

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 10, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, Moskowitz, Acosta, Freedman, JJ.

6702- Index 302208/10
6703 Liszeida Perez, etc.,
Plaintiff-Respondent,

-against-

KeySpan Corporation, et al.,
Defendants-Appellants.

Skadden, Arps, Slate, Meagher & Flom, LLP, New York (John H. Lyons of the bar of the District of Columbia, admitted pro hac vice, of counsel), for KeySpan Corporation, appellant.

Bingham McCutchen LLP, New York (Jon R. Roellke of the bar of the District of Columbia, admitted pro hac vice, of counsel), for Morgan Stanley, appellant.

Meiselman, Denlea, Packman, Carton & Eberz P.C., White Plains (D. Greg Blankinship of counsel), for respondent.

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about August 24, 2011, which, upon renewal and reargument, denied defendants' motion to dismiss the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint. Appeal from order, same court and Justice, entered March 17, 2011, unanimously dismissed, without costs, as abandoned.

In 2006, defendants KeySpan and Morgan Stanley entered into a complex financial swap transaction for the period 2006-2009, whereby KeySpan hedged the prices it could charge for electrical output through simultaneous agreements with Morgan Stanley and non-party Astoria Generating Company.

Plaintiff is a Con Ed customer. Non-party Con Ed purchases electrical energy from KeySpan. Plaintiff claims that defendants' transaction artificially elevated the auction price of electrical capacity.¹ As Judge Scheindlin ruled in *Simon v KeySpan Corp.* (785 F Supp 2d 120 [SD NY 2011]), a related case involving claims based on the same transaction, the filed rate doctrine bars plaintiff's claims. The Federal Energy Regulatory Commission (FERC) has exclusive authority to regulate a public utility's "sale of electric energy at wholesale in interstate commerce" (16 USC 824e[a]). As part of this authority, FERC has authority over the ICAP auction market, as well as any "practices" or "contracts" that may affect it (*see Maine Public Utilities Commission v FERC*, 520 F3d 464, 479 [DC Cir 2008], *rev'd in part on other grounds sub nom. NRG Power Mktg. v Maine Pub. Util. Commn.*, ___ US ___, 130 S Ct 693 [2010]).

¹ Electricity is generated in the form of "installed capacity" ("ICAP"). ICAP is not actual electricity, but is a regulatory construct that measures the capacity to generate or transmit electricity.

Pursuant to that authority, FERC found that KeySpan's ICAP auction prices complied with the governing tariffs and regulations, that its bidding behavior did not violate the filed rate doctrine and that there had been no deceptive conduct in effectuating the transaction. Accordingly, there is no basis to order refunds or restitution for the prices Con Ed and others paid at the auctions.

In view of the foregoing, it is unnecessary to address any other arguments or claims.

Defendants' appeal from the initial order denying dismissal is deemed abandoned, because they failed to address it in their briefs.

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

ENTERED: APRIL 10, 2012


CLERK

justice. As an alternative holding, we also reject it on the merits. There was no dispute as to the facts that led the court to make a purely legal determination that defendant was ineligible to apply for resentencing based on the uncontested facts relating to prior convictions.

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

ENTERED: APRIL 10, 2012


CLERK

meaning of Insurance Law § 5102(d), affirmed, without costs.

Defendants made a prima facie showing of entitlement to judgment as a matter of law. The differences in the defense experts' range-of-motion findings are minor and both doctors concluded that plaintiff's range of motion is normal (*see Feliz v Fragosa*, 85 AD3d 417, 418 [2011]).

In opposing defendants' motions, plaintiff failed to offer a reasonable explanation for a significant gap in his medical treatment that was raised by the Bissessar defendants when they cross-moved for summary judgment. As the Court of Appeals held in *Pommells v Perez* (4 NY3d 566 [2005]), "a plaintiff who terminates therapeutic measures following the accident, while claiming 'serious injury,' must offer some reasonable explanation for having done so" (*id.* at 574).

Plaintiff's accident occurred on April 8, 2007 and he underwent arthroscopic surgery on his right knee on June 29, 2007. As of July 5, 2007, plaintiff's orthopedic surgeon recommended physical therapy. When asked when he last received physical therapy, plaintiff testified that he was "cut off" five months before his July 2008 deposition. Therefore, the record gives no indication that plaintiff received any medical treatment during the 24-month period before he submitted answering papers to defendants' motions. We assume, as the dissent does, that

there are limits to the amount of no-fault coverage for medical services such as physical therapy. The inquiry, however, does not end there. A bare assertion that insurance coverage for medically required treatment was exhausted is unavailing without any documentary evidence of such or, at least, an indication as to whether an injured claimant can afford to pay for the treatment out of his or her own funds (*see e.g. Gomez v Ford Motor Credit Co.*, 10 Misc3d 900, 903 [Sup Ct Bronx County 2005]; *see also Salman v Rosario*, 87 AD3d 482 [2011]; *Jacobs v Rolon*, 76 AD3d 905 [2010]). Plaintiff, who was employed and living with his parents, gave no such indication. Also, the dissent's theory that "[i]njuries are not always treatable by physical therapy" is speculative and finds no support in the record.

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

SAXE, J.P. (dissenting)

Although the motion court dismissed plaintiff's serious injury claims on the ground that his physician's measurements of plaintiff's range-of-motion limitations were not made contemporaneously with the accident, the majority affirms the dismissal based on different reasoning, namely, what it deems to be an insufficiently-explained cessation of treatment. In view of plaintiff's assertion that he ceased ongoing therapy when his no-fault benefits for that service ceased, I believe it is error to affirm the dismissal of plaintiff's claims on that ground. I strenuously disagree with the majority's assertion that in order to be entitled to proceed with his serious injury claims, plaintiff had an affirmative obligation to explain why he could not afford to pay out of pocket for his continued therapy after his no-fault benefits stopped covering his therapy.

On April 8, 2007, plaintiff Nandkumar Ramkumar, then 23 years old, was a passenger in an automobile owned by defendant Bisnath Bissessar and operated by co-defendant Danish Bissessar, when their car collided with another automobile owned by defendant Grand Style Transportation Enterprises Inc. and operated by defendant Ibrahim S. Tandia. Plaintiff was taken by ambulance to a nearby hospital emergency room where he was diagnosed with soft tissue injury, prescribed ibuprofen and

released.

He sought treatment the next day, April 9, 2007, at Liberty Advanced Medical, P.C., complaining of severe neck pain, lower back pain and pain in his right knee. Dr. William Mejia diagnosed him with cervical and lumbar sprain and strain, and post-traumatic injury to the right knee, and prescribed a course of physical therapy, with MRIs to be performed if the symptoms persisted. On May 25, 2007, an MRI of plaintiff's lumbar spine was performed, and a left foraminal herniation was found at L3-4, and a central disc herniation was found at L4-5. On June 20, 2007, an MRI was performed on his right knee, revealing a tear of the lateral meniscus, involving both the anterior and posterior horns. Arthroscopic surgery was performed on plaintiff's knee by Dr. Mehran Manouel on June 29, 2007. Plaintiff alleges that he was confined to bed for two days in April 2007 and for seven days in June and July 2007 "and intermittently thereafter."

Plaintiff commenced this action on or about July 10, 2007, alleging that the accident resulted in tears to his right meniscus, and injuries to his shoulders, cervical spine and lumbar spine, including herniated discs at L3-4 and L4-5.

Defendants moved for summary judgment, contending that plaintiff cannot establish that he suffered a serious injury as defined by Insurance Law § 5102(d). They relied on the reports

of three experts: two orthopedists and a radiologist.

Although their experts' findings satisfied defendants' burden of making a prima facie showing of entitlement to summary judgment (*see Feliz v Fragosa*, 85 AD3d 417, 418 [2011]), the evidence offered in response by plaintiff created an issue of fact as to whether plaintiff's injuries constituted serious injuries that were causally related to the accident, at the very least, with regard to the injuries to his right knee.

The affirmation by plaintiff's surgeon, Dr. Manouel, emphasized that based on his direct observations of plaintiff's knee during the surgery and the photographs taken at the time of the surgery, the injury -- a large flap and radial shaped tear on the anterior and middle horn -- was unmistakable, consistent with the described accident, and explained plaintiff's complaints of recurrent knee pain that began only after the accident and continued consistently since then. He added that causality was apparent since plaintiff was a young man with no history of knee injury or previous complaints of knee pain. He further stated that the torn meniscus

"is by definition a permanent injury in that the tear or fissure of the meniscus can never spontaneously heal by itself without surgical intervention. Furthermore, once surgically repaired, *the meniscus has permanently lost its pre-injury stability with onset of scar tissue, instability and loss of range of motion and strength, with pain, all of which Mr. Ramkumar now has*

and will continue to have for the rest of his life"
(emphasis added).

He went on to explain the nature of the permanent injury in greater detail:

"Due to the mechanism of trauma he has sustained in this accident, there was a tearing of the right knee muscles, tendons, ligaments, blood vessels and nerves. These structures heal by formation of scar tissue, which is relatively inelastic and permanent in nature and causes significant restriction of motions, limitations of activities and pain."

In addition, in his examination of plaintiff on May 4, 2009, Dr. Manouel found significant limitations in plaintiff's range of motion in flexion in his knee, as well as some continued limitations of motion in his lumbar spine and shoulder.

The motion court granted defendants' cross-motions for summary judgment, concluding that plaintiff failed to satisfy his evidentiary burden of submitting objective medical proof of serious injury causally related to the accident, by failing to offer a *contemporaneous* examination showing limitations in plaintiff's range of motion, or the necessary objective evidence of the significant limitations resulting from the meniscal tear. It also held that a lack of evidence that plaintiff underwent any therapy or treatment required dismissal. The majority affirms on the ground that plaintiff failed to sufficiently explain his cessation of therapeutic treatment.

I respectfully dissent with regard to plaintiff's serious injury claims (other than his 90/180 claim – as to which I agree that he failed to offer the requisite proof to support the claim).

Serious injury may be established under Insurance Law § 5102(d) by a "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system." Establishing that a plaintiff suffered a torn meniscus, or a bulging or herniated disc, as a result of the occurrence, is not enough. These types of soft-tissue injury *may* constitute serious injuries within the meaning of the statute, but only if the necessary showing of objective evidence establishing that the injury resulted in significant physical limitations of significant duration is made by the plaintiff (see *Bamundo v Fiero*, 88 AD3d 831 [2d Dept 2011]; *Colon v Vincent Plumbing & Mechanical Co.*, 85 AD3d 541 [1st Dept 2011]).

In *Toure v Avis Rent A Car Systems, Inc.* (98 NY2d 345, 350-51 [2002]), the Court of Appeals wrote that, in "order to prove the extent or degree of physical limitation," plaintiff can provide either "an expert's designation of a numeric percentage of a plaintiff's loss of range of motion," or "[a]n expert's qualitative assessment of a plaintiff's condition," provided that such evaluation "has an objective basis and compares the

plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system," so that it "can be tested during cross-examination, challenged by another expert and weighed by the trier of fact." While Dr. Manouel did not initially perform quantified range of motion testing, he tendered a "qualitative assessment" of plaintiff's meniscal injuries, reporting that plaintiff experienced pain, buckling and popping of the knee, and that the knee continued to have functional limitations after surgery. Moreover, his assessment was supported by objective evidence, namely the MRI of the knee and the observations during the arthroscopic surgery establishing the existence of the tear, as well as the McMurray test that was performed.

Plaintiff adequately rebutted the assertion by defendants' experts that plaintiff's injuries were degenerative rather than caused by the accident (*see Spencer v Golden Eagle, Inc.*, 82 AD3d 589 [2011]). Plaintiff's radiologist specifically stated that there was no indication of any degenerative condition present when he read the films, and plaintiff's surgeon asserted that in view of plaintiff's age, the absence of any prior complaints, and the nature of the injuries found in MRIs performed weeks after the accident, the subject accident was the sole competent producing cause of plaintiff's injuries.

It was error to reject Dr. Manouel's measurements of plaintiff's limitations in his range of motion in the injured areas simply because those measurements were made in his follow-up examination on May 4, 2009, two years after the accident, and were not "contemporaneous" with the accident. The Court of Appeals explained in *Perl v Meher* (18 NY3d 208 [2011]), that there is no justification for imposing a requirement of "contemporaneous" quantitative measurements, since while "a contemporaneous doctor's report is important to proof of causation [because] an examination by a doctor years later cannot reliably connect the symptoms with the accident ... where causation is proved, it is not unreasonable to measure the severity of the injuries at a later time" (*id.* at 217-218). Here, there is strong evidence causally connecting the injuries to the accident, so the measurements of limitations taken two years later are valid evidence that plaintiff experienced continuing significant limitations due to his injuries. The surgeon's quantification of limitations in plaintiff's range of motion of the knee two years after the accident is therefore sufficient.

In my estimation, the majority's reliance on a so-called cessation of treatment is misplaced here. Injuries are not always treatable by physical therapy, but even when therapy might

help, sometimes the medical coverage of injured plaintiffs limits them to a set number of weeks or sessions or physical therapy, leaving them no choice but to cease treatment. Here, for instance, plaintiff testified during his July 2008 deposition that he had no medical insurance at the time of the accident, that he obtained treatment at the Liberty Medical clinic after this accident, received therapy three days a week for "more than six months," but in response to the question of when he was last treated at the Liberty Medical clinic, he answered "they cut me off like five months," although he added that he did have a subsequent follow-up appointment with Dr. Manouel, whose orthopedic practice was located elsewhere.

In *Pommells v Perez* (4 NY3d 566, 574 [2005]), the Court explained that "[w]hile a cessation of treatment is not dispositive -- the law surely does not require a record of needless treatment in order to survive summary judgment -- a plaintiff who terminates therapeutic measures following the accident, while claiming 'serious injury,' must offer some reasonable explanation for having done so." In the *Pommells* matter, the Court held that dismissal was proper because *neither* the plaintiff *nor* his doctors explained why he did not pursue any treatment for his injuries after the initial six-month period (*id.*), while in the related matter of *Brown v Dunlap*, the gap of

2½ years during which that plaintiff received no treatment for his injuries was explained by his doctor, who said he terminated treatment once he determined further medical therapy would be only palliative in nature (*id.* at 577). Here, the necessary explanation was offered by plaintiff when he said, perhaps inartfully, that his benefits were "cut off" at some point.

