LAW OFFICES OF
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THOMAS F. LIOTTI⟡

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*Also Admitted in CT

JEAN LAGRASTA
ELLEN LUXMORE
Paralegals

July 16, 2018

SENT VIA ECF

Honorable Marilyn Dolan Go
United States Magistrate Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

RE: *Gayle, et. al. v. Harry's Nurses Registry, Inc., et. al.*
Docket No. 07-CV-4672(NGG)(MDG)

Your Honor:

Thank you for acknowledging my recent, albeit temporary incapacity, as a result of surgery and doctor's orders. I will, of course, endeavor to comply in all respects regarding your order relative to the phone conference which you have scheduled for July 19 at 2 p.m.

My client is a CPA. I am not an accountant so I have asked my client to retain the services of a forensic accountant since neither the client nor I can decipher or determine the validity of Mr. Bernstein's accounting without copies of the checks for all disbursements being provided. Based upon the affidavits provided in my letter to you of July 9, 2018 my client believes that Mr. Bernstein's submissions are incorrect in that some of the nurses have not received the monies to which they were entitled. My client also believes that on the original execution of his accounts that Mr. Bernstein took a fee on that of over $100,000.00 and then also took legal fees from the clients. My client has contended that was in the nature of "double dipping" and therefore improper.

Finally the judgments which Mr. Bernstein was supposed to satisfy in this Court have not been satisfied in the State Court where they were registered. I have provided copies of the judgments which Mr. Bernstein should satisfy since the creditors/plaintiffs in all of those matters were his clients. The judgments remain unsatisfied and as such adversely affect my client's credit and ability to conduct business.

Mr. Dorvilier has an appointment with a forensic accountant on Tuesday, July 17, 2018. Thank you.

Respectfully submitted,

Thomas F. Liotti

TFL:el

cc: Jonathan A. Bernstein, Esq. (via electronic filing only)
Mr. Harry Dorvilier/Harry's Nurses Registry, Inc.

Harry Dorviler
88-25 163 Street
Jamaica, New York 11432

December 2, 2016

**RE: Appeal Pursuant to Court Rule 1240.7(e)(3) re: Grievance Complaint File. Nos. k-46-12, K-1812-16 Harry Dorvilier, Harry's Nurses Registry v. Alter**

John P. Conners, Esq.
Chairman
Grievance Committee for the Second Department
335 Adams Street, Suite 2400
Brooklynb New York, 11201

Dear Chairman Conners:

I am a small business owner who contracts with various individuals so that they may provide homecare to elderly and infirm patients. I employ a small staff of six employees in the office who help me manage independent contractor registered nurses.

Sometime in February 2010, I was falsely accused of stealing $300,000 from certain registered nurses. These charges were false as what occurred, was that the nurses, as independent contractors, agreed to in writing that a sum would be withheld from their paychecks to pay for workman's compensation insurance. This practice was common and allowed for independent contractors but not for employees.

Before engaging in this payment practice, I reviewed official decisions, orders and correspondence from the State Insurance Fund and its Board that informed me this practice was in all respects legitimate with respect to the contracting nurses. I turned all of these decisions over to my attorney Mitch Alter, and told him those were the decisions I relied upon in good faith. I also told him that I consulted with

a CPA firm that also told me the practice was legitimate and who themselves constructed the payment plan. Mr. Alter told me to pay $12000 to an expert CPA witness who reviewed the decisions and correspondence and who would personally present his findings to the District Attorney for a dismissal of the charges as I had a good faith belief in the legality of my actions and the official decisions upon which that belief was predicated.

When Mr. Alter took an approximately 45,000 trial fee plus had me pay the expert 12,000, and did nothing to present this expert to the prosecution or present my good faith mistake in the law defense to the authorities, I promptly filed a Grievance against Mr. Alter prior to the trial in 2011. I felt he was being dishonest and simply wanted my money without doing anything. He refused to return any money so I filed the grievance. At that point, any trust between he and I had broken down.

The Grievance committee took no action. Alter refusing to return funds, Mr. Alter proceeded with the trial without adequately preparing any witnesses, and without, despite Judge Blumenfeld beseeching him to present evidence of my good faith mistake in the law, including the decisions, documents and correspondences that I relied upon. Judge Blumenfeld warned Alter that an ineffective assistance of counsel claim could ensue if he did not present this evidence or call the CPA who constructed the payment plan.

Angry at me because I filed a Grievance against him, Alter proceeded to represent me in a conflicted manner and did nothing to present my defense to the prosecution, judge or jury. It was only after I was convicted and did independent research did I discover that Alter should have made a motion to withdraw from my case, even if he did not want to return the trial fee. There was a conflict and Mr. Alter had to withdraw.

Because the committed took no action I humbly appeal to you to reconsider my Grievance. I have filed an pro se ineffective assistance of counsel claim and the Supreme Court is currently considering it.

I respectfully request that Mr. Alter be sanctioned and appeal to you, Chairman, the dismissal of my grievance.

To reiterate, Mr. Alter had me pay approximately $12,000 to an alleged expert witness accountant who was to appear before the prosecution and court, to testify, and to explain his report and findings with respect to certain allegations made against me. His bill expressly indicated payment for **"in Court"** appearance. The accountant reviewed various court decisions and correspondence from the state which indicated my payment practices were proper, despite the State's allegation that I committed grand larceny.

Mr. Alter had me pay the accountant that was to testify and who prepared a report, but never did he present the accountant to the Prosecution and refused to call him, or any of the evidence he relied upon, as a witness in my trial. Because of his failure to do so and his insistence that I part with $12,000 for a witness that did not even show up to the prosecutor's office or at the trial, before the trial, I immediately filed the Grievance against him with your esteemed office.

