



Department of Education (DOE), and his lawyer wrote to DOE's lawyer that the parties' agreement was "quite different" from the way DOE was interpreting it (see *Pope v Hempstead Union Free School Dist. Bd. of Educ.*, 194 AD2d 654 [1993], *lv dismissed* 82 NY2d 846 [1993]). Because the petition to deem the notice timely was brought more than one year after March 22, 2007, the court lacked the authority to entertain it (see Education Law § 3813[2-a and 2-b]; *Consolidated Constr. Group, LLC v Bethpage Union Free School Dist.*, 39 AD3d 792, 794-795 [2007], *lv dismissed* 9 NY3d 980 [2007]).

Petitioner's argument that respondent should be estopped from asserting a late notice of claim defense because respondent did not respond to petitioner's requests for information until May 10, 2007 is unavailing. "An estoppel cannot be founded upon defendant's failure to communicate with plaintiff in response to . . . bills" (*Amsterdam Wrecking & Salvage Co. v Greater Amsterdam School Dist.*, 83 AD2d 654, 655 [1981], *affd* 56 NY2d 828 [1982]). A fortiori, an estoppel cannot be founded on respondent's delay in responding to petitioner's requests for information.

Petitioner's contention that CPLR 204(b) tolled the statute of limitations because his union and DOE made arguments to an arbitrator about the meaning of the stipulation is also

unavailing. To toll the statute of limitations, the arbitration must have been "instituted by the parties in order to resolve the present controversy" (*Matter of Majka v Utica City School Dist.*, 247 AD2d 845, 846 [1998]; see also *Provenzano v Ioffe*, 12 AD3d 353 [2004], *lv denied* 5 NY3d 701 [2005]). The arbitration between the union and DOE concerned the Custodian Engineers who were excluded from the stipulation of settlement. The present controversy concerns the Custodian Engineers who were covered by the stipulation.

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

ENTERED: MARCH 15, 2011

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receive health insurance or any other fringe benefits from defendants, and was not on defendants' payroll (see *Bynog v Cipriani Group*, 1 NY3d 193, 198 [2003]). Defendants withheld neither Social Security nor other taxes from his pay, and issued him 1099 forms, as opposed to W-2 forms. Defendants did not require Kumi to wear a uniform and did not instruct him as to the manner in which he drove. Both Kumi and defendants considered Kumi an independent contractor, and defendants purposefully treated him as an independent contractor to limit their liability.

Even if Kumi drove exclusively for defendants, that fact does not raise a triable issue whether defendants exercised a sufficient degree of control over his work to impose liability on them. Nor is it availing that Kumi worked for defendants for a long time or that he was paid "generously."

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ENTERED: MARCH 15, 2011



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Tom, J.P., Mazzarelli, Renwick, Freedman, Manzanet-Daniels, JJ.

4138            Marshall Investments Corporation,            Index 102512/08  
                  et al.,  
                  Plaintiffs-Appellants,

-against-

                  Harrah's Operating Company, Inc., etc., et al.,  
                  Defendants-Respondents.

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Maslon Edelman Borman & Brand, LLP, Minneapolis, MN (Kirk O. Kolbo, of the Minnesota Bar, admitted pro hac vice, of counsel), for appellants.

Meyer, Suozzi, English & Klein, P.C., Garden City (Kevin Schlosser of counsel), for Harrah's Operating Company, Inc., respondent.

Dechert LLP, New York (Neil A. Steiner of counsel), for Ivan Kaufman and Walter Horn, respondents.

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                  Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered August 3, 2009, which, inter alia, granted defendants' motion for summary judgment dismissing plaintiffs' first cause of action for tortious interference with contract, unanimously affirmed, with costs.

                  The subject pledge agreement did not constitute a management contract which required the approval of the National Indian Gaming Commission (25 CFR 502.15; *cf. Machal, Inc. v Jena Band of Choctaw Indians*, 387 F Supp 2d 659, 666-667 [2005]). However, because it changes the Tribe's obligations, requiring them to make payments into escrow, and alters their liabilities, giving

the right to sue and a veto over certain modifications of a separate management agreement to plaintiffs, the pledge agreement is a modification or assignment of rights under the management agreement. As such, it is void because it was never approved by the commission (25 CFR 533.7). Since the underlying contract is void, plaintiffs cannot recover for tortious interference with that contract (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]).

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contractual privity with defendant (see *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]). Nor do their allegations that defendant communicated directly with Skyllas in e-mails, representing that it was undertaking due diligence to verify that defendant/third-party plaintiff Henry Vargas owned a majority interest in 2141 MD Jr., LLC and that such interest was free of liens and encumbrances, describe a relationship of near-privity between Skyllas and defendant (see *Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood*, 80 NY2d 377, 384 [1992]; *Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417, 419 [1989] ["a bond . . . so close as to be the functional equivalent of contractual privity"]; *United Safety of Am. v Consolidated Edison Co. of N.Y.*, 213 AD2d 283, 286 [1995] ["a special relationship of trust or confidence which create(d) a duty for (defendant) to impart correct information to (Skyllas)"]). Rather, these allegations reveal the negotiation of a simple, arm's-length business transaction in which defendant served as Skyllas's adversary's counsel (see *Par Plumbing Co. v Engelhard Corp.*, 256 AD2d 124 [1998]; *Andres v LeRoy Adventures*, 201 AD2d 262 [1994]).