The majority suggests that a plaintiff cannot satisfactorily explain the cessation of treatment solely with the information that insurance coverage for continued therapy had ceased. It holds that the plaintiff must offer documentary evidence, "or, at least, an indication as to whether an injured claimant can afford to pay for the treatment out of his or her own funds." This proposal engrafts a new requirement onto our jurisprudence in the area of serious injury under Insurance Law § 5102(d), one that is not justified by the language of *Pommells v Perez*.

In support of imposing such an obligation on plaintiff, the majority cites *Salman v Rosario* (87 AD3d 482 [2011]) and *Jacobs v Rolon*, 76 AD3d 905 [2010]), in which this Court accepted the explanations provided by the plaintiffs that once their no-fault benefits stopped, they could not afford to pay for continued medical care. There is nothing incorrect about these rulings, but they were never intended to establish the minimum acceptable explanation as contemplated in *Pommells v Perez*.

Also offered in support for the majority's ruling is a lower court decision in *Gomez v Ford Motor Credit Co.* (10 Misc 3d 900, 903 [Sup Ct Bronx County 2005]). The court in *Gomez* analyzed the requirements set out in *Pommells v Perez* and concluded that a plaintiff's burden of explaining a gap or cessation in treatment was not satisfied by the explanation that no-fault benefits had been discontinued. The court there held that the plaintiff was required to submit substantiation for the assertion that no-fault benefits were discontinued, adding that "[a]t the very least, counsel for plaintiff should have provided a letter from the insurance carrier as to when and why the carrier discontinued coverage" (*id.*). It termed an unsubstantiated claim "conclusory and nonprobative" (*id.*). It then went even further, blaming the plaintiff for failing to "provide[] an explanation as to why he could not have continued treatment paid out of his own pocket" (*id.*).

This proposed requirement in *Gomez* of "substantiation" of the plaintiff's explanation for the cessation of treatment would engraft onto § 5102(d) an unfair and unreasonable standard of proof. Anyone who has ever dealt with no-fault carriers would understand the likely futility of obtaining the suggested letter from them. The onerous nature of the *Gomez* requirements is highlighted by the companion requirement suggested there -- one

that seems to be adopted by the majority here -- requiring a plaintiff to "explain" why he could not have paid out of pocket to continue his treatment when insurance benefits terminated. If we were to adopt such a requirement, a plaintiff with a substantial, lasting injury that was not healed during the course of the covered therapeutic treatment, would not be entitled to proceed with a lawsuit unless and until the plaintiff either dug deep into savings to pay for continued therapeutic treatment, or explained why his or her financial circumstances did not permit it. Indeed, consistent with *Gomez's* proposed "substantiation" requirement, proof of the plaintiff's financial condition would be necessary.

The fact of the matter is that for most people, when insurance coverage ends, treatment ends. Very few people have the means to pay the substantial fees that the uninsured are charged for medical care. People who are employed have regular expenses on which they must spend their earnings; even people with savings most often have plans for the use of those funds. The right to sue for a serious injury cannot be predicated on the plaintiff paying those substantial fees out of pocket, assuming that the funds exist.

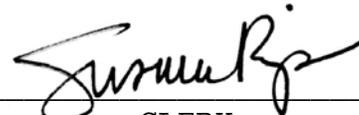
Pommells v Perez requires only that a plaintiff who claims that an injury remains after terminating treatment for it "must

offer some reasonable explanation for having done so" (4 NY3d at 574). It does not treat such an explanation as conclusory or nonprobative in the absence of corroborating documentation. I therefore disagree with the majority's ruling that a reasonable explanation for a gap in treatment due to a cessation of insurance benefits must include documentation or a showing as to whether the plaintiff can afford to pay for the treatment out of pocket.

I would reinstate plaintiff's serious injury claims.

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

ENTERED: APRIL 10, 2012


CLERK

Tom, J.P., Andrias, Catterson, Richter, Abdus-Salaam, JJ.

6814-

Index 601012/08

6815

Merrill Lynch, Pierce, Fenner &
Smith, Incorporated, et al.,
Plaintiffs-Respondents-Appellants,

-against-

Global Strat Inc., etc., et al.,
Defendants,

Ezequiel Nasser, et al.,
Defendants-Appellants-Respondents.

[And Another Action]

Shiboleth LLP, New York (Charles B. Manuel, Jr. of counsel), for appellants-respondents.

Bingham McCutchen LLP, New York (Kenneth I. Schacter of counsel), and Bressler, Amery & Ross, P.C., New York (Dominick F. Evangelista of counsel), for respondents-appellants.

Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered August 9, 2010, awarding plaintiffs the total sum of \$99,013,769 as against the Nasser defendants, unanimously affirmed, with costs. Order, same court and J.H.O., entered January 31, 2011, which granted so much of defendants' motion as sought to dismiss the eighth cause of action and to dismiss the complaint in its entirety as against Albert Nasser for lack of personal jurisdiction, unanimously modified, on the law, to deny the motion as to Albert Nasser, and the appeal therefrom otherwise dismissed, without costs, as academic.

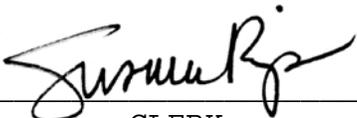
In granting the motion to dismiss as against Albert Nasser for lack of personal jurisdiction, Supreme Court stated that it was vacating the judgment as against him. However, the judgment in the record on appeal names Albert Nasser as a defendant from whom plaintiffs have recovery, and it is that judgment that we affirm. We find that plaintiffs made a prima facie showing that Albert is subject to jurisdiction in New York through evidence that in the first three months of 2008, he actively traded in the New York-based Merrill Lynch accounts of Inversiones, his personal holding company, and that he participated by telephone in a March 2008 meeting with Merrill Lynch in New York concerning the trading activities at issue in this case (*see Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]; *compare OneBeacon Am. Ins. Co. v Newmont Min. Corp.*, 82 AD3d 554, 555 [2011] [no evidence that defendant exercised control over the corporation that purchased insurance policies issued by insurers with principal places of business in New York]).

The Nassers' repeated failure to comply with discovery deadlines or offer a reasonable excuse for their noncompliance with discovery requests, as well as their counsel's misrepresentations in open court as to the cause of one of their violations, give rise to an inference of willful and contumacious conduct warranting the entry of judgment against them (*see Turk*

Eximbank-Export Credit Bank of Turkey v Bicakcioglu, 81 AD3d 494 [2011]). The Nassers were appropriately warned that judgment would be entered against them if their discovery responses were found by the Special Referee to be noncompliant with plaintiffs' requests (*see id.; cf. Corner Realty 30/7 v Bernstein Mgt. Corp.*, 249 AD2d 191, 194 [1998]).

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

ENTERED: APRIL 10, 2012


CLERK

the fact that an invoice is not itemized "does not . . . prevent an account stated from being created" (*Zanani v Schwimmer*, 50 AD3d 445, 446 [2008]; see also e.g. *Fink, Weinberger, Fredman, Berman & Lowell v Petrides*, 80 AD2d 781 [1981], lv dismissed 53 NY2d 1028 [1981]). Plaintiff established entitlement to a total of \$96,539, not just the \$17,558 awarded by the motion court.

On appeal, defendants clarify that their second counterclaim (for bad faith) is for breach of the covenant of good faith and fair dealing inherent in every contract. However, "it is unnecessary for a party to a contract dispute to raise the issue of good faith. The duty of good faith and fair dealing is implicit in the performance of contractual obligations to the extent that a separately stated cause of action asserting breach of that duty is routinely dismissed as redundant" (*Banc of Am. Sec. LLC v Solow Bldg. Co. II, L.L.C.*, 47 AD3d 239, 243-244 [2007] [internal citations omitted], *appeal withdrawn* 16 NY3d 796 [2011]). Therefore, we dismiss the second counterclaim as redundant of the fifth counterclaim (for breach of contract).

The fifth counterclaim should have been dismissed for lack of damages. A counterclaim "is fatally deficient" if "it does not demonstrate how the [counterclaim] defendant's alleged breach of the . . . agreement caused [counterclaim] plaintiffs any injury" (*Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436

[1988]). As in *Gordon*, the pleading "contains only boilerplate allegations of damage" (*id.*). "In the absence of any allegations of *fact* showing damage, mere allegations of breach of contract are not sufficient to sustain a complaint, and the pleadings must set forth *facts* showing the damage upon which the action is based" (*id.* [emphasis added]; see also e.g. *Edelman v Emigrant Bank Fine Art Fin., LLC*, 89 AD3d 632, 633 [2011]). Based on (1) the affidavit that defendant Ira Spanierman submitted in opposition to plaintiff's summary judgment motion and (2) defendants' brief on appeal, it is possible that plaintiff's alleged delay in filing tax forms caused defendants hardship. However, the agreement between plaintiff and Spanierman Gallery specifically disclaimed consequential damages, and such a limitation will be upheld (see e.g. *Metropolitan Life Ins. Co. v Noble Lowndes Intl.*, 84 NY2d 430, 436 [1994]). In addition, the agreement limited plaintiff's liability to "the professional fees [plaintiff] has actually received from [Spanierman Gallery] pursuant to this engagement letter." Such a limitation will also be upheld (see *Florence v Merchants Cent. Alarm Co.*, 51 NY2d 793,

795 [1980])). Defendants do not need discovery to oppose plaintiff's summary judgment motion because the damages that they suffered are "a matter within their own knowledge" (*Duane Morris LLP v Astor Holdings Inc.*, 61 AD3d 418, 419 [2009])).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 10, 2012


CLERK

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

7313 In re Tyieyanna L., and Another,

 Dependent Children Under the
 Age of Eighteen Years, etc.,

 Twanya McK.,
 Respondent-Appellant,

 Coalition for Hispanic Family Services,
 Petitioner-Respondent.

Andrew J. Baer, New York, for appellant.

Law Offices of Raymond L. Colon, New York (Raymond L. Colon of
counsel), for respondent.

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

Order, Family Court, New York County (Jody Adams, J.),
entered on or about March 8, 2011, which denied respondent
mother's motion to vacate orders of disposition, same court and
Judge, entered on or about July 14, 2010, upon her default,
which, upon findings of permanent neglect, terminated her
parental rights to the subject children and committed the custody
and guardianship of the children to petitioner agency and the
Commissioner of Social Services for the purpose of adoption,
unanimously affirmed, without costs.

Respondent failed to demonstrate a reasonable excuse for her
default and a meritorious defense to the petition (see CPLR

5015[a][1]); *Matter of Calvin S.*, 47 AD3d 491 [2008]; *Matter of Jones*, 128 AD2d 403 [1987]). She submitted an affidavit explaining that she had a severe toothache on the day of the hearing and a letter from her dentist stating that she was in his office on that day and was referred to an oral surgeon. However, she failed to notify her counsel, the court, or the agency in advance that she would not appear at the hearings, although her condition did not prevent her from doing so (see *Matter of Amirah Nicole A. [Tamika R.]*, 73 AD3d 428 [2010], *lv dismissed* 15 NY3d 766 [2010]; *Matter of Ciara Lee C. [Lourdes R.]*, 67 AD3d 437 [2009], *lv dismissed* 14 NY3d 756 [2010]).

There is no evidence that respondent completed the programs called for in her plan within the relevant one-year period so as to demonstrate a meritorious defense to the allegations of permanent neglect (see *Matter of Gloria Marie S.*, 55 AD3d 320, 321 [2008], *lv dismissed* 11 NY3d 909 [2009]). Her incarceration

during that period did not excuse her from the requirement that she realistically plan for her children's future (*see Matter of Jayson M.*, 177 AD2d 396 [1991]).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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CLERK

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

7314-

Index 309370/08

7315-

7316 Robertta Ovenseri,
Plaintiff-Respondent,

-against-

St. Barnabas Hospital,
Defendant-Appellant.

Garbarini & Scher, P.C., New York (William D. Buckley of
counsel), for appellant.

Amy Posner, New York, for respondent.

Appeals from order, Supreme Court, Bronx County (Robert E. Torres, J.), entered March 15, 2011, which, among other things, stayed all proceedings in this action for 90 days pending a determination by the Workers' Compensation Board regarding plaintiff's status at the time of the alleged accident, and order, same court and Justice, entered July 19, 2011, which denied as moot defendant's motion to modify the order entered March 15, 2011 by, among other things, deleting the 90-day limit on the stay, unanimously dismissed, without costs, as moot. Order, same court and Justice, entered December 2, 2011, which, to the extent appealed from as limited by the briefs, denied defendant's motion to stay all proceedings in this action pending its appeal of the Board's determination, and thereupon denied its

motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff, a participant in an out-patient program conducted on premises under the control of defendant hospital, alleges that she was injured when she slipped on a wet floor while she was voluntarily assisting during the program's coffee break.

Defendant is not entitled to a stay of the proceedings in this action pending a determination of its appeal by the Board. Indeed, the matter should not have been referred to the Board, as defendant failed to raise the workers' compensation defense until its eve-of-trial application for a stay, after the time for making summary judgment motions had expired (*see Shine v Duncan Petroleum Transport, Inc.*, 60 NY2d 22, 27-28 [1983]; *Sangare v Edwards*, 91 AD3d 513 [2012]). Nor should plaintiff's case be dismissed for her purported failure to timely file a workers' compensation claim. Defendant never raised this argument before the motion court, and it expressly waived the argument in its appeal of the Board's determination denying as time-barred any claim for workers' compensation benefits.

Defendant's appeals from the orders entered March 15, 2011 and July 19, 2011 have been rendered moot by the Board's determination.

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

ENTERED: APRIL 10, 2012


CLERK

Andrias, J.P., Friedman, Acosta, Richter, JJ.

7317 Carl Berg, Index 651431/10
Plaintiff-Appellant,

-against-

Eisner LLP, et al.,
Defendants-Respondents.

Berger & Webb, LLP, New York (Steven A. Berger of counsel), for appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York (Thomas W. Hyland of counsel), for respondents.

