SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 28, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

9151-
9152 Index 650176/11

Bowlmor Times Square LLC,
Plaintiff-Respondent,

-against-

AI 229 West 43rd Street Property Owner, LLC,
Defendant-Appellant,

Five Mile Capital II NYT JV., et al.,
Defendants.

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Meister Seelig & Fein LLP, New York (Stephen B. Meister of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Barbara R. Kapnick, J.), entered July 25, 2012, which, to the extent appealed from, denied defendant-appellant's motion to dismiss, pursuant to CPLR 3211(a), plaintiff's fifth, sixth, eighth and tenth causes of action, unanimously modified, on the law, to declare that rent became payable on September 19, 2011, 300 days after the date plaintiff tenant opened for business, and to grant

the motion to dismiss as to the eighth cause of action, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered June 4, 2012, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff's fifth and sixth causes of action seek a declaratory judgment as to when it was required to begin paying rent under the rent commencement date clause of the lease. It provides that the rent commencement date is "the earlier of" (i) 300 days from the date tenant opened for business at the premises, and (ii) 685 days after delivery of possession, subject to landlord delay pursuant to the provisions of lease section 14.04(B). Plaintiff seeks a declaration that delivery of possession did not occur on January 7, 2010, as defendant asserts, and that the rent commencement date is thereby extended for each day landlord delayed delivery. Since these causes of action cannot be sustained under the plain language of the rent commencement clause, defendant-appellant is entitled to a declaration in its favor on the merits (*Hirsch v Lindor Realty Corp.*, 63 NY2d 878, 881 [1984]).

The only portion of the provision that is operative is the first part, stating that rent shall become payable 300 days after plaintiff opened the leased premises for business. Accordingly,

rent first became due on September 19, 2011 – 300 days following the date plaintiff opened for business on November 23, 2010.

The clause's second part, providing that rent shall become payable 685 days after the delivery of the premises, was rendered moot by the opening of the business. The 685-day provision is merely a fail-safe designed to ensure that defendant would begin receiving rent within a specified time after plaintiff took possession of the premises.

The landlord delays contemplated by the rent commencement provision are limited by the referenced sections of the lease to delays occasioned by landlord's inability to secure permits (including a temporary certificate of occupancy) that landlord is obligated to obtain, and then "only to the extent that the Substantial Completion of Tenant's Work is actually delayed thereby." "Tenant's Work" is defined as "construction work which is required to complete the Premises and the Licensed Space to a condition ready for the conduct of Tenant's business." Thus, "landlord delays" are clearly confined to the period prior to tenant's commencement of operations.

Plaintiff's eighth cause of action, seeking damages for defendant's alleged failure to properly maintain the building in a reasonably safe and adequate condition of repair, must be

dismissed. This cause of action is expressly barred by § 6.02 of the lease, which states:

> "Except as may be expressly provided in this Lease, there shall be no allowance to Tenant for a diminution of rental value and no liability on the part of Landlord by reason of inconvenience, annoyance or injury to business arising from Landlord making, or failing to make, any repairs, alterations, additions or improvements in or to any portion of the Building, the Premises or the Licensed Space, or in or to fixtures, appurtenances or equipment thereof . . . ."

Plaintiff has pointed to no other provision in the lease that expressly provides for such relief, thereby superseding § 6.02.

Plaintiff's tenth cause of action sufficiently alleges a breach of lease claim based on landlord's purported refusal to permit plaintiff to install satellite and other communications equipment necessary for the successful operation of plaintiff's

intended sports bar.

We have considered the remaining arguments and find them unavailing.

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

ENTERED: MAY 28, 2013

CLERK

Mazzarelli, J.P., Saxe, DeGrasse, Manzanet-Daniels, Clark, JJ.

9489-
9490 Index 304045/08

Momodou J. Bayo, Administrator
of the Estate for Yusupha Tunkara,
etc., et al.,
Plaintiffs-Appellants,

-against-

626 Sutter Avenue Associates, LLC,
et al.,
Defendants,

Sutter Avenue Associates, LLC,
Defendant-Respondent.

_____

Pollack, Pollack, Isaac & DeCicco, New York (Brain J. Isaac of counsel), for appellants.

Milber, Makris, Plaousadis & Seiden, LLP, White Plains (David C. Zegarelli of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about June 1, 2012, granting plaintiffs' motion to reargue to the extent an order, same court and Justice, entered on or about September 26, 2011, granted defendant-respondent's motion for summary judgment and dismissed plaintiffs' wrongful death claim as against it and, upon reargument, vacating the prior order, reconsidering defendant-respondent's motion, and dismissing the complaint in its entirety as against defendant-respondent, unanimously affirmed, without

costs. Appeal from the prior order, unanimously dismissed, without costs, as superseded by the appeal from the order granting reargument.

On the morning of November 22, 2006, decedent Yusupha Tunkara was found dead at a construction site in a make-shift tool shed built by his employer, Joy Construction (Joy). Defendant-respondent Sutter Avenue Associates, LLC was the developer of the building under construction, and had retained Joy as the general contractor. An investigation and autopsy revealed that decedent had died from carbon monoxide poisoning caused by a gasoline-powered generator in the shed. Decedent was a night watchman for Joy and was apparently trying to use the generator to power a portable heater to stay warm in the shed during his graveyard shift. The administrator of decedent's estate commenced this action seeking to recover damages for common law negligence, violation of Labor Law §§ 200 and 241(6), conscious pain and suffering, and wrongful death. Decedent's wife filed a derivative claim for loss of consortium.

The court properly dismissed the common-law negligence and Labor Law § 200 claims. Where, as here, the injury is caused not by the methods of decedent's work, but by a defective condition on the premises, liability depends on whether the owner or

general contractor created or had actual or constructive notice of the hazardous condition (*see Espinosa v Azure Holdings II, LP*, 58 AD3d 287, 291 n 1 [1st Dept 2008]; *Hernandez v Columbus Ctr., LLC*, 50 AD3d 597, 598 [1st Dept 2008]; *Murphy v Columbia Univ.*, 4 AD3d 200, 201-202 [1st Dept 2004]; *Roppolo v Mitsubishi Motor Sales of Am.*, 278 AD2d 149, 150 [1st Dept 2000]). Defendant established prima facie absence of creation or notice on its part by submitting its managing member's testimony that he did not recall seeing a shed during his occasional visits to the site, and that he had never seen the subject generator and heater. The testimony of Joy's construction supervisor that Joy built the temporary shed for its own use, that it did not need defendant's permission to do so, and that it owned the generator and heater supports a finding of lack of awareness on defendant's part. Plaintiffs have not raised a triable issue of fact.

The court also properly dismissed the Labor Law § 241(6) claim on the ground that decedent was working as a night watchman, as opposed to a construction laborer, at the time of the accident (*Long v Battery Park City Auth.*, 295 AD2d 204 [1st Dept 2002]; *Blandon v Advance Contr. Co.*, 264 AD2d 550 [1st Dept 1999], *lv denied* 94 NY2d 754 [1999]; *Shields v St. Marks Hous. Assoc.*, 230 AD2d 903 [2d Dept 1996], *lv denied* 91 NY2d 806

[1998]). Defendant met its prima facie burden by submitting the deposition testimony of Joy's construction supervisor and an affidavit and payroll records from Joy's Director of Human Resources showing that decedent worked as a laborer from March 2006 but began working as a night watchman in October 2006. Plaintiffs failed to raise a triable issue of fact. Although decedent's brother-in-law and a former Joy laborer averred in their affidavits they had seen decedent cleaning, removing debris, and securing tools during his shift, which began at 3:30 p.m., the affidavits offer no facts as to what work plaintiff was performing at or near the time he died. Further, the former employee averred that he had stopped working for Joy about a month before the incident. Also, given that the evidence shows that electricity had not yet been hooked up to the site and the construction supervisor's testimony that the inside of the shed, which was built along a wall of the concrete pit that was under construction, was "pitch black" when he found decedent's body in the early morning, it cannot logically be inferred that plaintiff was performing any construction-related work overnight. The court did not err in dismissing the claim on reargument although it had sustained the claim in the initial order, as "every court retains continuing jurisdiction to reconsider its prior

interlocutory orders during the pendency of the action" (*Liss v Trans Auto Sys.*, 68 NY2d 15, 20 [1986]; *see also Kleinser v Astarita*, 61 AD3d 597, 598 [1st Dept 2009]). We note that dismissal of the Labor Law § 200 claim would also have been justified under the night watchman exception (*see Mordkofsky v V.C.V. Dev. Corp.*, 76 NY2d 573, 576-577 [1990]).

Although the court erred in sua sponte dismissing the claims for conscious pain and suffering and loss of consortium on reargument, where none of the parties addressed these claims on defendant's underlying motion for summary judgment or on the motion to reargue (*see Frank v City of New York*, 211 AD2d 478 [1st Dept 1995]; *Conroy v Swartout*, 135 AD2d 945, 947 [3d Dept 1987]), such error was harmless, given the absence of evidence showing that negligent or wrongful acts by defendant caused decedent's injuries.

While the court also improperly addressed the wrongful death claim sua sponte on defendant's summary judgment motion where none of the parties addressed this claim (*see Frank*, 211 AD2d at 479; *Conroy*, 135 AD2d at 947), plaintiffs waived any challenge to the impropriety of such act by raising the claim on its motion to reargue. In any event, the error was harmless given the absence of evidence of negligence or other wrongful acts on defendant's

part.

We have reviewed the remaining contentions and find them unavailing.

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

ENTERED: MAY 28, 2013

CLERK

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

9840 The Law Office of Sheldon Eisenberger, Index 600700/10
Plaintiff-Respondent,

-against-

Elaine Blisko,
Defendant-Appellant.

_____

Carl F. Lodes, Carmel, for appellant.

Sheldon Eisenberger, New York, respondent pro se.

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Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered March 12, 2012, which, after a nonjury trial, found defendant owed plaintiff law office the principal amount of $83,775.69 in legal fees related to her divorce proceedings, unanimously modified, on the law, to find that the retainer, through its language, terminated upon the commencement of the grounds trial, and remand to the Supreme Court, New York County for recalculation in accordance with this opinion, and otherwise affirmed, without costs.

Plaintiff, the Law Office of Sheldon Eisenberger (the law office), brought this action seeking legal fees from defendant Elaine Blisko arising from plaintiff's representation of defendant in her divorce proceedings. On March 13, 2008, Blisko met with Sheldon Eisenberger, the principal of the law office, to

discuss the law office's possible representation of her. Also present at the meeting was a matrimonial attorney not associated with the law office, Patricia Mandel. Eisenberger stated that he asked Mandel to attend the meeting because he does not routinely handle matrimonial actions and wanted her assistance in representing Blisko. At the end of the meeting, Blisko and Eisenberger signed a retainer agreement and a statement of client's rights and responsibilities. The retainer states that the law office will represent Blisko "in a matrimonial action, including motions and Court appearances up to but not including an actual trial on the matter." Although the retainer lists the law office's hourly fee, it does not indicate the hourly fees of any other attorney who would be working on the case, as required.

The law office filed an action against Blisko's husband in January 2009. However, the action was discontinued as the couple attempted to reconcile. When the reconciliation failed, the law office filed a second matrimonial action on Blisko's behalf in March 2009. As part of this second action, Eisenberger, Mandel and another associate at the law office attended a preliminary conference on June 12, 2009. At that conference, the motion judge found that a trial was necessary to determine the grounds for the divorce and the trial was calendared for August 18, 2009.

The trial commenced on that day, with the law office representing Blisko. However, a few days later the trial was adjourned pending settlement discussions.

In October 2009, Blisko retained new counsel to represent her in the divorce proceedings. A letter seeking consent to change of counsel was sent to the law office, which was signed and returned. In addition to the consent form, the law office included a letter stating that Blisko still owed unpaid legal fees. Blisko did not pay the outstanding legal fees and filed a request for arbitration, which was decided in her favor.

Following arbitration, the law office commenced this action seeking unpaid legal fees in the amount of $83,775.69 and a trial was held on the claim. Blisko asserted that the retainer did not comply with 22 NYCRR 1400.3 because it did not state the "hourly rate of each person whose time" was charged to her, but rather only stated the hourly rate of Eisenberger and made no mention of any other attorney working on the case. Blisko also contended that the retainer expressly stated that the law office's representation did not include being trial counsel. The trial court rejected Blisko's arguments and ordered her to pay $83,775.69 to the law office, in addition to the substantial amount she already had paid.

We modify because the law office should be denied any legal fees arising from representation of Blisko after the grounds trial commenced (*see Sherman v Sherman*, 34 AD3d 670, 671 [2d Dept 2006]). The plain language of the retainer states that the law office's representation of Blisko includes work leading "up to" a trial, "but not including an actual trial." Indeed, the law office acknowledges that the retainer did not include representation at trial. Following the commencement of the trial on August 18, 2009, the retainer between the law office and Blisko terminated and plaintiff was representing Blisko without a written retainer (*see Sherman*, 34 AD3d at 671).

The law office contends that, even if the retainer terminated when the trial began, it may still collect unpaid fees from Blisko because it substantially complied with the requirements of 22 NYCR 1400.3 (*Granato v Granato*, 75 AD3d 434, 434 [1st Dept 2010]; *Flanagan v Flanagan*, 267 AD2d 80, 81 [1st Dept 1999]; 22 NYCRR 1400.3). The substantial compliance argument has no relevance to this issue because there was no trial retainer at all (*see Sherman*, 34 AD3d at 671). If the law office wanted to be paid for representing Blisko at trial, it needed to have the client sign a new retainer. Moreover, there is no indication that the law office explained the limited nature

of the retainer to the client, who then agreed to expand its scope to include the actual trial (*cf. Gross v Gross*, 36 AD3d 318, 319-323 [2d Dept 2006] [a second retainer was not required where an attorney continued to represent the law firm's client after the law firm dissolved, as the client signed a consent to change attorney form]).

Although the law office cannot receive legal fees for any services completed after trial commenced, it may receive any outstanding unpaid fees for work completed prior to commencement of the actual trial. The law office substantially complied with the requirements of 22 NYCRR 1400.3 by giving the client the required statement of client rights and responsibilities and by listing the fee of the primary attorney (*see Flanagan*, 267 AD2d at 81). Blisko's testimony indicates that she was aware that more than one attorney was working on her case, and that she received bills reflecting the work of multiple attorneys.

