SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 3, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Andrias, J.P., Friedman, Renwick, DeGrasse, Abdus-Salaam, JJ.

5450-
5451 The Big Four LLC, Index 600119/10
Plaintiff-Appellant-Respondent,

-against-

The Bond Street Lofts Condominium,
Defendant-Respondent-Cross-Appellant.

Law Office of Frank Taddeo Jr., New York (Frank Taddeo Jr. Of counsel), for appellant-respondent.

Belkin Burden Wenig & Goldman, LLP, New York (Joseph Burden of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered January 31, 2011, which granted defendant's cross motion insofar as it sought summary judgment dismissing the complaint, denied the cross motion insofar as it sought summary judgment on the counterclaim seeking costs and legal fees, and denied plaintiff's motion to strike defendant's pleadings, or, in the alternative, to compel discovery, unanimously modified, on the law, to the extent of granting summary judgment dismissing the counterclaim for costs and legal fees, and otherwise

affirmed, with costs.

This dispute arose when plaintiff, the owner of a commercial space, attempted to rent its unit to nonparty 7-Eleven. When plaintiff wrote to defendant condominium association about its intention, defendant responded with a written objection to a 7-Eleven store in its building, on the ground that the proposed use of the unit included on-premises cooking in violation of the condominium bylaws. Nevertheless, plaintiff signed a 10-year lease with 7-Eleven. The lease, however, provided 60 days for plaintiff to obtain defendant's consent for 7-Eleven to use the commercial unit for its intended purpose. 7-Eleven had the right to terminate the lease within the 60-day period, which it did when defendant ignored plaintiff's repeated requests for written consent to have 7-Eleven use the commercial unit for its intended purpose.

Plaintiff then commenced this action against defendant condominium association. The first cause of action seeks a declaration that plaintiff is not prohibited by the condo documents from leasing the unit to 7-Eleven, or that the business which 7-Eleven intends to conduct is permissible and consistent with the documents. The second cause of action, sounding in breach of contract (i.e., breach of the Board's duties under the

condominium's declaration and bylaws) alleges that the condo breached its obligations to plaintiff by: (1) "acting in bad faith and beyond the scope of its authority," by objecting to 7-Eleven's lease purportedly based on the no-cooking rule, "when the Board's true motive for rejecting such tenancy has always been that such tenancy would allegedly constitute a security, health and vagrancy threat . . . about which [the condo governing] documents are silent;" and (2) not providing timely notice of its objections to the proposed lease, and not providing plaintiff "in good faith the opportunity to resolve such objections fairly, amicably, and with minimal expense." In its verified answer, defendant denied the complaint's material allegations, and asserted a counterclaim for recovery of its costs and legal fees pursuant to the condominium's declaration and bylaws.

In August 2010, plaintiff moved for an order, pursuant to CPLR 3126(3), striking defendant's pleading, or, alternatively, to compel production of requested information under CPLR 3124. By notice of cross motion, defendant moved for summary judgment dismissing the complaint, and for summary judgment on its counterclaim for legal fees. The court granted defendant's cross motion for summary judgment, dismissing the declaratory judgment

claim on the ground that “no justiciable controversy has been presented.” It dismissed the breach of contract claim on the ground that plaintiff asked for an "advisory opinion" from the board, and the board provided such opinion. The court also initially granted summary judgment to defendant on its counterclaim for legal fees, but later denied it when plaintiff moved for reargument. This appeal followed.

Supreme Court’s dismissal of the first cause of action on the ground that a declaratory judgment would be merely “advisory” was an improvident exercise of its discretion. “[W]hen a party contemplates taking certain action a genuine dispute may arise before any breach or violation has occurred” (*New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 530 [1977]). Defense counsel’s November 23, 2009 letter and defendant’s subsequent expression of its intent, constituted “past conduct” creating a genuine dispute for which a declaration would have had an “immediate and practical effect of influencing [the parties’] conduct” (*id.* at 531; *see M&A Oasis v MTM Assoc.*, 307 AD2d 872 [2003]).

We, however, affirm the dismissal of the complaint’s first cause of action for a declaratory judgment as to whether plaintiff may lease to nonparty 7-Eleven, on the ground that

plaintiff conceded below that 7-Eleven is no longer interested in such a lease. Accordingly, the dispute is moot, and there is no longer a "justiciable controversy" within the meaning of CPLR 3001 (*see Matter of Ideal Mut. Ins. Co.*, 174 AD2d 420 [1991]). Furthermore, there is no basis to find that the exception for cases where the issue presented "is likely to recur, typically evades review, and raises a substantial and novel question" is applicable (*Zuckerman v Goldstein*, 78 AD3d 412 [2010]) lv denied 17 NY3d 779 [2011]).

Similarly, the second cause of action - asserting a bad faith breach of contract by defendant - was properly dismissed. The defendant condominium established its prima facie entitlement to judgment as a matter of law by demonstrating that the actions it took by objecting to the proposed intended use of the commercial space by 7-Eleven were "taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes" (*Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537–538 [1990] [internal quotations omitted]). Aside from some conclusory, unsupported and self-serving conjecture, plaintiff has failed to raise any triable issues regarding defendant's alleged bad faith in objecting to 7-Eleven's use of the commercial space.

On the contrary, defendant condominium has established that its decision bears a "legitimate relationship to the welfare of the [condominium]" (*Levandusky*, 75 NY2d at 540). Heating hot dogs, sausages and other food products were among the uses of the premises set forth under plaintiff's lease with 7-Eleven. The definition of the word "cook" encompasses the preparation of food for eating by means of heat (*see* Webster's Third New International Dictionary Unabridged [Merriam–Webster], available at http://unabridged.merriam-webster.com). Therefore, there is a rational basis for defendant's conclusion that 7-Eleven planned to use the premises for cooking, a prohibited use. Indeed, a clearly articulated and rational purpose behind the "no cooking" provision set forth in the bylaws is for the benefit of the condominium and the unit owners to the extent it is intended to "prevent vermin and rodent infestation and odors permeating the property."

Plaintiff's argument that Supreme Court erred by denying its motion, made in the alternative, for an order compelling discovery under CPLR 3124, is rendered moot by our affirmance herein of the dismissal of the whole cause of action.

Finally, Supreme Court correctly denied that branch of defendant's cross motion for summary judgment on the counterclaim

seeking legal fees. Moreover, upon the search of the record, we find that plaintiff is not a "defaulting unit owner" under the plain language of section 19(d) of the bylaws. We therefore grant plaintiff summary judgment dismissing defendant's counterclaim for legal fees.

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

ENTERED: APRIL 3, 2012

CLERK

Andrias, J.P., Sweeny, Moskowitz, Richter, Román, JJ.

5580-
5580A Index 600109/08

Carnegie Associates Ltd.,
Plaintiff-Appellant,

-against-

Eric J. Miller, et al.,
Defendants-Respondents.

- - - - -

Eric J. Miller, et al.,
Counterclaim Plaintiffs-Respondents,

-against-

Carnegie Associates Ltd., et al.,
Counterclaim Defendants-Appellants.

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Ohrenstein & Brown, LLP, Garden City (Michael D. Brown of counsel), for appellants.

Frankfurt Kurnit Klein & Selz P.C., New York (Ronald C. Minkoff of counsel), for respondents.

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Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered October 25, 2010, which granted defendants' motion to dismiss the complaint and to strike the reply to their counterclaims, and imposed monetary sanctions, modified, on the law, to deny defendant's motion to dismiss plaintiff's complaint and reply to defendant's counterclaims, and otherwise affirmed, without costs. Plaintiff's appeal from the order, same court and Justice, entered December 16, 2010, which, inter alia, denied

plaintiff's motion for renewal, unanimously dismissed, without costs, as academic.

The motion court erred in striking the complaint and reply to defendants' counterclaims since neither CPLR § 3126 nor 22 NYCRR 202.26(e) authorizes this sanction under the circumstances. While CPLR § 3126 authorizes the striking of a party's pleadings, this extreme sanction is only authorized when a party "refuses to obey an order for *disclosure* or willfully refuses to *disclose information* which the court finds ought to have been disclosed" (CPLR § 3126) (emphasis added). Thus, by its express terms the sanction prescribed by CPLR § 3126 is warranted only upon a party's failure to comply with discovery requests or court orders mandating disclosure (*Bako v V.T. Trucking Co.*, 143 AD2d 561, 561 [1988]; *Henry Rosenfeld, Inc. v Bower & Gardner*, 161 AD2d 374, 374-375 [1990] [dismissal of a party's pleading appropriate when a party "disobeys a court order and by his conduct frustrates the disclosure scheme provided by the CPLR"]; *Bassett v Bando Sangsa Co.*, 103 AD2d 728, 728 [1984]). Here, where plaintiff had already been sanctioned for its failure to provide discovery and where defendants premised the instant motion to strike plaintiff's pleadings primarily on plaintiff's failure to proceed with court-ordered mediation, CPLR § 3126 simply does not apply.

Similarly, despite plaintiff's conceded failure to proceed with the court-ordered mediation, it was also error to strike its pleadings pursuant to 22 NYCRR 202.26(e). While 22 NYCRR 202.26 authorizes the trial court to schedule pretrial conferences, a mediation, pursuant to Rule 3 of the Rules of the Commercial Division of the Supreme Court (22 NYCRR 202.70[g]), is not a pretrial conference. More importantly, even if this rule did apply, the only sanction authorized by 22 NYCRR 202.26(e) for a party's failure to appear at a pretrial conference is "a default under CPLR § 3404," which initially only authorizes the striking of the case from the court's trial calendar. Accordingly, here, striking plaintiff's pleadings, which by operation of law resulted in dismissal of this action is not warranted pursuant to 22 NYCRR 202.26(e).

While we agree with the dissent that plaintiff's conduct was egregious, we nevertheless find that the sanction imposed by the motion court, namely, dismissal of plaintiff's complaint and the striking of its reply to defendant's counterclaims was simply not permitted. We further note that, here, plaintiff was in fact penalized for its conduct inasmuch as the motion court granted defendants' motion for costs and fees incurred as a result of plaintiff's failure to proceed to mediation.

In support of its argument that the motion court's order was

appropriate, the dissent partly relies on Rule 8(h) of the Commercial Division, Supreme Court, New York County, Rules of the Alternative Dispute Resolution Program. However, the dissent alone raises this argument, one which has never been advanced by any of the parties, either on appeal or below. Therefore, we should not consider it (*Misicki v Caradonna*, 12 NY3d 511, 519 [2009] ["We are not in the business of blindsiding litigants, who expect us to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made"]). Moreover, contrary to the dissent's remaining position, 22 NYCRR 202.70(g) Rule 12 does not avail plaintiff since like 22 NYCRR 202.26(e), the dismissal promulgated by Rule 12, which is made more clear by its reference to 22 NYCRR 202.27, is for the failure to appear at a conference and not for the failure to proceed to mediation.

All concur except Andrias, J.P. who dissents in a memorandum as follows:

ANDRIAS, J.P. (dissenting)

Because I believe that Supreme Court had the authority to sanction plaintiff for its failure to mediate as ordered, and that the striking of the complaint and the reply to counterclaims was a provident exercise of discretion, I respectfully dissent and would affirm the orders on appeal.

In January 2010, Supreme Court declined to strike plaintiff's pleadings but sanctioned it for “unnecessary and perhaps egregious [discovery] delay[s].” By so-ordered stipulation dated March 18, 2010, the parties agreed to "mediation through the Commercial Division ADR [Alternative Dispute Resolution] process."