The fraud cause of action, which alleges that defendant aided its client, Vargas, in selling Skyllas an interest in a real estate company that Vargas did not possess, fails to state

with particularity any knowing or reckless misrepresentation of a material fact by defendant (see *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Plaintiffs allege that defendant relied on a fraudulent operating agreement supplied to it by Vargas, took no further steps to verify the actual ownership of the company in drafting the relevant transactional documents, and represented to Skyllas's counsel in e-mails that Vargas had stated that he had an interest in the company and that it (defendant) would account for the origins of that interest and confirm that the interest was free of liens and encumbrances. However, these are either misrepresentations attributable to Vargas or statements of future intention, not statements of present material facts known to be false at the time they were made (see *ESBE Holdings, Inc. v Vanquish Acquisition Partners, LLC*, 50 AD3d 397, 398 [2008]; *Sheth v New York Life Ins. Co.*, 273 AD2d 72, 73-74 [2000]).

To the extent plaintiffs contend that defendant made actionable misrepresentations in the transactional documents it drafted by incorporating Vargas's misrepresentations into the documents, they are alleging substantial assistance by defendant to aid and abet Vargas's fraud (see *Oster v Kirschner*, 77 AD3d 51, 54-57 [2010]; *National Westminster Bank v Wechsel*, 124 AD2d 144, 147-150 [1987], *lv denied* 70 NY2d 604 [1987]). However, the

complaint fails to state a cause of action for aiding and abetting because it does not allege that defendant had actual knowledge of any fraud perpetrated by Vargas (see *Oster*, 77 AD3d at 55; *Weksel*, 124 AD2d at 148-150).

Nor does the complaint adequately allege that defendant reasonably could and should have foreseen that a class of persons like plaintiffs would act in reliance on the alleged misrepresentations (see e.g. *Houbigant, Inc. v Deloitte & Touche*, 303 AD2d 92, 100 [2003]; *Wey v New York Stock Exch., Inc.*, 2007 NY Slip Op 50880(U) [2007]). It fails to explain with sufficient particularity how defendant should have known or had reason to believe that anyone other than Skyllas would rely on its alleged misstatements in the relevant documents or in e-mails sent to Skyllas's counsel during negotiations.

Plaintiffs' allegations of scienter are also inadequate, since they do not support an inference that defendant's statements were "based on grounds so flimsy as to lead to the conclusion that there was no genuine belief in [their] truth" (see *DaPuzzo v Reznick Fedder & Silverman*, 14 AD3d 302, 303 [2005]; *Houbigant*, 303 AD2d at 97). The complaint alleges that defendant was reckless and grossly negligent in failing to conduct any reasonable investigation before lending its name and reputation to Vargas's scheme and that the documents contained

numerous obvious irregularities that should have led to an investigation to confirm the ownership interests. However, nowhere does it allege that defendant knew or should have known, or was grossly negligent or reckless in failing to conduct any inquiry and discover, that Vargas's representations were in fact false. Even if such an allegation can be inferred from the complaint and supporting affidavits, it is not sufficiently particularized (see *Houbigant*, 303 AD2d at 97).

Plaintiffs fail sufficiently to allege that defendant's misrepresentations were the direct and proximate cause of their claimed loss of the \$3.8 million they loaned to Skyllas (see *Friedman v Anderson*, 23 AD3d 163, 167 [2005]; *Laub v Faessel*, 297 AD2d 28, 30-31 [2002]). While the complaint alleges a sufficient causal link between defendant's alleged misrepresentations and Skyllas's loss of his \$1 million advance payment to Vargas to acquire the initial option, it acknowledges that at least three events occurred between the alleged misrepresentations and plaintiffs' loan to Skyllas: Skyllas declined to exercise the option (the only transaction in which defendant was involved), Skyllas and Vargas subsequently negotiated and consummated *on their own and without defendant's assistance*, the transfer of 49% of Vargas's purported interest in the company to Skyllas, and the holder of the mortgage on another of Skyllas's buildings demanded

immediate payment of a substantial portion of the principal.  
These events constitute superseding causes that broke the chain  
of causation (see generally *Derdiarian v Felix Contr. Corp.*, 51  
NY2d 308, 315 [1980]; see e.g. *Aronoff v Ernst & Young*, 1999 WL  
458779, \*3-5, 1999 NY Misc LEXIS 665, \*8-13 [1999]).

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

ENTERED: MARCH 15, 2011

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authorizing respondent to distribute assets in this proceeding was an initial order beginning the distribution process and was not a final order within the meaning of Insurance Law § 7434(e) (see *Burke v Crosson*, 85 NY2d 10, 15-16 [1995]). Notably, when the order was issued, there were more than 500 outstanding reinsurance claims in this proceeding. Further, claimant/objector's claim was never "allowed" by respondent, and no order was ever entered approving payment of the claim. Significantly, the 1992 order limited dividend payments to "claims duly allowed in this proceeding." Claimant/objector does not have a vested right to distribution of dividends by virtue of respondent's issuance in 1998 of the first court-ordered dividend distribution, since there was no allowance or court order with respect to claimant/objector's claim then, and there has been none since.

