SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 5, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Moskowitz, Acosta, Richter, JJ.

6289 In re Peter Principe, Index 116031/09
Petitioner-Respondent,

-against-

New York City Department
of Education,
Respondent-Appellant.

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein of counsel), for appellant.

Lichten & Bright, P.C., New York (Stuart Lichten of counsel), for respondent.

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered May 19, 2010, which, to the extent appealed from as limited by the briefs, denied respondent New York City Department of Education's (the DOE) cross motion to deny the petition and dismiss the proceeding brought pursuant to, among other things, CPLR article 75, and granted the petition to the extent of vacating as excessive the penalty of termination of petitioner's employment as a New York City schoolteacher, and remanded the

matter to the Hearing Officer for a lesser penalty, affirmed, without costs.

Petitioner Peter Principe was the dean of discipline of a middle school located in East New York, where many of the students belong to criminal gangs. This proceeding arose from two incidents that occurred between petitioner and several students in 2007.

The first incident occurred on April 20, 2007. The Hearing Officer found that petitioner placed MT, an 11-year-old student, in a headlock and swung him around. At the hearing, petitioner denied placing MT in a headlock or swinging him around. Rather, petitioner testified that, after he received several reports of MT's misconduct from that morning and after breaking up two lunchroom fights involving MT, he took MT out of the lunchroom. Petitioner further testified that, as he was holding the lunchroom door open to allow other students to exit, he had his arm across the door to prevent MT from coming back into the lunchroom, but MT was pushing with his chest against petitioner's arm to get back into the lunchroom.

The second incident occurred on April 23, 2007. The Hearing Officer found that petitioner grabbed RP, a 13-year-old student, by the neck, threw him against a wall and requested RP and

another student to retract their statements concerning the incident. At the hearing, petitioner testified that when he saw RP and another student in the hallway outside their homeroom teacher's classroom, he questioned them about their whereabouts that morning because he had learned from their homeroom teacher that they had run out of their homeroom class that morning, and petitioner had been unable to locate them in their morning classes. Petitioner further testified that, as he was questioning RP and the other student, they entered the homeroom teacher's classroom, and RP began shouting threats at his homeroom teacher. Petitioner testified that, as he and the two students were leaving the classroom, RP turned to reenter the classroom and shouted more threats at his homeroom teacher, so petitioner grabbed RP to escort him from the room. As they turned to leave the classroom the two lost their balance and fell into the wall. Petitioner denied asking the students to retract their statements.

As to both incidents, the Hearing Officer found that petitioner’s testimony was not credible and that he committed misconduct by using corporal punishment. We agree with the motion court that the Hearing Officer had an apparent bias against petitioner when he discredited petitioner's entire

testimony based, in part, upon respondent's mischaracterization of a portion of petitioner's testimony in addition to petitioner's testimony that he had once filed for bankruptcy. We also agree with the motion court that, by discrediting petitioner's entire testimony, the Hearing Officer failed to consider all the circumstances, including the disciplinary histories of the students involved, the context of the threatening environment in which the two incidents took place and that, at the time of the two incidents, petitioner was, as he testified, "only fulfilling [the] demands" of his position as dean of discipline. Moreover, the Hearing Officer appeared to give an inordinate amount of credit to a portion of a video recording, related to the second incident, that had been altered from its original format so that it appeared frame by frame at one second intervals rather than its original format of a continuous video recorded in real time. The alteration to the videotape made what actually transpired during that incident unclear and equivocal. Although the motion court sustained the Hearing Officer's findings, petitioner did not cross appeal. That is understandable because petitioner otherwise received a favorable decision from the motion court.

The Hearing Officer also determined that termination was the

appropriate penalty in this case. However, while we accept the Hearing Officer's findings against petitioner, we agree with the motion court that the evidence in this case demonstrates that petitioner's actions were not premeditated. Thus, given all of the circumstances, including petitioner's spotless record as a teacher for five years and his promotion to dean two years prior to the incidents at issue, we find the penalty excessive and shocking to our sense of fairness (*Matter of Pell v Board of Educ. Of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]; *cf. City School Dist. of the City of N.Y. v McGraham*, 75 AD3d 445 [2010], *affd* 17 NY3d 917 [2011] [penalty of 90-day suspension without pay and reassignment rather than termination reinstated in light of overall circumstances lending to the improbability of teacher engaging in similar inappropriate behavior in the future]).

Accordingly, we find that, in determining the penalty of termination, the Hearing Officer failed to consider all of the circumstances and relevant evidence, leading the Hearing Officer to view the incidents in isolation and divorcing them from the context in which they took place. Thus, we find the Hearing Officer's view of petitioner's credibility carried over, likely influencing his determination that petitioner should be

terminated. Lesser sanctions are available that would deter petitioner from engaging in this conduct in the future (*see Matter of Riley v City of New York*, 2010 NY Slip Op 32540[U][Sup Ct, New York County 2010], *affd* 84 AD3d 442 [2011]).

In this case, in view of the Hearing Officer's apparent unfair bias against petitioner, we believe that public policy considerations favor retention of a teacher who has a proven record of genuinely connecting with his students and making a positive impact in their lives (*McGraham*, 17 NY3d at 919 ["Courts will only intervene in the arbitration process in those 'cases in which public policy considerations, embodied in statute or decisional law, prohibit, in an absolute sense, particular matters being decided or certain relief being granted by an arbitrator'"], quoting *Matter of Sprinzen [Nomberg]*, 46 NY2d 623, 631 [1979]). There is no evidence in the record to suggest that petitioner was not well liked by the student body, and as the motion court emphasized, RP, one of the students involved in the second incident "made clear that he really liked [Principe] and that he felt that [Principe] understood him and was really kind of rooting for him and helping him with his difficulties."

The dissent, in reasoning that the penalty in this case was proportionate so that it did not shock one's sense of fairness,

cites cases in which the teachers involved engaged in conduct wholly unrelated to their employment with the DOE (*Cipollaro v New York City Dept. of Educ.*, 83 AD3d 543 [2011]; *Matter of Rogers v Sherburne-Earlville Cent. School Dist.*, 17 AD3d 823 [2005]). Indeed, in both *Cipollaro* and *Rogers*, neither of the teachers involved held a position similar to that of petitioner, the dean of discipline, and in both cases the hearing officer's determination to terminate the teachers' employment was based on fraudulent conduct wholly unrelated to their employment with the DOE. In the case before us, as the court below explained, petitioner "was put in the position of Dean of the school because obviously there was confidence in his judgment and his ability to deal with difficult situations and difficult children, which was the situation in both of these incidents" and "he was doing what he was supposed to be doing, which was to maintain order."

Moreover, the dissent cites *Cipollaro* for the proposition that, when determining the appropriate penalty, a hearing officer may consider a teacher's lack of remorse. Undoubtedly, it is entirely reasonable for a hearing officer to implement the harsher penalty of termination following a finding of a teacher's lack of remorse for engaging in fraudulent conduct. However, while lack of remorse is one factor that a hearing officer may

consider when determining the appropriate penalty, here as the motion court articulated, the Hearing Officer placed petitioner in a "very difficult situation," when he expected petitioner to show remorse, while petitioner, in exercising his responsibilities as dean of discipline, believed he was protecting members of his school's student body and faculty from two threatening situations.

Rather than considering the proportionality of petitioner's penalty, in light of "all the circumstances," as *Pell* requires, the dissent focuses on the incidents in the worst possible light by examining them in isolation from the context in which they occurred. Regarding the first incident, the dissent ignores the absence of evidence corroborating MT's testimony that petitioner placed him in a headlock. It also ignores that, in his role as dean of discipline, petitioner believed that his actions protected students by preventing the escalation of fights between MT and two other students. Indeed, petitioner was aware of MT's significant history of misbehaving and regularly fighting with other students. Regarding the second incident, the dissent ignores that petitioner, again in his role as dean of discipline, was attempting to deal with recalcitrant students, both of whom had a history of violence, while he tried to protect a teacher

whom he believed the students were threatening. Moreover, the dissent urges that the disciplinary histories of the students involved here are irrelevant. To the contrary, the disciplinary histories of MT and RP are relevant, because they are one factor among "all the circumstances" that *Pell* calls on us to consider when we are evaluating the proportionality of a penalty.

The dissent further attempts to justify the penalty of termination in this case by citing to a Court of Appeals case where the Court upheld termination for a single instance of corporal punishment and two cases where courts have upheld the same penalty for acts of corporal punishment (*Matter of Ebner v Board of Educ. of E. Williston Union Free School Dist. No. 2, N. Hempstead*, 42 NY2d 938 [1977] [teacher terminated for dragging a student by the hair from one class to another]; *Matter of Saunders v Rockland Bd. of Coop. Educ. Servs.*, 62 AD3d 1012 [2009] [teacher terminated for allowing a student to be strapped to a chair without cause and for striking a student in the chest and jaw]; *Matter of Giles v Schuyler-Chemung-Tioga Bd. of Coop. Educ. Servs.*, 199 AD2d 613 [1993] [teacher terminated for striking a student on the hands with a book and for throwing a car jack through a window]). However, nothing in those cases indicates that the teachers involved engaged in their sanctioned

conduct in furtherance of their employment with the DOE. Those cases differ from the case before us in that petitioner here, while charged with the role of dean of discipline, engaged in conduct that he believed was appropriate to protect members of his school's student and faculty bodies.

Accordingly, we agree with the determination of the motion court that the penalty imposed here was excessive and "disproportionate to the offenses, in the light of all the circumstances" (*Pell*, 34 NY2d at 233) and that the matter be remanded to the Hearing Officer for a lesser penalty consistent with this court's decision.

All concur except Friedman and Richter, JJ. who dissent in a memorandum by Richter, J. as follows:

RICHTER, J. (dissenting)

I respectfully dissent because I do not believe that the penalty imposed here was so disproportionate to the two offenses as to be shocking to one's sense of fairness. Nor do I believe that the penalty violates public policy.

Petitioner, a dean of discipline formerly employed by respondent New York City Department of Education, commenced this proceeding pursuant to Education Law § 3020-a(5) and CPLR 7511 seeking to vacate the opinion and award of an impartial hearing officer which found petitioner guilty of two separate incidents of corporal punishment, and ordered his termination. Supreme Court upheld the findings of guilt but concluded that the penalty of termination was excessive. Respondent now appeals, arguing that the court erred in vacating the penalty. Petitioner has not cross appealed to challenge the findings of guilt.

In the first incident, MT, an 11-year-old student, was exiting the school cafeteria after walking away from a verbal dispute he was having with a fellow student. As MT walked through the cafeteria doors, petitioner placed him in a headlock, swung him around, and told him to stop arguing. After petitioner let the child go, MT started crying because his "head hurt." MT walked up the stairs from the cafeteria and came upon a school

safety officer. The safety officer noticed that MT was crying and asked him what was wrong. MT told the officer that petitioner had "choked him."

In the second incident, petitioner saw RP, a 13-year-old student, and another student in the school hallway. Petitioner and the two boys entered a teacher's adjacent classroom, and petitioner asked the teacher if the students were cutting class. When the teacher responded that they were, RP walked out of the classroom, stating that he was tired of being blamed for things he did not do. Petitioner followed RP out of the room, grabbed him by the shirt and slammed him into the wall. The back of RP's head hit the wall, and RP felt pain and dizziness. Petitioner continued to hold onto RP's shirt collar while walking him down the hallway and into petitioner's office. RP subsequently went to the nurse's office and got an ice pack for the "red lump" on the back of his head, which was several inches in diameter.

Sergeant Johnie Washington, a supervising school safety officer, observed the hallway incident involving RP in real time on a live video feed. He "couldn't believe" what he saw and immediately reported the matter to the school's principal. As the principal explained at the hearing, he viewed the video and saw no actions that would have justified petitioner's behavior.

The video corroborated RP's account of the incident. RP prepared a written statement, reiterating his complaint that petitioner had pushed him into the wall. Later that day, petitioner summoned RP to his office. At that meeting, petitioner asked RP to retract the statement he had made about the incident.

Petitioner testified in his own defense at the hearing. With respect to the first incident, petitioner denied putting MT in a headlock and swinging him around. As for the second incident, petitioner admitted grabbing RP's shoulder, but denied throwing him into the wall. Instead, petitioner explained that RP lost his balance, and the "momentum" caused him to "fall" into the wall.

The Hearing Officer determined that petitioner was not a credible witness because his testimony was internally inconsistent and was contradicted by the credible testimony of seven other witnesses as well as a video of one of the incidents. The Hearing Officer found that petitioner repeatedly fabricated testimony in an effort to deny or justify his physically abusive behavior. He further found that petitioner's unreasonable use of physical force against the two students, who were less than half his size, warranted the penalty of termination. Petitioner showed no remorse for his misconduct and, indeed, argued that his

actions toward RP were proper and professional. For these reasons, the Hearing Officer concluded that petitioner would continue to engage in similar misconduct if returned to the classroom. As a result, the Hearing Officer found that petitioner was unfit to perform his duties and ordered his dismissal.

Where, as here, the parties are subject to compulsory arbitration, a determination made after a hearing held pursuant to Education Law § 3020-a must be in accord with due process, have adequate evidentiary support, and cannot be arbitrary, capricious or irrational (*City School Dist. of the City of N.Y. v McGraham*, 17 NY3d 917, 919 [2011]; *Lackow v Department of Educ. (or "Board") of City of N.Y.*, 51 AD3d 563, 567 [2008]). Moreover, a penalty will not be disturbed unless it "is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]). In determining the appropriate penalty, a hearing officer may consider the teacher's lack of remorse and failure to take responsibility for his or her actions (*Cipollaro v New York City Dept. of Educ.*, 83 AD3d 543, 544 [2011]; *Matter*

of Rogers v Sherburne-Earlville Cent. School Dist., 17 AD3d 823, 825 [2005]). Moreover, although the teacher's prior disciplinary history may also be considered, even a long and previously unblemished record does not foreclose termination as an appropriate sanction (*Cipollaro*, 83 AD3d at 544; *Matter of Rogers*, 17 AD3d at 824-825).

In an effort to minimize petitioner's guilt, the majority recites petitioner's version of the facts, which was rejected by the Hearing Officer. Not even petitioner chose to appeal these findings, which must be accepted as true for the purpose of determining the appropriate sanction. The arbitrator's decision to terminate petitioner was not arbitrary, capricious or irrational, nor does the penalty imposed shock one's sense of fairness. The Hearing Officer came to a reasoned conclusion that petitioner would continue to engage in similar behavior and that termination was the appropriate penalty. Petitioner, who served as the dean of discipline at the school, lost his temper on two separate occasions and unleashed his anger in violent acts involving two different students.

Moreover, as the Hearing Officer noted, petitioner showed no remorse whatsoever for his actions, and instead either denied or attempted to explain away his behavior. Making matters worse, in

an attempt to interfere with an ongoing investigation, petitioner inappropriately asked one of the students to retract his complaint. Although acting as the dean of discipline at a city school may present its challenges, in light of the egregiousness of petitioner's repeated misconduct, the penalty of termination should not have been disturbed (*see Cipollaro*, 83 AD3d at 544).

The Court of Appeals has upheld the sanction of dismissal where a teacher's misconduct consisted of a single instance of corporal punishment. In *Matter of Ebner v Board of Educ. of E. Williston Union Free School Dist. No. 2, N. Hempstead* (42 NY2d 938 [1977]), the school board terminated a teacher who lost her self-control and dragged a student by the hair from one classroom to another, and the Court of Appeals found that "the punishment was not so disproportionate as to warrant judicial correction" (42 NY2d at 939). Other courts have similarly upheld termination of teachers for acts of corporal punishment (*see e.g. Matter of Saunders v Rockland Bd. of Coop. Educ. Servs.*, 62 AD3d 1012 [2009]; *Giles v Schuyler-Chemung-Tioga Bd. of Coop. Educ. Servs.*, 199 AD2d 613 [1993]).

Citing the Court of Appeals' decision in *McGraham* (17 NY3d 917 [2011]), the majority argues that public policy considerations warrant a penalty less severe than termination.

McGraham, however, actually supports upholding the Hearing Officer's decision here. In *McGraham*, the Court took a narrow view of the public policy exception and cautioned that "[c]ourts will only intervene in the arbitration process in those cases in which public policy considerations, embodied in statute or decisional law, prohibit, in an absolute sense, particular matters being decided or certain relief being granted by an arbitrator" (*McGraham*, 17 NY3d at 919 [internal quotation marks omitted]). Thus, as the Court emphasized, "That reasonable minds might disagree over what the proper penalty should have been does not provide a basis for vacating the arbitral award or refashioning the penalty" (*id*. at 920).

Here, the majority suggests that the fact that petitioner has made a positive impact on students' lives is a valid public policy consideration that warrants reversing the penalty of termination. Although the teacher's positive record is one factor that the Hearing Officer could consider, it is not a public policy consideration that "prohibit[s], in an absolute sense" (*id*. at 919) the Hearing Officer's decision to terminate petitioner for his acts of violence against the two students.