The mediation was scheduled for April 20, 2010, but was postponed when plaintiff’s counsel, Jonathan Abraham, confirmed that Sherwood Schwarz, a necessary decision maker for plaintiff, would not attend. The mediation was rescheduled for July 26, 2010, but was cancelled because Mr. Abraham failed to file a mediation statement on plaintiff’s behalf. Consequently, the mediator asked that the matter be reassigned because he had "formed a bias against plaintiff's lawyer" due to the latter’s failure to communicate and his "extraordinarily cavalier attitude . . . toward the mediation process, the Court, and [the mediator]."

Pursuant to CPLR 3126 and 22 NYCRR 202.26(e), defendants moved to strike the complaint and the reply to counterclaims based on plaintiff's failure to mediate. Supreme Court granted the motion, finding that plaintiff, despite narrowly escaping dismissal for discovery violations, had continued to proceed in this litigation in a manner that could only lead to a conclusion that its conduct was willful and contemptuous.

"If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (*Brill v City of New York*, 2 NY3d 648, 653 [2004], quoting *Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]). While neither CPLR 3126 and 22 NYCRR 202.06(e) expressly gives the court the authority to strike a party's pleadings based on the failure to mediate, plaintiff did not raise that objection in its opposition to defendants' motion or in its motion to renew, and the issue is not preserved. Should we consider the issue, which raises a pure question of law, for the first time on appeal, it is appropriate that we determine whether there is any statute or rule that empowers the court to strike plaintiff's pleadings based on its failure to mediate as ordered.

Rule 3 of the Rules of the Commercial Division (*see* 22 NYCRR 202.70[g]), provides that "[a]t any stage of the matter, the

court may direct . . . the appointment of an uncompensated mediator." Rule 12 thereof provides that "[t]he failure of counsel to appear for a conference may result in a sanction authorized by section 130.2.1 of the Rules of the Chief Administrator or section 202.27 of this Part, including dismissal, the striking of an answer, an inquest or direction for judgment, or other appropriate sanction."

The majority is of the belief that Rule 12 is inapplicable because a mediation under the Commercial Division's ADR process is not a "conference." However, Rule 12 is included in the same section as Rule 3, which empowers the court to direct mediation, and the Supreme Court, New York County, "Guide to the Alternate Dispute Resolution Program" defines "mediation" as "[a] process in which a Neutral attempts to facilitate a settlement of a dispute by conferring informally with the parties, jointly and in separate 'caucuses,' and focusing upon practical concerns and needs as well as the merits of each side's position" (available at http://www.nycourts.gov/courts/comdiv/ADR_guide.shtml at 2). Further, Rule 8(h) of the Commercial Division, Supreme Court, New York County, Rules of the Alternative Dispute Resolution Program, provides that "[t]he Justice may impose sanctions or take such other action as is necessary to ensure respect for the court's Order and these Rules."

On the record before us, striking the complaint and the reply to counterclaims was a provident exercise of discretion. "[M]ediation procedures were established to resolve cases expeditiously and conserve judicial resources," and a party's failure to abide by the directives of a mediator evidences willful and contumacious conduct (*Perez-Wilson v McPhee,* 23 Misc 3d 1053, 1055 [Sup Ct NY County 2009]). Continued noncompliance with court orders also gives rise to an inference of willful and deliberate behavior (*see Jones v Green,* 34 AD3d 260 [2006]). Here, despite the fact that it had previously been sanctioned for discovery delays and had its note of issue stricken, plaintiff demonstrated utter disregard for the court, the appointed mediator, and for opposing counsel by its failure to make Mr. Schwarz available for more than three months after the mediation order was entered, failure to submit a mediation statement, and failure to tell either the mediator or the defendants that it would not file until after the deadline passed.

Plaintiff's motion for renewal on the ground that it should not be sanctioned for its counsel's misconduct was correctly denied. Plaintiff did not submit adequate documentation of the alleged lack of communication between it and Mr. Abraham and the court properly denied plaintiff an adjournment to cure this

deficiency (*see Wolosin v Campo*, 256 AD2d 332 [1998]; *Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 561-562 [1992] [rejecting defendant's reply containing a medical affidavit designed to cure the conclusory affidavit submitted with its initial motion]). In any event, plaintiff's in-house counsel received a copy of defendants' attorney's February 16, 2010 letter to the court, which referenced the first sanctions order, enumerated deficiencies in plaintiff's discovery responses, mentioned extensions to the note or issue deadline, and requested permission to file a second motion to dismiss. Given these circumstances, Supreme Court correctly found that plaintiff's in-house counsel was on notice of the situation and should have monitored it more closely, rendering plaintiff chargeable with the conduct of its attorney (*see Santiago v Santana*, 54 AD3d 929, 930 [2008] ["Even if the plaintiff's former attorney was responsible for both the lengthy delay in proceeding with trial and the plaintiff's failure to appear on the last three scheduled

trial dates, where there is a pattern of default and neglect, the negligence of the attorney is properly imputed to the client"]).

The Decision and Order of this Court entered herein on December 8, 2011 is hereby recalled and vacated (*see* M—84 decided simultaneously herewith).

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

ENTERED: APRIL 3, 2012

CLERK

Tom, J.P., Friedman, Freedman, Richter, Manzanet-Daniels, JJ.

6367-
6368 Index 15816/07

Musa Callistro, an Infant,
by his Mother and Natural
Guardian Jessica Rivera,
Plaintiff-Appellant,

-against-

Michael W. Bebbington, M.D., et al.,
Defendants-Respondents.

Fitzgerald & Fitzgerald, P.C., Yonkers (Mitchell Gittin of counsel), for appellant.

Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for respondents.

Judgment, Supreme Court, Bronx County (Howard H. Sherman, J.), entered December 7, 2009, dismissing the complaint, affirmed, without costs. Appeal from order, same court and Justice, entered June 24, 2009, which granted defendants' motion for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff claims that defendants deviated from good and accepted medical practice by failing to perform a cesarean section during his birth on December 10, 2003, and that this failure caused him to sustain a hypoxic event, which is responsible for expressive and language deficits and a developmental disorder that were diagnosed when he was about 4½ years old.

The court granted defendants' motion for summary judgment primarily on the ground that expert evidence disclosed that no hypoxic event occurred during plaintiff's birth and that plaintiff failed to raise a triable issue of fact because his main expert was unqualified to give an opinion, pursuant to the "locality rule" (*see Pike v Honsinger*, 155 NY 201, 209 [1898]).

We find that, while the locality rule may not apply here, defendants were correctly granted summary judgment because plaintiff did not raise factual issues as to either a departure or a resulting injury.

Defendants submitted the affirmation of Dr. Mary D'Alton, chairperson of the Department of Obstetrics and Gynecology at Columbia University-New York Presbyterian Hospital. Dr. D'Alton, basing her opinion on the medical records and testimonial evidence, a neurological evaluation of plaintiff in July 2008, and the complaint and bill of particulars, opined that defendants did not deviate from good and accepted medical practice, that no hypoxic incident occurred, and that no injury could be reasonably attributed to any act or omission by defendants.

Dr. D'Alton pointed to the post-delivery assessment of arterial and venous umbilical cord blood gases, both of which fell within normal limits. She also noted that plaintiff, whose delivery was complicated by shoulder dystocia and a nuchal cord,

was discharged from the hospital three days after his birth, at which time he was "active, alert, voiding and stooling appropriately and feeding on demand." Dr. D'Alton concluded that the normal cord gas measurements and plaintiff's speedy discharge were "entirely inconsistent with an alleged hypoxic injury occurring during labor and delivery." Dr. D'Alton also averred that the fetal monitoring strips, which are in evidence, indicated that any variable decelerations were followed by quick recovery to baseline and that there was no indication of fetal distress.

With respect to the delivery and subsequent treatment, Dr. D'Alton found that defendants effectively managed the delivery complications, including both the shoulder dystocia and the nuchal cord. She noted that Dr. King successfully performed a procedure called a "Wood's screw maneuver" to address the dystocia and deliver the shoulder, and added that nuchal cords occur in about 25% of all births and have no bearing on whether to perform a cesarean delivery.

Dr. D'Alton also noted that the July 2008 neurological evaluation of plaintiff, who was then about 4 years and 7 months old, was inconsistent with plaintiff's allegation that he suffers from "Pervasive Developmental Disorder." The examining physician, Dr. Regina R. DeCarlo, a pediatric neurologist, did

not detect any focal or motor neurological deficits. Dr. DeCarlo saw evidence of a developmental disorder of receptive and expressive language and a disorder of articulation, but found that plaintiff otherwise performed at the four-to-five-year level.

In opposition, plaintiff submitted affirmations from Dr. Bruce Halbridge, an obstetrician and gynecologist based in Texas, and Dr. Bruce Roseman, a pediatric neurologist practicing in White Plains, New York. Dr. Halbridge found various departures but limited his findings of causation to the following: He opined that once the mother was admitted on the morning of December 9, 2003 and defendants employed a fetal heart rate monitor, defendants should have abandoned their plan for a vaginal birth and instead delivered plaintiff by cesarean section. According to Dr. Halbridge, as of the morning of December 10, the fetal heart rate monitor had shown a "nonreassuring" pattern of late and variable decelerations. Dr. Halbridge contended that plaintiff was delivered in a hypoxic, "depressed" condition, and that, based on a December 11, 2003 sonogram, he had "possible small bilateral grade 1 subependymal hemorrhages."

Dr. Roseman's affirmation was based on his own examination of plaintiff in December 2008, just after plaintiff turned five.

Like Dr. DeCarlo, Dr. Roseman detected speech and language deficits and an articulation disorder. He stated that he agreed with Dr. Halbridge's opinion about the etiology of plaintiff's injuries, and opined that "[t]here is nothing in the child's medical history, other than the abnormal labor and delivery, that would account for his deficits in speech and language."

Contrary to the dissent's contention, neither Dr. Halbridge's nor Dr. Roseman's opinion raises a triable issue as to causation, since each fails to address how the claimed departures could have caused the claimed cognitive delays. Dr. Halbridge failed to rebut Dr. D'Alton's key assertion that the normal values for plaintiff's umbilical cord gas were "entirely inconsistent" with hypoxic injury. Dr. Halbridge did not dispute Dr. D'Alton's opinion that the gas test results completely ruled out hypoxia or the fact that the hospital record attributes the first (low) Apgar score to the nuchal cord. Rather, he ambiguously stated that "loss of beat to beat variability coupled with late decelerations . . . *enhance[] the likelihood* that the fetus is undergoing significant hypoxia" (emphasis supplied) and that "[t]his occurred in the present case, notwithstanding the normal umbilical cord blood gas values that were obtained." Dr. Halbridge's statement amounted to bare conjecture, which lacks the "reasonable degree of medical certainty" required in an

expert affidavit in a medical malpractice case (*see Burgos v Rateb*, 64 AD3d 530, 530 [2009]). Moreover, Dr. Halbridge ignored Dr. D'Alton's further point that plaintiff's discharge three days after his birth disproved his claimed injury. Finally, Dr. Halbridge did not explain how the December 11 neurosonogram, which indicated "possible" hemorrhages, could show that the plaintiff suffered permanent brain damage, as Dr. Roseman concluded, since a follow-up neurosonogram performed one month later showed no evidence of hemorrhaging.

Dr. Roseman opined in conclusory fashion that the hypoxic-ischemic stress and other trauma that occurred during the delivery resulted in permanent brain damage, primarily to the neocortex, which in turn caused plaintiff's speech and language disorder. However, Dr. Roseman failed to support this opinion with a radiological study of plaintiff's brain or any other medical record demonstrating brain damage other than language delay. Dr. Roseman's assertions that "[t]here is nothing in [plaintiff's] medical history, other than the abnormal labor and delivery, that would account for his deficits in speech and language" and that the deficits resulted from his permanent brain damage are entirely conclusory. In fact, the record shows that plaintiff's cousins suffer from similar language deficits.

