SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 30, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Sweeny, Renwick, Feinman, Kapnick, JJ.

14238 The People of the State of New York, Respondent, Ind. 4679/11

-against-

Latiff Thompson,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J. at suppression hearing, jury trial and sentencing), rendered May 23, 2012, convicting defendant of criminal possession of a weapon in the second degree (two counts) and criminal possession of stolen property in the fourth degree, and sentencing him, as a second violent felony offender, to an aggregate term of 12 years, unanimously reversed, on the law, the motion to suppress granted, and the indictment dismissed.

In response to defendant's motion to suppress a gun and the credit card belonging to the complainant, a hearing was held at which Police Officers Kahla Cadore and Siwy Made testified that on August 22, 2011, they, along with Officer Gene Park, were on uniform foot patrol in their assigned area, which extended from East 112th to East 115th Street, and from First Avenue to Madison Avenue. At around 11:25 p.m., the officers heard a radio report that a gunpoint robbery had just occurred at 77 East 115th Street.

According to Made, the report described the robbers as three black men around 20 years old. All of the men were reported to be wearing shorts, one was said to have on a white "wifebeater" vest or tank top, another a polo shirt, and the third man's shirt was not described. According to Cadore, based on memo book entries she recorded hours after the arrest, the radio run described three black men, about 5'7" tall, 20 years old, one wearing a white vest or tank top and khaki shorts, a second wearing a red polo shirt and khaki pants, and the third a buttoned-down, black and white T-shirt. The report also stated that the men were running from the Taft Housing Project toward the Johnson Housing Project.

While the officers searched the area, about 10 minutes later, they received a second radio report of a "suspicious male" in front of 1581 Park Avenue, in the Johnson Housing Project, two blocks from the location of the robbery. The officers went to that address, and saw a man entering the building using a key, which they did not find to be suspicious. About a minute later, however, they saw defendant and three young black men emerge from 1581 Park Avenue. According to Made, one man wore a white "wifebeater" tank top, one a blue polo shirt, and the third man wore shorts. Made testified that defendant fit the radioed description because he was young, black, and wore a tank top. Cadore testified that the four men were black and in their early 20's. Two of them wore "wifebeaters with shorts," one wore a red polo shirt, and defendant wore a black and white checkered shirt. According to Cadore, the men were all approximately 5'7". Defendant's pedigree information later showed that he was 5'8" tall.

Made directed the four men to stop and stand against a fence in front of 1581 Park Avenue, and he then asked them for identification. A few seconds later, Made radioed that he had stopped four men. Immediately after that, one man fled, and Officer Park chased him. The officers then frisked the remaining men. Made did a "quick pat" of defendant's sides and another man, while Cadore frisked the third man; neither officer found anything.

The officers then waited with the men for the complainant to arrive for a showup. After approximately five or six minutes had passed, Made noticed defendant "going to his waistband, inside his back" with his right hand, as though he were "throwing drugs or something." At around the same time, Cadore saw a bulge in defendant's waistband, under his shirt, in front of his pants, and saw defendant make "movements toward his back and toward his waist area." Made then lifted defendant's shirt to reveal a gun in his waistband. The officers arrested defendant. Several minutes later, other officers arrived. One of them searched defendant and recovered a credit card bearing the name of the complainant.

The court denied defendant's motion to suppress the gun as the product of an illegal search and the credit card as the fruit of a consequently illegal arrest. The court acknowledged that the 911 caller's descriptions of the robbers' clothing did not comport with what the individuals who were stopped were wearing, but speculated that the men might have changed clothes in the building. Regardless, the court concluded, the men could be subject to a level one inquiry under *People v DeBour* (40 NY2d 210 [1976]) because they emerged from a building located in the direction where the robbers were reported to have been running, and it was reasonable for the police officers to ask them whether they had seen anything suspicious. According to the court, the situation changed when one of the men took flight, which gave the officers the reasonable suspicion necessary to detain the remaining men. Further, the officers were entitled to determine why defendant was making certain hand movements near his waistline.

Defendant effectively concedes that the sequence of events leading up to the emergence of the four men from the building at 1581 Park Avenue justified a level one *DeBour* request for information. We agree, if only because the group of men was in a location to which a group of robbers had been reported to have fled only minutes earlier, giving the officers an articulable reason for inquiring into why the men were in the area (*see People v Hollman*, 79 NY2d 181, 191 [1992]). The question, then, is whether the encounter ever escalated to a point that the police would have been justified in holding the men at the scene while the complainant was transported to it.

As noted, reasonable suspicion is a necessary predicate to a detention for a showup identification (*see People v Williams*, 87 AD3d 938 [1st Dept 2011], *lv denied* 18 NY3d 863 [2011]).

Further, a person's flight is sufficient to create the reasonable suspicion necessary to escalate a level one or level two encounter to a level three detention, so long as other circumstances are attendant, such as a high-crime location and activity suggesting, although not alone creating, reasonable suspicion that the person fleeing the scene may be engaged in criminal conduct (*see People v Martinez*, 80 NY2d 444, 448 [1992]). In all of the cases which discuss flight as the determining factor in creating reasonable suspicion, however, the defendant is the person who fled. Here, of course, defendant did not flee; he obeyed the officers' direction to stop and to submit to their questioning. The People contend that this is irrelevant, because the consciousness of guilt demonstrated by the person who ran was imputed to the group as a whole.

We reject this approach, which the People fail to support with even a single case citation. The flight of one member of a group is hardly indicative of the collective guilt of the group. It is just as readily demonstrative of the innocence of those who remain at the scene. More importantly, it would be manifestly unfair to place an individual's right to be left alone in the hands of another person over whom he has no control, and who may not even be known to that person (*see People v St. Clair*, 80 AD2d 691 [3d Dept 1981], *aff'd* 54 NY2d 900 [1981]).

In any event, the other man's flight, even if it could in theory be imputed to defendant and the others in the group, was insufficient to raise the encounter to one based on reasonable suspicion that a crime had been committed. That is because the attendant circumstances were not otherwise suggestive of criminal activity. As the suppression court observed, the clothing worn by the men in the group did not match the clothing described to the officers in the radio run. Further, there was nothing unique about four men walking together late on a summer evening, and the fact that they left a building which was located in the housing project to which the radio run had reported the robbers were running was not strongly indicative that this was the same group (*compare People v Michimani*, 115 AD3d 528 [1st Dept 2014], *lv denied* 23 NY3d 1040 [2014] [defendant's flight was sufficient to raise level of suspicion and justify pursuit where he was with a group of eight men, the size of the group matched the description of a "shots fired" radio transmission, as did their physical descriptions, and the location where the police encountered them was "[i]n very close temporal and spatial proximity to the transmissions and the specific location"]).

Since the police officers did not have the reasonable suspicion necessary to detain the men, and should have let them know they were free to leave once they had gathered the basic information permissible in a level one stop, the officers should never have had the opportunity to notice the bulge in defendant's waistline that they missed when they performed their initial search. Nor can the lifting of defendant's shirt and seizure of the gun be justified as having been in the interests of the officers' safety, since there was no testimony that the officers believed defendant to be carrying a weapon (*see People v Alozo* (180 AD2d 584 [1st Dept 1992]). To the contrary, Officer Made seemed to think that the gestures defendant was making had to do with an effort to hide drugs.

Because the seizure of the weapon was illegal, so too was the arrest of defendant for possessing it. Accordingly, the credit card should have been suppressed as the fruit of an unlawful arrest (*see People v Powell*, 242 AD2d 500 [1st Dept 1997]).

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

ENTERED: APRIL 30, 2015

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CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Kapnick, JJ.

14546- Index 651982/11
14547 Zurich American Insurance Company,
Plaintiff-Respondent,

-against-

Sony Corporation of America, et al.,
Defendants-Appellants,

Mitsui Sumitomo Insurance Company of America, et al.,
Defendants-Respondents,

Sony Online Entertainment LLC, et al.,
Defendants.

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An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Jeffrey K. Oing, J.), entered on or about February 24, 2014,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated April 9, 2015,

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

ENTERED: APRIL 30, 2015

CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Clark, JJ.

14672 Kel-Mar Designs, Inc., Index 650871/12
Plaintiff-Appellant,

-against-

Harleysville Insurance Company
of New York, et al.,
Defendants-Respondents.

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Kenney Shelton Liptak Nowak LLP, Buffalo (Timothy E. Delahunt of counsel), for appellant.