This Court's decision in *Matter of Riley v City of New York* (84 AD3d 442 [2011]), relied upon by the majority, is

distinguishable. In *Riley*, we concluded that a penalty of termination was disproportionate for a teacher who, in an isolated incident, slapped a student across the face (*see Matter of Riley v City of New York*, 2010 NY Slip Op 32540[U] [2010], *affd* 84 AD3d 442 [2011]). Here in contrast, petitioner was found guilty of two separate acts of corporal punishment committed against two different students. Furthermore, in *Riley*, we focused on the fact that the student involved sustained no physical or emotional injury as a result of the incident. Both of the students here testified about the physical effects of petitioner's misconduct. RP described feeling pain and dizziness after petitioner slammed him into the wall. As a result, RP had a several-inch-wide "red lump" on his head requiring treatment by the school nurse. And, as MT described, his "head hurt," causing him to cry, after petitioner grabbed him in a headlock. Finally, unlike the teacher in *Riley*, petitioner attempted to influence the investigation by asking RP to withdraw his complaint.

The majority unfairly and incorrectly argues that the Hearing Officer failed to consider the context in which the two incidents took place and the disciplinary history of the students involved. The Hearing Officer's opinion explicitly states that in reaching his conclusions, he "fully considered" "[t]he

testimony of all witnesses," "the evidence adduced" at the hearing, and the "positions and arguments advanced by [petitioner] during the hearing and in . . . closing arguments." In any event, the disciplinary history of the students is irrelevant here, especially since there was no finding by the Hearing Officer that petitioner was acting in self-defense or was otherwise justified in using physical force. It is inappropriate to suggest that petitioner should have been given more latitude in his use of force, or that he should be penalized less severely, merely because the students involved had past disciplinary problems. It certainly does not shock one's sense of fairness that the Hearing Officer concluded that petitioner's use of corporal punishment was wrong and should be severely punished, regardless of the background of the victims.

The majority argues that a lesser penalty is appropriate because petitioner believed that he was protecting other students and faculty members from threatening situations. This, however, was not petitioner's defense at the hearing. As to the first incident with MT, petitioner flat out denied that it ever happened. And in the second incident, petitioner offered the absurd explanation that RP lost his balance and the "momentum" caused him to "fall" into the wall. Petitioner's claim that the

two boys had falsely accused him was soundly rejected by the Hearing Officer and is not the subject of this appeal.

I am troubled by the majority's belief that petitioner's punishment should be reduced because he was acting "in furtherance of" his role as dean of discipline. In fact, just the opposite is true. Petitioner's acts of violence against the two students were in blatant derogation of his duties as chief disciplinarian. The majority implies that because petitioner was dean of discipline, he should be treated less severely than a teacher in a classroom. This analysis turns logic on its head. As the dean of discipline, petitioner should be able to control verbal disruptions by students without resorting to excessive force.

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

ENTERED: APRIL 5, 2012

CLERK

Gonzalez, P.J., Friedman, Moskowitz, Acosta, Richter, JJ.

6290 Danette Chavis, etc., Index 21167/06
Plaintiff-Respondent,

-against-

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

P.O. "John Doe," etc.,
Defendant.

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Michael A. Cardozo, Corporation Counsel, New York (Andrew Lucas of counsel), for appellants.

Burns & Harris, New York (Christopher J. Donadio of counsel), for respondent.

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Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered February 22, 2011, which, to the extent appealed from, denied defendants-appellants' motion pursuant to CPLR 3211(a)(7) and CPLR 3212 to dismiss plaintiff's 42 USC § 1983 cause of action, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants City of New York and Detective Fisher dismissing the complaint.

In this action, plaintiff Danette Chavis, the administrator of the estate of decedent Gregory Chavis (Chavis), alleges that defendants City of New York and Detective William Fisher

(defendants) violated Chavis's civil rights by failing to ensure that he was provided with proper medical treatment after he was shot by an unidentified assailant.[1] The evidence before the motion court established that on the evening of October 9, 2004, Gregory Chavis and a group of friends were at a movie theater in the Bronx. After leaving the theater, they got into a verbal altercation with a group of people on the street. Two members of that group pulled out guns, and chased Chavis and his friends down the street, firing at them; Chavis was hit by one of the bullets.

Officer Angel Irizzary submitted an affidavit stating that he was in his patrol car when he heard a call over the radio that shots had been fired. He arrived at College Avenue and East 148th Street, which is approximately one block away from Lincoln Hospital, where he saw Chavis and his friends. Irizarry got out of his car, realized Chavis had been shot, and immediately called for an ambulance. After walking about twenty feet, Chavis collapsed on the sidewalk; Irizarry then called for the ambulance to be rushed. According to Irizarry, from the time he heard the radio call of shots fired until the time EMS arrived, no more

[1] Defendant P.O. "John Doe," who was also named in the complaint, is not a party to this appeal.

than five minutes had passed.

Defendant Detective William Fisher testified at his deposition that on the date in question, he was at his desk when he heard a radio report that a man had been shot. Fisher left the station house and arrived on the scene in less than a minute. EMS was present when Fisher arrived, and he learned that they had already pronounced Chavis dead. Fisher testified that, from the time of the first 911 call until the time Chavis died, not more than five minutes had elapsed.

The documentary evidence shows that starting at 9:26 p.m., several 911 calls were made reporting gunshots. The radio operator transmitted the job to patrol at 9:28 p.m. At 9:29 p.m., a request was made for an ambulance to be rushed to the scene. EMS arrived at 9:30 p.m, and pronounced Chavis dead at 9:32 p.m. The NYC Notice of Death similarly indicates that Chavis was pronounced dead at 9:32 p.m.

Rashaad Conyers, a friend of Chavis, submitted an affidavit in opposition to the dismissal motion describing the events that evening. According to Conyers, upon realizing that Chavis had been shot, he and his brother helped Chavis walk toward Lincoln Hospital. As they were walking, police officers approached them and ordered them to put Chavis down. Conyers avers that an

ambulance failed to arrive, and that Chavis died after remaining on the ground alive for over 30 minutes. Plaintiff testified at her deposition about a similar extended period during which an ambulance did not come.

Plaintiff brought this action alleging that defendants, in violation of 42 USC § 1983, deprived Chavis of his Fourteenth Amendment right to substantive due process by denying him adequate and timely medical care.[2] Defendants moved to dismiss, asserting, inter alia, that Chavis had no constitutional right to medical treatment, and even if he did, that no constitutional right was violated. The court denied defendants' motion, and this appeal ensued. We now reverse and conclude that no constitutional violation occurred in the particular circumstances here.

A plaintiff asserting a claim under 42 USC § 1983 must show that a person acting under the color of state law deprived plaintiff of a right, privilege or immunity secured by the Constitution or laws of the United States (*see Matter of Giaquinto v Commissioner of N.Y. State Dept. of Health*, 11 NY3d

[2] The complaint also asserted state tort claims, which were dismissed by the motion court due to plaintiff's failure to serve a notice of claim. The court's dismissal of those claims is not a subject of this appeal.

179, 186 [2008]). The due process clause of the Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . deprive any person of life, liberty or property, without due process of law." In *DeShaney v Winnebago County Dept. of Social Servs.* (489 US 189 [1989]), the Supreme Court observed that "nothing in the language of the Due Process Clause itself requires the State to protect . . . its citizens against invasion by private actors" (*id.* at 195). Thus, the Clause "generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual" (*id.* at 196).

Defendants acknowledge that the Second Circuit has recognized two exceptions to this general principle. The state may owe a constitutional obligation to the victim of private violence "if the state had a special relationship with the victim" or "if its agents in some way had assisted in creating or increasing the danger to the victim" (*Matican v City of New York*, 524 F 3d 151, 155 [2d Cir 2008], *cert denied* 555 US 1047 [2008] [internal quotation marks and citations omitted]). Defendants argue that no special relationship existed, and that the assailant, not the state, created the danger that resulted in

Chavis's death. Plaintiff counters that the police officers' actions both gave rise to a special relationship and increased the danger to Chavis.

We need not determine whether either of the exceptions applies because even assuming a special relationship or state-exacerbated danger, plaintiff cannot show, as she must, that the police actions here shocked the conscience. In *County of Sacramento v Lewis* (523 US 833 [1998]), the Supreme Court held that for executive action to violate substantive due process, it must be "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience" (*id*. at 847 n 8). "[N]egligently inflicted harm is categorically beneath the threshold of constitutional due process, whereas the intentional infliction of injury is the conduct most likely to rise to the conscience-shocking level" (*Matican*, 524 F 3d at 158 [internal quotation marks omitted]). Culpability that falls "within the middle range . . . something more than negligence but less than intentional conduct, such as recklessness or gross negligence, is a matter for closer calls" (*Lewis*, 523 US at 849 [internal quotation marks omitted]). Although a state actor's deliberate indifference may, under some circumstances, rise to a conscience-shocking level, this ordinarily is not the case "in the context

of a time-sensitive emergency" (*Matican*, 524 F 3d at 158), or where the defendants are "subject to the pull of competing obligations" (*Lombardi v Whitman*, 485 F 3d 73, 83 [2d Cir 2007]).

The police officers' conduct here, even when viewing the facts in the light most favorable to plaintiff, does not shock the conscience, particularly in light of the emergency presented. Importantly, there is no claim that the police officers intentionally caused any physical harm to Chavis. To the contrary, the undisputed evidence before the motion court shows that when the responding officer encountered Chavis, he called for an ambulance. Upon recognizing the gravity of Chavis's injuries, he requested that the ambulance be rushed. In so doing, the officer acted reasonably in accord with the NYPD patrol guide, which directs that upon encountering an injured person requiring medical assistance, an officer should "[r]equest an ambulance . . . if necessary" and "[w]ait in view to direct the ambulance" (Patrol Guide Procedure No. 216-01).

Plaintiff argues that the police officers' alleged conduct in stopping Chavis's friends and directing them to lay Chavis down is sufficient to establish a constitutional violation. We disagree. The police, in responding to a call of shots fired, came upon several individuals walking with an injured person. At

that point, the police could not have known if Chavis's friends were good samaritans or the perpetrators of a crime. Nor would the officers have had any information to assess the truthfulness of the friends' claim that they were taking Chavis to the hospital. The officers also would not have been able to assess the potential medical risks of allowing Chavis and his friends to keep going, as opposed to laying the injured Chavis on the ground. Thus, it would have been entirely reasonable for the police to secure the scene, and wait for an ambulance to arrive. The circumstances presented show that the officers were faced with a number of "competing obligations" (*Lombardi*, 485 F 3d at 83), namely, obtaining medical assistance for Chavis, maintaining their own safety, determining the identity of the shooters, and preserving the crime scene. Put simply, it cannot be said that, "in the context of [this] time-sensitive emergency" (*Matican*, 524 F 3d at 158), the officers' alleged actions were shocking to the conscience.

Nor is there anything, under the applicable § 1983 standards, conscience-shocking about the officers' decision to wait for the ambulance to arrive instead of going to the hospital themselves to summon emergency personnel to the scene. The only evidence supporting the view that they should have taken this

alternative course of action is an affidavit submitted by a former police officer. This officer's opinion contradicts the clear directives of the patrol guide which require an officer to call for an ambulance and wait until it arrives. More importantly, that another method of obtaining medical care might have yielded faster results, or perhaps resulted in a different outcome, does not transform the officers' actions here into a constitutional violation. That the ambulance may not have arrived as fast as one would have hoped is tragic, but does not provide grounds for relief here.

The § 1983 claim asserted against defendant Fisher should have been dismissed for the additional reason that the undisputed

evidence shows that he did not arrive on the scene until after Chavis had died.[3]

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

ENTERED: APRIL 5, 2012

CLERK

[3] In the absence of a constitutional violation, we need not address the City's alternative argument that the officers were not acting pursuant to a municipal policy or custom (*see Matican*, 524 F 3d at 154). Nor, in light of our conclusion that defendants should have been granted summary judgment, do we decide whether the complaint should have been dismissed pursuant to CPLR 3211(a)(7).

Gonzalez, P.J., Tom, Catterson, Renwick, Richter, JJ.

7268 The People of the State of New York, Ind. 6431/07
Respondent,

-against-

Rafael Irizarry,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Amy Donner of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered July 1, 2010, convicting defendant, upon his plea of guilty, of auto stripping in the second degree and four counts of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of four to eight years, unanimously modified, on the law, to the extent of vacating the second felony offender adjudication and the sentence and remanding for resentencing, and otherwise affirmed.

As the People concede, the court incorrectly sentenced

defendant as a second felony offender based on a conviction that occurred after defendant committed the present crimes (*see* Penal Law § 70.06[1][b][ii]). However, the court lawfully imposed consecutive sentences as a result of defendant's violation of his plea agreement.

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

ENTERED: APRIL 5, 2012

CLERK

Gonzalez, P.J., Tom, Catterson, Renwick, Richter, JJ.

7269 In re Shaquille M.,

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

Tamara A. Steckler, The Legal Aid Society, New York (Selene D'Alessio of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about May 12, 2011, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of menacing in the second degree, and placed him on enhanced supervision probation for a period of 18 months, unanimously affirmed, without costs.

The delinquency petition was legally sufficient. The elements of menacing could be readily inferred from the detailed allegations. Although the petition did not state that appellant was the person who waved a knife, the allegations supported the inference that appellant was at least criminally liable as an accessory (*see* Penal Law § 20.00).

The court properly denied appellant's motion to suppress identification testimony. The showup was in the constitutionally permissible range of temporal and spatial proximity to the incident (*see People v Brisco*, 99 NY2d 596, 597 [2003]). "The showup was not rendered unduly suggestive by factors inherent in any showup, including the victim's apparent awareness that he was viewing a possible suspect and the presence of police officers guarding [appellant]" (*People v Grant, 77* AD3d 558, 558 [2010], *lv denied* 16 NY3d 831 [2011] [citations and internal quotation marks omitted]).

The fact-finding determination was supported by legally sufficient evidence and 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 court's determinations concerning identification and credibility.

The evidence established that appellant made threatening gestures with a knife in a crowd of people standing at a bus stop. This occurred during a heated argument between two groups of teenagers. During the altercation, appellant's group pushed a girl in the other group off a bus and knocked her to the ground. The evidence supported the conclusion that when appellant waved the knife he intended to place the teenagers on the bus, as well

as the complaining witness, who was standing in close proximity to appellant, in fear of physical harm. The overall course of conduct negates the possibility that appellant was waving the knife as some type of innocent horseplay. We have considered and rejected appellant's remaining arguments concerning the sufficiency and weight of the evidence.

The court properly exercised its discretion in placing appellant on probation under the enhanced supervision program. This was the least restrictive dispositional alternative consistent with appellant's needs and the need for protection of the community (*see Matter of Katherine W.*, 62 NY2d 947 [1984]).

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

ENTERED: APRIL 5, 2012

CLERK

Gonzalez, P.J., Tom, Catterson, Renwick, Richter, JJ.

7271 Fern Martin, Index 115532/08
Plaintiff-Respondent,

-against-

Kone, Inc.,
Defendant-Appellant.

_____

Costello, Shea & Gaffney, LLP, New York (William A. Goldstein of counsel), for appellant.

Burns & Harris, New York (Christopher J. Donadio of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered September 26, 2011, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

This is action for personal injuries allegedly suffered by plaintiff when she was struck by an elevator door that failed to retract while she was attempting to exit the elevator. Contrary to the motion court's determination, defendant elevator maintenance company established that it did not have actual or constructive notice of a defective detector edge on the elevator door and did not fail to use reasonable care to correct a condition of which it should have been aware (*see Gjonaj v Otis El. Co.*, 38 AD3d 384, 385 [2007]; *Santoni v Bertelsmann Prop.*

Inc., 21 AD3d 712, 713 [2005]).

In opposition, plaintiff failed to raise a triable issue of fact on the issue of actual or constructive notice. There was no evidence that the prior incidents identified in the work tickets "were of a similar nature to the accident giving rise to this lawsuit" or "were caused by the same or similar contributing factors" (*Chunhye Kang-Kim v City of New York*, 29 AD3d 57, 60-61 [2006]; *see Levine v City of New York*, 67 AD3d 510, 510-511 [2009]).

Plaintiff also failed to raise an issue of fact as to defendant's negligent maintenance since her expert's affidavit contained mere speculation, unsupported by any evidentiary foundation (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). The expert failed to provide the results of his "examination" of the elevator and elevator room, or identify the basis for his conclusion that plaintiff's accident was caused by defendant's failure to maintain the elevator in accordance with industry standards.

However, defendant's witness testified that he did not know what type of detector edge was on the elevator or whether the detector edge had multiple beams in it. Thus, there was no evidence in the record that plaintiff had access to the mechanism

that would cause the door to retract (*see Gutierrez v Broad Fin. Ctr. LLC*, 84 AD3d 648 [2011]; *Ianotta v Tishman Speyer Props., Inc.*, (46 AD3d 297, 298 [2007]), Therefore, defendant is not entitled to summary judgment.

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

ENTERED: APRIL 5, 2012

CLERK

Gonzalez, P.J., Tom, Catterson, Renwick, Richter, JJ.

7272 In re Theresa Lemmitt, Index 400003/09
Petitioner,

-against-

Ricardo Morales, etc.,
Respondent.

_____

Advocacy Center of Queens County, Jamaica (Odella Woodson of counsel), for petitioner.

Sonya M. Kaloyanides, New York (Marisa D. Shemi of counsel), for respondent.

_____

Determination of respondent, dated September 3, 2008, which terminated petitioner's tenancy on the grounds of nondesirability and breach of New York City Housing Authority rules and regulations, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Richard F. Braun, J.], entered July 6, 2010), dismissed, without costs.

