SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 20, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

6076 Anna Konstantinov, etc., Index 114152/07
Petitioner-Appellant-Respondent,

-against-

Richard F. Daines, M.D., etc., et al.,
Respondents-Respondents-Appellants.

Bellin & Associates LLC, White Plains (Aytan Y. Bellin of counsel), for appellant-respondent.

Michael A. Cardozo, Corporation Counsel, New York (Norman Corenthal of counsel), for Richard F. Daines, respondent-appellant.

Eric T. Schneiderman, Attorney General, New York (Simon Heller of counsel), for Robert Doar, respondent-appellant.

Order and judgment (one paper), Supreme Court, New York County (Joan A. Madden, J.), entered July 29, 2010, dismissing the first, second, third and fourth causes of action, and, as to the fifth, sixth, seventh and eighth causes of action, directing respondents to draft and implement regulations that will outline the steps a Medicaid applicant must take to request immediate temporary personal care services, and that will provide for performance of an expedited assessment, including a physician's

assessment, social assessment and/or nursing assessment, and that thereafter, will provide for expedited review of the application for such services, and, once the procedure for obtaining immediate temporary personal care services is in place, to notify Medicaid applicants of the availability of this form of medical assistance, unanimously modified, on the law, to reinstate the first and second causes of action and to declare, upon those causes of action, that, pursuant to 42 USC § 1396a(a)(3), as further defined by 42 CFR 431.244(f), the final administrative action on a Medicaid claim must be taken within 90 days from the claimant's request for a fair hearing, even where the matter has been remanded to the local social services district, unless one of the exceptions provided in State Medicaid Manual § 2902.10 is applicable, and otherwise affirmed, without costs.

Supreme Court correctly found that the federal statute and implementing regulation governing hearings and decisions about Medicaid claims create a right to a final administrative determination within 90 days after a request for a hearing is made. 42 USC § 1396a(a)(3) mandates that a state plan for medical assistance "provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not

acted upon with reasonable promptness." This statute creates a right to a fair hearing that can be enforced through a private action under 42 USC § 1983 (*see Shakhnes ex rel Shakhnes v Berlin*, 689 F3d 244, 254 [2d Cir 2012]). 42 CFR 431.244(f)(ii) provides that the agency "must take final administration action ... [o]rdinarily, within 90 days from" the date of the request for the hearing (*see also* 18 NYCRR 358-6.4[a]). The 90-day deadline set forth in the regulation defines the scope of the § 1983 cause of action to enforce 42 USC § 1396a(a)(3) by "flesh[ing] out" the content of the right to a hearing (*see Shakhnes*, 689 F3d at 254). Similarly defining the scope of the right to a hearing, the Centers for Medicare and Medicaid Services State Medicaid Manual (SMM), promulgated by the federal Department of Health and Human Services, interprets the regulation to mean that the 90-day time limit must be adhered to "except where the agency grants a delay at the appellant's request, or when required medical evidence necessary for the hearing can not be obtained within 90 days" (SSM § 2902.10). This interpretation by the agency of its own regulation warrants significant deference (*see Fishman v Daines*, 743 F Supp 2d 127, 143-144 [ED NY 2010]).

While, as petitioner concedes, nothing in the federal

statute or regulations prohibits an administrative law judge from remanding a Medicaid application to the local social services district following the hearing, the ALJ is still required to render a final determination within the 90-day period. Thus, as Supreme Court observed, any remand should specify the time in which the agency must act and report back so that the ALJ can render a final determination within that 90-day period.

Supreme Court correctly found that pursuant to New York Social Services Law applicants for personal care services under Medicaid who are in immediate need are entitled to temporary personal care services while their applications are pending. Social Services Law § 133, "Temporary preinvestigation emergency needs assistance or care," provides that "[u]pon application for public assistance or care ..., the local social services district shall notify the applicant in writing of the availability of a monetary grant adequate to meet emergency needs assistance or care and shall, at such time, determine whether such person is in immediate need. If it shall appear that a person is in immediate need, emergency needs assistance or care shall be granted pending completion of an investigation." This statute is applicable to Medicaid benefits (*see Brad H. v City of New York*, 8 AD3d 142 [2004], *lv denied* 4 NY3d 702 [2004]). In New York State,

Medicaid benefits include personal care services (*see* Social Services Law § 365-a[2][e]; 18 NYCRR 505.14[a][1] [defining personal care services]).

The court also correctly found that the Department of Social Services' procedures for the provision of these services are inadequate to meet the requirements of Social Services Law § 133 to provide temporary personal care services for those in immediate need of those services and to notify applicants of the availability of those services. 18 NYCRR 505.14, which sets forth procedures for the provision of personal care services, recognizes that an applicant may need services "immediately to protect his or her health or safety" (subd [b][5][iv]). However, it does not provide procedures for submitting a request for immediate services to the local agency or a time frame in which the local agency must complete its expedited review of the application. Moreover, both federal and state regulations require Medicaid applicants to be notified of available services and the eligibility requirements for obtaining those services (*see* 42 CFR 435.905; 18 NYCRR 351.1[b]). In particular, 18 NYCRR 351.1(b)(1)(i) requires that the social services official provide applicants and recipients with "clear and detailed information concerning programs of public assistance, eligibility

requirements therefor, methods of investigation and benefits available under such programs." Non-compliance with these mandates is actionable notwithstanding a subsequent grant of such services (*Coleman v Daines*, __ NY3d __ , NY Slip Op 07222 [October 30, 2012]).

The issue of costs and attorneys' fees is not properly before us, since it is currently pending in a motion before Supreme Court (*see Smith v Lynch*, 50 AD3d 881, 883 [2008]).

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

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

ENTERED: DECEMBER 20, 2012

CLERK

Gonzalez, P.J., Saxe, Acosta, Gische, JJ.

8480- Index 110474/07
8481-
8482 In re Robert T. Giaimo, etc.,
for the Judicial Dissolution
of EGA Associates, Inc.,
Petitioner-Respondent-Appellant,

-against-

Janet Giaimo Vitale,
Respondent-Appellant-Respondent.

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In re Robert T. Giaimo, etc., No. 110445/07
for the Judicial Dissolution
of First Avenue Village Corp.,
Petitioner-Respondent-Appellant,

-against-

Janet Giaimo Vitale,
Respondent-Appellant-Respondent.

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Holland & Knight LLP, New York (Joseph P. Sullivan and Mitchell J. Geller of counsel), for appellant-respondent.

Putney, Twombly, Hall & Hirson LLP, New York (Philip H. Kalban of counsel), for respondent-appellant.

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Judgments, Supreme Court, New York County (Marcy S. Friedman, J.), entered August 26, 2011 and September 13, 2011, respectively, in consolidated proceedings seeking dissolution of the subject closely held corporations and upon respondent's election pursuant to BCL § 1118(b)to purchase petitioner's shares, awarding petitioner the "fair value" of his shares in the

corporations, plus interest, and bringing up for review an order, same court and Justice, entered April 26, 2011, which, to the extent appealed from, denied petitioner's motions to hold respondent in contempt of court, and confirmed so much of the June 30, 2010 report of the Special Referee that declined to apply a discount for lack of marketability (DLOM), reduced the value of the corporations' assets by the present value of taxes on built-in capital gains (BIG), valued the corporations' choses in action and concluded that the value of the choses should be placed in escrow, and awarded prejudgment interest at 4%, unanimously modified, on the law, to vacate the principal amounts awarded, apply a 16% discount for lack of marketability and direct petitioner to pay, in restitution, amounts he was paid in excess of fair value, and remand for further proceedings in accordance herewith, and otherwise affirmed, without costs. Appeal from the order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Valuation of closely held corporations is not an exact science, and it is the "particular facts and circumstances" of each case that will dictate the result (*Matter of Friedman v Beway Realty Corp.*, 87 NY2d 161, 167 [1995]).

Here, the motion court correctly held that the method of

valuing a closely held corporation should include any risk associated with the illiquidity of the shares (*see Matter of Seagroatt Floral Co. [Riccardi]*, 78 NY2d 439, 445-446 [1991]). It also properly rejected petitioner's contention that this Court's decision in *Vick v Albert* (47 AD3d 482 [1st Dept 2008], *lv denied* 10 NY3d 707 [2008]) limits the application of marketability discounts only to goodwill, or precludes such discounts for real estate holding companies such as the corporations at issue here. The motion court erred, however, in assessing that the marketability of the corporations' real property assets was exactly the same as the marketability of the corporations' shares (*see Seagroatt Floral*, 78 NY2d at 445-446). While there are certainly some shared factors affecting the liquidity of both the real estate and the corporate stock, they are not the same. There are increased costs and risks associated with corporate ownership of the real estate in this case that would not be present if the real estate was owned outright. These costs and risks have a negative impact on how quickly and with what degree of certainty the corporations can be liquidated, which should be accounted for by way of a discount.

Only respondent's expert, Jeffrey L. Baliban, quantified what, in his opinion, would be the appropriate DLOM discount. He

employed a number of studies of reported sales that bore some related characteristics to these particular corporations. He also employed a build-up method related to anticipated costs of selling the corporation that included real estate related costs and due diligence costs arising in the sale of closely held corporations. The studies and method employed reported a DLOM range of 8% to 30%, with Baliban recommending 20%. Petitioner criticizes all of the data and methods relied upon by Baliban as inapplicable. Neither the Referee nor the motion court addressed these arguments because they never reached the issue of the quantification of the DLOM. Since the entire record is included on appeal, it is sensible and economical for us to decide this issue rather than remand the issue to the motion court for further consideration (*see Wechsler v Wechsler*, 58 AD3d at 77). We find that the build up method, which makes calculations based upon expected projected expenses of selling a company holding real estate, best captures the DLOM applicable in this particular case. We conclude that a 16% DLOM against the assets of both corporations is appropriate and should be applied. Since the judgments have been paid, petitioner is directed to make restitution in an amount reflecting the discount (*see* CPLR 5523).

We reject petitioner's argument that a discount for embedded

capital gains taxes can never be included in assessing fair value. It is recognized by courts of this State that embedded capital gains taxes in assets held by "C" corporations will affect what a hypothetical willing purchaser, with a reasonable knowledge of the underlying facts, will pay for the corporate stock (*see Murphy v United States Dredging Corp.*, 74 AD3d 815 [2nd Dept 2010]; *Wechsler v Wechsler*, 58 AD3d 62 [1st Dept 2008], *appeal dismissed* 12 NY3d 883 [2009]). We also reject respondent's assertion that this Court's decision in *Wechsler* always requires that the BIG discount be calculated at 100% of the projected tax as of the date of valuation. In *Wechsler* we expressly left open issues about whether calculation methods employed by other courts to capture embedded capital gains were also proper (58 AD3d at 69). Applying a 100% discount in this case necessarily implies that following the hypothetical sale, the purchaser would immediately liquidate all of the real estate and realize the full capital gains impact. Not only is this contrary to a basic underlying assumption of fair valuation that the business will continue as an ongoing concern, but also to the motion court's finding that there is no financial reason in the foreseeable future for the properties to be sold. The BIG discount, as applied by the motion court, takes into account that

the real estate will continue to be held by the corporations and will not immediately be sold even if the corporate stock is sold. Consequently, the reduction of BIG to present value appropriately adjusts for embedded capital gains taxes that will not be paid until some time in the future.

There is no basis to disturb the Special Referee's valuation of the corporations' choses in action against the Estate of Edward Giaimo (*see Matter of F.P.D. Realty Corp.*, 267 AD2d 111, 112 [1st Dept 1999]). There is evidence in the record that Edward Giaimo's estate had sufficient assets to cover these claims and respondent's argument that the estate had a significant estate tax burden does nothing to disprove this evidence. Nor did petitioner support his contention that it was error to place the amounts of the choses in escrow.

There is no evidence that the Referee misread the testimony of petitioner's real estate expert. Rather, the evidence shows that the Referee rejected the expert's testimony regarding the appropriate appreciation rate for the corporations' properties. There is no basis for disturbing the Referee's determination (*see F.P.D. Realty Corp.*, 267 AD2d at 112).

Petitioner's argument that prejudgment interest should be 9% instead of 4%, based upon respondent's misconduct, is rejected.

Interest is not awarded as a penalty or to punish a party, it is a cost imposed for having the use of another party's money over a period of time (*see Manufacturer's & Traders Trust Co. v Reliance Ins. Co.*, 8 NY3d 583 [2007]).

The motion court correctly held that respondent did not engage in "fraudulent and perjurious conduct during the course of judicial proceedings" regarding management fee receivables (*see 317 W. 87 Assoc. v Dannenberg*, 159 AD2d 245, 246 [1st Dept 1990]).

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

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

ENTERED: DECEMBER 20, 2012

CLERK

Tom, J.P., Catterson, DeGrasse, Richter, Manzanet-Daniels, JJ.

6557 Yolanda Belmer, Index 116906/04
Plaintiff-Respondent,

-against-

HHM Associates, Inc.,
Defendant-Appellant,

Consolidated Edison Company
of New York, Inc., et al,
Defendants.

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Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Christopher Simone of counsel), for appellant.

Norman A. Olch, New York, for respondent.

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Judgment, Supreme Court, New York County (Matthew F. Cooper, J.), entered July 20, 2010, after a jury trial, in plaintiff's favor, reversed, on the law, without costs, the judgment vacated, and the matter remanded for a new trial on the issues of liability and plaintiff's comparative negligence.

Plaintiff was injured when the tire of a bus she was driving rolled into a large hole in a roadway. Defendant HHM Associates, Inc. had contracted with nonparty the City of New York to replace sewer mains along a stretch of roadway that included the site of the accident. HHM's project entailed excavating and restoring the roadway. According to the City's consulting engineer, the

roadway had been restored with temporary asphalt when the accident occurred. Plaintiff's theory at trial was that HHM left the hole in the roadway while performing its work. At the charge conference, HHM requested a charge based on the City's nondelegable duty to keep its streets in a reasonably safe condition (*see e.g. Friedman v State of New York*, 67 NY2d 271, 283 [1986]). HHM also submitted a proposed verdict sheet that contained interrogatories as to whether the City was negligent and, if so, whether such negligence was a substantial factor in causing plaintiff's injuries. The proposed verdict sheet also called for an apportionment of culpability among HHM, the City and plaintiff. The trial court declined to instruct the jury on the City's possible liability and did not reference the City on the verdict sheet that was submitted to the jury. The jury awarded damages for past and future pain and suffering (defined as noneconomic loss under CPLR 1600), lost earnings and medical expenses. In so doing, the jury found HHM and plaintiff to be 77% and 23% culpable, respectively. We reverse.

CPLR 1601(1) provides that a joint tortfeasor whose culpability is 50% or less is not jointly liable for all of a plaintiff's noneconomic loss but is severally liable for its

proportionate share (*see Sommer v Federal Signal Corp.,* 79 NY2d 540, 554 [1992]). Under the statute, the trier of fact must consider the relative culpable conduct of a nonparty in apportioning culpability unless the plaintiff proves that with due diligence she was unable to obtain jurisdiction over the nonparty (*see Duffy v County of Chautauqua,* 225 AD2d 261, 266 [4th Dept 1996], *lv dismissed in part and denied in part sub nom. Stuart v County of Chautauqua*, 89 NY2d 980 [1997]). Plaintiff failed to make such a showing. Accordingly, a new trial as set forth above is required to determine the extent of the City's relative culpable conduct, if any.

We also note that plaintiff testified that the hole had been in the roadway for at least a month prior to the accident. Unquestionably, a party's constructive notice of a dangerous condition that was left unremedied constitutes evidence of negligence (*see Gordon v Am. Museum of Natural History*, 67 NY2d 836, 837 [1986]). We disagree with the argument in Justice Tom's dissent that the record is devoid of evidence of negligence on the City's part. There was evidence of constructive notice on the part of the City. The City is under a nondelegable duty to maintain its streets in a reasonably safe condition (*Thompson v City of New York*, 78 NY2d 682, 684 [1991]). That duty remains

fixed even if a dangerous street condition that causes injury is created by an independent contractor such as HHM (*Lopes v Rostad*, 45 NY2d 617, 623 [1978]). In light of the City's nondelegable duty, we are not persuaded by plaintiff's argument that there was no evidence of a failure by the City to exercise reasonable care.

Where pertinent, CPLR 1602 provides as follows: "The limitations set forth in this article shall . . . 2. not be construed to impair, alter, limit, modify, enlarge, abrogate or restrict . . . (iv) any liability arising by reason of a non-delegable duty . . .." In *Rangolan v County of Nassau* (96 NY2d 42, 45 [2001]), the Court of Appeals explained that CPLR 1602(2)(iv), quoted above, does not preclude apportionment when a defendant's liability arises from a nondelegable duty the subsection is a savings provision and not an exception to apportionment under CPLR article 16 (*see Frank v Meadowlakes Dev. Corp.*, 6 NY3d 687, 693 [2006]). We, therefore, respectfully disagree with Justice Tom's dissent insofar as it posits that "the statutory language [of article 16] clearly indicates that the Legislature did not intend apportionment to be predicated on obligations that are . . . nondelegable." To be sure, the *Rangolan* Court held that "a municipality that delegates a duty for which the municipality is legally responsible, such as the

maintenance of its roads, to an independent contractor *remains vicariously liable for the contractor's negligence,* and cannot rely on CPLR 1601(1) to apportion liability between itself and its contractor" (*Rangolan,* 96 NY2d at 47 [emphasis added], citing *Faragiano v Town of Concord,* 96 NY2d 776 [2001]). However, the fundamental difference here is that HHM, like any other agent, is not responsible to third parties for the tortious acts of its principal, the City (*see Rusyniak v Gensini*, 629 F Supp 2d 203, 222 and n 41 [ND NY 2009]; *Dorkin v American Express Co.*, 74 Misc 2d 673, 674 [Sup Ct, Albany County 1973], *affd* 43 AD2d 877 [3rd Dept 1974]). *Rangolan* stands for the proposition that CPLR 1602(2)(iv) does not preclude a party, such as HHM, from seeking apportionment between itself "and other tortfeasors for whose liability [it] is not answerable" (96 NY2d at 47 [internal quotation marks omitted]).

We also disagree with Justice Tom's dissent to the extent it is based on the apparent premise that a municipality's breach of its nondelegable duty cannot give rise to culpable conduct within the meaning of CPLR 1601. Within the analogous context of CPLR article 14-A, the Court of Appeals has defined "culpable conduct"

as “conduct which, for whatever reason, the law deems blameworthy” (*Arbegast v Board of Educ. of S. New Berlin Cent. School*, 65 NY2d 161, 168 [1985]). The term embraces “any breach of legal duty or fault by the defendant, including but not limited to negligence in any degree, breach of warranty, strict liability and violation of a statutory duty” (*Lippes v Atlantic Bank of N.Y.*, 69 AD2d 127, 137 [1st Dept 1979] [internal quotation marks omitted] [emphasis omitted]).

Also, although discussed in Justice Tom’s dissent, the prior written notice law (Administrative Code of the City of New York § 7-201[c][2]) does not bear upon HHM’s right to have a jury determine the City’s relative culpability under CPLR 1601. By its own terms, the prior written notice law is limited in application to actions “maintained against the city” (*id.*). The prior written notice law is therefore inapplicable here because the City is not a party to this action. Prior written notice provisions are always strictly construed because they are enacted in derogation of common law (*Poirier v City of Schenectady*, 85 NY2d 310, 313 [1995]).

Citing *Diaz v Vasques* (17 AD3d 134 [1st Dept 2005], *lv denied sub nom. Boggio v Yonkers Contr. Co.*, 5 NY3d 706 [2005), HHM also argues that it had no duty to plaintiff because its work

was performed pursuant to the City's contract specifications and approved by its engineers (*see generally Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]). Here, HHM relies on the consulting engineer's testimony that he approved the work as being performed according to specifications. The contract, however, defined "final acceptance" as the issuance of a certificate of completion and acceptance signed by the Commissioner of the Department of Design and Construction. The record contains no evidence that such a certificate was issued. Moreover, the contract further provided that the engineer's inspection and approval of the work did not relieve HHM of its obligation to perform according to the contract. Therefore, HHM did not conclusively establish that it performed its work pursuant to the contract specifications. We also respectfully disagree with Justice Catterson's dissent insofar as it suggests that holding HHM to the "final acceptance" provisions of its contract "elevates form over substance." On the contrary, we look to the actual words of a contract so that form does *not* swallow substance (*see Sutton v East Riv. Sav. Bank*, 55 NY 2d 550, 555 [1982]). In this case, HHM should not be heard to invoke its contract as a shelter against liability while, at the same time, seeking to avoid the plain meaning of its provisions.

The court properly permitted plaintiff's vocational economic analyst to testify about plaintiff's lost fringe benefits even though her union's collective bargaining agreement was not in evidence. An expert's opinion must generally be based on facts in the record or personally known to the witness (*Hambsch v New York City Tr. Auth.*, 63 NY2d 723, 725 [1984] [internal quotation marks omitted]). Nevertheless, an expert may rely on out-of-court material that is "accepted in the profession as reliable in forming a professional opinion" (*id.* at 726 [internal quotation marks omitted]). HHM's objections to the expert's opinion were refuted by the fact that its own vocational expert also based his opinion, in part, on the collective bargaining agreement (*see e.g. Greene v Xerox Corp.*, 244 AD2d 877, 878 [4th Dept 1997], *lv denied* 91 NY2d 809 [1998]).

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

All concur except Tom, J.P. who dissents in a memorandum, and Catterson, J. who dissents in a memorandum as follows:

TOM, J.P. (dissenting)

Plaintiff alleges that she sustained injury to her back on December 5, 2001 while operating a New York City Transit Authority bus along Atlantic Avenue in Brooklyn. According to her trial testimony, as she approached the intersection with Nevins Street, traveling at five to seven miles an hour, she was forced to veer to the right by a car that suddenly pulled out in front of her. As a result, the left front tire of the vehicle struck a round construction hole perhaps two feet wide and 12 to 18 inches deep that was situated next to a manhole cover. Plaintiff had observed the hole regularly for over a month and previously avoided it by driving over it between the front wheels of the bus. The action proceeded to trial against HHM, which performed the road work along Atlantic Avenue under contract with the City of New York.

HHM's president testified that the company had resurfaced the area with temporary pavement on October 1, 2001, returning to connect a small pipe to a manhole on October 25th, after which the excavation was backfilled and the road restored with temporary asphalt. Operations were suspended due to the holiday season, and no other work was performed until January 2002.

After the jury returned a verdict in plaintiff's favor, the

parties submitted posttrial motions. The court granted plaintiff's motion to modify damages to the extent of adding an award of $22,000 for past medical expenses, bringing the total amount awarded to $1,697,174. The court denied HHM's motion to set aside the verdict, which asserted (1) that HHM owed plaintiff no duty of care, (2) that the awards for future lost earnings and medical expenses were speculative, and (3) that such awards were against the weight of the evidence. The trial court expressly noted that it had twice rejected HHM's position, advanced in motions interposed before and during trial, that it should not be held liable because maintenance of the streets is a nondelegable duty of the City.

On appeal, HHM contends that the trial court erred in denying its motion. Its primary contention is that the contractual duty it assumed for the City of New York does not extend to a third party, such as plaintiff, who was not an intended beneficiary of the contractual undertaking, and that the court erred in failing to instruct the jury to apportion fault as against the City. HHM contends that its acts, performed as a City contractor engaged to make street repairs, must be imputed to the municipality and maintains that its activities did not create any hazardous condition for which liability might be

assigned. HHM further argues that the jury finding of permanent disability is not supported by sufficient evidence and that the jury's determination of this question, as well as liability and causation in general, are against the weight of the evidence. Finally, HHM claims to have been prejudiced by plaintiff's summation, in which counsel was permitted to read from HHM's contract with the City.

HHM is correct that, as a general principle, a duty undertaken as a contractual obligation does not extend to third parties (*see Eaves Brooks Costume Co. v Y.B.H. Realty Corp.*, 76 NY2d 220, 226 [1990]). However, the law recognizes situations in which a duty of care is imposed on a party to a contract to provide services, which include, as pertinent here, where that party has "launche[d] a force or instrument of harm" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002], quoting *H.R. Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168 [1928]) by creating or exacerbating a dangerous condition (*Espinal*, 98 NY2d at 141-142).