Mr. Alter, after being paid approximately 45,000 and knowing that he was the subject of the grievance and, thus laboring under a conflict, simply pocketed the money, refused to return any money, and proceeded to trial without calling any witnesses in my defense including the expert witness, who would have testified that I was engaged in a common accounting practice when I deducted a sum of money from the pay of independent contractors for their insurance and not engaged in grand larceny.

Indeed, the *prosecutor's own expert witness* stated that this was a common practice, and the Judge, told Mr. Alter that if I had a good faith basis for believing that It was not illegal, that Alter must present the evidence either in the form of a witness or documentary evidence that I relied upon. Having in his possession the court decisions and correspondence from the state that I relied upon, which led me to believe that what I was doing was not illegal, and knowing about the expert witness, Alter did nothing.

Because Mr. Alter was the subject of my grievance stemming from his failure to prepare and present any witnesses or proof including the good faith defense as told to him by the Judge, *See Mathis v. Hood*, 937 F. 2d 790 (2nd Cir. 1991), he was obligated to move to withdraw from the case, and not simply pocket my money and proceed with the trial in a conflicted manner. Indeed, at the trial Alter did not call the accountant *or* ***present any evidence of my good faith defense.***

The conflict is clear, Mr. Alter suppressed the witness and evidence of good faith mistake in a self-interested effort to vindicate his failure to prepare and present witnesses and evidence to the prosecution and court, as asserted in my Grievance against him.

This is why, I submit, Attorneys must move to withdraw when they are the subject of a Grievance and laboring under a conflict, and not simply continue on with a trial because they do not want to refund fees. Should you need any further information kindly contact me at the number above.

Thank you for your kind attention and I humbly appeal to you Chairman the Committee's taking of no action Pursuant to Court Rule 1240.7(e)(3).

Sincerely,

Harry Dorvilier

2016 OCT 25 PM 2:54

QUEENS COUNTY, NY
2016 OCT 25 PM 2:55

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

THE PEOPLE OF THE STATE OF NEW YORK

IND. No.1709/2010

**NOTICE OF MOTION**
PURSUANT TO CPL 440.10

-against-

HARRY DORVILIER and HARRY'S NURSES REGISTRY, INC.

Defendants.

PLEASE TAKE NOTICE that upon the annexed affidavit of Harry Dorvilier, sworn to on October 25, 2016, the annexed Memorandum of Law, Affidavits, Exhibits, and other documents, defendant Harry Dorvilier will move this Court at the Courthouse located at Queens County at 125-01 Queens Blvd, Kew Gardens, NY 11415, Part K-22, Judge ~~Blumenfeld,~~ Mitchell on November 14, 2016 at 9:30 in the forenoon of that day, or as soon thereafter as counsel may be heard, for an Order, pursuant to CPL 440.10 setting aside his convictions for larceny in the above-captioned case, entered on or about October 4, 2012.

Dated: Queens, New York
October 25, 2016

Harry Dorvilier, Pro Se

Harry Dorvilier

TO: Richard Brown
District Attorney
Queens, County
125-01 Queens Boulevard
Kew Gardens, New York 11415

SUPREME COURT OF THE STATE OF NEWYORK
COUNTY OF QUEENS

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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

Indictment No. 1709/2010

AFFIDAVIT

HARRY DORVILIER and HARRY'S NURSES REGISTRY, INC.

Defendants.

----------X

State of New York )
SS:
County of Queens )

HARRY DORVILIER, being duly sworn deposes and says that:

1. I am one of the two listed defendants in the above-captioned matter and am fully familiar with the facts and circumstances of this case. I make this motion pursuant to CPL § 440.10, asking this Court to set aside my convictions for grand larceny entered on or about October 4, 2012.

**Factual and Legal Background**

2. I, Defendant Harry Dorvilier, and Harry's Nurses Registry (Hereinafter Harry's) were charged with two counts of grand larceny in the third degree and eleven counts of grand larceny in the fourth degree for allegedly stealing money from their "employees." The People claimed that Harry's workers were not independent contractors but employees, and that Harry's stole the employees' money when a sum of money was deducted from their pay checks.

3. Defendant's principle defense was that he relied upon official court and adminis rative decisions, and New York State correspondence which held that individuals working for him were independent contractors when he agreed with these individuals that a sum of money would be deducted from their pay, not for his personal benefit, but for their worker's compensation insurance. This practice was permissible, as testified to by the People's own expert witness, and indeed common, with respect to ***independent contractors*, but was impermissible if the workers were deemed *employees*** (T: 393-394). Exhibit A.

4. Harry Dorvilier, the undersigned, had the administrative decisions, court decisions, and correspondence in his possession upon which he relied when conducting business, and turned them over directly to his trial attorney who, because he would not turn them over to the prosecution or court, would later be the subject of a grievance. The existence of these decisions supported defendant's contention that he relied, in good faith, upon the decisions when he agreed with independent contractors to withhold a portion of their pay for their ins rance. Exhibit B.

5. Also supporting the defense was the prosecution's expert witness testimony that this sort of arrangement was common and not illegal with respect to *independent contractors* (T: 393-394), as well as an accountant's proposed testimony that defendant was informed that the practice was legal according to the State correspondence and decisions rendered, all of which were reviewed by the accountant. Exhibits A, B.

6. Prior to the commencement of trial, Defendant filed an official disciplinary grievance against his negligent and poorly prepared trial attorney for not adequately preparing, researching or interviewing any witnesses and for insisting that he pay 12,000 for a witness that trial counsel did nothing to prepare for testimony and ultimately did not present as a testifying witness. The grievance was duly filed with the bar disciplinary committee and created an insurmountable conflict between defendant and trial counsel prior to trial. Grievance Committee File No.: K-46-12, Dated Jan. 17, 2012.

