New York

By: Robert S. Hoff

Robert S. Hoff is a partner in Wiggin and Dana LLP's Litigation Department and White Collar Defense, Investigations and Corporate Compliance Practice Group. His client matters have involved the manufacturing, marketing, and sale of opioids; auditor malpractice; insider trading; subprime mortgages and mortgage-backed securities; antitrust; stock options backdating; bribery; securities fraud; and high-stakes commercial disputes, among others.

A. Adoption of the Uniform Commercial Code

New York adopted and codified portions of the Uniform Commercial Code on damages in transactions involving the sale of goods.[1] New York has also adopted and codified Article 2-A, governing any transaction involving leases, as well as other provisions of the Uniform Commercial Code.[2]

B. Compensatory Damages

In New York, compensatory damages "restore the injured party, to the extent possible, to the position that would have been occupied had the wrong not occurred."[3] "The damages must be compensatory only" and result "directly from and as a natural consequence of the wrongful act."[4] The New York Court of Appeals has held that "damages may not be merely speculative, possible or imaginary, but must be reasonably certain and directly traceable to the breach, not remote or the result of other intervening causes."[5]

New York also recognizes special damages in circumstances

[1] N.Y. U.C.C. LAW § 2-102 *et seq*.
[2] N.Y. U.C.C. LAW § 2-A-102.
[3] McDougald v. Garber, 536 N.E.2d 372, 374 (N.Y. 1989).
[4] E.J. Brooks Co. v. Cambridge Sec. Seals, 105 N.E.3d 301, 307 (N.Y. 2018).
[5] Kenford Co., Inc. v. Erie Cnty., 493 N.E.2d 234, 235 (N.Y. 1986).

where the damages did not flow directly from the breach but were "foreseeable and within the contemplation of the parties at the time the contract was made."[6] Compensatory damages may be recoverable under the following claims in New York, among others:

- breach of contract;[7]
- breach of warranty;[8]
- misappropriation of trade secrets;[9]
- conversion,[10] or
- fraud.

C. Mitigation

While an injured party is obligated to make "reasonable exertions" to mitigate or minimize damages, "such obligation does not require a party to incur extraordinary expense and risk."[11] The defendant bears the burden of establishing that the "plaintiff failed to make diligent efforts to mitigate its damages" and proving the "extent to which such efforts would have diminished its damages."[12]

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[6] Am. List Corp. v. U.S. News & World Report, Inc., 549 N.E.2d 1161, 1164 (N.Y. 1989) (lost profits sought by listing company were not special damages because they were contemplated at the contracts inception).

[7] David Home Builders, Inc. v. Misiak, 937 N.Y.S.2d 524 (N.Y. App. Div. 2012) (affirming jury award of compensatory damages in breach of contract for sale of home).

[8] N.Y. U.C.C. LAW § 2-714 (defining damages for breach of warranty to be "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount"); Park W. Mgmt. Corp. v. Mitchell, 391 N.E.2d 1288, 1295 (N.Y. 1979), cert. denied, 444 U.S. 992 (1979) (the proper measure of damages for breach of the warranty is the difference between the fair market value of the premises if they had been as warranted, as measured by the rent reserved under the lease, and the value of the premises during the period of the breach).

[9] Damages in trade secret actions are measured by the losses incurred by the plaintiff and are not based on the infringer's avoided development costs. *E.J. Brooks*, 31 N.Y.3d at 449; "[w]here disclosure of a trade secret has destroyed [a] competitive edge, the plaintiff's costs of developing the product *may* be the best evidence of the (now-depleted) value that the plaintiff placed on the secret." *Id.* at 454; "[d]amages are not a required element of misappropriation of trade secrets under New York law." Better Holdco, Inc. v. Beeline Loans, Inc., 666 F. Supp.3d 328, 398 (S.D.N.Y. 2023). Courts may award a defendant's unjust gains as a proxy for compensatory damages in an unfair competition case. However, "[t]he accounting for profits in such circumstance is not *in lieu of* ...damages, but is *a method of computing* damages," *E.J. Brooks*, 31 N.Y.3d at 450 (quoting Ronson Art Metal Works, Inc. v. Gibson Lighter Mfg. Co., 159 N.Y.S.2d 606, 609 (N.Y. App. Div. 1957)).