The resolution of disputed facts is within the province of the jury, as is causation generally (*Windisch v Weiman*, 161 AD2d 433, 437 [1st Dept 1990], citing *Kallenberg v Beth Israel Hosp.*, 45 AD2d 177, 180 [1st Dept 1974], *affd* 37 NY2d 719 [1975] and

O'Connell v Albany Med. Ctr. Hosp., 101 AD2d 637, 638 [3d Dept 1984]). On this record, the jury was at liberty to credit plaintiff's testimony that there was a substantial hole in the road surface, a dangerous condition, created by HHM in the course of its work on the sewer mains approximately six weeks before the accident, which defect was readily observable to plaintiff.

It is suggested that the complaint should be dismissed as against HHM because the City of New York, as the party charged with a nondelegable duty to maintain the streets in a safe condition, is wholly liable for the defect that caused plaintiff's injury. If this were the case, the City or any other party under a nondelegable duty would be unable to limit its liability in accordance with its relative culpability (CPLR 1601), a proposition which the Court of Appeals has rejected. In *Rangolan v County of Nassau* (96 NY2d 42 [2001]), the county was sued by a plaintiff who, while incarcerated, sustained injury in an assault by a fellow inmate. The trial court denied the county's request for an instruction as to apportionment against the assailant, concluding that CPLR 1602(2)(iv) renders apportionment unavailable where liability arises due to the breach of a nondelegable duty (*id.* at 45). The Court of Appeals disagreed, noting that it would be anomalous to read that

provision of the CPLR as an exception to the availability of apportionment to "municipalities, landowners and employers, who often owe a non-delegable duty or are vicariously liable for their agents' actions [, as] these are precisely the entities that article 16 was designed to protect" (*Rangolan*, 96 NY2d at 48).

It is further proposed that HHM must be permitted to seek apportionment against the City under CPLR 1601 on the basis of the municipality's nondelegable duty to maintain the roadway. HHM assigns error to the trial court's refusal to instruct the jury that it must determine the extent of the City's liability as a nonparty tortfeasor, arguing that a new trial is required to assess the City's relative culpability.

While it has been remarked that CPLR article 16 eludes expeditious interpretation (*see Chianese v Meier*, 98 NY2d 270, 275 [2002]), the statutory language clearly indicates that the Legislature did not intend apportionment to be predicated on obligations that are vicarious or nondelegable. Article 16, in limiting the defendant's liability for the plaintiff's noneconomic loss to the defendant's equitable share, provides

that the defendant's share shall be "determined in accordance with the relative *culpability* of each person *causing or contributing* to the total liability for non-economic loss" (CPLR 1601 [1] [emphasis added]). Culpability denotes guilt or blameworthiness, not simply liability incurred irrespective of causation. The language utilized indicates the intent to subject to apportionment those parties that are responsible for actually causing harm. Because HHM does not attempt to establish the City's culpable conduct in causing or contributing to the injury sustained by plaintiff but relies solely on the municipality's nondelegable duty to maintain the streets, HHM has not demonstrated that it is entitled to seek apportionment against the City under CPLR 1601. The majority's position is flawed in that it cites to legal principles that have no application to this case. The majority states that "a municipality . . . remains vicariously liable for the contractor's negligence" (emphasis omitted). This may be true, but the issue of vicarious liability was never raised in this case. Plaintiff is not seeking to recover damages against the City based on the municipality's vicarious liability as a result of its

contractor's negligence (*see Faragiano v Town of Concord*, 96 NY2d 776, 778 [2001]). Thus, the issue of vicarious liability is irrelevant. The majority also states that "HHM . . . is not responsible to third parties for the tortious acts of its principal." Once again, this may be a correct legal principle, however, in the present case the City committed no tortious act. The trial record is devoid of evidence of any negligence on the City's part. Thus, the jury would be asked to speculate on an issue without any supporting proof.

Furthermore, while the contractor is subject to liability to plaintiff for its negligence without condition, the City is only exposed to liability to plaintiff if the notice provisions of the Pothole Law (Administrative Code of City of NY § 7-201[c][2]) have been complied with. In denying HHM's request for an instruction as to assessment of liability against nonparty City, the trial court noted that there was "no evidence that there was any notice to the City" (which may well explain why the complaint does not name the City as a defendant). HHM did not contest the court's assessment or address the notice issue, interposing only a general objection to the court's refusal to issue a supplemental instruction concerning the City's nondelegable duty to the public at large to maintain the streets in a safe

condition.[1] This instruction concerns the City's common-law duty of care to plaintiff, not its alleged obligation to apportion damages with HHM. Because it omits the prior notice requirement as a condition of recovery, the trial court did not err in refusing to include it in its jury charge. Furthermore, HHM never requested a jury charge of apportionment of fault as against the City in either its initial or supplemental charge request. HHM's exception to the charge concerns only the court's failure to give a charge concerning the City's nondelegable duty to maintain its roads and not the court's failure to provide a charge on apportionment of fault. Thus, HHM has not preserved its present claim that the failure to instruct the jury concerning apportionment constitutes error (*De Long v County of Erie*, 60 NY2d 296, 306 [1983]; *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 317 [1980]).

Finally, it is settled that the City cannot be held liable for a defect in the street on a theory of constructive notice

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[1] The requested instruction states, in substance, that the City owes a nondelegable duty to the public to maintain its streets and to take reasonable precautions to ensure their safety. It directs the jury to assess reasonableness on the basis of whether the City should have anticipated plaintiff's presence at the location where she sustained injury and whether the City had knowledge of the hazard for a sufficient time to have enabled it to remedy the condition.

(*Amabile v City of Buffalo*, 93 NY2d 471, 475-476 [1999] ["constructive notice of a defect may not override the statutory requirement of prior written notice of a sidewalk defect"]). The Pothole Law requires prior written notice of a defective condition as a prerequisite to bringing suit, and the burden rests on the plaintiff to plead and prove that such written notice had been received prior to injury (*see Poirier v City of Schenectady*, 85 NY2d 310, 314 [1995]; *Laing v City of New York*, 71 NY2d 912, 914 [1988]). To permit HHM to seek apportionment pursuant CPLR 1601 under the facts of this case would introduce confusion as to the basis of the City's liability to plaintiff and obviate the intent of the Pothole Law to insulate the municipality from liability where no prior written notice of the alleged defect has been received (General Municipal Law § 50-e [4]; *Amabile*, 93 NY2d at 476).

The verdict was not against the weight of the evidence (*see McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [1st Dept 2004]). As noted, the jury's determination that there was a dangerous defect in the road resulting from HHM's construction activity has a rational basis in the record. It was within the jury's province to find that plaintiff's release of air from her inflatable seat cushion so as to better reach the pedals was not

a proximate cause of her injuries, given the testimony of her safety officer that even with a fully inflated cushion, the driver of a bus going over a deep road defect would be jolted.

Although plaintiff's collective bargaining agreement was not in evidence, her economist's valuation of her lost future benefits was properly based on that agreement (*see Hambsch v New York City Tr. Auth.*, 63 NY2d 723, 725-726 [1984]; *Tassone v Mid-Valley Oil Co.*, 5 AD3d 931, 933 [3d Dept 2004], *lv denied* 3 NY3d 608 [2004]). Indeed, HHM's vocational expert partially based his own valuation on the agreement. Further, because we conclude that HHM was under a duty of care, HHM was not prejudiced by opposing counsel's reading of a contract provision placing responsibility for injury on HHM.

Accordingly, the judgment should be affirmed.

CATTERSON, J. (dissenting)

I must respectfully dissent. In my opinion, there is no reason to remand for a trial to determine "relative culpability" pursuant to CPLR 1601 between nonparty New York City and defendant contractor HHM Associates, Inc. (hereinafter referred to as "HHM") because, for the reasons set forth below, the City was entirely liable for the condition of the road. Thus, the judgment against HHM should be vacated.

This appeal arises out of a personal injury action, in which the plaintiff, a N.Y.C. Transit Authority bus driver, claimed that she was injured on December 5, 2001 when the front left tire of the bus she was driving struck a "hole" or "uneven pavement" on Atlantic Avenue in Brooklyn. The plaintiff further claimed that the road was improperly repaired by HHM, and that even if HHM did not create the hole, HHM assumed absolute liability for the condition of the road in its contract with the City.

The record reflects that HHM was hired by nonparty City of New York to replace sewer mains along two miles of road over a three year period between 2000 and 2003. The contract required that HHM stop work between November 17, 2001 and January 2, 2002 for the holiday season, and backfill any excavations.

HHM's president testified that on October 1, 2001, HHM

workmen backfilled a 75-foot excavation along Atlantic Avenue, pursuant to the terms of the contract. On October 25, 2001, HHM returned to the site in order to connect a small pipe to a manhole. HHM's president further testified that the excavation was backfilled, and the road restored with temporary asphalt the following day.

The record also reflects that the City hired an engineering consulting firm to inspect and approve HHM's work. The resident engineer for the project testified that inspectors recorded the work performed by HHM every day to ensure that the work complied with the contract specifications, and, after HHM completed its work, to ensure that the road was safe for traffic during the holiday embargo.

At trial, at the conclusion of the plaintiff's case, HHM moved to dismiss the plaintiff's complaint for failure to establish a prima facie case, and at the close of the evidence, HHM moved for a directed verdict. The court denied the motions. Subsequently, HHM objected to the court's charge to the jury that "a contractor . . . is liable for injury to a person on the street . . . if, as a result of work performed, . . . the street was in a condition dangerous to persons on the street." HHM argued that the charge described a landowner's duty. The court

also refused HHM's request to charge the jury that the City has a nondelegable duty to maintain the road. The jury found in favor of the plaintiff and awarded damages in the amount of $1,675,174.00.[1]

Subsequently, the plaintiff moved to increase the award for past medical expenses. By order dated October 15, 2009, the motion court granted the plaintiff's motion and denied HHM's cross motion pursuant to CPLR 4404 to set aside the verdict, or, alternatively, for a new trial on liability and damages.

HHM now appeals on the grounds that it had no duty to the plaintiff and hence the complaint against it should have been dismissed. Alternatively, HHM argues that the improper jury charges entitle them to a new trial on all issues.

While I agree with the majority that the court erred as to its charges to the jury, for the reasons set forth below, I would

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[1] The jury awarded the plaintiff $50,000 for past pain and suffering, and $140,000 for past lost earnings. It awarded $50,000 for 35 years of future pain and suffering, $100,000 for 35 years of future medical expenses, and $1,334,174 for 12.5 years of future lost earnings. However, two months after her discectomy in October 2002, the plaintiff was cleared to return to work as a bus operator and *continued working for five years* until July 2007, when she went on disability leave due to an unrelated foot condition. She was terminated after *she refused, without consulting a physician, a transfer* to a sedentary position, and has not worked since.

vacate the judgment and dismiss the complaint as against HHM on the ground that HHM had no duty to the plaintiff. Rather, the City was entirely liable for the condition of the road. Consequently, in my view there is no need to determine "relative culpability" pursuant to CPLR 1601, and thus no reason to remand for a new trial.

The threshold question, whether HHM had a duty to the plaintiff, is a question of law for the court, not a question of fact for the jury. Sheila C. v. Povich, 11 A.D.3d 120, 125, 781 N.Y.S.2d 342, 347 (1st Dept. 2004). The plaintiff argues that HHM's duty to her arises either from HHM's contract with the City to "protect finished and unfinished work against any . . . injury," or from HHM's negligent creation of a defect in the road. The first argument, that "[HHM] is responsible whether they created [the alleged hole] or did not [because] they assume[d] that responsibility" from the City pursuant to the contract, is without merit.

It is well established that a contract such as the one between HHM and the City generally does not create a duty owed by the contractor to the general public. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 168, 159 N.E. 896, 899 (1928). As Chief Judge Cardozo explained in Moch, the duty that the contractor

owes is “to the city and not to its inhabitants” who benefit from the contract only incidentally. Id. at 165. Thus, HHM’s duty under the contract was to the City, not the plaintiff. Nor did the contract relieve the City of its duty to the plaintiff. A municipality’s duty to maintain the roads and highways in a reasonably safe condition is nondelegable. See Stiuso v. City of New York, 87 N.Y.2d 889, 891, 639 N.Y.S.2d 1009, 1010, 663 N.E.2d 321, 322 (1995).

However, the plaintiff, having failed to bring a claim against the City, also attempts to foist tort liability onto HHM by arguing that by leaving a hole in the street HHM “launched a force or instrument of harm.” See Espinal v. Melville Snow Contrs, Inc., 98 N.Y.2d 136, 140, 142, 773 N.E.2d 485, 488, 489 (2002) (a defendant contractor “launche[s] a force or instrument of harm” when it “negligently creates or exacerbates a dangerous condition”) (internal quotation marks omitted); see also Church v. Callanan Indus., 99 N.Y.2d 104, 111, 752 N.Y.S.2d 254, 257, 782 N.E.2d 50, 53 (2002) (“failing to exercise due care in the execution of [a] contract” may “launch[] a force or instrument of harm”) (internal quotation marks omitted). In my opinion, this argument fares no better.

As a matter of law, a contractor cannot be liable in tort

for failing to exercise due care in the execution of a contract where it complies with the contract specifications. See e.g Davies v. Ferentini, 79 A.D.3d 528, 529-530, 914 N.Y.S.2d 17, 18 (1st Dept. 2010) (because the defendant contractor's work was performed pursuant to the DOT's specifications, defendant fulfilled its contract and did not launch a force or instrument of harm); see also e.g. Luby v. Rotterdam Square, L.P., 47 A.D.3d 1053, 1055, 850 N.Y.S.2d 252, 254 (3d Dept. 2008); Gee v. City of New York, 304 A.D.2d 615, 616, 758 N.Y.S.2d 157, 158-159 (2d Dept. 2003). Here, it is undisputed that HHM's work was inspected and approved by the City's engineering consultants as compliant with the contract specifications. The resident engineer on the Atlantic Avenue project testified that he approved the backfilling and temporary resurfacing done by HHM on October 1 and again on October 26, 2001.

The majority's argument -- that the City's acceptance of the work was not "final" as defined by the contract because there was no issuance of a certificate of completion signed by the Commissioner -- elevates form over substance. It is undisputed that after HHM stopped work on the roadway on October 26, 2001, the City inspected HHM's work, approved it, and *opened Atlantic Avenue to traffic*, thereby implicitly authorizing the road as

safe for use. In my view, this was a de facto final acceptance as to the work that HHM had completed so far. Thus, the condition of the roadway was the City's responsibility until HHM resumed work after the holiday break. To subject HHM to liability for a purported defect arising from work approved by the City one month prior to the accident would create the very type of "indefinitely extended" duty "to an indefinite number of potential beneficiaries" that the Court of Appeals rejected more than seven decades ago in Moch.

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

ENTERED: DECEMBER 20, 2012

CLERK

Mazzarelli, J.P., Catterson, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

6875 John Samuelsen, etc., Index 109909/10
Plaintiff-Appellant,

-against-

New York City Transit Authority, etc., et al.,
Defendants-Respondents.

_____

Cary Kane LLP, New York (Larry Cary of counsel), for appellant.

Martin B. Schnabel, Brooklyn (Robert K. Drinan of counsel), for respondents.

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Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered May 20, 2011, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the complaint for failure to state a cause of action, reversed, on the law, without costs, and the motion denied.

Plaintiff is the president of Local 100, Transport Workers Union of Greater New York (the Union). The Union is the exclusive collective bargaining representative of approximately 32,000 workers employed by various subordinate bodies and affiliates of the Metropolitan Transportation Authority, including defendants, New York City Transit Authority (TA) and Manhattan and Bronx Surface Transit Authority (MaBSTOA). MaBSTOA was created by the Legislature in 1962, after the City of

New York seized several privately owned and operated bus lines through its eminent domain power. Public Authorities Law § 1203-a(2) was the enabling legislation that allowed the condemned assets to be conveyed to the new authority, a subsidiary corporation of the TA. The status of officers and employees of MaBSTOA was addressed in Public Authorties Law 1203-a, the subject of this dispute. It provided, in pertinent part: "Said officers and employees shall not become, for any purpose, employees of the city or of the [TA] and shall not acquire civil service status or become members of the New York city employees' retirement system" (NYCERS) (Public Authorities Law 1203-a [3][b]).

Although the arrangement outlined above was originally intended to operate "for a temporary period" (Public Authorities Law 1203-a[2]), it has continued for 50 years. Over the years, the two authorities have remained separate legal entities. Indeed, the TA is extremely vigilant against efforts to recover from it tort damages arising out of accidents caused by MaBSTOA operators and equipment. Nevertheless, the two organizations have developed, as a practical matter, functional overlap. For example, they share common resources, such as office facilities and a personnel department.

From 1999 to 2002, the terms of employment for both TA and MaBSTOA employees were governed by a collective bargaining agreement that provided that any layoffs of MaBSTOA employees would occur in reverse order of seniority, based upon date of hire. There was no similar provision in that agreement concerning TA workers, because their layoffs were governed by the Civil Service Law. Also under the terms of the CBA, MaBSTOA employees could pick only jobs associated with the bus lines operated by MaBSTOA, and TA employees could pick only jobs associated with bus lines and subways operated by the TA.

In December 2002, the TA and MaBSTOA executed a "Memorandum of Understanding" with the Union (the MOU), which, inter alia, modified the CBA to provide for the consolidation of MaBSTOA and TA surface transit operations. The MOU, also referred to as "Attachment E," provided, in pertinent part:

> "The Authority and the Union agree to the elimination of the artificial distinction between MaBSTOA and the Transit Authority. To that end, the parties agree as follows:
>
> "(1) Effective 90 days after final ratification all impediments to the free movement and commingling of equipment and personnel between MaBSTOA and Transit Authority shall be eliminated except as modified herein or by agreement of the parties.

> "(2) Effective that same day, all contractual pay and work practices at MaBSTOA shall be standardized at the Transit Authority level . . .
>
> "(3) Employees hired after the effective date of this agreement will be hired in the same ratio as the prior three-year average (Civil Service/Non-Civil Service Ratio). The ratio shall be established for each covered title."

In August 2003, the parties executed a consolidation agreement, which created uniform probationary employment rules, a uniform disciplinary system, and uniform sick leave rules. It resolved various problems that had arisen in the course of consolidating the TA and MaBSTOA surface transit employees. To further effectuate the MOU, the parties established a joint job pick procedure, which allowed MaBSTOA employees to "pick into" TA jobs and TA employees to "pick into" MaBSTOA jobs. Under this new procedure, employees of each authority would pick their jobs in an order established by a single, integrated seniority list, known as the "Consolidated Seniority List." Employees hired prior to December 2, 2004, were "grandfathered in," to the extent that MaBSTOA workers had first pick of "MaBSTOA" jobs before those jobs were made available to TA employees, and vice versa. Employees hired into either Authority after December 2, 2004 picked from any available job, regardless of whether it was a TA job or a MaBSTOA job.

The complaint alleges that "as a result of" the MOU and the consolidation agreement, "employees of MaBSTOA are, for almost all purposes, employees of [the TA]. MaBSTOA employees regularly work in [TA] facilities; they receive job assignments, direction and supervision from [TA] supervisors. MaBSTOA employees are disciplined and in some cases terminated by [TA] officials. MaBSTOA employees are paid from an account maintained by the [TA]. Other than not having civil service status or participating in a different pension system, MaBSTOA employees working for [TA] are for all purposes indistinguishable from [TA] employees." Plaintiff asserts that this directly violates the prohibition in Public Authorities Law 1203-a(3)(b) against MaBSTOA employees becoming, "for any purpose, employees of the city or of the [TA]." Plaintiff seeks a judgment declaring that no MaBSTOA employee may be treated as an employee of the TA for any purpose, and that the MOU and consolidation agreement are void and unenforceable to the extent that they have effectively made employees of MaBSTOA into employees of the TA. Plaintiff further seeks a judgment restraining defendants from taking any action in accordance with the 2002 MOU and 2003 consolidation agreement that is prohibited under the Public Authorities Law, or that adversely affects the employment of any employee of MaBSTOA.

Defendants moved, pursuant to CPLR 3211(a)(1), (2), (4) and (7) for an order dismissing the complaint. In support of their motion, defendants argued that, since the parties' agreements are valid on their face and enforceable, plaintiff failed to state a cause of action. In addition, defendants argued that, since the Union had reaped the benefit of the agreements, it was equitably estopped from suing to invalidate them. Defendants also invoked the doctrine of judicial estoppel, which was based on the fact that in two article 75 proceedings, the Union had sought to enforce the agreements. Defendants also contended that the action was barred by operation of the statute of limitations and laches. Finally, defendants sought a change of venue to Kings County, where an appeal from one of the article 75 proceedings was still pending.

The motion court rejected defendants' estoppel and procedural arguments. However, the court dismissed the complaint, finding that it failed to state a cause of action because nothing in the MOU or consolidation agreement indicated that MaBSTOA employees would gain civil service status or become members of NYCERS.

In interpreting any statute, we are required, first and foremost, to pay heed to the intent of the Legislature, as

reflected by the plain language of the text (*see Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]). In addition, "[i]n construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning" (*id.* [internal quotation marks omitted]).

We are also mindful of the fact that the issues herein are presented on a motion to dismiss pursuant to CPLR 3211. Accordingly, the pleading is to be afforded a liberal construction, the facts alleged in the complaint are to be accepted as true, and plaintiff is to be accorded the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Again, the language we are required to interpret is as follows: "[MaBSTOA] officers and employees shall not become, for any purpose, employees of the city or of the [TA] and shall not acquire civil service status or become members of [NYCERS]" (Public Authorities Law 1203-a[3][b]). In our view, this plainly means that three separate prohibitions apply to MaBSTOA employees: (1) that they "shall not become, for any purpose,"

employees of the TA; *and* (2) that they shall not acquire civil service status; *and* (3) that they shall not become members of the NYCERS. Accordingly, we agree with the Union that, to the extent that the MOU and consolidation agreement, by merging many of the policies of the two authorities, such as probationary employment rules, disciplinary rules, and sick-leave rules, transform MaBSTOA employees into employees of the TA, the agreements violate the first prohibition.

Defendants argue that the Union's interpretation of the statute is wrong. However, in doing so, they never account for the fact that the "shall not become, for any purpose" clause stands distinctly apart from the other two clauses in the provision. Rather, they posit that "[t]he plain and obvious meaning of the 'for any purpose' language is to ensure that a MaBSTOA employee cannot, simply by virtue of employment by MaBSTOA, even in a contractually agreed upon commingled work force, acquire civil service status or membership in NYCERS." The most glaring problem with this interpretation of course, is that it is decidedly not what the statute says. The way the provision is written, the "and" creates a separation between the "for any purpose" clause and the rest of the sentence. It does not signal a modification to the "for any purpose" clause or in

any way refer back to it. Furthermore, defendants' interpretation renders the first prohibition superfluous, a result which "is to be avoided" (*Matter of Branford House v Michetti*, 81 NY2d 681, 688 [1993]).

In addition, defendant's interpretation of the statute, with which the dissent agrees, would essentially substitute the phrase "for *all possible* purposes" for the words that are actually employed, "for any purposes." In other words, defendants argue that if a MaBSTOA employee cannot, under any circumstances, be subject to the Civil Service Law or participate in NYCERS, they simply cannot be considered TA "employees," rendering the first clause meaningless if not considered in the manner they urge. This approach is too narrow, for it pays no heed to the notion that different people working under the same employer can be classified differently. In other words, not every employee in an organization is similarly situated. Here, the statute recognizes that MaBSTOA workers could become so integrated into the TA organization that they could be seen as TA employees, albeit without the protections of the Civil Service Law and the benefit of NYCERS participation. We simply discern nothing in the statutory language which confirms, as the dissent insists, that Civil Service Law protection is the 'distinguishing' or

'hallmark' quality of TA employment.

Contrary to the dissent's observation, this approach is not in conflict with other provisions in the Public Authorities Law that might be interpreted as encouraging some standardization of the two agencies' operations. None of the sections which the dissent cites (i.e., Public Authorities Law 1204[11], [15] and [17]) authorize MaBSTOA employees to take on qualities of being "employed" by the TA. Further, while Public Authorities Law 1203-a(3)(d) authorizes MaBSTOA to "borrow" TA employees, there is no reciprocal provision. Since these sections have nothing to do with the nature of MaBSTOA employment, we fail to understand the dissent's statement that our position creates "ambiguity" as to when MaBSTOA employees can be considered de facto employees of the TA.

Because we agree with the Union's interpretation of Public Authorities Law 1203-a(3)(b), and because the complaint sufficiently alleged facts establishing that the MOU and consolidation agreement had the effect of conferring on MaBSTOA workers qualities of "employment" by the TA, the motion court erred in dismissing the complaint as not having stated a cause of

action.

We have considered defendants' other arguments for dismissal and find them unavailing.