7. Trial counsel, however, seeking to keep in excess of 30,000 and illicit and exorbitant expert witness referral fees, did not move to withdraw as counsel

despite his knowledge that there existed a conflict in his representation of defendant. Defendant did not, himself, know of the rule that an attorney must move to withdraw in the face of such a conflict and only learned of it after his trial. *Mathis v. Hood*, 937 F.2d 790 (2nd Cir. 1991). Trial counsel, at loggerheads with defendant, the subject of a grievance and demanding more money, instead of moving to withdraw, pocketed the trial fees, and simply moved ahead with the trial in an unprepared and conflicted manner. *Cf. Mathis v. Hood*, 937 F.2d 790 (2nd Cir. 1991).

8. Additionally, in the face of the important questions of fact concerning defendants' intent, good faith reliance, and mistake of law, this Honorable Court repeatedly instructed trial counsel that a defense to the charges of grand larceny from the ostensible "employees" existed and could be submitted to the jury if a mistaken belief is founded upon an "official statement of the law contained in a statute or other enactment or an administrative order or grant of permission or judicial decisions... or body legally charged or empowered with the responsibility or privilege of administering, enforcing or interpreting such statute of the law." (T: 10). Exhibit C.

9. The Court repeatedly instructed conflicted trial counsel to present what it was that defendant relied upon to support his mistake of law defense, as defendant was, indeed, claiming good faith reliance on the issued decisions and mistake of law. Defendants believed the workers were independent contractors and not employees because of the decisions possessed by defense counsel as well as the correspondence he received from the State. The prosecutor's theory was that the workers were employees and not independent contractors.

**10.** The Court found this defense germane and responsive to the prosecution's theory and specific charge that defendant was *stealing from his employees* and was not engaged in a common practice with respect to independent contractors. ***The Court repeatedly warned defense counsel that as evidence of defendant's good faith reliance and mistake of law was key to his defense, it had to be moved into evidence to support his defense and its submission to the jury.***

11. Despite these instructions to trial counsel, and despite trial counsel being in *possession of the decisions and orders relied upon* by defendant, and turned over to the defendant's account, trial counsel failed to submit the decisions to the judge and jury, and did nothing to move them into evidence, despite the undersigned's express request that he do so, and despite trial counsel's acknowledgment, when questioned by the Court, that he possessed the decisions. The Court repeatedly stressed to trial counsel that defendant would have to show what he relied upon to assert that he was mistaken as to the law (T. 213). Exhibit C.

12. Trial Counsel was in possession of this exculpatory evidence which would render it more likely than not that his clients would be acquitted of the crimes charged and was aware that a professional accountant was ready and willing to testify that these decisions existed and that defendant, in good faith, relied upon these decisions and correspondences concerning his payment practices. See Exhibit B.

13. Despite the clarity of this law, and the Court's careful instruction to trial counsel, trial counsel, having in his possession judicial decisions and pronouncements relied upon by the defendant which went directly to the issue of his intent, failed to submit the decisions and proof into evidence and failed to call any witnesses including the accountant that he failed to prepare for which defendant paid 12,000 (the subject of the trial counsel's disciplinary grievance). Trial counsel, the subject of a grievance, was thus ineffective and labored under a conflict that could not be waived. *Mathis v. Hood*, 937 F.2d 790 (2nd Cir. 1991).

14. Conflicted trial counsel also failed to present any of the witnesses to the workings of defendant's business that were ready willing and able to testify. See Exhibit D.

15. With respect to the employee and Independent Contractor distinction, to the extent that the People vacillated and sought to change their theory of the case to argue on summation that the theft was from independent contractors, the People could not so constructively amend the indictment. *See United States v. Keller*, 916 F.2d 628 (11th Cir. 1990). Indeed, the People's indictment also charged misdemeanor violations of the worker's

compensation law alleging the pay deduction was from "employees" for worker's compensation insurance and these charges were dismissed prior to trial because of the statute of limitations. A subsequent amendment from employees to independent contractors would have thus been a constructive amendment of the indictment, a *structural error and reversible per se.* See *Stirone v. United States*, 361 U.S. 212 (1960). Trial Counsel was likewise ineffective for not objecting to the amendment and structural error at trial. *United States v. Thomas*, 274 F.3d 655, 670 (2nd Cir. 2001).

16. After defendant was convicted, and represented by new counsel, this Court stated that defendant could bring a 440.10 motion and assert that his Constitutional Right to the Effective Assistance of Counsel was violated because of, among other things, trial counsel's failure to present evidence of defendants' mistake of law and reliance upon official court decisions (T. 213).

17. Defendant, the undersigned, now pro se, respectfully submits this 440.10 motion because he was deprived of his Sixth Amendment Constitutional Right to the effective assistance of counsel.

18. For the deprivation of the effective assistance of counsel, in violation of N.Y. Const. Article I § 6 and U.S. Const. Amends. V, VI and XIV, this Court should set aside Defendant's convictions and remand for a new trial.

19. If the Court determines that it cannot set aside the convictions on the papers, defendants request that it hold a hearing pursuant to CPL § 440.30.

Sworn to before me this
25th day of 2016

SHARON E DEXTER
Notary Public - State of New York
NO. 01DE6173841
Qualified in Queens County
My Commission Expires 09.04.19

Harry Dorvilier

SUPREME COURT OF THE STATE OF NEWYORK
COUNTY OF QUEENS

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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

Indictment No. 1709/2010

**MEMORANDUM OF LAW**

HARRY DORVILIER and HARRY'S NURSES REGISTRY, INC.

Defendants.

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This Memorandum of Law is submitted in support of Defendant's 440.10 motion.