As a final matter, summary judgment should have been granted to defendant Dr. Michael Bebbington for the separate reason that he was not involved in caring for or treating plaintiff.

All concur except Manzanet-Daniels, J. who dissents in part in a memorandum as follows:

MANZANET-DANIELS, J. (dissenting in part)

I agree with the majority that in rejecting Dr. Halbridge's affirmation, the motion court misapplied the "locality rule."[1] I would find, however, that plaintiff, through the expert affirmations of obstetrician-gynecologist Dr. Halbridge and pediatric neurologist Dr. Roseman, raised a triable issue of fact as to whether defendants' deviations from good and accepted medical practice caused his neurological deficits.

Plaintiff's obstetrical expert opined that during plaintiff's mother's near 24-hour labor, plaintiff experienced multiple late decelerations indicative of placental insufficiency causing fetal hypoxia.[2] He opined that it was a departure for staff to deliver plaintiff vaginally with Pitocin augmentation under these circumstances. He explained that diminished beat-to-

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[1]It cannot be denied that national standards of care have reduced local variations in standards of care, eroding the justification for the locality rule announced by the Court in *Pike v Honsinger*, 155 NY 393, in 1898. In any event, our sister courts have agreed that where a medical expert proposes to testify about minimum standards of care applicable throughout the United States, the locality rule is not implicated (*see McCulloch v United of Rochester Strong Mem. Hosp*., 17 AD3d 1063 [4th Dept. 2005]).

[2]Plaintiff's expert opined that repetitive late decelerations (i.e., one that begins after a contraction starts but reaches a peak well after the peak of contraction is reached and does not return to baseline until 30 to 60 seconds after the contraction is completed), particularly those marked by a prolonged return to baseline, signify a hypoxic state when they persist.

beat heart rate variability, coupled with late decelerations, enhances the likelihood that the fetus is experiencing significant hypoxia. Plaintiff's expert examined the fetal heart monitoring strips in great detail and opined that by 11:52 P.M. on December 10, 2003, at the latest, prompt delivery was essential to prevent further hypoxic-ischemic insult. Plaintiff's expert opined that plaintiff was delivered in a depressed condition as a result of central nervous system insult, noting that an ultrasound performed on the first day of life was positive for possible grade I subependymal hemorrhages. It is undisputed that plaintiff presented with shoulder dystocia and the umbilical cord wrapped around the neck. His Apgar score immediately after birth was 4 out of a possible 10 (2 for heart rate, 1 for tone, and 1 for reflex irritability, with zero scores for respiratory effort and color), and 7 at 4 minutes (respiration and color improved), after resuscitation with oxygen by bag and mask.

Plaintiff's pediatric neurologist noted that in addition to plaintiff's initial hypotonic, or "floppy" state, there was facial bruising, cephalohematoma, abdominal petechiae and separated sutures, all indicative of a traumatic delivery in addition to a period of hypoxia-ischemia.

The very neurological report relied on by defendants in

moving for summary judgment indicates that plaintiff suffers from a developmental disorder of receptive and expressive language development, that he has a disorder of articulation, and that he is fidgety, with a short attention span. Although at the time of the examination, plaintiff was 4½ years old, he was unable to count to 10 consistently or to sing the alphabet song. Plaintiff's pediatric neurologist notes that there is nothing else in plaintiff's medical history, apart from the abnormal labor and delivery, which would account for these deficits in speech and language. The nature of these deficits is such that they would not be immediately apparent, but would manifest at a later stage of development. I would accordingly find that plaintiff has sufficiently raised a triable issue of fact concerning defendants' departures from accepted practice and causation. The conflict between the opinions of both sides' experts is one for a jury to resolve (*see Cregan v Sachs*, 65 AD3d 101, 109 [2009]).

I agree, however, that the complaint was correctly dismissed as against defendant Dr. Bebbington, since the record does not reflect that he was involved in plaintiff's care or treatment.[3]

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

ENTERED: APRIL 3, 2012

CLERK

[3]Dr. King, the Fellow in Maternal Fetal Medicine on call at the hospital, delivered plaintiff.

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

6486 Carroll Bing, Index 112065/09
Plaintiff-Respondent,

-against-

296 Third Avenue Group, L.P., et al.,
Defendants-Appellants,

Al-Hafeez News Inc.,
Defendant.

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Litchfield Cavo LLP, New York (Russell J. McBrearty of counsel), for appellants.

The Rubino Law Firm, New York (JenniElena Rubino of counsel), for respondent.

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Order, Supreme Court, New York County (Jane S. Solomon, J.), entered June 17, 2011, that denied defendants 296 Third Avenue, L.P. and 296 Third Avenue Realty Corp.'s motion for summary judgment dismissing the complaint as against them and on their cross claim for contractual indemnification, unanimously modified, on the law, to grant the motion to dismiss the complaint, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint against said defendants.

In this action, plaintiff claims that she was injured when she allegedly slipped and fell on a snow or ice condition on a ramp that extends from the sidewalk to the interior of a newsstand located at 162 East 23rd Street in Manhattan (the

premises). Pursuant to a commercial lease (the lease), defendants 296 Third Avenue Group, L.P. and 296 Third Avenue Realty Corp. (landlord) leased the premises to the operator of the newsstand, defendant Al Hafeez News Inc. (tenant). The 296 defendants moved for summary judgment on the ground that they are out-of-possession landlords with no duty to maintain the premises or to remove snow. They also argued that they are entitled to contractual indemnification from defendant tenant.

The motion court denied the motion for summary judgment as to liability. The court held that an issue of fact existed as to whether the ramp where plaintiff allegedly slipped was within the demised premises because "[t]he ramp is open to the sidewalk, and so entry into the interior of the store is not necessary." However, the question of whether the ramp is part of the premises or the sidewalk is irrelevant because, under either scenario, tenant, and not landlord, was responsible for clearing the ramp of snow or ice.

Indeed, if the ramp were part of the sidewalk, landlord was not responsible for clearing it of snow or ice because the lease provided that tenant was responsible for maintaining its premises and removing snow and ice from the sidewalk. Thus, the motion court's application of Administrative Code of the City of New York § 7-210[b], that imposes liability on owners for, inter

alia, their "negligent failure to remove snow, ice, dirt, or other material from the sidewalk," was misplaced. In addition, § 7-210 is not applicable to this action because plaintiff did not allege landlord's violation of this section of the Administrative Code.

Moreover, if the ramp were part of the premises, landlord was not responsible for clearing it of snow or ice because, pursuant to the lease, landlord relinquished its possession and control over the premises and was, thus, an out-of-possession owner. "An out-of-possession landlord is generally not liable for the condition of the demised premises unless the landlord has a contractual obligation to maintain the premises, or right to re-enter in order to inspect or repair, and the defective condition is 'a significant structural or design defect that is contrary to a specific statutory safety provision'" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 420 [2011]). Although landlord retained the right of re-entry pursuant to the lease, plaintiff identified the defective condition as snow or ice on the ramp. However, snow or ice is not a significant structural or design defect. Accordingly, the trial court erred in denying

landlord's motion. As an out-of-possession owner, landlord was entitled to judgment as a matter of law (*see Ross*, 86 AD3d at 420).

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

ENTERED: APRIL 3, 2012

CLERK

Friedman, J.P., DeGrasse, Freedman, Abdus-Salaam, JJ.

7245 The People of the State of New York, Ind. 4666/09
Respondent,

-against-

Rashawn Simmons,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Lawrence T. Hausman of counsel), and Boies, Schiller & Flexner LLP, New York (Stephen Kyriacou of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Michael Sonberg, J.), rendered May 25, 2010, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree and attempted burglary in the second degree, and sentencing him to concurrent terms of one year, unanimously affirmed.

By pleading guilty, defendant waived his contention that the grand jury proceedings were impaired by the prosecutor's failure to introduce alleged exculpatory portions of his statement (*see People v Hansen*, 95 NY2d 227 [2000]; *People v Bishop*, 1 AD3d 112 [2003], *lv denied* 1 NY3d 568 [2003]). In any event, the alleged

errors did not rise to the level of impairment of the integrity of the grand jury proceedings and did not warrant the exceptional remedy of dismissal of the indictment or a count thereof (*see People v Huston*, 88 NY2d 400, 410 [1996]; *People v Darby*, 75 NY2d 449, 455 [1990]).

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

ENTERED: APRIL 3, 2012

CLERK

Friedman, J.P., DeGrasse, Freedman, Abdus-Salaam, JJ.

7246 Samuel Benolol, Index 107244/10
Plaintiff-Appellant,

-against-

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

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Frekhtman & Associates, Brooklyn (Andrew Green of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for respondents.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered February 10, 2011, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs, and the motion denied.

Plaintiff was injured while playing soccer when he tripped over an uneven portion of the artificial turf field. Plaintiff testified that prior to his fall, he had not noticed the allegedly defective condition over which he fell.

While "the doctrine of assumption of the risk does not exculpate a landowner from liability for ordinary negligence in maintaining a premises" (*Sykes v County of Erie*, 94 NY2d 912, 913 [2000]), here defendants established as a matter of law that the uneven condition of the artificial turf was open and obvious, and

was not the result of their negligence in maintaining the field (*see Ashbourne v City of New York*, 82 AD3d 461, 463 [2011]; *Simmons v Saugerties Cent. School Dist.*, 82 AD3d 1407, 1409-1410 [2011]; *Maddox v NYC*, 66 NY2d 270 [1985]).

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

ENTERED: APRIL 3, 2012

CLERK

Friedman, J.P., DeGrasse, Freedman, Abdus-Salaam, JJ.

7247 Sherard Taylor, Index 103976/08
Plaintiff-Appellant,

–against–

One Bryant Park, LLC, et al.,
Defendants-Respondents.

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

Fabiani Cohen & Hall, LLP, New York (Michele V. Ficarra of counsel), for respondents.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered June 17, 2011, which denied plaintiff's motion for summary judgment on the issue of liability on his Labor Law § 240(1) cause of action, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff was injured when the A-frame ladder he was ascending fell over. Plaintiff testified that he placed the ladder about six inches from a stack of metal studs and that as he was ascending the ladder, he heard a noise, which was the sound of the metal studs sliding against the ladder, causing it to fall. Under these circumstances, plaintiff established a violation of Labor Law § 240(1) (*see Bruce v 182 Main St. Realty Corp.*, 83 AD3d 433, 437 [2011]; *Schultze v 585 W. 214th St. Owners Corp.*, 228 AD2d 381 [1996]).

Although summary judgment is not warranted where “credible evidence reveals differing versions of the accident" (*Ellerbe v Port Auth. of N.Y. & N.J.*, 91 AD3d 441, 442 [2012]), the evidence upon which defendants rely is neither credible, nor admissible. The workers’ compensation C-2 report is not signed or authenticated, and it is not conclusively clear who created the report or where that person acquired the information (*see Zuluaga v P.P.C. Const., LLC*, 45 AD3d 479 [2007]). Assuming that the site medic listed on the report completed it, an affidavit from that same medic gives a different version of the accident from that listed on the C-2. The affidavit does not address the inconsistency, and is also not notarized. “While hearsay statements may be used to oppose a summary judgment motion, such evidence is insufficient to warrant a denial of the motion where [as here] it is the only evidence submitted in opposition” (*see Rivera v GT Acquisition 1 Corp.*, 72 AD3d 525, 526 [2010]).