Finally, as a general principle, the law office "need not return fees [it] properly earned" (*Markard v Markard*, 263 AD2d 470, 471 [2d Dept 1999]). Although the retainer does not fully comply with 22 NYCRR 1400.3, the law office did complete work that was within the scope of the pretrial retainer, and therefore it is not required to return fees already paid to it for work

completed before the trial (*see Mulcahy v Mulcahy*, 285 AD2d 587, 588 [2d Dept 2001], *lv denied* 97 NY2d 605 [2001]; *Markard*, 263 AD2d at 471). When a client is seeking the return of funds already paid to the attorney, the attorney does not need to show substantial compliance with 22 NYCRR 1400.3, but only that the fees paid were properly earned (*Markard*, 263 AD2d at 471; *Mulcahy*, 285 AD2d at 588).

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: MAY 28, 2013

CLERK

Andrias, J.P., Saxe, DeGrasse, Richter, Gische, JJ.

9901 In re Brandon P.,

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

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Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan B. Eisner of counsel), for presentment agency.

_____

Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about January 18, 2012, which adjudicated appellant a juvenile delinquent upon his admission that he committed the act of unlawful possession of weapons by a person under 16, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

The petition, together with the supporting deposition, contained nonhearsay allegations establishing every element of the offense charged, including the age element of Penal Law § 265.05 (*see generally* Family Ct Act § 311.2[3]; *Matter of Jahron S.*, 79 NY2d 632, 636 [1992]). Unlike the situation in *Matter of Devon V.* (83 AD3d 469 [1st Dept 2011]), the supporting deposition contained an explanation of how the deponent knew appellant was

15 years old. The deponent stated that she was appellant's sister, and it is generally recognized that the ages of family members are common knowledge within a family (*see Matter of Culligan's Pub v New York State Liq. Auth.*, 170 AD2d 506 [2d Dept 1991], and cases cited therein).

The court properly exercised its discretion in adjudicating appellant a juvenile delinquent and placing him on probation for a period of 18 months. This was the least restrictive alternative consistent with the needs of appellant and the community (*see Matter of Katherine W.*, 62 NY2d 947 [1984]) in light of, among other things, the fact that the underlying offense was a serious incident involving a knife. The court reasonably concluded that the six-month period of supervision available under an adjournment in contemplation of dismissal was inadequate to meet appellant's needs.

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

ENTERED: MAY 28, 2013

CLERK

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

10070 In re New York City Asbestos Litigation — Index 190377/10

- - - - -

Mary Andrucki, etc., et al.,
Plaintiffs-Respondents,

-against-

Aluminum Company of America, et al.,
Defendants,

Port Authority of New York and New Jersey,
Defendant-Appellant.

_____

Segal McCambridge Singer & Mahoney, Ltd., New York (Christian H. Gannon of counsel), for appellant.

Weitz & Luxenberg, P.C., New York (Daniel T. Horner of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Martin Shulman, J.), entered January 30, 2012, awarding plaintiffs damages, unanimously reversed, on the law, without costs, the judgment vacated, plaintiffs' motion for a default judgment against defendant Port Authority of New York and New Jersey denied, and defendant's motion to dismiss the complaint for lack of subject matter jurisdiction granted. The Clerk is directed to enter judgment accordingly.

In 1971 and 1972, plaintiffs' decedent, a sheet metal worker, worked on the construction of defendant Port Authority's

World Trade Center, where he believed he was exposed to asbestos and inhaled fibers. He was diagnosed with malignant mesothelioma in or about April 2010. On October 4, 2010, he and his wife filed a notice of claim against defendant for the injuries he sustained, and on November 12, 2010, they served the complaint. On November 27, 2010, decedent died. Although plaintiffs' counsel should have been aware of the time requirements in the applicable statute, the service of the complaint was premature, resulting in a lack of subject matter jurisdiction over the Port Authority (*see* McKinney's Unconsolidated Laws of NY § 7107 [requiring service of a notice of claim at least 60 days before commencement of the action]; *see e.g. Lyons v Port Auth. of N.Y. & N.J.*, 228 AD2d 250 [1st Dept 1996]; *Ofulue v Port Auth. of N.Y. & N.J.*, 307 AD2d 258 [2d Dept 2003]; *see also Campbell v City of New York*, 4 NY3d 200, 204 [2005]).

By concurrent legislation of the States of New York and New Jersey (Uncons Laws § 7101 *et seq.*; NJ Stat Ann 32:1-157 *et seq.*), the Port Authority gave its consent to suit in actions or proceedings accruing after June 13, 1951 upon compliance with

certain jurisdictional conditions precedent. The Port Authority grants such consent

> "upon the condition that any suit, action or proceeding prosecuted or maintained under this act shall be commenced within one year after the cause of action therefor shall have accrued, and upon the further condition that in the case of any suit, action or proceeding for the recovery or payment of money, prosecuted or maintained under this act, a notice of claim shall have been served upon the port authority by or on behalf of the plaintiff or plaintiffs at least sixty days before such suit, action or proceeding is commenced" (Uncons Laws § 7107).

We are, of course, required to apply New York law. However, we note that New Jersey courts have held "substantial compliance" with the notice requirements to be sufficient for instituting an action against the Port Authority. Thus, although both states' statutes are the same (Uncons Laws 7101 *et seq.*; NJ Stat Ann 32:1-157 *et seq.*), New Jersey courts have liberally construed the notice requirement (*see e.g. Zamel v Port of New York Auth.*, 56 NJ 1, 264 A2d 201 [1970] [finding substantial compliance based on the plaintiff's immediate reporting of the accident together with the parties' subsequent correspondence]; *Atlantic Aviation Corp. v Port of New York Auth.*, 66 NJ Super 15, 168 A2d 262 [1961] [finding substantial compliance where the Port Authority acknowledged the plaintiff's claim]; *cf. Santiago v New York &*

New Jersey Port Auth., 429 NJ Super 150, 57 A3d 54 [2012]; *Port Auth. of New York and New Jersey v Airport Auto Services, Inc.*, 396 NJ Super 427, 934 A2d 665 [2007] [finding that the invoices the counterclaimant submitted to the Port Authority did not constitute substantial compliance]). In New York, by contrast, compliance with the notice requirement is "mandatory" and "must be strictly construed" (*Lyons*, 228 AD2d at 251).

Plaintiffs argue that despite their initial failure to obtain subject matter jurisdiction over defendant, they nonetheless obtained subject matter jurisdiction through service of the amended complaint after the decedent's death. This argument is unavailing. The initial notice of claim specifically stated that it was for personal injury arising from the asbestos exposure and not for the decedent's death, which had yet to occur.

As plaintiffs correctly note, courts in this state have held, in considering notices of claim under General Municipal Law § 50-e, that notice of injury placed a municipality on notice of a plaintiff's subsequent death from that same injury (*see e.g. Mingone v State of New York*, 100 AD2d 897, 898 [2d Dept 1984]). However, these cases have no application to the Port Authority's suability statute. General Municipal Law § 50-e contains a

"substantial compliance" provision, permitting courts to consider whether a plaintiff has substantially complied with the statute's terms; the Port Authority's suability statute, on the other hand, contains no substantial compliance provision (Uncons Laws §§ 7107, 7108; *Port Auth. of N.Y. & N.J. v Barry*, 15 Misc3d 36, 38 [App Term, 2d Dept 2007]). Under these circumstances, plaintiffs should have served on the Port Authority a new notice of claim concerning the wrongful death and survivorship actions.

We further note that a limited exception to the notice provisions applies:

> "[W]here a person entitled to make a claim dies and by reason of his death no notice of claim is filed or suit, action or proceeding commenced within the time specified in section seven hereof then any court in which such suit, action or proceeding may be brought may in its discretion grant leave to serve the notice of claim and to commence the suit, action or proceeding within a reasonable time but in any event within three years after the cause of action accrued. Application for such leave must be made upon an affidavit showing the particular facts which caused the delay and shall be accompanied by a copy of the proposed notice of claim if such notice has not been served, and such application shall be made only upon notice to the port authority" (Uncons Laws § 7108).

Accordingly, because plaintiffs' cause of action accrued in November 2010, plaintiffs may, as of the date of this decision, still move for leave to serve a new notice of claim and commence a new suit against the Port Authority.

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

ENTERED: MAY 28, 2013

CLERK

Mazzarelli, J.P., Sweeny, Freedman, Gische, JJ.

10129 Bourema Niambele, Index 111143/09
Plaintiff-Appellant,

-against-

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

Shanta Johnson-McKinney, et al.,
Defendants.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about May 30, 2012,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated May 2, 2013,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: MAY 28, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Freedman, Manzanet-Daniels, JJ.

10182 The People of the State of New York, Ind. 78N/07
Respondent,

-against-

Richard Alicea,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Brenda Soloff, J. at first plea; Michael R. Ambrecht, J. at second plea; Patricia M. Nunez, J. at sentencing), rendered July 7, 2009, convicting defendant of criminal sale of a controlled substance in the fourth degree, and sentencing him, as a second felony drug offender, to a term of four years, unanimously affirmed.

Defendant's unpreserved challenges to the validity of his plea do not come within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662 [1988]; *see also People v Murray*, 15 NY3d 725, 726-727 [2010]), and we decline to review them in the interest of justice. As an alternative holding, we find that, when viewed as a whole, the record of the two plea proceedings and the written plea agreement establish

that defendant pleaded guilty with full knowledge of the consequences of his plea, including the prison and postrelease supervision terms he would be facing if he violated its conditions (*see e.g. People v Thomas*, 63 AD3d 642 [1st Dept 2009], *lv denied* 13 NY3d 863 [2009]). The court's explanation of the plea conditions was objectively clear (*see People v Cataldo*, 39 NY2d 578, 580 [1976]), and defendant had all the information he needed to "knowingly, voluntarily and intelligently choose among alternative courses of action" (*People v Catu*, 4 NY3d 242, 245 [2005]).

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 28, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Freedman, Manzanet-Daniels, JJ.

10183 In re Diana Haas, Index 110190/11
Petitioner-Respondent-Appellant,

-against-

New York City Department of Education,
Respondent-Appellant-Respondent.

_____

Michael A. Cardozo, Corporation Counsel, New York (Susan B. Eisner of counsel), for appellant-respondent.

Glass Krakower LLP, New York (Bryan D. Glass of counsel), for respondent-appellant.

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Order and judgment (one paper), Supreme Court, New York County (Carol R. Edmead, J.), entered May 21, 2012, which, inter alia, granted the petition to vacate a post-hearing award sustaining specifications of corporal punishment of a kindergarten student and of directing students who witnessed the incident not to discuss what they had observed, and imposing the penalty of termination of petitioner's employment as a New York City schoolteacher, to the extent of vacating the penalty imposed and remanding the matter to a different hearing officer for a determination of the penalty based on the administrative record, but taking no account of any evidence of uncharged wrongdoing, unanimously modified, on the law, the penalty of termination reinstated, and otherwise affirmed, without costs.

The record contains adequate evidence to support the determination that petitioner was guilty of the specifications charging her with pulling a chair out from underneath a kindergarten student and then kicking the student while he was on the floor, and that following the incident she directed the students who witnessed the incident not to discuss what they had observed. The Hearing Officer considered all of the testimony presented and no basis exists to disturb the credibility determinations made by the Hearing Officer (*see Matter of Douglas v New York City Bd./Dept. of Educ.*, 87 AD3d 856, 857 [1st Dept 2011]).

As petitioner failed to object to the admission of testimony regarding her attempts to persuade her coworkers to cover up her misconduct, and also failed to raise such issue in her petition, such issue is not preserved for our review (*see Matter of Cherry v Horn*, 66 AD3d 556, 557 [1st Dept 2009]). In any event, petitioner's argument that she was denied due process because the Hearing Officer's decision to terminate her employment was based upon evidence of wrongdoing that was not charged is unavailing, since the Hearing Officer expressly based the penalty upon the charged misconduct (*compare Mayo v Personnel Review Bd. of Health & Hosps. Corp.*, 65 AD3d 470, 472-473 [1st Dept 2009]).

Moreover, the penalty of termination does not shock one's sense of fairness, in light of petitioner's egregious misconduct of kicking a kindergarten student with special needs and then directing her other impressionable students not to discuss what they had observed. The record further shows that petitioner showed a lack of remorse for her actions (*see Cipollaro v New York City Dept. of Educ.*, 83 AD3d 543, 544 [1st Dept 2011]; *compare Matter of Principe v New York City Dept. of Educ.*, 94 AD3d 431 [1st Dept 2012], *affd* 20 NY3d 963 [2012]).

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

ENTERED: MAY 28, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Freedman, Manzanet-Daniels, JJ.

10184 In re Aribelys N., and Another,

Dependent Children Under Eighteen Years of Age, etc.,

Rafael N.,
Respondent-Appellant,

Abbott House,
Petitioner-Respondent.

_____

Kenneth M. Tuccillo, Hastings on Hudson, for appellant.

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

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

_____

Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about April 30, 2012, which, insofar as appealed from as limited by the briefs, found that respondent father's consent is not required for the adoption of the subject children, unanimously affirmed, without costs.

The father failed to demonstrate that he provided the children with fair and reasonable financial support, according to his means. Therefore, he failed to satisfy the requirements of

Domestic Relations Law § 111(1)(d) (*see Matter of Cassandra Tammy S. [Babbah S.]*, 89 AD3d 540, 540 [1st Dept 2011]; *see generally Matter of Dominique P.*, 24 AD3d 335 [1st Dept 2005], *lv denied* 6 NY3d 712 [2006]).

The father's constitutional challenges to the statutes providing for notice and consent of an unwed father are unpreserved for our review, and we decline to reach them in the interest of justice (*see Matter of Jayden C. [Michelle R.]*, 82 AD3d 674, 675 [1st Dept 2011]). As an alternative holding, we reject them on the merits.

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

ENTERED: MAY 28, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Freedman, Manzanet-Daniels, JJ.

10185 Lisa Bishop, et al., File 575/05
Plaintiffs-Respondents,

-against-

Rona Maurer, etc.,
Defendant-Appellant.

_____

Richard L. Herzfeld, New York, for appellant.

Lawrence H. Silverman, Commack, for respondents.

_____

Order, Surrogate's Court, New York County (Nora S. Anderson, S.), entered December 20, 2012, which denied defendant's motion for summary judgment dismissing the complaint alleging undue influence in the creation and execution of certain estate planning documents, unanimously affirmed, without costs.