## ARGUMENT

**HARRY DORVILIER WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL. CPL 440.10 (1)(h); N.Y. Const. Art. I 6; U.S. Const. Amends. V, VI, XIV.**

1. Trial Counsel, the subject of a grievance and laboring under a conflict of interest, failed to present evidence and documentary proof of Defendant's good faith reliance upon official court and administrative decisions, and State correspondence which, if presented to the jury, would have created more than a reasonable probability that he would be acquitted. Conflicted trial counsel's utter failure to prepare and call any witnesses, investigate and submit evidence of the nature of defendant's business, including defendant's reliance upon official court decisions, violated defendant's right to the effective assistance of counsel under both state and federal constitutions. Additionally, conflicted trial counsel's failure to object to the prosecutor's constructive amendment of the indictment, a structural error, was ineffective assistance of counsel. See *Stirone v. United States*, 361 U.S. 212 (1960);

*United States v. Thomas*, 274 F.3d 655, 670 (2nd Cir. 2001). *United States v. Keller*, 916 F.2d 628 (11th Cir. 1990). See also Mathis v. Hood 937 F. 2d 790 (2nd Cir. 1991).

2. Under the Sixth Amendment of the United States Constitution, a claim of ineffective assistance of counsel is evaluated under the two-part test set forth in (*Strickland v Washington*, 466 US 668 [1984]). To prevail, a defendant must (1) show that his counsel's performance fell below an "objective standard of reasonableness" judged by "prevailing professional norms" (the performance prong), and (2) "prejudice" by demonstrating that, but for counsel's unprofessional errors, the result of the proceeding would have been different (the prejudice prong) (*Strickland*, 466 US at 687-88, 693).

3. To establish that counsel's performance was deficient, a defendant must show that "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance" (*Pavel v Hollins*, 261 F3d 210, 216 [2d Cir 2001]).

4. To demonstrate prejudice, a defendant must show there is a "reasonable probability" that the ineffective performance rendered the proceeding fundamentally unfair or produced an unreliable result (*Missouri v Frye*, 132 S Ct 1399 [2012]; *Lafler v Cooper*, 132 S Ct 1376 [2012]; *Premo v Moore*, 131 S Ct 733 [2011]; *Padilla v Kentucky,* 559 US 356 [2010]; *Roe v Flores-Ortega*, 528 US 470 [2000]; *Lockhart v Fretwell*, 506 US 364 [1993]; *Hill v Lockhart*, 474 US 52 [1985]; *Strickland* at 694-695).

5. Success of an ineffective assistance of counsel claim under Article I, § 6 of the New York State Constitution rests on whether " the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation'" (*People v Henry*, 95 NY2d 563, 565 [2000], quoting *People v Baldi*, 54 NY2d 137, 146-47 [1981]; *see also People v Lane*, 60 NY2d 748, 750 [1983]).

6. Accordingly, because New York's concept of prejudice focuses on the quality of representation provided and not simply the "but for" causation chain, the distinction between *Baldi* and *Strickland* is that New York "refuse[s] to apply the harmless error doctrine in cases involving

substantiated claims of ineffective assistance" (*Benevento* at 714). As a practical matter then, New York has " adopt[ed] a rule somewhat more favorable to defendants,' (*People v Ozuna*, 7 NY3d 913, 915 [2006], quoting *People v Turner*, 5 NY3d 476, 480 [2005]), because its prejudice component focuses on the fairness of the process as a whole rather than its particular impact on the outcome of the case.

7. Under the facts of this case, conflicted trial counsel's omission of relevant, exculpatory evidence concerning defendant's intent and his omission of the official court decisions, State correspondence and professional testimony, relied upon by defendant, not only caused actual prejudice to defendant under the federal standard of ineffectiveness- the jury should have heard that the defendant was not stealing from *employees* but was contracting with *independent contractors in a common practice*- but also rendered the entire process unfair regardless of its impact on the outcome of the case.

8. As such, both federal and state standards of ineffective assistance of counsel are satisfied. It is clear that but for trial counsel's ineffectiveness, the verdict would have been different as the jury would have understood that defendant was, in good faith, relying upon official court documents holding that the workers were independent contractors, the payment arrangement was legal according to the People's own expert, and defendant did not intend to steal money from any *employees as charged by the People.* Under the state standard, defendant did not receive a fair trial and meaningful representation because the gravamen of his defense, that defendant believed what he was doing was legal according to the people's own witness, official court decisions, business custom, and professional advice, was never presented by *a conflicted* trial counsel. SEE Mathis v. Hood, 937 F.2d 790 (2nd Cir. 1991).

9. Moreover, trial counsel did not even offer the testimony of an accountant who reviewed the decisions with defendant and did instruct him that on the basis of these decisions his payment arrangement with the independent contractors was legal.

10. As these claims could not be resolved upon direct appeal, and as the Appellate Division has advised the undersigned to bring this CPL 440.10 motion with reference to the decisions, information, and attorney grievance

not on the record supporting defendant's ineffective assistance of counsel claim, defendant respectfully submits this motion. *See People v. Freeman*, 93 AD3d 805.

**RELIEF REQUESTED**

11. For the deprivation of the effective assistance of counsel, in violation of N.Y. Const. Article I § 6 and U.S. Const. Amends. V, VI and XIV, this Court should set aside Defendant's convictions and remand for a new trial.

12. If the Court determines that it cannot set aside the convictions on the papers, defendants request that it hold a hearing pursuant to CPL § 440.30.