Moreover, the record establishes plaintiff was not the sole

proximate cause of his injuries (*see e.g. Clarke v Morgan Contr. Corp.*, 60 AD3d 523 [2009]). There is a lack of evidence that plaintiff was aware that the stacked pile of studs was not secured when he placed the ladder near it.

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

ENTERED: APRIL 3, 2012

CLERK

Friedman, J.P., DeGrasse, Freedman, Abdus-Salaam, JJ.

7248-
7248A In re Naisha Johanna V., and Another,

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

John V.,
Respondent-Appellant,

Seaman's Society for Children
and Families,
Petitioner-Respondent.

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

John R. Eyerman, New York, for respondent.

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

Orders of disposition, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about January 5, 2011, which, upon findings of permanent neglect, terminated respondent father's parental rights to his daughters Anahys C. and Naisha J. V., and committed custody of the children to the Seamen's Society for Children and Families for the purpose of adoption, unanimously affirmed, without costs.

Family Court's determination that the father permanently neglected the children was supported by clear and convincing evidence. The agency presented ample evidence demonstrating the diligent efforts it made to strengthen the father's relationship

with the children by furnishing him with a service plan tailored to his individualized needs, and affording him referrals for treatment programs to address his particular obstacles (*see* Social Services Law § 384-b[7][a]; *Matter of Eddie Christian S.*, 44 AD3d 504 [2007], *lv denied* 9 NY3d 818 [2008]). Even considering the period of the father's incarceration, the agency's diligent efforts were made to no avail (*see Matter of Gregory B.*, 74 NY2d 77, 87 [1989]; Social Services Law § 384-b[7][f][3]). Other than completing an anger management program, the father entirely failed to complete the service plan during the statutory period. Most troubling, however, is the father's refusal to take responsibility for sexually abusing the children despite the Family Court's finding, which finding this Court affirmed (*see Matter of Anahys V. [John V.]*, 68 AD3d 485 [2009], *lv denied* 14 NY3d 705 [2010]), and despite knowing that it stood in the way of reunification with his children (*see Matter of Elijah Jose S. [Jose Angel S.]*, 79 AD3d 533 [2010], *lv denied* 16 NY3d 708 [2011]; *Matter of Perla B.*, 48 AD3d 261 [2008]; *Matter of Ronald Jamel W.*, 227 AD2d 169 [1996], *lv denied* 89 NY2d 803 [1996]). This supports Family Court's determination that the father "substantially and continuously or repeatedly" failed to

plan for the children's future (Social Services Law § 384-b [7] [a]; *see Matter of Jonathan R.*, 30 AD3d 426 [2006], *lv denied* 7 NY3d 711 [2006]).

Further, a preponderance of the evidence demonstrates that the children's best interests are served by terminating the father's parental rights and freeing them for adoption. At the time of the dispositional hearing, the children had been living with foster parents for over four years, and are getting along well in that kinship foster home. We decline to grant the father's request for a suspended judgment because it is not warranted under the circumstances, which include his repeated incarcerations, the length of time the children have spent in the care of their kinship foster parents, who wish to adopt them, and considering the children's need for permanence and stability (*see Matter of Jada Serenity H.*, 60 AD3d 469 [2009]; *Matter of Jahisha Jaysawnna J.*, 22 AD3d 383 [2005]).

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

ENTERED: APRIL 3, 2012

CLERK

Friedman, J.P., DeGrasse, Freedman, Abdus-Salaam, JJ.

7249-
7250 Kyle Tinney, et al., Index 21154/06
Plaintiffs-Respondents-Appellants,

-against-

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

Michael A. Cardozo, Corporation Counsel, New York (Edward F.X. Hart of counsel), for appellants-respondents.

Belovin & Franzblau, Bronx (David A. Karlin of counsel), for respondents-appellants.

Order, Supreme Court, Bronx County (Dominic R. Massaro, J.), entered December 28, 2009, which denied the motion by defendants The City of New York, New York City Police Department, New York City Department of Health, New York City Medical Examiner's Office of the Department of Health (collectively, the City) for summary judgment dismissing the complaint, and denied the cross motion by plaintiffs for summary judgment, unanimously modified, on the law, to grant plaintiffs' motion for summary judgment on the issue of liability, and remand the case to the IAS court for further proceedings, and otherwise affirmed, without costs.

Plaintiffs' action is not time-barred by General Municipal Law § 50-i(1)©. As we have previously held, a cause of action for the right of selpulcher "does not accrue until interference with the right directly impacts on the 'solace and comfort' of

the next of kin – that is, until interference causes mental anguish for the next of kin" (*Melfi v Mount Sinai Hosp.*, 64 AD3d 26, 32 [2009]). The next of kin's mental anguish cannot arise until he or she became aware of defendant's actions - in this case, in February 2006 when plaintiffs first discovered the facts underlying this action including learning for the first time that their father was dead (*id.*; *see also Johnson v State of New York*, 37 NY2d 378 [1975]).

In addition, under the circumstances presented in this case, where defendant had all the necessary identifying documents, the act claimed to be omitted is a ministerial, as opposed to a discretionary, function. Therefore, the City is not shielded from liability on the ground that the allegedly tortious acts were discretionary (*see McLean v City of New York*, 12 NY3d 194, 202 [2009]; *see also Garrett v Holiday Inns*, 58 NY2d 253, 263 [1983]; *cf. Valdez v City of New York*, 18 NY3d 69 [2011]). We further find that the City's omissions give rise in this action to liability for loss of the right to sepulcher (*Shipley v City of New York*, 80 AD3d 171 [2010]). Moreover, no further factual

development would shed any light on this case, at least not with respect to liability, and therefore, plaintiffs' motion for summary judgment should have been granted on the issue of liability.

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

ENTERED: APRIL 3, 2012

CLERK

Friedman, J.P., DeGrasse, Freedman, Abdus-Salaam, JJ.

7251-
7252 Landmark Capital Investments, Inc., Index 103673/08
Plaintiff-Respondent,

-against-

Li-Shan Wang,
Defendant-Appellant,

Innovation Datatronics Corporation,
Defendant.

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David S. Friedberg, New York, for appellant.

Daniel S. Roshco, P.C., New York (Daniel S. Roshco of counsel), respondent.

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Judgment, Supreme Court, New York County (Marcy S. Friedman, J.), entered December 22, 2010, awarding plaintiff the total amount of $69,211.12, unanimously affirmed, with costs. Judgment, same court (Louis Crespo, Special Referee), entered December 22, 2010, which awarded plaintiff attorneys' fees in the total amount of $21,489.60, unanimously affirmed, with costs.

The record supports the finding that defendant Wang (defendant) was properly served. The detailed description of the service attempts on defendant and of the interior of defendant's building supported the determination that the process server was credible. Although the process server was under investigation for improper record keeping by the Department of Consumer

Affairs, the relevant portions of the record support the finding that his version of facts was accurate *(cf. Matter of Barr v Department of Consumer Affairs of City of N.Y.,* 70 NY2d 821 [1987]).

Plaintiff established its entitlement to judgment as a matter of law by relying in part on the original loan file prepared by its assignor. Plaintiff relied on these records in its regular course of its business (*see Merrill Lynch Bus. Fin. Servs. Inc. v Trataros Constr., Inc.,* 30 AD3d 336, 337 [2006], *lv denied* 7 NY3d 715 [2006]). Defendant failed to raise a triable issue as to whether plaintiff was "doing business in this state without authority," which, under Business Corporation Law § 1312(a), would preclude it from bringing suit. Although plaintiff often purchased debt held by New York debtors, this, as an activity carried on by an Ohio company with no offices or employees in New York, is not sufficient to constitute doing business under section 1312 *(see Beltone Elecs. Corp. v Selbst,* 58 AD2d 560 [1977]).

Defendant also failed to raise a triable issue on her defense of fraudulent inducement. Defendant did not allege any misstatement by the maker of the loan. Rather, she asserted that she signed the guaranty without knowing what it was, which does

not constitute a defense *(see Imero Fiorentino Assoc. v Green,* 85 AD2d 419, 420 [1982]). Nor did the court abuse its discretion in allowing plaintiff to make a second summary judgment motion correcting certain defects, where that motion clearly enhanced judicial efficiency (*see Detko v McDonald's Rests. of N.Y.,* 198 AD2d 208, 209 [1993], *lv denied* 83 NY2d 752 [1994]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: APRIL 3, 2012

CLERK

Friedman, J.P., DeGrasse, Freedman, Abdus-Salaam, JJ.

7253 Hanover Insurance Company, etc., Index 600040/06
Plaintiff-Respondent,

-against-

David Andrew Krivine, et al.,
Defendants-Appellants,

Law Offices of Michael P. Mangan, LLC, New York (Michael P. Mangan of counsel), for appellants.

Abrams, Gorelick, Friedman & Jacobson, LLP, New York (Steven DiSiervi of counsel), for respondent.

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered October 7, 2010, after a jury trial, adjudging that plaintiff is the owner of the subject diamond and ordering non-party Gemological Institute of America (GIA) to release the diamond to plaintiff, unanimously affirmed, with costs.

The verdict was not against the weight of the evidence. The jury reached its finding that the 2001 Glick diamond and the 2005 Krivine diamond are the same diamond based on a fair interpretation of the evidence which showed that the two submissions to the GIA were identical in color, style, and clarity, had the same scratch on the surface, as well as the same cloud and feather inside the stone (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). The fact that the GIA's reports on the

two submissions showed a .03 millimeter difference in depth did not preclude the jury's verdict. Plaintiff's witnesses explained that the GIA's measurements had a margin of error of .02 millimeters per measurement which could result in a difference of up to .04 millimeters, and the actual difference in depth falls within that range.

The trial court, which "is vested with broad discretion to determine the materiality and relevance of proposed evidence" did not abuse its discretion in permitting plaintiff to introduce evidence that Ourel Golan was defendant Mimouni's nephew (*Hyde v County of Rensselaer*, 51 NY2d 927, 929 [1980]).

Defendants failed to preserve their argument that plaintiff's cause of action is time-barred and thus, it is not properly before this Court. Were we to review this argument, we would find it without merit.

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

ENTERED: APRIL 3, 2012

CLERK

Friedman, J.P., DeGrasse, Freedman, Abdus-Salaam, JJ.

7254 The People of the State of New York, Ind. 1330/10
Respondent,

-against-

Curtis Ferguson,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (John B.F. Martin 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 (Renee White, J.), rendered on or about July 6, 2010,

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

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

ENTERED: APRIL 3, 2012

CLERK

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

Friedman, J.P., DeGrasse, Freedman, Abdus-Salaam, JJ.

7256-
7257 In re East 51st Street Crane Collapse Litigation — Index 150063/10

- - - - -

East 51st Street Development Company, LLC, et al.,
Plaintiffs-Respondents-Appellants,

-against-

Lincoln General Insurance Company,
Defendant-Respondent-Appellant,

AXIS Surplus Insurance Company, et al.,
Defendants-Appellants-Respondents,

Everest National Insurance Company,
Defendant.

Hurwitz & Fine, P.C., Buffalo (Dan D. Kohane of counsel), for AXIS Surplus Insurance Company, appellant-respondent.

Chalos, O'Conner & Duffy, LLP, Port Washington (Alfred C. Constants, III of counsel), for Interstate Fire and Casualty Company, appellant-respondent.

Clyde & Co US LLP, New York (Sarah H. Mitchell of counsel), for East 51st Street Development Company, LLC, and Illinois Union Insurance Company, respondents-appellants.