[10] Fantis Foods, Inc. v. Standard Importing Co., Inc., 402 N.E.2d 122, 125 (N.Y. 1980) ("[t]he usual measure of damages for conversion is the value of the property at the time and place of conversion, plus interest").

[11] Murray v. New York City Transit Auth., 862 N.Y.S.2d 706, 708 (N.Y. App. Div. 2008).

[12] LaSalle Bank Nat. Ass'n v. Nomura Asset Capital Corp., 846 N.Y.S.2d 95, 99 (N.Y. App. Div. 2007).

The financial resources of either party are irrelevant to the determination of damages.[13]

D. Punitive Damages

Punitive damages are intended to punish the wrongdoer and deter others from acting similarly.[14] Rather than remedying a private wrong committed by the defendant, punitive damages are intended to "vindicate public rights."[15] Under New York law, punitive damages are available where the alleged actions "constitute gross recklessness or intentional, wanton or malicious conduct aimed at the public generally or are activated by evil or reprehensive motives."[16] The substantive standard for punitive damages is high and generally unavailable in ordinary breach of contract actions.[17] Punitive damages are recoverable upon proof of "an extraordinary showing of a disingenuous or dishonest failure to carry out a contract."[18]

Most New York courts require a clear and convincing standard before awarding punitive damages, while others have advocated a preponderance of the evidence standard.[19] Punitive damages do not constitute a separate cause of action and are not available absent a valid claim for compensatory damages.[20] New York does not place caps on punitive damages, instead cautioning that "exemplary damages awarded by a jury should not be reduced by a court unless it is so grossly excessive 'as to show by its very exorbitancy that it was actuated by passion.'"[21] Because punitive damages are designed to punish the wrongdoer, the New York Court of Appeals finds

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[13] Rupert v. Sellers, 368 N.Y.S.2d 904, 909 (N.Y. App. Div. 1975).

[14] Hartford Acc. & Indem. Co. v. Vill. of Hempstead, 397 N.E.2d 737, 743 (N.Y. 1979).

[15] Rocanova v. Equitable Life Assur. Society, 634 N.E.2d 940, 943 (N.Y. 1994).

[16] Thomas v. Farrago, 154 A.D.3d 896, 898 (N.Y. 2017) (quoting Gravitt v. Newman, 495 N.Y.S.2d 439, 441 (N.Y. App. Div. 1985)).

[17] Horn v. Toback, 989 N.Y.S.2d 779, 783 (N.Y. App. Div. 2014).

[18] Gordon v. Nationwide Mut. Ins. Co., 285 N.E.2d 849, 854, re-argument denied, 289 N.E.2d 569 (N.Y. 1972), cert. denied, 410 U.S. 931 (1973).

[19] Randi A.J. v. Long Island Surgi-Ctr., 842 N.Y.S.2d 558, 568 (N.Y. App. Div. 2007) (trial court erred in failing to instruct the jury on a clear and convincing evidence standard for punitive damages); Geressy v. Digital Equip. Corp., 950 F. Supp. 519, 522 (E.D.N.Y. 1997) (finding a preponderance standard to be appropriate since the substantive standard for punitive damages is already so high).

[20] Catalogue Serv. of Westchester, Inc. v. Ins. Co. of N. Am., 425 N.Y.S.2d 635, 637 (N.Y. App. Div. 1980); Prote Contracting Co., Inc. v. Bd. of Educ. of City of New York, 714 N.Y.S.2d 36, 37 (N.Y. App. Div. 2000).