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered February 28, 2011, which granted defendants' motion to dismiss the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff claims that defendants committed accounting malpractice by failing to inform him of a possible tax election that would have allowed him to write off a large portion of his securities trading losses. Given the parties' accountant-client relationship, the scope of defendants' duty to plaintiff is no narrower than the terms of the parties' agreement, and may be broader, based on professional accounting standards (*see Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 8 [2008] [the attorney-client relationship is both contractual and inherently fiduciary]). The allegations that defendants

provided plaintiff with tax planning advice concerning his trading income establish that the parties' agreement encompassed the election issue. These allegations also present the question whether defendants' failure to raise the election issue with plaintiff was a departure from professional accounting standards, which is a question that requires expert evidence for its resolution (see e.g. *Menard M. Gertler, M.D., P.C. v Sol Masch & Co.*, 40 AD3d 282 [2007]).

Contrary to defendants' contention, plaintiff adequately pleaded proximate cause (see *Fielding v Kupferman*, 65 AD3d 437, 442 [2009]).

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: APRIL 10, 2012


CLERK

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

7318-

Index 14836/07

7318A Maria Josefa Javier, etc.,
Plaintiff-Respondent-Appellant,

-against-

Henry Audette, et al.,
Defendants-Appellants-Respondents,

Richard A. Milko, Jr., et al.,
Defendants-Respondents.

Martin, Fallon & Mullé, Huntington (Michael Jones of counsel),
for appellants-respondents.

Peña & Kahn, PLLC, Bronx (Diane Welch Bando of counsel), for
respondent-appellant.

Faust Goetz Schenker & Blee, LLP, New York (Peter Kreymer of
counsel), for respondents.

Orders, Supreme Court, Bronx County (John A. Barone, J.),
entered September 19, 2011, which, in this personal injury action
arising out of a multivehicle accident, denied the motion by
defendants Audette Henry s/h/a Henry Audette and Darnell Lemuel
for summary judgment dismissing the complaint and any cross
claims against them, and denied plaintiff's motion for partial
summary judgment on the issue of liability as against defendants
Richard A. Milko, Jr. and Russell Reid Waste Hauling & Disposal
Service Co., Inc. (collectively the Milko defendants),
unanimously affirmed, without costs.

Defendants Henry and Lemuel failed to make a prima facie showing of entitlement to judgment as a matter of law, as the evidence they submitted did not establish the absence of a triable issue of fact as to whether Henry negligently operated the vehicle owned by Lemuel, and whether any negligence on Henry's part caused the accident (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Indeed, Henry did not submit an affidavit or deposition testimony describing her account of the accident, and neither the police accident report nor defendant Milko's deposition testimony described Henry's conduct prior to the collision.

Although the vehicle operated by Milko and owned by Russell Reid rear-ended plaintiff's decedent's vehicle, plaintiff's motion for partial summary judgment was correctly denied. The deposition testimony of the police officer who investigated the accident raised an issue of fact as to whether plaintiff's

decedent was driving under the influence of drugs and thereby caused or contributed to the accident (see *Tann v Herlands*, 224 AD2d 230, 230 [1996]).

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

ENTERED: APRIL 10, 2012


CLERK

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

7319-

7320 In re Jane Aubrey P.,

A Dependent Child Under the
Age of Eighteen Years, etc.,

Cynthia R.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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

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

Tamara A. Steckler, The Legal Aid Society, New York (Claire V.
Merkine of counsel), attorney for the child.

Order, Family Court, New York County (Susan K. Knipps, J.),
entered on or about April 21, 2008, which, insofar as appealed
from as limited by the briefs, following a fact-finding hearing,
determined that respondent mother neglected the subject child,
unanimously affirmed, without costs.

The finding of neglect was supported by a preponderance of
the evidence (*see* Family Court Act § 1012[f]; § 1046[b];
Nicholson v Scopetta, 3 NY3d 357, 368-369 [2004]). The record
shows, *inter alia*, that the mother was diagnosed with bipolar
disorder and engaged in conduct which raised serious questions
about her ability to care for the child. The mother was observed

acting in an inappropriate manner at the hospital during and after the birth of her child, and in the bathroom of the facility that hosted the parenting skills class she attended four months later.

The record does not support the mother's claim that she was improperly denied assigned counsel. The mother repeatedly failed to complete the financial disclosure form and gave varying accounts of her ability to hire counsel. When she finally stated that she earned only \$1,000 per month, the court found that she was indigent and provided assigned counsel. Moreover, the mother was represented by counsel when the fact-finding hearing commenced.

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

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

ENTERED: APRIL 10, 2012


CLERK

to full closure (see *Presley v Georgia*, 558 US ___, ___, 130 S Ct 721, 724 [2010]; *People Mickens*, 82 AD3d 430 [2011], *lv denied* 17 NY3d 798 [2011], *cert denied* 565 US ___, 132 S Ct 527 [2011]; *People v Manning*, 78 AD3d 585, 586 [2010], *lv denied* 16 NY3d 861 [2011], *cert denied* 565 US ___, 132 S Ct 268 [2011]).

Defendant did not preserve his present claim that closure of the courtroom to the general public was unwarranted, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits (see *Waller v Georgia*, 467 US 39 [1984]; *People v Ramos*, 90 NY2d 490, 497 [1997], *cert denied sub nom. Ayala v New York*, 522 US 1002 [1997]).

Defendant's ineffective assistance of counsel claim is unreviewable on direct appeal because it involves matters outside the record concerning counsel's reasons for making a particular strategic choice (see *People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (see *People v Benevento*, 91 NY2d 708, 713-714 [1998]; see also *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that the single error he alleges deprived him of a fair

trial or affected the outcome of the case (see *Strickland*, 466 US at 694).

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 10, 2012


CLERK

examinations of plaintiffs in November 2009 and February 2010, found no neurological deficits and full ranges of motion in both plaintiffs' cervical and lumbar spines, and in Barry's right knee, and concluded that any alleged injuries had resolved. Further, the affirmed MRI reports of defendants' radiologist noted an absence of evidence of recent trauma or acute injuries to the spines (*see Porter v Bajana*, 82 AD3d 488 [2011]; *Amamedi v Archibala*, 70 AD3d 449, 449 [2010], *lv denied* 15 NY3d 713 [2010]). The physicians' failure to review plaintiffs' medical records does not require denial of defendants' motion, as the doctors detailed the objective tests they employed during the examinations to find full ranges of motion, and the radiologist's finding of absence of recent trauma was based on an independent review of the MRI films (*see Canelo v Genolg Tr. Inc.*, 82 AD3d 584 [2011]; *Clemmer v Drah Cab Corp.*, 74 AD3d 660, 660-661 [2010]; *DeJesus v Paulino*, 61 AD3d 605, 607 [2009]).

Neither plaintiff raised a triable issue of fact to defeat summary judgment, as none of their medical evidence was submitted in admissible form. Their radiologists' and physiatrist's reports were unaffirmed (*see CPLR 2106; Lazu v Harlem Group, Inc.*, 89 AD3d 435 [2011]; *Pinkhasov v Weaver*, 57 AD3d 334 [2008]). Although their chiropractor affirmed his reports, reports of chiropractors must be subscribed before a notary or

other authorized official (see *Shinn v Catanzaro*, 1 AD3d 195, 197-198 [2003]; see also CPLR 2106).

Defendants did not submit any evidence contradicting plaintiff Barry's allegations and testimony that she was confined to home and was unable to work for three months, or any evidence negating existence of a 90/180-day injury (see *Suazo v Brown*, 88 AD3d 602 [2011]; *Alozie v Tempesta & Son Co., Inc.*, 83 AD3d 535 [2011]). However, the reports of defendants' radiologist finding only degenerative changes related to Barry's age and body habitus, and Barry's own deposition testimony that she had injured her lower back before the accident, established prima facie lack of causation, and Barry failed to submit any admissible evidence sufficient to raise an issue of fact (*Mitrotti v Elia*, 91 AD3d 449 [2012]; *Jimenez v Polanco*, 88 AD3d 604 [2011]).

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

ENTERED: APRIL 10, 2012


CLERK

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

7325 Patrick Reid, et al., Index 301426/10
Plaintiffs-Appellants,

-against-

I Grant Inc., et al.,
Defendants-Respondents.

Rodman and Campbell, P.C., Bronx (Hugh W. Campbell of counsel),
for appellants.

Order, Supreme Court, Bronx County (Wilma Guzman, J.),
entered on or about October 18, 2010, which, to the extent
appealed from as limited by the brief, denied plaintiff Patrick
Reid's motion seeking a judgment declaring defendants I Grant
Inc., Ivorine Grant, Robert Johnson and Salmon Johnson in breach
of a contract of sale of real property and that plaintiff was
entitled to a return of his \$10,000 down payment, held in escrow
by defendant Stella Azie, Esq., and for a money judgment in the
amount of \$5802, related to plaintiffs' lease of commercial space
on the premises, and granted defendants' cross motion to dismiss
Reid's claims for breach of contract and for a money judgment,
declared Reid in default under the contract of sale and directed
that Reid's down payment be transferred to defendant seller I
Grant Inc. as liquidated damages in accordance with the parties'
contract of sale, unanimously modified, on the law, to deny the

cross motion as to dismissal of Reid's claim for breach of contract, and to vacate the declaration that Reid was in default of the contract of sale and the directed transfer of the down payment to defendant I Grant Inc., and otherwise affirmed, without costs.

Triable issues existed whether Reid's lender declined to issue a mortgage commitment based upon requirements that neither party to the contract of sale had an obligation to rectify or cure (*see generally Rustum v Pinto*, 89 AD3d 574 [2011]; *Zellner v Tarnell*, 65 AD3d 1335 [2009]). Reid's lender allegedly would not extend a loan commitment to Reid after existing violations were noted on the premises in the lender's lien search. While Reid did agree to terms in the contract of sale that relieved the seller from the boilerplate obligation of curing violations on the property, Reid did not, in turn, assume the obligation to remove the violations to the satisfaction of his proposed mortgage lender. To the extent Reid failed to annex to his motion a copy of his lender's formal decision not to extend mortgage financing given the circumstances, and inasmuch as such letter was required to be delivered to the seller in accordance with Rider paragraph 2 to the contract of sale, Reid did not establish his right to a declaration that his down payment be returned to him.

The grant of defendants' cross motion directing, inter alia, that I Grant Inc. recover Reid's down payment as liquidated damages, was error inasmuch as I Grant Inc. did not offer evidence to show that its lender had approved a short sale to Reid. A party to a contract of sale that alleges damages directly flowing from a breach of such contract must show that he or she was ready, willing and able to meet his or her obligations under such contract, but for the other party's breach (see generally *Pesa v Yoma Dev. Group, Inc.*, __ NY3d __, 2012 NY Slip Op 856 [2012]); *Farahzad v Monometrics Corp.*, 119 AD2d 721 [1986]). Defendants did not satisfy this burden.

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

ENTERED: APRIL 10, 2012


CLERK

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

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

ENTERED: APRIL 10, 2012


CLERK

alarm and fear for his physical safety.”

These allegations were sufficient to warrant the conclusion that the victim suffered substantial pain. As in *People v Henderson* (92 NY2d 677 [1999]), based on the allegations, “a jury could certainly infer that the victim felt substantial pain” (*id.* at 680). We note that “substantial pain” (Penal Law § 10.00[9]) simply means “more than slight or trivial pain” (*People v Chiddick*, 8 NY3d 445, 447 [2007]).

We find the sentence excessive to the extent indicated.

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

ENTERED: APRIL 10, 2012


CLERK

to detect the return of disease. He testified that, although blood tests performed in June 2000, December 2000 and March 2001 revealed increasing levels of tumor markers, and a June 2001 CT scan showed recurrence of decedent's disease, his treatment plan was to intervene surgically only in the event that decedent became symptomatic, as surgery would only be palliative in nature. Defendant stopped treating decedent in May 2003 and in August 2003, another physician performed surgery in an unsuccessful attempt to remove or "debulk" decedent's tumor. She died approximately six weeks later.

At trial, plaintiff's experts opined that defendant's failure to perform a second surgery after a rise in tumor markers and the results of the June 2001 CT scan constituted a deviation from accepted medical practice. While defendant's experts disagreed with plaintiff's experts, the weight to be accorded to conflicting expert testimony is within the province of the jury (*see Torricelli v Pisacano*, 9 AD3d 291 [2004], *lv denied* 3 NY3d 612 [2004]). The jury clearly credited the testimony of plaintiff's experts on the issue of deviation from the standard of care and its determination on that issue was not one that "could not have been reached on any fair interpretation of the evidence" (*Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995] [internal quotation marks omitted]).

However, plaintiff failed to establish that defendant's negligence was "a substantial factor in producing the injury" as the "injury [wa]s one which might naturally occur" in the progress of decedent's disease and in the absence of negligence (*Mortensen v Memorial Hosp.*, 105 AD2d 151, 158 [1984]). Plaintiff's experts' speculation and conclusory assertions that decedent would have otherwise had a more favorable prognosis is insufficient to establish causation (see *Mosezhnik v Berenstein*, 33 AD3d 895, 897 [2006]; *Rodriguez v Montefiore Med. Ctr.*, 28 AD3d 357, 357-358 [2006]).

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

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

ENTERED: APRIL 10, 2012


CLERK

original commitment sheet did not mention PRS, the original sentencing court had imposed it orally, notwithstanding the court's trivial error in terminology (see *People v McFarland*, 88 AD3d 547 [2011], *lv denied* 18 NY3d 860 [2011]).

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

ENTERED: APRIL 10, 2012


CLERK

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

7331-

Index 104025/08

7332 Danielle Jean-Louis,
Plaintiff-Respondent,

-against-

Modou Gueye, et al.,
Defendants-Appellants.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for appellants.

Law Office of A. Ali Yusaf & Associates, Richmond Hill (Stephen A. Skor of counsel), for respondent.

Order, Supreme Court, New York County (George J. Silver, J.), entered April 14, 2011, which, in an action for personal injuries, denied defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d), and granted plaintiff's cross motion for partial summary judgment as to her 90/180-day claim, unanimously modified, on the law, to deny plaintiff's cross motion, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered October 12, 2011, which, insofar as it granted reargument, adhered to the prior order, unanimously dismissed, without costs, as academic.