Schoenfeld Moreland, P.C., New York (Edward F. Rubbery, of the Illinois Bar, admitted pro hac vice, of counsel), for Lincoln General Insurance Company, respondent-appellant.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered March 4, 2011, which granted plaintiffs' motion for summary judgment declaring that defendant Lincoln General

Insurance Company has a duty to defend East 51st Street Development Company, LLC (East 51st Street) and to reimburse Illinois Union Insurance Company for past defense costs in the underlying crane- collapse litigation from the date of the crane collapse (March 15, 2008) to the date that Lincoln General exhausted its policy limits, and so declared, granted plaintiffs' motion for summary judgment declaring that defendant AXIS Surplus Insurance Company has a duty to defend East 51st Street and to reimburse Illinois Union for past defense costs and to pay all future defense costs in the crane-collapse litigation, and so declared, granted Lincoln General's motion for summary judgment declaring that its policy is excess to the AXIS policy and that AXIS owes a primary duty to pay all or a portion of East 51st Street's defense costs, and so declared, granted Lincoln General's motion for summary judgment declaring that defendant Interstate Fire and Casualty Company is obligated to provide primary coverage to East 51st Street, and so declared, denied AXIS's motion for summary judgment declaring that it has no duty to defend, and denied Interstate's motion for summary judgment dismissing the complaint and Lincoln General's cross claims against it, unanimously modified, on the law, to deny Lincoln General's motions for summary judgment declaring that its policy

is excess to the AXIS and Interstate policies, to vacate those declarations, and to declare that Lincoln General is obligated to provide primary coverage to East 51st Street, and otherwise affirmed, without costs.

On March 15, 2008, a crane collapsed at a construction site on East 51st Street in Manhattan, causing the deaths of six construction workers and a pedestrian, injury to several other individuals, and extensive damage to property. Multiple claims for bodily injury and property damage were brought against plaintiff East 51st Street, the owner of the property on which the accident occurred, Reliance Construction Ltd., the construction manager on the project, and Joy Contractors, Inc., the superstructure subcontractor, whose employee was operating the crane at the time of the accident.

As is undisputed, the insurance policies issued by AXIS and Interstate to Reliance and the policy issued by Lincoln General to Joy were primary to the policy issued by Illinois Union to East 51st Street. AXIS, Interstate and Lincoln General therefore are obligated to reimburse Illinois Union for defense costs. Although Illinois Union had already taken up East 51st Street's defense, its intent to seek contractual indemnification from Reliance and Joy created a potential conflict between East 51st

Street and Lincoln General, giving East 51st Street the right to obtain independent counsel (*see 69th St. & 2nd Ave. Garage Assoc. v Ticor Tit. Guar. Co.*, 207 AD2d 225, 227 [1995], *lv denied* 87 NY2d 802 [1995]).

The "Supplementary Payments" provision of the AXIS policy issued to Reliance states that "[w]e will pay, with respect to any claim we investigate or settle, or any 'suit' against an insured we defend[] . . . [a]ll expenses we incur," and that "[t]hese payments will reduce the limits of insurance." However, the amended Insuring Agreement of the policy provides that AXIS's "duty to defend ends when [AXIS has] used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B [i.e., damages]." The ambiguity as to whether "expenses" includes defense costs that results from these conflicting provisions must be construed against AXIS (*see 242-44 E. 77th St., LLC v Greater N.Y. Mut. Ins. Co.*, 31 AD3d 100, 105 [2006]). We therefore conclude that the policy does not provide for defense within limits, which undermines AXIS's argument that the policy limits had been eroded, and that AXIS is obligated to share in the costs of the defense of East 51st Street, an "additional insured" on the policy (*see Pecker Iron Works of N.Y. v Traveler's Ins. Co.*, 99 NY2d 391, 393 [2003]).

Interstate's contention that East 51st Street is not listed on the additional insured endorsement or the declarations page of the policy issued to Reliance does not avail it since it admitted in its answer that East 51st Street was an additional insured under that policy. Nor does it avail Interstate that Reliance, the named insured, may not have complied with the policy's conditional coverage endorsement (*see Pecker Iron Works*, 99 NY2d at 393). Contrary to Interstate's further contention, since East 51st Street never filed any claims against Interstate in the related federal action brought by Reliance's excess liability carrier, and filed all its claims against Interstate in this state action, it did not engage in "claims splitting" (*see Emery Roth & Sons v Notional Kinney Corp.*, 44 NY2d 912 [1978]; *67-25 Dartmouth St. Corp. v Syllman*, 29 AD3d 888 [2006]).

We find that, pursuant to the "Other Insurance" provision in the AXIS, Lincoln General and Interstate policies, the insurance provided to East 51st Street, an additional insured on those policies, is primary (*see Sport Rock Intl., Inc. v American Cas. Co. of Reading, Pa.*, 65 AD3d 12, 18 [2009]). Our conclusion is not altered by the "Additional Insured" endorsement in the AXIS policy, which provides that "such insurance as is afforded by this policy for the benefit of [East 51st Street] shall be

primary insurance as respects any claim, loss or liability arising out of [Reliance's] operations, and any other insurance maintained by [East 51st Street] shall be excess and non-contributory with the insurance provided hereunder." A reasonable business person would understand the term "insurance maintained by" to refer to insurance actually procured by East 51st Street (the Illinois Union policy), rather than afforded it as an additional insured.

Although, as Interstate points out, a low premium suggests that a policy may not be primary, it is not conclusive (*see State Farm Fire & Cas. Co. v LiMauro*, 65 NY2d 369, 376 [1985]). The language of the Interstate policy does not establish the policy as a pure excess policy (*compare Tishman Constr. Corp. of N.Y. v Great Am. Ins. Co.*, 53 AD3d 416, 420 [2008]).

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

ENTERED: APRIL 3, 2012

CLERK

Friedman, J.P., DeGrasse, Freedman, Abdus-Salaam, JJ.

7258 The People of the State of New York, Ind. 2164N/09
Respondent,

-against-

Armstrong Wilkerson,
Defendant-Appellant.

Richard M. Greenberg, Office of Appellate Defender, New York (Lauren Stephens-Davidowitz of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered February 24, 2010, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and two counts of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to concurrent terms of 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 credibility determinations.

The court properly exercised its discretion in denying defendant's motion, made pursuant to County Law § 722-c, for authorization of an independent analysis of the narcotics

evidence. Other than the fact that this was a drug case, defendant offered only "vague and speculative" reasons for independent drug testing (*see People v Coleman*, 45 AD3d 432, 433 [2007], *lv denied* 10 NY3d 763 [2008]), and his present argument relies on matters outside the record that were never presented to the trial court. Furthermore, although defendant challenged the credibility of the officers involved in his case, there was no issue at trial concerning the identity or weight of the substances defendant allegedly sold and possessed. Accordingly, the court's ruling did not deprive defendant of a fair trial or the right to present a defense.

The evidence at the *Hinton* hearing established an overriding interest that warranted a limited closure of the courtroom during an undercover officer's testimony (*see Waller v Georgia*, 467 US 39 [1984]; *People v Ramos*, 90 NY2d 490, 497 [1997], *cert denied sub nom. Ayala v New York*, 522 US 1002 [1997]), and the closure order did not violate defendant's right to a public trial. The People made a sufficiently particularized showing that the officer's safety and effectiveness would be jeopardized by testifying in an open courtroom (*see e.g. People v Plummer*, 68 AD3d 416, 417 [2009], *lv denied* 14 NY3d 891 [2010]. Furthermore, the court implicitly or explicitly considered alternatives to

full closure, including those proposed by the People (*see Presley v Georgia*, 558 US __, __, 130 S Ct 721, 724 [2010]; *People Mickens*, 82 AD3d 430 [2011], *lv denied* 17 NY3d 798 [2011], *cert denied* 565 US __, 132 S Ct 527 [2011]). Instead of ordering a complete closure, the court permitted defendant's relatives to attend. Defendant objected to the closure ruling only to the extent it excluded his niece's friend from the courtroom. However, defendant made no showing that he had a "tie of more significance than ordinary friendship" with this person (*People v Nazario*, 4 NY3d 70, 74 [2005]). Defendant did not preserve his claim that the court failed to make sufficient findings to support its closure order (*see People v Doster*, 13 AD3d 114, 115 [2004], *lv denied*, 4 NY3d 763 [2005]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits (*see id.*).

The testimony adduced by the People at the *Hinton* hearing, demonstrating a need for partial closure of the courtroom, also met their burden of establishing a need for the undercover officer to testify under his shield number (*see People v Henderson*, 22 AD3d 311, 312 [2005], *lv denied* 6 NY3d 813 [2006]). Defendant failed to establish that he was prejudiced by only knowing the officer's shield number, and the ruling did not

violate defendant's right of confrontation (*see People v Washington*, 40 AD3d 228 [2007], *lv denied* 9 NY3d 927 [2007]).

Defendant did not preserve his claims regarding closure of the courtroom during the suppression hearing, or his claims regarding evidence of uncharged crimes, and we reject his arguments to the contrary. We decline to review these claims in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: APRIL 3, 2012

CLERK

Friedman, J.P., DeGrasse, Freedman, Abdus-Salaam, JJ.

7259-
7259A In re Ronald Anthony G., Jr.,
and Another,

Dependent Children Under
Eighteen Years of Age, etc.,

Ronald G.,
Respondent-Appellant,

Catholic Guardian Society
and Home Bureau,
Petitioner-Respondent.

Geoffrey P. Berman, Larchmont, for appellant.

Magovern & Sclafani, New York (Joanna M. Roberson of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Michael D. Scherz of counsel), attorney for the child.

Orders of disposition, Family Court, New York County (Susan Knipps, J.), entered on or about January 20 and February 2, 2011, which, to the extent appealed from, upon a fact-finding of permanent neglect, terminated respondent father's parental rights to the subject children and committed custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and

convincing evidence that respondent failed to plan for his children's future, as he refused to accept his diagnosis of, and seek treatment for, schizophrenia and refused to utilize the shelter system as a pathway to obtaining suitable housing (Social Services Law § 384-b[7][a], [c]; *Matter of Fernando Alexander B. [Simone Anita W.]*, 85 AD3d 658, 659 [2011]). The agency was not required to exercise reasonable efforts to return the children to respondent, as his parental rights to seven other children had been involuntarily terminated (*see* Family Ct Act § 1039-b[b] [6]; *Matter of Evelyse Luz S.*, 57 AD3d 329, 330 [2008]). In any event, the agency established by clear and convincing evidence that it exercised diligent efforts by referring respondent to mental health treatment programs and encouraging him to use the shelter system in order to obtain suitable housing (*see Matter of Sheila G.*, 61 NY2d 368, 384 [1984]).

A preponderance of the evidence supports the finding that it is in the children's best interests to terminate respondent's parental rights in order to free the children for adoption by their foster parents (*see* Family Ct Act § 631; *Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The record shows that respondent is still homeless and has failed to obtain appropriate mental health treatment. By contrast, since birth, the children,

now ages four and three, have lived in a loving and stable foster home with foster parents who wish to adopt them and with whom they have bonded (*see Matter of Kie Asia T. [Shaneene T.]*, 89 AD3d 528, 528-529 [2011]).

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

ENTERED: APRIL 3, 2012

CLERK

Friedman, J.P., DeGrasse, Freedman, Abdus-Salaam, JJ.

7261 Hawthorne Gardens, LLC, Index 102981/07
Plaintiff-Respondent,

-against-

Salman Home, Inc., et al.,
Defendant,

Rafael Salman, etc.,
Defendant-Appellant.

Sheldon Farber, New York, for appellant.