Milber Makris Plousadis & Seiden, LLP, Woodbury (Lorin A. Donnelly of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Eileen A. Rakower, J.), entered January 14, 2014, which denied plaintiff's motion for summary judgment, granted defendants' motion for summary judgment, and declared that defendants do not have a duty to defend or indemnify plaintiff, Frost Equities, or Walgreens in the underlying personal injury action, unanimously reversed, on the law, without costs, the declaration vacated, defendants' motion denied, and plaintiff's motion granted to the extent of declaring that defendant Harleysville Insurance Company of New York (defendant), as co-primary insurer with RLI Insurance Company (RLI), has a duty to defend and indemnify plaintiff and to pay its proportionate share of defense and indemnity costs in the underlying action.

The insurance policy that defendant provided to subcontractor Arcadia (the Harleysville policy) provides additional insured coverage to plaintiff general contractor only for "liability caused, in whole or in part, by the acts or omissions of [Arcadia] . . . in the performance of [Arcadia's] ongoing operations for the additional insured." The loss at issue in the underlying action — a personal injury suffered by an Arcadia employee when he lost his footing on a stairway while working on a construction project — resulted, at least in part, from "the acts or omissions" of the Arcadia employee while performing his work (i.e., his loss of footing while on the stairway), regardless of whether the Arcadia employee was negligent or otherwise at fault for his mishap (*see Strauss Painting, Inc. v Mt. Hawley Ins. Co.*, 105 AD3d 512, 513 [1st Dept 2013], *mod on other grounds* 24 NY3d 578 [2014]; *W & W Glass Sys., Inc. v Admiral Ins. Co.*, 91 AD3d 530, 530-531 [1st Dept 2012]). Accordingly, defendant is obligated both to defend and indemnify plaintiff as an additional insured under the Harleysville policy.

The Harleysville policy, by its plain terms, provides excess coverage to plaintiff, because the subcontract between plaintiff and Arcadia does not "specifically" require the Harleysville policy to provide plaintiff with primary coverage. However, because both the Harleysville policy and the insurance policy that plaintiff obtained from RLI purport to be excess to the other, the excess insurance provisions in the policies cancel each other out, and defendant and RLI, as co-insurers on a primary basis, are required to share plaintiff's defense costs in the underlying action (*see Great N. Ins. Co. v Mount Vernon Fire Ins. Co.*, 92 NY2d 682, 686-687 [1999]).

Defendant is not obligated to indemnify and defend Walgreens and Frost Equities. Those entities are not additional insureds under the plain terms of the Harleysville policy, as Arcadia did not perform operations for them pursuant to a written contract.

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

ENTERED: APRIL 30, 2015

CLERK

Sweeny, J.P., Renwick, Andrias, DeGrasse, Gische, JJ.

14798- Index 650339/11
14799 Certain Underwriters at Lloyd's London Subscribing to Policy No. QK0903325,
Plaintiff-Appellant,

-against-

Huron Consulting Group, Inc., et al.,
Defendants-Respondents.

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

Williams Montgomery & John Ltd., Chicago, Il (Christopher J. Barber of the bar of the State of Illinois, admitted pro hac vice, of counsel), for respondents.

Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered October 3, 2014, awarding defendants $2,685,505.49 in defense costs, and bringing up for review an order, same court and Justice, entered May 16, 2014, which granted defendants' cross motion for summary judgment declaring that plaintiff was obliged to pay their defense costs in the underlying action, and denied plaintiff's motion for summary judgment, unanimously reversed, on the law, without costs, the cross motion denied, the motion granted, and judgment entered in favor of plaintiff declaring that plaintiff is not obliged to pay defendants' defense costs in the underlying action. Appeal from aforementioned order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff, a professional liability insurer, commenced this declaratory judgment action, seeking a declaration that it had no duty to defend its policy holder, defendants, in a qui tam lawsuit. The lawsuit alleged that defendants had violated the Federal False Claim Act and the New York False Claims Act in connection with excessive Medicare and Medicaid billing.

We agree with plaintiff that its motion for summary judgment declaring that it was not obliged to pay defendants' defense costs in the underlying action should have been granted pursuant to "Exclusion N" of the professional liability policy. "Exclusion N" denies coverage for any "Damage, Penalties or Claim in connection with or resulting from any claim, or to any Privacy Notification Costs":

> "Brought by or on behalf of the Federal Trade Commission, the Federal Communications Commission, or any federal, state, local or foreign governmental entity, in such entity's regulatory or official capacity."

The motion court incorrectly determined that the "Exclusion N" was inapplicable because the underlying qui tam lawsuit was brought by a private party, not a governmental entity operating in an official or regulatory capacity. An action brought under the False Claims Act may be commenced in one of two ways. First, the federal government itself may bring a civil action against a defendant (31 USC § 3730[a]). Second, as is the case here, a private person, or "relator" may bring a qui tam action "for the person and for the United States Government," against the defendant, "in the name of the Government" (*id.* at [b][1]). Under such circumstances, the government may elect to intervene, and if it recovers a judgment, the relator receives a percentage of the award (*id.* at [d][1]). If the government declines to intervene, as in the case here, the relator may pursue the action and may receive as much as 30 percent of any judgment rendered (*see id.* at [d][2]).

While relators indisputably have a stake in the outcome of False Claims Act qui tam cases that they initiate, "the Government remains the real party in interest in any such action" (*see United States ex rel. Mergent Serv. v Flaherty*, 540 F3d 89, 93-94 (2d Circ 2008], quoting *Minotti v Lensink*, 895 F2d 100, 104 [2d Cir 1990]; *see also United States ex rel. Kreindler & Kreindler v United Tech. Corp.*, 985 F2d 1148, 1154 [2d Cir 1993], cert denied 508 US 973 [1993]). As the Second Circuit has explained:

> "All of the acts that make a person

> liable under [the False Claims Act] focus on the use of fraud to secure payment from the government. It is the government that has been injured by the presentation of such claims; it is in the government's name that the action must be brought; it is the government's injury that provides the measure for the damages that are to be trebled; and it is the government that must receive the lion's share-at least 70%-of any recovery." (*United States ex rel. Stevens v Vermont Agency of Natural Resources*, 162 F3d 195, 202 [2d Cir 1998], *revd on other grounds*, 529 US 765 [2000]).

Moreover, in considering the issue of relator standing, the Supreme Court of the United States has determined that a relator's interest in a qui tam suit is one as the "partial assignee" of the claims of the United States, but it has observed that the injury, and therefore, the right to bring the claim belongs to the United States (*see e.g. Vermont Agency of Natural Resources v US ex rel. Stevens*, 529 US 765, 773-777 [2000]). In short, while the False Claims Act permits relators to control the False Claims Act litigation, the claim itself belongs to the United States (*id.*).

Because the United States is the real party in interest in a qui tam action under the False Claims Act, the "Exclusion N" bars coverage for the underlying action. In light of our determination, the parties' remaining contentions need not be addressed.

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

ENTERED: APRIL 30, 2015

CLERK

Sweeny, J.P., Andrias, Manzanet-Daniels, Clark, JJ.

14922 In re Carmen Ortiz, Index 401515/13
Petitioner-Respondent,

-against-

John B. Rhea, etc., et al.,
Respondents-Appellants.

____

David I. Farber, New York (Seth E. Kramer of counsel), for appellants.

Kirkland & Ellis LLP, New York (Thomas Matthew of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Andrea Masley, J.), entered May 19, 2014, annulling respondent's determination, dated May 8, 2013, which denied petitioner succession rights to an apartment formerly leased to her mother, unanimously reversed, on the law, without costs, the determination reinstated, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed.

The determination that petitioner is not entitled to succession rights as a remaining family member (RFM) is rationally based and is not arbitrary and capricious (*see generally Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 363 [1987]). The only written consent petitioner ever acquired to occupy the apartment was as a temporary resident, which did not qualify her for RFM status (*see Matter of Rodriguez v Hernandez*, 51 AD3d 532 [1st Dept 2008], *lv denied* 11 NY3d 707 [2008]; *Matter of Powell v Franco*, 276 AD2d 430 [1st Dept 2000]). On July 29, 2010, petitioner's mother requested permission for petitioner to permanently reside in the apartment. Petitioner's mother died less than six months later, on January 9, 2011. Thus, even if the request had been granted immediately, petitioner would not have met the requirement of continuous residence in the apartment with respondent's written consent for at least one year preceding her mother's death that would entitle her to succession rights (*see Matter of Saad v New York City Hous. Auth.*, 105 AD3d 672 [1st Dept 2013]; *Matter of Ponton v Rhea*, 104 AD3d 476, 477 [1st Dept 2013]). Petitioner's mitigating circumstances do not provide a basis for annulling respondent's determination (*see Matter of Saad*, 105 AD3d at 672). Petitioner may not invoke estoppel against respondent (*see Matter of Schorr v New York City Dept. of Hous. Preserv. & Dev.*, 10 NY3d 776 [2008]; *Matter of Hutcherson v New York City Hous. Auth.*, 19 AD3d 246 [1st Dept 2005]).