All concur except Catterson and Abdus-Salaam, JJ. who dissent in a memorandum by Catterson J. as follows:

CATTERSON, J. (dissenting)

I must respectfully dissent. There are fundamental differences arising out of the civil service protections accruing to New York City Transit Authority (hereinafter referred to as "TA") employees in crucial areas of employment, namely hiring, promotion, suspension, termination and retirement pensions. Manhattan and Bronx Surface Transit Operating Authority (hereinafter referred to as "MaBSTOA") employees do not and cannot enjoy the same civil service protections, and as set forth more fully below, the 2002 memorandum of understanding (hereinafter referred to as the "2002 MOU") and 2003 Implementation Agreement do not purport to imbue MaBSTOA employees with such civil service benefits. Despite these differences, the majority is in agreement with the plaintiff that MaBSTOA employees are "indistinguishable" from TA employees except for "not having civil service status or participating in a different pension system." This is, in my opinion, simply incomprehensible. These differences, which the majority dismisses summarily, go to the very crux of the issue on appeal.

In my opinion, the majority is incorrect in holding that MaBSTOA employees are transformed into TA employees in violation

of the Public Authorities Law [1] on the ground that the 2003 Implementation Agreement merged "many of the policies of the two authorities, such as probationary employment rules, disciplinary rules and sick-leave rules." It is axiomatic that just because MaBSTOA employees are treated *similarly* to TA employees with respect to some areas of employment they do not *become* TA employees with all the statutory protections of the Civil Service Law. Indeed, there is no prohibition in the statute against MaBSTOA employees gaining benefits like additional sick days (identical to the sick days accorded to TA employees) when those extra sick days are gained by negotiation and collective bargaining specifically on behalf of MaBSTOA employees. The prohibition is against MaBSTOA employees gaining additional sick days just by virtue of employment in a TA job or location.

The plaintiff points specifically to the provision of the collective bargaining agreement (hereinafter referred to as "CBA") which allows MaBSTOA employees to "pick" into TA jobs pursuant to a single integrated seniority list of employees from

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[1] It is noteworthy that the plaintiff was not only a sophisticated party in the negotiations that resulted in the collective bargaining agreement in 2002, but has for the last 10 years reaped, for its members, such benefits of the collective bargaining agreement as suited the plaintiff.

both entities. The plaintiff asserts that this violates section § 1203-a(3)(b) of the Public Authorities Law, which, in relevant part, states that a MaBSTOA employee "shall not become, for any purpose, [an] employee[] of [...] the transit authority." Stated simply, the plaintiff's claim is that a MaBSTOA bus operator who picks a route and/or location in TA territory becomes a TA employee notwithstanding that the employee is vested with no other indicia of TA employee status.

However, the plain language of the statute does not prohibit a MaBSTOA employee "picking" into a TA job because such "picking" of a TA route or location does not alter the employment status of a MaBSTOA employee. As the defendants assert, there is "no ambiguity about the language or the legislative intent" of the provisions: the provisions are intended to preserve the fundamental distinction in the nature of the employment relationship.

The plaintiff fails to allege any indicia of TA employment that attach to a MaBSTOA employee "picking into" a TA job. Indeed, the plaintiff makes no allegation whatsoever that, by "picking" into a TA job, a MaBSTOA employee becomes *for the purpose* of promotion, termination or suspension a TA employee who is protected in those critical employment situations by the Civil

Service Law.

The following facts are also undisputed: The plaintiff John Samuelsen is the president of Local 100, Transport Workers Union of Greater New York (hereinafter referred to as "TWU"). TWU represents, for collective bargaining purposes, approximately 32,000 workers employed by various subordinate bodies and affiliates of the Metropolitan Transportation Authority (hereinafter referred to as "MTA"), including the TA and MaBSTOA.

The defendant TA is a public benefit corporation organized and existing under New York State Public Authorities Law to provide, inter alia, public bus service in the City of New York. See N.Y. Public Authorities Law article 5, title 9, § 1200 et seq. TA bus operators are appointed pursuant to the requirements of the New York State Civil Service Law, and, as competitive employees, must take and pass a civil service examination. The Department of Citywide Administrative Services (hereinafter referred to as "DCAS") places those who pass the examination on an eligibility list. Pursuant to the Civil Service Law, the TA is required to appoint employees from that list.

The defendant MaBSTOA is also a public benefit corporation, organized and existing under the Public Authorities Law, and it is a statutory subsidiary of the TA. See N.Y. Public Authorities

Law § 1203-a(2). Unlike TA bus operators, MaBSTOA bus operators are employed at will and their employment is not subject to the Civil Service Law.

Although TWU represents both TA civil service bus operators and MaBSTOA non-civil service bus operators, it has, for many years, negotiated a single CBA for its members addressing wages, working conditions, job picks, discipline and other work-related issues. The last complete CBA negotiated between the TWU, TA and MaBSTOA was executed in 1999.

In December 2002, the TWU executed the 2002 MOU, which amended, modified, and became part of the 1999 CBA. The parties negotiated and settled issues such as wage increases, lump sum payments and health benefits. The "Surface Consolidation" provision in the 2002 MOU states, in pertinent part, that "the artificial distinction between MaBSTOA and the Transit Authority" is eliminated, "impediments to the free movement and commingling of equipment and personnel between MaBSTOA and Transit Authority shall be eliminated," and "contractual pay and work practices at MaBSTOA shall be standardized." On August 25, 2003, the parties executed the 2003 Implementation Agreement, which addressed probationary employment, disciplinary procedures, and sick leave, and delineated the manner in which the 2002 MOU would be

implemented.

Shortly after execution of the 2003 Implementation Agreement, the parties established a joint job "pick" procedure that lies at the heart of this dispute. Under the new "pick" procedure, MaBSTOA employees could pick into TA jobs and TA employees could pick into MaBSTOA jobs from a single integrated seniority list. For employees of both authorities hired prior to December 2, 2004, MaBSTOA employees had first pick of MaBSTOA jobs and TA employees had first pick of TA jobs. Employees hired into either authority after that date pick from any available job regardless of whether it is a TA or MaBSTOA job.

On July 26, 2010, eight years after its negotiation, ratification and implementation, the plaintiff commenced the instant action seeking a judgment declaring portions of the 1999 CBA void and unenforceable, and preventing the defendants from taking any action in accordance with the 2002 MOU and 2003 Implementation Agreement, or any action that adversely affects the employment of any MaBSTOA employee.

The plaintiff alleges that as a result of the "Surface Consolidation" provision of the 2002 MOU, also known as Attachment E, and the 2003 Implementation Agreement, that MaBSTOA employees have "become" de facto TA employees in violation of New

York Public Authorities Law § 1203-a which states that:

> "[3][b] Said officers and employees [of MaBSTOA] shall not become, for any purpose, employees of the city or of the transit authority and shall not acquire civil service status or become members of the New York City employees' retirement system ['NYCERS']."

On September 24, 2010, the defendants moved, pursuant to CPLR 3211(a)(1), (2), (4), and (7), for an order dismissing the complaint. The defendants argued that although the agreements facilitate the integration of the two entities, MaBSTOA and TA remain legally separate. By decision and order dated May 16, 2011, Supreme Court dismissed the complaint, and the plaintiff appealed. I would affirm the dismissal for the reasons that follow.

The gravamen of the plaintiff's complaint is that as a result of the consolidated job pick procedure, "MaBSTOA employees working for [TA] are for all purposes indistinguishable from [TA] employees." The plaintiff alleges that because MaBSTOA employees work in TA facilities, receive TA job assignments, and are supervised, disciplined and sometimes terminated by TA officials, that they have "become" TA employees. The majority agrees, finding that to the extent that the 2003 Implementation Agreement applies TA "probationary employment rules, disciplinary rules, and sick-leave rules" to MaBSTOA employees, they are

"transform[ed]" into TA employees.

However, the 2003 Implementation Agreement applies to *all* MaBSTOA employees. Thus, in finding that the agreement is unenforceable, the majority appears to necessarily conclude that *MaBSTOA employees in MaBSTOA positions* have also been "transformed" and can "be seen as TA employees" as a result of these "rules." In my opinion, the majority arrives at this conclusion because it fails to recognize that the distinguishing "qualit[y] of being 'employed' by the TA" is not the additional number of sick days, the length of the probationary period, or the disciplinary grievance steps, which were negotiated for MaBSTOA employees. Benefits which are negotiated by the union for MaBSTOA employees do not transform them into TA employees where the "distinguishing" quality of TA employment is protection by the Civil Service Law in hiring, promotions, suspensions and termination.

For example, although the plaintiff alleges that as a result of the integration a TA official may terminate a MaBSTOA employee in a TA position, there is no allegation that the termination is in accordance with the Civil Service Law, which is applicable to TA employees in the same position. MaBSTOA employees are at-will employees and even if terminated by a TA supervisor the

termination is of an at-will employee with no protections other than those agreed upon in the CBA.

As a corollary, the section of the CBA related to TA employees does not include termination or suspension provisions because terminations and suspensions of civil service employees are governed by Civil Service Law § 75. Under the Civil Service Law, TA employees enjoy significant protections with regard to disciplinary proceedings and termination that the 2003 Implementation Agreement does not grant to MaBSTOA employees.[2] Thus, although the 2003 Implementation Agreement eliminates one step of the grievance process for MaBSTOA employees and provides for MaBSTOA's use of the same pool of arbitrators as the TA, the agreement does not transform them into TA employees with the same civil service benefits.

Likewise, layoffs of TA bus operators are governed by Civil Service Law § 80, which requires that provisional employees must

[2] For example, section 75 limits the grounds for termination of a civil service employee to "incompetency or misconduct," grants the right to a hearing and representation, and requires that the TA bear the burden of proof in an disciplinary proceeding. Civil Service Law § 75(2). Furthermore, the Civil Service Law limits the time for suspension without pay to 30 days, specifies the penalties that may be imposed for misconduct or incompetency, and limits the time within which a disciplinary proceeding may be commenced. Civil Service Law § 75(3) and (4).

be laid off first, then probationary employees in inverse order of civil service seniority, and then permanent employees in the affected title in inverse order of civil service seniority. The layoff lists for civil service employees are prepared and provided by DCAS in accordance with § 80, and include additional seniority credit for certain employees, including veterans and disabled veterans. Seniority for layoffs is generally based on eligibility lists and date of continuous permanent appointment in the civil service of the governmental jurisdiction in which the reduction occurs. Layoff of MaBSTOA employees, however, is governed by the CBA, and the seniority list is based on date of hire. Thus, although under the CBA MaBSTOA employees may be treated similarly to TA employees in some respects, the crucial differences between MaBSTOA and TA employees are preserved.

Viewed in this context, the statutory prohibition of section 1203-a(3)(b) must be interpreted as follows: a MaBSTOA employee (even when driving on a TA route or working at a TA location) "shall not become [...] an employee of the TA, [for any purpose]" (such as hiring, promotion, suspension, or termination, because the TA employees are protected by civil service law) "and shall not acquire [the] civil service status" (merely by working in a TA job over time without taking a civil service exam).

This interpretation has the advantage of adhering to general principles of statutory construction. First, it is based on the ordinary understanding of words, and structure. McKinney's Cons. Laws of NY, Book 1, Statutes § 232 (words used in a statute are to be given their usual and commonly understood meaning). It is also consistent with, and furthers the statutory scheme and purpose. See e.g. Matter of Long v. Adirondack Park Agency, 76 N.Y.2d 416, 559 N.Y.S.2d 941, 559 N.E.2d 635 (1990)(necessary to give a statute sensible and practical overall construction which is consistent with and furthers its scheme and purpose and which harmonizes all its interlocking provisions). Specifically, the foregoing interpretation of the provision complies with the requirement that a statute must be interpreted consistent with the spirit and purpose underlying its enactment. See McKinney's Cons. Laws of NY, Book 1, Statutes §§ 96, 97, and § 98.

In this case, the language of the New York Public Authorities Law indicates that the Legislature anticipated that the functional overlap of the two entities would necessitate standardization and consolidation and granted them the authority to act accordingly. In creating MaBSTOA, the Legislature granted it "all of the powers vested in the [TA] by section twelve

hundred four of this title except those contained in [certain] subdivisions." Public Authorities Law § 1203-a(3). Under these subdivisions, the only power not granted to MaBSTOA with regard to employees is the power "[t]o appoint employees and fix their compensation subject to the provisions of the civil service law." Public Authorities Law § 1204(6). Thus, MaBSTOA is authorized to "utilize business methods and efficient procedures ... " and to use TA employees and facilities. See Public Authorities Law § 1203-a(3)(d) and (e). The statute also directs that the chairman and directors of the TA serve as directors of MaBSTOA. Public Authorities Law § 1203-a(2).

Both entities are required to "assist and cooperate with the [MTA] to carry out the powers of the [MTA] in furtherance of the purposes and powers of the authority as provided in this article ...." See Public Authorities Law § 1204(11) and § 1203-a(3). To that end, the TA and MaBSTOA are authorized "[t]o make or enter into contracts, agreements, [...] necessary or convenient," and "[t]o exercise all requisite and necessary authority to manage [...] the maintenance and operation of transit facilities," and "[t]o do all things necessary or convenient to carry out [the] purposes [of MaBSTOA and TA] and for the exercise of [their] powers ...." See Public Authorities Law § 1204(11), (15), (17),

and § 1203-a(3).

Second, the above interpretation renders the provision consistent with other provisions of the Public Authorities Law. The interpretation takes into account that there will be intermingling of personnel, but prohibits the granting of TA employment protections and benefits to MaBSTOA employees. Specifically, it is consistent with the provisions that require that TA employment be governed by the Civil Service Law in the areas of hiring, promotion, suspension and termination and that ensure that the only way to become an employee of the TA with all of the attendant benefits is to pass a civil service exam, and be placed on an eligibility list. Public Authorities Law § 1210(2) ("[t]he appointment, promotion and continuance of employment of all employees of the [TA] shall be governed by the provisions of the civil service law").

Finally, the foregoing interpretation adheres to the fundamental principle of statutory interpretation that "meaning and effect should be given to every word of a statute." McKinney's Cons. Laws of NY, Book 1, Statutes § 231; See Leader v. Maroney, Ponzini & Spencer, 97 N.Y.2d 95, 104, 736 N.Y.S.2d 291, 297, 761 N.E.2d 1018, 1024 (2001). Section 1203-a(3)(b) applicable to MaBSTOA employees reads in relevant part that they

"shall not become, for any purpose, [an] employee[] of [...] the transit authority *and* shall not acquire civil service status *or* become members of the New York City employees retirement system (hereinafter referred to as 'NYCERS')." To the extent that the statute prohibits three separate eventualities, the majority is right. However, it is only by interpreting the provision as applying to MaBSTOA employees who are working in TA positions or in TA territory that the provision makes sense in its entirety: It prohibits such MaBSTOA employees from (1) benefiting from civil service protections for "any purpose" (i.e. promotions, suspensions or terminations) by virtue of simply performing a TA job rather than because they have civil service status. Additionally, it prohibits MaBSTOA employees from (2) acquiring (that is from eventually gaining for themselves through their own actions and efforts) such "civil service status" merely by working in a TA position rather than passing a civil service exam, and it prohibits MaBSTOA employees from (3) becoming members of NYCERS, and benefiting from a TA pension merely by working in TA jobs.

Thus, contrary to the majority's objection, this interpretation gives effect to every part of § 1203-a(3)(b). Indeed, it is the majority's interpretation that renders language

in the statute "superfluous." If § 1203-a(3)(b) is interpreted as prohibiting MaBSTOA employees from acquiring any "qualities of being 'employed' by the TA," then the following prohibitions against acquiring civil service status and membership in NYCERS, which are hallmark qualities of TA employment, are redundant. As the majority itself points out, such an interpretation should be avoided. McKinney's Cons. Laws of NY, Book 1, Statutes § 232 ("words are not to be rejected as superfluous when it is practicable to give to each a distinct and separate meaning"); See Leader, 97 N.Y.2d 95 at 104, 736 N.Y.S.2d at 297; Matter of Branford House v. Michetti, 81 N.Y.2d 681, 688, 603 N.Y.S.2d 290, 293-294, 623 N.E.2d 11, 14-15 (1993).

Moreover, in my view, the majority's interpretation creates unnecessary ambiguity. Although acknowledging that the statute "might be interpreted as encouraging some standardization," the majority finds that the statute prohibits such integration when it reaches a point where MaBSTOA employees have become so integrated that they "can be seen as TA employees." Thus, rather than clarifying the level of integration, the majority's interpretation provides no guidance at all to the parties.

An impractical or unworkable interpretation is disfavored. See Matter of Long v. Adirondack Park Agency, 76 N.Y.2d 416, 559

N.Y.S.2d 941, 559 N.E.2d 635 (1990), supra; People ex rel. Glick v. Russell, 181 App.Div. 322, 168 N.Y.S. 472 (2d Dept. 1917); Public Serv. Commn., Second Dist. v. New York Cent. R.R. Co., 193 App.Div. 615, 185 N.Y.S. 267 (3d Dept. 1920), aff'd 230 N.Y. 149, 129 N.E. 455 (1921); see also McKinney's Cons. Laws of NY, Book 1, Statutes §§ 141, 142, 144, and § 148. Furthermore, nowhere in title 9 is employment with the TA described in any terms other than by reference to civil service. See Public Authorities Law § 1210(2)(in the section entitled "Employees," describing TA employees as "governed by the provisions of the civil service law" without any reference to other "qualities" of employment).

In construing a statute, it is well established that we "should consider the mischief sought to be remedied ..., [and] construe the act in question so as to suppress the evil and advance the remedy." McKinney's Cons. Laws of NY, Book 1, Statutes § 95. In my opinion, § 1203-a(3)(b) seeks nothing more than to remedy the "mischief" of MaBSTOA non-civil service employees seeking TA civil service status as a result of the streamlining of the two entities' services and personnel. See e.g. Collins v. Manhattan & Bronx Surface Tr. Operating Auth., 62 N.Y.2d 361, 372, 477 N.Y.S.2d 91, 96, 465 N.E.2d 811, 816 (1984)(MaBSTOA employee not entitled to be promoted pursuant to

Civil Service Law merely because MaBSTOA "perform[s] functions in furtherance of governmental interests").

In my opinion, therefore, the job "picking" procedures negotiated, ratified and implemented in Attachment E do not violate Public Authorities Law § 1203-a(3)(b), but on the contrary conform to the law by accomplishing the uniformity and standardization envisioned by the Legislature while maintaining the statutorily mandated civil service distinction.

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

ENTERED: DECEMBER 20, 2012

CLERK

Tom, J.P., Andrias, Catterson, Moskowitz, Román, JJ,

7040 Beryl Zyskind, et al., Index 651240/10
Plaintiffs-Respondents,

-against-

FaceCake Marketing Technologies, Inc.,
Defendant-Appellant.

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Locke Lord LLP, New York (R. James De Rose, III of counsel), for appellant.

Sichenzia Ross Friedman Ference LLP, New York (Daniel Scott Furst of counsel), for respondents.

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Order, Supreme Court, New York County (Bernard J. Fried, J.), entered December 15, 2010, which granted plaintiffs' CPLR 3213 motion for summary judgment in lieu of complaint as to liability, referred the issue of damages and costs to a Special Referee, and severed counterclaims alleging fraud in the inducement, unanimously reversed, on the law, the motion denied, and the matter remanded for further proceedings.

Plaintiffs moved under CPLR 3213 for summary judgment in lieu of complaint against defendant, seeking to recover a total of $650,000 plus interest, costs and fees, on a series of 10 promissory notes. Defendant contends, among other things, that plaintiffs agreed to invest $625,000 each by providing funding in tranches in accordance with a strict payment schedule, but failed

to do so, and that plaintiffs fraudulently induced defendant to enter the underlying agreements pursuant to which the notes were issued.

To establish prima facie entitlement to summary judgment in lieu of complaint, a plaintiff must show the existence of a promissory note executed by the defendant containing an unequivocal and unconditional obligation to repay and the failure of the defendant to pay in accordance with the note's terms (*see Gullery v Imburgio*, 74 AD3d 1022 [2d Dept 2010]). Once the plaintiff submits evidence establishing these elements, the burden shifts to the defendant to submit evidence establishing the existence of a triable issue with respect to a bona fide defense (*see Pennsylvania Higher Educ. Assistance Agency v Musheyev*, 68 AD3d 736 [2d Dept 2009]).

Whether a note precludes a fraud in the inducement defense hinges upon the language used by the parties. The key is whether the obligor's reliance on a proffered misrepresentation is reasonable in light of the language used in the note (see *Citibank v Plapinger*, 66 NY2d 90 [1985]). Although the subject notes state that "[t]he obligation to make the payments provided for in this Note are absolute and unconditional and not subject to any defense, set-off, counterclaim, rescission, recoupment or

adjustment whatsoever," there is no general merger clause or statement that the unenforceability of the underlying liabilities shall not affect or be a defense to the notes (*compare Red Tulip, LLC v Neiva*, 44 AD3d 204, 209-213 [1st Dept 2007]). Significantly, each note states that "the Holder made representations and warranties to the Company upon which the Company is relying in connection with the Transaction evidenced [by this Note]." Given these circumstances, it cannot be said, as a matter of law, that the waiver provision forecloses defendant's reliance on the claim that it was fraudulently induced to enter the underlying agreement pursuant to which the relevant notes were issued.

Accordingly, plaintiffs' motion for summary judgment in lieu of complaint (CPLR 3212) should have been denied.

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

ENTERED: DECEMBER 20, 2012

CLERK

Mazzarelli, J.P., Friedman, Catterson, Richter, Manzanet-Daniels, JJ.

7716N- Index 603146/08
7717N-
7718N Epstein Engineering P.C.,
Plaintiff-Respondent,

-against-

Thomas Cataldo, et al.,
Defendants-Appellants,

Steven Gregorio,
Defendant.

_____

Jane M. Myers, P.C., Central Islip (James E. Robinson of counsel), for appellants.

Warshaw Burstein Cohen Schlesinger & Kuh, LLP, New York (Bruce H. Wiener of counsel), for respondent.

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Orders, Supreme Court, New York County (Judith J. Gische, J.), entered February 28, June 1, and June 14, 2011, which, to the extent appealed from as limited by the briefs, decided defendants Thomas Cataldo and Cataldo Engineering, P.C.'s motion for a protective order upon a determination that plaintiff is entitled to damages incurred after the date of Thomas Cataldo's resignation from it arising from defendants' work for clients obtained before Cataldo's resignation, unanimously affirmed, without costs.

Defendants are alleged to have incorporated a business which

directly competed with plaintiff, engaging in a "double life" for a period of 17 months prior to resigning from the company. A faithless servant must account not only for profits attributable to clients poached from the principal, but for all profits ascribable to the wrongful diversion of business (*see Maritime Fish Prods. v World-Wide Fish Prods.*, 100 AD2d 81, 89 [1st Dept 1984], *appeal dismissed* 63 NY2d 675 [1984] [noting that even if a faithless servant had first offered a diverted opportunity to the principal, he would not be free to take the business for himself or direct it to a competitor for his profit without the express consent and approval of his employer]).

It is entirely possible, given the breadth and duration of the alleged deception, that defendants diverted corporate opportunities belonging to plaintiff principal, and that any lost profits ascribable thereto accrued *after* the date of Cataldo's resignation. Thus, it would be inappropriate to use the date of Cataldo's resignation as a cut-off date.

We have considered and rejected the parties' remaining contentions.

> The Decision and Order of this Court entered herein on May 22, 2012 is hereby recalled and vacated (*see* M—2931 decided simultaneously herewith).

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

ENTERED: DECEMBER 20, 2012

CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Richter, Manzanet-Daniels, JJ.

7799 Clive Lino, et al., Index 106579/10
Plaintiffs-Appellants,

-against-

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

- - - - -

The Community Service Society of New York, The Bronx Defenders, The Center for Community Alternatives, The Legal Action Center, The Legal Aid Society, MFY Legal Services, Youth Represent, The New York County Lawyers' Association, and the Fortune Society,
Amici Curiae.

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New York Civil Liberties Union Foundation, New York (Christopher Dunn of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Mordecai Newman of counsel), for respondents.

Community Service Society of New York, New York (Judith M. Whiting of counsel), for amici curiae.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered June 28, 2011, which, to the extent appealed from as limited by the briefs, granted defendants' cross motion to dismiss the complaint, unanimously reversed, on the law, without costs, and the cross motion denied.