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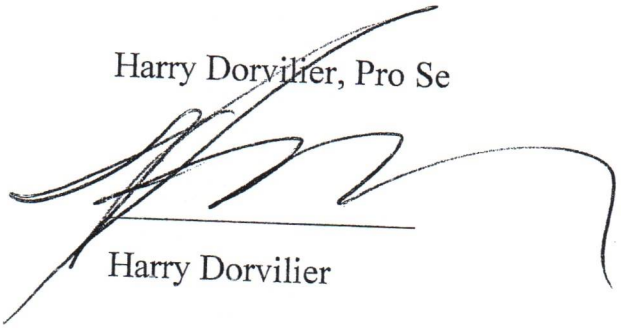
Dated: Queens, New York
October 25, 2016

Harry Dorvilier, Pro Se



Harry Dorvilier

TO: Richard Brown
District Attorney
Queens, County
125-01 Queens Boulevard
Kew Gardens, New York 11415

# EXHIBIT A

THE COURT: That's not what I asked you.

THE WITNESS: Okay. It is a way that businesses have done business in the past, yes. They basically deduct an amount of money for the --

THE COURT: Do they have to tell the employee up front or independent contractor that this is a term or condition of your employment, that you have to arrange for their own Worker's Compensation, or I will do it for you?

THE WITNESS: They could -- that could be done.

THE COURT: If they contracted with them.

THE WITNESS: They could contractually state that, yes.

THE COURT: If the relationship is independent contractor, that would be up to whether or not the independent contractor may want to have that kind of protection?

THE WITNESS: Then in certain cases if they want to work for that particular employer and they're independent contractors, the employer could require that they go out and get their own policy or the employer could take a certain amount out. That's common business practice.

THE COURT: You do that to protect the employer from being sued?

THE WITNESS: Exactly.

THE COURT: And the employee might want to do it to

do that. I want to make sure they understand the distinction between employer and employee, an independent contractor and how it impacts Worker's Compensation. You understand I have no interest here? I just want to make sure that it is fair to you to ask you to decide cases that you have enough information.

You may continue.

MS. BUCCHERI: I have nothing further.

CROSS-EXAMINATION

BY MR. ALTER:

Q Are nurses under the Worker's Compensation law --

THE COURT: You want to just tuck your shirt in.

MR. ALTER: Oh, okay.

Q Are you aware of the decision -- you are an expert on Worker's Compensation law.

Are you aware of the decision in Renouf, 254 New York 349?

MS. BUCCHERI: Objection.

THE COURT: Did I hear you correct that you didn't go to law school?

THE WITNESS: Yes, that's correct.

THE COURT: Nevertheless, in the course of your job, do you have occasion to read Court of Appeals cases?

THE WITNESS: Yes.

THE COURT: The case that he's asked you about, I

# EXHIBIT B

Supreme Court of the State of New York, New York County.

2011 NY Slip Op 32191(U) (N.Y. Misc. 2011)

# COMMIS. OF STATE INS. V. HARRY'S NURSES REGISTRY, 406555/07 (7-8-2011)

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[EDITOR'S NOTE: This case is unpublished as indicated by the issuing court.] MILTON TINGLING, J.:

Plaintiff moves pursuant to CPER 3212 for summary judgment against defendant in the amount of $122,729.01 plus interest from June 19, 2007 at the rate of 9% per year, collection costs and attorney fees pursuant to State Finance Law § 18 in the amount of $27,000.38, together with costs and disbursements.

Plaintiff State Insurance Fund issued and maintained a workers' compensation insurance policy covering defendants' employees commencing February 7, 2006. According to its terms, the policy was to be renewed annually. On its second term, defendant cancelled the policy, effective June 19, 2007. The premiums due on the policy were calculated based on the remuneration defendant paid to its employees, as adjusted to include ancillary charges. The total payroll would be multiplied by a constant determined by the New York Compensation Insurance Rating Board, an unincorporated association of insurance carriers. At the beginning of each policy term, defendant would be charged an estimated premium. At the end of each term, an audit would be performed to determine defendant's actual payroll and either a credit or a bill would be issued. *3

The first problem arose when plaintiff based its estimated premium on defendant's representation that it had 11 employees collectively earning $301,280 for the year (see plaintiffs exhibit B, p 4), but when plaintiff conducted a mid-term audit, to ascertain the adequacy of the estimated premium, it discovered that despite representations to the contrary (see *id.*, p 7), defendant in fact employed numerous "independent contractors" who were paid an aggregate of $2,457,483 from February 7 to June 30. 2006. After a complex process of audits, recalculations and document amendments, plaintiff determined that the final balance due under the policy was $ 122,729.01. Despite plaintiff's demands, defendant paid no part of that balance.

In this action, plaintiff seeks to collect the unpaid premiums, together with interest thereon at the rate of 9% from the date of the policy's cancellation, and collection and legal fees in the amount of $27,000.38.

In opposition, defendant contends that plaintiff charged such exorbitant rates for its policy despite negotiated rate reductions, that defendant was forced to cancel plaintiff's policy and replace it with a policy issued by AIG (for nearly half the price), which took effect on May 25, 2007. Despite the AIG polic, plaintiff would not let defendant cancel its duplicative coverage until nearly a month after the date requested, and then imposed an early cancellation penalty. Defendant argues that such penalty cannot be enforced because it is vastly disproportionate to plaintiffs exposure, Defendant seeks a recalculation of the premiums which would exclude the penalty and include defendant's payroll only until May 25, 2010, when defendant switched its coverage to A.1G.

Plaintiff counters that the early cancellation penalty is not an unconscionable liquidated damages provision, but rather a "short rate premium," a "time-honored `customary' or *4 `standard' clause" which allows an insurer to collect the premiums it would have charged for a short-term contract instead of the presumably lower premiums it actually charged expecting the contract to be for a longer term.