Defendants met their prima facie burden with respect to the

permanent consequential and significant limitation categories by offering the affirmation of an orthopedic surgeon who found normal ranges of motion for plaintiff's cervical spine, lumbar spine, left and right hips, and left and right knees (see Insurance Law § 5102[d]; *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]). Plaintiff raised an issue of fact in opposition by submitting the MRI reports of her lumbar spine showing bulges at L4-5 and L5-S1, of her cervical spine showing disc bulges at C5-C6, and a grade II tear of the MCL of plaintiff's right knee, along with the affirmation of her orthopedic surgeon stating that such injuries were caused by the accident or had been exacerbated thereby, and that each of those body parts suffered losses in their range of motion as a result of the accident.

We reject defendants' argument that the affirmation of plaintiff's orthopedic surgeon is rendered speculative because of his failure to reconcile the notation made on plaintiff's emergency room records indicating a full range of motion of her cervical spine. Those records are unaffirmed, fail to indicate any objective instruments or criteria used to make such a finding, and fail to compare normal values (see *Pommells v Perez*, 4 NY3d 566, 573-574 [2005]; *Rosa-Diaz v Maria Auto Corp.*, 79 AD3d 463, 464 [2010]; *DeJesus v Paulino*, 61 AD3d 605 [2009]). Further, contrary to defendants' arguments, plaintiff's

orthopedic surgeon set forth an adequate basis for relating the accident as the cause of plaintiff's injuries or the exacerbation thereof (*see Perl v Meher*, 18 NY3d 208 [2011]). We also reject defendants' arguments pertaining to plaintiff's alleged gap in treatment because it is adequately explained by her orthopedic surgeon's finding that her improvement plateaued (*see Pommells v Perez*, 4 NY3d at 574; *Mercado-Arif v Garcia*, 74 AD3d 446 [2010]).

As to plaintiff's 90/180-day claim, Supreme Court properly found that plaintiff met her prima facie burden with respect thereto. Plaintiff submitted evidence that her orthopedic surgeon instructed plaintiff to remain out of work and substantially restrict her day to day activities, finding that she was "totally disabled" during the relevant statutory period. Plaintiff testified that she had no choice but to do so given the fact that she underwent two surgeries during the relevant period. This was further corroborated by the affirmation from her employer stating that plaintiff was absent from work from February 12, 2008, the date of the accident, until June 23, 2008. However, defendants raised an issue of fact as to whether plaintiff was actually medically prevented from going to work and whether any injuries she may have experienced were caused by the accident or preexisted the accident. Plaintiff's emergency room records show that she was discharged on the day of the accident

with no restrictions and a full range of motion in her neck. Defendants' radiologists opined that plaintiff's MRIs showed no cervical or lumbar spine abnormalities and a preexisting knee condition unrelated to the accident, and their orthopedic surgeon opined that plaintiff suffered no injury to her spine, that the procedure performed on plaintiff's lumbar spine was not medically indicated, and that she had a preexisting knee condition (*see DeJesus*, 61 AD3d 605; *Black v Regalado*, 36 AD3d 437 [2007]).

We have considered the parties' remaining contentions, and find them unavailing.

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

ENTERED: APRIL 10, 2012


CLERK

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

7333-

Index 116356/10

7333A In re Jennifer Rodriguez,
Petitioner,

-against-

New York City Department of
Housing Preservation and Development,
Respondent.

- - - - -

In re Jennifer Rodriguez,
Petitioner-Appellant,

-against-

New York City Department of
Housing Preservation and Development,
Respondent-Respondent.

Richard Paul Stone, New York, for petitioner/appellant.

Michael A. Cardozo, Corporation Counsel, New York (Graham
Morrison of counsel), for respondent/respondent.

Determination of respondent New York City Department of
Housing Preservation and Development, dated August 19, 2010,
which, after a hearing, terminated petitioner's section 8 housing
subsidy, unanimously confirmed, the petition denied and the
proceeding brought pursuant to CPLR article 78 (transferred to
this Court by order of the Supreme Court, New York County [Emily
Jane Goodman, J.], entered April 15, 2011), dismissed, without
costs. Appeal from the foregoing order, insofar as it
transferred the proceeding to this Court, unanimously dismissed,

without costs, as taken from an order that is not appealable as of right (CPLR 5701[b][1]).

Respondent's determination was supported by substantial evidence. The record demonstrates that petitioner violated the agency's policies requiring truthful and complete reporting of household income (*Mormon v New York City Dept. Of Hous. Preserv. & Dev.*, 81 AD3d 528 [2011]). Petitioner was given ample opportunity to proffer a defense to, or explanation for, the charges, and she did, in fact, articulate several reasons why she did not accurately report her income, including a fear that if she reported her earnings, she would lose her section 8 subsidy. She conceded that her failure to accurately report her income was based on "bad judgment."

Her argument, raised for the first time in this proceeding, that she suffers from a mental illness that rendered her incapable of truthfully reporting her income, may not be considered (see *Matter of Lee v Department of Hous. Preserv. & Dev. of City of N.Y.*, 48 AD3d 376 [2008]). In any event, the hearing representative had no duty to inquire as to petitioner's mental health since there was no indication that she was suffering from any mental incapacity (cf. *Matter of Bush v Mulligan*, 57 AD3d 772, 774-775 [2008]). Furthermore, petitioner

fails to provide any evidence that her alleged depression rendered her incapable of truthfully reporting her income.

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

ENTERED: APRIL 10, 2012


CLERK

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

7334N Broadway 26 Waterview, LLC, etc., Index 602318/09
 Plaintiff-Appellant,

-against-

Bainton, McCarthy & Siegel, LLC,
Defendant-Respondent.

Itkowitz & Harwood, New York (Jay B. Itkowitz of counsel), for
appellant.

Bainton McCarthy LLC, Rockville Centre (John G. McCarthy of
counsel), for respondent.

Order, Supreme Court, New York County (Jane S. Solomon, J.),
entered June 16, 2011, which, to the extent appealed from as
limited by the briefs, denied plaintiff landlord's motion for
leave to amend the complaint to add additional defendants and new
causes of action sounding in alter ego and successor liability,
and under the Debtor and Creditor Law, unanimously affirmed, with
costs.

In this action to recover rent arrears allegedly owed by
defendant limited liability company, the motion court properly
exercised its discretion in denying the motion, as the proposed
amended pleadings lack merit (*see 360 W. 11th LLC v ACG Credit
Co. II, LLC*, 90 AD3d 552, 553 [2011]; *see also Sepulveda v Dayal*,
70 AD3d 420, 421 [2010]). None of the proposed individual
defendants, former partners of defendant, were signatories to the

original lease, and thus they cannot be held liable for the rent arrears (see *Matias v Mondo Props. LLC*, 43 AD3d 367, 367-368 [2007]; *American Theatre for the Performing Arts, Inc. v Consolidated Credit Corp.*, 45 AD3d 506 [2007]; Limited Liability Company Law § 609[a]). In addition, the proposed amendments asserting that, after hiring defendant's partners, the proposed defendant law firm became responsible for the rent arrears under the theory of successor liability fail as a matter of law, as there was no showing that the firm expressly or impliedly assumed defendant's contractual liability, that there was a consolidation or merger of defendant and the firm, that the firm was a mere continuation of defendant, or that a transaction was entered in order to fraudulently escape rent obligations (see *Schumacher v Richards Shear Co.*, 59 NY2d 239 [1983]; *Nationwide Mut. Fire Ins. Co. v Long Is. A.C., Inc.*, 78 AD3d 801, 801-802 [2010]). Plaintiff failed to raise a triable issue as to continuity of management merely by alleging that the firm hired defendant's

former partners (see *Kretzmer v Firesafe Prods. Corp.*, 24 AD3d 158, 159 [2005]).

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

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

ENTERED: APRIL 10, 2012


CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David Friedman
James M. Catterson
Dianne T. Renwick
Sheila Abdus-Salaam, JJ.

3944
Index 121119/02

x

Bernard Lewis,
Plaintiff-Respondent,

-against-

Joseph Caputo, etc.,
Defendant-Appellant,

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

x

Defendant Joseph Caputo appeals from the judgment of the Supreme Court, New York County (Milton A. Tingling, J.), entered May 5, 2009, which, after a jury trial, awarded plaintiff the principal sum of \$50,000 as against him, and bringing up for review an order, same court and Justice, entered June 30, 2008, which, denied his motion for judgment notwithstanding the verdict, or, in the alternative, to set aside the verdict.

Michael A. Cardozo, Corporation Counsel, New York (June A. Witterschein, John Hogrogian and Pamela Seider Dolgow of counsel), for appellant.

Michael J. Andrews, P.C., New York (Michael J. Andrews of counsel), for respondent.

RENWICK, J.

Defendant Caputo, an investigator for the New York City Department of Investigation (DOI), appeals from a jury verdict in favor of plaintiff in an action for false arrest. The jury found defendant liable for an unlawful arrest stemming from plaintiff's possession of a stolen laptop computer. Defendant arrested plaintiff despite plaintiff's denial that he knew that the laptop he had bought from his co-employee -- who turned out to be the computer thief -- was stolen, and the inability of the thief -- who was also plaintiff's accuser -- to remember whether he had informed plaintiff before the sale that the laptop was stolen. At the conclusion of trial, defendant moved for judgment notwithstanding the verdict or, in the alternative, to set aside the verdict on the ground that the trial court had made prejudicial comments. The principal issue in this appeal is whether the trial evidence, viewed in a light most favorable to plaintiff, established as a matter of law the affirmative defense of probable cause to arrest.

In August 1999, the New York City Administration for Children's Services (ACS) received a donation of 124 laptop computers to be delivered to indigent high school students who intended to pursue higher education. The laptops were stored at

ACS's headquarters at 150 William Street, in Manhattan. Upon receipt of the computers, ACS immediately began to distribute them. But not fast enough. In September, ACS discovered that some of the laptops were missing. At the time, plaintiff and his accuser, Elias Polanco, were both employed by a private firm, as computer tech assistants for ACS at 150 Williams Street.

Plaintiff testified that Polanco had told him in early September that he was seeking to sell his laptop. One day, after work, plaintiff and Polanco took the subway together and exited at Polanco's station, where plaintiff waited while Polanco went to get the laptop. Shortly thereafter, Polanco returned and handed the laptop to plaintiff, who looked at it for about 10 minutes and then brought it to his girlfriend; plaintiff had the laptop in his possession for about an hour. According to plaintiff, he was unaware at the time that ACS had received laptops or that any had been stolen. Nothing about the laptop led him to believe it was stolen or that Polanco was not its owner; it had a faulty battery, was missing a removable CD drive, and needed parts replaced.

In November, ACS notified DOI about the missing computers. Defendant Caputo (defendant), a deputy inspector general for DOI, was assigned to investigate the complaint. According to

defendant, Polanco became a suspect primarily because he had access to the keys to the room where the computers were stored and because of the presence of his fingerprints on empty computer boxes in the storage room.

Defendant interviewed Polanco on January 26 and 27, 2000. During the first interview, Polanco told defendant that he had heard rumors that 16 or 17 computers were missing; defendant heard about the rumors from others, too. According to defendant, during the first interview, Polanco tried to provide an innocent explanation for the presence of his fingerprints on empty computer boxes at ACS. During the second interview, defendant concluded that Polanco had not been truthful during the first, minimizing his involvement and blaming the theft on others. Defendant testified that Polanco had described a conversation in which he told plaintiff that the laptop he had sold him was stolen; however, defendant conceded that Polanco had never said when that conversation took place. In other words, Polanco could not tell defendant whether he had told plaintiff the laptop was stolen before selling it to him.

On January 28, 2000, upon defendant's instructions, Polanco wore a wire and conducted a conversation with plaintiff during which he tried to get plaintiff to state how much he had paid

for the laptop and to admit that he knew it was stolen at the time he had taken possession of it. The transcript of the conversation between plaintiff (BL) and Polanco (EP), which was placed in evidence at trial is, in pertinent part, as follows:

“EP: You still have that computer that I sold you? Your girlfriend has it?

BL: Yeah.

EP: Can you give it to me, can you get it back?

. . . .

BL: Why what happened?

EP: Somebody told.

BL: Somebody snitched?

EP: Somebody snitched. You remember, you remember I told you how we got ['] them?

BL: Yeah.

EP: From upstairs, how we took them from upstairs. You remember that?

BL: Yeah.

EP: Somebody said something and they giving me time to, like, collect them all back.

BL: Fucking snitches, who the fuck did that?

EP: You think I[']d be smiling if I knew who did it[?]

BL: But you know what, you know what. O.K., where did you get them from?

EP: From upstairs, remember I told you I got them from

upstairs.

BL: You took them out of [unintelligible] desk, some shit?
So how could they blame, how could they f... [sic], how
can they pinpoint you? They can[']t pinpoint you.
They have no evidence.

EP: Cause somebody said, and they tracked it down, and they
said he[']s the one who did it . . .

BL: Like I don[']t want nobody, you know how nosy people is
[unintelligible].

EP: Don[']t worry about that, we cool.

BL: Alright, word [sic].

. . .

BL: You told them that you took them?

EP: That I took them?

BL: Yeah.

EP: I didn[']t tell them nothing, they already knew
everything. They . . . knew the date, the hour,
everything, everything.

BL: Get the fuck out of here, the hour, get the fuck out of
here.

EP: Who must have said something, it must have been Robert.

BL: Huh?

EP: Rob . . . you asked me ... maybe Robert said something

BL: Who? The guy that was with you [unintelligible].
Stupid motherfucker."

Nowhere in this conversation did plaintiff state that he
knew the computer was stolen before he purchased it. Indeed,

defendant, who recorded this interview, admitted at trial that plaintiff did not state during the conversation that he knew before he bought the laptop that Polanco had stolen it from ACS.

In February 2000, defendant interviewed plaintiff, who said he would try to retrieve the computer. Four months later, on May 18, 2000, defendant placed plaintiff under arrest, and the New York County District Attorney charged him with criminal possession of stolen property in the fourth degree. However, more than a year later, on June 4, 2001, the District Attorney discontinued the action. In December 2002, plaintiff commenced this action seeking damages for unlawful arrest.