The New York City Housing Authority's determination terminating petitioner's tenancy is supported by substantial evidence. The New York City Police Department executed a search warrant of petitioner's apartment, based on the testimony of a confidential informant that he had purchased drugs there from

Shawn Gatling, a friend of petitioner and her family. The police recovered drugs and drug paraphernalia, and arrested petitioner, her daughter, and Gatling, who were all present in the apartment at the time of the raid (CPLR 7803[4]; *see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176 [1978]; *Matter of Diaz v Hernandez*, 66 AD3d 525 [2009]). The hearing officer's rejection of petitioner's testimony that she was unaware of the presence of the drugs and paraphernalia in the apartment is entitled to deference (*Matter of Diaz*, 66 AD3d at 526). Furthermore, evidence of drug activity in the apartment that was not attributable to Gatling and Gatling's presence in the apartment is also substantial evidence of petitioner's violation of the terms of a stipulation of settlement. That stipulation resulted from administrative charges brought in 2004 in which she agreed that she and any guests in the apartment would not commit any act that would constitute grounds for termination of her tenancy and that she would not permit Gatling to reside in or visit her apartment and that his absence would continue beyond any probationary period.

Under the circumstances, the penalty imposed does not shock

our sense of fairness (*see Matter of Featherstone v Franco*, 95 NY2d 550, 555 [2000]).

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

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

ENTERED: APRIL 5, 2012

CLERK

Gonzales, P.J., Tom, Catterson, Renwick, Richter, JJ.

7273 In re Adriano D.,
Petitioner-Respondent,

-against-

Yolanda A.,
Respondent-Appellant.

Steven N. Feinman, White Plains, for appellant.

Karen P. Simmons, The Children's Law Center, Brooklyn (Tammy Linn of counsel), attorney for the child.

Order, Family Court, Bronx County (Diane Kiesel, J.), entered on or about June 23, 2010, which, after a fact-finding hearing, awarded petitioner father custody of the parties' child with visitation to respondent mother, including every other weekend, one month during the summer and alternate holidays, unanimously affirmed, without costs.

The court properly determined that the child's best interests would be served by awarding custody to petitioner (*see Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]). The record shows that petitioner has provided a healthy, stable environment, and a comfortable home. He is able to provide for the child financially and emotionally and demonstrated that he has been actively involved in the child's education and special needs.

Respondent, however, suffers from emotional issues into which she lacks insight preventing her from putting the child's needs before her own. The record demonstrates that respondent exercises poor judgment in disciplining the child and that she has not been involved with his education. Further, respondent's evasiveness regarding her income and employment history raises doubts about her ability to provide for the child financially.

Contrary to respondent's contention, the court did not rely primarily on the forensic psychologist's report in making its determination, but rather, weighed all the relevant factors in deciding what is in the best interest of the child (*see Eschbach*, 56 NY2d at 171-173).

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

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

ENTERED: APRIL 5, 2012

CLERK

Gonzalez, P.J., Tom, Catterson, Renwick, Richter, JJ.

7274-
7274A In re Harold Ali D.-E.,
and Another,

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

Rubin Louis E., Jr.,
Respondent-Appellant,

Jewish Child Care Association
of New York.,
Petitioner-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Law Offices of James M. Abramson, PLLC, New York (Dawn M. Orsatti of counsel), for respondent.

Andrew J. Baer, New York, attorney for the child, Harold Ali D.-E.

_____

Orders of disposition, Family Court, New York County (Jane Pearl, J.), entered on or about April 29, 2011, which, insofar as appealed from, determined that appellant's consent was not required for the child Harold's adoption and that he permanently neglected and abandoned the child Rubin, terminated appellant's parental rights to Rubin, and committed custody and guardianship of the children to petitioner agency and the Commissioner of the Administration for Children's Services (ACS) for the purpose of adoption, unanimously affirmed, without costs.

The consent of appellant to the adoption of Harold was not required because appellant acknowledged that he has had no contact with and has provided no financial support for the child since 2007, and thus, he did not maintain "substantial and continuous or repeated contact with the child" (Domestic Relations Law § 111[1][d]; *see Matter of Marc Jaleel G. [Marc E.G.]*, 74 AD3d 689 [2010]). His incarceration does not absolve him of his responsibility for supporting the child or for maintaining regular contact (see *Matter of Javon Reginald G. [Everton Reginald G.]*, 89 AD3d 456, 457 [2011]; *Matter of Aaron P.*, 61 AD3d 448 [2009]).

The agency established that appellant had abandoned Rubin with clear and convincing evidence that appellant failed to communicate with Rubin or the agency during the six-month period immediately preceding the filing of a petition (*see Matter of Keyevon Justice P. [Lativia Denice P.]*, 90 AD3d 477 [2011]; *Matter of Anthony M.*, 195 AD2d 315, 315-316 [1993]). The agency also established, by clear and convincing evidence, that appellant had permanently neglected Rubin. Appellant testified that towards the end of 2009, he became aware that Rubin was in foster care after he "received letters from the courts in New York that stated [Rubin] was up for adoption," but failed to

contact the agency to apprise them of his whereabouts or that he wished to become a resource for the child, thereby relieving of the agency of its due diligence obligations (*see* Social Services Law § 384-b [7] [e] [I]; *Matter of Jamie Rumbel C.*, 43 AD3d 762, 763 [2007]; *Matter of Christina Janian E.*, 260 AD2d 300, 300-301 [1999]).

The Family Court's determination that the children's best interests would be served by adoption is supported by a preponderance of the evidence (*see Matter of Star Leslie W.*, 63 NY2d 136, 147–148 [1984]). The record reveals that Harold has been residing with his foster mother for over two years, that she provides him with a nurturing environment, has been attentive to his special needs, and wishes to adopt him (*see Matter of Mykle Andrew P.*, 55 AD3d 305, 306 [2008]).

The court's determination that it was in Rubin's best interests to have appellant's parental rights terminated is supported in the record by a preponderance of the evidence (*see Matter of Roger Guerrero B.*, 56 AD3d 262, 262-263 [2008], *lv denied* 12 NY3d 704 [2009]). Appellant contends that the court erred by terminating his parental rights to Rubin because the likelihood is remote that he will be adopted due to his age, psychological issues, and steadfast desire to be reunited with

his mother. However, the record shows that there is optimism that Rubin will find placement with a family that will be able to address his special needs. Indeed, the agency caseworker assigned to the case testified that once Rubin has been freed for adoption, the agency will be able to post his picture and biography with ACS and that in her experience, children who had been photo-listed with ACS found adoptive placement.

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

ENTERED: APRIL 5, 2012

CLERK

Gonzalez, P.J., Tom, Catterson, Renwick, Richter, JJ.

7275 Elisa Cohen, et al., Index 16471/04
Plaintiffs-Respondents,

-against-

The City of New York,
Defendant,

New York City Transit Authority,
et al.,
Defendants-Appellants.

_____

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Vanessa M. Corchia of counsel), for appellants.

Law Offices of David Scott, New York (Paul Biedka of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered November 1, 2010, which denied the motion of defendants New York City Transit Authority and Metropolitan Transportation Authority for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Plaintiff Elisa Cohen claims that she fell and injured herself when the subway car that she had just boarded departed the station in an allegedly sudden manner. Defendants moved for summary judgment, arguing that plaintiff failed to demonstrate

that the train jerked or lurched in an "unusual and violent" manner (*Harwin v Metropolitan Transp. Auth.*, 45 AD3d 488 [2007]). Defendants established their entitlement to judgment as a matter of law by demonstrating that plaintiff specifically declined to testify that the train's movement was "violent." Even assuming plaintiff's testimony was otherwise sufficient, her mere characterizations of the manner in which the train jolted are insufficient absent objective proof, such as testimony that other passengers also fell (*see e.g. Harwin*, 45 AD3d at 489; *Fonseca v Manhattan & Bronx Surface Tr. Operating Auth.*, 14 AD3d 397 [2005]). In opposing the motion, plaintiff offered no objective proof to raise an issue of fact.

Further, plaintiffs' attempt to impose liability based upon defendants' alleged failure to warn of a wet condition lacks merit. The condition was not only readily observable, but the rainstorm that caused it was ongoing (*Morazzani v MTA N.Y. City*

Tr., 67 AD3d 598 [2009]; *Duncan v New York City Tr. Auth.*, 260 AD2d 213 [1999]). In addition, we note that according to plaintiff's own testimony, she was fully aware of the condition and did not believe that it caused her fall.

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

ENTERED: APRIL 5, 2012

CLERK

Gonzalez, P.J., Tom, Catterson, Renwick, Richter, JJ.

7276 The People of the State of New York, Respondent, Ind. 2572/09

-against-

Edwin Espada, Defendant-Appellant.

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

Edwin Espada, appellant pro se.

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

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered May 12, 2010, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him, as a second violent felony offender, to a term of 10 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-49 [2007]). Defendant asserts that the evidence failed to establish the element of use or threatened use of a dangerous instrument (*see* Penal Law § 160.15[3]. Initially, we find no basis for disturbing the jury's credibility determinations.

A store employee tried to stop defendant from departing with stolen merchandise. Defendant warned the employee not to touch him, pulled out a pair of pliers that he held at his side, and repeated the warning. The jury could have reasonably concluded that defendant thus made an implied threat to use the pliers against the employee (*see e.g. People v Boisseau*, 33 AD3d 568 [2006], *lv denied* 8 NY3d 844 [2007]).

Defendant also claims the pliers were not sharp enough to be readily capable of causing serious physical injury under the circumstances of their threatened use (*see* Penal Law § 10.00[13]). However, two witnesses described the pliers as "sharp," and the pliers were received in evidence and shown to the jury.

Defendant's pro se claims are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: APRIL 5, 2012

CLERK

Gonzalez, P.J., Tom, Catterson, Renwick, Richter, JJ.

7280-
7280A The People of the State of New York, Respondent,

-against-

Wonder Williams,
Defendant-Appellant.

Ind. 58/07
1832/08

Robert S. Dean, Center for Appellate Litigation, New York (David J. Klem of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Karinna M. Arroyo of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Michael J. Obus, J.), rendered on or about December 21, 2009,

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 judgments so appealed from be and the same are hereby affirmed.

ENTERED: APRIL 5, 2012

CLERK

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

Gonzalez, P.J., Tom, Catterson, Renwick, Richter, JJ.

7281 Nina Yunayeva, Index 107714/10
Petitioner-Appellant,

-against-

Kings Bay Housing Co., Inc.,
et al.,
Respondents-Respondents.

Jack L. Lester, New York, for appellant.

Kagan Lubic Lepper Lewis Gold & Colbert, LLP, New York (Fran I. Lawless and Gregory D. Borah of counsel), for Kings Bay Housing Co., Inc., respondent.

Michael A. Cardozo, Corporation Counsel, New York (William K. Chang of counsel), for The New York City Department of Housing Preservation and Development, respondent.

Judgment, Supreme Court, New York County (Geoffrey D. Wright, J.), entered February 4, 2011, which denied the petition to annul the determination of respondent New York City Department of Housing Preservation and Development (HPD), dated February 23, 2010, denying petitioner succession rights to the subject Mitchell-Lama apartment and issuing a certificate of eviction, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The determination had a rational basis in the record and was in accordance with lawful procedure. Petitioner failed to

demonstrate that the subject apartment was her primary residence for two years immediately before her husband permanently vacated the apartment, and that she was listed on the income affidavits for those two years (28 RCNY 3-02[p][3]; *Matter of Girigorie v New York City Dept. of Hous. Preserv. & Dev.*, 75 AD3d 430 [2010]). Petitioner's argument that she was denied due process and a meaningful opportunity to participate in the administrative hearing because she was not provided with an interpreter is not properly before us, as she never requested an interpreter at the administrative level (*see Matter of Peckham v Calogero*, 12 NY3d 424, 430 [2009]). In any event, the hearing transcript shows that, despite the lack of an interpreter, petitioner understood and answered the questions asked of her by HPD's counsel. Moreover, petitioner's due process claim must fail, as she lacks

a protected property interest (*see Matter of Cadman Plaza N. v New York City Dept. of Hous. Preserv. & Dev.*, 290 AD2d 344 [2002]).

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

ENTERED: APRIL 5, 2012

CLERK

Gonzalez, P.J., Tom, Catterson, Renwick, Richter, JJ.

7282 Charito Nepomuceno, Index 103117/10
Plaintiff-Respondent,

-against-

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

Beth Israel Medical Center,
Defendant-Appellant,

Wenick & Finger, P.C., New York (Frank J. Wenick of counsel), for appellant.

Scott Baron & Associates, P.C., Howard Beach (John J. Burnett of counsel), for respondent.

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered on or about February 19, 2011, which denied defendant hospital's (defendant) motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the order vacated, and the matter remanded to Supreme Court for further proceedings consistent herewith.

Plaintiff, a registered nurse employed by defendant, alleges that she was injured when she slipped on a piece of fruit that had fallen behind a fruit stand on the sidewalk abutting the hospital. Plaintiff testified that, at the time of the accident, she was on her way to start her morning shift, but had first gone

to the fruit stand to buy some fruit.

In denying defendant's motion for summary judgment, the motion court relied on the "dual capacity" doctrine, which has been rejected by the Court of Appeals (*see Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 159-160 [1980]), and found that this action was not barred by the Workers' Compensation Law. However, where, as here, "the availability of workmen's compensation hinges upon the resolution of questions of fact or upon mixed questions of fact and law," the matter must, in the first instance, be determined by the Workers' Compensation Board (*Liss v Trans Auto Sys.*, 68 NY2d 15, 20–21 [1986], quoting *O'Rourke v Long*, 41 NY2d 219, 228 [1976]; *see also Valenziano v Niki Trading Corp.*, 21 AD3d 818 [2005]). Accordingly, instead of resolving the motion, the motion court should have referred the matter to the Board for a hearing and determination as to the

availability of workers' compensation (*see Liss*, 68 NY2d at 21; *Valenziano*, 21 AD3d at 818; *Mattaldi v Beth Israel Med. Ctr.*, 297 AD2d 234 [2002]). The motion court may stay the matter pending resolution by the Workers' Compensation Board.

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

ENTERED: APRIL 5, 2012

CLERK

Gonzalez, P.J., Tom, Catterson, Renwick, Richter, JJ.

7284 The People of the State of New York, Ind. 6480/08
Respondent,

-against-

Anthony Smith,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered January 5, 2011, convicting defendant, upon his plea of guilty, of murder in the first degree, and sentencing him to a term of 20 years to life, unanimously affirmed.

The court properly denied defendant's motion to withdraw his guilty plea. Defendant received a full opportunity to present his arguments, which were properly rejected by the court (*see People v Frederick*, 45 NY2d 520 [1978]). Defendant, as well as new counsel appointed for the plea withdrawal motion, made written submissions. Neither defendant nor his counsel sought to amplify those submissions, and no hearing was requested.

The record establishes the voluntariness of the plea. Defendant's claims of innocence, coercion and inadequate consultation with counsel were directly contradicted by responses defendant gave during the thorough plea allocution, and by the court's recollection of the proceedings.

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

ENTERED: APRIL 5, 2012

CLERK

Gonzalez, P.J., Tom, Catterson, Renwick, Richter, JJ.

7285 Frances Zimbardi, Index 104250/10
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent,

Endicott Apartment Corp., et al.,
Defendants.

_____

Sidney M. Segall, Port Washington, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered August 23, 2011, which, in this action for personal injuries allegedly sustained by plaintiff when she tripped on cobblestones near a tree on a sidewalk, denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiff failed to make a prima facie showing of entitlement to judgment as a matter of law as to liability. The testimony of a Department of Parks and Recreation employee concerning a tree rescue program, and the report of an inspection of the trees on the block where plaintiff allegedly fell, do not show that the City had prior written notice of the alleged

dangerous condition pursuant to Administrative Code of City of NY § 7-201(c)(2) (*see Amabile v City of Buffalo*, 93 NY2d 471, 475-476 [1999]; *Rosenblum v City of New York*, 89 AD3d 439, 439 [2011]). Contrary to plaintiff's contention, the City produced documents relevant to its knowledge of the alleged dangerous condition and, in any event, it was plaintiff's burden to show that the City had prior written notice of the alleged defect, which she failed to do. Nor did she move for sanctions based on the City's alleged wilful failure to produce documents (*see* CPLR 3126).

Plaintiff also failed to present evidence showing that any affirmative act of the City resulted in the existence of the dangerous condition (*see Oboler v City of New York*, 8 NY3d 888, 889 [2007]; *Rosenblum*, 89 AD3d at 439-440). Indeed, plaintiff presented no evidence that the City planted the tree at the

subject location, that it installed the alleged uneven cobblestones, that it improperly placed the tree guard, or that its affirmative acts immediately resulted in a dangerous condition (*see Oboler*, 8 NY3d at 890).

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

ENTERED: APRIL 5, 2012

CLERK

Gonzalez, P.J., Tom, Catterson, Renwick, Richter, JJ.

7286N- Index 651612/10
7287N- 602825/08
7288N- 650736/09
7289N & 650042/09
M-664-
M-665-
M-745

Ambac Assurance Corp., et al.,
Plaintiffs-Respondents,

-against-

Countrywide Home Loans, Inc., et al.,
Defendants,

Bank of America Corp.,
Defendant-Appellant.

- - - - -

MBIA Insurance Corporation,
Plaintiff-Respondent,

-against-

Countrywide Home Loans, Inc., et al.,
Defendants,

Bank of America Corp.,
Defendant-Appellant.