The court finds that plaintiff may charge a short-rate premium for the partial term of the February 7. 2007 to February 6, 2008 contract year so as to make the premiums payable by defendant equivalent to the premiums plaintiff would have charged had the policy been originally issued for

the abbreviated term (see *Commissioner of State Insurance Fund v. Kassas*, 5 Misc 3d 1012(A) [Civ Ct, NY Co, Billings, J, 2004]; short-term penalty applies only to the partial last year, it cannot be imposed on prior full years of policy).

The applicable clause in the parties' policy provides as follows:

> If you cancel for any reason other than that you are no longer required by law to have insurance, final premium will be more than pro rata, it will be based on the time this policy was in force, and increased by our short rate cancellation table and procedure. Final premium will not be less than the minimum premium

(¶ IV[F](2), at plaintiff's exhibit A). This provision was subsequently amended by plaintiff as follows:

> "If you request cancellation for any other reason other than you are no longer required by law to have insurance or if your policy is cancelled for non-payment of premium, final premium will be more than pro rata: it will be based on the time this policy was in force, and increased by our short-rate cancellation table and procedure. Final premium will not be less than the minimum premium.

(see various revised information pages at plaintiffs exhibit D). Such clauses are permitted by law (see *Gately-Haire Co., Inc. v. Niagara Fire Insurance Co. of City of New York*, 221 NY 162, 170-172 (/case/gately-haire-co-v-niagara-fire-ins-co#p170) [1917]; *Great American Indemnity Co. v. Greenberg Bros. Iron Steel Corporation*, 170 Misc 489 [Mun Ct, NY Co, 1939]; *McKenna v Firemen's Insurance Co.*, 30 Misc 727 [Sup Ct, NY Co, 1900]; see also 5 Couch on Ins § 79:21; 45 CIS Insurance § 810). *5

Nonetheless, there are two main issues which preclude the award of summary judgment to plaintiff: the cancellation date of the policy and the collection costs being charged by plaintiff.

With respect to the cancellation date, plaintiff argues that it cancelled the policy in accordance with its terms:

> You may cancel this policy if you secure benefits for your employees in another manner that complies with the Workers' Compensation Law. You must mail or deliver written notice to us which specifies the date you propose cancellation to take effect. Notwithstanding the date you specify, cancellation will not take effect until thirty days after the date you mail or deliver notice to us and ten days after we file notice in the office of the Chair of the Workers' Compensation Board.

(¶ V[D](1), at plaintiffs exhibit A). Even if this court were to find that clause enforceable as plaintiff interprets it, it could not determine the proper date of cancellation as a matter of law, since glaring by its omission from plaintiffs submission is defendant's notice of cancellation to plaintiff. Not only is the actual notice and proof of its transmission not provided to the court, but plaintiff does not allege either in its complaint or affidavits, on what date the notice was provided and on what date plaintiff filed the notice of cancellation with the Board. The only document provided (buried in plaintiff's exhibit I)) is plaintiffs notice dated May 30, 2007, addressed to no one, advising that at defendant's request it has cancelled the policy effective June 19, 2007.

"Basic summary judgment principles have long held that it is the movant's burden to present evidence demonstrating his or her prima facie entitlement to judgment as a matter of law. . . . Even where there is no opposition to a motion for summary judgment, the court is not relieved of its obligation to ensure that the movant has demonstrated his or her entitlement to the relief requested" ( *Zecca v Riccardelli*, 293 AD2d 31, 33-34 [2d Dept 2002], citing *Zuckerman v City of New York*, 49 N Y2d 557 and *Alvarez v Prospect Hospital*, 68 N Y2d 320). Plaintiff has not done so. *6

Furthermore, the court is not persuaded by plaintiffs interpretation of the applicable statute, Workers' Compensation Law § 54, which provides that

> . . . When cancellation is due to any reason other than non-payment of premiums such cancellation shall not be effective until at least thirty days after a notice of cancellation of such, contract, on a date specified in such notice, shall be filed in the office of the chair and also served on the employer; provided, however, in either case, that **if the employer has secured insurance with another insurance carrier which becomes effective prior to the expiration of the time stated in such notice, the cancellation shall be effective as of the date of such other coverage. . . .**

(WCL § 54, emphasis added). The Practice Commentary makes it clear that the 30-day wailing period was enacted solely for the benefit of the employer. The "provision is intended to protect employers from being subjected to personal and even criminal liability from an unexpected lapse in coverage without being given a proper opportunity to protect themselves by obtaining other coverage. . . . The old policy should then end when the new valid policy and coverage went into effect. There is no need for duplicate coverage" (Minkowitz, Practice Commentaries, McKinney's Cons Laws of NY, Book 64, Workers' Compensation Law § 54 (2006 Main Vol]). "If the employer obtains other coverage prior to the end of the 30-day period, the policy is deemed cancelled as to the date of the new coverage" ( *Id.*). In short, "[t]he statute requires First a written notice with a definite cancellation date, and the saving clause as to the effect of other insurance applies only to the period after the notice has been given and before the cancellation date fixed therein has been reached" ( *Horn v. Malchoff*, 276 App Div 683. 685 [3d Dept 1950], lv den 99 NYS2d 753 ("3d Dept 1950]). Thus, if defendant gave plaintiff notice of cancellation before May 25, 2007, plaintiff should have cancel ed the policy as of that date — when defendant's replacement policy became effective.