[21] Nardelli v. Stamberg, 377 N.E.2d 975, 977 (N.Y. 1978).

indemnification for punitive damages to violate public policy.[22]

E. Liquidated Damages

New York courts enforce liquidated damage provisions provided they are "neither unconscionable nor contrary to public policy."[23] The contractual provision fixing damages must bear "a reasonable relation to the amount of probable actual harm" and cannot be construed as penalty.[24] When New York courts interpret these provisions, they generally find it immaterial whether the parties call the provision one for "liquidated damages" or style it as a penalty.[25] Instead, courts focus on the intent of the parties and examine the substance of the agreement in light of the surrounding circumstances. Courts generally assign high regard to the parties' concern about damages at the time of a contract's formation and whether damages resulting from a breach would be difficult to ascertain.[26] In doubtful cases, courts tend to construe the provision as a penalty.[27] Similarly, where a contract contains numerous covenants of varying degrees of importance and the breach of a covenant is disproportionate to the liquidated damages, the sum is treated as a penalty.[28] However, where uncertainty exists over the precise measure of damages, the parties' advanced determination of damages is accorded greater latitude.[29]

F. Consequential Damages

New York law recognizes consequential damages to compensate claimants for harm that does not flow directly from the breach but was foreseeable and

[22] Soto v. State Farm Ins. Co., 635 N.E.2d 1222, 1225 (N.Y. 1994).
[23] Truck Rent-A-Ctr., Inc. v. Puritan Farms 2nd, Inc., 361 N.E.2d 1015, 1018 (N.Y. 1977) (liquidated damages provision in a milk truck lease was enforceable because there was unlikely to be a market for the specialized trucks after the breach and thus damages bore reasonable relation to the amount probable actual harm).
[24] *Id.* at 1019.
[25] *Id.* at 1018 (reasoning that an inverse approach "would put too much faith in form and too little in substance").
[26] Seidlitz v. Auerbach, 129 N.E. 461, 463 (N.Y. 1920).
[27] City of New York v. Brooklyn & Manhattan Ferry Co., 143 N.E. 788, 790 (N.Y. 1924).
[28] *Seidlitz*, 129 N.E. at 462–463.
[29] City of Rye v. Pub. Serv. Mut. Ins. Co., 315 N.E.2d 458, 459 (N.Y. 1974).

within the contemplation of the parties when assenting to the contract.[30] The New York Court of Appeals considers lost profits to be either general or consequential damages depending on "whether the lost profits flowed directly from the contract itself or were, instead, the result of a separate agreement with a nonparty."[31] If the contract is silent on the profits, the court will consider the parties' intentions through an examination of the surrounding circumstances at the time of contract formation and "what liability the defendant fairly may be supposed to have [consciously] assumed."[32]

The distinction between categorizing loss of future profits as either general or consequential damages can be dispositive, with the heightened standard of proof for consequential damages leading to the reversal of jury awards.[33] As a general rule, when the nonbreaching party bargained for the profits and they are "the direct and immediate fruits of the contract," the lost profits are considered general damages. Conversely, when the non-breaching party suffers loss of profits on collateral business arrangements, the lost profits are considered consequential damages.[34] If the product of collateral business arrangements, the lost profits are only recoverable when "(1) it is demonstrated with certainty that the damages have been caused by the breach, (2) the extent of the loss is capable of proof with reasonable certainty, and (3) it is established that the damages were fairly within the contemplation of the parties."[35]

To satisfy the requirement of reasonable certainty, the plaintiff must introduce "objective proof of the amount of that loss" that is based on "more than guesswork."[36] In calculating the loss of future profits, courts expect plaintiffs to incorporate the effect of market

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[30] *Am. List Corp.*, 549 N.E.2d at 1164; *see also* Restatement [Second] of Contracts § 351.

[31] Biotronik A.G. v. Conor Medsystems Ireland, Ltd., 11 N.E.3d 676, 681 (N.Y. 2014) (finding lost profits in an exclusive distribution agreement to constitute general damages).

[32] Schonfeld v. Hilliard, 218 F.3d 164, 172 (2d Cir. 2000).

[33] Trademark Research Corp. v. Maxwell Online, Inc., 995 F.2d 326 (2d Cir. 1993) (plaintiff failed to prove losses with reasonable certainty and failed to establish that damages were contemplated by the parties at the time of contracting).

[34] Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc., 487 F.3d 89, 109 (2d Cir. 2007); Compania Embotelladora Del Pacifico, S.A. v. Pepsi Cola Co., 650 F. Supp.2d 314, 322 (S.D.N.Y. 2009), aff'd, 976 F.3d 239 (2d Cir. 2020) (Pepsi's claim for lost profits from lost sales to third-parties were not governed by the contract and thus constituted consequential damages, requiring proof of reasonable certainty).