- - - - -

Financial Guaranty Insurance Co.,
Plaintiff-Respondent,

-against-

Countrywide Home Loans, Inc., et al.,
Defendants,

Bank of America Corp.,
Defendant-Appellant.

- - - - -

Syncora Guarantee, Inc.,
Plaintiff-Respondent,

-against-

Countrywide Home Loans, Inc., et al.,
Defendants,

Bank of America Corp.,
Defendant-Appellant.

O'Melveny & Myers LLP, New York (Jonathan Rosenberg of counsel), for appellant.

Patterson Belknap Webb & Tyler LLP, New York (Robert P. LoBue of counsel), for Ambac Assurance Corp. and The Segregated Account of Ambac Assurance Corporation, respondents.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Peter E. Calamari of counsel), for MBIA Insurance Corporation, respondent.

Kutak Rock LLP, New York (Robert A. Jaffe of counsel), for Financial Guaranty Insurance Co., respondent.

Allegaert Berger & Vogel LLP, New York (David A. Berger of counsel), for Syncora Guarantee, Inc., respondent.

Orders, Supreme Court, New York County (Eileen Bransten, J.), entered October 31, 2011 and November 2, 2011, which, among other things, denied defendant Bank of America Corp.'s motions to sever and consolidate plaintiffs' successor liability claims for purposes of discovery, and held in abeyance defendant's motion to consolidate the successor liability claims for purposes of trial, unanimously affirmed, with costs.

This is a consolidated appeal involving four related but separate claims by monoline insurers for primary liability against the Countrywide defendants in connection with financial guarantee insurance covering mortgage-backed securities. The actions also involve successor liability against defendant Bank of America. The court properly exercised its discretion in denying defendant's motion to sever plaintiffs' successor liability claims from the primary claims and to consolidate them, for purposes of discovery, in a single action. The successor liability actions are at completely different stages of

discovery, and consolidation would result in undue delay (*see Barnes v Cathers & Dembrosky*, 5 AD3d 122 [2004]).

M-664 - ***Syncora Guarantee Inc. v Countrywide Home Loans, Inc., et al. and Bank of America Corp.***

M-665 - ***MBIA Insurance Corporation v Countrywide Home Loans, Inc., et al. and Bank of America Corp.***

M-745 - ***MBIA Insurance Corporation, et al. v Countrywide Home Loans, Inc., et al. and Bank of America Corp.***

Motions to supplement the record on appeal (M-664, M-665) granted; cross motion to strike the supplemental record and reply brief, or for leave to supplement the record in the event the motion (M-665) is granted (M-745), granted to the extent of granting leave to supplement the record.

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

ENTERED: APRIL 5, 2012

CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Renwick, Abdus-Salaam, JJ.

6005-
6006 Fiserv Solutions, Inc., Index 601096/09
etc., et al, 601217/09
Plaintiffs-Appellants-Respondents,

-against-

XL Specialty Insurance Company,
Defendant-Respondent-Appellant.

[And Another Action]

Jenner & Block LLP, Chicago, IL (John H. Mathias, Jr. of the bar of the State of Illinois, admitted pro hac vice, of counsel), for appellants-respondents.

Steptoe & Johnson LLP, Washington, DC (Christopher T. Lutz of the bar of the District of Columbia, admitted pro hac vice, of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered March 23, 2011, which granted in part and denied in part plaintiffs Fiserv Solutions, Inc., Suntrust Bank, Compass Bank, Regions Bank, Altier Credit Union, Sovereign Bank, and ORNL Federal Credit Union's motion for summary judgment, and granted in part and denied in part defendant XL Specialty Insurance Co.'s motion for summary judgment, modified, on the law, to the extent of granting summary judgment to plaintiffs and declaring that the policy provides coverage where, solely by virtue of Fiserv's rounding up to the nearest dollar, the guaranteed insured value

reflected in the remittance reports sent by Fiserv to XL exceeds the maximum value in the HVB range, and otherwise affirmed, with costs.

The motion court correctly determined that XL's policy insures the range of value generated by the Fiserv program called HomeValueBot (HVB), and not, as asserted by plaintiffs, any amount selected by the lender within the HVB range when that amount is later determined to be greater than the actual market value upon a retrospective appraisal. The purpose and intention of the policy is ascertained upon examination of the service provided by Fiserv to lenders, and the reason why insurance was required.

Plaintiff Fiserv is a financial services company that provides mortgage lenders with home value appraisal services by using computer programs to generate appraisals, thus eliminating the need for the lenders to hire human appraisers. Fiserv used a computer appraisal method known as the automated valuation model (AVM) which stated a single dollar appraisal figure, with a plus or minus percentage margin of error. The insurance policy, which provides property valuation insurance, is intended to insure the accuracy of the appraisals and to cover losses sustained by the lenders by virtue of faulty appraisals provided by Fiserv.

The named insured is Fiserv and the lenders are additional insureds, with insurance provided for "Faulty Original Appraised Value." The policy defines "Original Appraised Value" as the value set forth in the AVM, and a "Faulty Original Appraised Value" as when the appraisal generated by the AVM is greater than the actual market value of the property at the time of loan origination, the actual market value being determined by a certified (human) appraiser of the property after a loan goes into default.

Fiserv also used a computer program called a HomeValueBot (HVB) which, rather than providing a single number for an appraisal, gave a range within which lenders could choose an appraisal amount and determine how much to lend. Defendant agreed to insure those HVB appraisals and issued an endorsement to the policy, which expanded the definition of "Original Appraised Value" to include the value of the property as reported from an HVB where the insured appraised value does not exceed the HVB's indicated range.

When Fiserv was providing a specific dollar amount for its appraisals and the lenders chose that value, the lenders had insurance for a loss when that number was higher than the amount later assigned by a human appraiser after the loan had gone into

default. When Fiserv began offering the HVB range of appraisals, the lenders were insured for a loss if the range was so wrong (so high) that the lenders could pick even the lowest number in the range and still be choosing a value higher than the retrospective human appraisal. It is Fiserv's HVB range that is at issue here.

Fiserv's interpretation of the policy - - that any appraisal number within the range and chosen by the lender is covered by insurance in the event that the number is greater than the actual market value as later determined by a human appraiser - - is not, as the dissent argues, the only reasonable interpretation. To the contrary, common sense tells us that this is not a logical interpretation. Fiserv's service to lenders is to provide an appraisal range within which lenders can select a value and grant a loan, and Fiserv, the named insured, has no control over the amount that the lenders select within the range. If the dissent and Fiserv are correct, then XL was insuring the lender's conduct, not the failings of Fiserv. This is not a reasonable interpretation of the policy which was issued to insure the accuracy of Fiserv's appraisal methods, not the bad choices of the lenders. The policy is not default insurance. Both Fiserv and XL agree that the purpose of the policy is to insure the accuracy of Fiserv's appraisals, not the lender's underwriting

decisions.[1] Thus, when an appraisal value is based on an HVB range, there is no coverage if the retrospective human appraisal falls within that range.

Fiserv argues that under XL's interpretation, the only way that a lender could be fully protected under the policy would be for it to always identify only the lowest dollar amount of the HVB range of value as the appraised value when making a loan, and that using any higher dollar amount would reduce the possibility of coverage available to the lender if the value used by the lender later proved to be overstated. That is correct, but it does not mean that XL's interpretation of the policy is incorrect. It is the lender's choice to use the HVB range of value when appraising a property, and the lender's choice of what amount to choose within that range. If the lender chooses the high end of the range, it follows that there is more room for

[1]XL's statement of undisputed facts pursuant to Rule 19-A of the Commercial Division Rules sets forth, among other things, the testimony of Fiserv's CEO that the insurance was designed to provide a guarantee of the accuracy of any valuation product that was delivered to a client, as well as the testimony of several lenders that they obtained the insurance to cover their losses if there was an inaccurate HVB and the property was overvalued. Fiserv's director of risk management acknowledged that the coverage wasn't a substitute for prudent underwriting or losses caused by poor underwriting and that the policy did not cover such losses.

overvaluing the property than if it chooses the low end of the range. That is the lender's business decision, involving a calculated risk. Again, it is only the HVB range that is being insured, not the lender's choice of value within that range.

The dissent points to the definition of "Original Appraised Value" found in the policy endorsement covering HVBs, specifically language stating the Original Appraised Value means the value as set forth in an HVB where the insured appraised value does not exceed the HVB's indicated range of value. This, according to the dissent, confirms that the accuracy of a single value out of the range, and not the range, is being insured. However, this concedley inartful and somewhat superfluous language serves only to limit coverage as follows: if the lender assigns a value *higher* than the range provided by Fiserv, it won't be insured, *even if the range was wrong because it was too high*. Conversely, if the lender picks a number within the range, and the range was wrong in that even the lowest number in the range was too high, then the lender has insurance for Fiserv's miscalculation.

The dissent posits that XL's position directly conflicts with the loss calculation provisions of the policy and that under XL's interpretation, it would be impossible to calculate a loss

if a range of values is being insured. Notably, Fiserv has not argued that XL's position makes it impossible to calculate a loss. In fact, Fiserv indicates in its memorandum of law that the formula used to determine the amount of insured loss is not at issue in this appeal. And, the record shows that the loss calculation provisions cited by the dissent can be, and have in fact been used to calculate a loss by applying XL's interpretation of the policy. An example of such a calculation was included in an e-mail sent by XL to Fiserv's assistant vice president, claims manager, in which specific provisions of the policy, including the loss calculation provisions, are set forth in explanation of the following calculation where the lender had sought coverage for a loss of $20,460.79 representing the outstanding balance of its loan:

> In this case, HomeValueBot estimated that the underlying property was worth between $99,929.31 and $122,135.83. The actual market value, according to the retrospective appraisal provided by [the lender], was $91,000. The difference between these values is $8,929.31 ($99,929.31 minus $91,000, equals $8,929.31). Since that amount is less than [the] amount due on [lender's] loan, [lender] is only entitled to recover that amount.

As noted by the dissent, for nearly four years after the policy was expanded to include the HVB range of appraisals, XL continued to (mistakenly, in our view), pay claims as it had when

Fiserv had only been providing specific dollar appraisals, with XL covering any value that the lenders used from the HVB range if that amount was less than the retrospective human appraisal. However, when a new internal claims manager eventually reviewed the claims, she concluded that there had been erroneous payment in the many instances where the insured appraised value had been a number within the HVB range. XL's unnecessary payment of claims that were not intended to be covered under the policy should not prevent it from now enforcing the meaning and intent of the policy.

The motion court's order is modified to the extent of granting summary judgment to plaintiffs declaring that the policy provides coverage where, solely by virtue of Fiserv's rounding up to the nearest dollar, the guaranteed insured value reflected in the remittance reports sent by Fiserv to XL exceeds the maximum value in the HVB range. As explained by plaintiffs, on an approximately monthly basis, Fiserv sent a list of loans closed by insured lenders (including the lender plaintiffs) "with the values used to originate each one - i.e, the insured loan amount and insured property value - to FLS's broker for delivery to XL, along with payment of the corresponding premium." These reports were referred to as remittance reports. According to plaintiffs,

"[w]hen the lender used HVB to originate a loan, the lender would report to FLS [Fiserv] the value within the HVB range that it used. When that value was the high value in the HVB range and HVB reported the value at the top of the range as dollars and cents, the computer system transferring HVB information would in some instances automatically round the number up or down to the nearest value."

Plaintiffs have provided an illustrative example where an HVB printout for a particular property set forth an insurable HVB range from $132,026.06 to $145,923.53, and the remittance report sent by Fiserv to XL listed the guaranteed appraised value for that property as $145,924.00. Essentially, it was the software system used to report the loan transactions to XL that rounded up the amount of the guaranteed appraised value to the next dollar, 47 cents higher than the highest value listed in the range provided by HVB. Defendant does not claim that any deviation from exact performance caused by Fiserv's rounding to the nearest dollar in its remittance reports affected the appraisal amount chosen by the lender, the amount loaned or the size of any claim against XL. Significantly, XL accepted the premiums paid by the lenders for those appraised values that were rounded up to the nearest dollar, while it now argues that the values are beyond

the HVB range and accordingly, uninsured.

A technical failure or immaterial breach should not furnish the insurer with a valid basis for voiding its obligation (*see generally Jacobs & Youngs, Inc. v Kent*, 230 NY 239 at 243 [1921] [Cardozo, J.]["We must weigh the purpose to be served, the desire to be gratified, the excuse for deviation from the letter, the cruelty of enforced adherence"]; *see also High Fashions Hair Cutters v Commercial Union Ins. Co.*, 145 AD2d 465, 466 [1988]; *Russell v Lornamead, Inc.*, 2011 WL 1567000, *14, 2011 Conn Super LEXIS 853, *39 [Super Ct. 2011]). Here, interpreting the contract to require precise reporting by Fiserv to the penny so that the rounded up figure does not exceed the high range of the HVB would result in a draconian forfeiture of the coverage paid for by the lenders, especially in light of their payment of premiums and XL's retention of those premiums based on the remittance reports with the amounts rounded to the nearest dollar.

As to the remaining issues raised by defendant, Fiserv has an insurable interest in the property valuation insurance policy issued by defendant, because it is exposed to potential liability to plaintiff lenders for any losses incurred on the subject loans (*see Calabrese v New London County Mut. Ins. Co.*, 21 Conn L Rptr 67 [Conn 1997]; *see also Jones v Equicredit Corp. of S. Carolina*,

347 SC 535, 542, 556 SE2d 713, 717 [2001]).

Finally, in light of Endorsement No. 1, which provides that "this policy does not require sale and/or foreclosure as the sole proof of Loss" and that "proof of a pending Loss by review of the lender's charge off analysis" is a "reasonable alternative[]," the 30 days within which a claim under the policy must be submitted begins to run after the sale or appraisal of the property, the charge-off of the loss, or, as the motion court found, "any other event that leads the lender to recognize the potential for loss." As we previously held, defendant may deny claims if it can show that an insured lender did not comply with its own procedures and requirements (*see Fiserv Solutions, Inc. v XL Specialty Ins. Co.*, 84 AD3d 480 [2011]).

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

MOSKOWITZ, J. (dissenting)

This appeal hinges on the interpretation of the following paragraph in a property valuation insurance policy:

> "Original Appraised Value means the value of the Secured Property set forth as an automated property valuation (AVM), or as reported from . . . an automated HomeValueBot (HVB) where the insured appraised value does not exceed the HVB's indicated range of value report collected or requested by the Insured for the Originator on or prior to the extension of the Loan to the Borrower"

In my view, the policy insured the accuracy of the single value selected by the mortgage lenders from the range of values that plaintiff Fiserv's computer program generated. In addition, the policy clearly states that, where the value the lender chose exceeds the high end of the computer-generated range, even as a result of simple rounding to the nearest whole dollar, the policy provided no coverage. Accordingly, to the extent the majority holds otherwise, I respectfully dissent.

Plaintiff Fiserv is a financial services company that provides banks with services, including accounting, data processing, loan closing and loan handling. Fiserv also provides mortgage lenders with home value appraisal services by supplying computer programs that appraise home values. The service at issue in this dispute is the provision of computer-generated home

appraisals. For a per-loan fee, Fiserv provided mortgage lenders with appraisals that it made electronically by inputting data such as square footage and building age. These computer appraisals were commonly known as automated valuation methods (AVMs). By using AVMs, lenders saved the expense of a human appraiser's visit to the property. Plaintiffs Suntrust Bank, Compass Bank, Regions Bank, Altier Credit Union, and Sovereign Bank (the Lenders) are some of the banks that issued home mortgage loans based on Fiserv's AVM appraisals.

Anticipating the possibility of errors in the AVM's, Fiserv secured insurance, on behalf of the Lenders, against inaccurate appraisals. This coverage was known as property valuation insurance. In June 2004, defendant XL Specialty Insurance Company (XL) issued the property valuation insurance policy to Fiserv, and each lender that used Fiserv's services became an additional insured under the policy. In the policy, XL agreed "to pay the Insured any covered Loss resulting from a Default of a Loan and a Faulty Original Appraised Value."

Pursuant to the policy, a "Faulty Original Appraised Value" existed when the appraisal generated by Fiserv's AVM's was greater than the actual market value of the property at the time the loan was originated. The actual market value was determined

by sending a certified appraiser to the property, after a loan went into default, to conduct the in-person appraisal that AVM's were designed to replace. The policy initially defined the term "Original Appraised Value" as

> "the value of the Secured Property set forth as a Stated Owners Estimate (SOE) in the loan application process, or an automated property valuation (AVM), or as reported from a desktop valuation report (Desktop) or Evaluation/Broker Price Opinion (BPO) report collected or requested by the Insured for the Originator on or prior to the extension of the Loan to the Borrower."

The AVMs typically stated a single dollar appraisal figure, along with a plus or minus percentage margin of error (e.g., "$200,000 +/- 10%"). In December 2004, however, XL agreed to Fiserv's proposal that XL insure appraisals generated by a Fiserv program called a HomeValueBot (HVB). HVB stated appraisals somewhat differently than the traditional AVMs. Instead of presenting a single value with a possible percentage variation, the HVB represented appraisals as a range (e.g., "$180,000 to $220,000"). The purpose of HVB appraisals was to afford lenders more flexibility in extending loans. Fiserv believed that given a range, lenders would more easily be able to justify larger loans. In other words, a $210,000 loan was more feasible to underwrite where that value actually existed within a given range

of $180,000 to $220,000, as opposed to being within the margin of error of a lower value ($200,000 +/- 10%).