Finally, plaintiffs failure of proof also dooms its motion for summary judgment with respect to collection costs, which plaintiff seeks to recover pursuant to State Finance Law § 18. *7 Plaintiff's complaint alleges that plaintiffs collection cost in this action is "22% of the principal amount sought. . . . or $27,000.38" (¶ 10, at plaintiffs exhibit J). No calculation of actual expenditures and costs of collection has been submitted — or indeed performed — other than that percentage. This is inconsistent with the statutory requirement. State Fin L § 1 8(5) allows plaintiff to assess employers who fail to make payment within 90 days of the first invoice "an additional collection fee charge to cover the cost of processing, handling and collecting such debt, not to exceed twenty-two percent of the outstanding debt . . . The assessed collection fee charge may not exceed the agency's estimated costs of processing, handling and collecting such debt." Since plaintiff has not even attempted to estimate its costs, it cannot prove that 22% of the principal does not exceed such estimate. Counsel's glib statement that if plaintiff prevails herein his office alone would be paid more than $27,000 (Florio supporting affirmation, ¶ 30) does not constitute an estimate. In this context, the court notes that it appears to be plaintiff's custom to charge 22% of whatever

amount is due, no matter what relation such percentage bears to the actual costs. Another Justice of this court has declined such practice by plaintiff and found it precludes summary judgment in plaintiff's favor (see *Commissioners of State Insurance Fund v Brooklyn Barber Beauty Equipment Co., Inc.*, 191 Misc 2d 1, 12-14 (/case/commissioners-st-ins-fund-v-brooklyn-barber-beauty#p12) [Civ Ct, NY Co, Billings, J, 2001], app dism 2 Misc 3d 14 (/case/commissioners-state-insurance-fund-v-brooklyn-barber) App Term, 1st Dept 2003]; *Commissioner of SIF v. Kassas, supra*, 5 Misc 3d 1012 (A) at *5). This court sees no reason to disagree.

Accordingly, plaintiffs motion for summary judgment is denied in its entirety. Upon service of a copy of this order with notice of entry, the Clerk of the Trial Support Office (Room 158) shall restore this action to its former place on the trial calendar. *8

This decision constitutes the order of the court. *1

The first problem arose when plaintiff based its estimated premium on defendant's representation that it had 11 employees collectively earning $301,280 for the year (see plaintiff's exhibit B, p 4), but when plaintiff conducted a mid-term audit to ascertain the adequacy of the estimated premium, it discovered that despite representations to the contrary (see *id.*, p 7), defendant in fact employed numerous "independent contractors" who were paid an aggregate of $2,457,483 from February 7 to June 30, 2006. After a complex process of audits, recalculations and document amendments, plaintiff determined that the final balance due under the policy was $122,729.01. Despite plaintiff's demands, defendant paid no part of that balance.

In this action, plaintiff seeks to collect the unpaid premiums, together with interest thereon at the rate of 9% from the date of the policy's cancellation, and collection and legal fees in the amount of $27,000.38.

In opposition, defendant contends that plaintiff charged such exorbitant rates for its policy despite negotiated rate reductions, that defendant was forced to cancel plaintiff's policy and replace it with a policy issued by AIG (for nearly half the price), which took effect on May 25, 2007. Despite the AIG policy plaintiff would not let defendant cancel its duplicative coverage until nearly a month after the date requested, and then imposed an early cancellation penalty. Defendant argues that such penalty cannot be enforced because it is vastly disproportionate to plaintiff's exposure. Defendant seeks a recalculation of the premiums which would exclude the penalty and include defendant's payroll only until May 25, 2010, when defendant switched its coverage to AIG.

Plaintiff counters that the early cancellation penalty is not an unconscionable liquidated damages provision, but rather a "short rate premium," a "time-honored 'customary' or

'standard' clause" which allows an insurer to collect the premiums it would have charged for a short-term contract instead of the presumably lower premiums it actually charged expecting the contract to be for a longer term.

The court finds that plaintiff may charge a short-rate premium for the partial term of the February 7, 2007 to February 6, 2008 contract year so as to make the premiums payable by defendant equivalent to the premiums plaintiff would have charged had the policy been originally issued for the abbreviated term (see *Commissioner of State Insurance Fund v. Kassas*, 5 Misc 3d 1012(A) [Civ Ct, NY Co, Billings, J, 2004]; short-term penalty applies only to the partial last year, it cannot be imposed on prior full years of policy).

The applicable clause in the parties' policy provides as follows:

> If you cancel for any reason other than that you are no longer required by law to have insurance, final premium will be more than pro rata, it will be based on the time this policy was in force, and increased by our short rate cancellation table and procedure. Final premium will not be less than the minimum premium

(¶ IV[F](2), at plaintiff's exhibit A). This provision was subsequently amended by plaintiff as follows:

> "If you request cancellation for any other reason other than you are no longer required by law to have insurance or if your policy is cancelled for non-payment of premium, final premium will be more than pro rata: it will be based on the time this policy was in force, and increased by our short-rate cancellation table and procedure. Final premium will not be less than the minimum premium.

(see various revised information pages at plaintiff's exhibit D). Such clauses are permitted by law (see *Gately-Haire Co., Inc. v. Niagara Fire Insurance Co. of City of New York*, 221 NY 162, 170-172 [1917]; *Great American Indemnity Co. v. Greenberg Bros. Iron & Steel Corporation*, 170 Misc 489 [Mun Ct, NY Co, 1939]; *McKenna v Firemen's Insurance Co.*, 30 Misc 727 [Sup Ct, NY Co, 1900]; see also 5 Couch on Ins § 79:21; 45 CJS Insurance § 810).

Nonetheless, there are two main issues which preclude the award of summary judgment to plaintiff: the cancellation date of the policy and the collection costs being charged by plaintiff.

With respect to the cancellation date, plaintiff argues that it cancelled the policy in accordance with its terms:

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(¶ V[D](1), at plaintiff's exhibit A). Even if this court were to find that clause enforceable as plaintiff interprets it, it could not determine the proper date of cancellation as a matter of law, since glaring by its omission from plaintiff's submission is defendant's notice of cancellation to plaintiff. Not only is the actual notice and proof of its transmission not provided to the court, but plaintiff does not allege either in its complaint or affidavits, on what date the notice was provided and on what date plaintiff filed the notice of cancellation with the Board. The only document provided (buried in plaintiff's exhibit D) is plaintiff's notice dated May 30, 2007, addressed to no one, advising that at defendant's request it has cancelled the policy effective June 19, 2007.