[35] *Biotronik*, 11 N.E.3d at 680.

[36] Toltec Fabrics, Inc. v. August Inc., 29 F.3d 778, 781 (2d Cir. 1994) (quoting Robert T. Donaldson, Inc. v. Aggregate Surfacing Corp. of Am., 366 N.Y.S.2d 194, 196 (N.Y. App. Div. 1975)).

risks on the venture's probability of success.[37] When a new business seeks to recover lost future profits, a more exacting standard is imposed to account for the increased uncertainty.[38] New York courts allow new businesses to establish lost profits by reference to comparable firms.[39] "[W]hen the existence of damage is certain, and the only uncertainty is as to its amount," the matter may be submitted to a jury.[40]

New York courts distinguish damages for lost profits and damages for the market value of a lost income-producing asset.[41] Often referred to as hybrid damages, this remedy compensates plaintiffs for an asset possessed prior to the breach based "on a buyer's projections of what income he could derive from the asset in the future."[42] Like all consequential damages, hybrid damages depend on the individual circumstances of the plaintiff and can be proven through evidence that the loss of the asset was within the contemplation of the parties at the formation of the contract, along with a reasonably certain estimation of the asset's value.[43] To determine the market value of unique or intangible assets, courts employ the hypothetical

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[37] *Schonfeld*, 218 F.3d at 174 (quoting Schonfeld v. Hilliard, 62 F. Supp.2d 1062, 1074 (S.D.N.Y. 1999), aff'd in part, rev'd in part, 218 F.3d 164 (2d Cir. 2000)).

[38] Cramer v. Grand Rapids Show Case Co., 119 N.E. 227, 228–229 (N.Y. 1918) ("The requirement imposed upon one whose business has been established and interrupted cannot be enforced as to him and made less stringent to one embarking in a new business who cannot furnish data of past business from which the fact that anticipated profits would have been realized can be legally deduced."); Ashland Mgmt. Inc. v. Janien, 624 N.E.2d 1007, 1011 (N.Y. 1993) ("Whether the claim involves an established business or a new business, however, the test remains the same, i.e., whether future profits can be calculated with reasonable certainty.").

[39] Bloor v. Falstaff Brewing Corp., 454 F. Supp. 258, 277 (S.D.N.Y. 1978), aff'd, 601 F.2d 609 (2d Cir. 1979) (allowing a brewery to establish damages by referencing the sales of comparable brewers during the same time period).

[40] Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 926 (2d Cir. 1977).

[41] *Schonfeld*, 218 F.3d at 176.

[42] *Id.*

[43] *Id.* at 177,

market standard.[44] Under this approach, fair market value "is the price that a willing buyer and a willing seller would agree to in an arm's length transaction."[45] Compared to proving lost profits, the inquiry is inherently less speculative because it is determined at a single point in time.[46]

G. Pre- and Post-Judgment Interest

New York allows plaintiffs to recover prejudgment interest in breach of contract cases.[47] Consistent with the policy goals of contract damages, prejudgment interest is a mechanism for making an aggrieved party whole.[48] New York courts distinguish damages from prejudgment interest, concluding that "[d]amages compensate plaintiffs in money for their losses, while prejudgment interest is simply the cost of having the use of another person's money for a specified period."[49]

Post-judgment interest is also available in New York.[50] State statute caps the rate of interest at 9% per annum, except for consumer debt actions, which have a lower rate of 2%.[51]

H. Attorneys' Fees

New York follows the well-established American Rule that "the prevailing litigant ordinarily cannot collect ... attorneys' fees from its unsuccessful opponents."[52] "The exception is when an award is authorized by agreement between the parties or by statute or court rule."[53]

When authorized, New York courts employ the lodestar amount by calculating the "number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate."[54] The product is a presumptively reasonable fee "that roughly approximates the fee that the prevailing attorney would have

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[44] *Id.* at 178 (citing United States v. Cartwright, 411 U.S. 546, 551 (1973)).

[45] Am. Soc. of Composers, Authors & Publishers v. Showtime/The Movie Channel, Inc., 912 F.2d 563, 569 (2d Cir. 1990).

