencing.

On February 27, 2007, defendant was convicted, after a jury trial, of robbery in the first degree, robbery in the third degree and criminal possession of a weapon in the third degree. On June 26, 2007, he was adjudicated a second violent felony offender, and sentenced to 13 years in prison on the robbery in the first degree count, with concurrent time on the other charges, and five years of postrelease supervision.

On or about April 6, 2009, defendant moved to set aside his sentence pursuant to CPL 440.20 on the ground that his 2004 predicate violent felony conviction was unconstitutionally obtained because he was not advised during the plea allocution that the sentence would include a period of postrelease supervision (*see People v Catu*, 4 NY3d 242 [2005]). The trial court denied the motion as procedurally barred because defendant failed to appeal the 2004 conviction. We now reverse.

Defendant's failure to appeal the 2004 conviction did not constitute a forfeiture of his right to independently challenge its constitutionality within the context of a predicate felony proceeding (*see People v Johnson*, 196 AD2d 408 [1993], *lv denied* 82 NY2d 806 [1993] ["Notwithstanding his failure to appeal from the 1985 conviction, defendant had an independent statutory right to challenge its use as a predicate conviction on the ground it was unconstitutionally obtained"]). Although the absence of an appeal may be a relevant consideration in predicate felony offender proceedings, it is not an automatic bar to challenging the constitutionality of a predicate conviction (*see People v Abdus-Samad*, 69 AD3d 516, 517 [2010], *lv denied* 15 NY3d 746 [2010]).

The People argue that the CPL 440.20 motion must be denied on the ground that defendant waived his right to challenge the 2004 conviction by failing to raise the argument at the appropriate time, which was the time of the 2007 second violent felony offender adjudication (*see* CPL 400.15[7][b]; *People v Odom*, 63 AD3d 408 [2009], *lv denied* 13 NY3d 798 [2009]). However, the People were required to preserve such an argument for review by this Court (*see People v Chavis*, 91 NY2d 500, 506 [1998]) and failed to do so. Before the trial court, misapplying *Odom*, the People only argued that defendant was procedurally barred from challenging the 2004 prior violent felony conviction by failing to appeal from that conviction. The trial court relied solely on that ground to deny the motion and this Court is without authority to affirm an order based on an issue of law or fact that the trial court did not hear and determine against the appellant, and we cannot invoke an alternative ground for affirmance (*see* CPL 470.15[1]; *People v Concepcion*, 17 NY3d 192 [2011]; *People v LaFontaine*, 92 NY2d 470 [1998]). For the same

reason, it is beyond our power to review the People's argument, also raised for the first time on appeal, that a *Catu* issue should not affect the constitutionality, for predicate felony purposes, of defendant's 2004 conviction.

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

ENTERED: JANUARY 5, 2012

CLERK

Saxe, J.P., Sweeny, Acosta, DeGrasse, Abdus-Salaam, JJ.

6334 ABN Ambro Mortgage Group, Inc., Index 13637/06
Plaintiff-Appellant,

-against-

Rafael Pantoja, et al.,
Defendants,

Ana Iris Salazar, et al.,
Defendants-Respondents.

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Jerry F. Kebrdle II, White Plains, for appellant.

Balfe & Holland, PC, Melville (Kevin E. Balfe of counsel), for respondents.

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Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered July 19, 2010, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment declaring that it is the holder of a first mortgage lien against the subject premises and dismissing defendant US Bank NA's answer, unanimously modified, on the law, to grant so much of the motion as seeks a declaration that plaintiff is the holder of a first mortgage lien against the subject premises, and to so declare, and to dismiss the counterclaim interposed by defendants Ana Iris Salazar, Bernice Collado and Intervenida Salvador (the individual defendants), and otherwise affirmed, without costs.

The subject premises were conveyed by nonparty The Rapsil Corporation to defendant Rafael Pantoja by deed dated July 27,

2001 and recorded on October 5, 2001. On the day of the conveyance, Pantoja delivered to plaintiff a note and mortgage in the principal amount of $274,900. Plaintiff's mortgage was also recorded on October 5, 2001. Part of the proceeds of the loan were used to satisfy a mortgage that was held by Chase Mortgage Company (CMC) in the principal sum of $147,250. The CMC mortgage was recorded in 1998.

Before plaintiff's mortgage and the Rapsil-Pantoja deed were recorded, Rapsil deeded the premises again, this time to defendant First Home Properties LLC. On September 21, 2001, First Home deeded the premises to the individual defendants. On the same day, the individual defendants delivered a mortgage to defendant Mortgage Electronic Registration Systems, Inc. (MERS), as nominee of defendant Saxon Equity Mortgage Bankers, Ltd. As noted above, plaintiff's mortgage was recorded on October 5, 2001. The individual defendants' deed and the MERS mortgage were not recorded until February 13, 2002.

By operation of Real Property Law § 291, in order to cut off a prior lien, such as a mortgage, a purchaser must have no knowledge of the outstanding lien *and* win the race to the recording office (*see Goldstein v Gold,* 106 AD2d 100, 101-102 [1984], *affd* 66 NY2d 624 [1985]). Accordingly, plaintiff's mortgage has priority over the MERS mortgage and the individual

defendants' deed because it was recorded earlier than both.

Plaintiff is also equitably subrogated to the rights of CMC in the sum of $178,434.89, the amount of the proceeds of plaintiff's mortgage which was used to satisfy CMC's mortgage. As held by the Court of Appeals,

> "Where property of one person is used in discharging an obligation owed by another or a lien upon the property of another, under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee or lien-holder" (*King v Pelkofski,* 20 NY2d 326, 333 [1967] [internal quotation marks and citation omitted]).

It does not avail defendants to assert that they were unaware of the CMC mortgage, because purchasers of real property are presumed to have knowledge of information contained in duly recorded instruments affecting the real property (*see HSBC Mtge. Servs. v Alphonso*, 58 AD3d 598, 599-600 [2009]).

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

ENTERED: JANUARY 5, 2012

CLERK

Saxe, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Román, JJ.

6467 The People of the State of New York, Ind. 515/08
Respondent,

-against-

Jamar Dingle,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Matthew I. Fleischman of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Jenetha G. Philbert of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Dominic Massaro, J.), rendered on or about July 12, 2010,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: JANUARY 5, 2012

CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Saxe, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Román, JJ.