In connection with the introduction of HVB appraisals, XL issued an endorsement to the policy that expanded the definition of "Original Appraised Value" to include "the value of the Secured Property . . . as reported from . . . an automated HomeValueBot (HVB) where the insured appraised value does not exceed the HVB's indicated range of value report collected or requested by the Insured for the Originator on or prior to the extension of the Loan to the Borrower."

Along with its premium payment for each loan that carried an insured appraisal, Fiserv submitted to XL the actual appraisal value that it had used to underwrite the loan. This practice apparently did not change with the introduction of HVB's. Notwithstanding that HVB appraisals stated a range of values, Fiserv's practice was to identify a specific dollar value within the range and to communicate that value to XL. Indeed, a principal of the company that underwrote the policy on XL's behalf testified that the single value Fiserv selected for appraisal purposes "would be covered under the policy subject to the rest of the terms." In some instances, Fiserv's internal computer system would round up the dollar value selected by the

lender and report the rounded figure to XL. For example, if the chosen value was $192,101.99, Fiserv might have reported the value to XL as $192,102. This could happen even where the high end of the range developed by the HVB was $192,101.99, making the reported number fall out of the range.

The Lenders began making claims under the policy in the middle of 2005. For nearly 4 years after the policy was issued, XL paid claims as though "Original Appraised Value" meant the single specific dollar amount the lender identified from within the HVB range. Thus, if a loan went into default and an in-person appraisal determined that the property should have been appraised at a value less than the value "chosen" by the Lender, XL paid on the claim, even if the market value and the selected value both fell within the range developed by the HVB. XL paid 165 out of 166 such claims during this period.

Most of these early claims were handled by a New York-based XL employee who testified that her area of expertise was fine arts claims and that she relied on loss summary sheets prepared by others. With claims volume increasing, on January 15, 2008 XL sent formal notice to Fiserv that it would cancel the policy, effective April 20, 2008. At the same time, XL transferred its internal claims management to Keri Ryan, who brought in new

outside counsel and retained a forensic accountant.

Ryan identified several issues that, in her opinion, led to erroneous payment of claims prior to her assignment. For example, Ryan observed that many claims involved loans where the retrospective appraisal was less than the appraisal value the lender relied on when underwriting the loan, but both appraisal values fell within the HVB range. Ryan took the position that XL merely insured the range and that, because the HVB range was accurate in such cases, the lender had not suffered a loss. Ryan also discovered that some claims involved loans where lenders used values higher than the top of the HVB range (this typically occurred where computers rounded up the appraisal amount upon which the lender relied in underwriting the loan). Ryan believed that these were not covered, because they did not fall within the definition of Original Appraised Value. It is not disputed that XL paid more than 99% of claims before it identified the issues outlined above. It is further undisputed that, after the personnel changes XL instituted, it denied 1,114 claims and paid only 21 claims from June 18, 2008 through October 1, 2010 – a payment rate of less than 2%.

Fiserv and the Lenders commenced this action in April 2009 seeking certain declaratory relief, including a declaration that

XL must adjust all existing and future claims in accordance with the terms of the Policy and asserting causes of action for breach of contract, violation of the Connecticut Unfair Insurance Practices Act[1], violation of the Connecticut Unfair Trade Practices Act, and breach of the implied covenants of good faith and fair dealing. They also sought injunctive relief precluding XL from adjudicating claims in a manner inconsistent with the policy and its claims handling practices prior to June 2008.

In October 2010, the parties both moved for partial summary judgment. Each side argued that the policy's text unambiguously supported its own interpretation. The parties also raised, in the alternative, the possibility that the policy was ambiguous. Their briefs likewise discussed the extrinsic evidence that they contended supports their respective interpretations. By order entered March 23, 2011, the court granted and denied the parties' motions in part.

Plaintiffs appeal from three specific rulings of the court: (1) "Original Appraised Value means the range of value generated by an HVB, as long as the final loan value is not higher than the

[1] Both Fiserv and XL had their place of business in Connecticut. The parties agree that Connecticut law governs their dispute.

highest value of the HVB" and that "any retrospective appraisal value that falls within the range is not covered under the Policy," (2) "any loans that exceed the highest value of an HVB value range, even if only by mere cents, are not covered under the Policy" and (3) "the Policy permits XL to inquire into the procedures and requirements of the lenders and [to] deny coverage for any loan not made in accordance therewith."

XL appeals from two specific rulings: (1) that notice of claim is timely if provided within 30 days of either the sale or appraisal of the property, charge-off of the loss, or "any other event that leads the lender to recognize the potential for loss" and (2) Fiserv has an insurable interest in the policy.

On their motion for partial summary judgment, plaintiffs argued that the definition of Original Appraised Value unambiguously indicates that the accuracy of the single value chosen by a lender within the HVB range is what the policy insured and that if the in-person appraised value turned out to be lower, coverage would nonetheless be available, even if the range was accurate because the market value also fell within the range. Regarding XL's position that the policy did not cover appraisals rounded up by Fiserv's computer system to a value above the HVB range, plaintiffs invoked the doctrine of

substantial performance that excuses a technical breach of a contract.

The motion court agreed with XL's interpretation of the definition of "Original Appraised Value" for purposes of HVB. It stated:

> "[s]ince the HVB was not a specific number as were other standard AVM's, but instead was a value range, common sense leads to the conclusion that the Policy only covered loss by lenders where the retrospective appraisal showed a property value below the HVB range . . . Since the HVB gave Lenders a range of values to choose from, and lenders consistently chose to grant loans based on the high value, subsequent retrospective appraisals often resulted in a value lower than the HVB high value but still within the HVB range. In these cases the HVB was not actually faulty, and thus not a situation intended to be covered under the Policy."

The court rejected plaintiffs' position concerning appraisal values that computers rounded up. It held that "[t]he Policy does not make allowance for substantial compliance but requires precise performance with respect to this provision. . . . Therefore, any loans that exceed the highest value of an HVB value range, even if only by mere cents, are not covered under the Policy."

On appeal, both parties contend that the definition of Original Appraised Value is unambiguous. However, their respective interpretations of the clause are diametrically

opposed to each other. Plaintiffs argue that the provision contemplates that lenders would rely on a single appraisal value from the HVB range in underwriting loans and that XL would insure the accuracy of that single value. They assert that the word "value" inherently means a single number and that "[a]ll of the 'value' definitions in the policy – 'Original Appraised Value,' 'Faulty Original Appraised Value,' and 'As of Appraised Value' – require a single and specific dollar amount." According to plaintiffs, the term "insured appraised value," which falls within the definition of Original Appraised Value, must also refer to a single dollar amount.

XL, on the other hand, asserts that the language defining Original Appraised Value makes clear that XL insured the accuracy of the range of values generated by the HVB program, not a single value. It parses the definition into two separate elements. The first element, XL claims, plainly provides that Original Appraised Value means the range reported by the HVB program. The second element of the definition, it contends, is a "limit on the use of HVB, providing that the HVB range is the Original Appraised Value only where the 'insured appraised value' does not exceed that range."

"If the terms of [an insurance] policy are clear

> and unambiguous, then the language, from which the intention of the parties is to be deduced, must be accorded its natural and ordinary meaning. However, when the words of an insurance contract are, without violence, susceptible of two equally responsible interpretations, that which will sustain the claim and cover the loss must, in preference, be adopted"

(*Heyman Assoc. No. 1 v Ins. Co. of the State of Pa.*, 231 Conn 756, 770, 653 A2d 122, 130 [1995] [internal citations omitted]). Further, a court may not read a clause in a policy in isolation, but must consider it in the context of the entire document (*see O'Brien v United States Fidelity and Guaranty Co.*, 235 Conn 837, 843, 669 A2d 1221, 1224 [1996]).

That the parties disagree over the definition of Original Appraised Value does not in itself render the provision ambiguous (*Hansen v Ohio Cas. Ins. Co.*, 239 Conn 537, 543, 687 A2d 1262, 1265). Again, that would only be the case if both interpretations were reasonable (*Heyman Assocs.*, 231 Conn at 770, 653 A2d at 130). While the definition was perhaps inartfully drawn, in my view, it is not susceptible to two reasonable interpretations. To the contrary, only Fiserv's interpretation is reasonable. The use of the phrase "insured appraised value" is the key to understanding the meaning of Original Appraised Value. By stating that the "insured appraised value" may not exceed the range, the policy confirms that the accuracy of a

single value out of the reported range is being insured, not the accuracy of the range itself. After all, if the thing being insured were the accuracy of the range, as XL and the majority assert, then the definition of Original Appraised Value would have to be read as providing that coverage would only be afforded where the "insured appraised [range of values] does not exceed the HVB's indicated range of value report." This would simply make no sense. The clear intent of the clause is to state (somewhat superfluously, it would seem) that if the value the lender selects is higher than the range in the HVB report, it is not covered.

This is why, in my view, the lower court correctly concluded that selected values that are rounded up by Fiserv's computer system to a number exceeding the high end of the range are not insured, even as a result of simple rounding up to the nearest whole dollar. The Original Appraised Value clause clearly provides that, for the policy to provide coverage, the single value a lender selects must not be higher than the highest value of the range the HVB reports. Indeed, when opposing plaintiffs' argument on the rounding issue, XL acknowledges that the accuracy of the single value selected by a lender is what is insured.

In any event, if "insured appraised value" cannot be

understood as indicating, on its face, that Original Appraised Value means a single dollar value, it can when one considers the rest of the policy. The policy defines a loss as "the amount of any principal of a covered Loan that remains unpaid following the sale of the Secured Property, if applicable, by the Originator following a Default, subject to the limitations set forth below in Section III." Section III clarifies that "[t]he Loss payable under this Policy for any covered Loan shall never be greater than the difference between the Original Appraised Value and the As of Appraised Value or the unpaid principal of the loan, whichever is less." Thus, to calculate a loss and determine how much to pay on a claim, XL must make a precise mathematical calculation. However, it would be impossible to perform this calculation if that part of the equation utilizing Original Appraised Value was a range of numbers, instead of a specific number. Thus, the definition of Original Appraised Value urged by plaintiff in the context of HVB reports must be correct, because only under plaintiffs' interpretation is one able to apply the loss calculation provisions in the policy.

XL's position directly conflicts with the loss calculation provisions in the policy because, if Original Appraised Value were a range of values, one could not determine the extent of an

insured's loss. XL asserts that the words insured appraised value "place a limit on the use of HVB," but this avoids the question of whether the word "insured" refers to a single value or a range of values. It is not enough for XL to argue that the policy "plainly" provides that Original Appraised Value refers to a range of values while it ignores critical language within that definition.

Because the plain language of the policy compels the conclusion that the Lenders are insured if the appraisal value they rely on is later found to be inaccurate, whether the in-person appraised value later comes in below the selected value but still within the HVB reported range or lower than the bottom of the range, the motion court should have granted plaintiffs' motion to the extent they sought such a declaration.

Accordingly, I would modify the order to the extent of denying XL's motion for partial summary judgment on the issue of the HVB range and granting plaintiffs' motion to the extent of

declaring that XL should adjust all existing and future claims in accordance with the terms of the policy, as described above.

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

ENTERED: APRIL 5, 2012

CLERK

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

6864 Paul Solomons, Index 110636/10
Plaintiff-Respondent,

-against-

Douglas Elliman LLC, etc.,
et al.,
Defendants,

Old Brownsville Renaissance Corp.,
Defendant-Appellant.

_____

Gleich, Siegel & Farkas, Great Neck (Lawrence W. Farkas of counsel), for appellant.

Giskan Solotaroff Anderson & Stewart LLP, New York (Amanda Masters of counsel), for respondent.

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Order, Supreme Court, New York County (Judith J. Gische, J.), entered December 13, 2010, which denied the motion by defendant Old Brownsville Renaissance Corp. (OBRC) to dismiss plaintiff's complaint as against it, unanimously affirmed, without costs.

Plaintiff, who is disabled and receives Section 8 housing assistance, alleged in the first amended complaint that OBRC and other property owners and real estate brokers violated the New York City Human Rights Law by refusing to rent apartments to him (*see* Administrative Code of the City of New York § 8-107[5]). The first amended complaint further alleged that the apartment

plaintiff allegedly tried to rent from OBRC was in a building containing six or more housing units, and accordingly the exemption for buildings with five or fewer apartments did not apply (*see* Administrative Code § 8-107[5][a][1],[o]).

OBRC moved for dismissal on the ground that the subject building only contained four apartments. In support, OBRC submitted the affidavit of its president, Tessie Travin, and a copy of the October 1990 certificate of occupancy for the building.

However, in his opposition papers, plaintiff raised a new theory of liability - namely, that the number of units in the subject building was not dispositive because another provision of the Human Rights Law provides that it applies to "any person who has the right to sell, rent or lease or approve the sale, rental or lease" of at least one housing accommodation in New York City with six or more units (Administrative Code § 8-107[5][o][ii]). Plaintiff alleged that Travin owned another apartment building in New York City with six units and a third building with twelve units. The motion court agreed with plaintiff and denied OBRC's dismissal motion on the ground that "the [number] of apartments [in the subject building] is really irrelevant" because the statute "still applies to an owner [that] has at least one

housing accommodation with 6 or more units."

OBRC contends that it was improper for plaintiff to raise a new theory of liability in his opposition papers. It also points out that plaintiff did not name Travin as a defendant in this case, that plaintiff submitted evidence in the opposition papers indicating that other corporations, instead of Travin, own the two buildings with six or more units, and that plaintiff did not link OBRC or Travin with the other corporate owners.

OBRC's dismissal motion was properly denied because, at this stage, neither Travin's affidavit nor the certificate of occupancy is sufficient to rebut plaintiff's claim that the subject building contains at least six units. A motion to dismiss under CPLR 3211, when based on documentary evidence, is granted only if that evidence "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. Of N.Y.*, 98 NY2d 314, 326 [2002]). The affidavit of Travin, "which do[es] no more than assert the inaccuracy of plaintiff['s] allegations, may not be considered, in the context of a motion to dismiss, for the purpose of determining whether there is evidentiary support for the complaint" (*Tsimerman v Janoff*, 40 AD3d 242, 242 [2007]). In addition, the 22-year-old certificate of occupancy does not

conclusively prove how many apartments were in the building when plaintiff tried to rent in it.

We also note that an addition to the record indicates that, after this appeal was filed, the motion court granted plaintiff leave to amend the complaint to add Travin as a defendant and assert direct claims against her; thus, this appeal may be premature.

We have examined OBRC's additional claims and find them without merit.

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

ENTERED: APRIL 5, 2012

CLERK

Tom, J.P., Catterson, Renwick, Richter, JJ.

7270-
7270A Index 108013/07

James Gregware, et al.,
Plaintiffs,

-against-

The City of New York,
Defendant,

Burtis Construction, Co., Inc.,
Defendant-Appellant,

MD K. Hasan, et al.,
Defendants-Respondents.

Baxter Smith & Shapiro, P.C., White Plains (Sim R. Shapiro of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for MD K. Hasan and Dochenka Taxi, Inc., respondents.

Gannon, Lawrence & Rosenfarb, New York (Lisa L. Gokhulsingh of counsel), for Albahri respondents.

DeSena & Sweeney, LLP, Hauppauge (Shawn P. O'Shaughnessy of counsel), for Romulo Romero-Valerezo and Juan Romero, respondents.

Orders, Supreme Court, New York County (George J. Silver, J.), entered January 20, 2011, which granted defendants Romero-Valerezo and Romero's, Hasan and Dochenka Taxi's, and Ahmad Albahri and Omar Albahri's motions for summary judgment dismissing the complaint and all cross claims against them,

unanimously affirmed, without costs.

Following a three-car collision on the West Side Highway, plaintiff's vehicle collided with one of the stopped cars. The impact of this collision was slight, and he was not injured. He exited his car to check on the passengers in the other car. After learning that they were uninjured, he returned to his car, retrieved his insurance information, and exited his car a second time. At that moment, a car driven by defendant DaSilva rear-ended plaintiff's car, which struck and injured plaintiff.

Defendant Burtis Construction Co. did not oppose Romero and Romero-Valerezo's and Hasan and Dochenka Taxi's motions, and therefore may not appeal from the order that decided them (*see Tortorello v Carlin*, 260 AD2d 201, 205 [1999]). In any event, the drivers of the cars that were involved in the initial accident did not cause DaSilva to hit plaintiff; they "did nothing more than furnish the condition or give rise to the

occasion by which the injury was made possible and which was brought about by the intervention of a new, independent and efficient cause" (*Barnes v Fix*, 63 AD3d 1515, 1516 [2009], *lv denied* 13 NY3d 716 [2010] [internal quotation marks omitted]).

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

ENTERED: APRIL 5, 2012

CLERK

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

7290 The People of the State of New York, Ind. 4656/07
Respondent,

-against-

Darrell Kinard,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (David J. Klem of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Jenetha G. Philbert of counsel), for respondent.

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Judgment, Supreme Court, New York County (Barbara F. Newman, J.), rendered June 29, 2010, as amended July 21, 2010, convicting defendant, upon his plea of guilty, of criminal sexual act in the first degree, and sentencing him to a term of five years, unanimously affirmed.