[46] *Schonfeld*, 218 F.3d. at 177.

[47] N.Y. C.P.L.R. 5001.

[48] Spodek v. Park Prop. Dev. Associates, 759 N.E.2d 760, 762 (N.Y. 2001); Prager v. New Jersey Fid. & Plate Glass Ins. Co. of Newark, N.J., 156 N.E. 76, 77 (N.Y. 1927) ("While the dispute as to value was going on, the defendant had the benefit of the money, and the plaintiff was without it. Interest must be added if we are to make the plaintiff whole.").

[49] Grobman v. Chernoff, 940 N.E.2d 557, 559 (N.Y. 2010) (quoting SIEGEL, N.Y. PRACTICE § 411 (6th ed.) (quotation omitted)).

[50] N.Y. C.P.L.R. 5002 and 5003.

[51] N.Y. C.P.L.R. 5004.

[52] Congel v. Malfitano, 101 N.E.3d 341, 351–352 (N.Y. 2018) (quoting Hunt v. Sharp, 649 N.E.2d 1201, 1202 (N.Y. 1995)).

[53] *Id.*

[54] Orser v. Wholesale Fuel Distributors-CT, LLC, 108 N.Y.S.3d 675, 680 (N.Y. Sup. Ct. 2018), aff'd, 105 N.Y.S.3d 137 (N.Y. App. Div. 2019), leave to appeal denied, 141 N.E.3d 953 (N.Y. 2020).

received if he or she had been representing a paying client who was billed by the hour in a comparable case."[55] The fee applicant is responsible for proving entitlement to the award and maintaining a record of the attorney's hours and rates.[56]

I. Reliance Damages

New York recognizes reliance damages to compensate plaintiffs for the "expenses of preparation and of part performance, as well as other foreseeable expenses incurred in reliance upon the contract."[57] Reliance damages are intended to "restore the injured party to the position it was in prior to entering the contract."[58] When expectation damages prove difficult to calculate, reliance damages are the appropriate remedy.[59] To recover reliance damages, a plaintiff must show that his losses were (1) proximately caused; (2) ascertainable; (3) fairly within the expectation of the parties at the time of contracting; and (4) a foreseeable consequence of the breach of contract.[60]

New York courts place several limitations on the recovery of reliance damages. Courts will not permit a reliance recovery that places a plaintiff in "a better position than he would have occupied had the contract been fully performed."[61] Likewise, when a contract's continuance allows the plaintiff to recoup its costs, reliance damages are not available.[62] New York also recognizes the "losing contract" limitation, which permits the breaching party to reduce reliance damages by proving with reasonable certainty that the plaintiff would have suffered the losses had the contract been fully performed.[63] Reliance damages may only address losses incurred during the term of the agreement and must not compensate plaintiffs for reliance interests extending beyond the contract's term.[64]

J. Unjust Enrichment

In the absence of a formal agreement between the parties, New York recognizes the equitable

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[55] *Id.*
[56] *Id.*
[57] Bausch & Lomb Inc. v. Bressler, 977 F.2d 720, 729 (2d Cir. 1992).
[58] 28A N.Y. PRAC., CONTRACT LAW § 23:27.
[59] Nature's Plus Nordic A/S v. Nat. Organics, Inc., 98 F. Supp.3d 600, 605 (E.D.N.Y. 2015), aff'd, 646 Fed. Appx. 25 (2d Cir. 2016).
[60] *Id.*; Freund v. Washington Square Press, Inc., 314 N.E.2d 419, 421 (N.Y. 1974).
[61] *Id.*
[62] V.S. Int'l, S.A. v. Boyden World Corp., 862 F. Supp. 1188, 1196 (S.D.N.Y. 1994).
[63] Farash v. Sykes Datatronics, Inc., 452 N.E.2d 1245, 1247 (N.Y. 1983) (citing Restatement (Second) of Contracts § 349).
[64] *V.S. Int'l, S.A.*, 862 F. Supp. at 1198 (expenditures made in expectation of a ten year long relationship would not constitute reasonable reliance since the initial contract, by its terms, was only for three years).