In this class action proceeding brought pursuant to article

9 of the CPLR, plaintiffs challenge the inclusion of their police records in the New York Police Department's (NYPD) "stop and frisk" database. Plaintiffs are a proposed class of 360,000 people who were stopped and frisked by NYPD officers and whose records are required to be sealed pursuant to CPL sections 160.50 and 160.55, which mandate sealing upon favorable dispositions and convictions for noncriminal offenses. The class allegations, however, are not subjects of this appeal.

The two named plaintiffs are individuals who were subject to the "stop and frisk" procedure of the NYPD and who, as a result, were arrested and issued summonses that were subsequently dismissed. Named plaintiff Clive Lino, at the time of the incident, was a 29 year old residing in Harlem where he works full-time at a residential facility for students in crisis. On April 18, 2009, Mr. Lino was stopped by NYPD officers while he was getting into his car in the Bronx. The officers issued Mr. Lino two summonses, both of which were later dismissed. The Bronx Criminal Court issued Mr. Lino a notice of dismissal stating that records of his summonses were to be sealed pursuant to CPL section 160.50. In a separate incident, Mr. Lino paid a fine to resolve a noncriminal violation.

Named plaintiff Daryl Khan, at the time of the incident, was

a 35-year-old freelance journalist living in the Clinton Hill neighborhood of Brooklyn. On October 7, 2009, two NYPD officers stopped Mr. Khan while he was riding his bicycle in Brooklyn. The officers issued Mr. Khan two summonses, both of which were later dismissed.

The record establishes that the procedure of NYPD officers when they stop and question individuals on the streets is as follows: the officer must complete a form known as an UF-250 which records information about the encounter, including the name and home address of the individual stopped. In March 2006, the NYPD adopted a practice of compiling this information in a centralized computer database.

In June 2009, in a letter responding to City Council member Peter Vallone, Jr.'s expressed concern about retention of the names in the database, Commissioner Kelly stated that the information collected during "stop and frisk" incidents is "a tool for investigators to utilize in subsequent location and apprehension of criminal suspects." Commissioner Kelly also disclosed that the personal information in the database "remains there indefinitely, for use in future investigations."

On May 19, 2010, plaintiffs commenced the present action seeking a declaration that the NYPD's failure to seal their

records violates CPL sections 160.50 and 160.55. In pertinent part, CPL section 160.50(1)(c) states that "[u]pon the termination of a criminal action or proceeding against a person in favor of such a person, [. . .] all official records and papers . . . shall be sealed and not made available to any person or public or private agency." (Section 160.50 is subject to exceptions that are not relevant here.) Additionally, CPL section 160.55 provides similarly where the result is a conviction for a noncriminal offense.

Plaintiffs also sought injunctive relief mandating sealing. Furthermore, plaintiff Khan alleges false arrest, false imprisonment, malicious prosecution, assault and battery, and seeks damages for these common-law torts and for violation of CPL section 160.50. Plaintiff Khan also seeks a declaration that his First, Fourth and Fourteenth Amendment rights under the US Constitution have been violated and that his rights under the Constitution and laws of the State of New York have been violated.

Defendants cross-moved pursuant to CPLR sections 3211(a)(7) and 7804(f) for an order dismissing plaintiffs' complaint on the grounds that the complaint fails to state a cause of action, that the named plaintiffs lack standing to sue, and that plaintiffs'

constitutional claims are barred by law and/or by the applicable statute of limitations.

The motion court granted defendants' cross motion to dismiss. Regarding plaintiff Khan's constitutional claims, the court held that "the statute[] grant[s] only a statutory, not a constitutional, privilege to one whose records should be sealed, and thus a statutory violation does not implicate a constitutional right, even if records that should and have not been sealed are used in another proceeding." Additionally, the court held that the statute did not create private rights of action and that plaintiffs lacked standing because they failed to show that they suffered or will suffer any injury. The motion court did not address the parties' remaining contentions.

For the reasons below, we agree with plaintiffs' assertions on appeal that (1) the motion court improperly dismissed plaintiffs' claims for declaratory and injunctive relief, (2) the motion court improperly dismissed plaintiff Khan's claim for damages pursuant to defendants' violation of CPL section 160.50, and (3) the motion court improperly dismissed plaintiff Khan's common-law tort claims seeking compensatory damages.

As a preliminary matter, defendants mischaracterize plaintiffs' complaint by asserting that plaintiffs requested the

NYPD to *expunge* their records when plaintiffs actually requested an injunction requiring the NYPD to *seal* their records. Additionally, defendants' assertion that they did not have the opportunity to develop an adequate record showing that the NYPD is, as a matter of fact, sealing the records at issue is immaterial to this appeal. Although the motion court did not resolve the factual issues regarding whether plaintiffs' records are sealed in compliance with CPL sections 160.50 and 160.55, defendants' motion to dismiss must be decided by accepting plaintiffs' allegation as true that the NYPD is not complying with the statute (*see Leon v Martinez*, 84 NY2d 83, 87 [1994] [noting that on a motion to dismiss, the court is to "accept the facts as alleged in the complaint as true [and] accord plaintiffs the benefit of every possible favorable inference"]).

Further, in order to establish standing, plaintiffs assert that they have suffered an "injury in fact" and that the injury falls within the zone of interests to be protected by the statutory provisions (*see Matter of Grasso v New York City Tr. Auth.*, 63 AD3d 410, 411 [1st Dept 2009]). Defendants argue that it is insufficient for plaintiffs to allege that their injuries arise from the fact that their records are not sealed. According to defendants, plaintiffs must wait until they face a "readily

apparent prospective injury" before they have standing to bring a cause of action against the possibility of an unlawful disclosure of their records.

Defendants' argument is misguided. Indeed, it makes little sense for plaintiffs to have to wait until their job applications are in the mail or they are about to appear for job interviews before they have standing to bring a cause of action against the effect of the unsealed records. In any event, well-established precedent supports the view that there can be an injury under the statute even where a plaintiff merely fears the prospect of an adverse effect before his record is ever unlawfully disclosed (*see Matter of Hynes v Karassik*, 47 NY2d 659, 664 [1979] [citing a list of cases in which sealing, even absent statutory authorization, "was found warranted to protect those who *might* unjustly be injured by the indiscriminate availability of records"] [emphasis added]). Plaintiffs therefore correctly assert that they have suffered an injury in fact for two reasons: (1) their records remain unsealed, which puts them at imminent *risk* that their records will be disclosed, and (2) the NYPD is improperly disclosing plaintiffs' records in the "stop and frisk" database, which may lead to plaintiffs being targeted in future investigations. Additionally, plaintiffs' injuries fall within

the statutory goal of insuring against the stigma that is created as a result of plaintiffs having been the subjects of unsustained accusations (*see id.* at 662). Therefore, plaintiffs have standing to claim that defendants' failure to seal their records relating to "stop and frisk" arrests or summonses violates CPL sections 160.50 and 160.55. Moreover, it is well established that the essential factors when determining whether a statute creates an implied private right of action are "(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted, (2) whether recognition of a private right of action would promote the legislative purpose, and (3) whether creation of such a right would be consistent with the legislative scheme" (*Sheehy v Big Flats Community Day,* 73 NY2d 629, 633 [1989]). Here, plaintiffs' criminal proceedings ended in either favorable dispositions or noncriminal violation convictions, which affords them the protections of CPL sections 160.50 and 160.55.

It is undisputed that the Legislature enacted CPL sections 160.50 and 160.55 to remove any stigma related to *accusations* of criminal conduct (*People v Patterson*, 78 NY2d 711, 716 [1991]). Additionally, the Legislature's objective in enacting the statute was to afford protection to accused persons "in the pursuit of

employment, education, professional licensing, and insurance opportunities" (*id.*); *see also Hynes*, 47 NY2d at 662 ["(t)hat detriment to one's reputation and employment prospects often flows from merely having been subjected to criminal process has long been recognized as a serious and unfortunate by-product of even unsuccessful criminal prosecutions . . . (and) (t)he statute's design is to lessen such consequences"]). Specifically, CPL section 160.50 was enacted to ensure protection for exonerated individuals that is "'consistent with the presumption of innocence, which simply means that no individual should suffer adverse consequences merely on the basis of an accusation, unless the charges were ultimately sustained in a court of law'" (*Matter of Joseph M. [New York City Bd. Of Educ.]*, 82 NY2d 128, 131-32 [1993], quoting Governor's Approval Mem., 1976 McKinney's Session Law of NY, at 2451).

Defendants suggest that "[i]t is inconceivable that the purpose of §§ 160.50 and 160.55 was to benefit individuals whose private information has *not* been improperly disclosed." Plaintiffs, however, correctly assert that CPL sections 160.50 and 160.55 were not intended to benefit only persons whose records have already been unlawfully released. The language employed in CPL sections 160.50 and 160.55 requires that records

must be sealed upon termination of a criminal action. Plaintiffs correctly assert that the statute's mandatory sealing requirements demonstrate that the statute seeks to protect individuals against the *risk* of public disclosure of their records prior to an actual unlawful disclosure. Thus, the motion court erred in holding that the statute did not create a private right of action because plaintiffs are part of the class for whose particular benefit the statute was enacted.

Plaintiffs also assert that recognition of a private right of action promotes the legislative purpose of sections 160.50 and 160.55 because a private right of action advances the interest of protecting people from the stigma flowing from public access to records of unsupported criminal charges. Lastly, plaintiffs argue that there are no indications that the creation of a private right of action is inconsistent with the legislative scheme. It should be noted that the Legislature did not establish other penalties for violation of the statute or provide any enforcement mechanism (*see e.g. Sheehy,* 73 NY2d at 635). Plaintiffs assert that nothing in sections 160.50 or 160.55 provides an enforcement mechanism available to those whose records are not sealed. Defendants failed to take issue with the second and third prongs of the private right of action test in

their brief and offered no contentions to disprove plaintiffs' assertion that both prongs are satisfied. Therefore, the motion court erred in dismissing plaintiffs' complaint in its entirety because CPL sections 160.50 and 160.55 create private rights of action, which allow plaintiffs to seek enforcement of the statute.

By dismissing plaintiffs' complaint in its entirety, the motion court also improperly dismissed plaintiff Khan's claims for false arrest and related common-law tort claims. The defendants did not challenge plaintiff Khan's state law claims in its brief but, instead, assert that the claims should be severed from plaintiffs' class action claims. In view of defendants' request for severance, such claims should not have been dismissed.

M-1696 - *Lino v City of New York, et al.,*

Motion to submit amicus brief granted.

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

ENTERED: DECEMBER 20, 2012

CLERK

Andrias, J.P., Friedman, DeGrasse, Manzanet-Daniels, Gische, JJ.

8767 Trevor Gibbs, etc., Index 21894/06
Plaintiff-Appellant,

-against-

New York City Health and Hospitals Corporation, etc., et al.,
Defendants-Respondents.

Fitzgerald & Fitzgerald, P.C., Yonkers (John M. Daly of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for respondents.

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered June 16, 2010, which denied plaintiff's motion to deem his previously served notice of claim timely, *nunc pro tunc*, and granted defendants' cross motion for dismissal of the complaint, unanimously affirmed, without costs.

In this medical malpractice action, the motion court properly exercised its discretion in denying the infant plaintiff's motion upon consideration of the pertinent statutory factors and (General Municipal Law §50-e[5]). The infant plaintiff's mother's excuse that she was unaware that she had a malpractice claim until she saw counsel's advertisement more than four and one half years after the infant plaintiff's birth and

more than three and one half years after she became aware of his injuries, is unreasonable (*see Plaza v New York Health & Hosps. Corp. [Jacobi Med. Ctr.]*, 97 AD3d 466, 467-468 [1st Dept 2012]). Additionally, there was no excuse for the more than three year delay from the time the notice was served until the instant motion was made.

Moreover, while plaintiff's expert interpreted the hospital records in a manner that supported his theory of liability, the records do not, on their face, evince that the hospital's acts or omissions inflicted injuries on the infant and thus, did not provide defendant hospital with timely, actual knowledge of the underlying claim (*see Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 537 [2006]; *Webb v New York City Health & Hosps. Corp.*, 50 AD3d 265 [1st Dept 2008]).

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

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

ENTERED: DECEMBER 20, 2012

CLERK

Andrias, J.P., Friedman, DeGrasse, Manzanet-Daniels, Gische, JJ.

8769 Derek Arauz, an Infant by His Mother and Natural Guardian, Fralia Lino,
Plaintiff-Appellant,

-against-

New York City Health and Hospitals Corporation, etc.,
Defendant-Respondent.

Index 350647/08

Fitzgerald & Fitzgerald, P.C., Yonkers (John M. Daly of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Karen M. Griffin of counsel), for respondent.

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered July 15, 2010, which denied plaintiff's motion to deem his previously served notice of claim timely, *nunc pro tunc*, and granted defendants' cross motion for dismissal of the complaint, unanimously affirmed, without costs.

In this medical malpractice action in which the infant plaintiff seeks to recover for injuries plaintiff's mother became aware of soon after his birth, the court properly considered the pertinent statutory factors and exercised its discretion in denying the infant plaintiff's motion (General Municipal Law § 50-e[5]). Plaintiff's mother's excuse that she was unaware that

she had a malpractice claim until approximately seven years after the infant plaintiff's birth, without explanation as to how she came to this knowledge, is unreasonable (*see Plaza v New York Health & Hosps. Corp.*, 97 AD3d 466 [1st Dept 2012]). Additionally, there was no excuse proffered for the additional delay of two years (nine years after the birth) between the filing of the notice of claim and the time the instant motion was made.

Moreover, while plaintiff's experts interpreted the hospital records to support his theory of liability, the records do not, on their face, evince that the hospital deviated from good and accepted medical practice, and thus, do not provide defendant hospital with timely actual knowledge of the underlying claim (*see Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 537 [2006]; *Webb v New York City Health & Hosps. Corp.*, 50 AD3d 265 [1st Dept 2008]).

The absence of the actual fetal monitoring tapes in defendant's records does not require a different result since, as those records confirm and defendant concedes, they showed severe fetal heart rate bradycardia. Additionally, there is no evidence in the medical record that any treatment rendered could have caused plaintiff's injuries, particularly since, upon infant

plaintiff’s delivery, plaintiff’s condition was attributed to the unfortunate presence of a true tight knot observed in the umbilical cord near the placenta. (*see Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 537 [2006]; *Rodriguez v New York City Health & Hosps. Corp. [Jacobi Med. Ctr.]*, 78 AD3d 538, 539 [1st Dept 2010], *lv denied* 17 NY3d 718 [2011]; *Velazquez v City of New York Health & Hosps. Corp.*, 69 AD3d 441, 442 [1st Dept 2010], *lv denied* 15 NY3d 711 [2010]).

Defendant has also demonstrated prejudice resulting from the passage of time, during which, many of its key employees involved in plaintiff’s care have left the employ of Lincoln, and have not responded to defendant’s efforts to contact them (*see Walker v New York City Tr. Auth.*, 266 AD2d 54, 55 [1st Dept 1999]). Since, in reaching his conclusions concerning Lincoln’s treatment of plaintiff’s mother, plaintiff’s expert relies upon her testimony, which contradicts the actual records, this is not a case that will turn mainly on records rather than witnesses' memories (*cf. Leeds v Lenox Hill Hosp.*, 6 AD3d 232, 233 [1st Dept 2004]).

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

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

ENTERED: DECEMBER 20, 2012

CLERK

Andrias, J.P., Saxe, Moskowitz, Freedman, Abdus-Salaam, JJ.

8840 The People of the State of New York, Ind. 1064/10
Respondent,

-against-

Cesar Romero,
Defendant-Appellant.

Davis Polk & Wardwell LLP, New York (Douglas S. Zolkind of counsel), and Steven Banks, The Legal Aid Society, New York (Alan Axelrod of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Beth Fisch Cohen of counsel), and Patterson Belknap Webb & Tyler LLP, New York (James L. Kerwin of counsel), for respondent.

Judgment, Supreme Court, New York County (Daniel Conviser, J.), rendered October 5, 2010, convicting defendant, after a jury trial, of burglary in the second degree, and sentencing him, as a second violent felony offender, to a term of 11 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, 348-349 [2007]). Defendant's criminal intent could be readily inferred from the surrounding circumstances (*see generally People v Mackey*, 49 NY2d 274, 278-79 [1980]). Defendant's presence in a walk-in closet inside an apartment in the early morning hours, with his hands above his head near a

jewelry box, provided ample evidence that defendant entered the apartment with intent to commit a crime therein. The jury properly rejected the implausible explanation that defendant offered for his actions (*see e.g. People v Jenkins*, 213 AD2d 279 [1st Dept 1995], *lv denied* 85 NY2d 974 [1995]).

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

ENTERED: DECEMBER 20, 2012

CLERK

Andrias, J.P., Saxe, Moskowitz, Freedman, Abdus-Salaam, JJ.

8842 Richard Judge, Index 301922/07
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Alan D. Levin, Kew Gardens, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered October 6, 2011, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The complaint was properly dismissed in this action where the incarcerated plaintiff was injured while playing basketball on an outdoor court. Plaintiff fractured his ankle when he jumped and landed on a defect in the pavement, which had created a significant unevenness in the playing surface. Plaintiff was aware of the defect in the pavement before the day of his accident.

It is well established that "[b]y engaging in a sport or recreational activity, a participant consents to those commonly

appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" (*Morgan v State of New York*, 90 NY2d 471, 484 [1997]). Here, plaintiff assumed the risk of injury by voluntarily playing basketball on the outdoor court and the risks inherent in the sport (*see Green v City of New York*, 263 AD2d 385 [1st Dept 1999]).

Plaintiff, relying on *Trupia v Lake George Cent. School Dist.* (14 NY3d 392, 396 n 1 [2010]), argues that the assumption of the risk doctrine should not be applied because he did not "freely and knowingly consent[]" to the risks of playing basketball on the outdoor court, as that was the only recreational activity available to him. Plaintiff's contention is belied by his testimony at the General Municipal Law § 50-h hearing.

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

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

ENTERED: DECEMBER 20, 2012

CLERK

Andrias, J.P., Saxe, Moskowitz, Freedman, Abdus-Salaam, JJ.

8843 In re Jean Lang, Index 112008/11
Petitioner-Appellant,

-against-

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

Jean Lang, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Keith M. Snow of counsel), for respondents.

Judgment, Supreme Court, New York County (Donna M. Mills, J.), entered April 6, 2012, denying the petition to annul respondents' denial, by virtue of a tie vote of respondent Board of Trustees, of petitioner's application for accidental disability retirement benefits, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner failed to demonstrate as a matter of law that her injury was the result of an accident, i.e., a sudden, unexpected, out of the ordinary event, rather than a misstep during the routine performance of her job (*see Matter of Lichtenstein v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II*, 57 NY2d 1010 [1982]; *Matter of Doyle v Kelly*, 8

AD3d 125 [1st Dept 2004]). She was injured when she tripped over computer wires extending across the threshold of the doorway between the precinct's female supervisors' locker room and the bathroom. In statements made contemporaneously with the accident, she indicated that the wires were "exposed." Two years later, she submitted a statement indicating that the wires had initially been secured to the floor with duct tape and that the tape was removed on the day she fell. Respondents were entitled to credit petitioner's contemporaneous account and reject her more recent statement that the condition of the wires changed on the day of the accident (*see Matter of Bisiani v Kelly*, 39 AD3d 261 [1st Dept 2007]). Respondents reasonably inferred that, since the wires had been in place for several months before petitioner's fall, she must have been aware of them and routinely stepped over them.

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

ENTERED: DECEMBER 20, 2012

CLERK

Andrias, J.P., Saxe, Moskowitz, Freedman, Abdus-Salaam, JJ.

8844 The People of the State of New York, Ind. 2231/09
Respondent,

-against-

Premnath Deolall,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Frances A. Gallagher of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Kibbie F. Payne, J.), rendered October 8, 2009, convicting defendant, after a jury trial, of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

Since defendant made only a general motion for a trial order of dismissal, and since the court did not make any ruling that addressed the specific arguments defendant makes for the first time on appeal, defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

The evidence supports the conclusion that, at the time and place of the theft (*see* Penal Law § 155.30[1]), the value of the stolen property exceeded the $1,000 threshold for fourth-degree grand larceny. The evidence included the victim's testimony that at the time of the theft he had recently bought the computer for more than twice the statutory threshold and that it was in excellent condition at the time of the crime (*see People v Geroyianis*, 96 AD3d 1641, 1644 [4th Dept 2012] [unlikely that computer's value depreciated significantly in nine months], *lv denied* 19 NY3d 996 [2012]; *compare People v Monclova*, 89 AD3d 424, 425 [2011] [insufficient proof of value of three-year-old computer], *lv denied* 18 NY3d 861 [2011]).

The court properly denied defendant's request for a missing witness charge regarding the victim's mother, because there was no evidence that she could have provided material, noncumulative testimony. The record failed to establish that this witness was in a position to see anything that was relevant to any contested issue (*see People v Dianda*, 70 NY2d 894 [1987]; *compare People v Kitching*, 78 NY2d 532, 538 [1991]). In any event, any error in

declining to give the charge was harmless in light of the overwhelming evidence that defendant was the person who took the computer.

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

ENTERED: DECEMBER 20, 2012

CLERK

Andrias, J.P., Saxe, Moskowitz, Freedman, Abdus-Salaam, JJ.

8845 Thomas Cashman, Index 301292/09
Plaintiff-Appellant,

-against-

Jose A. Berroa, et al.,
Defendants-Respondents.

Sim & Records, LLP, Bayside (Sang J. Sim of counsel), for appellant.

Law Offices of Cohen & Kuhn, New York (Michael V. DiMartini of counsel), for respondents.

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered February 9, 2012, which granted defendant Parkchester Preservation Management, LLC's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

In this personal injury action, plaintiff alleges that he was struck by the side mirror of a van driven by defendant Berroa, and that Berroa was driving the van while in the course of his employment with defendant Parkchester.

Defendant Parkchester made a prima facie showing of its entitlement to judgment as a matter of law with evidence that Berroa owned the offending vehicle and was not employed by Parkchester at the time of the accident.

In opposition, plaintiff failed to raise a triable issue of fact. The uncertified public safety report plaintiff submitted is not in admissible form and thus lacks evidentiary value (*see Coleman v Maclas*, 61 AD3d 569, 569 [1st Dept 2009]). The affidavit from a nonparty witness fails to raise a material issue of fact, as the witness never indicated who owned or drove the van he saw around the time of the accident.

Plaintiff has not shown that additional discovery will likely lead to evidence warranting denial of Parkchester's motion (*see Smith v Andre*, 43 AD3d 770, 771 [1st Dept 2007]; CPLR 3212 [f]).

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

ENTERED: DECEMBER 20, 2012

CLERK

Andrias, J.P., Saxe, Moskowitz, Freedman, Abdus-Salaam, JJ.

8846 Joyce Kafati-Batarse, Index 651344/11
Plaintiff-Respondent,

-against-

Corcoran Group,
Defendant-Appellant.

Saiber LLC, New York (Marc C. Singer of counsel), for appellant.

Stewart Occhipinti, LLP, New York (Frank S. Occhipinti of counsel), for respondent.

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered May 18, 2012, which, upon reargument, denied defendant's motion to compel plaintiff to respond to its discovery request concerning plaintiff's earnings from 2007-2010, unanimously affirmed, with costs.

In this suit stemming from commissions allegedly owed by defendant to plaintiff for projects and transactions in process when the contract between them was terminated in 2007, information concerning plaintiff's posttermination earnings with defendant's competitors is irrelevant and not discoverable (*see BGC Partners, Inc. v Refco Sec., LLC*, 96 AD3d 601, 602 [1st Dept 2012]). Plaintiff's claims concern monies owed for work performed by plaintiff prior to termination of her contract.

Accordingly, any money earned by her from subsequent employment is unavailable for use by defendant to offset monies that may be awarded in this case (*cf. Donald Rubin, Inc. v Schwartz*, 191 AD2d 171 [1st Dept 1993]). Further, the contract between the parties provides for a reduction of plaintiff's commissions based upon work performed by defendant's employees after the contract's termination. Accordingly, defendant's concerns of a windfall recovery by plaintiff are misplaced.

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

ENTERED: DECEMBER 20, 2012

CLERK

Andrias, J.P., Saxe, Moskowitz, Freedman, Abdus-Salaam, JJ.

8847 Daniel Barhak, Index 300984/10
Plaintiff-Appellant,

-against-

L. Almanzar-Cespedes,
Defendant-Respondent.

Elana Sharara, Great Neck, for appellant.