The court properly denied defendant's motion to withdraw his guilty plea. "When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry rest[s] largely in the discretion of the Judge to whom the motion is made and a hearing will be granted only in rare instances" (*People v Brown*, 14 NY3d 113, 116 [2010] [internal quotation marks omitted]). Defendant received a full opportunity to present his arguments, which were properly rejected by the court (*see People v*

Frederick, 45 NY2d 520 [1978]). Defendant was represented by new counsel, who made a written plea withdrawal motion. Neither defendant nor his counsel sought to amplify the written submissions, and no hearing was requested.

The record establishes the voluntariness of the plea. Defendant did not substantiate his claims that his plea was involuntary or that the attorney who represented him at the time of the plea rendered ineffective assistance. To the extent the record permits review, we find that defendant received effective assistance in connection with his plea (*see People v Ford*, 86 NY2d 397, 404 [1995]; *see also Hill v Lockhart*, 474 US 52, 59 [1985]).

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

ENTERED: APRIL 5, 2012

CLERK

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

7292 Mannuccio Mannucci, M.D., et al.,
Plaintiffs-Appellants,

-against-

The Missionary Sisters of the Sacred Heart of Jesus,
Defendant-Respondent.

Index 602284/08

Paduano & Weintraub LLP, New York (Katherine B. Harrison of counsel), for appellants.

Klestadt & Winters, LLP, New York (Sean C. Southard of counsel), for respondent.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered January 5, 2011, which, to the extent appealed from, granted defendant's motion to dismiss the amended complaint without prejudice and with leave to replead, unanimously affirmed, without costs.

Plaintiffs' claims against defendant are based solely on the theory that defendant is the alter ego of nonparty Cabrini Medical Center. Accordingly, Cabrini is a necessary party to this action (*see Stewart Tenants Corp. v Square Indus.*, 269 AD2d 246, 248 [2000]). Although the motion court did not consider whether the action should proceed without Cabrini pursuant to CPLR 1001(b), the matter need not be remanded (*cf. Matter of Red*

Hook/Gowanus Chamber of Commerce v New York City Bd. of Stds. & Appeals, 5 NY3d 452, 462 [2005]). Indeed, because Cabrini has filed for bankruptcy protection and plaintiffs have not obtained relief from the automatic stay, the alter ego claims must be dismissed (*see St. Paul Fire & Mar. Ins. Co. v PepsiCo, Inc.*, 884 F2d 688, 701-704 [1989]; *Corman v LaFountain*, 38 AD3d 706, 708 [2007]).

We have considered plaintiffs' remaining contentions and find them unavailing.

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

ENTERED: APRIL 5, 2012

CLERK

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

7293 In re Probate Proceeding, Will of Rosalin E. Melnick, Deceased. File No. 1814/10

- - - - -

Ken Miller, et al.,
Petitioners-Appellants,

-against-

Steven Melnick,
Objectant-Respondent,

Ann Canavan, et al.,
Additional Objectants.

Lebensfeld Borker Sussman & Sharon LLP, Mount Vernon (Alan M. Lebensfeld of counsel), for appellants.

Law Offices of Thomas Sciacca, PLLC, New York (Thomas Sciacca of counsel), for Respondent.

Order, Surrogate's Court, New York County (Nora S. Anderson, S.), entered October 28, 2011, which, to the extent appealed from as limited by the briefs, denied petitioners' motion for summary judgment seeking dismissal of the objections to probate filed by objectant, Steven Melnick, and for sanctions against objectant, unanimously affirmed, without costs.

The "plain language" of the release does not support petitioners' assertion of a waiver by objectant of his statutory right to file objections. Contrary to petitioners' contention, there is no evidence of a clear and unambiguous waiver of

objectant's right to file objections to the propounded will, as is required to establish relinquishment of a legal right (*see Matter of Germans*, 74 AD3d 636, 637 [2010]; *Ring v Printmaking Workshop, Inc.*, 70 AD3d 480 [2010]). The language of the release clearly imposes two conditions on the release by using the word "if," meaning there is no release unless it is established that: (1) the propounded will is decedent's valid will; and (2) a valid will limits objectant's total inheritance to $35,000. The Surrogate correctly held that petitioners failed to establish that the first condition was satisfied, thereby warranting denial of their motion for summary judgment. Furthermore, the Surrogate correctly determined that even "assuming arguendo that there is here some ambiguity to be resolved," such ambiguity must be construed against the drafter, i.e., petitioners' counsel (*see Macquarie Holdings [USA] Inc. v Song*, 82 AD3d 566, 567 [2011]).

It is true that, assuming the propounded will is a valid will, EPTL 2-1.5 would preclude objectant from sharing in the distribution of the estate, as the advancements he has already received from the decedent would equal decedent's bequest to objectant (EPTL 2-1.5[c]). However, the question of whether the propounded will is valid is the very subject of this probate proceeding. Nothing in the statute mandates that by accepting an

advancement, the legatee necessarily has relinquished his statutory right to file objections to a propounded will.

Petitioners' reliance on *Matter of Cook's Will* [244 NY 63 [1926]), is misplaced. In that case, decedents' heirs and next of kin were not permitted to contest her will, as in connection with receiving advancements from the testator during her lifetime, they explicitly agreed in writing not to contest the will (*id.* at 66-67). Those agreements did not contain the conditional "if" language of the subject release, which, at the very least, created ambiguity regarding whether objectant agreed not to contest the propounded will on SCPA 1410 grounds. Although "a person who prospectively waives all interest in a future estate . . . may not file objections to the probate of the will," any such waiver "must be clear and unequivocal" and "such waivers are to be narrowly interpreted" (*Estate of Mimoun*, 2008 NY Misc LEXIS 6035, *4 [2008]).

The court's denial of sanctions was not an improvident exercise of its discretion (22 NYCRR 130). In light of the foregoing, petitioners request for costs for the appeal is denied.

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

ENTERED: APRIL 5, 2012

CLERK

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

7294-
7295 In re Carl J., and Others,

Dependent Children Under
Eighteen Years of Age, etc.,

Carl J., Sr.,
Respondent-Appellant,

Administration for Children's
Services,
Petitioner-Respondent.

Howard M. Simms, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo of counsel), for respondent.

Appeals from order, Family Court, New York County (Susan K. Knipps, J.), entered on or about March 27, 2009, which, after a hearing, denied respondent father's application for the return of four of the subject children to his care pending a final order of disposition, and order of disposition, same court and Judge, entered on or about April 29, 2010, which, upon a fact-finding determination that respondent had neglected the subject children, placed them in the custody of the Commissioner of Social Services until completion of the next permanency hearing scheduled for September 20, 2010, and ordered that the Commissioner of Social Services could only discharge the children to the father's

custody on a trial basis upon the occurrence of specified events and conditions, unanimously dismissed, without costs, as moot.

Respondent's arguments regarding the denial of his application pursuant to Family Court Act § 1028 were rendered moot by the subsequent finding of neglect upon respondent's consent, and by the return of the subject children to respondent on a trial basis pursuant to the conditions set forth in the dispositional order, which ensured a smooth transition without further trauma to the children as well as compliance by respondent with the agency service plan (*see Matter of Javier R.* [Robert R.], 43 AD3d 1 [2007]). The challenge to the dispositional order has been rendered moot by the expiration of the terms of that order and the final discharge of the subject children to respondent (*see Matter of Sephaniah A.*, 45 AD3d 386, 386 [2007]). In any event, respondent's arguments are

unavailing, as the court's determinations are supported by the record.

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

ENTERED: APRIL 5, 2012

CLERK

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

7298 The People of the State of New York, Ind. 806/05
Respondent,

-against-

Perry McDowell,
Defendant-Appellant.

_____

Cardozo Appeals Clinic, New York (Stanley Neustadter of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (John Cataldo, J.), rendered April 27, 2006, as amended May 26, 2006, convicting defendant, after a jury trial, of rape in the second and third degrees and sexual abuse in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 3½ to 7 years, unanimously affirmed.

Defendant's legal sufficiency arguments are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find that the verdict was supported by legally sufficient evidence. We further find that 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. Although the

victim was mentally incapacitated, she was able to describe conduct by defendant constituting penetration (*see* Penal Law § 130.00[1]). There was ample evidence satisfying the corroboration requirement set forth in Penal Law § 130.16 that applies where lack of consent results from incapacity (*see e.g. People v Novak*, 212 AD2d 740, 741 [1995], *lv denied* 85 NY2d 941 [1995]).

The court providently exercised its discretion in determining that the probative value of the challenged testimony by the victim's mother and teacher was not outweighed by the potential for prejudice or the arousal of sympathy. Their testimony about the victim's mental and physical disabilities was highly relevant to assist the jury in evaluating the victim's testimony (*see People v Parks*, 41 NY2d 36, 47 [1976]). The court also properly permitted the mother to testify about family

background matters that were relevant to complete the narrative of events and provide context for other testimony *(see e.g. People v Milhouse*, 246 AD2d 119, 122 [1998]).

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

ENTERED: APRIL 5, 2012

CLERK

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

7299 Sean Reeps, etc., Index 100725/08
Plaintiff-Respondent,

–against–

BMW of North America, LLC.,
et al.,
Defendants-Appellants.

Biedermann Hoenig Semprevivo, P.C., New York (Peter W. Beadle of counsel), for BMW appellants.

Brill & Associates, P.C., New York (Corey M. Reichardt of counsel), for Hassel Motors, Inc., appellant.

Lawrence, Worden, Rainis & Bard, P.C., Melville (Leslie McHugh of counsel), for Martin Motor Sales, Inc., appellant.

Levy Phillips & Konigsberg, LLP, New York (Victoria E. Phillips of counsel), for respondent.

Order, Supreme Court, New York County (Louis B. York, J.), entered July 19, 2011, which, insofar as appealed from, denied defendants' respective motions for summary judgment dismissing the complaint as against them, unanimously modified, on the law, to grant Hassel Motors Inc.'s motion as to the strict products liability and breach of warranty claims, and otherwise affirmed, without costs.

Plaintiff alleges that he was injured in utero as a result of his mother's inhalation of gasoline fumes in a BMW automobile

with a defective, i.e., split, fuel hose. Defendants contend that plaintiff's parents' failure to preserve the vehicle warrants dismissal of the complaint. However, they failed to demonstrate that the parents disposed of the vehicle with knowledge of its potential evidentiary value (*see Shapiro v Boulevard Hous. Corp.*, 70 AD3d 474, 476 [2010]; *Burch v New York City Hous. Auth.*, 72 AD3d 551 [2010]). Moreover, in view of other existing evidence, including BMW's recall bulletin and Hassel's service records for the relevant period, the loss of the opportunity to inspect the vehicle did not deprive defendants of the means of establishing their defense against the allegations that the BMW defendants (BMW) negligently manufactured the vehicle and that Hassel negligently serviced it.

We find, contrary to the motion court, that BMW established prima facie that the vehicle was not defective and that plaintiff's injuries are not attributable to a product defect, by submitting an expert affidavit stating that the vehicle's fuel system was state of the art for vehicles of its class on the market at the relevant time, that the vehicle was designed with features that minimized the passage of fuel vapors directly from the engine compartment to the passenger cabin, and that the vehicle was built in accordance with industry standards (*see*

Boyle v City of New York, 79 AD3d 664 [2010]). However, plaintiff met her burden of submitting evidence that raised the inference that the fuel hose, as designed, was not reasonably safe, and that excluded all other possible causes of the defective condition of the fuel hose, including road debris, rodents, and negligent inspection (*see Speller v Sears, Roebuck & Co.*, 100 NY2d 38, 41 [2003]).

Hassel established, and plaintiff does not dispute, that it did not design, manufacture, distribute or sell the vehicle, and therefore that the product liability and breach of express and implied warranties claims should be dismissed as against it (*see Sukljian v Ross & Son Co.*, 69 NY2d 89, 95 [1986]). Contrary to its contention, the defense of laches is unavailable to Hassel since this is an action at law, in which no form of equitable relief is sought, and was commenced within the applicable statutory limitations period (*see Republic Ins. Co. v Real Dev. Co.*, 161 AD2d 189, 190 [1990]; *see also* CPLR 208).

Martin's motion for leave to serve a late cross motion for summary judgment was unsupported by a showing of "good cause" for

the delay in making the motion and emphasized only the lack of prejudice to the other parties (CPLR 3212[a]; *see Brill v City of New York*, 2 NY3d 648, 652 [2004]).

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

ENTERED: APRIL 5, 2012

CLERK

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

7300 Robert M. Ginsberg, Index 101331/11
Plaintiff-Appellant,

-against-

Alvin H. Broome,
Defendant-Respondent.

Ginsberg & Wolf, P.C., New York (Robert M. Ginsberg of counsel), for appellant.

Alvin H. Broome & Associates, P.C., New York (Alvin H. Broome of counsel), for respondent.

Order, Supreme Court, New York County (Donna M. Mills, J.), entered October 24, 2011, which granted so much of defendant's motion as sought to dismiss the second, third, fourth and fifth causes of action, and awarded costs to defendant pursuant to 22 NYCRR 130-1.1(c), unanimously affirmed, with costs.

The second cause of action lacks a theory of recovery. The third cause of action is expressly founded on the parties' partnership agreement, which negates plaintiff's factual allegations and establishes a defense to his claims as a matter of law (*see e.g. Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1999], *affd* 94 NY2d 659 [2000]; *US Express Leasing, Inc. v Elite Technology (NY), Inc.*, 87 AD3d 494 [2011]). The fourth and fifth causes of action, which sound in defamation, are not

pleaded with sufficient particularity (*see* CPLR 3016[a]; *Manas v VMS Assoc., LLC*, 53 AD3d 451, 454-455 [2008]). Indeed, conceding the insufficiency, plaintiff seeks, for the first time on appeal, to recast these causes of action as claims for breach of fiduciary duty with malicious intendment. This argument is unavailing as well as unpreserved. The fourth cause of action alleges that defendant falsely reported that plaintiff engaged in malpractice. However, plaintiff acknowledged that the partnership had a duty to report potential malpractice, that the malpractice likely occurred on two of the three reported occasions, and that one instance of malpractice was correctly attributed to him. The fifth cause of action alleges that defendant disseminated false information about plaintiff in the legal community, harming plaintiff's "new firm." The reference to a "new" firm suggests that defendant was no longer plaintiff's

partner at the time, which undermines the claim that he breached any fiduciary duty to plaintiff.

We see no basis for disturbing the award of costs to defendant.

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

ENTERED: APRIL 5, 2012

CLERK

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

7301- Ind. 4218/08
7301A- 1272N/09
7301B The People of the State of New York, 704/09
Respondent,

-against-

Anthony Shimukonas,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

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

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Ruth Pickholz, J.), rendered on or about May 5, 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 judgments so appealed from be and the same are hereby affirmed.

ENTERED: APRIL 5, 2012

CLERK

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

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

7302 In re Final Accounting of Leonard B. Boehner, et al., as Executors of the Estate of E. MacGregor Strauss, Deceased Trustee of a Trust Created Under Deed of Trust Dated October 5, 1957, Made by Anne Archbold, etc. Index 5101/89

- - - - -

Leonard Boehner, et al.,
Petitioners-Appellants,

-against-

Lydia Delaunay,
Respondent-Respondent,

Bank of New York Mellon,
Respondent,

Armar Strauss,
Interested Party.

_____

Morris & McVeigh LLP, New York (Leonard B. Boehner of counsel), for appellants.

Davidson, Dawson & Clark LLP, New York (Jayne M. Kurzman and Barbara L. MacGrady of counsel), for Lydia Delaunay, respondent.

_____

Order, Surrogate's Court, New York County (Nora S. Anderson, S.), entered on or about April 21, 2011, which denied petitioners' motion for summary judgment seeking a determination that the two adopted children of E. MacGregor Strauss (MacGregor), deceased, are the sole remainder beneficiaries of a trust created for MacGregor from a share of a trust created by

MacGregor's grandmother, Anne Archbold, unanimously affirmed, without costs.

On October 5, 1957, Anne Archbold created an irrevocable trust for the lifetime benefit of her daughter Lydia A. Foote. The trust provided that, upon the death of Foote, the principal of the trust would be divided into equal shares for each of Foote's children. The trustees would "continue to have and to hold" those shares for the life of each of those children, paying the net income of the secondary trusts to each child. Upon the death of one of the Foote children, "the trustee [wa]s directed to divide, distribute, and pay over the principal of the trust to the descendants of such child." If the child had no living descendants, the trustee was to pay over "the principal of the trust" to Foote's then living descendants, per stirpes.

On November 18, 1988, Foote died. By decree of the Surrogate's Court, New York County, dated January 24, 1990, the Surrogate approved and confirmed the division of the principal of the trust into three separate trusts, one for each of the children of Foote, that is, decedent MacGregor, respondent Lydia Delaunay, and interested party Armar Strauss. Delaunay has biological issue, MacGregor and Armar do not. In 1984, MacGregor married a widow who had two children, both of whom resided with

MacGregor throughout their childhood. In 2005, MacGregor adopted both children, who were then 31 and 29 years old. He died on January 28, 2008, survived by his wife and two adopted children.