Surrogate's Court properly denied summary judgment after concluding that there are issues of fact regarding whether defendant, the decedent's wife, coerced the decedent into executing certain estate planning documents that transferred real and personal property to defendant, to the alleged detriment of his daughter from a prior marriage, Lisa Bishop, among others.

While defendant correctly asserts that plaintiffs submitted certain hearsay evidence in opposition to the summary judgment motion, including certain physician and attorney notes, such

hearsay evidence may be considered when submitted in opposition to a summary judgment motion, so long as it is not the only proof submitted (*see e.g. Sumitomo Mitsui Banking Corp. v Credit Suisse,* 89 AD3d 561, 564 [1st Dept 2011]). Here, nonhearsay evidence, including affidavits from the decedent's friends as well as the decedent's first daughter, described the contentious nature of the marriage and the decedent's declining mental health. Moreover, the decedent, who was 83 years old and undisputedly suffered from some degree of cognitive impairment when he signed the documents, initiated this lawsuit during his lifetime and attested, by his verified complaint, to his declining health and defendant's abusive and coercive conduct.

Plaintiffs further rely on a nonhearsay affidavit from a forensic document examiner that concluded that the decedent's signature was forged on the retainer letter, possibly by defendant, as additional evidence that defendant coerced the decedent into retaining counsel to execute these documents and did not want the decedent to have separate counsel in the event of any conflict. All of this raises triable issues of fact whether defendant wielded sufficient influence over the decedent to overcome

his free will (*Matter of Walther*, 6 NY2d 49, 53-54 [1959]; *Matter of Ryan*, 34 AD3d 212, 213-214 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]).

Defendant argues that plaintiffs' claim that the decedent would not have signed the documents in question had he known that they transferred property outright to defendant shows that he had such free will. However, plaintiffs do not claim that the decedent was incompetent; the allegations are that the decedent suffered a "cognitive impairment," that defendant committed forgery, and deceived or abused and importuned the decedent, wearing him down to the point that he signed without reading the documents. Thus, viewed in the light most favorable to plaintiffs (*see e.g. Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]), that the decedent, after the fact, asserted that he would not have signed the documents had he known what was in them does not defeat the claim of undue influence.

In light of our conclusion, we need not reach the issue of whether summary judgment should have been granted on defendant's counterclaims for breach of contract, specific performance, and sanctions.

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

ENTERED: MAY 28, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Freedman, Manzanet-Daniels, JJ.

10186- Index 102673/12
10187- 102601/12
10188- 102602/12
10189- 102603/12
10190- 102604/12
10191- 102605/12
10192- 102606/12
10193- 102607/12
10194- 102608/12
10195- 102447/12
10196 In re Gregory Floyd, 102636/12
Petitioner-Respondent,

-against-

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

- - - - -

In re Lillian Roberts, etc., et al.,
Petitioners-Respondents,

-against-

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

- - - - -

In re Tom Klein, etc.,
Petitioner-Respondent,

-against-

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

- - - - -

In re Michael Bilello, etc.,
Petitioner-Respondent,

-against-

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

- - - - -

In re John T. Ahern, etc., et al.,
Petitioners-Respondents,

-against-

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

- - - - -

In re Gene DeMartino, etc.,
Petitioner-Respondent,

-against-

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

- - - - -

In re John Murphy, etc.,
Petitioner-Respondent,

-against-

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

_____

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

Archer, Byington, Glennon & Levine LLP, Melville (Marty Glennon of counsel), for Gregory Floyd, respondent.

Mary J. O'Connell, New York (Steven E. Skyes of counsel), for Lillian Roberts, James Tucciarelli, Kyle Simmons, Mark Rosenthal, Manuel Roman, Michael Coppola, Jon Bailey, Anthony Carter and Cornell Heyward, respondents.

Broach & Stulberg, LLP, New York (Robert B. Stulberg of counsel), for Tom Klein and Michael Bilello, respondents.

Green Burzichelli Greenberg, P.C., Lake Success (Harry Greenberg of counsel), for John T. Ahern, Sean Fitzpatrick, Stephen Melish, Joseph Colangelo and Augustino Martiniello, respondents.

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

Colleran, O'Hara & Mills L.L.P., Garden City (Carol O'Rourke Pennington of counsel), for John Murphy, respondent.

Judgments, Supreme Court, New York County (Manuel J. Mendez, J.), entered July 11, 2012, July 24, 2012, and July 26, 2012, annulling Mayoral Personnel Orders No. 2012/1 and 2012/2, dated April 11, 2012, unanimously affirmed, without costs.

Pursuant to the subject Mayoral Personnel Orders, the City issued rules reclassifying ungraded civil service titles subject to prevailing wage bargaining under Labor Law § 220 as graded workers subject to bargaining under the New York City Collective Bargaining Law without complying with the procedures mandated by Civil Service Law § 20, i.e., notice, a public hearing, and approval by the State Civil Service Commission, which are applicable to those rules (*see Matter of Corrigan v Joseph*, 304 NY 172, 185 [1952], *cert denied* 345 US 924 [1953]).

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

ENTERED: MAY 28, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Freedman, Manzanet-Daniels, JJ.

10197 The People of the State of New York, Ind. 6967C/07
Respondent,

-against-

Dominick Delvecchio,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Julia L. Chariott of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Barbara F. Newman, J.), rendered October 3, 2008, convicting defendant, after a nonjury trial, of attempted criminal contempt in the second degree and attempted aggravated harassment in the second degree, and sentencing him to a term of 90 days and a conditional discharge, 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]). There is no basis for disturbing the court's credibility determinations. There was ample evidence of defendant's guilt, including the testimony of defendant's mother-in-law, sister-in-law and estranged wife that defendant made

repeated, threatening telephone calls in violation of a valid order of protection, along with an answering machine tape containing several of defendant's messages.

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

ENTERED: MAY 28, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Freedman, Manzanet-Daniels, JJ.

10198 Ellen Brooks, Index 116753/09
Plaintiff-Respondent,

-against-

Somerset Surgical Associates,
et al.,
Defendants-Appellants.

_____

Martin Clearwater & Bell LLP, New York (Barbara D. Goldberg of counsel), for appellants.

Law Offices of Frederick W. Altschuler, East Meadow (Daniel P. Trunk of counsel), for respondent.

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered September 15, 2011, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the complaint as against defendant Dr. Norman Sohn, M.D., and to dismiss the action pursuant to CPLR 3215(c) as against defendant Somerset Surgical Associates, P.C., unanimously affirmed, with costs.

Plaintiff alleges she was injured when she fell from an operating table while under anesthesia for procedures being performed at defendants' medical facility. Although Dr. Sohn submitted an affidavit stating he was not present at the moment of plaintiff's fall, his motion for summary judgment was properly denied as premature, because essential facts concerning the cause

of plaintiff's accident and the relationship between Dr. Sohn and defendant Somerset are exclusively within the possession of defendants and might well be disclosed by examination before trial or through cross-examination (*see* CPLR 3212[f]; *Baldasano v Bank of N.Y.*, 199 AD2d 184, 185 [1st Dept 1993]). Moreover, the existing record, including the consent form indicating that plaintiff would be treated only by Dr. Sohn, raises questions of fact, which preclude summary judgment (*see Aetna Cas. & Sur. Co. v Island Transp. Corp.*, 233 AD2d 157, 158 [1st Dept 1996]; *Greenidge v HRH Constr. Corp.*, 279 AD2d 400, 403 [1st Dept 2001]). Further, Dr. Sohn's affidavit did not address his potential liability as shareholder of a professional corporation, responsible for supervision of the office staff and for implementation of office policy and procedure (*see Yaniv v Taub*, 256 AD2d 273, 274-275 [1st Dept 1998]).

The court properly exercised its discretion in denying defendant Somerset's motion to dismiss the complaint as against it as abandoned. Plaintiff demonstrated she did not intend to abandon the action, but rather had been in discussions with the insurance carrier and had engaged in discovery proceedings, and thus offered a reasonable excuse for the delay, and demonstrated

that the complaint is potentially meritorious (*see Laourdakis v Torres*, 98 AD3d 892, 893 [1st Dept 2012]*; Iorizzo v Mattikow*, 25 AD3d 762, 763 [2d Dept 2006]; *Corbin v Wood Pro Installers*, 184 AD2d 234 [1st Dept 1992]). Defendant Somerset has not argued that it was prejudiced by the delay in seeking a default against it (*see Hinds v 2461 Realty Corp.*, 169 AD2d 629, 632 [1st Dept 1991]).

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

ENTERED: MAY 28, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Freedman, Manzanet-Daniels, JJ.

10199 Randy Bonito, et al., Index 650541/11
Plaintiffs-Appellants,

-against-

Avalon Partners, Inc., et al.,
Defendants-Respondents.

_____

Joseph & Kirschenbaum LLP, New York (Michael D. Palmer of counsel) for appellants.

Sichenzia Ross Friedman Ference LLP, New York (Christopher P. Milazzo of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about March 26, 2012, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the complaint as against defendant Vincent Au, unanimously reversed, on the law, with costs, and the motion denied.

Supreme Court should not have dismissed the complaint as against Au. Although there is no private right of action against corporate officers for violations of article 6 of the Labor Law (§ 190 *et seq.*) (*Stoganovic v Dinolfo*, 92 AD2d 729 [4th Dept 1983], *affd* 61 NY2d 812 [1984]), plaintiffs here bring suit against Au as an employer, not as a corporate officer. Therefore, plaintiffs are not precluded from asserting claims

against Au under article 6 (*Lauria v Heffernan*, 607 F Supp 2d 403, 409 [ED NY 2009]; *see Wing Wong v King Sun Yee*, 262 AD2d 254, 255 [1st Dept 1999]).

Plaintiffs may also assert claims against Au for violations of the New York Minimum Wage Act (Labor Law § 650 *et seq*.) and its implementing regulations, including 12 NYCRR 142-2.2. Under the Act, Au may be liable for failure to properly compensate plaintiffs if he was their employer or plaintiffs show that the corporate veil should be pierced (*Robles v Copstat Sec., Inc.*, 2009 WL 4403188, *3, 2009 US Dist LEXIS 112003, *10 [SD NY, Dec. 2, 2009, No. 08-Civ-9572(SAS)]). Here, plaintiffs allege in their complaint that, during their employment with Avalon, Au exercised control of Avalon's "day-to-day operations" and that he was their employer under New York law. They also submitted plaintiff Brian Cespedes's affidavit, wherein he stated that Au hired and fired employees, supervised and controlled employees' work schedules, determined the method and rate of pay, kept employment records, and approved any vacations. At this pre-answer juncture, and upon consideration of the economic realities of the case (*see Matter of Carver v State of New York*, 87 AD3d 25, 30 [2d Dept 2011]), plaintiffs have stated a cause of action against Au, as an "employer" within the meaning of Labor Law

§§ 190(3) and 651(6) (*see Pugliese v Actin Biomed LLC*, 2012 NY Slip Op 31566[U] [Sup Ct, NY County 2012]). Accordingly, plaintiffs were not required to show that the corporate veil should be pierced or allege that Au exercised complete domination and control over the corporation.

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

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

ENTERED: MAY 28, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Freedman, Manzanet-Daniels, JJ.

10200 Health People, Inc., Index 308226/11
Plaintiff-Appellant,

-against-

Affinity Health Plan, Inc.,
Defendant-Respondent.

_____

Stroock & Stroock & Lavan LLP, New York (David M. Cheifetz of counsel), for appellant.

Greenberg Traurig, LLP, Albany (Stephen M. Buhr of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered April 13, 2012, which granted defendant's motion to dismiss the complaint, unanimously modified, on the law, the motion denied as to the first and second causes of action of the complaint alleging breach of contract, and otherwise affirmed, without costs.

Plaintiff stated a cause of action for breach of a letter agreement, whereby defendant promised to provide certain consulting services, by alleging that the consultant defendant retained proved incompetent and that a replacement was retained at the end of the six-month period covered by that agreement. The cause of action for breach of a subsequent grant agreement was also viable because the unqualified right to terminate that

agreement set forth in its Section 10 (*see Red Apple Child Dev. Ctr. v Community School Dists. Two*, 303 AD2d 156, 157-158 [1st Dept 2003], *lv denied* 1 NY3d 503 [2003]) was supplemented by the right to terminate set forth in Section 4, which was conditioned on giving plaintiff the opportunity to cure any purported deficiencies in its performance (*see Summit Dev. Corp. v Fownes*, 74 AD3d 563 [1st Dept 2010]; *see also Fairway Prime Real Estate Mgt., LLC v First Am. Intl. Bank*, 99 AD3d 554, 556-558 [1st Dept 2012]). There is a question of fact as to whether plaintiff was afforded such opportunity.

Dismissal of the third and fourth causes of action alleging promissory estoppel and unjust enrichment, respectively, was proper inasmuch as the claims were duplicative of the claim for breach of the grant agreement (*see Susman v Commerzbank Capital Mkts. Corp.*, 95 AD3d 589, 590 [1st Dept 2012], *lv denied* 19 NY3d 810 [2012]; *cf. Sabre Intl. Sec., Ltd. v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 438-439 [1st Dept 2012]).

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

ENTERED: MAY 28, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Freedman, Manzanet-Daniels, JJ.

10201 Naticha Ruiz-Hernandez, Index 117068/07
Plaintiff-Respondent,

-against-

TPE NWI General,
Defendant-Appellant-Respondent.
- - - - -
TPE NWI General,
Third-Party Plaintiff-Appellant-Respondent,

-against-

Guardsman Elevator Co., Inc.,
Third-Party Defendant-Respondent-Appellant.

_____

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

Kral Clerkin Redmond Ryan Perry & Van Etten, LLP, New York (Joseph C. Bellard of counsel), for respondent-appellant.

Pazer, Epstein & Jaffe, P.C., New York (Matthew J. Fein of counsel), for respondent.

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Order, Supreme Court, New York County (Debra A. James, J.), entered April 19, 2012, which denied the motion of defendant-third-party plaintiff TPE NWI General (General) for summary judgment dismissing the complaint, and denied the motion of third-party defendant Guardsman Elevator Co., Inc. (Guardsman) for summary judgment dismissing the third-party complaint, unanimously modified, on the law, Guardsman's motion granted to the extent that it sought dismissal of General's third-party

claim for contractual indemnification, and otherwise affirmed, without costs.