Backer, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Stacy R. Seldin of counsel), for respondent.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered October 20, 2011, which, insofar as appealed from, granted defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, the motion denied to the extent it sought dismissal of plaintiff's claim that he suffered "permanent consequential" and "significant limitation" injuries to his cervical spine, and otherwise affirmed, without costs.

Plaintiff alleges that as a result of a rear-end motor vehicle accident that occurred in August 2009, he sustained permanent injuries to his cervical spine, lumbar spine, left elbow, and left shoulder. Defendant met his prima facie burden

by submitting, among other things, the affirmation of an orthopedic surgeon who found upon recent examination that each body part exhibited full range of motion (*see Spencer v Golden Eagle, Inc.*, 82 AD3d 589 [1st Dept 2011]; *DeLeon v Ross*, 44 AD3d 545 [1st Dept 2007]). As to plaintiff's claimed cervical spine injury, defendant proffered the affirmation of a radiologist who, upon reviewing an MRI taken after the accident, opined that plaintiff had extensive degenerative disc disease and desiccation which predated the accident and the disc herniations seen at multiple levels had a degenerative etiology (*see Porter v Bajana*, 82 AD3d 488 [1st Dept 2011]).

Plaintiff raised an issue of fact as to his claim of serious injury to his cervical spine. He submitted the affirmations of a radiologist who found that the MRI films reveal a bulging disc and herniations at multiple levels, and his treating neurologist who conducted an EMG/NCV test showing radiculopathy, measured continuing limitations in range of motion, and opined, based on the medical evidence and absence of prior injuries, that plaintiff's cervical spine injuries were caused by the accident (*see Serbia v Mudge*, 95 AD3d 786, 787 [1st Dept 2012]; *Yuen v Arka Memory Cab Corp.*, 80 AD3d 481, 482 [1st Dept 2011]). Plaintiff also adequately addressed his gap in treatment through

his treating doctor's explanation that treatment had stopped because plaintiff reached "maximum medical improvement" (*Ayala v Cruz*, 95 AD3d 699, 700 [1st Dept 2012])

Plaintiff, however, submitted no objective medical evidence of any lumbar spine injury (*see Williams v Horman*, 95 AD3d 650, 651 [1st Dept 2012]), failed to adduce any evidence in support of his claimed left shoulder injury, and proffered no evidence of continuing limitations in the left elbow (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]; *Martinez v Goldmag Hacking Corp.*, 95 AD3d 682, 683 [1st Dept 2012]).

Supreme Court properly dismissed plaintiff's 90/180-day claim in light of his deposition testimony that he lost no time from work, and the allegation in his verified bill of particulars that he was not confined to bed or home after the accident (*see Mitrotti v Elia*, 91 AD3d 449, 450 [1st Dept 2012]). Plaintiff failed to submit evidence sufficient to raise an issue of fact as to the 90/180-day claim.

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

ENTERED: DECEMBER 20, 2012

CLERK

Andrias, J.P., Saxe, Moskowitz, Freedman, Abdus-Salaam, JJ.

8848 In re Joann Moorer, Index 403272/10
Petitioner-Respondent,

-against-

NYC HPD Office of Housing Operations
and Division of Tenant Resources,
Respondent-Appellant.

Michael A. Cardozo, Corporation Counsel, New York (Michael J. Pastor of counsel), for appellant.

Joann Moorer, respondent pro se.

Judgment, Supreme Court, New York County (Manuel J. Mendez, J.), entered August 9, 2011, which granted the petition, brought pursuant to CPLR article 78, to annul respondent's determination, dated May 9, 2009, terminating petitioner's Section 8 housing subsidy as of June 30, 2009, and to reinstate the subsidy retroactive to the date of termination, and remanded the matter to respondent for an administrative hearing on the merits, unanimously affirmed, without costs.

Supreme Court correctly found that petitioner timely commenced this article 78 proceeding and that respondent's determination should be annulled. The court correctly found that petitioner timely challenged respondent's decision to terminate her subsidy by timely filing a re-certification package with the

agency addressing the grounds for termination, and by timely submitting the agency's form requesting a conference. It should be noted that the form to request a conference addressing pre-termination status and the form to request a hearing addressing termination status are virtually identical, in that both instruct the participant to explain why his or her subsidy should not be terminated, and that here, the agency concededly interpreted the request for a conference as a request for a hearing.

Subsequently, when petitioner finally received actual notice of respondent's adverse, final and binding administrative determination in September 2010, i.e., that her subsidy was terminated and that her request for a conference or hearing was denied, and commenced this proceeding in November 2010, it was well within the four-month limitation period (*see* CPLR 217[1]; *Yarbough v Franco*, 95 NY2d 342 [2000]). Annulment was proper since respondent failed to comply with its own procedures in reaching its determination, inasmuch as its termination procedures require it to afford a hearing to challenge

termination decisions, and respondent cannot lawfully terminate the subsidy until the hearing process is completed (*see* 24 CFR § 982.555; CPLR 7803 [3] *Robinson v Martinez*, 308 AD2d 355 [1st Dept 2003]).

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

ENTERED: DECEMBER 20, 2012

CLERK

Andrias, J.P., Saxe, Moskowitz, Freedman, Abdus-Salaam, JJ.

8849 The People of the State of New York, Ind. 864/10
Respondent,

-against-

Stewart Hamilton,
Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Thomas Farber, J.), rendered on or about March 29, 2011,

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

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

ENTERED: DECEMBER 20, 2012

CLERK

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

Andrias, J.P., Moskowitz, Freedman, Abdus-Saalam, JJ.

8851 In re Sheila Karp, et al., Index 3737/05
Petitioners-Appellants,

Sharon Louise Steinberg,
Respondent-Respondent.

Goldfarb Abrandt Salzman & Kutzin LLP, New York (Ira Salzman of counsel), for appellants.

Donald M. Nussbaum, New York, for respondent.

Order, Surrogate's Court, New York County (Kristin Booth Glen, S.), entered September 22, 2011, which granted respondent's motion for summary judgment dismissing the forfeiture claim and denied petitioners' cross motion for summary judgment, unanimously affirmed, without costs.

Because the record demonstrates that there is no evidence to establish that decedent's death was caused in part by sepsis, petitioners' claim was properly dismissed at the summary judgment stage. Moreover, given that decedent's sepsis was improving when he decided to stop receiving treatment, it cannot be shown that

sepsis – rather than decedent's competent decision to refuse further treatment, and the resulting uremia – caused his death (*cf. People v Snow*, 79 AD3d 1252, 1253 [2010], *lv denied* 16 NY3d 800 [2011]).

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

ENTERED: DECEMBER 20, 2012

CLERK

Andrias, J.P., Saxe, Moskowitz, Freedman, Abdus-Salaam, JJ.

8852 David Cuttino, Index 103895/09
Plaintiff-Respondent,

-against-

West Side Advisors, LLC,
Defendant-Appellant.

Jackson Lewis LLP, Melville (Marc S. Wenger of counsel), for appellant.

Himmel & Bernstein, LLP, New York (Tracey S. Bernstein of counsel), for respondent.

Order, Supreme Court, New York County (Joan A. Madden, J.), entered July 9, 2011, which granted defendant-employer's motion for summary judgment dismissing the complaint only to the extent of dismissing the second and third causes of action, and, upon a search of the record, granted plaintiff employee summary judgment on his first cause of action for breach of contract, unanimously modified, on the law, to the extent of vacating that portion of the order granting plaintiff summary judgment on his first cause of action for breach of contract, and denying that branch of defendant's motion seeking dismissal of plaintiff's second cause of action for quantum meruit, and otherwise affirmed, without costs.

The evidence, including plaintiff's testimony, defendant's

internal correspondence and bookkeeping records, when viewed favorably to the plaintiff on defendant's motion for summary judgment (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]), raises triable issues as to whether the parties orally agreed to extend the terms of plaintiff's 2007 compensation agreement into 2008, as well as for the remainder of the year. Although plaintiff alleges that defendant's principal agreed to extend the agreement, defendant's principal testified that he did not agree to an extension of the 2007 compensation agreement and that in 2008, compensation payments were to be made at his discretion. That the parties had not entered into a written compensation agreement, as they had in the past, supports this position; however, plaintiff and a similarly-situated co-worker received payments in 2008 that reflect the application of the 2007 agreements for each individual. While this may reasonably be explained as having been made for convenience, or to buy the principal time to decide how to compensate at-will employees during a difficult period for the financial market, an issue of fact precludes an award of summary judgment to either party.

Under the circumstances, reinstatement of the quantum meruit

claim is warranted since the record reflects a triable issue of fact as to whether, in the absence of a contract, plaintiff is entitled to unpaid incentive compensation (*see Haythe & Curley v Harkins*, 214 AD2d 361, 362 [1st Dept 1995]).

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

ENTERED: DECEMBER 20, 2012

CLERK

Andrias, J.P., Saxe, Moskowitz, Freedman, Abdus-Salaam, JJ.

8853 In re Jasiaia Lew R., etc.,

A Dependent Child Under
Eighteen Years of Age, etc.,

Aylyn R.,
Respondent-Appellant,

Catholic Guardian Society & Home Bureau,
Petitioner-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Joseph T. Gatti, New York, for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Susan Clement of counsel), attorney for the child.

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Order, Family Court, New York County (Douglas E. Hoffman, J.), entered on or about November 14, 2011, which, upon a fact-finding determination that respondent mother abandoned the subject child, terminated her parental rights and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence established that respondent failed to visit or communicate with the child or the agency for the six-month period immediately preceding the filing of the

petition, which gave rise to a presumption of abandonment (*see* Social Services Law § 384-b[5][a]; *Matter of Omar Saheem Ali J. [Matthew J.]*, 80 AD3d 463 [1st Dept 2011]; *Matter of Chaka F.*, 220 AD2d 310 [1st Dept 1995]). The agency's caseworker provided credible testimony that during the relevant time period, respondent never visited the child at the agency, never contacted the agency concerning the child, and did not attend a visit scheduled for a drug treatment referral, at which time she was to have also seen the child. The lone contact between respondent and the child during the relevant time period was initiated by the foster mother so as to obtain respondent's permission to take the child on a vacation. Respondent's claim that she once visited the child at the foster mother's home was uncorroborated, as were her claims that she called the foster mother several times concerning the child and that she once sent a friend to deliver clothing and money. The court's rejection of respondent's testimony is entitled to deference (*see Matter of Jared S. [Monet S.]*, 78 AD3d 536 [1st Dept 2010], *lv denied* 16 NY3d 705 [2011]). Moreover, even assuming the veracity of respondent's claims, such efforts constituted only sporadic minimal contacts that were insufficient to preclude a finding of

abandonment (*see Matter of Elvis Emil J. C.*, 43 AD3d 710 [1st Dept], *lv denied* 9 NY3d 814 [2007]; *Matter of Female W.*, 271 AD2d 210 [1st Dept 2000]).

Respondent's arguments that her parental rights should not have been terminated and that the petition should have been dismissed are raised for the first time on appeal (*see Matter of Matthew Niko M. [Niko M.]*, 85 AD3d 544 [1st Dept 2011]). In any event, a preponderance of the evidence established that it was in the child's best interest to terminate respondent's parental rights so that he could be freed for adoption by his foster mother, the only parent he has ever known (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]).

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

ENTERED: DECEMBER 20, 2012

CLERK

Andrias, J.P., Saxe, Moskowitz, Freedman, Abdus-Salaam, JJ.

8854 The People of the State of New York, Ind. 4287/08
Respondent,

-against-

Carl Jiminez, etc.,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (David C. Bornstein of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J. at suppression hearing; A. Kirke Bartley, Jr., J. at jury trial and sentencing), rendered December 15, 2010, convicting defendant of menacing in the second degree, and sentencing him to time served, unanimously affirmed.

The court properly denied defendant's motion to suppress physical evidence. The police went to defendant's apartment in response to a complaint that defendant had used a knife to threaten another person. Defendant opened the door to the officers while holding a knife and then placed it in plain view on a stove within two feet of his door, where food was cooking. Immediately after the police lawfully arrested defendant in his doorway, the exigent circumstances justified an officer's minimal

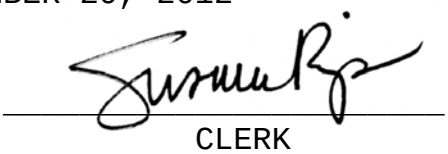
intrusion (*see People v Febus*, 157 AD2d 380, 384 [1990], *appeal dismissed* 77 NY2d 835 [1991]) of taking a few steps into the apartment, retrieving the knife to prevent defendant from being able to access it (*see People v Wylie*, 244 AD2d 247, 251 [1st Dept 1997], *lv denied* 91 NY2d 946 [1998]), and shutting off the stove burner. The fact that defendant was handcuffed and in custody of other officers just outside the apartment is not dispositive (*see id.*). Moreover, the officer's entry was justified by the need to turn off the burner to prevent a hazard. Since the entry was permissible, the officer was authorized to seize the evidence found in plain view (*see generally People v Brown*, 96 NY2d 80, 89 [2001]). In any event, any error in admitting this evidence was harmless (*see People v Crimmins*, 36 NY2d 230, 237 [1975]).

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the jury's credibility determinations. The victim's testimony established all the elements of second-degree menacing.

Defendant's contention that the verdict was legally repugnant is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits (*see People v Muhammad*, 17 NY3d 532 [2011]).

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

ENTERED: DECEMBER 20, 2012



CLERK

Andrias, J.P., Saxe, Moskowitz, Freedman, Abdus-Salaam, JJ.

8857 The People of the State of New York, Ind. 757N/11
Respondent,

-against-

Gina Villalobos,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Ellen M. Coin, J.), rendered on or about June 3, 2011, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: DECEMBER 20, 2012

CLERK

Tom, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Clark, JJ.

8860 The People of the State of New York, Ind. 2688/08
Respondent,

-against-

Juan Toledo,
Defendant-Appellant.

_____

Fitzpatrick, Cella, Harper & Scinto, New York (Brian D. O'Reilly of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Justin J. Braun of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Cassandra M. Mullen, J.), rendered March 18, 2010, convicting defendant, after a jury trial, of causing animal fighting (Agriculture and Markets Law § 351[2][a]), and sentencing him to a term of one year and a fine of $25,000, unanimously affirmed.

Defendant did not preserve his claim that the court erred in failing to excuse two prospective jurors for cause, as he did not join in the challenges made to those jurors by other defendants (*see People v Buckley*, 75 NY2d 843, 846 [1990]; *People v Colselby*, 240 AD2d 227 [1st Dept 1997], *lv denied* 90 NY2d 1010 [1997]). The record does not support the assertion that there was an arrangement whereby any defendant's challenge for cause applied to all defendants. The record only shows that the four

defendants shared *peremptory* challenges, as mandated by statute (*see* CPL 270.25[3]). By contrast, when challenges for cause were made, the court gave the attorneys the opportunity to individually join in the challenge. Furthermore, the primary claim of bias on the part of the two panelists at issue did not involve defendant, but only a codefendant.

We decline to review defendant's claim in the interest of justice. As an alternative holding, we find that the court properly exercised its discretion in denying the challenges. As noted, the bias, if any, was primarily directed at a codefendant, notwithstanding the fact that the defendants were charged with acting in concert. In any event, the colloquy between counsel, the court and each panelist, viewed as a whole, did not cast doubt on either panelist's ability to follow the court's instructions and render an impartial verdict (*see People v Chambers*, 97 NY2d 417, 419 [2002]; *People v Johnson*, 94 NY2d 600, 610-614 [2000]).

We perceive no reason to reduce the fine. If defendant can establish that he is unable to pay the fine because of indigency, CPL 420.10(5) provides a remedy.

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

ENTERED: DECEMBER 20, 2012

CLERK

Tom, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Clark, JJ.

8862-
8862A In re Jeremiah Emmanuel R., and Another,

Dependent Children Under Eighteen
Years of Age, etc.,

Sylvia C.,
Respondent-Appellant,

Leake and Watts Services, Inc,
Petitioner-Respondent.

_____

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

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

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

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Orders of disposition, Family Court, Bronx County (Carol R. Sherman, J.), entered on or about November 18, 2011, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject children, and committed custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Petitioner met its burden of establishing, by clear and convincing evidence, that the children were permanently neglected

(*see* Social Services Law § 384–b[7][a]). Respondent failed to plan for the future of her children despite the diligent efforts of the agency to strengthen and encourage her relationship with the children by, among other things, scheduling visitation with them, providing respondent with referrals for appropriate services, and assisting respondent in obtaining suitable housing (*see Matter of Shaqualle Khalif W. [Denise W.]*, 96 AD3d 698, 698–699 [1st Dept 2012]). Respondent failed to remain drug and alcohol free or to secure appropriate housing or employment, and she interacted poorly with the children during visitation. Consistent visitation with the children does not preclude a finding of permanent neglect where, as here, there is a failure to plan for the children's future (*see Matter of Jonathan Jose T.*, 44 AD3d 508, 509 [1st Dept 2007]).

Respondent's contention that she was deprived of a fair trial because the court asked questions regarding how one of her older children felt when respondent refused to allow her to be adopted and whether she was concerned with the children's wishes regarding adoption that were speculative and/or lacked a foundation is unavailing. Respondent's perception of and response to the children's wishes and needs is material and relevant to the issue of whether or not it was in the children's

best interest that they be freed for adoption (*see* Family Ct Act *§ 624; Matter of Jamaal DeQuan M.*, 24 AD3d 667, 668 [2d Dept 2005]; *Matter of Chelsea K.*, 15 AD3d 794, 794-795 [3rd Dept 2005], *lv dismissed* 4 NY3d 869 [2005]; *Matter of Ricky A.B.*, 15 AD3d 838, 839 [4th Dept 2005]).

Lastly, a preponderance of the evidence establishes that it is in the best interests of the children to terminate respondent's parental rights (*see Matter of Khalil A. [Sabree A.]*, 84 AD3d 632 [1st Dept 2011]). The children have been residing in a stable and nurturing environment with their foster mother, who is willing and able to adopt them, for approximately three and a half years. In view of the foregoing, a suspended judgment is not appropriate (*see id.*; *Matter of Fernando Alexander B. [Simone Anita W.]*, 85 AD3d 658, 659 [1st Dept 2011]).

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

ENTERED: DECEMBER 20, 2012

CLERK

Tom, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Clark, JJ.

8863 Maria Castro, Index 305671/10
Plaintiff-Appellant,

-against-

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

_____

Sim & Records, LLP, Bayside (Sang J. Sim of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered April 23 2012, which, in this sidewalk trip and fall case, granted the City defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The pleadings, 50-h hearing testimony, photographs, and the Big Apple Map, viewed together, show that the City did not have written notice of the sidewalk condition which plaintiff alleges caused her to trip and fall (*see* Administrative Code of City of NY § 7-201[c]; *D'Onofrio v City of New York*, 11 NY3d 581, 585 [2008]; *Roldan v City of New York*, 36 AD3d 484 [1st Dept 2007]). Plaintiff’s argument that the City is liable because it is required to maintain the sidewalk pursuant to Administrative Code § 7-210, even if it did not have written notice of the defect, is

unavailing (*see Sondervan v City of New York*, 84 AD3d 625 [1st Dept 2011]).

In any event, the photographs plaintiff submitted and the evidence of the circumstances surrounding the accident establish that the defect is trivial in nature, and did not amount to a hazard (*see Trincere v County of Suffolk*, 90 NY2d 976, 977-978 [1997]; *Schwartz v Bleu Evolution Bar & Rest. Corp.*, 90 AD3d 488 [1st Dept 2011]).

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

ENTERED: DECEMBER 20, 2012

CLERK

Tom, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Clark, JJ.

8864 Linda Strauss, Index 12131/08
Plaintiff-Respondent,

-against-

Babak Saadatmand,
Defendant-Appellant.

Babak Saadatmand, appellant pro se.

Linda Strauss, respondent pro se.

Order, Supreme Court, Bronx County (La Tia W. Martin, J.), entered June 25, 2012, which, inter alia, granted plaintiff's motion to increase interim child support from $2,000 to $3,000 per month, and denied defendant's cross motion to suspend interim child support payments and direct plaintiff to reimburse him for all child support payments related to a former nanny, unanimously affirmed, without costs.

We do not perceive any "exigent circumstances" warranting disturbance of the modified interim award (*see Anonymous v Anonymous*, 63 AD3d 493, 496-497 [1st Dept 2009], *appeal dismissed* 14 NY3d 921 [2010]). The motion court properly directed the parties to supplement their motion papers with updated financial statements (*see* CPLR 2214[c]). In any event, however, the motion court did not base the upward modification in interim child

support on the parties' updated financial information; it based the modification on the "substantial change in circumstances" represented by the reduction in defendant's interim visitation schedule from two to three days per week to one two-hour supervised visit per week (*see* Domestic Relations Law § 236[B][9][b][2][i]).

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

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

ENTERED: DECEMBER 20, 2012

CLERK

Tom, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Clark, JJ.

8866 In re Commissioner of Social Services on Behalf of Hasime C.,
Petitioners-Respondents,

-against-

Kastriot D.,
Respondent-Appellant.

Kenneth M. Tuccillo, Hudson, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Kathy H. Chang of counsel), for respondent.

Order, Family Court, New York County (Douglas E. Hoffman, J.), entered on or about June 25, 2010, which denied respondent father's objection to an order of a Support Magistrate, entered on or about February 23, 2010, denying his motion to vacate an order of support, entered upon his default, and a judgment for support arrears in the amount of $31,826.56, unanimously affirmed, without costs.

Respondent failed to demonstrate a reasonable excuse for his default (*see* CPLR 5015[a][1]). Before the date of the support hearing, respondent was present in court and advised that he needed to document his financial condition on the next court date or the support order would be based on the children's needs on a public assistance budget, pursuant to Family Court Act § 413(1)

(k). Nonetheless, respondent failed to appear at the support hearing. Although he was incarcerated at the time of the hearing, he took no action to notify the court of his unavailability (*see Matter of A.C.S. Child Support Litig. Unit v David S.*, 32 AD3d 724, 724 [1st Dept 2006]).

Respondent also failed to present a meritorious defense (*see Matter of Tyieyanna L. [Twanya McK.]*, 94 AD3d 494, 494 [1st Dept 2012]), since he never established his income for the period before the date of the default order.

The court correctly declined to cancel, reduce or otherwise modify the child support arrears that accrued before respondent's filing of an application for that relief (*see* Family Court Act § 451[1]; *see Matter of Dox v Tynon*, 90 NY2d 166, 173-174 [1997]). A grievous injustice does not result from this determination, as respondent's financial hardship was the result

of his wrongful conduct leading to his incarceration (*see Matter of Knights v Knights*, 71 NY2d 865, 866-867 [1988]).

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: DECEMBER 20, 2012

CLERK

Tom, J.P., Sweeny, DeGrasse, Manzanet-Daniels, JJ.

8867 The People of the State of New York, Ind. 6514/10
Respondent,

-against-

Ryan Figuiredo,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Allen J. Vickey of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie Wittner, J. at plea; Renee A. White, J. at sentencing), rendered on or about March 29, 2011,

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

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

ENTERED: DECEMBER 20, 2012

CLERK

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

Tom, J.P., Sweeny, DeGrasse, Clark, JJ.

8868 JPMorgan Chase Bank, N.A., Index 601257/10
Plaintiff,

-against-

Luxor Capital, LLC,
Defendant-Appellant.
- - - - -
Luxor Capital, LLC,
Third-Party Plaintiff-Appellant,

-against-

Credit Industriel ET Commercial,
Third-Party Defendant-Respondent.

Porzio, Bromberg & Newman, P.C., New York (Peter J. Gallagher of counsel), for appellant.

Jenner & Block LLP, New York (Carletta F. Higginson of counsel), for respondent.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered July 26, 2011, which, to the extent appealed from as limited by the briefs, denied defendant/third-party plaintiff Luxor's motion for summary judgment on its contractual indemnification claim against third-party defendant Credit Industriel et Commercial (CIC), unanimously affirmed, with costs.

The indemnification clause in the Loan Syndication and Trading Association agreement at issue provides, among other things, that CIC shall indemnify Luxor for any costs or expenses

arising out of a breach of CIC's representations and warranties under the agreement. The IAS court correctly denied Luxor's motion as premature, as it cannot be determined on this record whether CIC breached the LSTA agreement. CIC's duty to defend is not broader than its duty to indemnify (*see Inner City Redevelopment Corp. v Thyssenkrupp El. Corp.*, 78 AD3d 613, 613 [1st Dept 2010]), and the indemnification clause does not apply to the mere assertion of claims, regardless of their outcome (*cf. Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265, 275 [2007]).