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

ENTERED: APRIL 30, 2015

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CLERK

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

14974 In re Sergeants Benevolent Association of the City of New York, Inc., et al., Petitioners-Appellants, Index 104481/12

-against-

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

Gleason, Dunn, Walsh & O'Shea, Albany (Ronald G. Dunn of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Susan Paulson of counsel), for The City of New York, New York City Police Department and The City of New York Office of Labor Relations, respondents.

Philip L. Maier, New York (Karine Spencer and Michael T. Fois of counsel), for The New York City Board of Collective Bargaining and Marlene Gold, respondents.

Order, Supreme Court, New York County (Paul Wooten, J.), entered December 9, 2013, which denied the petition brought pursuant to CPLR article 78 to annul the decision of respondent New York City Board of Collective Bargaining, dismissing an improper practice petition alleging that respondents City of New York and New York City Police Department violated the New York City Collective Bargaining Law by unilaterally implementing a policy requiring alcohol testing for police officers when their discharge of a firearm results in injury or death, unanimously affirmed, without costs.

The court properly found that the Board of Collective Bargaining acted rationally in dismissing the improper practice petition. The Board correctly concluded that unilateral implementation of the alcohol testing program fell within the Police Commissioner's disciplinary authority and thus did not relate to a mandatory subject of collective bargaining (*see Matter of City of New York v Patrolmen's Benevolent Assn. of the City of N.Y., Inc.*, 14 NY3d 46, 58-59 [2009]).

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

ENTERED: APRIL 30, 2015

CLERK

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

14975 In re Gabriel J., and Others,

Children Under Eighteen
Years of Age, etc.,

Stacey J.,
Respondent-Appellant,

Commissioner of Social Services
of the City of New York,
Petitioner-Respondent.

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Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Drake A. Colley of counsel), for respondent.

Andrew J. Baer, New York, attorney for the children Gabriel J, Hezekiah J., Jeremiah J. and Joshua J.

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

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the child Isaiah J.

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Order, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about November 22, 2013, which, after a hearing, determined that respondent mother had neglected the six subject children, unanimously affirmed, without costs.

A preponderance of the evidence supports the finding that respondent mother’s boyfriend inflicted excessive corporal punishment on three of the children (*see* Family Ct Act §§ 1012[f][i][B]; 1046[b][i]), and that respondent mother knew or should have known about the abuse but failed to take any steps to protect those children (*see Matter of Gabriel J. [O'Neill H.]*, 99 AD3d 543, 544 [1st Dept 2012], *lv dismissed* 20 NY3d 999 [2013]). The children's out-of-court statements were cross-corroborated by each other's statements to the agency's caseworker, and by the caseworker's observation of an injury sustained by one of the children (*see Matter of Jasmine A. [Albert G.]*, 120 AD3d 1125, 1125 [1st Dept 2014]; *Matter of Carmine G. [Franklin G.]*, 115 AD3d 594, 594 [1st Dept 2014]). The caseworker also testified that the mother had acknowledged knowing about incidents in which the boyfriend punched one child in the head and struck another in the mouth, and that she did not address the situation. Further, the mother's behavior towards the three children who were subject to excessive corporal punishment "demonstrates a sufficiently faulty understanding of her parental duties to warrant an inference of an ongoing danger" to all of the children (*Matter of Cevon W. [Talisha W.]*, 110 AD3d 542 [1st Dept 2013]).

The caseworkers' testimony concerning unsanitary conditions in the apartment was insufficient standing alone to provide an independent ground for finding neglect (*see Matter of Clydeane C. [Annetta C.]*, 74 AD3d 486, 487 [1st Dept 2010]; *Matter of Iyanah D.*, 65 AD3d 927, 927 [1st Dept 2009]).

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

ENTERED: APRIL 30, 2015

CLERK

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

14976 In re Kawon W.,

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

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

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Peter J. Passidomo, J.), entered March 3, 2014, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of criminal possession of marijuana in the fifth degree, and placed him on probation for a period of 10 months, unanimously affirmed, without costs.

The court properly denied appellant’s motion to suppress physical evidence. There is no basis for disturbing the court’s credibility determinations. When a police officer asked appellant about the address of a nearby building, this did not even constitute a level one inquiry (*see People v Thornton*, 238 AD2d 33, 34-35 [1st Dept 1998]; in any event, the officer had the requisite "objective credible reason" (*People v De Bour* (40 NY2d 210, 223 [1976]) for such an inquiry.

The court's fact-finding determination was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). We likewise find no basis for disturbing the court's credibility determinations. The "open to public view" element of fifth-degree marijuana possession (Penal Law § 221.10[1]) was established by evidence that defendant exposed to public view what was plainly a marijuana cigarette (*see Matter of Michael I.*, 309 AD2d 598 [1st Dept 2003], *lv denied* 1 NY3d 508 [2004]).

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

ENTERED: APRIL 30, 2015

CLERK

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

14977 The People of the State of New York, Ind. 4927/11
Respondent,

-against-

Pedro Santiago,
Defendant-Appellant.

Scott A. Rosenberg, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Jeffrey A. Wojcik of counsel), for respondent.

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered June 19, 2012, convicting defendant, after a jury trial, of robbery in the first and second degrees, grand larceny in the third and fourth degrees and four counts of criminal mischief in the fourth degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 25 years to life, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence supported conclusions that defendant used force to retain control of a stolen van, and not merely to escape or to defend himself (*see generally People v Gordon*, 23 NY3d 643, 649-651 [2014]), and that, under the circumstances of its use, the van constituted a dangerous instrument (*see People v Diaz*, 129 AD2d 968 [4th Dept 2987], *lv denied* 70 NY2d 710 [1987]).

The court's compromise *Sandoval* ruling, which allowed inquiry into a portion of defendant's extensive record without elicitation of any underlying facts, balanced the appropriate factors and was a proper exercise of discretion (*People v Walker*, 83 NY2d 455, 458-459 [1982]).

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 30, 2015

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CLERK

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

14978- Index 653599/11
14979 MP Fashion Inc.,
Plaintiff-Appellant,

-against-

Woori America Bank,
Defendant-Respondent.

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Anthony Balsamo, New York, for appellant.

Koven & Krausz, New York (Laurence Reinlieb of counsel), for respondent.

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Judgment, Supreme Court, New York County (Jeffrey K. Oing, J.), entered August 27, 2014, which dismissed the complaint at the close of plaintiff’s evidence, and brings up for review an order, same court and Justice, entered on or about September 13, 2013, which, to the extent appealed from, denied plaintiff’s cross motion for summary judgment, unanimously affirmed, with costs. Appeal from aforementioned order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The question whether plaintiff’s presented documents were in strict compliance with the letter of credit is one of law, which the motion court should have considered based on the documents themselves, independent of any disputes or questions of fact concerning the underlying transaction (*Banco Nacional De Mexico, S.A. Integrante Del Grupo Financiero Banamex v Societe Generale*, 34 AD3d 124, 128-129 [1st Dept 2006]). Plaintiff's documents were not in strict conformity with the letter of credit (*United Commodities-Greece v Fidelity Intl. Bank*, 64 NY2d 449, 455 [1985], and, therefore, the dismissal of the complaint, although rendered at trial, rather than on summary judgment, was proper.

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

ENTERED: APRIL 30, 2015

CLERK

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

14980 Joseph Peritore, Index 154738/12
Plaintiff-Appellant,

-against-

Anna & Diane Cab Corp., et al.,
Defendants-Respondents.

Morelli Alters Ratner LLP, New York (Tom Bernard of counsel), for appellant.

Marjorie E. Bornes, Brooklyn, for respondents.

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered June 18, 2014, which, in this action for personal injuries sustained when plaintiff pedestrian was struck by defendants' vehicle, denied plaintiff's motion for summary judgment on the issue of liability, unanimously affirmed, without costs.