Triable issues of fact exist as to whether General, the building's owner, and Guardsman, the elevator maintenance contractor, had notice of the defective mechanism that allegedly caused the elevator to malfunction. Guardsman's "Trouble Site Report" indicates that on May 16, 2007, it installed a new IP-8300 relay, the "landing control system," and replaced that component on May 31, 2007, less than one month before plaintiff's accident. The installation and replacement of this component within the weeks immediately preceding plaintiff's accident, raises a triable issue as to whether Guardsman had notice of the defective condition, and such knowledge is imputable to General as the premises' owner (*see Dabbagh v Newmark Knight Frank Global Mgt. Servs., LLC*, 99 AD3d 448, 450 [1st Dept 2012]).

Plaintiff also established that she is entitled to invoke the doctrine of res ipsa loquitur because the IP-8300 relay was exclusively within the control of General and Guardsman (*see DiPilato v H. Park Cent. Hotel, L.L.C.*, 17 AD3d 191 [1st Dept 2005]; *Myron v Millar El. Indus.*, 182 AD2d 558 [1st Dept 1992]), an elevator would not suddenly drop into a free fall in the

absence of negligence (*see Stewart v World El. Co., Inc.*, 84 AD3d 491, 495 [1st Dept 2011]; *Williams v Swissotel N.Y.*, 152 AD2d 457, 458 [1st Dept 1989]), and the record gives no indication that plaintiff somehow contributed to the occurrence.

General's third-party claim against Guardsman for contractual indemnification should have been dismissed. Such provisions must be clear and unambiguous (*see Hogeland v Sibley, Lindsay & Curr Co.*, 42 NY2d 153, 158-159 [1977]; *Susko v 337 Greenwich LLC*, 103 AD3d 434, 436 [1st Dept 2013]), and here, the parties cannot locate any written agreement and the testimony about the agreement's terms are insufficient to support a claim for contractual indemnification.

We have considered the remaining arguments and find them unavailing.

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

ENTERED: MAY 28, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Freedman, Manzanet-Daniels, JJ.

10202- Index 850044/11
10202A Orchard Hotel, LLC,
Plaintiff-Respondent,

-against-

D.A.B. Group, LLC,
Defendant-Appellant,

Orchard Construction, LLC, et al.,
Defendants,

Brooklyn Federal Savings Bank, et al.,
Defendants-Respondents.

_____

Everett N. Nimetz, Kew Gardens, for appellant.

Morrison Cohen LLP, New York (Y. David Scharf of counsel), for Orchard Hotel, LLC, respondent.

O'Reilly, Marsh & Corteselli, Mineola (James G. Marsh of counsel), for Brooklyn Federal Savings Bank and State Bank of Texas, respondents.

_____

Orders, Supreme Court, New York County (Bernard J. Fried, J.), entered March 30, 2012, which granted plaintiff's and defendants-respondents' (additional counterclaim defendants) motions to dismiss defendant D.A.B. Group LLC's counterclaims, unanimously affirmed, with costs.

Plaintiff, assignee of additional counterclaim defendant Brooklyn Federal Savings Bank, seeks to foreclose on real property securing two construction-related loans to defendant

D.A.B. Group that matured on March 1, 2011 and remain unsatisfied. In its counterclaim for fraud, D.A.B. alleges that agents acting on behalf of Brooklyn Federal or additional counterclaim defendant State Bank of Texas orally misrepresented that the banks would extend the maturity date of the loans to November 2011. However, D.A.B. fails to allege the requisite reasonable reliance on these oral misrepresentations (*see International Plaza Assoc., L.P. v Lacher*, 63 AD3d 527, 528 [lst Dept 2009]). The loan documents expressly prohibit oral termination or amendment and provide for termination or amendment only in writing signed by Brooklyn Federal, and in the mortgage agreement D.A.B. acknowledged that the mortgage and all the other documents could be extended, modified or amended only in writing executed by Brooklyn Federal, and that no officer or administrator of the bank had the power or authority from the bank to make an oral extension or modification or amendment on any of the loan documents on its behalf.

D.A.B.'s counterclaim for breach of contract alleges that Brooklyn Federal failed to fund the construction project during certain periods in 2008 and 2009. This claim is barred by an Estoppel Certificate executed August 26, 2010 in which D.A.B. represented and warranted that it had no claims against Brooklyn

Federal and no defenses to any of its obligations under any of the loan documents.

D.A.B. also alleges two post-Estoppel Certificate breaches by Brooklyn Federal. The first is a breach of the Building Loan Agreement by the failure to fund the general contractor's requisitions numbered 8 and 9. This claim is also refuted by documentary evidence. The subject requisitions were certified after March 1, 2011, the maturity date of the building loan. As a consequence of D.A.B.'s default under the note at maturity, Brooklyn Federal was not obligated to make any more advances under the Building Loan Agreement. Indeed, it was entitled to cease making any advances, without advising D.A.B. that D.A.B. was in default.

The second is a breach of a purported agreement to satisfy the mechanic's lien for $960,000 filed against the property by the general contractor in February 2010. Although D.A.B. did not refer to any particular written agreement, the motion court found a provision in the Estoppel Certificate that addresses this issue, and, on appeal, D.A.B. argues that this provision supports its claim. The provision states "The sum of $12,040,000 is available to Contractor which sum may be increased by the amount, if any, by which the Cava Construction mechanic's lien is

resolved, to the satisfaction of Lender, for a sum less than $960,000, provided that no assurances are made as to the availability of any such additional funds." However, as the court concluded, nothing in the provision suggests that Brooklyn Federal agreed to pay the lien.

In its third counterclaim, D.A.B. alleges that Brooklyn Federal "grossly exaggerated the amount necessary to fully satisfy the loan by miscalculating interest and purported late charges due," as a result of which D.A.B. was unable to satisfy or obtain financing to refinance the loan. As the motion court found, even if these allegations are true, they do not fit into any cognizable legal theory. "A dispute as to the exact amount owed by the mortgagor to the mortgagee ... does not preclude the issuance of summary judgment directing the sale of the mortgaged property" (*Long Is. Sav. Bank of Centereach, F.S.B. v Denkensohn*, 222 AD2d 659, 660 [2d Dept 1995]).

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

ENTERED: MAY 28, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Freedman, Manzanet-Daniels, JJ.

10203 In re Gloria C.,
Petitioner-Appellant,

-against-

Josephine I.,
Respondent-Respondent.

_____

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

_____

Order, Family Court, New York County (Carol J. Goldstein, Referee), entered on or about July 20, 2010, which, after a fact-finding hearing, dismissed the petition for an order of protection, unanimously affirmed, without costs.

Petitioner failed to demonstrate by a fair preponderance of the evidence that respondent acted with an intent to harass, annoy or alarm petitioner, and repeatedly committed acts that served no legitimate purpose (*see generally* Family Ct Act § 832; *Matter of Melind M. v Joseph P.*, 95 AD3d 553, 555 [1st Dept 2012]). Accordingly, the Family Court correctly determined that respondent did not commit acts that constituted harassment in the second degree (*see* William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, 2013 Electronic Update, Penal Law § 240.26). There is no basis to disturb the court's credibility

determinations (*see Matter of Everett C. v Oneida P.*, 61 AD3d 489 [1st Dept 2009]).

Petitioner's appellate brief does not challenge the Family Court's conclusion that the petition's other allegations were without merit; accordingly, those allegations are deemed abandoned (*see Matter of Wechsler v New York State Adirondack Park Agency*, 85 AD3d 1378, 1379 n 2 [3d Dept 2011]).

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

ENTERED: MAY 28, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Freedman, Manzanet-Daniels, JJ.

10204 In re Paula Cruz, Index 260980/11
Petitioner-Respondent,

-against-

New York City Housing Authority,
Respondent-Appellant.

_____

Kelly D. MacNeal, New York (Byron S. Menegakis of counsel), for appellant.

Law Offices of Annette G. Hasapidis, South Salem (Annette G. Hasapidis of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered July 26, 2012, in this CPLR article 78 proceeding brought by petitioner tenant to annul respondent's determination to terminate her tenancy, granting the application to the extent of remanding the matter to respondent for imposition of a lesser penalty, unanimously vacated, the petition treated as one transferred to this Court for de novo review, and, upon such review, the challenged determination confirmed, the petition denied, and the proceeding dismissed, without costs.

The petition raises an issue of substantial evidence and therefore, the proceeding should have been transferred to this Court pursuant to CPLR 7804(g). Accordingly, we will "treat the substantial evidence issues de novo and decide all issues as if

the proceeding had been properly transferred" (*Matter of Jimenez v Popolizio*, 180 AD2d 590, 591 [1st Dept 1992]).

The determination terminating petitioner's tenancy for violation of the permanent exclusion stipulation in which she agreed to permanently exclude her son from the subject apartment, is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). The record shows that petitioner's son, who was barred from the apartment for drug-related activity, maintained a room in the apartment, visited regularly, and was arrested in the apartment while in possession of crack cocaine.

Although the penalty imposed will likely have significant adverse consequences for petitioner, she failed to take any action to prevent her son from using the premises *(see Matter of Perez v Rhea*, 20 NY3d 399 [2013]). Moreover, the other residents of the development should not be placed at risk by the criminal activities of petitioner's son (*see e.g. Matter of Gibbs v New York City Hous. Auth.*, 82 AD3d 412 [1st Dept 2011]).

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

ENTERED: MAY 28, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Freedman, Manzanet-Daniels, JJ.

10207 William Philips, Index 150202/09
Plaintiff-Respondent,

-against-

Paco Lafayette LLC, et al.,
Defendants-Appellants,

Rusabo 300 LLC, et al.,
Defendants.

_____

Marin Goodman, LLP, Harrison (Richard P. Marin of counsel), for appellants.

Kahn Gordon Timko & Rodriques, P.C., New York (Nicholas I. Timko of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered September 12, 2012, which, to the extent appealed from, denied defendants-appellants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, defendants-appellants' motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Plaintiff commenced the instant action for personal injuries allegedly sustained when he tripped over a concrete curb at the top of the Broadway/Lafayette subway station exit located on the south side of East Houston Street, between Lafayette Street and Crosby Street. The concrete curb was on the premises

owned by defendant Paco Lafayette LLC and leased by defendant BP Products North America, Inc. d/b/a Service Station for use as a gas station, and was immediately adjacent to the subway station exit. According to plaintiff's testimony and the color photographs in the record, the curb measured about 8 inches high and 10 inches wide, ran parallel to the subway station guard rail, and protruded beyond the rail by a few feet.

The photographs show that the concrete curb was open and obvious, not inherently dangerous and readily observable by one's reasonable use of his or her senses (*see Boyd v New York City Hous. Auth.*, __ AD3d __, 2013 NY Slip Op. 02507 [1st Dept 2013]; *Tillman v New York City Hous. Auth.*, 15 AD2d 738 [1st Dept 1962], *affd* 12 NY2d 898 [1963]). The photographs also undermine plaintiff's contention that the unpainted concrete curb created optical confusion, or that its placement rendered it likely to be easily overlooked (*see Boyd*, __ AD3d __, 2013 NY Slip Op. 02507; *cf. Saretsky v 85 Kenmare Realty Corp.*, 85 AD3d 89, 92 [1st Dept 2011]; *Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 75 [1st Dept 2004]). Rather, the evidence establishes that the accident was caused by plaintiff's inattentiveness (*see Langer v 116 Lexington Ave., Inc.*, 92 AD3d 597, 598-599 [1st Dept 2012]; *cf. Saretzky*, 85 AD3d at 92). We note that the accident occurred

on a sunny afternoon, and BP's area site manager testified that BP had not received any complaints concerning the concrete curb prior to the present incident (*see Langer*, 92 AD3d at 598-599).

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

ENTERED: MAY 28, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Freedman, Manzanet-Daniels, JJ.

10208 Pratibha Singh, Index 308854/10
Plaintiff-Appellant,

-against-

Kristen A. Stair,
Defendant-Respondent,

Sunita Ramnath, et al.,
Defendants.

_____

Alpert, Slobin & Rubenstein, LLP, Bronx (Morton Alpert of counsel), for appellant.

Law Offices of Karen L. Lawrence, Terrytown (David Holmes of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered September 6, 2012, which granted defendant Kristen Stair's motion for summary judgment dismissing all claims asserted against her, unanimously affirmed, without costs.

In this case arising from a motor vehicle accident, defendant Stair made a prima facie showing of her entitlement to judgment as a matter of law by submitting the deposition testimony of herself and of defendant Jeremy Ramnath, the other driver involved in the accident. They both testified that the accident occurred when Ramnath rear-ended Stair's car, and Ramnath's testimony showed that he had been tailgating and speeding before he hit Stair's vehicle.

In opposition, plaintiff failed to submit evidence raising an issue of fact as to Stair's negligence in connection with the accident. The police accident report and amended report were insufficient to raise an issue of fact, since they were prepared by an officer who had not observed the accident and whose initial report contained obvious errors, some of which were corrected in an amended report (*see Quinones v New England Motor Frgt. Inc.*, 80 AD3d 514, 515 [1st Dept 2011]). Moreover, the amended report did not provide a basis for imposing liability on Stair.

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

ENTERED: MAY 28, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Freedman, Manzanet-Daniels, JJ.

10213N Neal Auerbach, D.D.S., Index 653352/12
Plaintiff-Appellant,

-against-

Irv Tregerman, D.D.S.,
Defendant-Respondent.

_____

Ira Daniel Tokayer, New York, for appellant.

Gallet Dreyer & Berkey, LLP, New York (Adam M. Felsenstein of counsel), for respondent.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered January 10, 2013, which, to the extent appealed from as limited by the briefs, granted defendant's motion to vacate an order entered upon his default, unanimously affirmed, without costs.

The court properly exercised its discretion in granting the motion, given the lack of evidence that the default was willful or part of a pattern of dilatory conduct and the strong public policy in favor of disposing of cases on their merits (*see DaimlerChrysler Ins. Co. v Seck*, 82 AD3d 581, 582 [1st Dept 2011]). Additionally, the default was purportedly caused by innocent law office failure (*see Goodwin v New York City Hous. Auth.*, 78 AD3d 550, 551 [1st Dept 2010]), and defendant has

demonstrated at least a colorable defense, as the appeal pending from a prior action will likely also be dispositive on the merits of plaintiff's motion for summary judgment in this action.

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

ENTERED: MAY 28, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Freedman, Manzanet-Daniels, JJ.

10214 In re Roy Taylor, Ind. 4222/11
[M-1876] Petitioner,

-against-

Hon. Jill Konviser, etc.,
Respondent.