Gutman, Mintz, Baker & Sonnenfeldt, P.C., New Hyde Park (Neil Sonnenfeldt of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered January 19, 2011, as amended January 21, 2011, to the extent that it directed entry of judgment in the principal amount of $686,208 in plaintiff's favor against defendant guarantor, unanimously affirmed, without costs.

Although the guaranty was only for the first two years of the lease, the court properly awarded the landlord the entire accelerated rent amount through the end of the six year lease term. This did not subject the individual guarantor to a greater obligation than he intended or offend the rule of strict construction of guaranties (*see generally Lo-Ho LLC v Batista*, 62 AD3d 558, 559-560 [2009]). The possibility of acceleration was

in the lease that the guarantor signed, and tenant's default in rent and the acceleration took place within the period of the guaranty.

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

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

ENTERED: APRIL 3, 2012

CLERK

Friedman, J.P., DeGrasse, Freedman, Abdus-Salaam, JJ.

7262 Harold E. Garber, et al., Index 601917/05
Plaintiffs-Respondents,

-against-

Troy D. Stevens, Jr., etc., et al.,
Defendants-Appellants.

Hogan & Cassell, LLP, Jericho (Michael D. Cassell of counsel), for appellants.

Edward B. Safran, New York, for respondents.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered August 18, 2011, which, to the extent appealed from as limited by the briefs, granted plaintiffs Harold E. Garber, Ronald Seiden, Seymour C. Nash, Robert C. Magoon, Gordon Miller, Stephen M. Kulvin, Steven Zaron and Lee Dufner's motion for partial summary judgment as to their breach of fiduciary duty, breach of contract and violation of Real Property Law (RPL) article 12-A causes of action, and denied defendants Troy D. Stevens, Jr., individually and d/b/a Development Co., Kinpit Realty Corp., Kinpit Realty, Inc., Kinpit Realty Co., Kinpit Management and Dawmich Industries, Inc.'s motion for summary judgment on their affirmative defenses, unanimously modified, on the law, to deny plaintiffs summary judgment on the RPL cause of action, and otherwise affirmed, without costs.

In support of summary judgment, plaintiffs submitted a fully executed Partnership Agreement, which, inter alia, precluded the general partners from: employing the credit or capital of the partnership in any other than partnership business; refinancing the property without the approval of 51% of the limited partners; and receiving compensation for services rendered to the partnership, and required any payment of proceeds to be paid to the limited partners first. It is undisputed that the general partner defendants refinanced the property six times without prior approval from plaintiffs; paid defendant Stevens proceeds from those refinancings, presumably for loans he had made for property renovations; did not pay any of the loan monies to the limited partners; and paid themselves management fees for services provided to the partnership. As such, plaintiffs established prima facie entitlement to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]) on the issue of liability as related to the breach of contract and breach of fiduciary duty claims.

In response, defendants failed to raise an issue of fact precluding summary judgment (*see id.* at 324) as to those claims. Although defendants dispute whether the agreement submitted by plaintiffs was the final version, that version was the same one

appended to an affidavit submitted by Stevens in a prior litigation, and the court was entitled to rely on Stevens' representation as to the document's authenticity (*Pippo v City of New York*, 43 AD3d 303, 304 [2007] ["(a) party's affidavit that contradicts (his or) her prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment"]). Moreover, there is no evidence in the record to suggest that plaintiffs ever agreed to the alterations in the version of the agreement offered by defendants.

However, the grant of summary judgment on the RPL claim, which was premised solely upon the general partner defendants' collection of rent without a broker's license (§§ 440, 440-a), was error. This Court has held that "[t]he statute is inapplicable where the collection of rent is incidental to responsibilities which fall outside the scope [of] brokerage services" (*Herson v Troon Mgt. Inc.*, 58 AD3d 403, 403 [2009]). Here, triable issues of fact exist as to whether the collection of rent was a mere incident of the various real estate management services allegedly rendered by defendants. Although plaintiffs contend that the record does not support such an assertion, we find that there is just as much support for the assertion as

there is against it and, as such, summary judgment was not appropriate.

Defendants' affirmative defenses of fraud and/or unconscionability, which were not asserted in their answer or raised on a prior motion, were properly rejected (*see BMX Worldwide v Coppola N.Y.C.*, 287 AD2d 383, 384 [2001]).

Defendants' reliance on plaintiffs' silence and inaction to establish the defenses of waiver and/or equitable estoppel is misplaced (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-107 [2006]; *EchoStar Satellite L.L.C. v ESPN, Inc.*, 79 AD3d 614, 617 [2010]. Plaintiffs did not discover many of the acts about which they now complain until long after they entered into the agreement, in part, because of defendants' subterfuge and violation of that agreement. Moreover, defendants' last alleged violation occurred in 2005, the same year the complaint was filed.

Finally, laches is unavailable as a defense to the claims of breach of contract, breach of fiduciary duty and for the return of management fees, which, although brought together as a

derivative action, are not equitable in nature (*see e.g. Cadlerock, L.L.C. v Renner*, 72 AD3d 454, 454 [2010]; *see also Pfeiffer v Berke*, 4 Misc 2d 918 [Sup Ct, Kings County 1953]).

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

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

ENTERED: APRIL 3, 2012

CLERK

Friedman, J.P., DeGrasse, Freedman, Abdus-Salaam, JJ.

7263-
7264 The People of the State of New York, Ind. 1379/09
Respondent,

-against-

Daquan Mathis,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Bruce D. Austern of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

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Judgment, Supreme Court, New York County (Robert H. Straus, J.H.O. and Richard Carruthers, J. at hearing; Analisa Torres, J. at jury trial and sentencing), rendered May 4, 2010, as amended June 24 and July 21, 2010, convicting defendant of robbery in the first and second degrees and attempted robbery in the first and second degrees, and sentencing him to an aggregate term of 10 years, unanimously affirmed.

The court properly denied defendant's motion to suppress identification testimony. Under the unusual circumstances of the case, the display of a single photograph was not unduly suggestive. This procedure took advantage of an unexpected opportunity to obtain an identification while the attempted robbery victim's memory of the crime was still fresh. The police

had only a cell phone photo of a person they suspected to be the then-unnamed and unapprehended perpetrator, and insufficient information to obtain a police photo. Accordingly, it would have been impracticable to construct a fair photo array. These factors created a unique exigency justifying this procedure.

In any event, the passage of time between the single-photo identification and the victim's identification of defendant at a lineup was sufficient to attenuate any possible taint (*see People v Leibert*, 71 AD3d 513, 514 [2010], *lv denied* 15 NY3d 752 [2010]). Finally, there was overwhelming evidence of defendant's guilt, even without identification testimony.

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

ENTERED: APRIL 3, 2012

CLERK

Friedman, J.P., DeGrasse, Freedman, Abdus-Salaam, JJ.

7265 Dean Robinson, Index 16870/06
Plaintiff-Respondent,

-against-

New York City Department of Education, etc.,
Defendant-Appellant,

Michael A. Cardozo, Corporation Counsel, New York (Norman Corenthal of counsel), for appellant.

Law Offices of Albert W. Cornachio, P.C., Rye Brook (Albert W. Cornachio, III of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Wilma Guzman, J.), entered September 8, 2010, which, after a jury trial, awarded plaintiff a total of $1,003,649, including $268,000 for past pain and suffering and $600,000 for future pain and suffering for 40 years, unanimously modified, on the facts, to vacate the awards for past and future pain and suffering and order a new trial solely as to those damages, unless plaintiff, within 30 days of service of a copy of this order with notice of entry, stipulates to accept reduced awards for past and future pain and suffering of $125,000 and $175,000, respectively, and to entry of an amended judgment in accordance therewith, and otherwise affirmed, without costs.

Plaintiff seeks recovery for injuries sustained while

playing basketball in a school gymnasium while participating in an after-school program. After "clapping" the basketball backboard with his right hand, plaintiff, who was 14-years old at the time, caught his middle finger on a V-shaped pinch point, in a metal cage, located about one foot away from the backboard.

Plaintiff's sports and recreational safety expert, whose testimony was uncontroverted, testified that the installation of the metal cage, which protected an emergency light fixture located below, and centered on, the basketball backboard, deviated from industry standards which required a minimum of 3 feet of unencumbered space from the end line or the out-of-bounds line to the next area and thus, posed a danger to players. Under these circumstances, the risks posed by the metal cage were not commonly appreciated ones inherent in, and flowing from, participation in the game of basketball (*see Morgan v State of New York*, 90 NY2d 471, 484 [1997]).

While plaintiff had been aware of the metal cage's existence and the fact that objects had gotten caught in it, he was unaware of anyone being injured by the metal cage. Thus, the V-shaped pinch point, which was not visible on a frontal view of the cage,

rendered the conditions not as safe as they appeared to be (*see Turcotte v Fell*, 68 NY2d 432, 439 [1986]) and created an "unassumed, concealed or unreasonably increased risk[]" (*Benitez v New York City Bd. of Educ.*, 73 NY2d 650, 658 [1989]). Accordingly, defendant failed to establish entitlement to dismissal based upon the doctrine of the assumption of risk, and the jury's finding that plaintiff was not contributorily negligent was not against the weight of the evidence.

The trial court's refusal to charge the jury to consider the possible negligence of the nonparty operator of the after-school program, pursuant to CPLR 1601(1), was proper, as the evidence at trial failed to suggest that the nonparty was negligent and that such negligence proximately caused and/or contributed to the accident (*cf. Sargeant v New York Infirmary Beekman Downtown Hosp.*, 222 AD2d 228 [1995], *lv dismissed* 88 NY2d 962 [1996]). Defendant's remaining objections to the jury instructions are unpreserved (*see* CPLR 4017, 4110-b), and we decline to review them.

Plaintiff lost the tip of the middle finger on his dominant hand, resulting in sensitivity and a 25% disability of the hand. While plaintiff had undergone two surgeries, was cautious about using his hand and hid it from view, he had resumed most of his

pre-accident activities and his prosthetic expert testified that a prosthesis would protect the injured finger and increase function and appearance. Hence, we find that, based on a review of cases involving similar injuries, the awards for past and future pain and suffering deviated materially from what would be reasonable compensation, and we reduce them accordingly (*compare Shi Pei Fang v Heng Sang Realty Corp.*, 38 AD3d 520 [2007]; *Brown v City of New York*, 309 AD2d 778 [2003]; *Bradshaw v 845 U.N. Ltd. Partnership*, 2 AD3d 191 [2003]; *Allende v New York City Health & Hosps. Corp.*, 228 AD2d 229 [1996], *rev on other grounds* 90 NY2d 333 [1997]; *Fields v City Univ. of N.Y.*, 216 AD2d 87 [1995]).

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

ENTERED: APRIL 3, 2012

CLERK

Friedman, J.P., DeGrasse, Freedman, Abdus-Salaam, JJ.

7266 In re Edwin Ortiz, Index 115486/09
Petitioner-Appellant,

-against-

Raymond Kelly, etc., et al.,
Respondents-Respondents.

Jeffrey L. Goldberg, Port Washington, for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Inga Van Eysden of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Judith J. Gische, J.), entered November 12, 2010, which denied the petition brought pursuant to article 78 seeking to annul the determination of respondents, dated July 10, 2009, denying petitioner retired police officer's application for line of duty Accidental Disability Retirement (ADR) benefits, and dismissed the proceeding, unanimously affirmed, without costs.