The parties' conflicting versions as to how the accident occurred, including whether plaintiff was within the crosswalk at the time that he was struck by defendants' vehicle, raise triable issues that preclude the grant of plaintiff's motion for summary judgment on the issue of liability (*see Thoma v Ronai*, 82 NY2d 736 [1993]).

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

ENTERED: APRIL 30, 2015

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CLERK

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

14982 The People of the State of New York, Ind. 1790/11
Respondent,

-against-

Joseph Rodriguez,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Jordan K. Hummel of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Ann M. Donnelly, J.), rendered November 26, 2012, convicting defendant, after a jury trial, of burglary in the third degree and criminal possession of stolen property in the fifth degree, and sentencing him to an aggregate term of two to six years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility and identification, including its evaluation of inconsistencies. There was ample evidence of defendant's guilt, including a prompt identification, physical evidence, and incriminating statements.

After considering the factors set forth in *People v*

Taranovich (37 NY2d 442, 445 [1975]), we conclude that defendant was not deprived of his constitutional right to a speedy trial. Very little of the approximately 17-month delay was attributable to the People, and we find defendant's claim that he was prejudiced by the delay unpersuasive.

We have considered and rejected defendant's remaining claims, including those related to the loss of a 911 tape and alleged ineffective assistance of counsel.

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

ENTERED: APRIL 30, 2015

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CLERK

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

14983 Gary Linder, Index 105528/10
Plaintiff-Appellant,

-against-

Innovative Commercial Systems LLC, et al.,
Defendants-Respondents.

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Siegel & Reiner, New York (Carl D. Bernstein and Craig Gold of counsel), for appellant.

Hodgson Russ LLP, New York (Mark A. Harmon of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered October 18, 2013, which, insofar as appealed from, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Given the seven-year course of dealing between the parties, in which plaintiff received regular statements about his commissions, and the always adhered-to practice of paying the commissions only if and when customers paid on the contracts plaintiff procured, plaintiff earned his commissions upon payment by the customer (*see Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609, 617-618 [2008]). Thus, absent an agreement expressly providing for posttermination commissions, plaintiff, an at-will commissions salesman, was not entitled to commissions for payments made by customers after his termination (*see id.*; *Yudell v Israel & Assoc.*, 248 AD2d 189, 189-190 [1st Dept 1998]). Furthermore, since plaintiff was fully compensated under his agreement with defendants, he had no claim for a violation of the Labor Law (*see Tierney v Capricorn Invs.*, 189 AD2d 629, 632 [1st Dept 1993], *lv denied* 81 NY2d 710 [1993]). Nor did he have a claim for unjust enrichment, where defendants merely retained the amounts that they were not obligated to pay for posttermination commissions.

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

ENTERED: APRIL 30, 2015

CLERK

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

14984 Herman Ortiz, Index 157841/12
Plaintiff-Appellant,

-against-

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

____

Tracie A. Sundack & Associates, LLC, White Plains (Albert Pizzirusso of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Emma Grunberg of counsel), for respondents.

____

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered October 22, 2013, which granted defendants' motion to dismiss plaintiff's complaint on the ground that it is barred by a general release executed by plaintiff, unanimously affirmed, without costs.

The court properly held that plaintiff's instant claims are barred by a prior general release executed by plaintiff. Following plaintiff's arrest on October 6, 2010, he commenced an action for assault, allegedly occurring during a search conducted at the station house subsequent to his arrest. That action was settled, and, in the stipulation of settlement, plaintiff agreed that he would be forever barred from seeking any recovery "relating to the subject incident." He then executed a broad general release, releasing all of the instant defendants from, essentially, any claims plaintiff had or could have had up to the date of the general release.

Contrary to plaintiff’s assertion, that release did not apply only to the specific claims raised in the original complaint, and reference to that prior action in the release is only in the context of identifying the releasor (*compare Morales v Solomon Mgt. Co., LLC*, 38 AD3d 381 [1st Dept 2007] [where release’s language clearly limited it to only one of two distinct claims against defendants, it only applied to that claim]). The general release executed by plaintiff contained no limiting language from which it could be inferred that it was only meant to apply to the specific claims made in the original action (*compare Lexington Ins. Co. v Combustion Eng'g*, 264 AD2d 319 [1st Dept 1999] [despite release’s broad preliminary language, its subsequent language, and that of the accompanying settlement agreement, narrowed its scope to specific claims]).

Here, plaintiff’s arrest is clearly “related to” the subsequent search conducted pursuant to the arrest, and the "words of [the] general release are clearly operative not only as to all controversies and causes of action between the releasor and releasees which had, by that time, actually ripened into litigation, but to all such . . . [preexisting] controversies [which might have been adjudicated]" (*Lucio v Curren*, 2 NY2d 157, 161-162 [1956]; *see also Broyhill Furniture Indus., Inc. v Hudson Furniture Galleries, LLC*, 61 AD3d 554, 555 [1st Dept 2009]; *cf. Kaminsky v Gamache*, 298 AD2d 361 [2d Dept 2002] [where a new controversy between the parties arose creating a situation where their release/settlement agreement of an earlier controversy would not be performed, the court erred in concluding that the release was applicable to the new controversy]).

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

ENTERED: APRIL 30, 2015

CLERK

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

14985 Kathleen Asser Weslock, Index 313555/09
Plaintiff-Respondent-Appellant,

-against-

Solomon Asser,
Defendant-Appellant-Respondent.

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Wrobel Schatz & Fox LLP, New York (Philip R. Schatz of counsel), for appellant-respondent.

Lee Anav Chung White & Kim LLP, New York (Olivia S. Lee of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Laura E. Drager, J.), entered September 23, 2014, which, to the extent appealed from as limited by the briefs, denied defendant husband's motion for 50% of plaintiff's relocation benefit, for 50% of the value of the parties' truck, and for counsel fees, and denied plaintiff wife's motion for an assessment of the parties' Pennsylvania property and for counsel fees, unanimously affirmed, without costs.

The parties' settlement agreement does not provide that defendant is entitled to 50% of the value of plaintiff's relocation benefit, and there is no basis for looking beyond the four corners of the agreement (*see McCoy v Feinman*, 99 NY2d 295, 302 [2002]).

Supreme Court properly awarded plaintiff sole ownership of the parties' truck, regardless of whether title to the truck was in both parties' names. The settlement agreement does not provide for any disposition of the parties' automobiles, the truck originally belonged to plaintiff's father, and defendant retained the parties' other four automobiles.

There is no basis for ordering an additional neutral appraisal of the parties' Pennsylvania property. In accordance with the settlement agreement, three brokers selected by the parties valued the property. There is no evidence that any of them was improperly influenced or given misinformation about the property. Thus, pursuant to the agreement, the buyout price should be determined by averaging those three valuations.

Neither party has prevailed in this proceeding to an extent that warrants an award of counsel fees under the settlement agreement (*see generally* Domestic Relations Law § 237[a]).

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

ENTERED: APRIL 30, 2015

CLERK

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

14986 The People of the State of New York Ind. 45618C/05
Respondent,

-against-

Clarence Evans,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (David P. Johnson of counsel), for respondent.

Order, Supreme Court, Bronx County (Megan Tallmer, J.), entered on or about May 29, 2013, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously modified, on the law, and as a matter of discretion in the interest of justice, to the extent of reducing the adjudication to that of a level two offender, and otherwise affirmed, without costs.

Clear and convincing evidence established aggravating factors that were not adequately taken into account by the risk assessment instrument (*see e.g. People v Faulkner*, 122 AD3d 539 [1st Dept 2014], *lv denied* 24 NY3d 915 [2015). The instrument did not sufficiently reflect the unusual repulsiveness of the underlying sex act, or the extent of defendant's criminal history, which includes a pattern of impersonating a police officer in order to sexually assault and rob prostitutes. These considerations indicate a risk of recidivism and severe harm to potential victims, justifying an upward departure from level one to level two. In deciding to adjudicate defendant a level three offender, the court expressly relied on a comment made by defense counsel suggesting that prostitutes are unworthy victims. The court improperly ascribed counsel's personal beliefs to defendant, who never made any such statement. Based on our review of the record, we conclude that an upward departure to level two, but not to level three, is warranted.

Defendant's claim that the court was obligated to rule on a particular point assessment is unpreserved, and is in any event unavailing. The court properly exercised its discretion in declining to rule on a matter it considered academic (*see People v Pedraja*, 49 AD3d 325 [1st Dept 2008], *lv denied* 10 NY3d 711 [2008]).