6468 Leonard Ellerbe, Index 106395/09
Plaintiff-Appellant,

-against-

The Port Authority of New York and New Jersey, et al.,
Defendants-Respondents.

_____

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for appellant.

Segal McCambridge Singer & Mahoney, Ltd., New York (Dinesh U. Dadlani of counsel), for respondents.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered February 16, 2011, which denied plaintiff's motion for partial summary judgment as to liability under Labor Law § 240(1), unanimously affirmed, without costs.

Plaintiff allegedly sustained injuries when he fell from an extension ladder he had ascended in order to perform steel deckwork on a construction project. Defendant The Port Authority of New York and New Jersey owned the property, and defendant Bovis Lend Lease was the project's construction manager. Defendants contracted with plaintiff's employer, nonparty Cornell Steel, to perform steel erection at the project. According to Ellerbe's deposition, the ladder from which he fell had only been "tied off" at the top right side and the ladder had "reared back"

when he attempted to dismount from the top of the ladder by stepping to his left onto the deck floor.

However, Bovis site safety manager Omar Jackson testified that plaintiff told him, immediately after the fall and while plaintiff was still on the ground, that he fell because he "lost his footing." This account was memorialized in a Bovis incident report completed by Jackson that day. Jackson also testified that he inspected and climbed the ladder immediately after plaintiff's fall, finding it to be stable, since its feet were wedged between cells in the corrugated steel floor, and its upper right column was also secured. In an affidavit, Jackson averred that, based upon his inspection of the ladder, the accident could not have happened as plaintiff claims.

On this record, Supreme Court correctly denied plaintiff's motion for partial summary judgment as to liability under Labor Law § 240(1). While it is undisputed that plaintiff made out a prima facie case, the aforementioned incident report and testimony of Jackson, which is inconsistent with Ellerbe's account, raises a triable issue of fact as to whether Ellerbe's accident in fact resulted from a violation of the statute. Where credible evidence reveals differing versions of the accident, one under which defendants would be liable and another under which they would not, questions of fact exist making summary judgment

inappropriate (*see Santiago v Fred-Doug 117, L.L.C.*, 68 AD3d 555 [2009]; *Antenucci v Three Dogs, LLC*, 41 AD3d 205 [2007]; *Boccia v City of New York*, 46 AD3d 421 2007]).

Defendants would not be subject to statutory liability if plaintiff simply lost his footing while climbing a properly secured, non-defective extension ladder that did not malfunction (*see Buckley v J.A. Jones/GMO*, 38 AD3d 461, 462 [2007]; *Taglioni v Harbor Cove Assoc.*, 308 AD2d 441, 442 [2003]; *Chan v Bed Bath & Beyond*, 284 AD2d 290 [2001]). Contrary to plaintiff's contentions, Jackson's affidavit was not inconsistent with his deposition testimony and thus, did not constitute an attempt to create a feigned issue of fact (*see Nesper v Goldmag Hacking Corp.*, 77 AD3d 598 [2010]).

Jackson's testimony concerning defendants' policy of using stair towers instead of ladders did not constitute an admission that the ladder was an inappropriate safety device for the work.

Plaintiff submitted no evidence that an otherwise non-defective ladder would be a per se inadequate device for the task at hand, i.e., climbing up a single story (*compare Carino v Webster Place Assoc., LP*, 45 AD3d 351 [2007]).

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

ENTERED: JANUARY 5, 2012

CLERK

Saxe, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Román, JJ.

6469 In re Anais B.,

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

_____

Kenneth M. Tuccillo, Hastings-on-Hudson, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Scott Shorr of counsel), for presentment.

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Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about January 21, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed an act that, if committed by an adult, would constitute the crime of attempted assault in the third degree, and imposed a conditional discharge for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence. Although the

victim did not identify appellant as one of her assailants, appellant's confession established her accessorial liability. The evidence also warranted the inference that appellant intended to cause physical injury to the victim.

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

ENTERED: JANUARY 5, 2012

CLERK

Saxe, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Román, JJ.

6470 The People of the State of New York, Ind. 1321/09
Respondent,

-against-

Justin Calderon,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Bonnie B. Goldburg of counsel), for appellant.

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Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered on or about January 2, 2009, 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 5, 2012

CLERK

Saxe, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Román, JJ.

6472 Ursula Zwicker, Index 116512/09
Plaintiff-Appellant,

-against-

Emigrant Mortgage Company, Inc., et al.,
Defendants-Respondents.

_____

The Law Offices of James Briscoe West, PLLC, New York (James Briscoe West of counsel), for appellant.

Deutsch & Schneider, LLP, Glendale (Doris Barkhordar of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered July 14, 2010, which, in this action for vacatur of a non-judicial foreclosure sale, denied plaintiff's motion for a default judgment, and granted defendants Emigrant Mortgage Company, Brian Goldberg, and Deutsch & Schneider LLP's cross motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff's motion for a default judgment was properly denied since defendants' proffered a reasonable excuse for the default and a meritorious defense to the action (*see ICBC Broadcast Holdings-NY, Inc. v Prime Time Adv., Inc.*, 26 AD3d 239 [2006]). The evidence established that the parties were involved in settlement negotiations even after defendants' extended time to answer the complaint had expired.

Plaintiff's first cause of action, alleging that the foreclosure notices were defective, was properly dismissed since the documentary evidence established that pursuant to UCC 9-504(3), defendants gave notice of the foreclosure in a "commercially reasonable manner," and the statute requires only that reasonable steps be taken to notify the debtor of the foreclosure (*see e.g. Thornton v Citibank*, 226 AD2d 162 [1996], *lv denied*, 89 NY2d 805 [1996]). The foreclosure mailings were sent to plaintiff via certified mail, return receipt requested, and defendants' use of the wrong zip code was insufficient to establish that service was inadequate, where the address itself was otherwise correct (*see DeRosa v Chase Manhattan Mtge. Corp.*, 10 AD3d 317, 322 [2004]). Moreover, plaintiff acknowledged receipt of at least the first notice, her counsel acknowledged receipt of notices, and notices were published in a local newspaper for three consecutive weeks prior to the sale. Under UCC 9-608(a)(1)(C), the foreclosure of the first security interest automatically extinguished the second security interest, which was the subordinate lien, and thus, a separate notice of foreclosure for the latter lien was not required.