_____

Roy Taylor, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for respondent.

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

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

ENTERED: MAY 28, 2013

CLERK

Acosta, J.P., Renwick, Richter, Feinman, JJ.

10216 Catherine Humphries, as Executor of the Estate of William Mistofsky, Petitioner-Respondent, Index 104148/97

-against-

Consolidated Edison Co. of NY Inc., Respondent-Appellant.

_____

Vecchione, Vecchione & Connors, LLP, Garden City Park (Michael F. Vecchione of counsel), for appellant.

Wilentz, Goldman & Spitzer, P.A., New York (Kevin M. Berry of counsel), for respondent.

_____

Order, Supreme Court, New York County (Sherry Klein Heitler, J.), entered January 4, 2012, which, among other things, granted petitioner's motion to approve, nunc pro tunc, settlements previously entered into between petitioner and four nonparties (defendants in the underlying class action asbestos litigation), and directed petitioner's counsel to amend the caption to reflect the substitution of the estate of the deceased as petitioner, unanimously affirmed, with costs.

The court properly granted a nunc pro tunc substitution of petitioner, where she had been appointed executor of decedent's estate shortly after his death, retained the same counsel, and actively participated in the litigation before the Workers'

Compensation Board and the court (*cf. Griffin v Manning*, 36 AD3d 530, 532 [1st Dept 2007]).

The court properly approved, nunc pro tunc, the previously agreed-upon settlements with the four entities. Petitioner demonstrated that the settlement amounts were reasonable in light of the limited resources and uncertain liability of the entities; that she was not dilatory, since she had no reason to seek court approval of the settlements until after the Workers' Compensation Board determined that respondent Con Edison's consent had not been obtained; and that Con Edison was not prejudiced (*see Medina v Phillips*, 88 AD3d 524, 525 [1st Dept 2011]).

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

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

ENTERED: MAY 28, 2013

CLERK

Acosta, J.P., Renwick, Richter, Feinman, JJ.

10217 George Ricketts, et al., Index 306836/09
Plaintiffs-Respondents, 83842/11

-against-

Cuffe Auto Sales, Inc.,
Defendant-Appellant,

"John Doe", etc.,
Defendant.
- - - - -
[And a Third-Party Action]

_____

Reardon & Sclafani, P.C., Tarrytown (Michael V. Sclafani of counsel), for appellant.

Dubow, Smith & Marothy, Bronx (Steven J. Mines of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered November 21, 2012, which, upon reargument, vacated the court's prior order dated May 25, 2012, denied defendant Cuffe Auto Sales, Inc.'s motion for summary judgment dismissing the complaint, and granted plaintiffs' cross motion to amend their bill of particulars, unanimously affirmed, without costs.

The court providently exercised its discretion in granting reargument, since the court, in its prior order, appeared to have overlooked most of plaintiffs' evidence (*see* CPLR 2211[d][2]). Upon reargument, the court properly denied defendant's motion, as issues of fact exist as to plaintiffs' 90/180-day claim. While

defendant met its initial burden as movant, plaintiffs provided credible evidence that the injured plaintiff suffered a medically-determined injury that prevented him performing his usual and customary activities — including working, picking his daughter up from school, cooking, and cleaning — for more than 90 days after the accident (*compare Castillo v Collado*, 83 AD3d 581, 582 [1st Dept 2011], *with Bailey v Islam*, 99 AD3d 633, 634 [1st Dept 2012], *and Jno-Baptiste v Buckley*, 82 AD3d 578, 579 [1st Dept 2011]). Whether plaintiff's doctor's averments are credible is an issue for the jury to decide (*see Sung v Mihalios*, 44 AD3d 500, 501 [1st Dept 2007]).

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: MAY 28, 2013

CLERK

Acosta, J.P., Renwick, Richter, Feinman, JJ.

10218-
10218A In re Rafael F.,
Petitioner-Appellant,

-against-

Pedro Pablo N.,
Respondent-Respondent.

- - - - -

In re Rafael F.,
Petitioner-Appellant,

-against-

Elizabeth V.,
Respondent-Respondent.

_____

Randall S. Carmel, Syosset, for appellant.

_____

Orders, Family Court, New York County (Mary E. Bednar, J.), entered on or about May 8, 2012, which, after a fact-finding hearing in proceedings brought pursuant to article 8 of the Family Court Act, dismissed the petitions for orders of protection against respondents, unanimously affirmed, without costs.

The determination that respondents' actions did not rise to the family offense of harassment in the second degree is supported by a fair preponderance of the evidence (*see Matter of Everett C. v Oneida* P., 61 AD3d 489 [1st Dept 2009]; Penal Law § 240.26[1], [3]). There exists no basis to disturb the court's

finding that petitioner's testimony established only isolated incidences of threats made by his niece and nephew in the course of an ongoing dispute over property, and did not amount to genuine threats (*see People v Dietze*, 75 NY2d 47, 53-54 [1989]; *Matter of Ebony J. v Clarence D.*, 46 AD3d 309 [1st Dept 2007]).

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

ENTERED: MAY 28, 2013

CLERK

Acosta, J.P., Renwick, Richter, Feinman, JJ.

10221 Richard Rivera, Index 302797/10
Plaintiff, 84243/10

-against-

Core Continental Construction 3, LLC, et al.,
Defendants.

- - - - -

Core Continental Construction 3, LLC,
Third-Party Plaintiff-Respondent,

-against-

Mt. Hawley Insurance Company,
Third-Party Defendant-Appellant,

Orion Elevator, Inc., et al.,
Third-Party Defendants.

_____

Kenney Shelton Liptak Nowak LLP, Buffalo (Timothy E. Delahunt of counsel), for appellant.

Pollack, Pollack, Isaac DeCicco, New York (Jillian Rosen of counsel), for Core Continental Construction 3, LLC, respondent.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered April 4, 2012, which, to the extent appealed from as limited by the briefs, denied third-party defendant Mt. Hawley's motion for summary judgment, unanimously reversed, on the law, without costs, the motion granted, and it is declared that Mt. Hawley is not obligated to defend or indemnify defendant/third-party plaintiff Core in the main personal injury action.

The notice provision in the pre-2009 Mt. Hawley policy at issue operates as a condition precedent to coverage, and late notice of an occurrence, absent a valid excuse, vitiates coverage as a matter of law, regardless of any prejudice to Mt. Hawley (*see National Union Fire Ins. Co. of Pittsburgh, Pa. v Great Am. E&S Ins. Co.*, 86 AD3d 425, 426 [1st Dept 2011]). Here, the underlying accident occurred on May 26, 2009, and there is no dispute that Core, the insured and general contractor, was immediately aware of the accident and plaintiff's injuries. Core, however, did not place Mt. Hawley on notice until November 2009; therefore, notice was untimely as a matter of law (*see Brownstone Partners/AF&F, LLC v A. Aleem Constr., Inc.*, 18 AD3d 204, 205 [1st Dept 2005] [five-month delay untimely], *and Paramount Ins. Co. v Rosedale Gardens*, 293 AD2d 235 [1st Dept 2002] [7½-month delay untimely]).

Core's assertion that it had a reasonable, good-faith belief that the accident would not result in liability fails as a matter of law, given that Core's principal was aware of the accident within two days of its occurrence, it involved an accident at the project site and the injured person had to be transported by

ambulance (*see Tower Ins. Co. of N.Y. v Lin Hsin Long Co.*, 50 AD3d 305, 308 [1st Dept 2008]). Moreover, it is undisputed that Core did not undertake any investigation of the incident, or make inquiry regarding its alleged belief that it was not responsible for the area where the accident occurred. Thus, it could not have formed a reasonable belief of nonliability (*see Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742, 743-744 [2005]; *Tower Ins. Co. of N.Y. v Jaison John Realty Corp.*, 60 AD3d 418, 418-419 [1st Dept 2009]).

Based on the foregoing determination, the remaining issues need not be addressed.

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

ENTERED: MAY 28, 2013

CLERK

Acosta, J.P., Renwick, Richter, Feinman, JJ.

10222-
10223 Index 114532/11

Mark Kottler,
Plaintiff-Appellant-Respondent,

-against-

Steven Sims,
Defendant-Respondent-Appellant.

- - - - - -

Mark Kottler,
Plaintiff-Respondent,

-against-

Steven Sims,
Defendant-Appellant.

_____

Walter L. Rich, White Plains, for appellant-respondent/respondent.

Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis & Fishlinger, Uniondale (Gregory A. Cascino of counsel), for respondent-appellant/appellant.

_____

Order, Supreme Court, New York County (Donna M. Mills, J.), entered April 5, 2012, which denied plaintiff's motion for summary judgment in lieu of complaint, and denied defendant's cross motion to dismiss the complaint and for summary judgment dismissing the complaint, unanimously modified, on the law, to grant plaintiff's motion, and otherwise affirmed, without costs. Order, same court and Justice, entered November 15, 2012, which, to the extent appealed from, denied defendant's subsequent motion

for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff presented two promissory notes obligating defendant to pay the amounts within 10 years from the dates of the notes, May 15, 1998 and December 11, 1998, and established that defendant had not paid when this action was commenced more than 10 years later, in 2011 (*see Rice v Cohen*, 161 AD2d 530 [1st Dept 1990]). In opposition, defendant failed to raise an issue of fact. His argument that the notes contain a condition precedent to his obligation to pay and the condition was not met is belied by the language of the notes. Each note provides that it "shall become due and payable 60 days following the later of the consummation of a registered public offering of shares of [Target Capital Partners, Inc. (TCP), a Connecticut corporation] and the release of any restrictive covenants on the shares of TCP then held by [defendant] and subject to the security interest

created hereby." It is apparent from the wording of the note itself that rather than being a condition precedent, this provision constitutes an acceleration provision, which was never triggered.

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

ENTERED: MAY 28, 2013

CLERK

Andrias, J.P., Renwick, Richter, Feinman, JJ.

10224 Carla Lewis-Burnett, et al., Index 103562/08
Plaintiffs-Appellants,

-against-

West Side Radiology Associates,
Defendant-Respondent,

Jane Doe,
Defendant.

_____

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellants.

Schiavetti, Corgan, DiEdwards, Weinberg & Nicholson, LLP, New York (Samantha E. Quinn of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan B. Lobis, J.), entered April 4, 2012, which granted defendant's motion for summary judgment dismissing the complaint in this medical malpractice action, unanimously affirmed, without costs.

Plaintiff alleged that she suffered, inter alia, a torn rotator cuff and a partial tear of the labrum due to improper positioning by defendant's technician during a routine mammography study, which resulted in weakness and other long-term injuries to her left arm and shoulder, and the need for corrective orthopedic surgical procedures. Defendant's expert, an orthopedic surgeon, opined that upon review of the operative findings attendant to plaintiff's surgeries, her injuries were

the result of chronic, degenerative conditions, and were not caused by a traumatic incident. Plaintiffs failed to counter defendant's prima facie showing of entitlement to judgment as a matter of law, since they did not submit a medical expert's affidavit, or any other form of medical evidence which specifically disputed defendant's expert's opinion negating causation. Hence, plaintiffs failed to raise a triable issue of fact regarding causation, and the motion was properly granted (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324-325 [1986]; *Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [1st Dept 2009]).

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

ENTERED: MAY 28, 2013

CLERK

Acosta, J.P., Renwick, Richter, Feinman, JJ.

10225 Linda Shenwick, derivatively on behalf of Himelsein Mandel Offshore Limited,
Plaintiff-Appellant,

-against-

HM Ruby Fund, L.P., et al.,
Defendants-Respondents,

Himelsein Mandel Offshore Limited,
Nominal Defendant.

Index 652082/11

_____

Abraham, Fruchter & Twersky, LLP, New York (Jeffrey S. Abraham of counsel), for appellant.

Katten Muchin Rosenman LLP, New York (William M. Regan of counsel), for HM Ruby Fund, L.P., Wayne Himelsein, Jason G. Mandel, Himelsein Mandel Advisors LLC and Himelsein Mandel Fund Management LLC, respondents.

Seward & Kissel LLP, New York (Jack Yoskowitz of counsel), for Vijayabalan Murugesu and Evan Burtton, respondents.

_____

Order, Supreme Court, New York County (Melvin Schweitzer, J.), entered June 7, 2012, which, to the extent appealed from, granted the motion of defendants HM Ruby Fund LP, Wayne Himelsein, Jason G. Mandel, Himelsein Mandel Advisors LLC and Himelsein Mandel Fund Management LLC to dismiss the complaint pursuant to CPLR 3211(a)(1), (3) and (7), and granted the motion of defendants Evan Burtton and Vijayabalan Murugesu to dismiss the complaint pursuant to CPLR 3211(a)(7) and (8), unanimously

affirmed, with costs.

Plaintiff, an investor in the nominal defendant Offshore Fund which is registered in the Cayman Islands, commenced this derivative action against the managers, directors and investment advisors of the fund alleging that they engaged in self-dealing by artificially inflating the value of assets held by the fund, thereby also artificially inflating the fund's net asset value so that they would receive higher compensation and bonuses. Plaintiff's action, however, may not be maintained under the law of the Cayman Islands, which the parties agree is applicable (*see e.g. In re BP p.l.c. Derivative Litigation*, 507 F Supp 2d 302 [SD NY 2007]).

The Cayman Islands modeled its laws predominantly on English common law, which prohibits shareholder derivative actions (*see e.g. Foss v Harbottle*, 2 Hare 461 [Eng. 1843]), unless an exception to the general rule applies (*id.*). Although there are four exceptions, the only one advanced here is the "fraud-on-the-minority" exception. For this exception to be properly pleaded, it must generally be shown that the defendants, as a result of their wrongful conduct, obtained a personal benefit at the company's expense (*see e.g. In re Tyco Intl, Ltd.*, 340 F Supp 2d 94, 102 [D NH 2004]).

Here, plaintiff's allegations fail to meet even this broad standard. There is no indication that defendants' conduct in setting the net asset value of the fund contributed to the collapse of the fund, resulted in compensation beyond the normal emoluments of office, or came, in some special way, at the expense of shareholders (*Winn v Schafer*, 499 F Supp 2d 390, 398 [SD NY 2007]). Plaintiff's lack of standing to sue in a derivative capacity requires dismissal of the action.

The remainder of the motions are therefore moot and the arguments advanced on appeal academic. We note, however, that we agree with the motion court's determination that the courts of New York State do not have personal jurisdiction over the foreign directors named as defendants (*Pramer S.C.A v Abaplus Intl Corp.*, 76 AD3d 89, 95-96 [1st Dept 2010]).