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

ENTERED: APRIL 30, 2015

CLERK

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

14987 The People of the State of New York, Ind. 5695/11
Respondent,

-against-

Pedro Saturria,
Defendant-Appellant.

Seymour W. James, Jr., The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael J. Obus, J.), rendered on or about July 18, 2013,

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

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

ENTERED: APRIL 30, 2015

CLERK

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

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

14988 David Kassel, Index 150886/13
Plaintiff-Respondent,

-against-

James P. Donohue, etc., et al.,
Defendants-Appellants,

James Lynch, etc., et al.,
Defendants.

Hinshaw & Culbertson LLP, New York (Philip Touitou of counsel), for appellants.

Thomas D. Shanahan, P.C., New York (Thomas D. Shanahan of counsel), for respondent.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered August 26, 2013, which, insofar as appealed from, denied defendants James P. Donohue and Crystal and Donohue's motion to dismiss the complaint as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint as against James P. Donohue and Crystal and Donohue.

The allegations in the complaint reflect plaintiff's dissatisfaction with defendants' strategic choices and tactics in the conduct of the arbitration; there is no showing that those choices and tactics were unreasonable (*see Rosner v Paley*, 65 NY2d 736, 738 [1985]; *Pouncy v Solotaroff*, 100 AD3d 410 [1st Dept 2012], *lv denied* 21 NY3d 857 [2013]; *Dweck Law Firm v Mann*, 283 AD2d 292 [1st Dept 2001]).

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

ENTERED: APRIL 30, 2015

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CLERK

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

14990 The People of the State of New York, Ind. 1043/13
Respondent,

-against-

Amara Toure,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Shane Tela of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Joshua L. Haber of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael J. Obus, J.), rendered on or about September 19, 2013,

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

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

ENTERED: APRIL 30, 2015

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CLERK

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

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

14991 Hosam Alrqiq, Index 104341/12
Plaintiff-Appellant,

-against-

New York University, et al.,
Defendants-Respondents.

____

Kathy A. Polias, Brooklyn, for appellant.

Gordon & Rees LLP, New York (Kuuku Minnah-Donkoh of counsel), for respondents.

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Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered February 20, 2014, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

The court properly dismissed the complaint wherein plaintiff alleges that he was subjected to discrimination on account of his race, religion, and national origin when he was not admitted to the Orthodontics Residency Program at New York University. Although "couched in terms of unlawful discrimination," the complaint is "a challenge to a university's academic and administrative decision[] and thus is barred by the four-month statute of limitations for a CPLR article 78 proceeding, the appropriate vehicle for such a challenge" (*Padiyar v Albert*

Einstein Coll. Of Medicine of Yeshiva Univ., 73 AD3d 634, 635 [1st Dept 2010], *lv denied* 15 NY3d 708 [2010]).

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

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

ENTERED: APRIL 30, 2015

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CLERK

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

14992N In re The Port Authority of New York and New Jersey, Petitioner-Appellant, Index 450618/13

-against-

The Port Authority Police Detectives Endowment Association, Inc., Respondent-Respondent.

James M. Begley, New York (Toby Jon Russell of counsel), for appellant.

Witham & Kozan, P.A., New York (Craig Kozan of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Joan M. Kenney, J.), entered March 10, 2014, which denied the petition to vacate an arbitration award, dated January 22, 2013, rendered in favor of respondent ruling that petitioner violated the parties' governing collective bargaining Memorandum of Agreement (MOA) by eliminating free E-Z Pass privileges for retired detectives, and confirmed the award, unanimously affirmed, without costs.

The MOA expressly incorporates the terms of a 1973 Port Authority Administrative Instruction, PAI 40-1.01, which provides that respondent's retirees shall "receive the same allowance to which they would be entitled if their [PA] service was not interrupted." The arbitrator's ruling that this language vests respondent's retirees with a lifetime interest in the EZ-Pass privileges which they enjoyed while employed, is not "'completely irrational'" or otherwise beyond the scope of the arbitrator's authority (*Matter of Port Auth. of N.Y. & N.J. v Port Auth. Police Lieuts. Benevolent Assn.*, 124 AD3d 473 [1st Dept 2015]; *Matter of Port Auth. of N.Y. & N.J. v Port Auth. Police Sgts. Benevolent Assn.*, 124 AD3d 474 [1st Dept 2015] [*SBA I*]; *Matter of Port Auth. of N.Y. & N.J. v Port Auth. Police Sergeants Benevolent Assn.*, 124 AD3d 475 [1st Dept 2015] [*SBA II*]). Given his finding that PAI 40-1.01 had been repeatedly incorporated into the MOA's predecessor agreements, the arbitrator rationally construed the MOA as continuing and incorporating vested personal pass benefits for all retirees, and he did not exceed his contractual authority by declining to limit the scope of the award to respondent's members who retired during the term of the current MOA (*see SBA II*, 124 AD3d at 475).

Petitioner's contention, that the arbitrator exceeded his contractual power by misapplying applicable precedent, is without merit. "The contractual phrase, 'in accordance with applicable law,' refers to the extent to which the arbitral award will be binding upon the parties; it does not indicate an intent of the parties to deviate from the basic principle that an arbitral award may not be vacated on the ground that the arbitrator made a mistake of law” (*SBA I*, 124 AD3d at 475; *SBA II*, 124 AD3d at 475-476).

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

ENTERED: APRIL 30, 2015

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Moskowitz, DeGrasse, JJ.

14349 John Seward Johnson, Jr., etc., et al., Index 652075/11
Plaintiffs-Respondents-Appellants,

-against-

Proskauer Rose LLP, et al.,
Defendants-Appellants-Respondents,

Ira Akselrad,
Defendant.

Proskauer Rose LLP, New York (David M. Lederkramer of counsel), for appellants-respondents.

Pashman Stein, P.C., Hackensack, NJ (Gary S. Stein of the bar of the State of New Jersey, admitted pro hac vice, of counsel), and Baratta, Baratta & Aidala, LLP, New York (Ottavio V. Mannarino of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Lawrence K. Marks, J.), entered January 29, 2014, to the extent appealed from, affirmed, without costs. Plaintiffs' appeal from order insofar as it granted defendant Akselrad's motion to dismiss the complaint as against him, withdrawn, without costs, pursuant to the parties' stipulation dated April 24, 2015.

Opinion by Mazzarelli, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
Angela M. Mazzarelli
Rolando T. Acosta
Karla Moskowitz
Leland G. DeGrasse, JJ.

14349
Index 652075/11

____x

John Seward Johnson, Jr.,
etc., et al.,
Plaintiffs-Respondents-Appellants,

-against-

Proskauer Rose LLP, et al.,
Defendants-Appellants-Respondents,

Ira Akselrad,
Defendant.

____x

Cross appeals by plaintiffs and defendants Proskauer Rose LLP and Jay Waxenburg from the order of the Supreme Court, New York County (Lawrence K. Marks, J.), entered January 29, 2014, which, to the extent appealed from, denied, in part, defendants' motion to dismiss plaintiffs' causes of action alleging fraud, excessive legal fee and unjust enrichment, denied that portion of their motion seeking dismissal of plaintiffs' demand for punitive damages based on the fraud claim, and granted that portion of their motion seeking dismissal of the cause of action for legal malpractice.

Proskauer Rose LLP, New York (David M. Lederkramer, Elise A. Yablonski and Andrew S. Wellin of counsel), for appellants-respondents.

Pashman Stein, P.C., Hackensack, NJ (Gary S. Stein of the bar of the State of New Jersey, admitted pro hac vice, of counsel), Pashman Stein, P.C., New York (Sean Mack of counsel), and Baratta, Baratta & Aidala, LLP, New York (Ottavio V. Mannarino, Joseph P. Baratta and Louis R. Aidala of counsel), for respondents-appellants.

MAZZARELLI, J.

On this appeal and cross appeal from the disposition of a motion addressed to the allegations in plaintiffs' first amended complaint, the following recitation of facts is based strictly on the allegations set forth in that pleading. As this is a motion to dismiss the complaint, the allegations must be assumed to be true. Plaintiffs are individual heirs to the Johnson & Johnson (J & J) fortune, trusts established for the benefit of those individuals, and trustees of the plaintiff trusts. They own many shares of J & J stock, much of it obtained at a low cost basis. One of the trustee-plaintiffs, Robert Matthews, is also a certified public accountant who prepared the tax returns that were challenged by the IRS and give rise to this dispute. Defendant Proskauer Rose LLP (Proskauer) is a law firm that, prior to the events at issue, had represented plaintiffs on a variety of matters, including tax matters. Defendant Jay Waxenberg is a member of Proskauer.