The second cause of action for fraudulent misrepresentation was properly dismissed, since "[t]here is no fiduciary duty arising out of the contractual arm's-length debtor and creditor

legal relationship between a borrower and a bank" (*FAB Indus. Inc. v BNY Fin. Corp.*, 252 AD2d 367 [1998]; *see AJW Partners LLC v Itronics Inc.* 68 AD3d 567, 568 [2009]).

The third cause of action for negligent misrepresentation was properly dismissed, since it is predicated upon promises of future conduct, rather than statements as to "existing material fact" (*see Capricorn Invs. III, L.P. v Coolbrands Intl., Inc.*, 66 AD3d 409 [2009]; *Margrove Inc. v Lincoln First Bank of Rochester*, 54 AD2d 1105 [1976], *appeal dismissed* 40 NY2d 1092 [1977]).

Plaintiff's fourth and fifth causes of action were also properly dismissed, since the sale price of $187,000 represented 62% of the alleged market value, and, in any event, the sale was conducted in a commercially reasonable manner (*see* UCC 9-627[b]; *DeRosa v Chase Manhattan Mtge. Corp.*, 10 AD3d at 322).

The documentary evidence conclusively established a defense to plaintiff's sixth cause of action, alleging that defendants colluded to ensure that defendant Plotch would prevail as the winning bidder. Plaintiff attended the auction along with the

purchaser she claimed was prepared to purchase the apartment; however, no bid was entered by either plaintiff or her purchaser.

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

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

ENTERED: JANUARY 5, 2012

CLERK

Saxe J.P., Sweeny, Moskowitz, Manzanet-Daniels, Román, JJ.

6475 In re Yukiyu C.,

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

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

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

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Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about November 29, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of criminal mischief in the fourth degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was not against the weight of the evidence. There is no basis for disturbing the court's credibility determinations, including its resolution of alleged

inconsistencies in testimony. The victim testified that he clearly saw appellant use a stick-like object to break an external security camera at his store. The fact that the stick was not recovered does not warrant setting aside the court's finding.

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

ENTERED: JANUARY 5, 2012

CLERK

Saxe, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Román, JJ.

6477 The People of the State of New York, Ind. 4267/06
Respondent,

-against-

Thomas Quinones,
Defendant-Appellant.

_____

Stanley Neustadter, Cardozo Appeals Clinic, New York (Robert Rosenthal of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Karen Swiger of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Megan Tallmer, J.), rendered July 1, 2009, convicting defendant, after a jury trial, of manslaughter in the second degree, and sentencing him, as a second felony offender, to a term of 7 to 14 years, unanimously affirmed.

The court properly denied defendant's request for a justification charge. In the circumstances of this case, defendant's entitlement to such a charge turned on whether there was a reasonable view of the evidence, viewed most favorably to defendant, that he only used nondeadly force.

In written and videotaped statements, defendant explained that, during an argument, the victim swung at defendant and missed him. Defendant then hit the victim, who fell on the bed. Defendant then "jumped on the bed" and the two men "started

tussling on the bed." Defendant "somehow ended up putting [the victim] in a head lock." Defendant continued to hold the victim until he "stopped moving," whereupon defendant realized that the victim was dead. Defendant did not indicate how long he applied the hold prior to realizing that the victim was no longer moving. Based on her autopsy and review of defendant's statements, the medical examiner found that defendant had applied a carotid sleeper hold, which was consistent with her finding that the victim had died of homicidal asphyxiation. The medical examiner explained that application of a carotid sleeper hold will cause unconsciousness within 6 to 20 seconds, but that death will not result unless the hold is maintained for a period of minutes after the person loses consciousness. The medical examiner further testified that if a person being asphyxiated loses consciousness, that fact would be apparent to the assailant.

Accordingly, the evidence, viewed as a whole, established not only that defendant applied a carotid sleeper hold, but that he applied it for a lethal length of time after the victim had already lost consciousness; likewise, the evidence afforded no reasonable view to the contrary. Therefore, there was no reasonable view that defendant only used nondeadly physical force, and thus no jury issue as to whether defendant used deadly physical force, defined as "physical force which, under the

circumstances in which it is used, is readily capable of causing death or other serious physical injury" (Penal Law § 10.00[11]).

The court properly received evidence that defendant took the victim's body to a secluded area and set it on fire. This evidence was probative of consciousness of guilt and absence of accident. The photographic and videotape evidence relating to the body, which the court carefully limited, was not excessively gruesome or voluminous (*see People v Wood*, 79 NY2d 958 [1992]; *People v Pobliner*, 32 NY2d 356, 369-70 [1973], *cert denied* 416 US 905 [1974]). Defendant's remaining claims concerning this evidence, including his uncharged crimes argument, are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. Any inadequacy in the court's limiting instructions was harmless.

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

ENTERED: JANUARY 5, 2012

CLERK

Saxe, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Román, JJ.

6478-
6479-
6480 The Options Group, Inc., Index 602867/09
Plaintiff-Respondent,

-against-

Deepali Vyas,
Defendant-Appellant.

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The Law Offices of Neal Brickman, P.C., New York (Neal Brickman of counsel), for appellant.

Tannenbaum Helpern Syracuse & Hirschtritt LLP, New York (Joel A. Klarreich of counsel), for respondent.

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Orders and judgment, Supreme Court, New York County (Milton A. Tingling, J.), entered January 12, 2010, September 13, 2010, and January 14, 2011, which, respectively, denied defendant's motion to dismiss the complaint, granted plaintiff's motion to compel specific performance of a settlement agreement, and ordered defendant, pending the outcome of this appeal, to execute a general release in favor of plaintiff, unanimously reversed, on the law, without costs, the judgment vacated, plaintiff's motion denied and defendant's motion granted. The Clerk is directed to enter judgment in defendant's favor dismissing the complaint.

The record evidence establishes definitively that the June 8, 2009 e-mail that plaintiff contends was defendant's acceptance of its settlement offer did not result in a preliminary agreement

that embodied all the essential terms of the agreement between the parties (*see Williamson v Delsener*, 59 AD3d 291 [2009]). In any event, this alleged settlement agreement was superseded by a formal settlement agreement drafted by plaintiff and signed by defendant, which contained additional terms and specifically provided that it cancelled all preceding agreements (*see e.g. Olivo v The City of New York*, 2010 WL 3200073, 2010 US Dist LEXIS 81951 [SD NY 2010]). Even if plaintiff never formally executed the settlement agreement it proffered to defendant, the record demonstrates that both parties intended to be bound by the agreement, and it is therefore enforceable (*see Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 369 [2005]; *Kowalchuk v Stroup*, 61 AD3d 118, 125 [2009]).