Surrogate's Court correctly determined that the "precautionary addendum" in former Domestic Relations Law § 117, which was repealed in 1964, and which prohibits adopted children from defeating the rights of remainder beneficiaries where the adoptive parent dies without biological children (*see Matter of Park*, 15 NY2d 413, 416 [1965]), applies to the deed creating the trust that became irrevocable upon execution in 1957 and to the distributions contained within the deed of trust (*see* Domestic Relations Law § 117[3]). Surrogate's Court also correctly determined that, under the precautionary addendum, MacGregor's adopted children cannot inherit as sole remaindermen, since this would improperly defeat and cut off the rights of the contingent remaindermen, that is, the living descendants of Foote (*see Matter of Leask*, 197 NY 193 [1910]). However, while the precautionary amendment prevents MacGregor's adopted children from jointly receiving the entire remainder of MacGregor's trust, to the exclusion of the contingent remaindermen, it does not apply to prevent them, as descendants of Foote, from sharing in that contingent distribution with the other contingent

remaindermen. Indeed, their adoption merely brought them into that existing class of beneficiaries (i.e., the descendants of Foote); it did not completely cut off the rights of the other remaindermen (*see Matter of Silberman*, 23 NY2d 98 [1968]). Thus, Surrogate Court's correctly found that the trust remainder should be distributed one-third to Armar, one-third to Delaunay, and one-third, in equal shares, to MacGregor's adopted children.

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

ENTERED: APRIL 5, 2012

CLERK

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

7303 Josephson LLC, doing business as The Moinian Group, et al., Plaintiffs-Respondents,

-against-

Column Financial, Inc., et al., Defendants-Appellants,

Rubicon Finance America LLC, et al., Defendants.

Index 603872/09

Cadwalader, Wickersham & Taft LLP, New York (Jason M. Halper of counsel), for appellants.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about January 5, 2011, which denied defendants Column Financial, Inc. and Credit Suisse Securities (USA) LLC's motion for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendants contend that the breach of contract cause of action should be dismissed because the subject contract expressly prohibits oral modifications and the alleged oral agreement is barred by the Statute of Frauds (*see* General Obligations Law § 15-301). Plaintiffs failed to raise an issue of fact whether

there was a partial performance of the contract that would permit enforcement of the oral modification (*see F. Garofalo Elec. Co. v New York Univ.*, 270 AD2d 76, 80-81 [2000], *lv dismissed* 95 NY2d 825 [2000]). The act they identify as partial performance, i.e., the delivery of the purchase price to the title company, is not "unequivocally referable" to the oral modification; it can also reasonably be regarded as preparatory to performing the contract (*see e.g. Merrill Lynch Interfunding, Inc. v Argenti*, 155 F3d 113, 122-123 [1998]). Further, the record demonstrates that the parties did not agree on all the material terms of the alleged oral agreement. The deposition testimony upon which plaintiffs rely reflects a mere agreement to agree (*see e.g. Meyers Assoc., L.P. v Conolog Corp.*, 61 AD3d 547 [2009]).

Plaintiffs abandoned their remaining claims by failing to oppose the parts of defendants' motion that sought summary judgment dismissing those claims.

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

ENTERED: APRIL 5, 2012

CLERK

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

7304 The People of the State of New York, Ind. 4648/09
Respondent,

-against-

Dwayne Tyler,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Kerry S. Jamieson of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

Judgment, Supreme Court, New York County (Ruth Pickholz, J. at suppression hearing; Richard D. Carruthers, J. at plea and sentencing), rendered May 20, 2010, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of two years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations. There was probable cause for defendant's arrest (*see generally People v Bigelow*, 66 NY2d 417, 423 [1985]). Defendant met a very detailed description of a person who sold

drugs to an undercover officer, and defendant appeared at the prearranged time and place of a prospective drug sale that was clearly linked to the completed sale. The brief detention by the police of another suspect was satisfactorily explained.

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

ENTERED: APRIL 5, 2012

CLERK

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

7305 Fred Vays, etc., Index 400833/08
Plaintiff-Respondent-Appellant,

-against-

139 Emerson Place,
Defendant-Respondent,

970 Kent Avenue Associates, LLC, et al.,
Defendants,

Sycamore Development Group, LLC, et al.,
Defendants-Appellants-Respondents.

_____

Melvin S. Hirshowitz, New York, for appellants-respondents and respondent.

Goldberg & Rimberg PLLC, New York (Brad Coven of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered January 25, 2011, which, insofar as appealed from, granted plaintiff's motion for leave to amend the complaint to add a proposed fourth cause of action for restitution/unjust enrichment, and otherwise denied the motion, and denied defendants-appellants' cross motion for summary judgment dismissing the complaint as against them, unanimously affirmed, with costs.

As is relevant to the instant motion and cross motion, the individual litigants, plaintiff Fred Vays and defendants George

Dellapa and Elissa Winzelberg, are equal shareholders in corporate co-defendants 139 Emerson Place, LLC (Emerson) and Sycamore Development Group, LLC (Sycamore). Emerson was formed to develop, own and operate a residential apartment building, located at 139 Emerson Place, in Brooklyn. At about the same time, the individual parties also formed Sycamore for the purpose of engaging in future real estate development projects, and signed an operating agreement (Sycamore operating agreement), pursuant to which the consent of all three members was required to authorize Sycamore's involvement in any such development project.

Plaintiff alleges that defendants Dellapa and Winzelberg attempted to use Sycamore to acquire an interest in another residential building, located at 970 Kent Avenue, in Brooklyn, and thereafter transferred that interest to co-defendant Sycamore Kent Group, LLC (Sycamore Kent), without plaintiff's knowledge or consent, in breach of the Sycamore operating agreement.

In a previous order, which was not appealed, the motion court determined that defendants' alleged use of Sycamore to acquire an interest in the Kent property, and its later transfer of that interest, were legally void (*Vays v 139 Emerson Place LLC*, 2010 NY Slip Op 30379[U] [Sup Ct, NY County 2010]; citing

TIC Holdings v HR Software Acquisition Group, 194 Misc 2d 106 [Sup Ct, NY Cty 2002], *affd* 301 AD2d 414 [2003]). The record contains evidence that defendants initiated both of those transactions, and that the latter transaction occurred less than six years before the commencement of this action. Thus, plaintiff's first and second causes of action, for an accounting and breach of contract, respectively, are not barred by the applicable six-year statute of limitations (*see Airco Alloys Div. v Niagara Mohawk Power Corp.*, 76 AD2d 68 [1980]; *see also Bischoff v Boar's Head Provisions Co., Inc.*, 38 AD3d 440 [2007]).

Moreover, on this record, factual issues exist with respect to the issue of damages which warrant that this case proceed to trial (*see e.g. Najjar Indus. v City of New York*, 87 AD2d 329 [1982], *affd* 68 NY2d 943 [1986]).

With respect to plaintiff's motion for leave to file an amended complaint, the court correctly determined that, with respect to plaintiff's proposed third cause of action, the entity upon which plaintiff seeks to impose a constructive trust, Emerson, was unrelated to the instant dispute, and that three of four factors relevant to a finding of a constructive trust (i.e., a promise, a transfer in reliance thereon, and unjust enrichment) are not alleged in the instant case (*Simonds v Simonds*, 45 NY2d

233, 241-242 [1978]).

With respect to plaintiff’s proposed fifth cause of action for restitution, plaintiff failed to show that defendants were unjustly enriched with respect to their alleged actions in connection with Emerson (*see* 22 NY Jur2d Contracts § 74; *see also Unisys Corp. v Hercules Inc.*, 224 AD2d 365, 367 [1996]).

In addition, with respect to plaintiff’s sixth cause of action, plaintiff failed to state a claim for fraudulent concealment, in that the 2001 contract and deed by which the Kent property was purchased, using Sycamore's name, were contemporaneously recorded and were thus available for public inspection in 2001 (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 63 AD3d 583, 586 [2009]).

With respect to plaintiff’s proposed fourth cause of action for unjust enrichment, under these circumstances and in light of the court’s determination that the October 18, 2001 transfer, and defendants’ attempt to have Sycamore obtain an interest in the Kent property were void ab initio, plaintiff is permitted to proceed on this alternative theory in the event recovery is

unavailable under his breach of contract claim (*see Jeremy's Ale House Also, Inc. v Joselyn Luchnik Irrevocable Trust*, 22 AD3d 6 [2005]).

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

ENTERED: APRIL 5, 2012

CLERK

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

7309N Gil Zinger, Index 115572/09
Plaintiff-Appellant,

-against-

Service Center of New York, Inc.,
doing business as Bubu Carpet,
et al.,
Defendants-Respondents.

Hunton & Williams LLP, New York (Stephen R. Blacklocks of counsel), for appellant.

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered August 5, 2011, which, to the extent appealed from, in this action seeking recovery for services rendered, denied plaintiff's motion to compel production of responses to certain interrogatories and document requests, unanimously modified, on the law and the facts, to the extent of compelling disclosure of document requests numbered 1 and 2 and interrogatories numbered 1 and 2, limited to the period of September 30, 2003 to March 21, 2006, and otherwise affirmed, without costs.

Plaintiff's requests for vehicular insurance policies and governmental filings were irrelevant to his alter-ego claim against the individually named defendant. However, the requests concerning the corporate defendant's bank accounts and credit

cards seek documents and information of the type that would yield evidence of misuse of the corporate form (*see e.g. Horizon Inc. v Wolkowicki*, 55 AD3d 337 [2008]). Accordingly, we find that such records and information, to the extent limited to the period of plaintiff's employment plus one year, are "material and necessary" for the prosecution of the action (CPLR 3101[a]).

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

ENTERED: APRIL 5, 2012

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

6227 Richard Feiner and Company Inc., Index 110756/09
Plaintiff-Respondent,

-against-

Paramount Pictures Corporation,
Defendant-Appellant.

_____

Davis Wright Tremaine LLP, New York (Edward J. Davis of counsel), for appellant.

Gregory A. Sioris, New York, for respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered April 15, 2011, reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants, dismissing the complaint.

Opinion by Renwick, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli J.P.
David Friedman
James M. Catterson
Dianne T. Renwick
Leland G. DeGrasse, JJ.

6227
Index 110756/09

_____x

Richard Feiner and Company Inc.,
Plaintiff-Respondent,

-against-

Paramount Pictures Corporation,
Defendant-Appellant.

_____x

Defendant appeals from an order of the Supreme Court, New York County (Paul Wooten, J.), entered April 15, 2011, which, insofar as appealed from, denied their motion for summary judgment dismissing the complaint based on documentary evidence.

Davis Wright Tremaine LLP, New York (Edward J. Davis, Marcia B. Paul and Elisa L. Miller of counsel), for appellant.

Gregory A. Sioris, New York, for respondent.

RENWICK, J.

In this action we are asked to interpret a 1986 contract under which defendant's predecessor in interest purchased the rights to exploit 17 feature-length motion pictures produced in the 1940s and 1950s by Warner Brothers. On the one hand, defendant Paramount Pictures Corporation asks us to interpret the contract broadly as to permit defendant to exploit the 17 pictures through national cable deals. On the other hand, plaintiff Richard Feiner and Company Inc. asks us to interpret the contract narrowly to reserve to plaintiff, as the grantor, the exclusive right to exploit the 17 pictures in certain important local markets such as New York City. Applying cardinal principles governing the construction of contracts, namely that a written contract will be read as a whole and every part will be interpreted with respect to the whole, we reject plaintiff's interpretation of the contract and dismiss the complaint.

Plaintiff trades in the motion picture and television industries, including the production and licensing of movies. On September 17, 1986, plaintiff and Republic Pictures Corp. entered into an agreement for the sale of plaintiff's "rights, and interest of every kind, nature, and description throughout the Universe" in 17 pictures, including all copyrights, renewals and extensions of copyrights (the agreement) for $2,475,000. The 17

pictures are: Blood on the Sun, Bugles in the Afternoon, Johnny Come Lately, Kiss Tomorrow Goodbye, Mission in Morocco, Only the Valiant, Blowing Wild, Cloak and Dagger, Court Martial of Billy Mitchell, Distant Drums, The Enforcer, Marjorie Morningstar, My Girl Tisa, Pursued, Retreat, Hell!, South of St. Louis, and Three Secrets.

Defendant's rights in perpetuity with regard to the 17 pictures are listed in section 1(a) of the agreement, which provides as follows:

> "Subject to paragraphs 2 and 5 below, Seller [Feiner] hereby sells, grants, assigns and sets over to Purchaser [now Paramount], its licensees, successors and assigns, in perpetuity all of Seller's rights, and interest of every kind, nature, and description throughout the Universe (whether or not such rights, title or interest is now known, recognized or contemplated), if any, and the following "Elements" (hereinafter called "the Grant"): . . . (ii) all physical properties and property rights pertaining to each and every Picture; . . . (viii) all rights and property of every kind and nature belonging or pertaining to all of the foregoing, both tangible and intangible, including, but not limited to all copyrights, renewals and extensions of copyrights thereto, and to each and every part thereof."

Paragraph 2 of the agreement provides that the "foregoing Grant" was subject to certain retained rights. First, paragraph 2(a) provides that plaintiff retained all its rights in certain preexisting licenses "pertaining to exploitation of the

Pictures," which plaintiff or its predecessor had granted to local broadcast television stations as licensees:

> "(a) The Grant is subject to certain licenses pertaining to exploitation of the Pictures in existence as of January 1, 1986 between Seller [Feiner Co.] (or certain predecessors of Seller) and third parties (the 'Licenses') specified on Exhibit B annexed hereto. Seller retains all rights in and to such Licenses and all proceeds therefrom (subject to paragraph 3(a)(xiv) below) except that upon the expiration or sooner termination of any License, all rights granted thereunder shall revert to Purchaser including, without limitation, all rights to and rights of access to, any Film Materials subject to any such expired or terminated License."

The markets in which the licensees under the local Licenses operated were as follows: Altoona, Atlanta, Binghamton, Boston, Buffalo, Chicago, Cincinnati, Columbus, Cleveland, Dayton, Detroit, Fresno, Hartford-New Haven, Indianapolis, Los Angeles, Milwaukee, New York City, Philadelphia, Lebanon (PA), Toledo and Washington, D.C.

Second, pursuant to section 2(b)(vi) of the agreement, the grant of rights also excluded certain rights "reserved" by plaintiff, namely the right to exhibit, distribute and otherwise exploit the 17 pictures in certain languages in Germany, Austria, Switzerland, Lichtenstein, and Luxembourg. Likewise, section (2)(b) of the agreement provides that defendant "shall have no interest therein or claim thereon." No other geographic market

is reserved to plaintiff, in either Paragraph 2 or any other provision of the agreement.

Defendant and its predecessors have exploited the 17 pictures for approximately 25 years. On June 6, 2007, however, plaintiff filed a demand for mediation before the American Arbitration Association, claiming that defendant had breached the agreement by "exploiting" the pictures in "territories" which were reserved by plaintiff. In a separate agreement dated November 1, 2007, the parties agreed to waive the agreement's arbitration provision so as to allow plaintiff to pursue this action in a New York court.

A year-and-a-half later, in a complaint dated July 29, 2009, plaintiff alleges that, under the agreement, it retained rights in the Licenses which "concern exhibitions of the subject motion pictures on television . . . in the designated markets, with plaintiff never having alienated its retained rights in and to television exhibitions in those markets" reserved by plaintiff. Plaintiff alleges that, since on or before January 1, 2001, defendant, without plaintiff's consent and in violation of plaintiff's retained rights under the agreement, had either directly or through third parties, "commercially exhibited, continues to exhibit and likely will keep on exhibiting the seventeen motion pictures in the above markets without accounting

to plaintiff for their exhibitions or paying plaintiff a licensing fee for such exhibitions."

On or about May 14, 2010, defendant moved for summary judgment dismissing the complaint based on documentary evidence. In support, defendant submitted the affidavit of its Executive Vice President, Business and Legal Affairs, Mary Luppi Basich, who avers that she conducted and supervised a review of Paramount's records, and that her search revealed that Paramount had not collected any royalties, fees, payments or proceeds of any kind from the Licenses between June 6, 2001 and May 13, 2010.

Plaintiff cross-moved for summary judgment on its breach of contract claim.[1] In support of its motion, plaintiff submitted the affidavit of its president and majority shareholder, Richard Feiner, who asserts that approximately four or five years ago, he noticed that some of the pictures were being shown on television, which prompted him to conduct a search of television program guides and the Internet, which revealed that the pictures were being exhibited in cities nationwide. Feiner annexes a list showing the networks (including American Movie Classics and Turner Classic Movies) and broadcast playdates for some of the pictures between September 12, 2002 and December 14, 2006. He

[1] In the complaint, plaintiff also seeks an accounting.

avers that he knew from his experience in the industry that the pictures exhibited in New York were exhibited nationally, and "obviously are being shown in those cities whose markets my company has reserved rights under the licenses," many of which are reserved in perpetuity.

Feiner further claims that defendant had entered into two "deal memos," with nonparty Rainbow Media Holdings, Inc., dated March 20, 2001 and December 9, 2002, pursuant to which defendant charged fees ranging between $12,000 and $75,000 for exhibition of the pictures listed in the agreement. Feiner argues that the deal memos involved a license to exhibit the pictures, and that the territory for those licenses was the "fifty (50) United States of America." He also argues that the existence of the deal memos directly contradicts Basich's affidavit, in which she claims that defendant had not collected any royalties, fees, payments or proceeds of any kind from the Licenses during the six years preceding commencement of the action.

In opposition to plaintiff's cross motion, defendant submitted a second affidavit of Mary Luppi Basich, who avers that Paramount's entry into "certain national cable licenses to exhibit" the 17 pictures on cable television does not breach the agreement, because the agreement unambiguously provides that plaintiff "retained only the benefit of the performance of the

licensees under the Licenses" and "the resultant proceeds." Since defendant has received no royalties, fees or proceeds of any kind from the Licenses since at least June 2001, there could be no breach. She reiterates that her search of defendant's records revealed that Paramount had no record of any protest or complaint for breach by any licensees under the Licenses related to the national cable licenses.