Although plaintiffs had not expressed to anyone at Proskauer that they desired to sell J & J stock, Waxenberg telephoned Matthews several times in September 2000 to discuss a method which, he told Matthews, would permit plaintiffs to sell J & J stock without being subject to a large tax liability. Plaintiffs agreed to hear more about the proposal, and on October 2, 2000, plaintiff John Seward Johnson, Jr. and Matthews met Waxenberg and his partner, defendant Ira Akselrad, at Proskauer's offices. At the meeting, Waxenberg and Akselrad introduced Johnson and Matthews to James Haber, who was identified as a principal of The Diversified Group, Inc. (TDG). Haber explained to Johnson and Matthews that TDG was in the business of developing tax minimization strategies for individuals and families with high net worths.

Haber, Waxenberg and Akselrad then described to Johnson and Matthews the specific scheme they believed would benefit plaintiffs, and instructed them how to execute it. They represented to Johnson and Matthews that the plan would obviate plaintiffs' need to pay tax on the gains realized by the sale of J & J stock and would withstand IRS scrutiny since it had "a legitimate and bona fide business and economic purpose." Waxenberg and Akselrad stated that, at a later date, Proskauer would prepare and issue to plaintiffs an opinion letter explaining the legal rationale supporting the scheme, and which would protect plaintiffs from the imposition of any penalties in the "unlikely" event the IRS disagreed with defendants' opinion that the strategy was a legitimate one. They also told Johnson and Matthews that after the plan was implemented, they would continue to represent plaintiffs in connection with it. In the meantime, however, even though Johnson and Matthews told them that they were in no rush to sell J & J stock, Waxenberg and Akselrad told Johnson and Matthews that they should execute the strategy in the very near future, and would be "foolish" not to. This, Waxenberg and Akselrad said, was because plaintiffs' opportunity to do so may not be open-ended, because it was being offered to them as favored clients of Proskauer, and because other similarly-situated clients, including members of the Johnson family, had already done so. Finally, Akselrad and Waxenberg told Johnson and Matthews not to discuss the tax avoidance plan with anybody else.

Also on October 2, 2000, Johnson and Matthews executed a retainer letter that provided, inter alia, that Proskauer would render tax advice to plaintiffs regarding the discussed sale of J & J stock, that Proskauer had represented TDG in the past on "unrelated matters," that plaintiffs had agreed that Proskauer would "continue to represent TDG fully in unrelated matters notwithstanding [its] ongoing representation of [plaintiffs]," and that plaintiffs had waived "any conflict of interest" arising in connection with Proskauer's representation of TDG "in unrelated matters notwithstanding [its] ongoing representation of [plaintiffs].”

Between October 13, 2000 and November 30, 2000, plaintiffs took the complex series of steps recommended by TDG and Proskauer to effectuate the tax strategy. They paid TDG a total of $1,379,650 in fees and costs, of which they allege that $425,000 was paid by TDG to Proskauer to cover its legal fee.

In June 2001, Proskauer sent plaintiffs a 63-page opinion letter, dated December 29, 2000, which concluded that “it was more likely than not” that the scheme, already executed, would not generate any gain or loss, or accrue any penalties if it was disallowed by the IRS.

In January 2002, the IRS announced a tax amnesty program which allegedly would have been applicable to plaintiffs’ situation. However, Proskauer did not notify plaintiffs of that program. In April 2006, the IRS sent plaintiffs a letter requesting documents and detailed information about the tax avoidance strategy they had implemented over five years earlier. Plaintiffs sought counsel from Waxenberg, but he informed them that Proskauer was conflicted by its representation of TDG. Concerned that the agency would ultimately challenge the scheme and assess penalties against them, plaintiffs secured a tolling agreement from Proskauer which, after a later extension, tolled the statute of limitations for any claims against Proskauer up to and including July 31, 2011. Ultimately, the IRS ruled the shelter transaction was not entitled to favorable capital gains tax treatment and assessed plaintiffs back taxes, penalties and interest amounting to millions of dollars.

In December 2010, plaintiffs became aware of a decision in a federal case in Massachusetts District Court (*Fidelity Intl. Currency Advisor A Fund, LLC v United States*, 747 F Supp 2d 49 [D Ma 2010]). That case was brought by a former Proskauer client who had executed a tax avoidance plan similar to that recommended to plaintiffs by Proskauer and Akselrad. The District Court, after a 44-day trial, issued findings of fact and conclusions of law which stated that the attorneys "agreed in advance to provide favorable legal opinions in order to induce taxpayer-investor" to get involved in the shelter opportunity, and that Proskauer and another law firm had "derived substantial profit from the promotion and sale of the tax shelter strategy, and therefore had a financial interest in upholding the strategy" (747 F Supp 2d at 212, 213).

In July 2011, plaintiffs commenced this action against defendants. Plaintiffs asserted causes of action against defendants sounding in fraud, legal malpractice and unjust enrichment; they also sought a declaratory judgment in their favor and recovery of legal fees, which they claimed were grossly excessive. The fraud claim was supported by the allegations that, at the October 2000 meeting, Waxenberg and Akselrad made affirmative statements touting a tax avoidance plan that they had no genuine basis to represent would be an effective one, as well as their failure to apprise plaintiffs of the fact that Proskauer was effectively in a business partnership with TDG and had a direct financial interest in plaintiffs' purchasing the services being offered by TDG. Plaintiffs claim that the fraud was widespread, since, they allege, Proskauer issued 380 opinion letters to other clients, similar to the one they received, discussing TDG tax avoidance strategies. In connection with the fraud cause of action, plaintiffs sought, inter alia, the taxes, penalties and interest to be assessed by the IRS, and dividend income and appreciation sacrificed by their decision to sell J & J stock at the urging of defendants. Plaintiffs also sought punitive damages based on defendants' alleged "conscious, willful and wanton disregard of the rights" of plaintiffs, which was "directed at members of the public, to generate unwarranted and excessive fees."

Proskauer and Waxenberg jointly moved to dismiss plaintiffs' first amended verified complaint, arguing, as is relevant here, that the legal malpractice claim was time-barred before the tolling agreement was executed and that the other substantive claims must be similarly barred based on the duplicative claims doctrine codified in CPLR 214(6). They further posited that, on the merits, the fraud claim must fail because plaintiffs could not have justifiably relied on any of the representations or omissions attributed to defendants, given plaintiffs' relative sophistication and the fact that the opinion letter advised that it was merely "more likely than not" that the scheme would pass IRS muster. Finally, defendants asserted that, even were the fraud claim to survive, it did not give rise to a claim for punitive damages.

Plaintiffs argued in opposition to the motion that the continuing representation doctrine tolled the accrual of their malpractice claim until at least April 2006, which was when Proskauer affirmatively informed them that it could not represent them with respect to the tax avoidance plan. They further argued that the fraud and malpractice claims were not duplicative because they rested on different allegations and sought different damages.

The court denied defendants' motion, except to the extent it sought dismissal of the causes of action for legal malpractice and declaratory relief. With respect to the malpractice claim, it found that the opinion letter expressly disclaimed any obligation by defendants to "update" the opinion, notwithstanding a change in the law or facts, and that no other events served to extend the accrual of the limitations period. The court rejected plaintiffs' continuous representation argument, noting there were no allegations that plaintiffs required any form of representation from Proskauer on the shelter transaction between June 2001, when they received the opinion letter, and 2006, and that any alleged general understanding of a "standby," "ongoing representation," in the event IRS inquiries arose, did not amount to continuous representation. The court stated that plaintiffs' allegation that Proskauer represented that it was unlikely that the IRS would challenge the tax strategy undermined their continuous treatment argument, because it indicated that they had no acute awareness of the need for further representation on the matter.

The court declined to dismiss plaintiffs' fraud claim as duplicative of the legal malpractice claim, since the former claim was founded upon allegations indicating something more than mere concealment of malpractice. The court found the fraud claim alleged independent, intentionally tortious conduct, particularly concerning Proskauer’s failure to disclose its true relationship with TDG, and that such conduct allegedly gave rise to separate and distinct damages from the malpractice claim. The court noted that plaintiffs alleged that Proskauer intentionally made false representations as to the legality of the shelter transaction, as well as to the nature of its relationship with TDG regarding the tax shelter transactions. The court further noted that plaintiffs alleged that Proskauer participated in a broader fraudulent scheme with TDG to target numerous wealthy clients.