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

ENTERED: JANUARY 5, 2012

CLERK

Saxe, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Román, JJ.

6481 In re Briana S., and Another,

Children Under the Age
of Eighteen Years, etc.,

LaQueena S.,
Respondent-Appellant,

The Administration for Children's Services,
Petitioner-Respondent.

_____

Randall S. Carmel, Syosset, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Patricia Colella of counsel), attorney for the children.

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Order, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about March 4, 2010, which, after a fact-finding hearing, determined that respondent mother neglected the subject children, unanimously affirmed, without costs.

The finding of neglect is supported by a preponderance of the evidence. The record demonstrates that the mother would be unable to care adequately for the infant children due to her documented history of mental retardation, mental illness, poor impulse control, impaired judgment, depression, medication noncompliance, and repeated psychiatric hospital admissions and treatment. Moreover, her problems have resulted in, among other

things, her missing medical appointments for Daunte and his hospitalization for dehydration and weight loss. Under these circumstances, the court properly found that the children's "physical, mental or emotional condition . . . [was] in imminent danger of becoming impaired" (Family Ct Act § 1012 [f][i]; *see Matter of Kayla W.*, 47 AD3d 571 [2008]). Contrary to the mother's contention, expert testimony as to how her mental illness affected her ability to care for the children was not required (*see Matter of Jonathan S. [Ismelda S.]*, 79 AD3d 539 [2010]).

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

ENTERED: JANUARY 5, 2012

CLERK

Saxe, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Román, JJ.

6482-
6483 The People of the State of New York, Ind. 2694/06
Respondent,

-against-

Donnell Alston,
Defendant-Appellant.

_____

Davis Polk & Wardwell LLP, New York (Osmar Jose Benvenuto of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered April 1, 2008, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him, as a persistent violent felony offender, to a term of 20 years to life, and order, same court and Justice, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

The court properly denied defendant's CPL 440.10(1)(g) motion to vacate the judgment on the ground of newly discovered evidence. This evidence would not have created any reasonable possibility of changing the result, let alone the "probability" required by the statute (*see e.g. People v Taylor*, 246 AD2d 410 [1998], *lv denied* 91 NY2d 978 [1998]).

Despite minor inconsistencies in her testimony, the victim

of this robbery of an antique shop made an unusually reliable identification. On the date of the robbery, the victim had three separate conversations with defendant, who was posing as a shopper. The first conversation was approximately 45 minutes long. Since each conversation made reference to the preceding conversation, there is no doubt that the victim encountered the same man each time. Moreover, defendant's fingerprints were found on a jewelry display case, and there was evidence warranting an inference that it was at least likely that these prints were left on the day of the robbery.

The newly discovered evidence consisted of potential testimony by a customer in the store at the time of the robbery. According to the customer, defendant was not the robber, and there were differences in his appearance from that of the robber. However, in contrast to the victim, the customer had a very limited opportunity to observe defendant. Accordingly, the motion court properly concluded that it was not probable that the customer's testimony would have overcome the strong evidence against defendant.

The court properly exercised its discretion in denying defendant's mistrial motion, made after a police witness gave testimony about fingerprints that the court found to be beyond the witness's competence. The court struck this testimony and

gave thorough curative instructions that were sufficient to prevent any prejudice (*see People v Santiago*, 52 NY2d 865 [1981]), and which the jury is presumed to have followed (*see People v Davis*, 58 NY2d 1102, 1104 [1983]).

Defendant's remaining evidentiary claims are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find that evidence of repetitive conduct regarding the cleaning of the display case was correctly received, and that the admission of a prior consistent statement was harmless error.

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

ENTERED: JANUARY 5, 2012

CLERK

Saxe, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Román, JJ.

6487 The People of the State of New York, Ind. 4248N/09
Respondent,

-against-

Glen Thomassini,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bruce Allen, J. at sentence), rendered on or about June 8, 2010,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: JANUARY 5, 2012

CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Saxe, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Román, JJ.

6488 Roberto Mitrotti, Index 112025/06
Plaintiff-Appellant,

-against-

Frank J. Elia,
Defendant-Respondent.

_____

Max D. Leifer, P.C., New York (Ira H. Zuckerman and Max D. Leifer of counsel), for appellant.

McCabe, Collins, McGeough & Fowler, LLP, Carle Place (Patrick M. Murphy of counsel), for respondent.

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Order, Supreme Court, New York (George J. Silver, J.), entered August 17, 2010, which, in this action for personal injuries sustained in a motor vehicle accident, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established his entitlement to judgment as a matter of law by demonstrating that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). Defendant submitted an affirmed report of an orthopedist finding normal ranges of motion in plaintiff's cervical and lumbar spine, and left knee (*see Porter v Bajana*, 82 AD3d 488 [2011]). Defendant also submitted the affirmed report of a radiologist who opined that changes shown in MRIs of the then 64-year-old plaintiff were degenerative, and that the condition of his spine

was unchanged since 2002, when MRIs were taken following a prior motor vehicle accident.

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's medical affirmations did not provide an opinion as to causation (*see Jackson v Delossantos-Diaz*, 82 AD3d 489 [2011]), and while plaintiff has admitted that he was involved in another accident two years before the one at issue, his doctors ignored the effect of that accident on the purported neck and back symptoms attributable to the subject accident (*see Farrington v Go On Time Car Serv.*, 76 AD3d 818, 818 [2010] ["even where there is objective medical proof of an injury, summary dismissal of a serious injury claim may be appropriate when additional contributory factors, such as preexisting conditions, interrupt the chain of causation between the accident and the claimed injury"]). Plaintiff also failed to submit an affirmation of any medical expert showing current range-of-motion deficits to rebut the findings of defendant's medical experts.

Dismissal of the 90/180-day claim was also proper. Plaintiff's bill of particulars stated that he was confined to bed for two weeks and home for two months following the accident

(*see Williams v Baldor Specialty Foods, Inc.*, 70 AD3d 522, 523 [2010]).

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

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

ENTERED: JANUARY 5, 2012

CLERK

Saxe, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Román, JJ.

6489 The People of the State of New York, Docket 66074C/07
Appellant,

-against-

Juan Rivera,
Defendant-Respondent.