It cannot be determined on this record whether section 4.1(h) of the LSTA agreement is implicated, as the language in that section is ambiguous (*see RM Realty Holdings Corp. v Moore*, 64 AD3d 434, 436 [1st Dept 2009]). Indeed, there are reasonable, conflicting interpretations of that section, including CIC's interpretation that it applies only to conduct that results in equitable subordination, which is not at issue here (*see Enron Corp. v Springfield Assoc., LLC [In re Enron Corp.]*, 379 BR 425, 444 n 96 [SD NY 2007]).

We do not reach Luxor's argument, raised for the first time in its appellate reply brief, that CIC breached its warranties in

section 4.1(g) and (i) of the LSTA agreement (*see Cassidy v Highrise Hoisting & Scaffolding, Inc.*, 89 AD3d 510, 511 [1st Dept 2011]). Were we to reach the argument, we would still find that Luxor's motion was correctly denied, as the waiver upon which it bases its argument has terms that are ambiguous.

We also decline to consider Luxor's argument that it is entitled to indemnification under section 6.1(a)(ii) of the LSTA agreement, as the argument was raised for the first time in Luxor's reply before the IAS court (*see Lumbermens Mut. Cas. Co. v Morse Shoe Co.*, 218 AD2d 624, 625-626 [1st Dept 1995]). Were we to consider the argument, we would affirm the denial of summary judgment, as the language in section 6.1(a)(ii) is ambiguous.

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

ENTERED: DECEMBER 20, 2012

CLERK

Tom, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Clark, JJ.

8869 Jacqueline Duval, Index 314424/11
Plaintiff-Appellant,

-against-

John Scott Major,
Defendant-Respondent.

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Stein & Ott, LLP, New York (Sharon Stein of counsel), for appellant.

Cohen Clair Lans Greifer & Thorpe LLP, New York (Robert Stephan Cohen of counsel), for respondent.

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Order, Supreme Court, New York County (Lori S. Sattler, J.), entered August 3, 2012, which, inter alia, granted defendant's motion to dismiss the complaint and for attorneys' fees, unanimously affirmed, without costs.

By the standards of either New York or English law, the plain language of the parties' agreement, as set forth in the Financial Order issued by the London High Court of Justice on May 26, 2006, reflects the parties' intention that English law govern an application by either party for modification of the maintenance provision of the agreement and that any application for a modification be made to the English court (*see Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]; *Ditta Estasis Salotti di Colzani Aimo E Gianmario Colzani v RÜWA*

Polstereimaschinen GmbH, [Case 24/76 TJWS 6], 1 CMLR 345, 355 [1977] [whether clause conferring jurisdiction reflects parties' consensus "must be clearly and precisely demonstrated"]; *Coreck Maritime GmbH v Handelsveem BV* [Case C-387/98], Celex No. 698J0387).

In view of the fact that plaintiff's financial resources are significantly greater than defendant's and that her actions have caused unnecessary and protracted litigation, the motion court properly awarded defendant attorneys' fees (to be determined) (*see Stella v Stella*, 16 AD3d 109 [1st Dept 2005]).

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

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

ENTERED: DECEMBER 20, 2012

CLERK

Tom, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Clark, JJ.

8870 The People of the State of New York, Ind. 204/09
Respondent,

-against-

Marino Molina,
Defendant-Appellant.

Green & Willstatter, White Plains (Theodore S. Green of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Robert R. Sandusky, III of counsel), for respondent.

Judgment, Supreme Court, Bronx County (John W. Carter, J.), rendered on April 4, 2012, convicting defendant, after a jury trial, of attempted assault in the first degree, and sentencing him to a term of 3½ years, unanimously reversed, on the law, and the matter remanded for a new trial.

The trial court should have instructed the jury on justification pertaining to the use of nondeadly physical force and should not have limited the justification charge to those circumstances in which the use of deadly physical force would have been justified (*see* Penal Law § 35.15). Although the People's theory was that defendant attacked the complainant with a scissors, there was a reasonable view of the evidence, viewed in the light most favorable to the defendant, that defendant used

nondeadly force. Defendant testified that the complainant initially punched defendant in the face, and defendant then grabbed the complainant, causing him to fall on the floor and sustain injuries (*see People v Smith*, 62 AD3d 411 [1st Dept 2009], *lv denied* 12 NY3d 929 [2009]; *People v Ogodor*, 207 AD2d 461 [2d Dept 1994]). Furthermore, the error was not harmless, since defendant's case rested entirely on his contention that he used only nondeadly force, and that such use was justified (*see People v Lauderdale*, 295 AD2d 539, 540 [2d Dept 2002]; *see also Ogodor*, 207 AD2d at 463).

Since we are ordering a new trial, we find it unnecessary to discuss defendant's other arguments, except that we find that the verdict was based on legally sufficient evidence and was not against the weight of the evidence.

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

ENTERED: DECEMBER 20, 2012

CLERK

Tom, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Clark, JJ.

8871 Stewart Dorrian, Index 306691/10
Plaintiff-Appellant,

-against-

Criolis Cantalicio,
Defendant-Respondent.

Krentsel & Guzman, LLP, New York (Alex Rybakov of counsel), for appellant.

Richard T. Lau & Associates, Jericho (Kathleen E. Fioretti of counsel), for respondent.

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered October 11, 2011, which granted defendants' motion for summary judgment dismissing the complaint based on the failure to establish a serious injury within the meaning of Insurance Law § 5102(d), and denied plaintiff's cross motion for partial summary judgment as moot, unanimously affirmed, without costs.

Plaintiff alleged that, as the result of a rear-end car accident, he sustained injuries to his cervical and lumbar spine and left knee. He acknowledged having suffered prior back injuries in one or more of three prior motor vehicle accidents and a work-place accident, and that he had left knee surgery following one of the prior accidents.

Defendant met his prima facie burden by submitting the

affirmed reports of an orthopedist who found that plaintiff had full range of motion in all affected parts, and of a radiologist who found degeneration in all claimed injured body parts (*see Spencer v Golden Eagle, Inc.*, 82 AD3d 589 [1st Dept 2011]), as well as the evidence of prior accidents which resulted in injuries to his back and knees (*see Brewster v FTM Servo, Corp.*, 44 AD3d 351, 352 [1st Dept 2007]).

In opposition, plaintiff failed to raise an issue of fact. His treating physician measured normal range of motion in his cervical spine, with only minor limitations in one plane, at several examinations months after the accident (*see Phillips v Tolnep Limo Inc.*, 99 AD3d 534 [1st Dept 2012]; *Canelo v Genolg Tr., Inc.*, 82 AD3d 584 [1st Dept 2011]), and offered no explanation for the decline of plaintiff's cervical spine range of motion at his most recent examination (*see Thomas v City of New York*, 99 AD3d 580 [1st Dept 2012]). This failure to explain the inconsistencies between her earlier finding of near full range of motion and her present findings of deficits entitles defendant to summary judgment (*see id.*; *Jno-Baptiste v Buckley*, 82 AD3d 578, 578-79 [1st Dept 2011]).

As for the claimed left knee injury, plaintiff's physician found normal range of motion in the months following the accident

and did not explain subsequent declines. Moreover, her opinion as to causation was inadequate in light of plaintiff's prior history of left knee surgery and defendant's expert's opinion that any tear was degenerative in origin (*see Pines v Lopez*, 88 AD3d 545 [1st Dept 2011]). Plaintiff's physician also failed to explain earlier improvements in lumbar range of motion, or to raise an issue of fact as to causation of that injury, since her opinion that plaintiff's lumbar injuries were caused by the accident was based on plaintiff's subjective statement that "he had recovered" from his three prior accidents, without reference to prior medical records or other medical evidence (*see McArthur v Act Limo, Inc.*, 93 AD3d 567 [1st Dept 2012]; *Style v Joseph*, 32 AD3d 212, 214 [1st Dept 2006]). Plaintiff did not plead a claim for exacerbation of prior injuries and, in any event, his physician did not provide any basis for determining the extent of any exacerbation of plaintiff's prior injuries (*see Suarez v Abe*, 4 AD3d 288 [1st Dept 2004]).

Given the lack of serious injury, the issue of liability is academic (*see Hernandez v Adelango Trucking*, 89 AD3d 407, 408 [1st Dept 2011]).

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

ENTERED: DECEMBER 20, 2012

CLERK

Tom, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Clark, JJ.

8872 The People of the State of New York, Ind. 619/11
Respondent,

-against-

Ariel Pupobacallao,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Bonnie Wittner, J.), rendered on or about June 28, 2011, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: DECEMBER 20, 2012

CLERK

Tom, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Clark, JJ.

8873 Sean Palomo, Index 305897/09
Plaintiff-Respondent-Appellant,

-against-

175th Street Realty Corp., et al.,
Defendants-Appellants-Respondents.

Rivkin Radler LLP, Uniondale (Merril S. Biscone of counsel), for appellants-respondents.

Barry E. Greenberg, P.C., Farmingdale (Barry E. Greenberg of counsel), for respondent-appellant.

Order, Supreme Court, Bronx County (John A. Barone, J.), entered March 9, 2012, which denied defendants' motion for summary judgment dismissing the complaint, and denied plaintiff's cross motion for, inter alia, an order striking defendants' answer for spoliation of key evidence, directing defendants and their insurance carriers to produce their files for in camera inspection, and granting him summary judgment as to liability, unanimously modified, on the law, to grant defendants' motion to the extent it sought dismissal of the complaint as against defendants Steven Padernacht and Michael Padernacht, and otherwise affirmed, without costs.

Defendants satisfied their burden on summary judgment by presenting evidence demonstrating that they did not create the

defective condition of the marble staircase landing that collapsed under plaintiff, and lacked actual or constructive notice thereof. In opposition, plaintiff presented evidence that the landing was visibly cracked for an extended period of time and wobbled when stepped on, thereby raising an issue of fact as to whether defendants had constructive notice of the defective condition for a sufficient period of time before the landing collapsed to be able to make repairs. However, to the extent that the motion sought dismissal as against the Padernacht defendants individually, it should have been granted, inasmuch as that portion of the motion was unopposed by plaintiff, and there is no evidence that the individual defendants personally participated in any malfeasance or misfeasance constituting an affirmative tortious act (*see Peguero v 601 Realty Corp.*, 58 AD3d 556, 558-559 [1st Dept 2009]).

Defendants' claim that the affidavits of three notice witnesses should be disregarded because they were not timely disclosed is unpersuasive since one witness was a former employee of defendants, and the other two were identified by plaintiff or his mother in their deposition testimony. Thus there can be no claim of prejudice or surprise. In any event, even without considering those affidavits, plaintiff raised an issue of fact

as to notice. The alleged untimely disclosure of plaintiff's expert did not render his expert's affidavit inadmissible, since any such failure was not intentional or willful, and there was no showing of prejudice to defendants (*see Baulieu v Ardsley Assoc., L.P.*, 85 AD3d 554 [1st Dept 2011]).

The merits of the untimely cross motion for summary judgment were properly reached to the extent that it is based on the same issues raised by the motion (CPLR 3212(a); *see Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280 [1st Dept 2006], *appeal dismissed* 9 NY3d 862 [2007]). Plaintiff did not establish entitlement to summary judgment based on the doctrine of res ipsa loquitur, since, even assuming arguendo that exclusivity could be established, he has not shown that the inference of negligence is inescapable or that defendants failed to raise any material issue of fact in rebuttal (*see Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 [2006]; *Estrategia Corp. v Lafayette Commercial Condo*, 95 AD3d 732 [1st Dept 2012]).

Plaintiff's motion to have defendants' answer stricken as a sanction for spoliation, based on the building superintendent's disposal of the broken marble pieces of the stair landing, was properly denied since plaintiff has not been deprived of his

ability to prove his case (*see Shapiro v Boulevard Hous. Corp.*, 70 AD3d 474, 476 [1st Dept 2010]), and plaintiff has not sought any lesser sanction (*Rodriguez v 551 Realty LLC*, 35 AD3d 221, 221 [1st Dept 2006]). The court properly declined to grant plaintiff's request for in camera inspection, as plaintiff did not seek such relief until more than six months after he filed his note of issue indicating that discovery was completed.

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

ENTERED: DECEMBER 20, 2012

CLERK

Tom, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Clark, JJ.

8874 Florence Ahnor, Index 305051/09
Plaintiff-Respondent,

-against-

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

IPIS Agency, et al.,
Defendants.

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Michael A. Cardozo, Corporation Counsel, New York (William K. Chang of counsel), for appellants.

Finkelstein & Partners, LLP, Newburgh (Andrew L. Spitz of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered May 16, 2011, which denied the motion of defendants City of New York and New York City Department of Homeless Services to dismiss the complaint and all cross claims as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

On January 8, 2008, plaintiff was injured when she slipped and fell on a wet substance on the floor of premises owned by defendant City and leased by defendant Department of Homeless Services. On April 3, 2009, which was five days before the one-year-and-90-day statute of limitations expired (General Municipal

Law § 50-i[1]), plaintiff moved for leave to file a late notice of claim. By order entered May 26, 2009, the court granted leave and directed plaintiff to serve the late notice of claim by June 25, 2009. On June 9, 2009, plaintiff filed the late notice of claim, and she commenced this action on June 23, 2009.

Based on these circumstances, dismissal of the complaint was warranted, since the action was not timely commenced. Although the May 26, 2009 order allowed plaintiff until June 25, 2009 to file her late notice of claim, plaintiff was nevertheless required to file her complaint within the one-year-and-90-day statute of limitations (*see Doddy v City of New York*, 45 AD3d 431 [1st Dept 2007]). Since plaintiff filed her application for leave to file a late notice of claim five days before the statute of limitations expired, she had until five days following the entry of the May 26, 2009 order to file the summons and complaint (*see id.; see also Pichardo v New York City Dept. of Educ.*, 99 AD3d 606 [1st Dept 2012]).

Plaintiff's reliance on the May 26, 2009 order is misplaced, because an extension of time cannot "exceed the time limited for the commencement of an action by the claimant against the [City]" (General Municipal Law § 50-e[5]). Moreover, General Municipal Law § 50-e provides that "[a]n application for leave to serve a

late notice shall not be denied on the ground that it was made after commencement of an action," (General Municipal Law § 50-e), and thus, nothing prevented plaintiff from filing the complaint prior to receiving leave to file a late notice of claim (*see Giblin v Nassau County Med. Ctr.*, 61 NY2d 67, 75 [1984]).

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

ENTERED: DECEMBER 20, 2012

CLERK

Tom, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Clark, JJ.

8875 The People of the State of New York, Ind. 7982/00
Respondent,

-against-

Alma Crawford,
Defendant-Appellant.

Richard M. Greenberg, Office of Appellate Defender, New York (Risa Gerson of counsel), for appellant.

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

Judgment of resentence, Supreme Court, New York County (Renee A. White, J.), rendered June 2, 2009, resentencing defendant to a term of 10 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: DECEMBER 20, 2012

CLERK

Tom, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Clark, JJ.

8876 Saint David's School, Index 653497/11
Plaintiff-Appellant,

-against-

Ben Hume,
Defendant-Respondent.

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Wilmer Cutler Pickering Hale and Dorr LLP, New York (Patrick Mair of counsel), for appellant.

Emery Celli Brinckerhoff & Abady LLP, New York (Matthew D. Brinckerhoff of counsel), for respondent.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered March 26, 2012, which granted defendant's cross motion to dismiss plaintiff's complaint to the extent it is based on the protest placard statements referenced as signs #1 and #3, unanimously affirmed, without costs.

Defendant, a long-standing rent-stabilized tenant in a residential building owned by plaintiff, a private elementary school, became upset when plaintiff commenced a plan to eliminate certain residential apartments so as to expand its classroom space into the building. Defendant alleged that, inter alia, noise, construction debris and the threat of eviction had adversely affected the health of elderly tenants. To protest plaintiff's actions, defendant alone stood outside in front of

the school, on several dates, wearing placards that were draped over his body, stating, "DONT [*sic*] KILL FOR CLASSROOMS," and "RESPONSIBLE PARENTS DON'T IGNORE ABUSE/PROTECT OUR CHILDREN AND DISABLED ELDERLY."

Defendant's statements, viewed by a reasonable reader, in light of the circumstances, are vague exaggerations, if not pure opinion. Accordingly, they constitute nonactionable opinion (*see e.g. Steinhilber v Alphonse*, 68 NY2d 283, 294-295 [1986]; *see generally Gross v New York Times Co.*, 82 NY2d 146 [1993]). Plaintiff's argument that the statements are actionable as "mixed opinion" is unavailing. The challenged statements do not suggest the existence of undisclosed facts, and a reasonable reader, under the circumstances, would not infer that defendant alone possessed such facts (*see Gross*, 82 NY2d at 153-154).

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

ENTERED: DECEMBER 20, 2012

CLERK

Tom, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Clark, JJ.

8877 Alphy Vanderlinde, et al., Index 302273/08
Plaintiffs-Appellants,

-against-

600 West 183rd Street Realty Corp.,
Defendant-Respondent.

Trolman, Glaser & Lichtman, P.C., New York (Michael T. Altman of counsel), for appellants.

Francine Scotto, Staten Island, for respondent.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered August 2, 2011, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant landlord made a prima facie showing of its entitlement to judgment as a matter of law with evidence that it had no duty to maintain, repair or replace the smoke detector in the tenant plaintiffs' apartment. Defendant submitted evidence showing that it had installed a functional smoke detector in plaintiffs' apartment within one year of the subject fire and had not received written notice of an inoperable detector within one year of its installation (*see* Administrative Code of City of NY § 27-2045[a][1], [3], [4]; [c]).

In opposition, plaintiffs failed to raise a triable issue of fact. Any oral complaints about the smoke detector did not impose a duty upon defendant (*see* Administrative Code § 27-2045[a][4]).

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

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

ENTERED: DECEMBER 20, 2012

CLERK

Tom, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Clark, JJ.

8879 Jeannine Stoyer-Rivera, Index 100872/11
Petitioner-Appellant,

-against-

New York City Board/Department of Education,
Respondent-Respondent.

Jeannine Stoyer-Rivera, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Kathy H. Chang of counsel), for respondent.

Amended order and judgment (one paper), Supreme Court, New York County (Doris Ling-Cohan, J.), entered September 20, 2011, denying the petition to vacate an arbitration award, confirming the award, issued after a hearing pursuant to Education Law § 3020-a, which found that petitioner inflicted corporal punishment on a special education student and imposed a $10,000 fine, and dismissing the proceeding, unanimously affirmed, without costs.

The court properly found that the hearing officer's determination was supported by adequate evidence, was rational and neither arbitrary nor capricious (*see Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 567-568 [1st Dept 2008]). The sustained specifications were supported by the injured student's testimony, along with the written statements

from other student witnesses who corroborated the injured student's version of events, and the testimonial and physical evidence regarding the injured state of the student's ear.

The arbitration award, which imposed a penalty of a $10,000 fine upon petitioner was not "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] [citations and internal quotation marks omitted]; *see also Batyreva v N.Y.C. Dept. of Educ.*, 95 AD3d 792 [1st Dept 2012]).

Petitioner's claim that her due process rights were violated is unpreserved for our review (*see Green v New York City Police Dept.*, 34 AD3d 262, 263 [1st Dept 2006]), and we decline to review it in the interests of justice. Were we to consider this

claim, we would find that it lacks merit, since the award was made in accord with due process.

We have considered petitioner's remaining contentions and find them to be unavailing.

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

ENTERED: DECEMBER 20, 2012

CLERK

Tom, J.P., Sweeny, DeGrasse, Manzanet-Daniels, Clark, JJ.

8880N NRT New York, LLC, doing business as The Corcoran Group, Plaintiff-Respondent, Index 113391/11

-against-

Hercules Kontos, Defendant-Respondent.

- - - - -

Hercules Kontos, Third-Party Plaintiff-Respondent,

-against-

Triton Enterprises, LLC, et al., Third-Party Defendants-Appellants.

_____

Borchert, Genovesi & LaSpina, P.C., Whitestone (Helmut Borchert of counsel), for appellants.

Katten Muchin Rosenman LLP, New York (Jay W. Freiberg of counsel), for respondent.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered on or about September 6, 2012, which, to the extent appealed from, denied so much of third-party defendants' motion to dismiss as sought dismissal of third-party plaintiff Kontos' claim for legal fees, unanimously reversed, on the law, without costs, and the motion granted.

The indemnification clause at issue here clearly and unambiguously makes third-party defendant Triton's

indemnification of Kontos conditioned upon Triton's use of a broker other than Corcoran. Thus, Triton promised that if it violated the contract by dealing with another broker and that broker sued Kontos, Triton would indemnify Kontos for the cost of defending such suit. With regard to indemnification, the sales contract promised that, and nothing more, and this Court rejects Kontos' attempt to read into the clause a duty by Triton to otherwise indemnify Kontos (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989]). Moreover, neither Kontos' conclusory allegations in his complaint nor parol evidence may be used to alter the plain meaning of the contract (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 163 [1990]; *Harvey v Greenberg*, 82 AD3d 683 [1st Dept 2011]).

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

ENTERED: DECEMBER 20, 2012

CLERK

Tom, J.P., Andrias, Catterson, Acosta, Manzanet-Daniels, JJ.

7591 Katz 737 Corp., Index 116054/10
Plaintiff-Appellant,

-against-

Lester Cohen, et al.,
Defendants-Respondents.

_____

Stempel Bennett Claman & Hochberg, P.C., New York (Richard L. Claman of counsel), for appellant.

Moulinos & Associates, LLC, New York (Peter Moulinos of counsel), for respondents.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered September 30, 2011, affirmed, with costs.

Opinion by Tom, J.P. All concur except Andrias, J. who concurs in a separate Opinion, and Catterson, J. who concurs in a separate Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Richard T. Andrias
James M. Catterson
Rolando T. Acosta
Sallie Manzanet-Daniels, JJ.

7591
Index 116054/10

_____x

Katz 737 Corp.,
Plaintiff-Appellant,

-against-

Lester Cohen, et al.,
Defendants-Respondents.

_____x

Plaintiff appeals from the order of the Supreme Court, New York County (Milton A. Tingling, J.), entered September 30, 2011, which granted defendants' motion to dismiss the complaint.

Stempel Bennett Claman & Hochberg, P.C., New York (Richard L. Claman of counsel), for appellant.

Moulinos & Associates, LLC, New York (Peter Moulinos of counsel), for respondents.

TOM, J.P.

Defendants, Lester Cohen and Carol Cohen, have resided in apartment 6F, a rent stabilized apartment, at 737 Park Avenue in Manhattan since April 1989. Plaintiff, Katz 737 Corp., owns and manages the building. The Cohens' current rent is $3,060 per month. Lester Cohen, who is over 80 years old, is unemployed and has a medically determined heart condition. Carol Cohen was, until 2010, a real estate broker employed by nonparty Corcoran Group as a senior vice president. Carol alleged that she worked with "a group" of brokers at Corcoran Group and that she only earned a small portion of the real estate commissions that were split among the brokers in the group, at her superiors' discretion, after the deduction of expenses including advertising, transportation, and overhead, and office staff salaries.

From 2004 through 2008, Katz annually filed petitions with the Division of Housing and Community Renewal (DHCR) challenging the Cohens' qualification for rent-regulated status pursuant to the luxury deregulation law. DHCR denied each of Katz's petitions.

The luxury deregulation law provides for deregulation, by DHCR, of apartments with rents in excess of $2,000 per month where the occupants earn more than $175,000 per year for two

consecutive years, as measured by the federal adjusted gross income reported on their New York State income tax return (Rent Stabilization Law of 1969, Administrative Code of City of NY § 26-504.3).[1] The denial of a petition to deregulate an apartment only applies to that year's income review, and each annual lease cycle thereafter is evaluated separately.

Katz did not file for deregulation of the Cohens' apartment in either 2009 or 2010. However, in December 2010, rather than file a petition seeking deregulation of the apartment, Katz commenced this action in Supreme Court asserting three causes of action against the Cohens, namely: (1) for fraud, (2) for a judgment declaring that in the years for which DHCR denied luxury deregulation, the Cohens had annual income that exceeded $175,000, warranting the deregulation of the apartment, and (3) for indemnification of Katz for monies it allegedly paid to the Cohens' downstairs neighbor for damages asserted to have been caused by an unrepaired leak in the Cohens' apartment. Katz contends that, in light of Carol Cohen's brokers' group's sales, the Cohens' earnings should have exceeded $175,000 from 2004 through 2008 and that they falsely represented their income for

[1] For proceedings commenced after July 1, 2011, the deregulation income threshold is $200,000, and the deregulation rent threshold is $2,500 (Administrative Code § 26-504.3[a][2], [3]).

those years on their income verification forms.