The record provides credible evidence to support the Medical Board's findings that petitioner's left shoulder complaints did not warrant a grant of ADR benefits, inasmuch as the complaints pertaining to a "stretch injury" of the brachial plexus were not substantiated by objective medical testing, which included MRI results and EMG/NCV studies. Moreover, there was no evidence of internal derangement of petitioner's left shoulder, apart from

mild deficits, and petitioner's own physician found a full range of motion in the left shoulder upon post-operative testing (*see generally Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760-761 [1996]; *Matter of Goffred v Kelly*, 13 AD3d 72 [2004]). The Medical Board's finding that petitioner was not disabled and could return to the regular duties of a police officer was supported by some credible evidence in the record. The conflicting medical opinion offered by petitioner's physicians as to his claimed disability was not substantiated by objective medical proof.

The fact that the Police Department's orthopedic surgeon found petitioner physically unfit for purposes of his application seeking reinstatement to the Police Department -- which was denied -- did not stand as a direct contradiction to the Medical Board's determination that petitioner was not disabled within the meaning of Administrative Code of City of NY § 13-252 or eligible

for disability benefits (*see generally Matter of Nemecek v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 99 AD2d 954 [1984]).

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

ENTERED: APRIL 3, 2012

CLERK

Mazzarelli, J.P., Saxe, DeGrasse, Román, JJ.

6528-
6529-
6530

John R. Denza, et al.,
Plaintiffs-Respondents,

Index 117673/05
113831/04

-against-

Independence Plaza Associates, LLC, et al.,
Defendants-Appellants.

- - - - -

Independence Plaza North Tenants' Association, et al.,
Plaintiffs-Respondents,

-against-

Independence Plaza Associates, L.P., etc., et al.,
Defendants-Appellants.

- - - - -

Independence Plaza North Tenants' Association, et al.,
Plaintiffs-Appellants,

Felix Ortiz,
Plaintiff,

-against-

Independence Plaza Associates., L.P., etc., et al.,
Defendants-Respondents.

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The Rent Stabilization Association of New York City, Inc. and Community Housing Improvement Program, Inc.,
Amici Curiae.

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Meister Seelig & Fein LLP, New York (Stephen B. Meister of counsel), for Independence Plaza Associates, LLC, WB/Stellar IP Owner, L.L.C., and Independence Plaza Associates, L.P., appellants/respondents.

Collins, Dobkin & Miller, LLP, New York (Seth A. Miller of counsel), for John R. Denza, Susan Greenberg, Brett Macune, Andrew Parsons, Robert P. Rice, Christophe Rihet, and Nadav Zeimer, respondents, and for Independence Plaza North Tenants' Association, Pamela Beaulieu, Anna Braudes, James Berend, Eric Berend, Carolyn Dicarlo Anastasia Dilieto, Theresa, Lopez, Adam Macagna, Kathleen McGovern, Koluska Poventud, Catherine Procopio, Edmund Rosner, Elizabeth Saenger, Sally Etta Sheinfeld, Philip Stein, Gertrude Stein, Linda Stein, Adrian Vanderplas, Steve Vorillas and Mildred Zeldis, respondents/appellants and Felix Ortiz, respondent.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for amici curiae.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered December 17, 2010, affirmed, without costs. Order and judgment (one paper), same court and Justice, entered September 2, 2010, reversed, on the law, without costs, plaintiffs' motions denied, defendants' motion granted, and the complaint in *Denza* dismissed. The Clerk is directed to enter judgment accordingly.

Opinion by Saxe, J. All concur except DeGrasse, J. who dissents in part in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
David B. Saxe
Leland G. DeGrasse
Nelson S. Román, JJ.

6528-
6529-
6530
Index 117673/05
113831/04

_____x

John R. Denza, et al.,
Plaintiffs-Respondents,

-against-

Independence Plaza Associates, LLC, et al.,
Defendants-Appellants.

- - - - -

Independence Plaza North Tenants' Association, et al.,
Plaintiffs-Respondents,

-against-

Independence Plaza Associates, L.P., etc., et al.,
Defendants-Appellants.

- - - - -

Independence Plaza North Tenants' Association, et al.,
Plaintiffs-Appellants,

Felix Ortiz,
Plaintiff,

-against-

Independence Plaza Associates., L.P., etc., et al.,
Defendants-Respondents.

- - - - -

The Rent Stabilization Association of New York City, Inc. and Community Housing Improvement Program, Inc.,
Amici Curiae.

_____x

Plaintiffs Independence Plaza North Tenants' Association, Pamela Beaulieu, Anna Braudes, James Berend, Eric Berend, Carolyn DiCarlo Anastasia Dilieto, Theresa, Lopez, Adam Macagna, Kathleen McGovern, Koluska Poventud, Catherine Procopio, Edmund Rosner, Elizabeth Saenger, Sally Etta Sheinfeld, Philip Stein, Gertrude Stein, Linda Stein, Adrian Vanderplas, Steve Vorillas and Mildred Zeldis appeal from the order of the Supreme Court, New York County (Marcy S. Friedman, J.), entered December 17, 2010, which, to the extent appealed from as limited by the briefs, denied defendants' motion to remand the first through sixth causes of action to nonparty New York State Division of Housing and Community Renewal. Defendants appeal from the order and judgment (one paper) of the Supreme Court, New York County (Marcy S. Friedman, J.), entered September 2, 2010, which, insofar as appealed from, granted plaintiffs' motions for summary judgment in both of these actions consolidated for appeal and denied defendants' motion for summary judgment dismissing the first action (*Denza*).

Meister Seelig & Fein LLP, New York (Stephen B. Meister, Stacy M. Ashby and Remy J. Stocks of counsel), for Independence Plaza Associates, LLC, WB/Stellar IP Owner, L.L.C., and Independence Plaza Associates, L.P., appellants/respondents.

Collins, Dobkin & Miller, LLP, New York (Seth A. Miller of counsel), for John R. Denza, Susan Greenberg, Brett Macune, Andrew Parsons, Robert P. Rice, Christophe Rihet, and Nadav Zeimer, respondents, and for Independence Plaza North Tenants' Association, Pamela Beaulieu, Anna Braudes, James Berend, Eric Berend, Carolyn Dicarlo Anastasia Dilieto, Theresa, Lopez, Adam Macagna, Kathleen McGovern, Koluska Poventud, Catherine Procopio, Edmund Rosner, Elizabeth Saenger, Sally Etta Sheinfeld, Philip Stein, Gertrude Stein, Linda Stein, Adrian Vanderplas, Steve Vorillas and Mildred Zeldis, respondents/appellants and Felix Ortiz, respondent.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz, Sherwin Belkin and Martin J. Heistein of counsel), for amici curiae.

SAXE, J.

These appeals present the question of whether the continued receipt of J-51 tax benefits by the owner of a housing complex, following the owner's withdrawal of the complex from the Mitchell-Lama program, triggers the applicability of the Rent Stabilization Law even if those benefits were determined to have been unauthorized from the moment of the withdrawal, and were retroactively repaid.

Independence Plaza North (IPN) is a residential housing development constructed in 1974 under the Mitchell-Lama program (Private Housing Finance Law art II), which grants incentives such as low-interest mortgage loans and real estate tax exemptions to landlords who develop low- and middle-income housing, when the landlords agree to regulation of rents and profits. As a development subject to the Private Housing Finance Law, IPN was also entitled to receive tax abatements from the City of New York, commonly called J-51 benefits, for major renovations (*see* Administrative Code of City of NY § 11-243[d][2][ii], [i][1]; 28 RCNY 5-03[f][1][iii]). In 1998, IPN received a J-51 tax abatement amounting to $7,550 per year for 12 years, for making $90,600 worth of major capital improvements.

Owners of projects constructed after May 1, 1959 are entitled to withdraw from the Mitchell-Lama program after 20

years by paying the remaining balance of a property's mortgage (*see* Public Housing Finance Law § 35[2]). On or about June 26, 2003, the New York City Department of Housing Preservation and Development (HPD) and IPN's tenants were notified of the owner's intent to exit the Mitchell-Lama program. On March 12, 2004, before its formal withdrawal from Mitchell-Lama, the owner, Independence Plaza Associates, L.P., entered into an agreement with the tenants' association, plaintiff Independence Plaza North Tenants' Association, Inc. Under that agreement, the tenants' association agreed to try to cause every tenant to apply for a so-called "enhanced voucher" under Section 8 of the United States Housing Act of 1937 (42 USC § 1437f[a]), which would provide eligible low-income families with extra housing assistance to subsidize any market-based rent increase following the development's withdrawal from Mitchell-Lama. The owner agreed that those tenants who were granted such assistance would be awarded leases at the rental value determined by HPD, so that the amount they themselves were required to pay would remain the same; those tenants who were denied such assistance would "receive the benefits of the Landlord Assistance Program," meaning that their rents would increase in accordance with New York City Rent Guideline Board (RGB) increases for the first nine years after IPN withdrew from Mitchell-Lama, for the 10th-12th

years, their rents would increase by the RGB increases plus 3.33%, and for every year thereafter, their rents would increase by the RGB increase plus 1%. In addition, those tenants' families would be granted succession rights.

In a letter dated and delivered on June 28, 2004, IPN formally notified the New York City Department of Finance (DOF) of its withdrawal as of that date from Mitchell-Lama and that consequently "the Property shall forthwith be restored to a full taxpaying position" effective as of that date. However, no action was taken by DOF to terminate IPN's J-51 benefits, and these benefits continued until March 23, 2006, when, following consideration prompted by IPN's inquiries, HPD informed DOF that IPN's J-51 benefits should have been terminated as of June 28, 2004. On April 3, 2006, IPN repaid all J-51 benefits it received after June 28, 2004, plus interest.

On September 28, 2004, after IPN formally withdrew from Mitchell-Lama, the tenants' association and 20 tenants who had been denied enhanced Section 8 vouchers brought the action captioned *Independence Plaza N. Tenants' Assn. v Independence Plaza Assoc., L.P.*, initially seeking leases in accordance with the March 12, 2004 agreement. In the fall of 2007 they amended their complaint to add a cause of action seeking a declaration that their apartments were rent-stabilized.

In December 2005, the *Denza v Independence Plaza Assoc., LLC* action was commenced by tenants who entered into market-rate leases at IPN after it withdrew from Mitchell-Lama. These tenants claimed that IPN's post-exit receipt of J-51 benefits rendered their apartments rent-stabilized, and sought single damages, treble damages, attorneys' fees, lease reformation, and a declaratory judgment.

In April 2009, the court in both actions remanded to the New York State Division of Housing and Community Renewal (DHCR) the issue of IPN's status under the Rent Stabilization Law. The opinion issued by DHCR concluded that IPN was not subject to the Rent Stabilization Law, reasoning:

> "In view of the fact that HPD terminated the J-51 tax abatement effective as of the dissolution date ..., the complex was not effectively receiving benefits subsequent to leaving Mitchell Lama regulation and, therefore, [Rent Stabilization Law] 26-504c [*sic*] would not be applicable ... Since IPN did not become subject to rent stabilization in the first place, 28 RCNY (5-03(f)(3) [*sic*], the provision of HPD's J-51 regulation that mandates continued rent regulation when J-51 benefits are revoked or waived would accordingly not be applicable to this matter, since according to HPD the benefits never attached after dissolution."

The parties then moved for summary judgment on their respective claims regarding whether the IPN apartments became rent-stabilized on June 28, 2004, based on the owner's continued receipt of J-51 benefits.

In the order now on appeal, the motion court, disagreeing with DHCR's reasoning, granted plaintiffs' motions for summary judgment to the extent of holding that as a result of IPN's continued receipt of J-51 benefits, the IPN tenants' apartments became subject to the Rent Stabilization Law upon IPN's withdrawal from the Mitchell-Lama program. It decreed "that each plaintiff's apartment is subject to the Rent Stabilization Law and shall remain subject until the vacancy of that apartment by the tenant of that apartment."