_____

Robert T. Johnson, District Attorney, Bronx (Thomas R. Villecco of counsel), for appellant.

Anthony M. Giordano, Ossining, for respondent.

_____

Order, Supreme Court, Bronx County (William Mogulescu, J.), entered on or about March 15, 2011, which granted defendant's CPL 440.10 motion to vacate a judgment convicting him, upon his plea of guilty, of driving while intoxicated, unanimously affirmed.

The record supports the court's conclusion, made after a thorough evidentiary hearing, that defendant did not receive meaningful representation. "In the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404 [1995]).

Defense counsel failed to conduct any investigation, make any motions, or even view the video of defendant's breathalyzer test before negotiating a plea bargain whereby defendant would

plead guilty to the top count of the accusatory instrument. There were lines of defense that were at least worthy of investigation, including matters that could have affected the accuracy of the breathalyzer results. The attorney's testimony established that there were no strategic reasons for these omissions.

The hearing evidence also established that since defendant had no prior record and no accident occurred, it was extremely unlikely that defendant would receive a jail sentence. Accordingly, defendant received little, if any benefit, by pleading guilty to the top count without ever having received even a minimally accurate assessment of the strength of the People's case.

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

ENTERED: JANUARY 5, 2012

CLERK

Saxe, J.P., Sweeny, Moskowitz, Mazanet-Daniels, Román, JJ.

6490-
6491 Pentalpha Enterprises, Ltd., et al., Index 601098/09
Plaintiffs-Appellants-Respondents,

-against-

Cooper & Dunham LLP, et al.,
Defendants-Respondents-Appellants.

_____

Ernest H. Gelman, New York, for appellants-respondents.

Stillman, Friedman & Schechtman, P.C., New York (John B. Harris of counsel), for respondents-appellants.

_____

Order, Supreme Court (Richard B. Lowe, III, J.), entered September 3, 2010, which granted defendants' motion to dismiss the complaint, but denied their request for sanctions pursuant to 22 NYCRR 130-1.1(c), unanimously affirmed, with costs. On the Court's own motion, pursuant to 22 NYCRR § 130-1.1 *et seq.*, sanctions in the amount of $5,000.00 are imposed against plaintiffs payable to the Commissioner of Taxation and Finance respectively, for the reasons stated. The Clerk of the Supreme Court, New York County, is directed to enter judgment accordingly.

Plaintiffs infringed a patent owned by defendant SEB beginning in 1997. SEB sued plaintiffs in Federal District Court in 1998, and successfully obtained a preliminary injunction in

1999, which was affirmed by the Second Circuit in 2000 (*SEB S.A. v Montgomery Ward & Co.*, 77 F Supp 2d 399 [1999], *affd* 243 F3d 566 [2000]). The following five years consisted of discovery disputes, primarily involving plaintiffs' accusations of discovery misconduct by defendants concerning Document Request #14. In 2006, the issue was conclusively decided when a federal jury found plaintiffs liable for willful infringement and inducement to infringe. Subsequently plaintiffs' motion to set aside the verdict was denied after a hearing (2007 US Dist LEXIS 80394 [2007]). Plaintiffs appealed both the jury verdict and the denial of the motion to set aside the verdict to the Federal Circuit, then to the United States Supreme Court. Plaintiffs again lost (594 F3d 1360 [2010], *affd sub nom. Global-Tech Applicances, Inc. v SEB S.A.*, __ US __, 131 S Ct 2060 [2011]).

Plaintiffs brought the instant state court action alleging discovery misconduct concerning Request #14, but couched their assertions as claims sounding in fraud and violations of Judiciary Law § 487, and included as defendants not only SEB, but SEB's law firm and firm partners. Plaintiffs lost in the court below on the grounds that their claims were barred pursuant to the doctrines of res judicata and collateral estoppel.

Plaintiffs now appeal, having lost in no fewer than four courts of competent jurisdiction, and despite having been warned

in the court below that any further prosecution of this matter would be dangerously close to sanctionable conduct. We are of the opinion that plaintiffs' appeal must, again, be denied on the merits; and that, with this appeal, the conduct of plaintiffs and their attorneys has crossed the line from zealous advocacy to that which is sanctionable under 22 NYCRR 130-1.1.

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

ENTERED: JANUARY 5, 2012

CLERK

Saxe, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Román, JJ.

6492 The People of the State of New York, Docket 70340C/07
Respondent,

-against-

Marco Angelo Vargas,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Sheilah Fernandez of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Bari L. Kamlet of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Richard Lee Price, J.), rendered November 21, 2008, convicting defendant, after a nonjury trial, of harassment in the second degree, and sentencing him to a conditional discharge and five days of community service, unanimously affirmed.

Defendant's challenge to the sufficiency of the evidence is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the verdict was supported by legally sufficient evidence. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The totality of defendant's conduct supports the conclusion that defendant

intended to harass, annoy or alarm the arresting officer, irrespective of whether he also intended to resist arrest (*see People v Rivera*, 78 AD3d 578 [2010], *lv denied* 16 NY3d 745 [2011]).

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

ENTERED: JANUARY 5, 2012

CLERK

Saxe, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Román, JJ.

6493N Wadsworth Avenue Associates, Plaintiff-Appellant, Index 601740/03

-against-

Kenneth L. Maynard, Defendant-Respondent.

_____

Robert H. Haggerty, New York, for appellant.

Kennedy Berg LLP, New York (James W. Kennedy of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered October 15, 2010, which, inter alia, denied the motion of Robert H. Haggerty, who was a limited partner of purported plaintiff, for leave to amend the complaint, unanimously affirmed with costs.

Haggerty, nominally not a party but effectively acting as a party, commenced several actions against defendant, the general partner of plaintiff Wadsworth Avenue Associates, one of which sought, among other things, an accounting and repayment of partnership funds allegedly converted or stolen by defendant. The action was dismissed by a final judgment entered May 23, 2005. Haggerty improperly appealed from the interlocutory order dismissing the complaint and not from the subsequently entered

final judgment, and his appeal was dismissed (23 AD3d 302 [2005]). He is now seeking leave to amend the complaint in that action. The motion court correctly concluded that Haggerty has no right to seek leave to amend a complaint in an action that has been finally dismissed.

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

ENTERED: JANUARY 5, 2012

CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Abdus-Salaam, Román, JJ.