The court similarly declined to dismiss the claim alleging that Proskauer’s fee was excessive, since this claim too was distinct from the legal malpractice claim inasmuch as it did not relate to the quality or content of defendants’ legal advice to plaintiffs. The court credited allegations that Proskauer had issued approximately 380 other opinion letters confirming the legality of the tax avoidance plan, and that the fee appeared to be a disguised finder’s fee, or commission. For similar reasons, the court declined to dismiss plaintiffs’ fifth cause of action for unjust enrichment, as it was predicated upon the same excessive fee claim, and was thus not duplicative of the legal malpractice arguments.

The motion court rejected Proskauer's argument that the allegations did not support the justifiable reliance element of a fraud claim. It recognized that plaintiffs acknowledged the opinion letter only went so far as to state that "it was more likely than not" that the shelter transaction was legal. However, it held that because plaintiffs did not receive the opinion letter until after they entered the shelter transaction, they had adequately stated a basis for justifiable reliance upon Proskauer's much more favorable assessment of the shelter transaction at the October 2000 meeting.

The court declined to dismiss plaintiffs' punitive damages claim. It credited their allegations that defendants participated in a scheme that targeted hundreds of clients, notwithstanding their fiduciary duty to those clients, and that they did so strictly in the pursuit of profits and without full disclosure of the nature of their relationship to TDG. It did dismiss plaintiffs' cause of action seeking a declaration of "the rights and legal relations" of the parties, including that defendants were liable to plaintiffs for the resulting taxes, penalties, interest and legal fees, finding that plaintiffs had an adequate remedy at law under the other causes of action alleged in the complaint.

Because these appeals arise out of a motion brought pursuant to CPLR 3211, our analysis of plaintiffs' claims is limited to the four corners of the pleading, the allegations of which we must give a liberal construction and accept as true (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). We must also accord plaintiffs the benefit of every possible favorable inference (*id.*) and bear in mind that "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). These guidelines apply not only to a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), but also to dismiss based on the statute of limitations pursuant to CPLR 3211(a)(5) (*New York Tel. Co. v Mobil Oil Corp.*, 99 AD2d 185, 192 [1st Dept 1984]).

Plaintiffs do not dispute that, ordinarily, a legal malpractice claim accrues when the injury to the client occurs, regardless of the client's awareness of the malpractice (*see Goldman v Akin Gump Strauss Hauer & Feld LLP*, 46 AD3d 481, [1st Dept 2007], *lv dismissed in part*, *denied in part* 11 NY3d 749 [2008]). According to that principle of law, the statute of limitations would have begun to run, at the latest, on June 8, 2001, when Proskauer delivered the opinion letter. Plaintiffs argue that the continuous treatment doctrine tolled the limitations period. That doctrine "appreciates the client's dilemma if required to sue the attorney while the latter's representation on the matter at issue is ongoing" (*Shumsky v Eisenstein*, 96 NY2d 164, 167 [2001]). However, the tolling it allows only applies to the specific matter out of which the malpractice claim arises; it does not apply merely because the lawyer and client had a continuing relationship pursuant to which they would have occasion to deal with each other from time to time (*id.* at 168).

Plaintiffs contend that their retainer agreement with Proskauer establishes continuous representation since it preserved the firm's right to represent TDG "in unrelated matters notwithstanding [its] *ongoing representation* of [plaintiffs]" (emphasis added). However, what controls is not what a retainer agreement might say, but rather whether a client is "acutely aware of [the] need for further representation on the specific subject matter underlying the malpractice claim" (*Shumsky* at 169). In *Shumsky*, the retainer agreement supported the plaintiff's continuous representation argument where it made specific reference to the action he had retained the attorney to commence and prosecute. Thus, the Court of Appeals deemed the representation to be continuous until such time as the plaintiff should have realized that the attorney had implicitly withdrawn from representation by refusing to return his telephone calls seeking to ascertain the status of the action. Here, the retainer agreement is distinguishable from the agreement in *Shumsky* because, notwithstanding the "ongoing representation" language, there was no concrete task defendants were likely to perform after they delivered the opinion letter. Accordingly, while there was certainly the *possibility* that the need for future legal work would be required with respect to the tax strategy, plaintiffs could not have "acutely" anticipated the need for further counsel from defendants that would trigger the continuous representation toll.

Defendants argue that, because the legal malpractice claim is time-barred, plaintiffs' other claims arising out of the representation are also time-barred since they are merely duplicative of the malpractice cause of action. This contention derives from CPLR 214(6), which was enacted to prevent plaintiffs from circumventing the three-year statute of limitations for professional malpractice claims by characterizing a defendant's failure to meet professional standards as something else, such as a breach of contract (for which there is a six-year statute of limitations) (*see Matter of R.M. Kliment & Frances Halsband, Architects [McKinsey & Co., Inc.]*, 3 NY3d 538, 541-542 [2004]). The key to determining whether a claim is duplicative of one for malpractice is discerning the essence of each claim (*see id.* at 542; *Spinale v Tenzer Greenblatt*, 309 AD2d 632 [1st Dept 2003]). Thus, in *Kliment*, a breach of contract claim against an architect was barred because it merely sought to enforce a provision in an agreement that required the architect to prepare its plans in accordance with law, and failure to do so would have been the same as failing to carry out its professional obligations.

On the other hand, a fraud claim survived dismissal of an accounting malpractice cause of action in *Mitschele v Schultz* (36 AD3d 249 [1st Dept 2006]). There, the defendant accounting firm was recommended to the plaintiff by her employer. The plaintiff asserted that the defendant committed numerous errors in preparing and filing her tax returns. She also alleged that the defendant had represented to her that the manner in which it declared her earnings was "the way it's got to be," and that it insisted on the particular course of action not with her own interests in mind, but those of her employer, which was seeking to minimize its own tax liability. This Court held that

> "defendants' alleged fraud is not simply the failure to disclose the malpractice based upon accounting errors. Rather, defendants are alleged to have perpetrated a fraud on plaintiff *from the time they were retained* to provide accounting services, in failing to disclose their concern with protecting the interests of another entity, namely, plaintiff's employer" (36 AD3d at 254)(emphasis added).

Thus, in *Mitschele*, the fraud claim was considered independent of the malpractice claim for statute of limitations purposes even though the harm arose out of the accountant's failure to properly protect its client. The situation here is no different. Plaintiffs allege not only that defendants failed to adequately advise them with respect to the tax strategy. They also claim that Proskauer pressured them into the scheme because, *at the outset*, Proskauer's paramount concern was preserving its lucrative arrangement with TDG, which presumably intended to continue to work with Proskauer to sell the scheme to other high net worth individuals and entities.

This Court has not disavowed *Mischele*, as defendants contend. In *Carl v Cohen* (55 AD3d 478 [1st Dept 2008]), on which defendants rely, the plaintiff sought to elevate the defendant's failure to reveal an ethical conflict of interest from a malpractice claim into a fraud claim. However, *Carl* is substantively different from *Mischele* and from the situation here, because there the attorney disclosed the conflict (*Carl v Cohen*, 2007 NY Slip Op 31665[u] [Sup Ct NY County 2007]). Further, there was no allegation, as here, that the defendant was overwhelmingly motivated by the potential to profit from the adversely-situated party. Here, while defendants disclosed that they represented TDG on "other matters," they did not disclose that they were in business with TDG with respect to selling the tax avoidance scheme and that helping TDG to sell the scheme was of primary importance. Further, the damages plaintiffs seek for the fraud and malpractice causes of action do not completely overlap with each other. Thus, the claims are not one and the same. The first amended complaint seeks far more money in damages under the fraud cause of action than under the malpractice cause of action. Indeed, Proskauer's narrow focus on what each claim seeks in damages ignores its own statement as to what the focus should be in determining whether claims are duplicative; that is, the essence of the claims. Here, the essences of the fraud and malpractice claims are sufficiently distinct from one another that the court properly did not invoke the duplicative claims doctrine.

The excessive fee and unjust enrichment claims are also not duplicative of the malpractice claim. The former is stated regardless of the quality of the work performed, so long as a plaintiff can reasonably allege that the fee bore no rational relationship to the product delivered (*see Ullmann-Schneider v Lacher & Lovell-Taylor, P.C.*, 121 AD3d 415, 416 [1st Dept 2014]). Here, plaintiffs did so, since they asserted that defendants collected a $425,000 fee for a "cookie cutter" legal opinion. By the same logic, the unjust enrichment claim, which is predicated on the excessiveness of the $425,000 fee, also properly survived the motion to dismiss.