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

ENTERED: MAY 28, 2013

CLERK

Acosta, J.P., Renwick, Richter, Feinman, JJ.

10226 In re Michaellica Lee W.,

Anthony Michael W.
Petitioner-Appellant,

-against-

Administration for Children's Services,
Respondent-Respondent.

_____

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Katharine E.G. Brooker of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Jacob Gardener of counsel), for respondent.

Frederic P. Schneider, New York, attorney for the child.

_____

Order, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about February 17, 2012, which, to the extent appealed from as limited by the briefs, denied the father's petition for custody of his daughter, unanimously affirmed, without costs.

Family Court properly found that extraordinary circumstances exist to deprive the father of custody of his child (*Matter of Bennett v Jeffreys*, 40 NY2d 543, 544 [1976]). Family Court did not place undue emphasis on the father's past criminal convictions of rape in the first degree and related crimes against four children, committed nearly 30 years earlier, or on

his resulting level three sex offender status. Family Court appropriately considered this, along with other factors, in concluding that extraordinary circumstances exist (*see e.g. Matter of Ruth L. v Clemese Theresa J.*, 104 AD3d 554, 555 [1st Dept 2013]). Family Court also considered the father's voluntary relinquishment of physical custody of the child (*see Matter of Cote v Brown*, 299 AD2d 876 [4th Dept 2002]). Although the father claims that he had intended to surrender his then roughly seven-week-old child only temporarily because he was having fainting spells and was concerned for her welfare, he did not seek medical attention for his condition for nearly four months and did not initiate custody proceedings for almost two years. Family Court also appropriately considered the bond between the child and foster mother, with whom the child, now six years old, had lived since she was seven weeks old (*Bennett*, 40 NY2d at 550; *see also Matter of Carolyn F. v Pauline G.*, 187 AD2d 589, 590 [2d Dept 1992]).

There is no basis to disturb Family Court's determination that it is in the child's best interests to remain with the foster mother (*see Matter of Natasha Latoya T.-M. v Michael Devonne M.*, 90 AD3d 536 [1st Dept 2011]). Family Court properly considered all relevant factors in making that determination and

did not unduly focus on the foster mother's material advantages or the father's criminal history (*see Bennett*, 40 NY2d at 549, 551-552; *see also Matter of Benjamin v Benjamin*, 48 AD3d 913, 913 [3d Dept 2008]). Indeed, Family Court also considered, among other things, the expert's recommendation that the child remain with the foster mother in light of the disruption and possible harm that the child might suffer if she were removed from her home, and in light of the father's financial and housing circumstances. This case is distinguishable from *Matter of Afton C.* (*James C.*) (17 NY3d 1 [2011]) because Family Court did not solely rely on the father's sex offender status and prior conviction. Family Court also cited the father's excitability, evidenced in several incidents when the father became unjustifiably enraged in the child's presence.

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

ENTERED: MAY 28, 2013

CLERK

Acosta, J.P., Renwick, Richter, Feinman, JJ.

10227 The Najjar Group, LLC, Index 603657/06
Plaintiff-Appellant,

-against-

West 56th Hotel LLC, doing
business as Chambers Hotel,
Defendant-Respondent.

_____

Buckley Law Group, P.A., New York (Michael B. Buckley of counsel), for appellant.

Levy Sonet & Siegel, LLP, New York (Steven G. Sonet of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered March 23, 2012, which, insofar as appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the fourth and fifth causes of action, for breach of contract and breach of fiduciary duty, unanimously affirmed, without costs.

Choses in action, such as claims for breach of contract and breach of fiduciary duty, are freely assignable (General Obligations Law § 13-101; *see M. W. Zack Metal Co. v International Nav. Corp. of Monrovia*, 112 AD2d 865, 867 [1st Dept 1985], *affd* 67 NY2d 892 [1986]; *Hill Intl. v Town of Orangetown*, 290 AD2d 416, 417 [2d Dept 2002]; *American Banana Co. v Venezolana Internacional De Aviacion S.A. [VIASA]*, 67 AD2d 613

[1st Dept 1979], *affd* 49 NY2d 848 [1980]). While, generally speaking, an assignee stands in the shoes of the assignor (*see New York & Presbyt. Hosp. v Country-Wide Ins. Co.*, 17 NY3d 586, 592 [2011]), the plain language of an assignment determines its breadth and scope (*see CIT Group/Equip. Fin. v Abele Tractor & Equip. Co.*, 213 AD2d 820, 821 [3d Dept 1995]; *see also* 29 Richard A. Lord, Williston on Contracts § 74:6 [4th ed 2012]). Here, the subject assignment provided that plaintiff would assume "all of [the Assignor]'s *liabilities and obligations* with respect to the Membership Interest" in a limited liability corporation, and "*assume[d] all obligations* of the Assignor arising from any failure to make a Capital Contribution as defined in the Operating Agreement, prior to the date hereof." Supreme Court properly determined that the plain language of this assignment did not include assignment of the assignor's rights to choses in action preceding the assignment.

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: MAY 28, 2013

CLERK

Acosta, J.P., Renwick, Richter, Feinman, JJ.

10228 The People of the State of New York, Ind. 1952/11
Respondent,

-against-

Yahabebe Brown,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi 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 (Larry Stephen, J.), rendered on or about June 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: MAY 28, 2013

CLERK

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

Acosta, J.P., Renwick, Richter, Feinman, JJ.

10229 Maria Basabe, Index 306873/10
Plaintiff-Respondent,

-against-

Joseph Carrozza,
Defendant-respondent,

Sobeida Santana, et al.,
Defendants-Appellants.

_____

Brand Glick & Brand P.C., Garden City (Andrew B. Federman of counsel), for appellants.

McCarthy/Kelly LLP, New York (William P. Kelly of counsel), for Maria Basabe, respondent.

White Fleischner & Fino, LLP, New York (Jason S. Steinberg of counsel), for Joseph Carrozza, respondent.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered September 24, 2012, which granted plaintiff's motion for summary judgment on the issue of liability, and denied defendants Sobeida Sandana and VIP Car Service Inc.'s cross motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

While there is evidence that defendant Carrozza violated Vehicle and Traffic Law § 1141 by turning left into the intersection without yielding the right-of-way to defendant Santana, whose vehicle was approaching from the opposite

direction, there are triable issues of fact whether Santana, in whose vehicle plaintiff was a passenger, also violated the Vehicle and Traffic Law by failing to avoid the accident and speeding (*see* Vehicle and Traffic Law § 1180[a], [e]). Santana stated both that she did not see Carrozza's vehicle until just before the collision and that she had a clear view of the road and was watching for oncoming traffic. Thus, an issue of fact exists whether she failed to observe what should have been observed. In addition, plaintiff testified that Santana was traveling at about 50 or 60 miles per hour, and increased her speed upon entering the intersection. Carrozza also stated that Santana was traveling about 50 miles per hour, which was above the speed limit.

Santana present no evidence to support her contention that she was faced with an emergency situation.

Plaintiff's entitlement to partial summary judgment as a blameless passenger is not contingent upon the apportionment of

liability between Santana and Carrozza (*see Petty v Dumont*, 77 AD3d 466 [1st Dept 2010]).

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

ENTERED: MAY 28, 2013

CLERK

Acosta, J.P., Renwick, Richter, Feinman, JJ.

10231 Piotr Harasim, et al., Index 400124/09
Plaintiffs-Respondents-Appellants, 75461/08
76074/08

-against-

Eljin Construction of New York, Inc.,
Defendant-Appellant-Respondent,

Madison-90th Street Corporation,
Defendant-Respondent-Appellant,

Wholesale Marble Distributors, Inc.,
Defendant,

Douglas Elliman, LLC,
Defendant-Respondent.

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Madison-90th Street Corporation, et al.,
Third-Party Plaintiffs-Respondents-Appellants,

-against-

Susan Goldberg, et al.,
Third-Party Defendants-Appellants-Respondents.

[And a Second Third-Party Action]

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Faust Goetz Schenker & Blee, New York (Peter Kreymer of counsel), for Eljin Construction of New York, Inc., appellant-respondent.

Cuomo, LLC, New York (Sara R. David of counsel), for Susan Goldberg and Michael Goldberg, appellants-respondents.

The Perecman Firm, P.L.L.C., New York (Peter D. Rigelhaupt of counsel), for Piotr Harasim and Anna Harasim, respondents-appellants.

Morris Duffy Alonso & Faley, New York (Anna J. Ervolina of counsel), for Madison-90th Street Corporation, Residential Management, LLC and Douglas Elliman, LLC, respondents-appellants/respondent.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered May 21, 2012, which, to the extent appealed from as limited by the briefs, denied the part of defendant Eljin Construction of New York, Inc.'s motion for summary judgment that sought dismissal of plaintiffs' Labor Law § 241(6) claim as against it, denied the part of third-party defendants' motion for summary judgment that sought dismissal of third-party plaintiffs' claims against them for contractual indemnification and breach of contract for failure to procure adequate insurance, denied plaintiffs' cross motion for partial summary judgment on their Labor Law § 241(6) claims against defendants Madison-90th Street Corporation and Eljin, denied so much of the motion of defendants/third-party plaintiffs Madison and Douglas Elliman, LLC as sought summary judgment dismissing plaintiffs' Labor Law § 241(6) claims as against Madison, and denied so much of their motion as sought conditional summary judgment on their contractual indemnification claims against third-party defendants, unanimously modified, on the law, to dismiss plaintiffs' Labor Law § 241(6) claim against Madison and Eljin solely to the extent that it is predicated on 12 NYCRR 23-1.7(e)(2), and otherwise affirmed, without costs. Appeal from the part of the order entered May 21, 2012 that denied so much of Madison and Elliman's motion as sought summary judgment

dismissing plaintiffs' Labor Law § 200 and common-law negligence claims as against Madison, denied so much of their motion as sought conditional summary judgment on their contractual indemnification claim against Eljin, and granted so much of Eljin's motion as sought summary judgment dismissing plaintiffs' Labor Law § 200 and common-law negligence claims as against it, unanimously dismissed, without costs, as untimely.

Industrial Code (12 NYCRR) § 23-1.7(e)(2), which protects workers from tripping hazards, is inapplicable because the injured plaintiff does not allege that he tripped over "dirt and debris," "scattered tools" or "sharp projections" in his work area (*id.*). Rather, he alleges that he slipped on a stairway in a building owned and maintained by defendant Madison (*see Velasquez v 795 Columbus LLC*, 103 AD3d 541, 541 [1st Dept 2013]).

Industrial Code (12 NYCRR) § 23-1.7(d) is applicable because the permanent staircase where plaintiff's accident occurred was a "passageway" within the meaning of that provision. Indeed, the staircase was the sole means of access to the work site, and it was not an open area accessible to the general public (*Wowk v Broadway 280 Park Fee, LLC*, 94 AD3d 669, 670 [1st Dept 2012]). Nonetheless, plaintiffs are not entitled to partial summary judgment as to liability on that claim, as there are triable issues of fact as to whether a slippery condition on the stairway

caused plaintiff's accident (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146-147 [1st Dept 2012]).

Madison does not dispute that its notice of appeal was untimely (*see* CPLR 5513), and it offers no explanation for its delay. Accordingly, its appeal must be dismissed to the extent indicated (*Steinhardt Group v Citicorp*, 303 AD2d 326, 326 [1st Dept 2003], *lv denied* 100 NY2d 506 [2003]; *see Hecht v City of New York*, 60 NY2d 57, 61-62 [1983]). If the appeal were properly before us, we would affirm, as there is no evidence of Eljin's negligence and there are triable issues of fact with respect to Madison's negligence (*see Picaso v 345 E. 73 Owners Corp.*, 101 AD3d 511, 512 [1st Dept 2012]).

The third-party defendant tenants are not entitled to a declaration as to the enforceability of the indemnification provision governing Madison's contractual indemnification claims, as they did not seek such relief from the court below. The court properly denied the parties' competing summary judgment motions with respect to those claims, since the contractual indemnification provision does not preclude indemnification for damages caused by Madison's own negligence and an issue of fact exists as to Madison's negligence (*see Bell v City of New York*, 104 AD3d 484, 486 [1st Dept 2013]; *Picaso*, 101 AD3d at 512).

Triable issues of fact also exist as to whether the

insurance coverage procured by third-party defendants satisfied the requirements of their alteration agreement with third-party plaintiffs, particularly in light of the declaratory judgment action pending on the issue, and the failure of the parties to submit competent proof in support of their respective arguments (*Nenadovic v P.T. Tenants Corp.*, 94 AD3d 534, 535-536 [1st Dept 2012]).

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

ENTERED: MAY 28, 2013

CLERK

Acosta, J.P., Renwick, Richter, Feinman, JJ.

10232N John P. Corrieri, et al., Index 118251/09
Plaintiffs-Respondents,

-against-

Schwartz & Fang, P.C., et al.,
Defendants-Appellants.

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Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for appellants.

Michael F. Mongelli II, P.C., Flushing (Michael F. Mongelli II of counsel), for respondents.

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Order, Supreme Court, New York County (Louis B. York, J.), entered January 18, 2012, which denied defendants' motion to compel plaintiffs to respond to certain discovery demands and to disqualify Michael F. Mongelli and his law firm from representing plaintiffs in this action, unanimously affirmed, with costs.

Defendants seek to defend against plaintiffs' claims of negligent representation in a probate and accounting proceeding by compelling discovery of privileged communications between plaintiffs and the counsel who substituted for defendants in that proceeding and who represents plaintiffs in this legal malpractice action. The court properly denied the motion to compel because there is no merit to defendants' argument that the filing of this malpractice action placed the subject matter of the privileged communications "at issue." The invasion of the

privilege is not required to determine the validity of plaintiffs' malpractice claim, and the application of the privilege does not deprive defendants of information vital to their defense (*see Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 62 AD3d 581 [1st Dept 2009]; *Veras Inv. Partners, LLC v Akin Gump Strauss Hauer & Feld LLP*, 52 AD3d 370 [1st Dept 2008]). Nor was there a partial, selective disclosure of privileged communications such that the privilege was waived (*see Orco Bank v Proteinas Del Pacifico*, 179 AD2d 390 [1st Dept 1992]).

The court properly denied defendants' motion to disqualify plaintiffs' counsel, as defendants failed to show that counsel's testimony would be necessary to establish the claim or defense (*see East Forty-Fourth St. LLC v Bildirici*, 58 AD3d 542 [1st Dept 2009]).