During his testimony, defendant stated that he was a peace officer, and that the Criminal Procedure Law (CPL) required him to obtain authority before making an arrest. When he sought to show that he had probable cause based on a conversation in which an assistant district attorney directed him to arrest defendant, the court precluded this evidence because during discovery defense counsel had prohibited plaintiff from inquiring into that conversation. In light of defendant's inability to prove probable cause, the court initially directed a verdict against him. However, after defense counsel asked the court to take judicial notice of a peace officer's authority to arrest as set

forth in the statute in CPL 140.25(3)(b), defendant was allowed to submit further evidence of probable cause.

In charging the jury regarding a peace officer's statutory authority to arrest, the court summarized defendant's view that he could not effect an arrest without obtaining actual authority, and stated that "that testimony appears to have not been true." Defense counsel did not, at that juncture, object or move for a mistrial based on the court's comment. It was not until the next morning that defense counsel moved for a mistrial on the ground that the court had commented prejudicially on defendant's credibility. Although counsel stated her belief that the court did not mean it in that sense, she felt that "the bell was already rung" and that it was "very prejudicial."

The court denied the motion for a mistrial, and counsel sought a curative instruction. The court declined to give a curative instruction. However, the court proposed to clarify that when it said "not true," that was not a reflection on defendant's credibility but, rather, an indication that his view was incorrect. The court ultimately gave that instruction, and no exceptions were taken.

The jury found that defendant failed to show probable cause, and awarded plaintiff \$50,000 for false arrest. Defendant then

moved for judgment notwithstanding the verdict on the ground that the evidence showed probable cause as a matter of law or, in the alternative, to set aside the verdict on the ground that the trial court's "not true" comment was prejudicial. The court denied the motion.

We first address defendant's argument that the trial court erred by denying the motion for a directed verdict on the claim of false arrest because the trial evidence established as a matter of law that there was probable cause for plaintiff's arrest. Before a court can conclude that a jury verdict is not supported by legally sufficient evidence, it must first find that there is "simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). The evidence must be viewed in the light most favorable to the prevailing party (*see Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]; *Dublis v Bosco*, 71 AD3d 817 [2010]).

A showing of probable cause is a complete defense to an action alleging false arrest or false imprisonment (*see Marrero v City of New York*, 33 AD3d 556 [2006]; *Strange v County of Westchester*, 29 AD3d 676 [2006]; *Molina v City of New York*, 28

AD3d 372 [2006])). However, where, as here, an arrest is made without a warrant, it is presumed that the arrest was unlawful and defendant is required to establish the affirmative defense of probable cause (see *Lynn v State of New York*, 33 AD3d 673 [2006]; *Wallace v City of Albany*, 283 AD2d 872, 873 [2001])).

"[T]he issue of probable cause is a question of law to be decided by the court only where there is no real dispute as to the facts or the proper inferences to be drawn [therefrom]" (*Wyllie v District Attorney of County of Kings*, 2 AD3d 714, 718 [2003] [internal quotations omitted]; *Orminski v Village of Lake Placid*, 268 AD2d 780, 781 [2000])). Conversely, if the facts are disputed or there are varying inferences to be drawn therefrom regarding the question of probable cause, the issue is one to be determined by the jury (*Parkin v Cornell Univ.*, 78 NY2d 523, 529 [1991], citing *Veras v Truth Verification Corp.*, 87 AD2d 381, 384 [1982], *affd* 57 NY2d 947 [1982])).

In the present case, the evidence at trial gave rise to a number of factual disputes bearing on the issue of probable cause. As indicated, the basis for plaintiff's arrest was twofold: information provided by the computer thief, Polanco, and plaintiff's allegedly incriminating statements to Polanco. Initially, we note that this case presents the exception to the

general rule that an accusation by an identified citizen is sufficient to provide probable cause to arrest where the witness's credibility is not at issue. *Burgio v Ince* (79 AD3d 1733 [2010]) and *Sital v City of New York* (60 AD3d 465, 466 [2009], *lv dismissed* 13 NY3d 903 [2009]), illustrate this exception. In *Burgio*, the Second Department upheld the trial court's denial of the defendant's motion for summary judgment on the issue of probable cause because the testimony of various witnesses contradicted the version provided by the defendant of his investigation preceding the arrest, raising issues of credibility (79 AD3d at 1375).

In *Sital*, this Court held that the defendant failed to establish the affirmative defense of probable cause as a matter of law. Specifically, this Court held that a rational jury could have found that there was no probable cause for the plaintiff's arrest because the accusation by an identified citizen, which was the sole basis for the arrest, was not sufficiently reliable, given the investigating officer's doubts about the witness's credibility (60 AD3d at 466).

Here, the information defendant obtained from his two interviews of Polanco raised doubts about the accuser's credibility. For instance, during the first interview, Polanco

tried to provide an innocent explanation for the presence of his fingerprints on empty computer boxes at ACS. During the second interview, defendant concluded that Polanco had not been truthful during the first, minimizing his involvement and blaming the thefts on others. Under these circumstances, a reasonable jury could have found that defendant did not, in good faith, believe that Polanco's accusatory statements against plaintiff were credible, or that his belief did not rest on grounds that would induce an ordinarily prudent officer to believe he had probable cause to arrest plaintiff for knowing possession of stolen property.

Significantly, there is no evidence in the record indicating that plaintiff knew the computer was stolen when he purchased it. In fact, Polanco never stated that he revealed to plaintiff that the laptop was stolen before selling it to him. Indeed, defendant's use of Polanco to attempt to obtain incriminating statements from plaintiff indicated defendant's unwillingness to proceed solely on Polanco's statements that he had sold the computer to plaintiff.

Moreover, the taped conversation between Polanco and plaintiff, as summarized above, suggests, at most, that plaintiff knew as of January 28, 2000, the date of the taped conversation,

that the laptop was stolen. Nowhere in the recording did plaintiff admit that he knew it was stolen several months earlier, either in late August or early September 1999, before obtaining possession of it. Absent any direct incriminating statement on the issue, defendant, at best, could infer from the recorded conversation that plaintiff knew *at some point* that he had purchased stolen property. However, given the competing inferences that could have been drawn from plaintiff's conversation with Polanco, the jury could well have concluded that plaintiff learned, in the months following his purchase of the laptop, from the rumor mill at ACS, that laptops had been stolen. Apart from this inference, there was no evidence offered by defendant to show that plaintiff had knowledge that the computer was stolen at the time he purchased it.

Nor was the circumstantial evidence at trial necessarily indicative of plaintiff's knowledge that the laptop was stolen property. For instance, while the low price of the laptop – it had a market value of \$2,000 and was sold to plaintiff for \$400 – could be understood as a circumstantial indicator that it was stolen, plaintiff had denied knowing of the thefts and had testified that Polanco told him it was his own laptop. Since it was a used computer needing replacement parts, purchased from a

fellow computer tech working for the same employer, there was a rational basis for a reasonable juror to justify the price. Likewise, contrary to defendant's contention, adopted by the dissent, the fact that the transfer of possession took place in the subway does not necessarily suggest furtiveness or that it was obviously stolen property. Indeed, since it was supposed to be Polanco's own laptop that he was selling from his home, it would have been more difficult for him to bring it to work and transfer it to plaintiff there.

Finally, the dissent makes much of the fact that plaintiff expressed outrage that a snitch was responsible for Polanco's getting caught. However, the dissent ignores the fact that people, law abiding citizens included, have different attitudes about snitches, and life experiences contribute to those attitudes. Indeed, it is an undeniable fact that police work with informants has a checkered history in some communities. Thus, the inference to be drawn from plaintiff's derogatory remarks toward the unknown snitch was an issue within the province of the jury, not the exclusive domain of the court, under the particular circumstances of this case.

The dissent's attack on the majority's position is relentless but misguided. Contrary to the dissent's contention,

the majority's position is not "that a jury question was presented because the information on which defendant relied was theoretically consistent with the hypothesis that plaintiff did not learn that the computer in question had been stolen until after he conveyed it to someone else." Rather, as the majority's analysis makes clear, in determining whether the jury verdict should stand, our analysis focuses on whether the evidence adduced at trial supports a jury finding that it was not reasonable for defendant to conclude that plaintiff had committed a crime. Thus, the dissent's assertion that the majority is "[l]aboring under a misconception of the central issue in the case" does not ring true.

On the contrary, viewing the facts in the light most favorable to plaintiff and drawing every inference in his favor (see *Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]), a rational jury could have found that there was no probable cause for plaintiff's arrest because the accusation from the criminal suspect, made four months before plaintiff's arrest, was not sufficiently reliable, particularly given that the investigating officer had doubts about the accuser's credibility and the accuser did not tell defendant that he had revealed to plaintiff that the laptop was stolen before selling it to him. A rational

jury could have found lack of probable cause for plaintiff's arrest because the evidence upon which defendant relied to conclude that plaintiff knew at the time of purchase that the laptop was stolen property was highly equivocal. Under the circumstances, it simply cannot be said that there is no valid line of reasoning and permissible inferences that could possibly have led rational people to the conclusion reached by the jury on the basis of the evidence presented here (*Cohen v Hallmark Cards*, 45 NY2d 493, 499).

The trial court also correctly denied defendant's motion to set aside the verdict on the ground of prejudicial comments by the court. Contrary to defendant's contention, the court's comment that defendant's testimony regarding his authority as a peace officer was "not true" was directed, as defense counsel conceded at trial, not at defendant's veracity but at the accuracy of his legal opinion; it was not prejudicial. In any event, defendant's objection and motion for a mistrial were untimely. Moreover, the court gave an appropriate curative instruction that was not objected to and is presumed to have been followed by the jury (*see Askin v City of New York*, 56 AD3d 394, 395-396 [2008], *lv dismissed* 12 NY3d 769 [2009]).

Accordingly, the judgment of the Supreme Court, New York

County (Milton A. Tingling, J.), entered May 5, 2009, after a jury trial, awarding plaintiff the principal sum of \$50,000 as against defendant Joseph Caputo, and bringing up for review an the order of the same court and Justice, entered June 30, 2008, which denied defendant Caputo's motion for judgment notwithstanding the verdict, or, in the alternative, to set aside the verdict, should be affirmed, without costs.

All concur except Friedman and Abdus-Salaam, JJ. who dissent in an Opinion by Friedman, J.

FRIEDMAN, J. (dissenting)

Plaintiff was arrested for criminal possession of a laptop computer stolen from his workplace at the City of New York's Administration for Children's Services (ACS) after he was caught on tape making inculpatory statements to the coworker who sold it to him. The seller (who was wearing a hidden recording device) requested that plaintiff get the laptop back from his girlfriend (to whom he had given it) because "[s]omebody told." Plaintiff's first reaction to this request was to ask, not "What are you talking about," but: "Somebody snitched?" In addition, plaintiff responded in the affirmative when the seller asked if he "remember[ed]" that he had been told that the seller "took them [the 17 computers that had been stolen] from upstairs." Later in the conversation, plaintiff asked who the informant was; used obscene language to refer to the informant; asserted his disbelief that the authorities could "pinpoint" the seller as the thief; and, when the seller asked him to turn down the music he was playing, expressed concern that the conversation not be overheard by "nosy" people. While it is evident from the transcript of the conversation that plaintiff was outraged that someone had exposed the scheme and anxious about the possibility that his involvement might be discovered, at no point in the

conversation did he express surprise, anger or even regret that he had been sold a stolen computer.¹

¹The transcript of the recorded conversation between plaintiff (BL) and the seller (EP), which was placed in evidence at trial, runs in part as follows:

“EP: You still have that computer I sold you?
Your girlfriend has it?

BL: Yeah.

EP: Can you give it to me, can you get it back?

. . .

BL: Why what happened?

EP: Somebody told.

BL: Somebody snitched?

EP: Somebody snitched. You remember, you remember I told you how we got [']em?

BL: Yeah.

EP: From upstairs, how we took them from upstairs. You remember that?

BL: Yeah.

EP: Somebody said something and they giving me time to, like, collect them all back.

. . .

BL: Fucking snitches, who the fuck did that?

EP: You think I[']d be smiling if I knew who did it[?]

BL: But you know what, you know what. O.K., where did you get them from?

EP: From upstairs, remember I told you I got them from upstairs.

BL: You took them out of [unintelligible] desk, some shit? So how could they blame, how could they f... [sic], how can they pinpoint you? They can['t] pinpoint you? They have no evidence.

EP: Cause somebody said, and they tracked it down, and they said he[']s the one who did it. Lower that music, lower it down.

BL: Like I don['t] want nobody, you know how nosy people is [unintelligible].

EP: Don['t] worry about that, we cool.

BL: Alright, word [sic].

. . .

BL: You told them that you took them?

EP: That I took them?

BL: Yeah.

EP: I didn['t] tell them nothing, they already knew everything. They knew the date, they knew the date, the hour, everything, everything.

BL: Get the fuck out of here, the hour, get the fuck out of here.

EP: Who must have said something, it must have been Robert.

When plaintiff was arrested, his recorded conversation with the seller was not the only evidence in investigators' possession supporting their belief that plaintiff had purchased the laptop knowing it was stolen. Before the recorded conversation took place, the seller, Elias Polanco, was twice interviewed by defendant Joseph Caputo, a deputy inspector general of the City's Department of Investigation. In the second interview, Polanco admitted, among other things, that he and another ACS worker had stolen the 17 missing computers, that he had sold one of those laptops to plaintiff, and that, at some unspecified time, he had told plaintiff that the laptop Polanco sold him had been stolen from ACS. Indeed, Polanco averred that it was common knowledge at ACS headquarters that the computers Polanco was selling had been stolen from the agency. Polanco told defendant that he had sold plaintiff the stolen laptop - which had a market value of more than \$2,000 at the time - for about \$400, and that he had

BL: Huh?

EP: Rob . . . you asked me . . . maybe Robert said something.

BL: Who? The guy that was with you [unintelligible]. Stupid motherfucker."

handed the device over to plaintiff, not at their common workplace, but in a subway station.

Finally, after defendant had plaintiff's conversation with Polanco on tape, defendant interviewed plaintiff about his purchase of the laptop. Defendant asked plaintiff to write a statement, and plaintiff began to write. While plaintiff was writing, defendant told him that he "should have no trouble" if his written statement was consistent with the oral statements he made during the recorded conversation with Polanco. At that point, according to defendant's testimony, plaintiff "tore up" the written statement he had been preparing.