We turn now to defendants' argument that, even if the fraud claim is not duplicative of the malpractice claim, it still must be dismissed for failure to state a cause of action. Specifically, defendants contend that plaintiffs cannot establish justifiable reliance because, as defendants characterize the allegations in the first amended complaint, plaintiffs were aware of the uncertain nature of the tax strategy when they agreed to participate in it. Defendants rely on *Shalam v KPMG LLP* (89 AD3d 155 [1st Dept 2011]), which also involved a failed tax avoidance scheme. In that case, this Court found that "the information that plaintiff *acknowledged* possessing at the time, along with information contained in documents in his possession, conclusively establish that he knew or should have known that he was participating in a scheme of doubtful legality" (89 AD3d at 157-158). This case is significantly different from *Shalam*. *Shalam* was decided on a motion for summary judgment, where the Court was permitted to look well beyond the allegations in the complaint. Thus, this Court was able to consider precisely what the plaintiff knew, and what he did not know, and was able to conclude that the "[p]laintiff was presented with information sufficient to cause him to doubt the propriety of the [shelter] scheme for tax avoidance purposes, and willfully blinded himself to that information by failing to ask questions, pay attention to details, or read the documents he signed" (*id.* at 159). Here, by contrast, we are limited to what can reasonably be inferred from the four corners of the complaint, construing every possible reasonable inference in plaintiffs' favor. The pleading plainly alleges that, at the time plaintiffs agreed to participate in the TDG strategy, they were not armed with information sufficient to form their own opinion that the scheme might very well not pass IRS muster. To the contrary, the complaint alleges that defendants, who held themselves out as experts in tax law at the October 2000 meeting, led plaintiffs to believe, inter alia, that the strategy "*would* enable [p]laintiffs to legitimately and legally obviate the necessity to pay [t]axes otherwise arising in connection with a sale of J & J shares"; that the "multi-step transactions *would* establish a legitimate and bona fide business and economic purpose and rationale for the tax treatment of" the strategy; and that it was "unlikely" that the IRS would challenge the strategy (emphases added). It was not until well after defendants allegedly made these representations, and acted on them by executing the recommended scheme, that they furnished the opinion letter stating that it was merely "more likely than not" that the strategy would be effective.

Defendants argue that the complaint concedes that plaintiffs knew at the October 2000 meeting that it was merely more likely than not that the IRS would not challenge the shelter scheme. They base this contention on the allegation in the first amended complaint that the opinion letter "reiterated and restated the representations made at the initial meeting that, for federal income tax purposes, it was 'more likely than not'" that the strategy would achieve results predicted by defendants. This reflects a misreading of the complaint. At most, that particular allegation establishes that at the October 2000 meeting defendants played down the likelihood that certain of the nuts and bolts in the complex process of executing the strategy would be recognized by the IRS as legitimate. It does not allege that defendants tempered their language at the meeting when presenting their opinions as to the chances the IRS would ultimately bless the overall strategy. Further, guided by the admonition, outlined above, that we are to construe the pleading liberally while affording plaintiffs every possible favorable inference (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]), the first amended complaint should not be read in the inherently contradictory manner that defendants' interpretation requires; that is, that the complaint alleges that at the October 2000 meeting defendants told plaintiffs the tax strategy *would* succeed, while simultaneously representing that it was merely "more likely than not" that it would succeed.

Defendants further argue that *Shalam* stands for the proposition that a sophisticated party has a heightened burden in establishing fraud in the context of a tax avoidance scheme. Preliminarily, we note that the defendant in *Shalam* was not, like here, a law firm. That is a critical distinction. The sophisticated investor doctrine will, in applicable cases, require a party claiming fraud to establish that it "used due diligence and took affirmative steps to protect [itself] from misrepresentations by employing what means of verification were available at the time" (*VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 57 [1st Dept 2013]). However, where the party relying on this doctrine is an attorney, and the sophisticated party is her client, this principle must give way to the notion that the

> "unique fiduciary reliance, stemming from people hiring attorneys to exercise professional judgment on a client's behalf – 'giving counsel' – is imbued with ultimate trust and confidence (*see*, *Rosner v Paley*, 65 NY2d 736, 738 [1985]; *Greene v Greene*, 56 NY2d 86, 92 [1982]. *The attorney's obligations, therefore, transcend those prevailing in the commercial market place* (*compare*, *Meinhard v Salmon*, 249 NY 458, 463 [1928]). The duty to deal fairly, honestly and with undivided loyalty superimposes onto the attorney-client relationship a set of special and unique duties, including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the clients' interests over the lawyer's" (*Matter of Cooperman*, 83 NY2d 465, 472 [1994][emphasis added]).

Moreover, this Court has stated that, where an attorney enters into a business transaction with a client whereby the two parties' interests may at some point diverge, the ethics rules place on the attorney the burden of obtaining the client's consent, after full disclosure, "irrespective of the sophistication of the client" (*Forest Park Assoc. Ltd. Partnership v Kraus*, 175 AD2d 60, 62 [1st Dept 1991] [holding that law firm should have been disqualified from representing the plaintiff in a litigation, which was an entity in which 49 of its partners were investors, where the firm had previously represented the defendant in connection with the transaction in which the entity was formed]; *accord Schlanger v Flaton*, 218 AD2d 597, 602-603 [1st Dept 1995]). Accordingly, defendants were required to place plaintiffs' interests above all else, without regard to their perceived pedigrees, fortunes or business savvy.

Indeed, the mere facts that plaintiffs were wealthy and could afford high-priced counsel are insufficient for us to draw the conclusion that, as a matter of law, they should have known that there was almost a 50% possibility that the tax strategy would not succeed. On this record, defendants cannot establish the specific backgrounds of plaintiffs and their familiarity with the tax code and IRS practices such that defendants can argue that plaintiffs were not justified in relying on defendants' advice. Ironically, this argument by defendants bolsters plaintiffs' excessive fee claim, since it invites the question why, if they were truly so sophisticated, they needed a $425,000 opinion from Proskauer to convince them to pursue the TDG/Proskauer strategy. Further, it is worth noting that one of the things a sophisticated investor is presumed to know to do before entering a transaction is to consult with its attorney (*see Stuart Silver Assoc. v Baco Dev. Corp.*, 245 AD2d 96, 99 [1st Dept 1997]). That is precisely what plaintiffs did, and they were entitled to rely on defendants' advice.

Finally, plaintiffs' claim for punitive damages properly survived dismissal. Defendants' conduct is alleged to have been directed at a wide swath of clients, and the first amended complaint sufficiently alleges intentional and malicious treatment of those clients as well as a "wanton dishonesty as to imply a criminal indifference to civil obligations" (*Walker v Sheldon*, 10 NY2d 401, 405 [1961]). Indeed, although we offer no opinion regarding whether the particular scheme at issue was criminal in its manipulation of the tax laws, plaintiffs have demonstrated that similar tax avoidance schemes resulted in the indictments of some of their promoters. Accordingly, the demand for punitive damages is adequately stated. Defendants cite *Denenberg v Rosen* (71 AD3d 187 [1st Dept 2010], *lv dismissed* 14 NY3d 910 [2010]) for the purported proposition that an attorney's involvement in promoting an unsuccessful tax avoidance scheme can never support a claim for punitive damages. However, this Court made no such declaration in that case. Nor did this Court find in *Denenberg* that the pension plan at issue was generally defective. Rather, it held that "it was the operation of plaintiff's *particular* plan that caused the problems with the IRS" (71 AD3d at 195) (emphasis added).

Accordingly, the order of the Supreme Court, New York County (Lawrence K. Marks, J.), entered January 29, 2014, which, to the extent appealed from, denied, in part, defendants Proskauer Rose LLP and Jay Waxenberg's motion to dismiss plaintiffs' causes of action alleging fraud, excessive legal fee and unjust enrichment, denied that portion of their motion seeking dismissal of plaintiffs' demand for punitive damages based on the fraud claim, and granted that portion of their motion seeking dismissal of the cause of action for legal malpractice, should be affirmed, without costs. Plaintiffs' appeal from that portion of the order granting defendant Akselrad's motion seeking dismissal of the complaint as against him is unanimously withdrawn, without costs, in accordance with the stipulation of the parties dated April 24, 2015.

All concur.

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

ENTERED: APRIL 30, 2015

CLERK