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

ENTERED: MAY 28, 2013

CLERK

Acosta, J.P., Renwick, Richter, Feinman, JJ.

10233N Carlos Torres, Index 306975/09
Plaintiff, 84179/10

-against-

Visto Realty Corp.,
Defendant.

- - - - -

Visto Realty Corp.,
Third-Party Plaintiff-Appellant,

-against-

1801 Laundry Corp., doing business
as Station Laundromat,
Third-Party Defendant-Respondent.

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Law Offices of Michael E. Pressman, New York (Steven H. Cohen of counsel), for appellant.

White & McSpedon, P.C., New York (Michael J. Caulfield of counsel), for respondent.

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Order, Supreme Court, Bronx County (John A. Barone, J.), entered on or about June 6, 2012, which granted third-party defendant's motion to sever the third-party action, unanimously affirmed, without costs.

Since the main action involves the factual issue whether there was a defect in the sidewalk that contributed to plaintiff's injury, and the third-party action involves lease contract issues such as indemnification, and plaintiff, who has filed a note of issue, would be prejudiced by the delay caused by

the need for discovery in the third-party action, severance of the third-party action was appropriate (*see* CPLR 1010; *Garcia v Gesher Realty Corp.*, 280 AD2d 440 [1st Dept 2001]).

We reject defendant/third-party plaintiff landowner's argument, pursuant to CPLR 1001(b)(2) and (5), that third-party defendant tenant is a necessary party to the main action. Plaintiff's cause of action is grounded in Administrative Code of the City of New York § 7-210, which imposes on the owner of property abutting a sidewalk a nondelegable duty to maintain the sidewalk in reasonably safe condition (*see e.g. Collado v Cruz*, 81 AD3d 542 [1st Dept 2011]). The provisions of the tenant's lease obligating it to repair the sidewalk could not be enforced through the main action (*id.*).

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

ENTERED: MAY 28, 2013

CLERK

Acosta, J.P., Renwick, Richter, Feinman, JJ.

10234 In re Jamal Grant, Ind. 1573/03
[M-2029] Petitioner,

-against-

Hon. John Cataldo, etc., et al.,
Respondents.

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Jamal Grant, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for Hon. John Cataldo, respondent.

Cyrus R. Vance, Jr., District Attorney, New York (Richard Nahas of counsel), for Eve Dowdell and Patricia Bailey, respondents.

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The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

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

ENTERED: MAY 28, 2013

CLERK

Gonzalez, P.J., Mazzarelli, Renwick, Richter, Gische, JJ.

9421- Index 603243/09
9421A Bovis Lend Lease (LMB), Inc.,
Plaintiff-Appellant-Respondent,

-against-

Lower Manhattan Development Corp.,
Defendant-Respondent-Appellant.

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Sutherland Asbill & Brennan LLP, New York (Jennifer W. Fletcher of counsel), for appellant-respondent.

Winston & Strawn LLP, New York (Jeffrey L. Kessler of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 10, 2011, modified, on the law, to grant the motion to dismiss the claims for damages based on delay, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered April 6, 2012, dismissed, without costs, as academic.

Opinion by Mazzarelli, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
Angela M. Mazzarelli
Dianne T. Renwick
Rosalyn H. Richter
Judith J. Gische, JJ.

9421-9421A
Index 603243/09

_____x

Bovis Lend Lease (LMB), Inc.,
Plaintiff-Appellant-Respondent,

-against-

Lower Manhattan Development Corp.,
Defendant-Respondent-Appellant.

_____x

Cross appeals from orders of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 10, 2011 and April 6, 2012, on reargument, which, to the extent appealed from, granted defendant's motion to dismiss the claims for damages for extra work allegedly resulting from changes in the scope of work and for damages arising out of defendant's alleged acceleration of plaintiff's work and plaintiff's insurance costs, and denied the motion to dismiss the claim for damages related to delay caused by alleged regulatory interference.

Sutherland Asbill & Brennan LLP, New York (Jennifer W. Fletcher and Lawrence A. Dany III of counsel), for appellant-respondent.

Winston & Strawn LLP, New York (Jeffrey L. Kessler, Adam J. Kaiser, Martin C. Geagan and Eric Laufgraben of counsel), for respondent-appellant.

MAZZARELLI, J.

This dispute concerns the Deutsche Bank Building, which neighbored the World Trade Center and was severely damaged on September 11, 2001. Defendant, Lower Manhattan Development Corp. (LMDC), is a subsidiary of the Urban Development Corporation d/b/a the Empire State Development Corporation, a joint City-State corporation charged with redeveloping lower Manhattan. LMDC purchased the building from Deutsche Bank after the 9/11 attacks and discovered that contaminants such as asbestos and lead were likely present. Accordingly, on September 8, 2005, LMDC and other governmental authorities approved a "Deconstruction Plan," to abate, clean, decontaminate, empty, deconstruct, and remove the building.

Plaintiff, Bovis Lend Lease (LMB), Inc., submitted the winning bid to carry out the Deconstruction Plan. It and LMDC executed a contract requiring Bovis to perform the abatement, decontamination, and deconstruction services in exchange for a lump sum of approximately $74.8 million. That amount was later increased to approximately $81 million. Bovis made several representations and warranties in the contract. For example, it acknowledged that it was accepting a lump sum and, except with LMDC's consent, was not entitled to additional compensation, "notwithstanding whatever obstacles or unforeseeable conditions

may arise or be encountered." It "accept[ed] all conditions in the Building . . . and otherwise at the Site, whether or not such conditions were foreseeable, as they exist or may eventually be found to exist, and in whatever condition same may exist." Bovis also agreed to accept a variety of risks, "whether they arise from acts or omissions of [Bovis], of LMDC, or of third persons, or from any other cause, and whether such risks are within or beyond the control of [Bovis] and/or are known or unknown, and foreseeable or unforeseeable." One of the specific risks delineated in that section of the contract was "[t]he risk of all regulatory and other Governmental Authority delays." In addition, Bovis agreed

> "to make no claim for damages for delay in the Work (or the performance thereof) of any kind whatsoever, whether foreseeable or unforeseeable, and agree[d] that any such claim shall be compensated for solely by an extension of time to complete performance of the Work when the provisions of Article 12 hereof allow same."

In the section describing the project's "Scope of Work," the contract provided that

> "[a]ny and all changes to the Deconstruction Plan ... require LMDC's advance written permission and the approval of the applicable Governmental Authorities. No such changes may be requested without LMDC's advance consent and written approval. No such changes shall be deemed Extra Work."

Indeed, "Extra Work" was specifically defined in the contract, which made clear that anything not considered extra work was included in the work compensated for by the lump sum. As relevant here, extra work was defined as "Work required by a written change order issued by LMDC pursuant to Article 22 hereof which . . . adds substantial scope or program to the Scope of Work . . . ." The contract further specified: "For the avoidance of doubt, 'Extra Work' does not include [among other things] (f) any Work required by reason of any change in Legal Requirement . . .; and/or (g) Work required by reason of any risk or obligation assumed by [Bovis] in any part of the Contract Documents." A "Legal Requirement" was itself defined, in relevant part, as "any statute, ordinance, code, law, rule, regulation, permit, agency notice or order, ... order, decision, determination, or other written requirement, standard or procedure enacted, adopted or applied by any Governmental Authority, or any administrative . . . interpretation thereof, together with all related . . . implementing regulations." The definition also made clear that "actions taken 'in order to comply with any Legal Requirement,' or actions 'necessary to comply with any Legal Requirement' shall include actions taken in order to meet a Legal Requirement in the absence of a written order or other such directive mandating such actions."

Even if work qualified as Extra Work, the contract still specified that "[n]o Extra Work shall be performed except pursuant to a Change Order of LMDC expressly and unmistakably indicating LMDC's intention to treat the Work described therein as Extra Work, *subject to the next paragraph*. The "next paragraph" stated:

> "If [Bovis] is of the opinion that any Work ordered to be done as Work pursuant to the Contract Documents is instead Extra Work ('Disputed Work'), [Bovis] shall nevertheless comply with such order, but shall within 72 hours give written notice thereof to LMDC, stating why [Bovis] deems it to be Extra Work, and shall moreover furnish to LMDC time slips and memoranda as required by Article 7 hereof."

Finally, the contract contained an "acceleration" provision, which stated:

> "If at any time the Work is not progressing in accordance with the CPM Schedule or the Work is likely to be delayed for any reason within the control of [Bovis], or if LMDC otherwise desires to accelerate the Work for any reason, LMDC may give may give [Bovis] Notice requiring [Bovis] to: ¶1.) increase the number of workers and/or the amount or types of machinery, tools, equipment, or materials employed by [Bovis] in or for the performance of the Work; and/or ¶2.) schedule and conduct additional lawful work shifts.
>
> . . .
>
> Costs of additional labor, machinery, tools, equipment and/or materials, if any, required by LMDC under this Article: ¶3.) shall be borne by [Bovis] as part of the Lump Sum if

> and to the extent the applicable acceleration of Work was necessary or appropriate to maintain [Bovis]'s compliance with, and progress under, the CPM Schedule as updated pursuant to the Specifications immediately prior to the date of such acceleration; or ¶4.) otherwise shall be borne by LMDC as Extra Work."

In the contract, Bovis agreed to a binding schedule for the work, which required it, among other things, to complete the work by March 15, 2007, "time being of the essence." However, according to Bovis, factors completely outside of its control made completion by that date impossible. Most significant was what Bovis characterizes as unforeseen interference by regulators monitoring the efficacy of the abatement portion of the project. Bovis asserts that the plans and specifications it relied on in bidding for and entering into the contract provided that the protocol governing the abatement work was embodied in Industrial Code Rule 56 (12 NYCRR 56-1.1) (ICR 56) and that this was the standard that had been followed for decades in asbestos abatement projects in New York City. According to Bovis, ICR 56 does not require that representatives of regulatory bodies perform visual inspections of the ongoing work to ensure compliance with the standard. However, it claims that the relevant regulators, with LMDC's knowledge and approval, insisted on visual inspections and adopted an impractically high standard of cleanliness. For example, Bovis alleges that regulators would "fail" any portion

of the building that contained pieces of debris larger than a dime, a supposedly arbitrary measurement. In addition, any and all non-porous material was to be presumed to be contaminated with asbestos and removed during the abatement phase, rather than during the demolition phase. Bovis further claims that the inspectors visited the site frequently and took several hours each visit to perform their work, which interfered with its ability to work efficiently.

The lengthy and frequent visits, as well as the implementation of rules that Bovis claims were unreasonable and impossible to foresee, allegedly slowed the abatement process down significantly. LMDC issued two change orders in response to Bovis's complaints about these delays. After LMDC refused to pay the second change order, Bovis threatened to commence formal arbitration against LMDC. To resolve the dispute, Bovis and LMDC entered into a "Supplemental Agreement." The supplemental agreement required Bovis to implement sufficient measures, subject to LMDC's approval, to complete the project by December 31, 2007. These expressly included a workforce of 200 people, double the number Bovis claims it originally anticipated for the project. The supplemental agreement required LMDC to pay an additional $9.7 million outright towards the increased costs of abatement, and to "advance" an additional $28.3 million. This

was subject to refund by Bovis if LMDC could establish that the payment was not necessary. In any event, the payments were to be applied to actual out-of-pocket costs only, and not to overhead and profit mark-ups. The supplemental agreement reiterated Bovis's obligation, set forth in Article 12 of the original contract, to formally request additional time to complete the work because of "Excusable Delays," defined in the contract as resulting from, among other things, "changes in Legal Requirements" and "any other cause beyond [Bovis]'s control." However, it also absolved Bovis of any obligation to formally notify LMDC that it considered work it performed outside the scope of the original contract to be extra work.

After the supplemental agreement was executed, Bovis submitted a request to LMDC for an extension of time to complete the project. The request cited excusable delays spanning the period from March 2006 (the beginning of the project) to February 2007. The causes of the delays included, among other things, regulatory interference and resulting cash flow problems. Bovis claimed a total of 52 weeks in delay. Thus, Bovis requested that the deadline, notwithstanding the supplemental agreement's having extended it to December 31, 2007, be further extended to June 3, 2008. Bovis claims that LMDC did not respond to the request and that, in fact, the interference caused by regulatory inspections

became even worse, further delaying the project.

According to Bovis, additional delays resulted from a fire that broke out on the 17th floor of the building in August 2007, damaging 10 floors, and, tragically, causing the deaths of two firefighters. On January 8, 2008, the parties entered into a letter agreement intended to permit completion of the project, Bovis's grievances notwithstanding. This agreement required Bovis to hire a new subcontractor to complete the project (its previous subcontractor's negligent conduct was found to have caused the fire). The letter agreement also provided that until completion, LMDC would pay general conditions (i.e., non-trade costs such as electricity, insurance, and site security) in an amount reflecting the actual costs incurred. However, "[i]ncremental insurance costs resulting from [the] fire delay" were not to be billed as general conditions. Otherwise, plaintiff agreed to "abide by the terms of the Contract . . . including all financial terms." The project was completed in early 2011.

Bovis's amended complaint asserts seven causes of action, four of which (the second, third, fourth and fifth) are at issue on this appeal. The second cause of action is related to the moneys conditionally advanced to Bovis by LMDC pursuant to the supplemental agreement. As is relevant to this appeal, Bovis

claims that it is entitled to retain those moneys since they compensated it for material changes in the scope of work and unanticipated conditions that resulted in delay. Bovis's third cause of action seeks unspecified amounts due under the contract for general conditions costs and profit, including costs of insurance and backcharges allegedly asserted against Bovis by LMDC. Bovis's fourth cause of action seeks damages for "extra . . . work" and "work disruption" caused by "regulatory requirements that were beyond all precedent on the Project or any similar project." The fifth cause of action seeks damages for "constructive acceleration," which allegedly resulted from LMDC's failure to grant Bovis's "numerous ... written requests for an extension of the final completion date based upon excusable delays."

LMDC moved to dismiss the second through seventh causes of action. With respect to the second cause of action, it argued that Bovis's claim that it was entitled to additional compensation as a result of so-called regulatory interference was barred by various provisions in the contract. LMDC specifically cited, among others, those clauses that precluded additional compensation for delay and excluded from the definition of extra work "Legal Requirements" and risk factors expressly assumed by Bovis in the contract. It further cited the clauses that

provided that Bovis's only remedy for delay would be extensions of time, rather than monetary damages.