On May 18, 2000, based on the information obtained from plaintiff's recorded conversation with Polanco and defendant's interviews with Polanco and plaintiff, defendant placed plaintiff under arrest, and the New York County District Attorney charged him with criminal possession of stolen property in the fourth degree, a felony. Plaintiff was one of eight individuals who worked at the ACS offices who were arrested and charged with felonies based on the theft, sale and illegal possession of 17 laptop computers valued at over \$40,000. Sixteen of those computers - including the one plaintiff furtively purchased from Polanco - had been donated to ACS for distribution to college-

bound children in foster care.

On June 4, 2001, the charge against plaintiff was dismissed upon the motion of the District Attorney. Although plaintiff had been free on his own recognizance during the entire period from his arrest until the charge's dismissal, he commenced this action for false arrest against defendant Caputo, the City investigator who interviewed him and placed him under arrest. Defendant now appeals from a \$50,000 judgment for plaintiff that was entered on a jury verdict after the court denied defendant's motion for judgment notwithstanding the verdict.

As a result of the judgment, the City, which is defending defendant and presumably will indemnify him, faces having the loss represented by the theft of the computers and the costs of the investigation and the defense of this action compounded by the loss of an additional \$50,000 to be paid to plaintiff. If the judgment stands, plaintiff is to receive these damages notwithstanding a record establishing that, based on information that included incriminating statements out of plaintiff's own mouth, defendant reasonably believed that plaintiff knowingly purchased a computer stolen from the City and disposed of it to a third party not entitled to it. This prospect apparently does not trouble the majority, but – considering the uncontroverted

facts of this case that establish that defendant did nothing wrong – it troubles me to impose this further cost on the City.

In my view, the judgment should be reversed and the complaint dismissed because the record establishes, as a matter of law, that the arrest of plaintiff was supported by probable cause to believe that he purchased the laptop computer from Polanco, and gave it to his girlfriend, with knowledge that the computer had been stolen. I therefore respectfully dissent from the majority's affirmance of the judgment.

In an action for false arrest based on an arrest effected without a warrant, the defendant may establish a complete defense by proving that the arrest was supported by probable cause to believe that the plaintiff had committed a felony. Probable cause means "such grounds as would induce an ordinarily prudent and cautious person, under the circumstances, to believe that [the person arrested] had committed [a] felony" (*Smith v County of Nassau*, 34 NY2d 18, 25 [1974]). "Probable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a reasonable belief that an offense has been or is being committed" (*People v Bigelow*, 66 NY2d 417, 423 [1985]; see also *Brinegar v United States*, 338 US 160, 175 [1949]; *People v Rodriguez*, 84

AD3d 500, 501 [2011], *lv denied* 17 NY3d 861 [2011]; *People v Kettermann*, 56 AD3d 323 [2008], *lv denied* 12 NY3d 784 [2009]). Stated otherwise, an arrest "need not be supported by information and knowledge which, at the time, excludes all possibility of innocence and points to [the arrested person's] guilt beyond a reasonable doubt" (*People v Nowell*, 90 AD2d 735, 736 [1982] [internal quotation marks omitted]). "As the very name suggests, probable cause depends upon probabilities, not certainty" (*People v Rodriguez*, 168 AD2d 520, 521 [1990], *lv denied* 78 NY2d 926 [1991] [internal quotation marks omitted]). It follows that probable cause may be based upon circumstantial evidence (see *People v Teasley*, 88 AD3d 490, 491 [2011]; *Rodriguez*, 84 AD3d at 501; *Ketterman*, 56 AD3d at 323).

The crucial point in deciding this appeal is that, in an action for false arrest, "[w]here there is no real dispute as to the facts or the proper inferences to be drawn from such facts, the issue of probable cause is a question of law to be decided by the court" (*Brown v Sears Roebuck & Co.*, 297 AD2d 205, 210 [2002], citing *Parkin v Cornell Univ.*, 78 NY2d 523, 529 [1991]; see also *Orminski v Village of Lake Placid*, 268 AD2d 780, 781 [2000]; *Maxwell v City of New York*, 156 AD2d 28, 31 [1990]). Notably, in *Maxwell*, this Court affirmed Appellate Term's order

overturning a jury verdict in favor of the plaintiff on a claim for false arrest, notwithstanding that the plaintiff had been "incarcerated for 24 days for a crime which he clearly did not commit" (*id.*). We held that the defendant was entitled to dismissal of the claim because the record established that "the police had probable cause to arrest plaintiff as a matter of law, and it was error [for the trial court] to submit that question to the jury and also to deny defendant's motion for judgment notwithstanding the verdict" (*id.*).

In considering whether the evidence is sufficient to support the judgment in favor of plaintiff, it should be borne in mind that the relevant "inferences to be drawn from [the] facts" in an action for false arrest do not concern whether the plaintiff was actually guilty or innocent, but whether the defendant, in making the arrest, could reasonably infer that the plaintiff was guilty, "irrespective of [his] innocence" (*Smith v County of Nassau*, 34 NY2d at 23). Stated more succinctly, the question is one of an inference about what was, under the circumstances, a permissible inference. Thus, a showing of probable cause is not negated by the plaintiff's offering an innocent explanation of his conduct or an otherwise self-exculpatory account of what occurred (see *Baker v City of New York*, 44 AD3d 977, 980 [2007], *lv denied* 10

NY3d 704 [2008]; *Drayton v City of New York*, 292 AD2d 182, 183 [2002], *lv denied* 98 NY2d 604 [2002]; *Orminski*, 268 AD2d at 781; *Quigley v City of Auburn*, 267 AD2d 978, 979 [1999]; *Coleman v City of New York*, 182 AD2d 200, 205 n [1992] ["An accused's exculpatory statement does not, of course, negate the existence of probable cause"]. Similarly, "conflicting evidence . . . is relevant to the issue of whether guilt beyond a reasonable doubt could have been proved at a criminal trial, not to the initial determination of the existence of probable cause" (*Agront v City of New York*, 294 AD2d 189, 190 [2002], citing *Gisondi v Town of Harrison*, 72 NY2d 280, 285 [1988]). As illustrated by the decisions just cited, among others, in numerous civil cases raising the issue of probable cause for an arrest or prosecution, appellate courts have held that the undisputed facts established that probable cause existed as a matter of law, regardless of the plaintiff's actual guilt or innocence.

Notwithstanding the information defendant received from Polanco, the recording of plaintiff himself expressing dismay that the scheme had been exposed by "snitches," and plaintiff's tearing up of his written statement when defendant reminded him that it would be compared with his recorded statements to Polanco, the majority – for the most part – takes the position

that the jury could rationally find that defendant lacked probable cause to arrest plaintiff. In this regard, the premise of the majority's position appears to be that a jury question was presented because the information on which defendant relied was theoretically consistent with the hypothesis that plaintiff did not learn that the computer in question had been stolen until after he conveyed it to someone else. As previously noted, Polanco never told defendant when he informed plaintiff that he had stolen the computer, and plaintiff - although he clearly knew before his recorded conversation with Polanco on January 28, 2000 that the computer was stolen - did not say anything during that conversation indicating precisely when he became aware that the computer was stolen.

Still, the information available to defendant was consistent with plaintiff's innocence only in the most technical sense -- and then only with the near-complete suspension of common sense. To be clear, there is nothing in the record (other than plaintiff's self-serving statements when interviewed by defendant and in subsequent litigation) to indicate that plaintiff received and transmitted the computer innocently. Moreover, plaintiff's recorded January 28, 2000 conversation with Polanco makes plain that he not only had learned of the illicit source of the

computer by that time but that (1) he was not angry at Polanco for having sold him stolen property (indeed, he did not voice any objection at all to Polanco's action in this regard), (2) he was, on the other hand, quite angry to learn that "snitches" had exposed the scheme, (3) he was interested in ascertaining the identity of the supposed informant, and (4) he was concerned to avoid having his involvement in the matter come to light. It cannot be seriously suggested that these were the reactions of an innocent purchaser for value.² The low price that plaintiff paid for the computer, relative to its market value, was also circumstantially suggestive of an illicit transaction. Finally, that the laptop computer was passed to plaintiff in a subway station, rather than at the ACS offices (where both Polanco and plaintiff worked), strongly suggested that both men wished to conduct the transaction furtively. Beyond question, the foregoing information tended to show consciousness of guilt on plaintiff's part and supported the inference that it was "more probable than not" (*People v Quarles*, 187 AD2d 200, 204 [1993], *lv denied* 81 NY2d 1018 [1993] [internal quotation marks omitted]) that he had knowingly received from Polanco, and then conveyed to

²Indeed, if the matter were not so serious, the proposition would be laughable.

another person, property he knew to be stolen.

The majority appears to regard the jury question in this case as having been whether the jurors themselves were persuaded, based on the information defendant relied upon in making the arrest, that plaintiff committed the crime for which he was arrested. Stated otherwise, the majority essentially views this matter as if it were a civil version of a criminal prosecution, with the stake being the accused's entitlement to damages if he wins rather than his liability to a penal sanction if he loses. The issue to be determined, however, was not plaintiff's underlying guilt or innocence but the reasonableness of defendant's conclusion that probable cause existed for plaintiff's arrest to face further proceedings to adjudicate his guilt or innocence.

Laboring under a misconception of the central issue in the case, the majority repeatedly goes astray in its discussion of the evidence. For example, the majority, in discussing plaintiff's recorded conversation with Polanco, states: "[G]iven the competing inferences that could have been drawn from plaintiff's conversation with Polanco, the jury could well have concluded that plaintiff learned, in the months following his purchase of the laptop, from the rumor mill at ACS, that laptops

had been stolen." If, as the majority here concedes, "competing inferences" about plaintiff's guilt or innocence could legitimately be drawn from the recorded conversation, then plaintiff has no viable claim against defendant for drawing the adverse inference, even if the jury in this case drew a more favorable inference from the same evidence. Similarly, that plaintiff presented evidence that the computer he purchased was in suboptimal condition may have provided "a rational basis . . . to justify the price" he paid, but does nothing to undercut the rationality of the competing inference drawn by defendant that plaintiff knew he was purchasing a stolen computer. With regard to the transfer of the computer in a subway station, the majority's view that the choice of this suspicious location for the transaction "does not necessarily suggest furtiveness or that it was obviously stolen property" has no relevance to the question of whether defendant reasonably reached a different conclusion.³

³The majority states: "[S]ince it was supposed to be Polanco's own laptop that he was selling from his home, it would have been more difficult for him to bring it to work and transfer it to plaintiff there." This makes little sense. According to plaintiff, he and Polanco took the subway after work to Polanco's stop, where they both got off the train and, while plaintiff waited in the station, Polanco went to his home, retrieved the computer, and brought it back to the station, where he gave it to

The majority's view that the jury might rationally have concluded that the evidence before it did not prove plaintiff's guilt has no relevance to the question that was actually at issue in this civil suit for damages against a public servant. To reiterate, that question was whether the information defendant relied upon in making the arrest gave him a reasonable basis for believing that plaintiff probably committed the crime, even if others viewing the same evidence might reasonably disagree with that assessment. Thus, that the circumstantial evidence defendant relied upon was, in the majority's view, not "*necessarily* indicative" (emphasis added) of plaintiff's guilt should be immaterial to the probable cause analysis so long as his guilt could reasonably be inferred – even if not beyond a reasonable doubt – from that evidence. Similarly, it should make no difference that plaintiff's recorded statements demonstrating that he was aware in January 2000 that the computer had been stolen might – theoretically – be consistent with a hypothetical scenario in which plaintiff did not learn that the computer was

plaintiff. It would appear to have been far easier for Polanco simply to bring the laptop computer to work in the morning and give it to plaintiff there. Thus, defendant had every right to infer from the location of the transfer a mutual intent to keep the transaction secret.

stolen until after it was out of his possession. Defendant, as a peace officer, was entitled to draw the inferences flowing most naturally from the information he relied upon, regardless of the ability of plaintiff's counsel – or the majority – to propose hypotheses explaining away each piece of information at issue, after the fact, so as to harmonize that information, in theory, with plaintiff's hypothetical innocence.

To reiterate, "probable cause depends upon probabilities, not certainty" (*Rodriguez*, 168 AD2d at 521), and requires neither proof beyond a reasonable doubt nor the exclusion of all possibility of innocence (*see Nowell*, 90 AD2d at 736). The implication of the majority's position is that circumstantial evidence (which can almost always be theoretically explained away) can never support a finding of probable cause. Not surprisingly – given that even a conviction can be based on circumstantial evidence – this is not the law (*see Teasley*, 88 AD3d at 491 ["a chain of circumstantial evidence . . . was sufficient to establish probable cause"]; *Rodriguez*, 84 AD3d at 501 [a description matching defendant, although, "standing alone, (it) "would have fit too many people to justify an arrest," established probable cause "when taken together with strong circumstantial evidence linking defendant to one of the other

suspects"]; *Kettermann*, 56 AD3d at 323 ["The circumstantial evidence in the possession of the police was sufficient to establish probable cause"]).

The majority also goes astray in holding that "a reasonable jury could have found that defendant did not, in good faith, believe that Polanco's accusatory statements against plaintiff were credible, or that his belief did not rest on grounds that would induce an ordinarily prudent officer to believe he had probable cause to arrest plaintiff for knowing possession of stolen property." While it is true that defendant concluded that Polanco had been lying during his first interview (at which he denied any involvement with the missing computers), for purposes of determining probable cause, defendant's conclusion that Polanco had been lying during the first interview did not, as a matter of law, render unreasonable defendant's reliance on Polanco's statements during the second interview, when he admitted stealing the computers and identified plaintiff as the purchaser of one.