5517 James M. Hazen, Index 104781/10
Petitioner/Cross-Respondent,

-against-

Hill Betts & Nash, LLP,
Respondent/Cross-Petitioner,

New York State Division of Human Rights,
Respondent.

_____

William H. Roth, New York, for petitioner/cross-respondent.

Jackson Lewis LLP, New York (Diane Windholz of counsel), for respondent/cross-petitioner.

_____

Determination of respondent State Division on Human Rights, dated October 27, 2010 (transferred to this Court, pursuant to Executive Law § 298 and 22 NYCRR 202.57(c)(2), by order of the Supreme Court, New York County [Lucy Billings, J.], entered March 11, 2011), annulled, on the law, without costs, the award vacated, and the complaint dismissed.

Opinion by Catterson, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
James M. Catterson
Leland G. DeGrasse
Sheila Abdus-Salaam,
Nelson S. Román, JJ.

5517
Index 104781/10

_____x

James M. Hazen,
Petitioner/Respondent,

-against-

Hill Betts & Nash, LLP,
Respondent/Petitioner,

New York State Division of Human Rights,
Respondent.

_____x

Petitioner James Hazen challenges a determination of respondent State Division of Human Rights, dated October 27, 2010, which, in this employment discrimination proceeding (transferred to this Court, pursuant to Executive Law § 298 and 22 NYCRR 202.57(c)(2), by order of the Supreme Court, New York County [Lucy Billings, J.], entered March 11, 2011), after a hearing, found that respondent Hill Betts & Nash, LLP unlawfully discriminated against him, and awarded him damages.

William H. Roth, New York, for petitioner/respondent.

Jackson Lewis LLP, New York (Diane Windholz of counsel), for respondent/petitioner.

CATTERSON, J.

In this employment discrimination action arising from the termination of the petitioner attorney by the respondent law firm, we reiterate that a petitioner's disability does not shield him from the consequences of workplace misconduct.

Respondent Hill Betts & Nash (hereinafter referred to as "HBN") terminated the petitioner, James Hazen, on March 15, 2006, upon discovering that the petitioner charged hotel rooms, limousines, alcohol, adult movies and calls to escort services to his corporate American Express card and then attempted to have these charges billed to clients. On August 30, 2006, HBN reported the petitioner's misconduct to the Departmental Disciplinary Committee for the First Judicial Department (hereinafter referred to as the "DDC"). The petitioner filed a verified complaint with the New York State Division of Human Rights (hereinafter referred to as the "DHR") on November 7, 2006 charging HBN with unlawful discrimination and retaliation. The petitioner claims that his misconduct was caused by his bipolar disorder, that HBN failed to accommodate his mental illness, that his termination was discriminatory, and that HBN retaliated against him by reporting him to the DDC.

Evidence and testimony before the Administrative Law Judge (hereinafter referred to as "ALJ") at a public hearing held

during four days in December 2007 and January 2008 established the following: The petitioner was one of several partners at HBN who were issued a corporate American Express card for business expenses. HBN permitted Hazen to use the credit card for personal expenses, but required that he identify these charges and reimburse HBN. HBN's policy is to send each cardholder a sub-statement to mark up with notations indicating whether the charges are personal, chargeable to the firm or a client, or related to travel, entertainment or automobile expenses. It was not HBN's practice to return the statement to the cardholder for further review. The petitioner testified that until the period at issue in this case, he had adhered to this procedure and returned marked-up sub-statements with any receipts and payment for his personal charges.

However, in December 2005, when the petitioner was provided with a sub-statement for the last quarter of 2005, he ignored requests from HBN's accounting department and did not submit his annotated sub-statement. The petitioner stopped coming to the office in mid-December, and advised HBN that he was told to "decompress." On January 11, 2006, a partner at HBN contacted the petitioner and asked him to submit his credit card sub-statement on the following day so that the accounting department could close out the 2005 books. The petitioner sent a fax in

reply stating that he could not "waste two hours coming in [to] do the bills," but that he would mark up the sub-statement and fax it to accounting. When he did not send in the sub-statement on January 12, the accounting department e-mailed the sub-statement to the petitioner again and copied two partners at HBN. That evening, one of the partners reviewed the bills, and, seeing charges for more than 50 hotel stays between September 26 and December 27, 2005, initiated an internal investigation of the petitioner's credit card use.

The day after the petitioner received the e-mail from HBN's accounting department, he asked Phillip Russotti, his friend, also an attorney, to intervene on his behalf. Russotti testified that the petitioner advised him that he was having a problem at work with his credit card reports and that the firm was demanding that he complete them. Later that day, Russotti called a partner at HBN and advised him that he had met with the petitioner and found him in a "terrible state" and that the petitioner planned to begin seeing a psychiatrist. HBN presented evidence that until this point, it was unaware that the petitioner was having any mental health issues. Russotti also requested more time for the petitioner to prepare his expense reports.

The evidence reflects that the petitioner saw a doctor on January 16. On January 17 and 25, Russotti advised HBN that the

petitioner was suffering from a mental ailment, but did not specify the ailment. On January 23, the petitioner faxed the accounting department his annotated credit card sub-statement. The same day, HBN requested medical documentation supporting the petitioner's claim of mental illness and inability to return to work. However, on January 26, petitioner refused to discuss his purported illness with HBN citing "privacy" reasons.

On January 27, Russotti mailed a copy of a one-page letter from the petitioner's doctor stating that the petitioner had experienced an unspecified "severe mood disorder." None of the correspondence contained any medical documentation of bipolar disorder or a description of the petitioner's workplace limitations as a result of his "disorder." The letter indicated only that the petitioner was responding well to treatment and was expected to be able to return to work within a few weeks.

On January 31, Russotti sent a letter to HBN on the petitioner's behalf advising HBN that the credit card sub-statement that the petitioner submitted on January 23 falsely listed personal expenses in December 2005 and January 2006 as chargeable to clients. Russotti explained that these false expenses were attributable to "[the petitioner's] emotional illness." On February 3, HBN's counsel informed Russotti that HBN was terminating the petitioner effective March 6, 2006.

During the hearing, the petitioner testified that although he engaged in the conduct for which he was terminated, it was caused by his bipolar disorder. The petitioner admitted that he repeatedly charged hotel rooms, limousines, and liquor to the HBN corporate card. Furthermore, during his hotel stays, petitioner charged pornographic movies and calls to escort services on the HBN card. Although HBN expected the petitioner to stay a few nights at a hotel in September to work on a case, the petitioner did not tell HBN about any of the other stays. The petitioner blamed his conduct on his bipolar disorder, and testified that he "only engaged in this inappropriate behavior and needed a companion when [he] was either in a manic or depressed state." However, he also admitted that in 2001, he had charged an escort to his corporate credit card and marked it as a client expense that was later discovered and corrected by HBN.