LMDC asserted that plaintiff's third cause of action did not state a claim because, to the extent it sought recovery of insurance costs, the letter agreement expressly barred their recovery. With respect to the fourth cause of action, LMDC again argued that what Bovis characterized as extra work was not so under the relevant provisions in the contract, characterizing the regulatory inspections that Bovis claimed resulted in significant delay as "Legal Requirements," which the contract expressly stated did not constitute extra work. It also cited, once again, those provisions barring delay damages. LMDC sought dismissal of the fifth cause of action on the basis that it never accelerated the work as that term was defined in the contract. In fact, LMDC argued, a claim of acceleration was absurd because Bovis completed the project behind schedule, not ahead of schedule.

In opposition to the motion, Bovis claimed that it was entitled to the damages sought in its second cause of action because its cost overruns fell within the definition of extra work under the contract, or were compensable as a consequence of LMDC's decision to accelerate the work. As for the third cause of action, Bovis characterized the January 8, 2008 letter

agreement as only apportioning insurance costs on a pro rata basis, not absolving LMDC of any responsibility to pay. Bovis claimed that its fourth cause of action stated a claim because no fair interpretation of the contract required it to absorb the costs resulting from wholly unforeseeable interference by regulators. In any event, it argued, the inspections that it claimed delayed its work were not made pursuant to any identifiable "legal requirements" that would take it outside the scope of extra work, as that term was defined by the contract. Finally, Bovis contended that its claim for damages arising out of LMDC's acceleration of the project should not be dismissed because although it had legitimate reasons to request an extension of the completion date to June 3, 2008, LMDC insisted that it achieve the completion date of December 31, 2007.

To the extent relevant to this appeal, the motion court dismissed the second and third causes of action in part and the fourth and fifth causes of action. The court dismissed the portions of the second cause of action seeking damages for changes in the scope of work, changed project conditions, and acceleration, reasoning that the contract "clearly provided that additional costs in connection with a change to the Scope of Work are not recoverable unless LMDC issued a written change order with respect thereto." The court noted that LMDC issued some

written change orders, but pointed out that Bovis's claim sought damages beyond any change orders. The court denied LMDC's motion to dismiss the remaining portions of the second cause of action, including, insofar as pertinent to this appeal, Bovis's claim for damages for extra work allegedly resulting from unforeseeable interference by the regulators. The court noted Bovis's allegations that that interference was excessive and unprecedented. While acknowledging the contract's provision that there would be no damages for delay, it held that that provision could not be used to bar claims for damages for unforeseeable delays.

The court dismissed all aspects of the third cause of action except for one that is not challenged here, finding that the supplemental agreement required Bovis to maintain insurance at its own expense. The court dismissed the fourth cause of action as duplicative of the second, but stated that to the extent the fourth cause of action sought damages for delays resulting from regulatory interference, the claim was "subsumed" in that portion of the second cause of action that survived the motion. Finally, the court dismissed the fifth cause of action, for damages for LMDC's alleged acceleration of the project, on the basis that the contract provided that plaintiff would bear the costs of acceleration to the extent acceleration was necessary to maintain

plaintiff's compliance with the CPM Schedule. The court explained that "LMDC was directing plaintiff to prosecute the work expeditiously and diligently, and meet a deadline many months after the Contract completion date."

Bovis moved for renewal and reargument of the first order, or for leave to file a second amended complaint. It sought reargument on the ground that, among other things, the court's prior order improperly dismissed the acceleration claim based on its finding that a deadline of December 31, 2007 applied at the time of the supplemental agreement, and overlooked the fact that Bovis claimed entitlement to a later deadline due to excusable delays. Bovis also contended that it was entitled to damages for its insurance costs pursuant to the January 8 letter agreement. In support of renewal, Bovis submitted an affidavit by an executive who asserted that, regarding the acceleration claim, the CPM Schedule and completion deadline were not "fixed" but were "continually revised over the course of the Project." The affidavit further stated that the supplemental agreement "ordered [Bovis] to expressly accelerate work by doubling manpower and resources in order to achieve final completion by December 31, 2007 -- an acceleration of 163 days." To the extent relevant to this appeal, the court granted plaintiff's motion for reargument, and upon reargument, amended its prior order "only to the extent

that the damages sought in the third claim . . . for any remaining amounts due and unpaid under the parties' original lump sum Contract, dated October 2005, including overhead and profit and insurance, are reinstated."

The claims on this appeal are governed by the terms of the contract and other agreements at issue. "[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). This is especially true where, as here, the parties are sophisticated business entities represented by counsel (*see Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1, 7 [1st Dept 2012]). Further, an agreement should be read as a whole and its individual provisions considered within their greater context (*see South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 277 [2005]).

Bovis claims that the plain language of the contract entitles it to payment for work that was not included in the original scope of work set forth in the contract, and challenges the motion court's conclusion that payment was not recoverable without the issuance of a change order by LMDC. It further claims that nothing on the contract's face indicated that the parties contemplated the possibility of the type of regulatory

delays and interference it encountered, which caused it to expend far more resources than it originally anticipated.

With respect to LMDC's position that written change orders were required to authorize extra work based on regulatory interference, Bovis first asserts that the provision requiring a written change order can only refer to work initiated by Bovis, and to hold otherwise would be to interpret the provision in a commercially unreasonable manner. Bovis argues that because the extra work was constructively initiated by LMDC when it permitted the regulators to assert themselves in such an aggressive manner, no change order was necessary. Based on the plain language of the contract, we disagree. Nothing in the change order provision suggests that LMDC is not entitled to insist on a change order even for work it directs that falls outside the scope of the contract. Indeed, it is perfectly logical that LMDC would require a written change order for all such work, to eliminate any uncertainty over precisely what it was agreeing to pay extra for. Bovis cites cases such as *Joseph F. Egan, Inc. v City of New York* (17 NY2d 90 [1966]) and *Tridee Assoc. v New York City School Constr. Auth.* (292 AD2d 444 [2nd Dept 2002]) in support of its contention that a contractor can waive the requirement that extra work be authorized by a written change order. However, nowhere in its pleading or in its supporting affidavits has Bovis

alleged facts that, if proven, would establish that LMDC knowingly relinquished the right to insist on a change order.

Bovis also ignores the fact that the contract expressly bars payment to it by LMDC of any amounts above the lump sum without *either* LMDC's agreement that the work falls within the definition of extra work (confirmed by the issuance of a change order) *or* a formal and timely declaration by Bovis that it disputes LMDC's position that the work it was ordered to perform is not extra work. Here, Bovis has not pleaded, nor can it plead, that it received a change order for extra work. Further, it has not alleged, except with respect to work covered by the supplemental agreement, for which the requirement was waived, that it complied with the contractual requirement that, within 72 hours of being ordered to perform work that LMDC deemed within the original scope of work, it notify LMDC of its contrary position that the work qualified as extra work.

In any event, Bovis was not entitled to a change order for the extra work it sought as a result of regulatory interference, regardless of whether that work was subject to the supplemental agreement. That is because the definition of extra work in the contract expressly excluded work necessitated by any change in "Legal Requirements," which included any "standard or procedure enacted, adopted or applied by any Governmental Authority," even

if a directive to comply with such a standard or procedure was not written. No reasonable interpretation of that definition permits any conclusion other than that the meticulous regulatory inspections Bovis was forced to tolerate did not create a right to compensation for extra work. That the interference did not lead to a claim for extra work is further established by the exclusion from the definition of extra work of "[w]ork required by reason of any risk or obligation assumed by [Bovis] in any part of the Contract Documents." Here, Bovis expressly assumed "[t]he risk of all regulatory and other Governmental Authority delays."

LMDC argues that, besides being barred because it does not qualify as extra work, Bovis's claim for additional compensation based on regulatory interference is not allowed under the contract because it constitutes damages for delay. Such damages are unquestionably precluded by the contract. Bovis contends, however, that the no damages for delay clause is unenforceable because the parties could not have foreseen the delays encountered on this project.

"A clause which exculpates a contractee from liability to a contractor for damages resulting from delays in the performance of the latter's work is valid and enforceable and is not contrary to public policy if the clause and the contract of which it is a

part satisfy the requirements for the validity of contracts generally" (*Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297, 309 [1986]). However, such a clause may be disregarded under certain recognized exceptions, including one for delays that are "uncontemplated" (*see id.*). Delays are not considered uncontemplated when they "are reasonably foreseeable, arise from the contractor's work during performance, or . . . are mentioned in the contract" (*id.* at 310). Further, a party seeking to invoke any of the exceptions to the general rule that no damages for delay clauses are enforceable bears a heavy burden (*LoDuca Assoc., Inc. v PMS Constr. Mgt. Corp.*, 91 AD3d 485, 485 [1st Dept 2012]).

Here, Bovis failed to carry its heavy burden. The contract specifically anticipated the possibility that the involvement of regulators would delay the process. Again, Bovis expressly acknowledged that it assumed the "risk of all regulatory and other Governmental Authority delays." Certainly this lifted the no damages for delay clause out of the exception for uncontemplated delays. There is no basis for Bovis to argue that by alleging that the extent of the regulatory delays was extreme and unprecedented it stated a claim for delay damages. As this Court has stated in finding a no damages for delay clause enforceable, "[W]hile the conditions themselves may not have been

anticipated, the possibility, however unlikely, of their arising was contemplated and addressed by the parties in their agreement" (*Blau Mech. Corp. v City of New York*, 158 AD2d 373, 375 [1st Dept 1990] [internal quotation marks]).

Bovis separately claims that it should be compensated for extra resources it was forced to devote to the project based on LMDC's insistence that it complete its work by December 31, 2007, the date specified in the supplemental agreement. It first asserts that LMDC "expressly" accelerated the project when it insisted in the supplemental agreement that Bovis meet the new deadline set forth therein. It further claims that LMDC "constructively" accelerated the project because it refused to entertain Bovis's requests for more time based on excusable delay. Thus, it argues, by holding Bovis to the original completion date (as adjusted by agreement of the parties), LMDC ignored reality and placed Bovis in an untenable position.

Bovis has not stated a claim for "express" acceleration because nowhere does it allege that LMDC gave it the requisite "notice" required by the contract to complete the project before the date the parties had otherwise agreed on. Certainly the supplemental agreement did not constitute such "notice," since it extended the completion date rather than shorten it. Bovis also fails to allege facts necessary to sustain a cause of action

based on "constructive" acceleration, to the extent such a claim even exists. The Court of Appeals observed in *Corinno Civetta*, that "[a]ll delay damage claims seek compensation for increased costs . . . whether the costs result because it takes longer to complete the project or because overtime or additional costs are expended in an effort to complete the work on time" (67 NY2d at 313-314). Accordingly, in that case the Court rejected a contractor's attempt to distinguish between extra costs it incurred because the project went beyond the anticipated completion date (which it conceded were barred by a no damages for delay provision) and costs it incurred in an attempt to bring the job in on time. Likewise, it is of no moment that Bovis's request to complete the project by December 31, 2007 constituted "acceleration" based on its theory that the delays caused by government regulators should have resulted in LMDC's granting it a later completion date. Simply put, the no damages for delay clause bars Bovis from recovering any money from LMDC as a result of delay.

Finally, Bovis asks us to "correct [an] ambiguity" in the portion of the order that granted reargument and, upon reargument, reinstated the third cause of action "to the limited extent that damages for any remaining amounts due and unpaid under the original lump sum Contract, such as line items listed

in the Contract's Schedule of Values for overhead and profit, and insurance, are not dismissed." Bovis asserts that the order is ambiguous about which costs it sought in the third cause of action, and that this Court should make clear that Bovis is entitled to damages to cover any insurance costs incurred by it, other than incremental insurance costs related to the fire, which the January 8, 2008 letter argument stated were not recoverable by Bovis.

LMDC counters that there is no basis to "clarify" the second order on this point, because the first order dismissed Bovis's claim seeking insurance costs, and the court did not change that determination upon reargument. We agree with LMDC. The court's first order properly dismissed Bovis's claim seeking damages for its insurance costs other than incremental fire-related insurance costs. As the court explained, dismissal of that claim was warranted by the provision of the contract flatly stating that Bovis must bear the costs of its own insurance.

Moreover, contrary to Bovis's argument, the text of the January 8, 2008 letter agreement does not support its position. Bovis focuses on a provision of that agreement stating that LMDC has no liability for incremental fire-related insurance, and argues that this provision implies that LMDC is liable for all non-fire-related insurance costs incurred by plaintiff. However,

there is no affirmative language in the letter agreement even suggesting that the contract's requirement that Bovis pay insurance costs has been superseded. To the contrary, the letter agreement states that Bovis and the new subcontractor remained bound by the contract, specifically emphasizing that "all financial terms" continue to bind Bovis. The contract, in turn, provides that Bovis is liable for the costs of its own insurance, extensively setting forth the types of insurance it was required to obtain and also requiring it to name LMDC as an additional insured. Had the parties intended to effect such a significant change to the contract by revoking its general provision regarding Bovis's obligation to procure insurance, it can be presumed that they would have expressed that intent in clear language rather than implying it through a provision mentioning only incremental fire-related insurance.

Indeed, these highly sophisticated parties otherwise negotiated a comprehensive agreement that reflected their careful allocation of costs and of the risk that circumstances would lead to substantial cost overruns. Bovis generally accepted the financial burden of such risk. That the deal Bovis made turned out to be a poor one is not something this Court can remedy, since the agreement was fairly negotiated and unambiguous. Moreover, Bovis had not one, but two, opportunities to

renegotiate based on cost overruns, when it entered into the supplemental agreement and the January 8, 2008 letter agreement, both of which afforded it extra compensation. Now Bovis is bound by the parties' agreements, and LMDC is entitled to the benefit of its bargain.

Accordingly, the order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 10, 2011, which, to the extent appealed from, granted defendant's motion to dismiss the claims for damages for extra work allegedly resulting from changes in the scope of work and for damages arising out of defendant's alleged acceleration of plaintiff's work and plaintiff's insurance costs, and denied the motion to dismiss the claim for damages related to delay caused by alleged regulatory interference, should be modified, on the law, to grant the motion to dismiss the claims for damages based on delay, and otherwise affirmed, without costs. The appeal from the order, same court and Justice, entered April 6, 2012, upon reargument, should be dismissed, without costs, as academic.

All Concur.

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

ENTERED: MAY 28, 2013

CLERK