Given law enforcement's frequent need to rely on the statement of one criminal to apprehend another, it is not surprising that the Court of Appeals has long recognized that probable cause for an arrest may be based on information supplied

by a person who is *not* generally credible or trustworthy where circumstances otherwise show that the specific information relied upon is credible (*see People v DiFalco*, 80 NY2d 693, 696-697 [1993] [determination of veracity of information received from informant as basis for warrantless arrest "requires a showing *either* that the informant is credible and the information supplied may, for that reason, be accepted as true *or*, in the absence of such showing, that the specific information given is reliable"]; *People v Comforto*, 62 NY2d 725, 727 [1984])). In particular, where – as here – the informant is himself a criminal suspect and thus not generally trustworthy, a peace officer may rely upon the informant's admissions against his own penal interest (*see DiFalco*, 80 NY2d at 697 n 2; *People v Johnson*, 66 NY2d 398, 403 [1985]; *Comforto*, 62 NY2d at 727; *People v Rodriguez*, 52 NY2d 483, 490 [1981]; *People v Walker*, 27 AD3d 899, 900 [2006], *lv denied* 7 NY3d 764 [2006]; *People v Muir*, 3 AD3d 597, 598 [2004], *lv denied* 1 NY3d 631 [2004]; *People v Stroman*, 293 AD2d 350 [2002], *lv denied* 98 NY2d 702 [2002]; *People v Miranda*, 293 AD2d 344 [2002], *lv denied* 98 NY2d 678 [2002]; *People v Daily*, 287 AD2d 293 [2001], *lv denied* 97 NY2d 680 [2001])).

While Polanco's statement that he sold a stolen computer to

plaintiff, standing alone, could be deemed reliable as an admission against Polanco's penal interest (*see Muir*, 3 AD3d at 598, citing *People v Benjamin*, 150 AD2d 952, 953 [1989]), defendant did not rely on that statement alone as grounds for plaintiff's arrest. Plaintiff was not arrested until defendant obtained ample corroboration of Polanco's statement in the form of the recorded self-incriminating statements made by plaintiff himself during his conversation with Polanco on January 28, 2000. It is true that the recorded conversation did not directly reveal exactly when plaintiff learned that the computer was stolen (although he clearly knew before the conversation that the computer was stolen). Nonetheless, plaintiff's statements during the conversation were far more than merely suggestive of his guilt. The natural and inescapable inference from plaintiff's statements to Polanco expressing anger that the scheme had been exposed by "snitches" and concern to keep his involvement secret, among other things, is that he believed that Polanco's exposure as a thief placed him at risk because his purchase of the computer was not innocent (*see Muir*, 3 AD3d at 598 [probable cause for arrest existed where informant's statements against penal interest were "corroborated to some extent by the monitored telephone conversations which lend credence to the information"

supplied by informant])).⁴

The main thrust of the majority's argument is that there was a triable issue concerning probable cause to be submitted to the jury. At one point in its writing, however, the majority goes even beyond that claim to assert that "there is *no* evidence in the record indicating that plaintiff knew the computer was stolen when he purchased it" (emphasis added). This statement – which

⁴*Sital v City of New York* (60 AD3d 465 [2009], *lv dismissed* 13 NY3d 903 [2009]), on which the majority relies, does not support affirming the judgment here. There is no indication in the *Sital* decision that the witness's statement that provided the basis for arresting the plaintiff in that case was against the witness's penal interest. Moreover, "the investigating officer had doubts about the witness's credibility" (*id.* at 466); the identification of the plaintiff was "arguably contradicted by physical evidence from the crime scene that was consistent with a conflicting statement of an independent eyewitness" (*id.*); and there was evidence that the investigating officer was prejudiced against the plaintiff based on a prior arrest (*id.*). On that record, we held, "[A] rational jury could have determined that the officer's failure to make further inquiry of potential eyewitnesses was unreasonable under the circumstances" (*id.*). Here, by contrast, Polanco's implication of plaintiff was both against his penal interest and corroborated by plaintiff's own recorded statements, while the record discloses no countervailing exculpatory evidence. Also misplaced is the majority's reliance on the Fourth Department's decision in *Burgio v Ince* (79 AD3d 1733 [2010]), in which there was conflicting evidence about the truthfulness of the defendant arresting officer's account of his investigation. As the court stated in *Burgio*: "[T]he deposition testimony of various witnesses contradicts the version provided by defendant of his investigation, raising issues of credibility that preclude summary judgment" (*id.* at 1735). The case did not raise any issue of a peace officer's right to rely on information provided by an informant against his own penal interest.

perhaps results from the realization that the verdict becomes insupportable once the evidence of plaintiff's guilt is acknowledged – is an astounding distortion of the case. As is plain from the rage and apprehension plaintiff expressed in his recorded conversation with Polanco, and from plaintiff's tearing up his written statement upon learning that the tape existed, the record is replete with *circumstantial* evidence that plaintiff did not buy the laptop innocently. Even if defendant did not have *direct* evidence of plaintiff's guilt – which is presumably what the majority means when it makes the otherwise inaccurate statement that "there is no evidence" of plaintiff's guilt – defendant was, as a matter of law, entitled to rely on circumstantial evidence of guilt in determining to make the arrest (*see Teasley*, 88 AD3d at 491; *Rodriguez*, 84 AD3d at 501; *Kettermann*, 56 AD3d at 323).⁵

The majority, glossing over plaintiff's tape-recorded denunciation of "snitches," asserts that defendant had no basis

⁵To the extent the majority is suggesting that the record does not contain even circumstantial evidence of plaintiff's guilt, it is flatly wrong. I note that, if the majority were correct in stating that "there is no evidence" of plaintiff's guilt, it would follow that the case, rather than being submitted to the jury, should have been disposed of by directed verdict. Understandably, the majority refrains from spelling out that implication.

for inferring that plaintiff knowingly purchased stolen property "[a]bsent any direct incriminating statement on the issue." The majority appears to forget that intent is *usually* proven through circumstantial evidence. "Because intent is an invisible operation of [the] mind, direct evidence is rarely available (in the absence of an admission) and is unnecessary where there is legally sufficient circumstantial evidence of intent" (*People v Rodriguez*, 17 NY3d 486, 489 [2011] [internal quotation marks and citation omitted]). In fact, the Court of Appeals has expressly held that knowledge that property is stolen – precisely the kind of intent at issue here – "can be established through circumstantial evidence 'such as by . . . [the accused's] conduct or contradictory statements from which guilt may be inferred'" (*People v Cintron*, 95 NY2d 329, 332 [2000], quoting *People v Zorcik*, 67 NY2d 670, 671 [1986]). It makes no sense for the majority to say that the circumstantial evidence of plaintiff's intent – which would have sufficed to support a conviction at a criminal trial – did not suffice to provide probable cause for his arrest.

Realizing the flimsiness of plaintiff's arguments for affirming a judgment that holds a public servant liable for doing his job in an entirely competent and lawful fashion, the majority

fashions a new argument, not raised by plaintiff himself, for the result it prefers to reach. Thus, the majority speculates that the jury may have attributed plaintiff's expression of outrage over the exposure of the scheme by a "snitch" to an antagonism to informants that, the majority tells us, prevails among some portions of the public, "law abiding citizens included." It bears repeating that plaintiff did not raise this argument at trial or on appeal, and the majority points to no evidence for it in the record. Putting all that aside, it remains the case that, even when an accused himself offers a self-exculpatory explanation of his conduct, that explanation does not negate probable cause for an arrest that otherwise arises from the information available to law enforcement. As Justice Sullivan of this Court wrote nearly 20 years ago, "An accused's exculpatory statement does not, of course, negate the existence of probable cause" (*Coleman*, 182 AD2d at 205 n). If it were otherwise, it is difficult to see how the law could be effectively enforced. Here, the majority seeks to save an irrational verdict for plaintiff, in the face of probable cause for his arrest that fairly leaps from the record, by offering an exculpatory explanation of plaintiff's conduct that plaintiff himself never presented to the jury. The majority's speculation that

plaintiff's anger at "snitches" did not necessarily arise from his own consciousness of guilt might well have made a good closing argument for the defense had the criminal case against plaintiff gone to trial. As an after-the-fact rationalization of a patently irrational verdict – a rationalization that, to reiterate, not even plaintiff has deemed worthy to offer – it is entirely out of place.

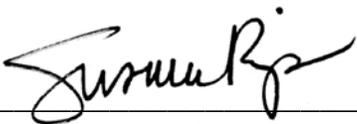
The majority asserts that my argument for reversal is "relentless but misguided." I believe that my arguments are not "misguided" but, on the contrary, guided by numerous precedents applying well established principles of the law of probable cause – principles and precedents that, for the most part, the majority ignores. Further, it does not trouble me to be described as "relentless" in opposing a decision that requires the City of New York, at a time of fiscal stress, to divert resources from public needs to the enrichment of an individual whom the City has not wronged in any way, as the record establishes as a matter of law. Whether that individual wronged the City and the children ACS serves -- as defendant reasonably concluded he did, based on the evidence in the present record – is, of course, a question that is not before us.

For the foregoing reasons, the judgment for plaintiff should

be reversed, defendant's motion for judgment notwithstanding the verdict granted, and the complaint dismissed. Accordingly, I respectfully dissent from the affirmance of the judgment.

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

ENTERED: APRIL 10, 2012


CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom,	J.P.
David B. Saxe	
Leland G. DeGrasse	
Helen E. Freedman	
Nelson S. Román,	JJ.

5647
Ind. 3438C/05

_____x

The People of the State of New York,
Respondent,

-against-

Nicholas Sanchez,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of the Supreme Court, Bronx County (Denis J. Boyle, J.), rendered August 5, 2008, which convicted him, after a jury trial, of robbery in the first degree and imposed sentence.

Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Noah J. Chamoy and Rafael Curbelo of counsel), for respondent.

DeGRASSE, J.

We find that defendant has not made a showing that he was denied effective assistance of counsel by reason of a conflict of interest that "operated on" or otherwise affected his defense at trial (*see People v Konstantinides*, 14 NY3d 1, 14 [2009]).

The complainant, a livery cab driver, was robbed at gunpoint by two assailants, one of whom he identified as defendant. On December 29, 2004 at about 7:00 p.m., the robbers hailed the complainant's cab at Broadway and West 225th Street. Upon entering the vehicle, defendant sat in the rear seat on the passenger's side and the other individual sat on the driver's side of the rear seat. When the complainant stopped the vehicle at West 233rd Street between Broadway and Bailey Avenue, defendant grabbed his collar and announced a robbery. The complainant turned toward defendant and saw that he was holding a handgun. At defendant's demand, the complainant turned over his money, rings and cell phone. Defendant's accomplice pulled the complainant out of the cab and the two robbers drove away leaving him in the street.

At 8:00 p.m. that evening, Detective Treacy of the 50th Precinct and Police Officer Tunnock of the Evidence Collection Team responded to 3460 Bailey Avenue where the complainant's livery cab had been recovered. The complainant, who met the

officers at the scene, spoke with Detective Treacy and described his assailants as Hispanic males who were approximately 20 years old and five feet, eight inches tall. The complainant said one weighed about 150 pounds and the other 160 pounds. Officer Tunnock dusted the cab for fingerprints and retrieved eight latent prints.¹ Officer Tunnock also downloaded nine time-recorded images from the cab's video surveillance system to a disc and then uploaded the images to his laptop computer. The images reflected the period between 7:11 and 7:20 p.m. According to his trial testimony, Detective Treacy recognized the person depicted in the passenger-side rear seat as defendant, who happened to be the complainant in a robbery he investigated in 2002. Detective O'Neil, who was assigned to the instant case, testified that he recognized defendant as a person he had known for about five years.

Treacy and O'Neil picked defendant up at 3340 Bailey Avenue, an address half a block from where the cab was recovered. The detectives brought defendant to a precinct, where he was photographed and then allowed to leave. The complainant

¹On January 10, 2005, Detective Perruzza of the Latent Fingerprint Unit examined the prints and found four to be of value. None of the prints matched those of the complainant or defendant. However, a print that was lifted from the inside of the window of the rear door on the passenger side matched that of a man who turned out to be Elvis Montero.

identified defendant from a photo array on December 31, 2004 and picked him out of a lineup on January 19, 2005. Defendant was arrested after being identified in the lineup. In response to pedigree questions, he stated that he was 20 years old, five feet, six inches tall, weighed 160 pounds and lived at the 3340 Bailey Avenue address. On February 5, 2005, defendant was indicted for robbery in the first degree, grand larceny, criminal possession of stolen property and related offenses.

Defendant was represented at trial by the Legal Aid Society. During jury selection, the assistant district attorney (ADA) shared with defense counsel information that the fingerprint found on the cab's window matched Elvis Montero's fingerprint. The ADA also turned over to counsel three photographs of Montero as well as a complaint follow-up (DD5) report that contained Montero's name as well as that of Franklin DeJesus. After the jury was sworn but before opening statements, defense counsel informed the court that Legal Aid had represented DeJesus during part of the time that it was representing defendant. Counsel obtained this information from another Legal Aid attorney who had secured an acquittal for DeJesus in a robbery case. The following colloquy ensued on the subject of a purported conflict of interest:

"[DEFENSE COUNSEL]: . . . Now, earlier, a

couple of days earlier, we became aware of the fact that Officer O'Neil or Treacy had investigated an individual named Franklin DeJesus And it came to light that my firm, the Legal Aid Society, represented Mr. DeJesus, unbeknownst to me, simultaneous to my representation of Mr. Sanchez. And [another attorney], of my office, represented him, went to trial with him last year.

And it came to light through privileged communication that there is some connection between this individual, Mr. Montero, and Mr. DeJesus. We're not sure exactly what that connection is, but we know it's there, but it came to us through privileged information, therefore, raising the possibility of a conflict.

Now, we've talked to the Court about it. I've discussed it at length with my two supervisors, and I mean at length.

What we've arrived at is this, that there is no conflict regarding the issue surrounding Mr. Montero and his print that was lifted from this cab in question. We don't see any conflict there. There would only be a conflict were we to go into the issue of Mr. DeJesus.

For evidentiary reasons and for just reasons related to common sense, we don't see a need to go into Mr. DeJesus, since there is no physical evidence connecting him to this crime.

Therefore, so long as we don't actively go into Mr. DeJesus, we don't see the possibility of a conflict, although anything is possible at a later date, we don't know who might come out, as of this moment, we no longer see it.

Of course, if the People go into Mr. DeJesus, they may drag me into a conflict in the middle of this trial, but they've expressed no interest in going into Mr. DeJesus.

So that's the bottom line, Judge.

We see the possibility of potential for conflict, but we also see that there's not necessarily one there.

So, we're not asking the Court to act on this, we're just reporting to the Court what our findings were.

. . . Mr. DeJesus's information came to us last week. Mr. Montero's came to us yesterday. And the confidential information that came to me - - actually came to me this morning for the first time.