In a decision and order dated April 15, 2011, the IAS court denied both motions. Preliminarily, the court found that defendant established its ownership of the 17 pictures and "its right to use the pictures." Nevertheless, the court found that summary judgment was precluded because the documentary evidence raised factual issues as to whether defendant's national cable licenses "involved proceeds or royalties paid to defendant for the exhibition of the pictures and whether those exhibitions constitute a breach of the local broadcast Licenses held by Feiner." Only defendant appeals, and we reverse for the reasons explained below.

The governing principles are familiar. On a motion to dismiss pursuant to CPLR 3211, the court may grant dismissal when "'documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law'" *(Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 571 [2005], quoting *Held*

v Kaufman, 91 NY2d 425, 430–431 [1998]). The initial question for the court on a motion for summary judgment with respect to a contract claim is "whether the contract is unambiguous with respect to the question disputed by the parties" *(International Multifoods Corp. v Commercial Union Ins. Co.*, 309 F3d 76, 83 [2d Cir 2002]). Of course, the matter of whether the contract is ambiguous is a question of law for the court *(Bailey v Fish & Neave*, 8 NY3d 523, 528 [2007]; *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]*; W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990].

On this appeal, plaintiff does not dispute defendant's claim that defendant has received no proceeds of any kind "pursuant to the local broadcast Licenses" during the limitations period applicable to plaintiff's claims. Instead, plaintiff claims that, under the agreement, it retained not only the rights in the pre-existing local Licenses and any proceeds derived therefrom, but also the exclusive right to exploit the pictures in the markets covered by those Licenses. Defendant, however, argues that plaintiff's breach of contract claim is contrary to the plain and unambiguous language of the agreement.

Where the parties dispute the meaning of particular contract clauses, the task of the court is to determine whether such clauses are ambiguous when "read in the context of the

entire agreement" (*W.W.W. Assoc.*, 77 NY2d at 163). Accordingly, the intention of the parties to a contract must be ascertained not from one provision but from the entire instrument (*Paige v Faure*, 229 NY 114, 118 [1920]*; Village of Hamburg v American Ref-Fuel Co. of Niagara,* 284 AD2d 85, 89 [2001], *lv denied* 97 NY2d 603 [2001]; *Readco, Inc. v Marine Midland Bank*, 81 F3d 295, 300 [2d Cir 1995]; *Hudson-Port Ewen Assoc. v Chien Kuo*, 78 NY2d 944, 945 [1991]).

In the present case, the contract, read as a whole to determine its purpose and intent (*see e.g. W.W.W. Assoc.,* 77 NY2d 157), plainly manifests the intention to grant defendant's predecessor the right to exploit the 17 pictures through national cable deals, unimpeded by the Licenses. As noted above, the operative language provides that the "seller sells, grants, assigns and sets over to purchaser . . . all of the seller's rights, and interest . . . throughout the Universe." This exclusive right to exploit the pictures worldwide was subject to certain expressed limitations. First, as delineated under Paragraph (2)(b), the worldwide grant excluded the rights retained by plaintiff to exploit the pictures in certain languages in a limited number of European national markets. Second, as delineated under Paragraph (2)(a), the worldwide grant was subject to certain licenses that plaintiff had granted to

certain local broadcast television stations for exclusive broadcast rights to the Pictures.

Contrary to plaintiff's allegations, we do not read the retained rights in the preexisting local Licenses as establishing the exclusive right to exploit the Pictures in the markets covered by those Licenses. On the contrary, a plain reading of Paragraph (2)(a) establishes that plaintiff retained only the benefit of the performance of the licenses, namely the proceeds, if any, defendants received as a result of the exploitations of the pictures by the local licenses. The agreement, on its face, does not manifestly reserve to plaintiff any right to exploit the pictures in the national cable markets, or to collect proceeds from defendant's exploitation of its rights in the 17 Pictures.

Indeed, a contrary reading would be inconsistent with Paragraph 2(a)'s reversion provision. That provision states that the rights under the Licenses "shall revert to the Purchaser" upon expiration or sooner termination of the Licenses. Thus, exhibition rights granted under the Licenses belong to either the licensee, while a License is in effect, or defendant, under the reversion clause. Either way, plaintiff itself has no exhibition rights in any U.S. market.

Further support for the plain reading of Paragraph (2)(a) emerges from the juxtaposition of Paragraph 2(a) with Paragraph

2(b). "'[s]ingle clauses cannot be construed by taking them out of their context and giving them an interpretation apart from the contract of which they are a part'"(*Analisa Salon, Ltd. v Elide Props., LLC,* 30 AD3d 448, 448–449 [2006], quoting *Aimco Chelsea Land v Bassey*, 6 AD3d 367, 368 [2004]). In Paragraph (2)(b), the agreement expressly reserved to plaintiff the right to exploit certain European markets. This demonstrates that when the parties exempted a market from the agreement's broad grant, they did so explicitly. Yet, the agreement contains no similar geographical exclusive right to exploit the 17 pictures in any U.S. market covered by those Licenses.

Finally, the plain reading of subparagraph 2(a) is also consistent with another provision in the agreement. Specifically, the agreement contains a Copyright Assignment, which was filed with the Copyright Office, that conveyed to Paramount's predecessor "all of [plaintiff's] rights, title and interest of every kind . . . in and to [the Pictures]" except for the so-called "Reserved Rights." The "Reserved Rights" in the Copyright Assignment are identical to those "reserved" in Paragraph 2(b) of the agreement itself (including the reservation of the European exhibition rights as described above). The Copyright Assignment makes no mention of exhibition rights in the domestic markets. Certainly, if the parties intended to

"reserve" exhibition rights in any U.S. market to plaintiff, they would have so stated in the publicly filed record of their copyright conveyance. Thus, the use of the word "solely" in paragraph 2(b)(vi) of the agreement, and the limited "Reserved Rights" noted in the Copyright Assignment, further confirm that the parties did not provide for the reservation of rights in any market other than the specified European territories.

Accordingly, the order of the Supreme Court, New York County (Paul Wooten, J.), entered April 15, 2011, which, insofar as appealed from, denied defendants' for summary judgment dismissing the complaint based on documentary evidence, should be reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants, dismissing the complaint.

All concur.

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

ENTERED: APRIL 5, 2012

CLERK

Friedman, J.P., Sweeny, Acosta, Renwick, Abdus-Salaam, JJ.

6520N-
6521N Village Center for Care, Index 651668/11
Plaintiff-Appellant,

-against-

Sligo Realty and Service Corp.,
Defendant-Respondent.

_____

Cutler Minikes & Adelman LLP, New York (Jonathan Z. Minikes of counsel), for appellant.

Novick, Edelstein, Lubell, Reisman, Wasserman & Leventhal, P.C., Yonkers (Gregory S. Bougopoulos of counsel), for respondent.

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Orders, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 20, 2011 and June 21, 2011, reversed, on the law, without costs, the motion granted and the action reinstated.

The Decision and Order of this Court entered herein on January 10, 2012 is hereby recalled and vacated.

Opinion by Acosta, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
John W. Sweeny, Jr.
Rolando T. Acosta
Dianne T. Renwick
Sheila Abdus-Salaam, JJ.

6520N-6521N
Index 651668/11

_____x

Village Center for Care,
Plaintiff-Appellant,

-against-

Sligo Realty and Service Corp.,
Defendant-Respondent.

_____x

Plaintiff appeals from orders of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 20, 2011 and June 21, 2011, which denied their motion for a *Yellowstone* injunction, and dismissed the action, respectively.

Cutler Minikes & Adelman LLP, New York (Jonathan Z. Minikes of counsel), for appellant.

Novick, Edelstein, Lubell, Reisman, Wasserman & Leventhal, P.C., Yonkers (Gregory S. Bougopoulos of counsel), for respondent.

ACOSTA, J.

In this appeal we reaffirm this Department's rule that where defaults are incapable of being cured within the time provided in the notice to cure, and all that the terms of the lease require from the tenant is commencement of diligent efforts to cure the defaults within the allotted time, service of a notice of termination does not necessarily bar subsequent *Yellowstone* injunctive relief.

In November 2000, plaintiff-tenant Village Center for Care leased the second floor at 534 Hudson Street, New York, New York from defendant-landlord Sligo Realty and Service Corp., as an office for its not-for-profit corporation, which provides community case management to disabled, geriatric and low income individuals. The lease term was for 15 years, 6 months and fifteen days, and tenant agreed to perform certain electrical, plumbing and HVAC work at the premises. This work was completed in or about 2001.

On March 28, 2011 landlord served tenant with a "10-day" notice to cure alleging that tenant violated the lease inasmuch as tenant failed to (a) obtain and/or furnish landlord with proof that the Landmarks Commission had signed off on the work performed by tenant at the premises, (b) provide a mechanical ventilation certificate, (c) furnish proof of the structural

stability of the work that was performed, and (d) provide proof of the sprinkler hydrostatic test. The Notice set forth a "cure date" of April 15, 2011.

In pertinent part, Paragraph 17 of the lease provides that:

> "If the Tenant defaults in fulfilling any of the covenants of this lease other than the covenants for the payment of rent or additional rent . . . upon Owner serving a written ten (10) days' notice upon Tenant specifying the nature of said default and upon the expiration of said ten (10) days, if Tenant shall have failed to comply with or remedy said default, *or if the said default or omission complained of shall be of a nature that the same cannot be completely cured or remedied within said ten (10) day period and if Tenant shall not have diligently commenced curing such default within such ten (10) day period, and shall not thereafter with reasonable diligence and in good faith, proceed to remedy or cure such default, then Owner may serve a written five (5) days' notice of cancellation of this lease upon Tenant* . . ." (emphasis added).

In response to the notice to cure, tenant annexed a Landmarks Preservation Commission permit, a technical report regarding the mechanical ventilation certificate, and OP-38 self certification of plumbing inspection conducted by the sprinkler contractor, the approved sprinkler system hydraulic analysis, and the work plans stamped approved by City of New York Department of Buildings.

Tenant received no response to its correspondence, but on

May 4, 2011 it was served with a notice of termination, which stated that the lease would be terminated as of May 16, 2011. Thereafter, the landlord agreed to an extension of the termination date to June 16, 2011. During this extension period, all defects were cured except the City's waiver of a further sprinkler hydrostatic test for the second floor premises. In order to obtain the waiver, tenant was obligated to provide the City with a copy of the building-wide hydrostatic test, and requested such from the landlord. Landlord, however, provided the tests of another tenant's demised space, but did not respond to tenant's further request for the building-wide test.

Thereafter, tenant sought a *Yellowstone* injunction arguing, among other things, that it had made immediate and diligent efforts to cure its default. Supreme Court denied *Yellowstone* relief because the application was untimely. According to the court, this Court's holding in *Becker Parkin Dental Supply Co. v 450 Westside Partners*, 284 AD2d 112 [2001], is no longer good law. In *Becker Parkin,* we held that *Yellowstone* relief is appropriate even where defaults in a notice to cure are not capable of being cured within the time provided in the notice as long as all the lease requires is that the tenant commence diligent efforts to cure the defaults within the allotted time (*id.*). We disagree that *Becker Parkin* is no longer good law, and

now reverse.

Yellowstone relief is available to protect against leasehold forfeiture, provided that the tenant has the ability to cure by means short of vacatur in the event the tenant is found to be in default of its obligations under a lease (*Post v 120 E. End Ave. Corp.*, 62 NY2d 19, 25 [1984]). This rationale is in line with this State's public policy against the forfeiture of leases (*see Sharp v Norwood*, 223 AD2d 6, 11 [1996], *affd* 89 NY2d 1068 [1997]). This disinclination against leasehold forfeitures serves to promote the economy and business in our City. In addition, it promotes beneficial services in circumstances such as those presented here, where tenant is a not-for-profit organization dedicated to providing community case management to disabled, geriatric and low income individuals. This public policy concern takes on greater weight when a tenant diligently and in good faith attempts to cure the defect, but through no inaction of its own, can not do so (*see Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 695 [1995] [equity may intervene to "relieve ( ) against . . . forfeitures of valuable lease terms when default in notice has not prejudiced the landlord"], quoting *Jones v Gianferante*, 305 NY 135, 138 [1953]; *J.N.A. Realty Corp. v Cross Bay Chelsea*, 42 NY2d 392, 397 [1977]; *Weissman v Adler*, 187 AD2d 647, 648 [1992]). The Court

of Appeals has acknowledged that courts routinely grant *Yellowstone* relief to reflect this State's policy against forfeiture, and courts have done so by accepting "far less than the normal showing required for preliminary injunctive relief" (*Post*, 62 NY2d at 25).

We previously held that where a notice of termination is premature under the terms of a lease, the notice is invalid, and thus the service of the notice will not bar a tenant from obtaining *Yellowstone* relief (*Empire State Bldg. Associates v Trump Empire State Partners*, 245 AD2d 225, 229 [1997]). That is, a default provision in a lease may provide, in addition to the specific number of days constituting a "cure period," for an unspecified longer period to cure. In such instances, we have held that where a tenant with good faith and diligence commences curing within the specified period of time, but cannot complete the cure within that period, the unspecified longer period provided for in the lease governs the applicable "cure period" (*see VB Mgt. v AD 1619 Co.*, 256 AD2d 84 [1998], *lv denied* 93 NY2d 810 [1999]).

In this case, the lease in question defined the cure period as 10 days, but also contains an unspecified longer period of cure "if the said default or omission complained of shall be of a nature that the same cannot be completely cured or remedied

within said ten (10) day period." It cannot be reasonably argued that tenant could have cured all the alleged defaults within 10 days, since the tenant needed to, among other things, schedule and complete a hydrostatic sprinkler test with the City of New York. While it is possible that tenant could have obtained a waiver within 10 days, that application required it to obtain the results of the building-wide hydrostatic test, which the landlord admits it failed to produce. Tenant commenced curing the violation within the 10 days by providing landlord with the documentation tenant believed would remedy its default, and it was error for Supreme Court to deny *Yellowstone* relief "since all that the lease terms require from the tenant is commencement of diligent efforts to cure the defaults within the allotted time" (*Becker Parkin*, 284 AD2d 112 [2001]).

Contrary to defendant's assertion, and Supreme Court's view, *Becker Parkin* is still good law in this Department. We note that *Becker Parkin* cited, with approval, to *Long Island Gynecological Services, P.C. v 1103 Stewart Ave. Associates Ltd. Partnership* (224 AD2d 591 [1996]), a Second Department case, where the lease provided for an unspecified longer cure term for defaults that could not be cured within the set period. The tenants in both *Becker Parkin* and *Long Island Gynecological* commenced diligent efforts to cure the default, but could not complete the cure

within the lease's specified 30 days. In both cases, *Yellowstone* relief was found to be timely.

The Second Department subsequently rejected *Long Island Gynecological* in *Korova Milk Bar of White Plains, Inc. v PRE Props, LLC* (70 AD3d 646 [2010]), and held that a tenant, such as tenant here, who did not file for *Yellowstone* relief within the cure period is forever barred from such relief, no matter what the provisions of the lease concerning defaults incapable of cure within the stated time and regardless of what efforts they had undertaken to effectuate the cure (*Korova Milk Bar*, 70 AD3d at 647-648).

The Second Department reiterated its abrogation of *Long Island Gynecological* in *Goldcrest Realty Co. v 61 Bronx Riv. Rd. Owners, Inc.* (83 AD3d 129 [2011]), and mistakenly asserted that this Department had also "rejected the argument that a *Yellowstone* motion brought after the expiration of the applicable cure period may be deemed timely as long as it is made before the lease in question is actually terminated" citing *KB Gallery, LLC v 875 W. 181 Owners Corp.* (76 AD3d 909 [2010]). This is incorrect. *KB Gallery* does not reject *Long Island Gynecological* and *Becker*, and in fact does not mention those decisions at all.

Although we cited the Second Department's *Korva* decision,

there is nothing in *KB Gallery* which indicates that we intended to overrule *Becker Parkin.* The issue of whether the notice of termination was valid under the lease's cure provision was not before this Court in *KB Gallery.* Rather, the issue was whether *Yellowstone* relief could be granted after service of a valid notice of termination, but before the lease has been "actually" terminated (*KB Gallery*, 76 AD3d 909). In this regard, the tenant in *KB Gallery* argued that it was actually not in default, not that its time to cure under the lease had not yet expired. In *Becker,* however, defaults in the notice were not capable of being cured within the time provided in the notice and we held, "Under these circumstances, all that the lease terms require from the tenant is commencement of diligent efforts to cure the defaults within the allotted time" (284 AD2d 112)

Here, the plain language of the lease similarly provides for a scenario where tenant may not be able to cure a defect within the 10 day period; landlord should be bound by the terms of the agreement (*see Empire State Building*, *supra*, 245 AD2d at 228 ("the existence of a period in which a violation may be cured *does not depend on the contents of the notice of default, but upon the terms of the lease"* (emphasis added).

Accordingly, orders of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 20, 2011 and June

21, 2011, which denied plaintiff tenant's motion for a *Yellowstone* injunction, and dismissed the action, respectively, should be reversed, on the law, without costs, the motion granted and the action reinstated.

The Decision and Order of this Court entered herein on January 10, 2012 is hereby recalled and vacated.

All concur.

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

ENTERED: APRIL 5, 2012

CLERK