In January 2011, the Cohens moved to dismiss the action pursuant to CPLR 3211(a)(2) (lack of subject matter jurisdiction), 3211(a)(7) (failure to state a cause of action), and 3211(a)(10) (failure to join a necessary party). They also sought sanctions for frivolous conduct, attorneys' fees and costs. The Cohens argued that the complaint's allegations were baseless, conclusory and speculative and that Katz's continual harassment since 2004 concerning their annual earnings had been an apparent effort to obtain market level rent or, alternatively, to force them to abandon the apartment to permit a condominium conversion.

Katz opposed the motion, arguing that it had incurred losses due to the Cohens' submission of fraudulent earning statements and that the Supreme Court was the only court that could award it damages for those losses. Katz argued that since DHCR had no statutory authority to "look behind" the Cohens' filed federal tax returns, the instant action was required to enable Katz to obtain the discovery to find the truth regarding the Cohens' actual income. Katz noted that the Cohens, in support of their motion, did not submit an affidavit based on personal knowledge. Katz further argued that it had conducted an investigation and learned that Carol Cohen was a highly successful broker whose

group sold “hundreds of millions of dollars of New York real estate.” It argued that in light of those sales Carol should have had annual earnings of more than $175,000, and that the sales information alone supported the instant pleadings and warranted discovery on the income issue. Katz stated that it had previously requested financial documentation from the Cohens, including tax returns, W-2s, pay stubs, and possible S-Corporation filings, but the Cohens declined to disclose such information. Katz suggested that the Cohens may be hiding income “through a corporate entity.” It argued that absent the instant plenary action, it would have no way of obtaining the necessary discovery to establish that the Cohens’ income exceeded the annual threshold deregulation amount of $175,000.

The motion court granted the Cohens’ motion to dismiss, finding that the complaint was “completely baseless” and failed to state a cause of action. The court noted that DHCR had already ruled on Katz’s attempts to deregulate the unit and had denied the requested relief, and stated that the action would not be used to “circumvent the authority of the DHCR.”

On appeal, Katz has abandoned its second cause of action for declaratory judgment and its third cause of action seeking indemnification for certain repair costs. Thus, the only question before this Court is whether Katz should be permitted to

proceed on its first cause of action sounding in fraud.

This action is no more than an attempt to launch a belated collateral attack against determinations that are subject to the rule of administrative finality and by which Katz is bound. The question whether the subject dwelling unit continues to be subject to rent regulation has been contested before an administrative agency and decided adversely to Katz. It is uncontroverted that DHCR issued determinations for the years 2002 through 2008 denying Katz's petitions for deregulation and that Katz never sought administrative or judicial review of these determinations. Administrative determinations are binding on the parties and the courts until either vacated by the issuing agency or set aside upon judicial review (*see e.g. 520 E. 81st St. Assoc. v Lenox Hill Hosp.*, 38 NY2d 525 [1976] [once a court decides that the Rent Stabilization Law is applicable, issues arising thereunder must be administratively determined until such remedy is exhausted]; *Ament v Cohen*, 16 AD2d 824 [2d Dept 1962] [Rent Administrator's order setting rent is conclusive and not subject to collateral attack]; *Parisi v Hines*, 131 Misc 2d 582, 584 [Civ Ct, NY County 1986], *affd for reasons stated below* 134 Misc 2d 20 [App Term, 1st Dept 1986] [court bound by DHCR order, which is subject only to article 78 review]). Having been afforded due process and received a final determination, Katz may

not relitigate the question of the regulatory status of the unit.

The present plenary action alleging that the Cohens fraudulently underreported their income for the years in issue to avoid luxury deregulation of their dwelling unit is merely an attempt to relitigate issues administratively determined and to circumvent the jurisdiction of DHCR to decide such matters. The law vests exclusive original jurisdiction in DHCR to determine whether a rent-stabilized tenant's household income exceeds the threshold for deregulation (Administrative Code § 26-504.3[b], [c][2]).

While the luxury deregulation provision does not expressly say that DHCR alone is to decide such issues, the intent of the Legislature that luxury deregulation matters be decided by DHCR in the first instance can be reasonably inferred from the detailed language in § 26-504.3 as well as the statutory scheme, which explicitly provides for DHCR to hear and resolve luxury deregulation issues. As noted by the Court of Appeals in *Sohn v Calderon* (78 NY2d 755, 767 [1991]):

> "[T]he constitutionally protected jurisdiction of the Supreme Court does not prohibit the Legislature from conferring exclusive original jurisdiction upon an agency in connection with the administration of a statutory regulatory program. In situations where the Legislature has made that choice, the Supreme Court's power is limited to article 78 review, except where

> the applicability or constitutionality of the regulatory statute, or other like questions, are in issue."

The comprehensive procedure for luxury deregulation set forth in the Rent Stabilization Law confers authority on DHCR to oversee and enforce the prescribed rules and regulations. Significantly, the provision speaks only of petitioning DHCR, not the courts, to deregulate an apartment due to the high income of its occupants (Administrative Code § 26-504.3; *also see Matter of Classic Realty v New York State Div. Of Hous. & Community Renewal*, 2 NY3d 142 [2004] [discussing comprehensive luxury deregulation statute in article 78 proceeding]; *Matter of Dworman v New York State Div. Of Hous. & Community Renewal*, 94 NY2d 359 [1999] [same]).

Even assuming, arguendo, that the Legislature did not place exclusive original subject matter jurisdiction in DHCR to decide luxury deregulation matters, it is reasonably inferred from the applicable provisions of the Rent Stabilization Law that the doctrine of primary jurisdiction enjoins courts sharing "concurrent jurisdiction to refrain from adjudicating disputes within an administrative agency's authority, particularly where the agency's specialized experience and technical expertise is involved" (*Sohn* 78 NY2d at 768, citing *Capital Tel. Co. v Pattersonville Tel. Co.*, 56 NY2d 11, 22 [1982]).

As a policy matter, allowing plenary actions to be used as a

vehicle for achieving luxury deregulation would circumvent the legislative intent that these matters be summarily and uniformly decided by DHCR, based on federal tax return information. Permitting the use of plenary actions for this purpose would invite harassment of tenants by landlords, unduly burden the courts, and pit typically deep-pocketed, resourceful owners against less financially secure tenants in costly, prolonged and at times speculative litigation. To permit Katz's common-law claim to proceed would establish an untenable precedent affording a ready means to relitigate DHCR's final determination of high income deregulation applications by the simple expedient of claiming fraud in reporting tenant income. This would effectively render the agency's final determination without effect and inundate the courts with countless luxury deregulation cases.

As this Court observed in *Matter of Nestor v New York State Div. of Hous. & Community Renewal* (257 AD2d 395, 396 [1st Dept 1999], *lv dismissed in part, denied in part* 93 NY2d 982 [1999]), a court must enforce a statute consistent with the legislative intent expressed in the enactment – which, in this case, provides for a single expedient determination based on a household's total adjusted gross income, as verified by the Department of Taxation and Finance (DTF); and while the criterion of household income

might be less than comprehensive, “it has the advantage of affording a simple and consistent methodology” (*id.*). In accord with this view is *Matter of Classic Realty* (2 NY3d at 146), in which the Court of Appeals stated that “the luxury decontrol procedures . . . contemplate a single verification, the result of which is binding on all parties unless it can be shown that DTF made an error.” Indeed, any concerns of fraud, if adequately shown by the owner, may be referred by DHCR to DTF in accordance with the same luxury deregulation provisions (Administrative Code § 26-504.3; *see Matter of Power v New York State Div. of Hous. & Community Renewal*, 61 AD3d 544, 544 [1st Dept 2009] ["DHCR has jurisdiction to adjudicate luxury deregulation petitions and to request that the Department of Taxation and Finance verify the total annual income"], *lv denied* 13 NY3d 716 [2010]).

Further, as noted in *Sohn*, the exclusivity of an agency’s jurisdiction may depend on the subject matter of the dispute. What is dispositive in the instant matter, however, is not only whether DHCR has exclusive original jurisdiction to issue a luxury decontrol order (which it does) but also that the agency has issued a final ruling that is both dispositive of the dispute between the parties and binding on them and on the courts. Having failed to pursue an administrative appeal before DHCR, Katz has failed to exhaust its administrative remedies and is

precluded from seeking judicial review (*see Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]). Nor is Katz relieved of the need to comply with the exhaustion rule by recasting its petition for review of the administrative determination as a tort action (*see California Suites, Inc. v Russo Demolition Inc.*, 98 AD3d 144 [1st Dept 2012] [rejecting constitutional claim asserted to avoid administrative requirements]).

Moreover, the complaint fails to state a fraud claim with the requisite particularity (*see* CPLR 3016[b]). Katz's pleadings show that it placed no reliance upon the Cohens' statements of income or upon DHCR's findings on Katz's earlier petitions seeking luxury deregulation. Katz's non-reliance on the earlier DHCR determinations evidently spurred the instant plenary action to circumvent DHCR's determination. Further, Katz's fraud allegations are wholly speculative; there are no allegations offered from which it could reasonably be inferred that the Cohens provided fraudulent income statements, and there are no non-conclusory allegations that they earned more than $175,000 in two consecutive years (*see generally Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 560 [2009]). The crux of Katz's fraud argument, that the Cohens fraudulently hid their annual income in an S-Corporation that cannot be traced without

proper discovery, is likewise without merit since that income cannot be considered for purposes of determining whether the Cohens met the $175,000 threshold to warrant luxury deregulation (*see e.g. Matter of Nestor*, 257 AD2d 395 at 396). Thus, there is no basis upon which this action may be maintained.

Accordingly, the order of the Supreme Court, New York County (Milton A. Tingling, J.), entered September 30, 2011, which granted defendants' motion to dismiss the complaint, should be affirmed, with costs.

All concur except Andrias, J. who concurs in a separate Opinion, and Catterson, J. who concurs in a separate Opinion.

ANDRIAS, J. (concurring)

I agree that the complaint was properly dismissed. However, I write separately to express my view that the statutory scheme for luxury deregulation precludes plaintiff's common-law fraud cause of action.

Pursuant to Rent Stabilization Law (Administrative Code of City of NY) §§ 26-504.1 and 26-504.3, a rent-stabilized apartment that has a legal regulated rent of at least $2,000 per month is eligible for luxury deregulation if the combined annual income of all persons occupying the unit as their primary residence exceeds $175,000 for each of the two years preceding the owner's petition.[1] Rent Stabilization Law § 26-504.3(a)(1) provides that "annual income shall mean the federal adjusted gross income as reported on the New York state income tax return." Pursuant to Rent Stabilization Law § 26-504.3(b) and Tax Law § 171-b, the New York State Department of Taxation and Finance (DTF) is authorized to verify, at the request of the New York State Division of Housing and Community Renewal (DHCR), whether the total annual income exceeds or is below the $175,000 threshold.

Defendants, Lester Cohen and Carol Cohen, are tenants of a

[1]For proceedings commenced after July 1, 2011, the deregulation income threshold is $200,000 and the deregulation rent threshold is $2,500 (Administrative Code § 26-504.3[a][2],[3]).

rent-stabilized apartment in a building that was owned by plaintiff. Although their monthly rent exceeded $2,000, from 2004 through 2008, DHCR denied plaintiff's yearly petitions for luxury deregulation after DTF verified that defendants' federal adjusted gross income did not exceed the $175,000 threshold.

In 2010, plaintiff commenced this action. In its first cause of action, plaintiff seeks to recover damages for common-law fraud, based on allegations that defendant Carol Cohen, a successful real estate broker, affirmatively manipulated the annual income shown in her tax returns to bring it below the $175,000 threshold.

Citing *ABN AMRO Bank, N.V. v MBIA Inc.* (81 AD3d 237 [1st Dept 2011], *mod* 17 NY3d 208 [2011]), *Assured Guar. [UK] Ltd. v J.P. Morgan Inv. Mgmt Inc.* (18 NY3d 341 [2011]), *61 W. 62 Owners Corp. v CGM EMP LLC* (77 AD3d 330 [1st Dept 2010], *mod on other grounds and remanded* 16 NY3d 822 [2011]), and *Chelsea 18 Partners, LP v Scheck Yee Mak* (90 AD3d 38 [1st Dept 2004]), Justice Catterson, in his concurrence, opines that there is nothing inherent in the statutory scheme for rent regulation that

would preclude a common-law claim for fraud. However, in *Assured Guar. [UK] Ltd.*, the Court of Appeals explained:

> "Read together, *CPL Intl.* [*v McKesson Corp.*, 70 NY2d 268 (1987)] and *Kerusa* [*Co. LLC v W10Z/515 Real Estate Ltd. Partnership* (12 NY3d 236 [2009]) stand for the proposition that a private litigant may not pursue a common-law cause of action where the claim is predicated solely on a violation of the Martin Act or its implementing regulations and would not exist but for the statute. But, an injured investor may bring a common-law claim (for fraud or otherwise) that is not entirely dependent on the Martin Act for its viability. Mere overlap between the common-law and the Martin Act is not enough to extinguish common law remedies" (18 NY3d at 353).

The gravamen of plaintiff's cause of action is that defendant Carol Cohen fraudulently used a closely held corporation and improper corporate and personal deductions to manipulate her annual income in order to avoid luxury deregulation. Unlike the nuisance claims in *61 W. 62 Owners Corp.* and *Chelsea 18 Partners, LP*, the cause of action is entirely dependent on the existence of the luxury deregulation statute for its viability. But for the statute, plaintiff could not claim to be damaged by Mrs. Cohen's allegedly fraudulent conduct in connection with the filing of her tax returns.

Further, "the luxury decontrol procedures . . . contemplate a single verification, the result of which is binding on all

parties unless it can be shown that DTF made an error" (*Matter of Classic Realty v New York State Div. of Hous. & Community Renewal*, 2 NY3d 142, 146 [2004]). Because plaintiff does not allege any wrongs that would be actionable independent of the statute, to allow the use of plenary actions for luxury deregulation, or for obtaining damages based on a tenant's alleged fraudulent conduct in connection with luxury deregulation proceedings, would circumvent the legislative intent that these matters be heard and decided by DHCR based on federal tax return information and that any concerns of fraud be referred by DHCR to DTF in accordance with the luxury deregulation provisions (*see* Administrative Code § 26-504.3; *see also Matter of Power v New York State Div. of Hous. & Community Renewal*, 61 AD3d 544 [1st Dept 2009], *lv denied* 13 NY3d 716 [2010]).

Accordingly, the common-law fraud cause of action was correctly dismissed (*see Berenger v 261 W. LLC*, 93 AD3d 175 [1st Dept 2012] ["There is no private right of action where the fraud and misrepresentation relies entirely on alleged omissions in filings required by the Martin Act"]; *Han v Hertz Corp.*, 12 AD3d 195, 196 [1st Dept 2004] [customer did not possess a private right of action under former General Business Law (GBL) § 396-z because his quasi-contract claim was admittedly dependent on the allegation that the form contract was automatically voided by

former GBL 396-z(10)]).

In any event, we all agree that the complaint fails to state a fraud claim with the requisite particularity (see CPLR 3016[b]). Plaintiff's fraud allegations are wholly speculative, since there are no allegations from which it could reasonably be inferred that defendants provided fraudulent income statements, and there are no non-conclusory allegations that defendants earned over $175,000 in two consecutive years. The crux of plaintiff's fraud argument, that defendants fraudulently hid their annual income under a closely held corporation that cannot be traced without proper discovery, is not sustainable since the income of a corporation cannot be considered for purposes of determining whether defendants met the $175,000 threshold to warrant luxury deregulation (*see e.g. Matter of Nestor v New York State Div. of Hous. & Community Renewal*, 257 AD2d 395 [1st Dept 1999], *lv dismissed in part, denied in part,* 93 NY2d 982 [1999]).

CATTERSON, J. (concurring)

Although I concur in the outcome, namely the dismissal of Katz 737 Corp.'s (hereinafter referred to as "the landlord") complaint, I do so on the ground that the landlord failed to plead fraud with particularity. I disagree with Justice Andrias's concurrence that the landlord's common-law cause of action for damages arising from the defendants' alleged fraud is preempted by the luxury decontrol statute. I also disagree with the majority that the landlord's action is foreclosed on the ground that the New York State Division of Housing and Community Renewal (hereinafter referred to as "DHCR") has "exclusive" jurisdiction in the matter, and that the landlord cannot "relitigate" an issue already decided by the agency. As set forth more fully below, well-established precedent militates against extinguishing common-law claims and remedies even where legislative regulatory schemes exist. Moreover, in this case, the statute does not provide a remedy for the landlord's allegation that the defendants circumvented the statutory scheme by fraudulent conduct.

The defendants, Lester Cohen and Carol Cohen, have resided as tenants in an apartment at 737 Park Avenue between 71st and 72nd Streets in Manhattan since April 1989. The lease and tenancy at issue are subject to the New York Rent Stabilization

Law. The Cohens' current rent is $3,060 per month. Lester Cohen, who is over 80 years old, is retired. Carol Cohen was, until 2010, a real estate broker employed as a senior vice president by nonparty Corcoran Group.

Mrs. Cohen asserted that she worked with "a group" of brokers at Corcoran Group and that, she only earned a small portion of the real estate commissions that were split among the brokers in the group at her superiors' discretion, and only after the deduction of expenses like advertising, transportation, and overhead and office staff salaries.

Every year, from 2004 through 2008, the landlord challenged the Cohens' qualification for rent-regulated status with the DHCR. The DHCR denied each of the landlord's petitions seeking de-regulation.

By statute enacted in 1993 (amended effective as of 1998), the Legislature provided for the DHCR to deregulate apartments with rents in excess of $2,000 per month where the occupants earned more than a specified "threshold" dollar amount per year (originally $250,000 per year, amended effective as of 1998 to $175,000 per year) for two consecutive years. Administrative Code of City of N.Y. § 26-504.3. This income is measured by the occupants' federal adjusted gross income tax returns as reported on their New York State income tax returns. See id.; Rent

Stabilization Code (9 NYCRR) § 2531.1(a), (b); Gudz v. Jemrock Realty Co., LLC, __ Misc.3d __, 2011 NY Slip Op 31647(U) (Sup. Ct., N.Y. County 2011). The denial of a petition to deregulate an apartment applies only to the year under review, and each annual lease cycle thereafter "is processed separately on its own merits."

The landlord did not file for deregulation of the Cohens' apartment in either 2009 or 2010. However, in December 2010, the landlord commenced the instant plenary action against the Cohens asserting three causes of action, namely: (1) for fraud, (2) for a judgment declaring that the Cohens had annual income that exceeded $175,000, warranting the deregulation of the apartment, and (3) for indemnification for the $3,635.40 that the landlord allegedly paid to the Cohens' downstairs neighbor for damages allegedly caused by an unrepaired leak in the Cohens' apartment.

The Cohens moved to dismiss the action pursuant to CPLR 3211(a)(2) (lack of subject matter jurisdiction), 3211(a)(7) (failure to state a cause of action), and 3211(a)(10) (failure to join a necessary party). They also sought sanctions against the landlord for frivolous conduct, attorneys' fees and costs.

The landlord opposed the motion, arguing that it had incurred losses due to the Cohens' submission of fraudulent earning statements and that the Supreme Court was the only court

that could award it damages for those losses. The landlord argued that since the DHCR had no statutory authority to "look behind" the Cohens' filed federal tax returns (see generally Matter of Nestor v. NYS Div. of Hous. and Community Renewal, 257 A.D.2d 395, 683 N.Y.S.2d 74 (1st Dept 1999), lv. denied, 93 N.Y.2d 982, 695 N.Y.S.2d 740, 717 N.E.2d 1077 (1999)), the instant action was required to enable Katz to obtain discovery to find the truth as to the Cohens' actual income.

The landlord argued that it had conducted an investigation and learned that Mrs. Cohen was a highly successful broker whose group sold "hundreds of millions of dollars of New York real estate." It argued that in light of such sales, Mrs. Cohen should have had annual earnings of more than $175,000 and that the sales information alone supported the instant pleadings, and warranted giving it an opportunity to obtain discovery on the "income" issue. The landlord argued that absent the instant plenary action, it had no way of obtaining the necessary discovery to establish that the Cohens' income exceeded the annual threshold deregulation amount of $175,000.

By order entered September 30, 2011, the court granted the Cohens' motion to dismiss the landlord's action. The court found that the complaint was "completely baseless" and failed to state a cause of action, particularly as the DHCR had already ruled on

the landlord's attempts to deregulate the unit and had denied the relief the landlord sought. The court found that the landlord was improperly attempting to "circumvent the authority of the DHCR."

For the reasons that follow, in my opinion, the landlord's common-law cause of action is not preempted by luxury deregulation law. Furthermore, the DHCR's decisions on the landlord's petitions to deregulate the Cohens' apartment do not bar the landlord's subsequent assertion of a common-law cause of action.

The Court of Appeals and this Court have repeatedly held that common-law causes of action have viability independent of many legislatively created regulatory schemes. In ABN AMRO Bank, N.V. v. MBIA Inc. (17 N.Y.3d 208, 928 N.Y.S.2d 647, 952 N.E.2d 463 (2011)), the Court of Appeals was faced with the question of whether the plaintiffs' common-law fraud claims were preempted by the power of the State Superintendent of Insurance to approve the restructuring of the defendants under various provisions of the Insurance Law.

The plaintiffs attacked the restructuring in a plenary action predicated on common-law fraud, alleging that the restructuring contained a series of fraudulent conveyances designed to allow the defendants to escape their insurance

obligations. The defendants moved to dismiss, contending that the complaint was merely a "collateral attack" on the Superintendent's approval of the restructuring.

A majority of this Court had agreed with the defendants that "[a] plenary action that seeks the overturn of the Superintendent's determination, or challenges matters that the determination necessarily encompasses, constitutes 'an impermissible "indirect challenge"' to that determination." ABN AMRO Bank, N.V. v. MBIA Inc., 81 A.D.3d 237, 246, 916 N.Y.S.2d 12, 19 (1st Dept. 2011), citing Fiala v. Metropolitan Life Ins. Co., 6 A.D.3d 320, 321, 776 N.Y.S.2d 29, 31 (1st Dept. 2004). However, our statement on the question of "collateral attack" only applied to claims brought under the Debtor and Creditor Law. The common-law claims were all generally dismissed for failure to state a cause of action.[1] Finally, we noted that the only appropriate method of challenging the Superintendent's determination was through a CPLR article 78 petition.

[1] The claim seeking to pierce the corporate veil through declaratory judgment, while not a common-law claim, was also dismissed as not a proper subject for a declaratory judgment and because it would be "in direct conflict with the Superintendent's determinations." 81 A.D.3d at 245, 916 N.Y.S.2d at 18.

The Court of Appeals reversed, beginning its analysis with the observation:

> "It is fundamental that 'Article VI, §7 of the NY Constitution establishes the Supreme Court as a court of "general original jurisdiction in law and equity"' (*Sohn v Calderon*, 78 NY2d 755, 766 [1991], quoting NY Const, art VI, § 7[a]). 'Under this grant of authority, the Supreme Court "is competent to entertain all causes of action unless its jurisdiction has been specifically proscribed"' (*id.*, quoting *Thrasher v United States Liab. Ins. Co.*, 19 NY2d 159, 166 [1967]). Indeed 'it has never been suggested that every claim or dispute arising under a legislatively created scheme may be brought to the Supreme Court for original adjudication' (*id.*). Thus, 'the constitutionally protected jurisdiction of the Supreme Court does not prohibit the Legislature from conferring exclusive original jurisdiction upon an agency in connection with the administration of a statutory regulatory program' (*id.* at 767)." 17 N.Y.3d at 222-223, 928 N.Y.S.2d at 654.

The Court then framed the issue thus: whether or not the Superintendent was the "exclusive arbitrator of all private claims that may arise" in connection with the defendants' restructuring. 17 N.Y.3d at 224, 928 N.Y.S.2d at 655. In language equally applicable to the instant case, the Court stated:

> "Defendants' contention, taken to its logical conclusion, would preempt plaintiffs' Debtor and Creditor Law and common-law claims. We reject this argument and conclude that there is no indication from the statutory language

> and structure of the Insurance Law or its legislative history that the Legislature intended to give the Superintendent such broad preemptive power (see *Matter of Zuckerman v Board of Educ. of City School Dist. of City of N.Y.*, 44 NY2d 336, 342-343 [1978] ['Although the (Public Employment Relations Board [PERB]) has exclusive jurisdiction of labor disputes between public employers and public employees involving the right to organize and the right to negotiate in good faith, this jurisdiction does not mean that any and all disputes between such parties fall exclusively to PERB. PERB's jurisdiction encompasses only those matters specifically covered by the Taylor Law']).'' 17 N.Y.3d at 224, 928 N.Y.S.2d at 655.