With that in mind, we're ready to proceed. I have explained this to my client.

THE COURT: [to the ADA] Is there anything the People wish to be heard on or any other matters before we proceed?

[ADA]: . . . I just want the record to be clear that we have no information about this Mr. DeJesus. It's all based on speculation on defense counsel's part that, looking at a sealed folder and looking at a photo, comparing it to stills that were taken from the cab, that's his link that this is Mr. DeJesus. The name was provided to the detective by the defendant's brother. That was the only reason why the name appeared in one of the police reports."

The People's theory at trial was that defendant was the robber who sat in the rear seat on the passenger's side and held the gun. Defendant put forth alibi and third-party culpability defenses. With respect to the latter, defense counsel sought to place Montero, instead of defendant, in the passenger's side seat, saying the following in his opening statement:

"But you're going to get to look at the photos from this taxicab; you're going to get to look at the photos

of [defendant] proximately contemporaneous with his arrest in this investigation.

And then you're going to hear some more evidence. You're going to hear evidence from someone from the police Forensic Unit And he's going to tell you that eight fingerprints were lifted from this taxicab. And he's going to tell you that those eight fingerprints, which were taken from two doors and, I believe, inside and out, were compared to [defendant's] fingerprints. And he's going to tell you that none of those fingerprints that were lifted from that cab the night this happened were a match with defendant.

You will also hear that those prints were matched up with somebody else. You'll hear that person's name. That person was in the cab and his fingerprints were lifted. And you're going to get to look at that person's photo and compare it to the photos in that taxicab, the person whose fingerprints were lifted from the cab and matched."

The complainant testified defendant wielded the gun and sat in the rear seat on the passenger's side. By stipulation, a photograph of Montero was introduced into evidence during the People's case. Upon viewing the photo, the complainant testified that Montero was not involved in the robbery. After the People rested, defendant called five alibi witnesses and offered evidence in support of his third-party culpability defense. Defendant was convicted as set forth above and remanded for sentencing.

Defendant moved, through new counsel, for an order setting aside the verdict pursuant to CPL 330.30(3) on the ground of

newly discovered evidence.² In his supporting affidavit, defendant described a chance encounter at Riker's Island with DeJesus who, according to defendant, took responsibility for committing the subject robbery. Defendant, DeJesus, and his two Legal Aid attorneys testified as defense witnesses at an evidentiary hearing on the motion. Defendant reiterated his claim, testifying that DeJesus admitted to committing the robbery with Montero. DeJesus testified that he did not know Montero, did not commit a robbery with him and denied having told defendant that he had done so. The court denied defendant's CPL 330.30(3) motion, finding "no evidence to be provided by Franklin DeJesus which is, in any respect, exculpatory, and surely nothing of such nature as to create a probability of a more favorable verdict to the defendant." In reaching its conclusion, the court found that defendant's testimony that DeJesus admitted committing the robbery would not have been admissible at trial.

As a preliminary matter, we note that the court correctly rejected defendant's argument that his testimony about DeJesus's alleged out-of-court admission would have been admissible as a declaration against DeJesus's penal interest. The unavailability

²While still represented by Legal Aid, defendant also moved pursuant to CPL 330.30(1) for an order setting aside the verdict on the basis of the trial court's admission of police testimony discussed later in this opinion.

of the declarant is a prerequisite to the admission of a declaration against penal interest (*People v Settles*, 46 NY2d 154, 167 [1978]). Defendant asserts that DeJesus would be unavailable if he decided to invoke his Fifth Amendment privilege. On this record, defendant failed to establish that DeJesus intended to invoke his Fifth Amendment privilege particularly in light of the fact that he testified at the CPL 330.30(3) hearing.

Defendant claims to have been deprived of the effective assistance of counsel based on a conflict of interest arising from Legal Aid's representation of defendant as well as DeJesus, a person believed by counsel to have participated in the robbery. "The right to effective counsel ensures not only meaningful representation but also the assistance of counsel that is conflict-free and single-mindedly devoted to the client's best interests" (*People v Berroa*, 99 NY2d 134, 139 [2002] [internal quotation marks and citations omitted]). "That right is impaired when, absent a defendant's informed consent, defense counsel represents interests which are actually or potentially in conflict with those of the defendant" (*id.*). A defendant seeking to have a conviction overturned on account of counsel's relationship with a former client must first demonstrate a substantial possibility of a conflict between his or her

interests and those of the former client (see *People v Ortiz*, 76 NY2d 652, 656-657 [1990]). To prevail on such a claim the defendant must "show that 'the conduct of his [or her] defense was in fact affected by the operation of the conflict of interest,' or that the conflict 'operated on' the representation" (*id.* at 657 [citation omitted]). Defendant posits that a conflict of interest was created by Legal Aid's dual representation of himself and DeJesus. We disagree.

As set forth above, Montero was the target of defendant's third-party culpability defense. The complainant's testimony was that defendant was the individual who sat on the passenger's side of the cab and held the gun. The theory of the defense was that Montero, and not defendant, was the robber depicted by the surveillance video image to be on the *passenger's* side of the rear seat. Although one of the defendant's Legal Aid attorneys testified at the CPL 330.30(3) hearing that counsel thought DeJesus was depicted in the photograph on the *driver's* side, the third-party culpability defense, that was focused on Montero only, did not require counsel to implicate DeJesus or otherwise act in a way that was adverse to his interests. For this reason, counsel was correct in telling the court that there was no need to reference DeJesus by name during the trial. There was no conflict between defendant's interests and those of DeJesus.

Even if such a conflict existed, it would not have affected the conduct of defendant's defense or operated on counsel's representation of defendant (*see People v Ortiz*, 76 NY2d at 657). We note that in putting forth the third-party culpability defense, counsel made unimpeded use of evidence consisting of:

Detective Perruzza's expert testimony of a fingerprint match that linked Montero to the area of the cab where defendant sat;

the video surveillance images;

Montero's photograph which counsel urged the jury to compare to the video surveillance images during his summation; and

stipulated police testimony that Montero was arrested for and confessed to a gunpoint robbery that he said he committed with two accomplices named Newton and Danny approximately seven weeks after the instant robbery.

Based on the foregoing, we conclude that defendant was afforded "meaningful representation" sufficient to meet the constitutional requirement of effective representation of counsel (*see People v Baldi*, 54 NY2d 137, 147 [1981]).

We also find that defendant's claim that he was prejudiced by late disclosure of *Brady* material is unpreserved because defendant was afforded the very remedy he requested - the opportunity to present testimony of Montero's confession to the subsequent robbery (*see e.g. People v Monserate*, 256 AD2d 15, 16 [1998], *lv denied* 93 NY2d 855 [1999]). We decline to review the *Brady* claim in the interest of justice. Were we to review this

claim, we would find that defendant received a meaningful opportunity to use the above alleged exculpatory material as evidence (*see People v Cortijo*, 70 NY2d 868, 870 [1987]).

Defendant made the CPL 330.30(1) motion on the ground that the trial court erroneously permitted Detectives O'Neil and Treacy to testify that they recognized defendant as one of the robbers depicted in the video surveillance images. Defendant argued that the detectives' testimony constituted inadmissible lay opinion evidence. The trial court correctly rejected the argument. "A lay witness may give an opinion concerning the identity of a person depicted in a surveillance photograph if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury" (*People v Russell*, 165 AD2d 327, 333 [1991], *affd* 79 NY2d 1024 [1992]). In this case, the testimony of both detectives was properly admitted based on the evidence of their familiarity with defendant from prior occasions. Moreover, the identification testimony by the detectives was also relevant in light of Detective Treacy's testimony that defendant "got a lot heavier" between December 2004 and the May 2006 trial (*see People v Russell*, 79 NY2d at 1025; *People v Steward*, 72 AD3d 524 [2010], *revsd* on other grounds 17 NY3d 104 [2011]).

The court properly denied defendant's motion to suppress

identification testimony. There is ample support for the court's finding that the persons depicted in the photo array and the lineup appeared to be in the same general age range and possessed largely similar facial and other characteristics. We find that the photo array met the requirement that the persons depicted therein resembled each other sufficiently so as to obviate a substantial likelihood that defendant would have been "singled out for identification" (see *People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). Similarly, the variations in skin tone and facial hair among defendant and the fillers in the lineup were minor (see e.g. *People v Lundquist*, 151 AD2d 505, 506 [1989], *lv denied* 74 NY2d 849 [1989]).

We are not persuaded by defendant's argument that a reversal is required because of the loss of exhibits consisting of some of the surveillance video images. Although the missing images have substantial importance to the issues of this case, the information that they could have provided is otherwise reflected by the surveillance images that were preserved. Therefore, the loss of the exhibits does not prevent effective appellate review (see *People v Yavru-Sakuk*, 98 NY2d 56, 59-60 [2002]). We also perceive no basis for reducing the sentence. We have considered defendant's remaining contentions and find them to be lacking in merit.

Accordingly, the judgment of the Supreme Court, Bronx County (Denis J. Boyle, J.), rendered August 5, 2008, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him to a term of eight years, with five years post-release supervision, should be affirmed.

All concur except Freedman, J. who dissents in an Opinion.

FREEDMAN, J. (dissenting)

I respectfully disagree with the majority opinion and would reverse the conviction and remand the matter for a new trial based both on the conflict of interest and the improper admission of identification testimony by the police officers.

Defendant was convicted of robbing the driver of a livery cab at gunpoint on December 29, 2004. He voluntarily came to the police station on the next day, and was identified by the livery cab driver in a photo array on December 31st and in a lineup conducted on January 19, 2005. Immediately prior to opening statements, defense counsel alerted the court that he had just learned that his firm (the Legal Aid Society) had another client, DeJesus, who may have had a connection to the case. Counsel reported that the prosecution had just informed him that the other Legal Aid client had been investigated by the police in connection with this robbery. Counsel also reported that he had learned, through a privileged communication, that this other client had "some connection" with another man, Elvis Montero, whose latent fingerprint had been recovered from the cab where the robbery occurred. The cab driver had failed, however, to identify Montero.

The existence of and information about the latent fingerprint was also disclosed to defense counsel just prior to

trial. Defense counsel acknowledged that this raised the possibility of a conflict of interest, but stated that “[f]or evidentiary reasons and for just reasons related to common sense, we don’t see a need to go into [the other client] since there is no physical evidence connecting him to this crime,” concluding that this would avert the possible conflict. Defense counsel, who had been precluded from examining the other client’s file, proceeded to try the case without reference to the other client.

The record does not disclose whether the conflict was explained to defendant, who suffered from and was on medication for mental illnesses. On appeal, defendant contends that he was denied effective assistance of counsel due to his trial counsel’s conflict of interest, which adversely affected the conduct of his defense.

A defendant is entitled to “assistance of counsel that is conflict-free and single-mindedly devoted to the client’s best interests That right is impaired when, absent a defendant’s informed consent, defense counsel represents interests which are actually or potentially in conflict with those of the defendant” (*People v Berroa*, 99 NY2d 134, 139 [2002] [internal quotation marks and citations omitted]). To prevail on a conflict claim based on successive representation, “a defendant does not have to establish that the conflict affected the outcome

of the proceedings; a defendant must only show that the conflict operated on the defense" (*People v Konstantinides*, 14 NY3d 1, 14 [2009]; see also *People v Ortiz*, 76 NY2d 652 [1990]).

I believe that defendant's counsel was unable to avoid the potential conflict of interest simply by agreeing to "not go into" the other Legal Aid client at trial. Indeed, counsel's decision to overlook the evidence he had already obtained showing some connection between the man investigated by the police and the man whose latent fingerprints were found in the livery cab, and to forgo any further pursuit of evidence of a connection between the two men, was itself the inevitable product of the conflict of interest he faced, which clearly affected the conduct of the defense. Rather than proceeding to trial with the understanding that there would be no reference to this other suspect, a nonconflicted attorney would have, at least, sought a recess of the trial to further investigate this suspect for the purpose of building a third-party culpability defense. Pursuant to a defense motion, a CPL 330 hearing was conducted to determine whether evidence that subsequently came to light concerning the other client was a basis to reverse the conviction, but the trial court found that the allegedly new evidence, which in fact related to the other client, would not be helpful to defendant.

In addition, I believe that the admission of Detectives Treacy's and O'Neil's testimony identifying defendant based on the images from a digital camera taken from the cab was error. Although Detective Treacy's identification and arrest of defendant, whom he knew because the latter had been the victim of another crime, was based on the images, I reject the argument that the detectives' testimony merely completed the narrative as to how defendant became a suspect. The detectives not only testified as to their identification based on the camera images, some of which were lost, but Detective Treacy also testified that between defendant's arrest and trial he "got a lot heavier." The jury viewed the same digital videotapes that the detectives had. Even though the court instructed the jurors that it was for them to make the ultimate factual determination as to the identity of the person on the tapes, I find the admission of this testimony to be improper bolstering. While such testimony is "commonly allowed in cases where the defendant has changed his or her appearance since being photographed or taped, and the witness knew the defendant before that change of appearance" (*People v Coleman*, 78 AD3d 457, 458 [2010], *lv denied* 16 NY3d 829 [2011]), there is no such claim here. The prosecutor made no claim for admission based on weight gain when defendant objected to admission of the testimony. Rather, she argued that Detective

Treacy's testimony and the prior identification evidence by the other officer were needed to explain police conduct in arresting defendant. As we noted in *People v Coleman*, admission of the Detective's identification testimony was improper bolstering. Since the main issue in this case is identification, I find admission of the testimony to be reversible error.

While defendant argues that the photo array followed by a lineup was unduly suggestive, in part based on differences in age and skin tone, that issue would not be a basis for reversal here. The use of a photo array followed by a lineup in which the defendant was the only individual present in both procedures was criticized in the recent decision of the New Jersey Supreme Court, *State v Henderson* (208 NJ 208, 255-256 [2011]), dealing with identification evidence; however, this court has never rejected the procedure.

Accordingly, I would find that the conflict of interest adversely affected the conduct of the defense (*see e.g. People v*

DiPippo, 82 AD3d 786 [2011], *lv denied* 17 NY3d 903 [2011]), and the identification testimony of Detective Treacy was improperly admitted. For these reasons, I would reverse the conviction and remand for a new trial.

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

ENTERED: APRIL 10, 2012


CLERK