doctrine of unjust enrichment.[65] The doctrine construes an implied-in-law contract to prevent a person from enriching himself unjustly at the expense of another.[66] To recover damages under a theory of unjust enrichment, the plaintiff must have suffered a loss for which it seeks restitution.[67]

Under New York law, the essential elements of an unjust enrichment claim are that (1) one party was enriched, (2) at another party's expense, and (3) "that it is against equity and good conscience to permit [the benefitting party] to retain what is sought to be recovered."[68] Although contractual privity is not required, the plaintiff must have "a sufficiently close relationship with the other party."[69] In determining damages in unjust enrichment cases, New York courts "generally consider factors surrounding the benefit received by the defendant, such as whether the defendant still retains that benefit, whether the defendant's conduct was tortious, or whether there was a change in position by the defendant."[70] However, "in situations where the defendant receives a benefit, but the plaintiff's loss is difficult to measure, proper restitution is the amount by which the defendant is enriched."[71]

K. Public Policy Prohibitions

New York follows the general rule that "parties are free to enter into contracts that absolve a party from its own negligence or that limit liability to a nominal sum."[72] However, New York does not allow a party to "insulate itself from damages caused by grossly negligent conduct."[73] Thus, "exculpatory clauses and liquidated damages clauses in contracts are not enforceable against allegations of gross negligence."[74] This rule "does not apply to contractual limitations on remedies that do not immunize

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[65] IDT Corp. v. Morgan Stanley Dean Witter & Co., 907 N.E.2d 268, 274, reargument denied, 911 N.E.2d 855 (N.Y. 2009).

[66] *Id.*

[67] State v. Barclays Bank of New York, N.A., 563 N.E.2d 11, 15 (N.Y. 1990) (quoting Restatement (First) of Restitution § 128 (1937)).

[68] Columbia Mem'l Hosp. v. Hinds, 192 N.E.3d 1128, 1137 (N.Y. 2022) (quoting Citibank, N.A. v. Walker, 787 N.Y.S.2d 48, 49 (App. Div. 2004) abrogated by Butler v. Catinella, 868 N.Y.S.2d 101 (N.Y. App. Div. 2008)).

[69] Schroeder v. Pinterest Inc., 133 A.D.3d 12, 26, 17 N.Y.S.3d 678, 690 (N.Y. App. Div. 2015) (citations omitted) (The relationship between the parties cannot be "too attenuated" and must be close enough to "have caused reliance or inducement.").

[70] Empire Fin. Servs., Inc. v. Bellantoni, 53 A.D.3d 1095, 1097, 861 N.Y.S.2d 898, 900 (N.Y. App. Div. 2008) (citations omitted).

[71] Mayer v. Bishop, 158 A.D.2d 878, 881, 551 N.Y.S.2d 673, 675 (N.Y. 1990).

[72] Abacus Fed. Sav. Bank v. ADT Sec. Servs., Inc., 967 N.E.2d 666, 669 (N.Y. 2012) (citations omitted).

[73] *Id.*

[74] *Id.*

the breaching party from liability for its conduct."[75]

New York courts recognize several public policy limitations on the recovery of punitive damages. Courts do not allow indemnification for punitive damages and find such policy provisions to be unenforceable.[76] Similarly, "punitive damages are not recoverable for an ordinary breach of contract as their purpose is not to remedy private wrongs but to vindicate public rights."[77] The New York Court of Appeals has carved out an exception "where the breach of contract also involves a fraud evincing a high degree of moral turpitude and demonstrate[es] such wanton dishonesty as to imply a criminal indifference to civil obligations [and the] . . . conduct was aimed at the public generally."[78] Thus, "a private party seeking to recover punitive damages [in a breach of contract action] must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally."[79]

[75] Matter of Part 60 Put-Back Litig., 165 N.E.3d 180, 184 (N.Y. 2020).
[76] J.P. Morgan Sec. Inc. v. Vigilant Ins. Co., 992 N.E.2d 1076, 1081 (N.Y. 2013).
[77] *Rocanova*, 634 N.E.2d at 943.
[78] *Id.* (quoting Walker v. Sheldon, 179 N.E.2d 497 (N.Y. 1961)) (quotation marks omitted).
[79] *Id.*