Important to the Court's analysis were the observations that the plaintiffs' rights under the Debtor and Creditor Law and, necessarily, the common law were "historic" and that the Superintendent was without the authority to even consider the plaintiffs' claims. 17 N.Y.3d at 224, 928 N.Y.S.2d at 655. Finally, the Court held that the plaintiffs' claims could not be raised in an article 78 proceeding. 17 N.Y.3d at 225, 928 N.Y.S.2d at 656.

The Court followed ABN AMRO Bank with Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Mgmt. Inc., (18 N.Y.3d 341, 939 N.Y.S.2d 274, 962 N.E.2d 765 (2011)). In that case, the plaintiff asserted a series of common-law claims of breach of fiduciary duty and gross negligence. The defendant moved to dismiss on the grounds that the common-law claims were precluded by the Attorney

General's broad grant of power to prosecute "fraudulent securities and investment practices" under the Martin Act. 18 N.Y.3d at 349, 939 N.Y.S.2d at 277. In examining the scope of the statute, the Court stated:

> "Legislative intent is integral to the question of whether the Martin Act was intended to supplant nonfraud common-law claims. It is well settled that 'when the common law gives a remedy, and another remedy is provided by statute, the latter is cumulative, unless made exclusive by the statute' (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 324 [1983] [internal quotation marks and citation omitted]). We have emphasized that 'a clear and specific legislative intent is required to override the common law' and that such a prerogative must be 'unambiguous' (*Hechter v New York Life Ins. Co.*, 46 NY2d 34, 39 [1978])." 18 N.Y.3d at 350, 939 N.Y.S.2d at 278.

The Court then observed that the Martin Act "does not expressly mention or otherwise contemplate the elimination of common-law claims." 18 N.Y.3d at 351, 939 N.Y.S.2d at 278, citing ABN AMRO Bank, N.V., 17 N.Y.3d at 224, 928 N.Y.S.2d at 655. The Court distinguished its prior holdings in CPC Intl. Inc. v. McKesson Corp., (70 N.Y.2d 268, 519 N.Y.S.2d 804, 514 N.E.2d 116 (1987)), and Kerusa Co. LLC v. W10Z/515 Real Estate

Ltd. Partnership, (12 N.Y.3d 236, 879 N.Y.S.2d 17, 906 N.E.2d 1049 (2009)), by stating:

> "Read together, CPC Intl. and Kerusa stand for the proposition that a private litigant may not pursue a common-law cause of action where the claim is predicated solely on a violation of the Martin Act or its implementing regulations and would not exist but for the statute. But, an injured investor may bring a common-law claim (for fraud or otherwise) that is not entirely dependent on the Martin Act for its viability. Mere overlap between the common law and the Martin Act is not enough to extinguish common-law remedies." 18 N.Y.3d at 353, 939 N.Y.S.2d at 279.

In my opinion, Justice Andrias makes an erroneous extrapolation from case law pertaining to the Martin Act: Those cases involved preemption issues based on a distinction between the exclusive enforcement authority of the Attorney General and the rights of private litigants. Justice Andrias's reliance on Han v. Hertz Corp., (12 A.D.3d 195, 784 N.Y.S.2d 106 (1st Dept. 2004)), is misplaced for the same reason since he does not take issue with *who* has the right to pursue the claim. Nor does he suggest that the landlord is simply "rephrasing" a claim that precludes a *private* lawsuit. Instead, he finds that the statutory scheme precludes a common-law action because the landlord's entire cause of action is dependent on the existence of the luxury deregulation statute.

There is simply no authority to support such a view. Moreover, the cause of action in this case is not predicated on a violation of the statute per se, but rather on the allegation that the Cohens have circumvented the statutory scheme in order to defraud the landlord of its rightful rent. To be sure, the landlord could not bring the common-law action if the Rent Regulation Reform Act of 1993 (L 1993, Ch 253) (hereinafter referred to as "Reform Act") had not been enacted. However, the Reform Act would not exist except for the Legislature's decision to remedy "the glaring inequity in the rent regulation system whereby property owners [are] required to subsidize high income tenants residing in rent-controlled and rent-subsidized apartments." Matter of Classic Realty v. New York State Div. Of Hous. & Community Renewal, 309 A.D.2d 205, 212-213, 763 N.Y.S.2d 271, 277 (1st Dept. 2003) (Sullivan, J. dissenting) (quotation marks omitted), rev'd, 2 N.Y.3d 142, 777 N.Y.S.2d 1, 808 N.E.2d 1260 (2004). It would make no sense, therefore, to enact a statute to rectify an inequitable rent situation, but deny a landlord any remedy when a tenant attempts to fraudulently circumvent the statute, let alone a remedy that has existed at common law since the founding of the Republic. In my opinion, this is precisely the type of overlap between a common-law claim and statute that the Court of Appeals held should not

"extinguish common-law remedies." Assured Guar., 18 N.Y.3d at 353, 939 N.Y.S.2d at 279.

Moreover, this Court has consistently followed that direction from the Court of Appeals. In 61 W. 62 Owners Corp. v. CGM EMP LLC, (77 A.D.3d 330, 906 N.Y.S.2d 549 (1st Dept 2010), mod. on other grounds and remanded, 16 N.Y.3d 822, 921 N.Y.S.2d 184, 946 N.E.2d 172 (2011)), we rejected the defendants' contention that the New York City Noise Control Code precluded the plaintiff's action in common-law nuisance. Similarly, and more importantly for its similarity to the posture of this case, in Chelsea 18 Partners LP v. Sheck Yee Mak, (90 A.D.3d 38, 933 N.Y.S.2d 204 (1st Dept. 2011)), we reversed Supreme Court's dismissal of the plaintiff landlord's plenary action sounding in common-law nuisance against the defendant tenants of a rent-controlled apartment. Supreme Court held, inter alia, in dismissing the action, that the landlord's sole remedy lay in Housing Court pursuant to the rent regulation statutory scheme and that the court had no jurisdiction.

We began our analysis in that case in the same manner as the ABN AMRO Bank Court:

> "As a threshold issue, Supreme Court has unlimited general jurisdiction over all plenary real property actions, including those brought by a landlord against a tenant (NY Const Art VI, §7(a); *see Nestor v*

> *McDowell*, 81 NY2d 410, 415 [1993]). Moreover, as the landlord correctly asserts, it is for the plaintiff to determine how, and in which court, to plead its case (*Lex 33 Assoc. v Grasso*, 283 AD2d 272, 273 [1st Dept. 2001][plaintiff entitled to 'chart its own procedural course']). Thus, the tenants are entirely incorrect in asserting that Supreme Court lacks subject matter jurisdiction." 90 A.D.3d at 41, 933 N.Y.S.2d at 206.

The analysis of ABN AMRO Bank, Assured Guar., 61 W. 62 Owners, and Chelsea 18 Partners clearly controls the threshold issue in the instant dispute and mandates recognition of the validity of a common-law claim for fraud. There is nothing inherent in the statutory scheme for rent regulation that would preclude a common-law claim for fraud. If fraud claims were permitted to proceed in ABN AMRO Bank and Assured Guar. in the face of extensive statutory regulation, there can be no inherent bar merely because the statutory scheme is rent regulation.

Similarly, both nuisance in 61 W. 62 Owners and Chelsea 18 Partners, and fraud in the instant case are common-law causes of action asserted in the context of a complex statutory scheme of governmental regulation. Merely because the elements of each common-law cause of action are different, I find that there is no coherent argument for permitting a nuisance claim to proceed but not a claim for fraud, as a matter of law. The Cohens point to no section of the Rent Stabilization Code that affirmatively bars

such common-law claims, nor does Justice Andrias.

The majority, in my opinion, is incorrect in stating that the "law vests *exclusive* ... jurisdiction in DHCR to determine whether a rent-stabilized tenant's household income exceeds the threshold for deregulation (emphasis added)." First, there is no such specific language in the statute. See Administrative Code § 26-504.3. Nor can exclusive jurisdiction be inferred based on the DHCR's "specialized experience and technical expertise." See Sohn v. Calderon, 78 N.Y.2d 755, 768, 579 N.Y.S.2d 940, 946, 587 N.E.2d 807, 812 (1991). The statute simply provides that, in response to a landlord's petition contesting that a tenant's annual household income as shown on an income certification form (hereinafter referred to as "ICF") is no more than $175,000, the DHCR requests the Department of Taxation and Finance (hereinafter referred to as the "DTF") to verify the income. In turn, the DTF provides nothing more than a "yes" or "no" answer as to whether the tenant has understated the annual income on the ICF compared to that filed on the tenant's annual tax return. There is no "specialized experience" or "technical expertise" required to carry out these steps. Indeed, I would posit exactly the opposite.

Further, as the landlord asserts, the Cohens' position rests on a leap from the predicate that the DHCR has exclusive

jurisdiction over petitions seeking to deregulate an apartment to the unsupported conclusion that anything that "emanates from" the deregulation provision must somehow also be within DHCR's exclusive jurisdiction. However, the statute clearly does not provide the DHCR with any authority or any mechanism for testing the veracity of the income tax return, or for the investigation of fraudulent conduct. See Matter of London Terrace Gardens v. New York State Div. of Hous. & Community Renewal, 6 Misc. 3d 1020(A), 800 N.Y.S.2d 349 (Sup. Ct., N.Y. County 2005). Nor does it specifically state that a single DTF verification is the landlord's exclusive remedy in the event that a landlord disputes a tenant's ICF. Indeed, the DTF verification can hardly be characterized as a remedy; it is simply a step in the process of deregulation. Effectively, the statute does not provide the landlord with any remedy against a duplicitous tenant. In my opinion, therefore, the statute must be viewed as creating a framework by setting the schedule and formula (when rent is no less than $2,000 and annual household income is more than $175,000) for obtaining relief regardless of whether that relief is by statutory mechanism or common-law claim.

The majority, quoting Nestor (257 A.D.2d at 396, 683 N.Y.S.2d at 75), lauds the "simpl[icity] and consisten[cy]" of the single DTF verification "methodology," exhibiting a tunnel

vision to the altar of primacy-of-statute, and thus ignoring the foundation of this country on the common-law. By so doing, moreover, it ignores a statement by the Court of Appeals that clearly contemplates the possibility of the DTF's making an error. See Classic Realty, 2 N.Y.3d at 146, 777 N.Y.S.2d at 3 ("luxury decontrol procedures ... contemplate a single verification, the result of which is binding on all parties *unless it can be shown that DTF made an error*") (emphasis added). Given the absence of any statutory provision that could rectify a verification based on fraud or deceit, the Court's statement must be viewed as supporting the pursuit of a common-law remedy, especially where the challenge is to the veracity of the one document on which the DTF verification and the DHCR determination are based.

That being said, however, the Cohens argue convincingly that the fraud claim, as pleaded, fails to state a cause of action. To state a claim for common-law fraud, a plaintiff must allege a material misrepresentation of fact; that the misrepresentation was made with an intent to defraud or mislead; that the plaintiff reasonably relied upon the misrepresentation, and that it suffered damages as a result of its reliance. See IDT Corp. v. Morgan Stanley Dean Witter & Co., 63 A.D.3d 583, 586, 882 N.Y.S.2d 60, 63 (1st Dept. 2009). The landlord did not meet the

strict pleading requirements of pleading fraud with particularity. See CPLR 3016(b); Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 178-179, 919 N.Y.S.2d 465, 469, 944 N.E.2d 1104, 1108 (2011).

On this record, the landlord's fraud allegations, even construed most favorably to the landlord, are wholly speculative, since there are no allegations from which it could reasonably be inferred that the Cohens provided fraudulent income statements. There was no non-conclusory allegation that the Cohens earned more than $175,000 in two consecutive years and intentionally misrepresented their income to the DHCR. See generally Eurycleia Partners, LP v. Seward & Kissel, LLP, 12 N.Y.3d 553, 560, 883 N.Y.S.2d 147, 151, 910 N.E.2d 976, 980 (2009).

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

ENTERED: DECEMBER 20, 2012

CLERK

Friedman, J.P., Acosta, Abdus-Salaam, Manzanet-Daniels, Román, JJ.

8110 Alexandra Gomez-Jimenez, et al., Index 652226/11
Plaintiffs-Appellants,

-against-

New York Law School,
Defendant-Respondent,

DOES 1-20, et al.,
Defendants.

_____

Strauss Law, PLLC, New York (Jesse Strauss of counsel), for appellants.

Venable LLP, New York (Michael J. Volpe of counsel), for respondent.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered March 21, 2012, affirmed, without costs.

Opinion by Acosta, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Rolando T. Acosta
Sheila Abdus-Salaam
Sallie Manzanet-Daniels
Nelson S. Román, JJ.

8110
Index 652226/11

_____x

Alexandra Gomez-Jimenez, et al.,
Plaintiffs-Appellants,

-against-

New York Law School,
Defendant-Respondent,

DOES 1-20, et al.,
Defendants.

_____x

Plaintiff appeals from an order of the Supreme Court, New York County (Melvin L. Schweitzer, J.), entered March 21, 2012, which granted defendant New York Law School's motion to dismiss the complaint.

Strauss Law, PLLC, New York (Jesse Strauss of counsel), David Anziska, New York, and Frank Raimond, New York, for appellants.

Venable LLP, New York (Michael J. Volpe, Edmund M. O'Toole, and Michael C. Hartmere of counsel), for respondent.

ACOSTA, J.

This appeal involves the propriety of the disclosures of post-graduate employment and salary data by defendant New York Law School to prospective students during the period August 11, 2005 to the present. Plaintiffs allege that the disclosures cause them to enroll in school to obtain, at a very high price, a law degree that proved less valuable in the market-place than they were led to expect. We hold that defendant's disclosures, though unquestionably incomplete, were not false or misleading. We thus affirm the dismissal of the complaint.

Plaintiffs are graduates of the law school who attended the school between 2004 and 2011. They assert, individually and on behalf of all others similarly situated, a claim for deceptive acts and practices in violation of General Business Law (GBL) § 349 and claims for common-law fraud and negligent misrepresentation. These claims are based on allegations that the employment and salary information published by defendant during the relevant time period concealed, or failed to disclose, that the employment data included temporary and part-time positions and that the reported mean salaries were calculated based on the salary information submitted by a deliberately small selected subset of graduates. In addition, plaintiffs allege that defendant enhanced its numbers by, among other things,

hiring unemployed graduates as short-term research assistants so that they could be classified as employed. Plaintiffs assert that defendants engaged in this fraud to increase its class size and use the high tuition demanded of its students to lavish perks and exorbitant salaries on its administration and large faculty. The complaint seeks damages and equitable relief, including refund and reimbursement of plaintiffs' tuition.

Defendants moved to dismiss the complaint pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7), arguing, among other things, that its employment reports were not materially misleading because they 1) complied with the then applicable disclosure rules of the American Bar Association (ABA); 2) made no representation or implication that they included only full-time, permanent employment that required or preferred a law degree; and 3) explicitly revealed that the reported salary ranges were based on a small sample of graduates.

Supreme Court granted the motion to dismiss the complaint. With respect to the GBL 349 claim, the court first rejected defendant's argument that it had a complete defense pursuant to GBL 349(d) because, although the regulations with which it complied were written by the United States Department of Education, the interpreting party, the Council of the Section of Legal Education and Admissions to the Bar of the ABA, is not an

"official department, division, commission or agency of the United States." The court then found that defendants' post graduate employment statistics were not misleading in a material way and that the salary data was not misleading because the school disclosed the sample size upon which the data was based. The court further found that the GBL 349 claim failed to identify the actual injury sustained by each plaintiff as a result of the allegedly misleading statements. With respect to the fraud claim, the court found that defendant had no duty to clarify its marketing materials. Further, while the court rejected defendant's argument that plaintiffs failed to plead reliance on the alleged misrepresentations, it found any reliance unreasonable as a matter of law. With respect to the claim for negligent misrepresentation, the court again found that any reliance would have been unreasonable. This appeal followed.

When considering a motion to dismiss pursuant to CPLR 3211(a)(7), "the court must accept the facts as alleged in the complaint as true and accord the plaintiff the benefit of every possible favorable inference, and must determine whether the facts as alleged fit within any cognizable legal theory" (*Phillips v City of New York*, 66 AD3d 170, 174 [1st Dept 2009] internal quotation mark omitted]; *see also* CPLR 3026). Pursuant to CPLR 3211(a)(1), dismissal may be "granted only where the

documentary evidence [tendered by defendant] 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]).

We begin our analysis by first considering plaintiffs' GBL 349 claim. To state a cause of action under that statute, a plaintiff "must, at the threshold, charge conduct that is consumer oriented. The conduct need not be repetitive or recurring but defendant's acts or practices must have a broad impact on consumers at large; [p]rivate contract disputes unique to the parties . . . would not fall within the ambit of [GBL 349]" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995], quoting *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 [1995]). "If a plaintiff meets this threshold, its prima facie case may then be established by proving that defendant is engaging in an act or practice that is deceptive in a material way and that plaintiff has been injured by it" (*id.*). Whether a representation or omission is a "deceptive act or practice" depends on the likelihood that it will "mislead a reasonable consumer acting reasonably under the circumstances" (*Oswego*, 85 NY2d at 26). "In the case of omissions in particular . . . [GBL 349] surely does not require businesses to ascertain consumers' individual needs and guarantee

that each consumer has all relevant information specific to its situation" (*id.*). However, "[o]mission-based claims under Section 349 are appropriate 'where the business alone possesses material information that is relevant to the consumer and fails to provide this information'" (*Bildstein v Mastercard Int'l, Inc.*, 2005 US Dist LEXIS 10763, *10-11, 2005 WL 1324972, *4 [SD NY 2005], quoting *Oswego*, 85 NY2d at 26).

Here, the challenged practice was consumer-oriented insofar as it was part and parcel of defendant's efforts to sell its services as a law school to prospective students (*see Chais v Technical Career Insts.*, 2002 NY Slip Op 30082[U], *11-12 [Sup Ct, NY County 2002]). Nevertheless, although there is no question that the type of employment information published by defendant (and other law schools) during the relevant period likely left some consumers with an incomplete, if not false, impression of the schools' job placement success, Supreme Court correctly held that this statistical gamesmanship, which the ABA has since repudiated in its revised disclosure guidelines,[1] does

[1] See ABA Letter to Law School Deans and Career Services Officers regarding Reporting Placement Data on Annual Questionnaire, July, 27, 2011 (http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/2011_questionnaire_memo_deans_career_services_officers.authcheckdam.pdf).

not give rise to a cognizable claim under GBL 349. First, with respect to the employment data, defendant made no express representations as to whether the work was full-time or part-time. Second, with respect to the salary data, defendant disclosed that the representations were based on small samples of self-reporting graduates. While we are troubled by the unquestionably less than candid and incomplete nature of defendant's disclosures, a party does not violate GBL 349 by simply publishing truthful information and allowing consumers to make their own assumptions about the nature of the information (*see Andre Strishak & Assoc. v Hewlett Packard Co.* 300 AD2d 608, 609-610 [2nd Dept 2002]; *St. Patrick's Home for Aged & Infirm v Laticrete Intl.*, 264 AD2d 652, 655-656 [1st Dept 1999]; *see also Corcino v Filstein*, 32 AD3d 201, 202 [1st Dept 2006]). Accordingly, we find that defendant's disclosures were not materially deceptive or misleading (*id.*). Because plaintiffs have not adequately pleaded that defendant's practice was misleading, we need not consider whether plaintiffs' have alleged cognizable injuries. We also decline to consider defendants' argument that GBL 349(d) provides a complete defense.

We next address plaintiffs' fraud and negligent misrepresentation claims. To state a cause of action for fraudulent misrepresentation, "a plaintiff must allege a

misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011][internal quotation marks omitted]). "A cause of action for fraudulent concealment requires, in addition to the four foregoing elements, an allegation that the defendant had a duty to disclose material information and that it failed to do so" (*P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept 2003]). "In addition, in any action based upon fraud, the circumstances constituting the wrong shall be stated in detail" (*id.*, citing CPLR 3016[b]). To state a cause of action for negligent misrepresentation, in turn, the plaintiff must allege "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*Mandarin Trading*, 16 NY3d at 180 [internal quotation marks omitted]).

Plaintiffs argue that they stated causes of action for common law fraud and negligent misrepresentation based on their allegations that defendant knowingly published misrepresentations

about its graduates' employment rates and salaries, and fraudulently concealed the fact that the employment rates included temporary, part-time, voluntary or non-JD-required/preferred employment. However, as previously discussed, the employment and salary data disclosed by defendant was not actually false (even if it was incomplete). Thus, the fraud claim fails insofar as it is based on fraudulent misrepresentations (*see Pappas v Harrow Stores, Inc.*, 140 AD2d 501, 504 [2nd Dept 1988]; *see also MacDonald v Cooley*, 2012 WL 2994107, *6 [WD Mich 2012] [dismissing a law suit against a law school on the grounds that plaintiff's "subjective misunderstanding of information that is not objectively false or misleading cannot mean that (defendant) has committed the tort of (fraud)"]). Furthermore, because plaintiffs have not alleged any special relationship or fiduciary obligation requiring a duty of full and complete disclosure from defendants to its prospective students, we dismiss plaintiff's claim to the extent that it is based on fraudulent concealment (*see Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491, 492 [1st Dept 2006] ["A fiduciary relationship does not exist between parties engaged in an arm's length business transaction"] and *Jana L. v West 129th St. Realty Corp.*, 22 AD3d 274, 277-279 [1st Dept 2005]), and negligent misrepresentation (*see US Express Leasing, Inc. v Elite Tech.*

[NY], Inc., 87 AD3d 494, 497 [1st Dept 2011]; *United Safety of Am., Inc. v Consolidated Edison Co. of N.Y.*, 213 AD2d 283, 285-286 [1st Dept 1995]).

We are not unsympathetic to plaintiffs' concerns. We recognize that students may be susceptible to misrepresentations by law school. As such, "[t]his Court does not necessarily agree [with Supreme Court] that [all] college graduates are particularly sophisticated in making career or business decisions" (*MacDonald,* 2012 WL 2994107, at *10). As a result, they sometimes make decisions to yoke themselves and their spouses and/or their children to a crushing burden because the schools have made misleading representations that give the impression that a full time job is easily obtainable when in fact it is not.

Given this reality, it is important to remember that the practice of law is a noble profession that takes pride in its high ethical standards. Indeed, in order to join and continue to enjoy the privilege of being an active member of the legal profession, every prospective and active member of the profession is called upon to demonstrate candor and honesty. This requirement is not a trivial one. For the profession to continue to ensure that its members remain candid and honest public servants, all segments of the profession must work in concert to

instill the importance of those values. "In the last analysis, the law is what the lawyers are. And the law and the lawyers are what the law schools make them."[3] Defendant and its peers owe prospective students more than just barebones compliance with their legal obligations. Defendant and its peers are educational not-for-profit institutions.[4] They should be dedicated to advancing the public welfare.[5] In that vein, defendant and its peers have at least an ethical obligation of absolute candor to their prospective students.

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[3] Letter from Felix Frankfurter, Professor, Harvard Law School, to Mr. Rosenwald 3 (May 13, 1927) (Felix Frankfurter papers, Harvard Law School library), quoted in Rand Jack & Dana C. Jack, Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers 156 (1989).

[4] *See* New York Department of State, Division of Corporations, Corporation & Business Entity Database, New York Law School http://appext9.dos.ny.gov/corp_public/CORPSEARCH.ENTITY_INFORMATION?p_nameid=134944&p_corpid=109732&p_entity_name=new%20york%20law%20school&p_name_type=A&p_search_type=BEGINS&p_srch_results_page=0.

[5] *See* E. Lisk Wyckoff, Jr., Practice Commentaries, McKinney's Not-For-Profit Corporation Law, Book 37, Cons Law of NY § 201 ("This type of corporation is established primarily to benefit society in general as opposed to the members of a not-for-profit corporation").

Accordingly, the order of the Supreme Court, New York County (Melvin L. Schweitzer, J.), entered March 21, 2012, which granted defendant New York Law School's motion to dismiss the complaint, should be affirmed, without costs.

All concur.

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

ENTERED: DECEMBER 20, 2012

CLERK