"Basic summary judgment principles have long held that it is the movant's burden to present evidence demonstrating his or her prima facie entitlement to judgment as a matter of law.... Even where there is no opposition to a motion for summary judgment, the court is not relieved of its obligation to ensure that the movant has demonstrated his or her entitlement to the relief requested" (*Zecca v Riccardelli*, 293 AD2d 31, 33-34 [2d Dept 2002], citing *Zuckerman v City of New York*, 49 NY2d 557 [1980] and *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Plaintiff has not done so.

Furthermore, the court is not persuaded by plaintiff's interpretation of the applicable statute, Workers' Compensation Law § 54, which provides that

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(WCL § 54, emphasis added). The Practice Commentary makes it clear that the 30-day waiting period was enacted solely for the benefit of the employer. The "provision is intended to protect employers from being subjected to personal and even criminal liability from an unexpected lapse in coverage without being given a proper opportunity to protect themselves by obtaining other coverage.... The old policy should then end when the new valid policy and coverage went into effect. There is no need for duplicate coverage" (Minkowitz, Practice Commentaries, McKinney's Cons Laws of NY, Book 64, Workers' Compensation Law § 54 [2006 Main Vol]). "If the employer obtains other coverage prior to the end of the 30-day period, the policy is deemed cancelled as to the date of the new coverage" (*Id.*). In short, "[t]he statute requires first a written notice with a definite cancellation date, and the saving clause as to the effect of other insurance applies only to the period after the notice has been given and before the cancellation date fixed therein has been reached" (*Horn v. Malchoff*, 276 App Div 683, 685 [3d Dept 1950], lv den 99 NYS2d 753 [3d Dept 1950]). Thus, if defendant gave plaintiff notice of cancellation before May 25, 2007, plaintiff should have cancelled the policy as of that date -- when defendant's replacement policy became effective.

Finally, plaintiff's failure of proof also dooms its motion for summary judgment with respect to collection costs, which plaintiff seeks to recover pursuant to State Finance Law § 18.

# WOULD YOU LIKE TO SAVE MONEY?

Proper preparation of records can save money in more ways than one. Here are some ways:

1. **Overtime -**You can deduct the extra amount over the regular rate of pay. If your employee's regular rate is $10.00 per hour and he receives time and one-half for overtime, he will be paid $15.00 for each overtime hour. The additional $5.00 can be deducted from your gross payroll, but only if it is shown separately on your records. Furthermore, if your policy has more than one classification, overtime must be shown separately for each classification. The key words are *shown separately*, otherwise the savings will be lost.

2. **Payroll Separation -**if your policy has more than one classification, payroll must be shown separately for each in order to take advantage of the lower-rated classification. If this is not done, all payroll may be assigned to the highest-rated classification.

3. **Construction -**Usually a separation is allowed for an employee's earnings if he works in more than one trade. In other words, some of your employees' payrolls can be charged at lower rates if your records show a separation for each trade on an actual time spent basis. No percentage breakdowns are allowed. Also we encourage you to take advantage of the New York Construction Premium Adjustment Program (NYCCPAP). Also, in 1998, the Construction Employment Payroll Limitation law was enacted. This program applies a maximum payroll limitation for each eligible construction classification code. Ask our auditor about these two programs during the audit.

4. **Uninsured Subcontractors -**You are responsible for injury claims brought by employees of uninsured subcontractors. We must charge premiums for this. Obtaining an original certificate of Workers' Compensation insurance from your subcontractor before work is started is the best thing to do. If you use an out-of-state subcontractor to do work in New York, the certificate must state that subcontractor is covered in New York. In any event it is important to have these certificates available for review at the time of the audit. This will avoid unnecessary charges for subcontracting on your policy. For this reason, it is beneficial to have audits involving subcontractors conducted at your location rather than at your accountant.

## Review The Audit

Please allow time to review the audit with the auditor. By the time the auditor leaves, you should have a full understanding of what you are being charged for. It is during this review that many audit problems can, and should, be resolved. The auditor will work with you to resolve any problems you may have with the audit.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 44

----------X

COMMISSIONERS OF THE STATE INSURANCE FUND,

Plaintiff,

INDEX NO.
406555/07

-against-

HARRY'S NURSES REGISTRY, INC.,

Defendant.

----------X



**MILTON TINGLING, J.:**

Plaintiff moves pursuant to CPLR 3212 for summary judgment against defendant in the amount of $122,729.01 plus interest from June 19, 2007 at the rate of 9% per year, collection costs and attorney fees pursuant to State Finance Law § 18 in the amount of $27,000.38, together with costs and disbursements.

Plaintiff State Insurance Fund issued and maintained a workers' compensation insurance policy covering defendants' employees commencing February 7, 2006. According to its terms, the policy was to be renewed annually. On its second term, defendant cancelled the policy, effective June 19, 2007. The premiums due on the policy were calculated based on the remuneration defendant paid to its employees, as adjusted to include ancillary charges. The total payroll would be multiplied by a constant determined by the New York Compensation Insurance Rating Board, an unincorporated association of insurance carriers. At the beginning of each policy term, defendant would be charged an estimated premium. At the end of each term, an audit would be performed to determine defendant's actual payroll and either a credit or a bill would be issued.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MILTON A. TINGLING PART 44

Index Number : 406555/2007
STATE INSURANCE FUND
vs.
HARRY'S NURSES REGISTRY
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

on this motion to/for _____

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

**Cross-Motion:** ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision.

FILED

AUG 03 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/8/11

Mat
J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.