The petitioner testified that he also booked hotel rooms to avoid contact with people in the office on days when he was productive, but not manic. However, the petitioner explained that he booked the hotel rooms *in advance* on a travel web site. The petitioner conceded that despite using the hotels for inappropriate conduct, he believed that he could list the hotel fees as client expenses because he used the rooms for work.

A partner at HBN testified that the investigation of the

petitioner's expenses was concluded in March 2006 and determined that petitioner had charged $21,117.77 in personal expenses to the credit card since October 25, 2005, and attempted to list many of those expenses as billable to clients. HBN sent a letter to the petitioner on March 20 that included the investigation findings and stated the amount that the petitioner owed to the firm. Although the petitioner testified that he could have reimbursed HBN at any time, he did not remit the balance owed. On April 24, the petitioner sent a letter to HBN indicating that he believed he was wrongfully terminated.

HBN submitted evidence that in June 2006, HBN retained a legal ethics expert to seek an opinion as to whether HBN was under a duty to report the petitioner's misconduct to the DDC. HBN's counsel advised HBN that it could not avoid reporting the petitioner's misconduct, and that the obligation to report was not affected by the petitioner's alleged disability. Following a meeting with the petitioner's counsel regarding the allegations of discrimination in July, HBN reported the petitioner's misconduct on August 30, 2006.

Nine months after the hearing concluded, on September 25, 2008, the DHR ALJ issued a Recommended Findings of Fact, Opinion and Decision and Order finding that HBN had discriminated and retaliated against the petitioner. The ALJ awarded the

petitioner $50,000 for mental anguish, but declined to award any compensation for lost salary or benefits on the ground that the petitioner failed to show that he made reasonable efforts to mitigate damages. Both parties objected to the ALJ Order and submitted supplemental briefs to the DHR Commissioner. The Commissioner issued a Final Order on October 27, 2010, amending the Recommended Order to award the petitioner compensation for lost wages through December 31, 2009, in the amount of $548,161, plus interest.

In his petition to Supreme Court, the petitioner sought to affirm the Final Order to the extent that it found HBN liable and calculated lost wages through December 31, 2009. However, the petitioner objected to the Final Order to the extent of claiming that he is entitled to additional compensation. The petitioner asserts that he should have also been awarded lost wages from December 31, 2009 through October 27, 2010, in the amount of $126,840, and an additional $200,000 for mental anguish. The petitioner also claims that he should have been awarded lost wages until his anticipated retirement date in the amount of $973,356.

The Commissioner filed a cross petition to enforce the Final Order as issued, and HBN filed a cross petition to annul, reverse and vacate the Final Order and dismiss the petitioner's

complaint. By order entered March 11, 2011, Supreme Court transferred the proceeding pursuant to Executive Law § 298 and 9 NYCRR 202.57 to this Court for review.

For the reasons set forth below, we annul the Commissioner's Final Order, vacate the award, and dismiss the petitioner's complaint. Under the Human Rights Law, the scope of judicial review is "extremely narrow and is confined to the consideration of whether the Division's determination is supported by substantial evidence in the record." City of New York v. State Div. of Human Rights, 70 N.Y.2d 100, 106, 517 N.Y.S.2d 715, 717, 510 N.E.2d 799, 801 (1987); see also 300 Gramatan Ave. Assoc. v. State Div. of Human Rights, 45 N.Y.2d 176, 179-181, 408 N.Y.S.2d 54, 56-57, 379 N.E.2d 1183, 1185-1186 (1978). "Substantial evidence, which has been characterized as a minimal standard or as comprising a low threshold must consist of such relevant proof, within the whole record, as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." Matter of Café La China Corp. v. New York State Liq. Auth., 43 A.D.3d 280, 280, 841 N.Y.S.2d 30, 31 (1st Dept. 2007) (internal quotation marks and citations omitted). Although judicial review of an agency determination appears to be limited, the Court of Appeals has made clear that a reviewing court exercises a genuine judicial function and that review is more

than a "rubber stamp" of an agency's determination. See Matter of New York City Tr. Auth. v. State Div. of Human Rights, 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 54, 577 N.E.2d 40, 45 (1991); Matter of Reape v. Adduci, 151 A.D.2d 290, 293, 542 N.Y.S.2d 562, 564 (1st Dept. 1989).

In this case, the ALJ found that the respondent's reason for terminating the petitioner was a pretext and that the real reason for terminating him was his disability. We disagree. The record reflects that there is no evidence at all, much less substantial evidence, that HBN knew, before they terminated the petitioner, that the petitioner was disabled by a bipolar disorder or how that disorder limited his performance in the workplace. See e.g. Pimentel v. Citibank, N.A., 29 A.D.3d 141, 811 N.Y.S.2d 381 (1st Dept. 2006), lv. denied, 7 N.Y.3d 707, 821 N.Y.S.2d 813, 854 N.E.2d 1277 (2006) (employer was not required to accommodate employee's depression where employee failed to adequately explain extent and limits of her restrictions).

The record reflects that until the petitioner began receiving requests from HBN in December 2005 to account for his credit card expenses, there was no indication that the petitioner was suffering from a mental illness. By his own account, the petitioner was able to produce "quality professional legal work" during the time he was allegedly disabled, and argued his portion

of a complex summary judgment motion on December 9, 2005. Russotti testified that when he saw the petitioner in December, shortly before their January meeting, the petitioner's behavior did not seem unusual. The petitioner's doctor's records also indicate that neither the internist who had been treating him for more than a year for diabetes, nor the therapist who had been treating him for post-9/11 stress, diagnosed the petitioner with bipolar disorder or even mentioned the possibility that he was bipolar.

Furthermore, once the petitioner began alluding to an "emotional illness," HBN specifically requested the details of the petitioner's condition in order to evaluate the medical benefits available to the petitioner, and the petitioner flatly refused to provide any information. The communications from Russotti, the petitioner, and the petitioner's doctor, contained only vague references to emotional illness or "mood disorder," and thus did not fall into the category of an "impairment [...] which [...] is demonstrable by medically accepted clinical [...] techniques." Executive Law § 292(21)(a).