The motion court reached its determination by applying two provisions of the Rules of the City of New York tit 28, ch 5, which is headed "J51 Tax Exemption and Tax Abatement," and two provisions of Rent Stabilization Law (Administrative Code) § 26-504. It first looked to 28 RCNY 5-03(f)(1), which provides that "to be eligible to receive [J-51] benefits . . ., and for at least so long as a building is receiving the benefits of the Act, . . . all dwelling units in [such] buildings . . . shall be subject to rent regulation." It then considered 28 RCNY 5-07(f)(3), which at the relevant time[1] provided that if a building ceased to be subject to rent regulation, the Commissioner "shall

[1] That provision was since eliminated by amendments announced in the City Record on March 16, 2010, effective April 15, 2010.

withdraw" J-51 benefits. The court emphasized that § 5-07(f)(3) does *not* require termination of J-51 benefits by operation of law whenever a building exited the Mitchell-Lama program; it only required termination of J-51 benefits when the building was, at that point, no longer subject to *any type of* rent regulation.

The court then reasoned that these regulations must be read in light of two provisions of Rent Stabilization Law (Administrative Code) § 26-504: first, subsection (a)(1)(b), which exempts from rent stabilization coverage dwelling units in a building subject to regulation under the Private Housing Finance Law, such as a Mitchell-Lama building; second, and most importantly, subsection (c), which provides that the Rent Stabilization Law shall apply to dwelling units in a building receiving J-51 benefits, as long as that building is not owned as a cooperative or a condominium and is not subject to rent control. It concluded that, "[r]ead together, these sections extend rent stabilization coverage to units in buildings based on receipt of J-51 benefits if, but only if, the building is no longer rent regulated under the PHFL."

In further support of its conclusion, the motion court pointed out that even HPD did not interpret its own rules regarding J-51 tax abatements (28 RCNY ch 5) as requiring the automatic termination of J-51 benefits under such circumstances;

rather, HPD considered itself to have the discretionary authority to order such a termination of benefits after review of the facts and the equitable and policy considerations. The court also noted that HPD's Commissioner had testified before Congress that nearly three-quarters of the units at Starrett City receive a J-51 tax exemption "which makes them subject to rent stabilization at [Mitchell-Lama] buy-out." Additionally, the court observed, although DHCR had ruled that IPN's units were not rent-stabilized after IPN's withdrawal from Mitchell-Lama, the agency *agreed* with the proposition that "if the complex received J-51 benefits for the period after it existed the Mitchell Lama program, ... the development *is* subject to rent stabilization" (emphasis added). The court observed that DHCR merely believed it was constrained by HPD's retroactive determination that as soon as IPN withdrew from Mitchell-Lama, it was no longer entitled to receive J-51 benefits, and the resulting legal fiction that by virtue of IPN's subsequent repayment of those benefits, IPN should be treated as if it had not received such benefits in the first place.

Finally, the motion court suggested that since HPD's retroactive termination of IPN's J-51 benefits was "at defendants' instance," IPN had in effect voluntarily waived those benefits. It then looked to 28 RCNY 5-03(f)(3)(ii), which provides that "rent regulation shall not be terminated by the

waiver or revocation of tax benefits," to hold that HPD's termination of IPN's J-51 benefits could not terminate the rent stabilization coverage of the units.

For the reasons that follow, we reverse.

Initially, we reject defendants' contention that this claim is time-barred. We also reject defendants' contention that the motion court was required to defer to DHCR's determination that IPN was not rent-stabilized; we particularly observe that DHCR was not interpreting its own regulations (*see generally Matter of Kilgus v Board of Estimate of City of N.Y.*, 308 NY 620, 625-628 [1955]; *Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270, 285 [2009]). Nor do we accept the suggestion that we are otherwise barred from considering the issue on the merits.

In addressing the merits, we must acknowledge at the outset that the same issue was recently presented to the United States District Court for the Southern District of New York, in the context of a qui tam complaint brought by an IPN tenant on behalf of the United States against IPN and the owners of another similarly situated housing development. The federal government sought reimbursement for the enhanced Section 8 subsidies it paid to IPN and the other development, representing increases in the rent of low-income tenants to fair market rates after these developments were withdrawn from Mitchell-Lama (*United States v*

WB/Stellar IP Owner LLC, 800 F Supp 2d 496 [SD NY 2011]). As here, the parties in that matter moved for summary judgment, one side arguing that the receipt of J-51 tax benefits after the buildings were withdrawn from Mitchell-Lama subjected the buildings to rent regulation under the Rent Stabilization Law, the other contending that the owner's J-51 tax benefits necessarily terminated as a matter of law upon its withdrawal from Mitchell-Lama, so that at that point no rent regulation applied.

We concur with Judge Scheindlin's reasoning in the federal matter, granting summary judgment to the owners. We hold that IPN's continued receipt of J-51 benefits after it exited the Mitchell-Lama program was merely the erroneous result of DOF's failure to adjust IPN's tax liability following its receipt of notice that the property would be restored to full taxpaying status as of June 28, 2004. That error did not create rent stabilized status for a development that was not otherwise subject to the Rent Stabilization Law.

It is true that the receipt of J-51 benefits may trigger the applicability of Rent Stabilization Law (Administrative Code) § 26-504(c), which provides that the Rent Stabilization Law shall apply to dwelling units in a building receiving J-51 benefits, as long as that building is not owned as a cooperative or a

condominium and is not subject to rent control. Had IPN intentionally sought and obtained J-51 benefits when no other rent regulation applied to its units, its receipt of those benefits would have triggered rent stabilization. But IPN sought and obtained J-51 benefits while it was subject to the Private Housing Finance Law, so the Rent Stabilization Law did not become applicable to it by virtue of those payments.

The question is whether continued receipt of those benefits after IPN's exit from the Mitchell-Lama program, which occurred because DOF took no action to restore IPN to full taxpaying status as of June 28, 2004, caused rent stabilization protection to spring into existence the moment the protection of the Private Housing Finance Law ceased.

At the time of IPN's withdrawal from the Mitchell-Lama program on June 28, 2004, the HPD rule then in effect, 28 RCNY 5-07(f)(3),[2] provided that if a building ceased to be subject to

[2] Although that provision was eliminated by an amendment effective April 15, 2010, at the time of these events it was still in effect. Moreover, despite the comment in HPD's Statement of Basis and Purpose, that "[t]hese rule amendments are not intended to make any substantive changes in the eligibility requirements for these tax benefit programs nor in the continuing obligations such programs impose on taxpayers upon the revocation or termination of their tax benefits," we consider the deletion of 28 RCNY 5-07(f) a substantive change, and therefore will not permit plaintiffs to rely on this amendment, which became effective almost six years after the events in question (*see Matter of Peckham v Calogero*, 12 NY3d 424, 432 [2009]).

rent regulation, the Commissioner "shall withdraw" J-51 benefits. That exact situation was presented here: IPN ceased to be subject to the only rent regulations covering it, namely, the Private Housing Finance Law, and at that moment the City was required to stop allowing it J-51 benefits.

Plaintiffs nevertheless contend that, notwithstanding the mandatory language of the then-applicable rule, withdrawal of J-51 benefits was not actually mandatory, but was discretionary, as HPD indicated in its opinion on this matter.

We find nothing in the mandatory language of the rule as it then stood that may be read to give the agency discretion as to whether an owner's J-51 benefits could survive the building's withdrawal from Mitchell-Lama, where no other rent regulation was ever applicable. In contrast, the preceding section, 28 RCNY § 5-07(e), denominated "Revocation or reduction of tax exemption and tax abatement for failure to substantiate claimed costs," expressly gives HPD discretion in other types of circumstances.

IPN became ineligible to continue receiving J-51 benefits, as a matter of law, at the moment it exited Mitchell-Lama (*see* Administrative Code § 11-243[i][1]; 28 RCNY 5-03[f][1]; former 28 RCNY 5-07[f][3]; *Stellar*, 800 F Supp 2d at 511). Nor does 28 RCNY 5-03(f)(3)(ii) operate here to provide the tenants with rent-stabilized status, because that rule prohibits the

termination of rent regulation by revocation or waiver of J-51 benefits, and here it was defendants' withdrawal from the Mitchell-Lama program that terminated rent regulation, not the revocation or waiver of their J-51 benefits (*see id.* at 511 n 122). An entity cannot waive that which it is not entitled to receive.

The erroneous continuation of the tax benefits after Mitchell-Lama coverage ended, which were refunded in full, with interest, did not cause the buildings to take on a new form of rent regulation. We must therefore reverse the grant of judgment to plaintiffs and the legal conclusion that, as a result of its continued receipt of J-51 benefits, IPN became subject to the Rent Stabilization Law upon its withdrawal from Mitchell-Lama.

Lastly, the court's order in *Independence Plaza N. Tenants' Assoc.* denying defendants' motion to remand to DHCR the first through sixth causes of action, which seek enforcement of rights under the parties' March 12, 2004 agreement, was correct. As the court recognized, nothing raised therein is subject to DHCR review, because those causes of action seek relief under the parties' agreement rather than under the Rent Stabilization Law. In fact, in view of the remainder of our determination, those issues may now require litigation.

Accordingly, the order and judgment (one paper) of the

Supreme Court, New York County (Marcy S. Friedman, J.), entered September 2, 2010, which, insofar as appealed from, granted plaintiffs' motions for summary judgment in both of these actions consolidated for appeal and denied defendants' motion for summary judgment dismissing the first action (*Denza*), should be reversed, on the law, without costs, plaintiffs' motions denied, defendants' motion granted, and the complaint in *Denza* dismissed. The Clerk is directed to enter judgment accordingly. The order of the same court and Justice, entered December 17, 2010, which, to the extent appealed from as limited by the briefs, denied defendants' motion to remand the first through sixth causes of action to nonparty New York State Division of Housing and Community Renewal (DHCR), should be affirmed, without costs.

All concur except DeGrasse, J. who dissents in part in an Opinion:

DeGRASSE, J. (dissenting in part)

I respectfully dissent because plaintiffs' appeal in the action entitled *Independence Plaza N. Tenants' Assoc. v Independence Plaza Assoc., L.P.* should be dismissed. The appeal is from the order that denied defendants' motion for an order remanding the first through sixth causes of action to the New York State Division of Housing and Community Renewal. Plaintiffs submitted answering papers requesting that the motion be denied in its entirety. The appeal should be dismissed because plaintiffs are not aggrieved by the denial of the remand they opposed.

CPLR 5511 provides that "[a]n aggrieved party . . . may appeal from any appealable judgment or order except one entered upon the default of the aggrieved party." "Generally, the party who has successfully obtained a judgment or order in his favor is not aggrieved by it, and, consequently, has no need and, in fact, no right to appeal" (*Parochial Bus Sys. v Board of Educ. of the City of N.Y.*, 60 NY2d 539, 544 [1983]). Although the remand that defendants requested was denied, plaintiffs have taken this appeal because in dictating its decision on the record the court commented that "there is nothing to remand." In light of the fact that plaintiffs' claims are still pending, there is no merit to their argument that the court thereby "effectively dismissed"

their causes of action. There are no grounds for appeal where the successful party has obtained the full relief sought, "even where that party disagrees with the particular findings, rationale or the opinion supporting the judgment or order below in his favor" (*id.* at 545). This aspect of the appeal is based entirely on such a disagreement. Accordingly, I would dismiss plaintiffs' appeal from the December 17, 2010 order. I agree with the majority's conclusions in all other respects.

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

ENTERED: APRIL 3, 2012

CLERK