Thus, all that was before HBN when it terminated the petitioner on February 3 was that he had charged more than $21,000 in hotels and other personal expenses to the corporate credit card and tried to bill HBN's clients for personal

expenses. Then, when confronted and asked for an explanation, he did not reimburse HBN and instead blamed his conduct on a "mood" illness, which he still did not identify.

Despite this total lack of evidence as to the petitioner's termination due to his bipolar disorder, the ALJ incomprehensibly found that HBN's legitimate reason for terminating the plaintiff was a pretext. The ALJ relied on evidence that another HBN attorney had charged $25,000 to his corporate credit card and was not terminated. However, this demonstrates only that the ALJ misapprehended the nature of the professional misconduct. The other HBN attorney did not attempt to charge clients for his personal expenses and paid the money back over time; therefore, his conduct is clearly distinguishable from the petitioner's, which essentially amounted to attempted theft from HBN and its clients.

The ALJ also noted that e-mails between two HBN partners raised an inference of discrimination. This too is not supported by record evidence. The e-mails have no direct statements of animus based on disability. Rather, they are the rational concerns of a law firm in the midst of litigating what the ALJ called "the largest case [HBN] had ever had in 10 to 15 years, with a potential for realizing damages in the hundreds of millions of dollars."

In rejecting HBN's nondiscriminatory reason, the ALJ further credited the petitioner's belated excuse that he behaved improperly because of his disability and accepted the petitioner's argument that HBN was obligated to accommodate him. The ALJ was persuaded by the petitioner's testimony and that of his doctor that the petitioner booked hotel rooms and escorts and falsified his credit card accounting as a result of his bipolar disorder.

We note that the petitioner also testified that he had engaged in the same misconduct in 2001, four years before the onset of his purported bipolar disorder, when he billed an escort to his credit card and was discovered by HBN trying to list it as a client expense. Furthermore, although the petitioner testified that he only used the hotel rooms and escorts when he was either manic or depressed, he also testified that he booked the rooms on-line weeks in advance. Thus, the only way to credit the testimony that his disorder caused him to engage in such behavior, is to accept the preposterous notion that he was able to predict his mental state weeks in advance and plan accordingly.

The record further refutes the ALJ's findings. Petitioner submitted the sub-statement on January 23. By that time, he had seen his doctor twice. On January 25, the doctor reported that

the petitioner had responded promptly to drug treatment on January 16 and continued to have a "brisk, robust response to appropriate treatment." This testimony directly refutes the petitioner's claim that the sub-statement was the "diary of a madman."

Even were we to accept that there was some evidence -- sufficient to satisfy the substantial evidence standard -- that the petitioner was disabled and that his misconduct was caused by his disability, HBN was not required to excuse that misconduct as an accommodation. Well-established precedent demonstrates that the New York State Human Rights Law "does not immunize disabled employees from discipline or discharge for incidents of misconduct in the workplace." Valentine v. Standard & Poor's, 50 F.Supp.2d 262, 289 (S.D.N.Y. 1999), aff'd, 205 F.3d 1327 (2d Cir. 2000); see e.g. McPhatter v. New York City, 378 Fed.Appx. 70, 72, available at 2010 WL 2025758 (2d Cir. May 24, 2010) (even assuming that employee had a history of a disability, the reasons for terminating the employee, including poor attendance, disciplinary record, and other insubordinate behavior, were not pretexts for disability-based discrimination).

There are few reported decisions examining workplace misconduct resulting from a bipolar condition. In each case, the court found that the employer was not required to endure

misconduct simply because the employee is disabled. Husowitz v. Runyon, 942 F.Supp. 822 (E.D.N.Y. 1996); Davila v. Qwest Corp., 113 Fed.Appx. 849, available at 2004 WL 2005915 (10th Cir. 2004). Nor is the employer required to retroactively excuse the misconduct as an accommodation under the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.). Davila, 113 Fed.Appx. at 854, 2004 WL 2005915 at *4. In Davila, the petitioner was terminated for workplace violence and argued that his termination was based on his bipolar disorder, which the employer should have accommodated. In dismissing the petitioner's claim, the court found that "excusing workplace misconduct to provide a fresh start/second chance to an employee whose disability [was] offered as an after-the-fact excuse is not a required accommodation under the ADA." Id.

In this case, the record is clear that it was not until after the petitioner accrued the expenses on his corporate credit card, and was asked to account for them, that he then consulted an attorney and sought a diagnosis from a psychiatrist. Thus, here, as in Davila, the petitioner has offered his disability as an "after-the-fact excuse."

The Equal Employment Opportunity Commission similarly acknowledges that an employee's disability does not relieve him of the consequences of his misconduct. EEOC Guideline No. 30

specifically provides that "an employer [may] discipline an individual with a disability for violating a workplace conduct standard if the misconduct resulted from a disability," when "the workplace conduct standard is job-related for the position in question and is consistent with business necessity." Here, it is undisputed that charging personal expenses to clients constitutes serious job-related misconduct.

The ALJ's finding of retaliation is also not supported by substantial evidence. We note at the outset that rule DR 1-103 of the Code of Professional Responsibility, which was in effect in August 2006, requires an attorney to report another attorney's violation of the rules. See 22 NYCRR 1200.0 (now Rules of Professional Conduct rule 8.3). The ALJ concluded that the proximity of notification by the petitioner's attorney of his discrimination claim in July to HBN's report to the DDC in August 2006 raised an inference of retaliation. It is undisputed that in June HBN consulted an attorney specializing in ethics and was advised that it had an *obligation to report* the petitioner's attempted theft to the DDC if it had a reasonable belief of wrongdoing, regardless of the petitioner's disability. Thus, HBN has provided a legitimate, nondiscriminatory reason demonstrating that the report was not retaliatory.

Accordingly, the determination of respondent State Division

of Human Rights, dated October 27, 2010, which, in this employment discrimination proceeding (transferred to this Court, pursuant to Executive Law § 298 and 22 NYCRR 202.57(c)(2), by order of the Supreme Court, New York County [Lucy Billings, J.], entered March 11, 2011), after a hearing, found that respondent Hill Betts & Nash, LLP unlawfully discriminated against petitioner James Hazen, and awarded petitioner damages, is annulled, on the law, without costs, the award vacated and the complaint dismissed.

All concur.

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

ENTERED: JANUARY 5, 2012

CLERK