To the extent claimant/objector claims it had a vested right by operation of law under the prior distribution scheme, we find that the retroactive application of the current version of Insurance Law § 7434 does not unconstitutionally impair that

purported right (see *Matter of Liquidation of Union Indem. Ins. Co. of New York* (2009 NY Slip Op 30387 [Sup Ct, NY County 2009] [analyzing constitutionality of retroactive application of Insurance Law § 7434 according to factors cited in *Alliance of Am. Insurers v Chu*, 77 NY2d 573, 586 (1991)]). Insurance Law § 7434 is a remedial statute and does not impair vested rights; the priority scheme in force at any given time is subject to change at the discretion of the Legislature; and the Legislature was acting in the public interest when it applied the new priority scheme to existing liquidations so as to institute a more equitable and consistent scheme for the distribution of an insolvent's assets and better protect the public (Senate Mem in Support, reprinted in 1999 McKinney's Session Laws of NY, at 1596; Assembly Mem in Support, L 1999, ch 134, 1999 NY Legis Ann, at 73; Mem of Assemblyman Alexander B. Granis, L 2005, ch 33, 2005 NY Legis Ann, at 23 ["The purpose of this bill is to ensure the workers' compensation security fund has adequate funds to pay claims of injured workers insured by insolent carriers"]).

Claimant/objector had no more than a hope or expectation of future dividend distribution, not a vested, absolute right to distribution.

While claimant/objector is correct that even under the new statutory scheme all creditors in the same class are to be

treated alike, when the Legislature enacted Insurance Law § 7434(e) it was cognizant that dividend distributions had been made in liquidation estates to which the priority classification would be retroactively applied, and yet it made no exception or exemption for those estates. It exempted only estates in which a final court order of distribution had been made. We must infer that "what is omitted or not included was intended to be omitted or excluded" (*Matter of Jose R.*, 83 NY2d 388, 394 [1994]).

We have considered claimant/objector's remaining contentions and find them unavailing.

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production of the play. There is no evidence that Benken had notice of the movement of the prop, undertaken by plaintiff, Knox and a different Jumpers employee, that allegedly caused plaintiff's injuries (see *Balaj v Equitable Life Assur. Socy. of U.S.*, 211 AD2d 487 [1995], *lv denied* 85 NY2d 811 [1995]). Knox testified only that he sought additional men to move a large bed, not the item causing plaintiff's injury, and that he may have spoken to Benken a second time, but nowhere testified that the subject of this possible second conversation concerned the movement of the injury-causing object.

We decline Jumpers' invitation to search the record and find in its favor, since triable issues of fact remain as to whether Jumpers' employee, Denise Grillo, acted negligently.

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

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ENTERED: MARCH 15, 2011

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Saxe, J.P., Sweeny, Catterson, Freedman, Román, JJ.

4411 William Lugo, Index 300682/08  
Plaintiff, 84169/08

-against-

Purple & White Markets, Inc., etc.,  
Defendant,

White Rose, Inc., et al.,  
Defendants/Third-Party  
Plaintiffs-Appellants,

-against-

FICA Transportation, Inc.,  
Third-Party-Defendant-Respondent.

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Havkins Rosenfeld Ritzert & Varriale, LLP, Mineola (Gail L. Ritzert of counsel), for appellants.

O'Connor Redd, LLP, White Plains (Michael P. Hess and Amy L. Fenno of counsel), for respondent.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about August 24, 2009, which, insofar as appealed from, denied defendants-third-party plaintiffs' (collectively, White Rose) motion for a default judgment against third-party-defendant FICA Transportation, Inc. (FICA) and granted FICA's cross motion to dismiss the third-party complaint to the extent of dismissing White Rose Food's claim for breach of contract, unanimously affirmed, without costs.

The motion court properly denied White Rose's motion for a

default judgment against FICA and compelled acceptance of FICA's answer. White Rose's attempt to serve FICA pursuant to CPLR 3215(g) (4) (i) was plainly inadequate, as it was not sent to FICA's last known address.

The motion court also properly dismissed the breach of contract cause of action, brought by White Rose Foods, Inc., for FICA's failure to obtain insurance coverage. The 2001 agreement, which provided the only basis for a relationship between White Rose Foods and FICA, contained an express provision barring any civil actions brought more than two years after the occurrence giving rise to the claim. Here, the evidence of insurance coverage was to have been provided to White Rose Foods on or about December 19, 2001, making December 2003 the latest this claim for breach could have been brought. Thus, the breach of contract claim is untimely.

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

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plaintiff testified that the bus operator stated either that the bus did not have a lift or that it was not working.

Defendant bus operator testified at her deposition that plaintiff never asked to use the hydraulic wheelchair lift that was located in the middle of the bus. For the first time on appeal, defendants contend that the "lift" plaintiff referred to throughout her deposition testimony and in her pleadings and motion papers and to which defendants referred throughout their own motion papers, is two different pieces of equipment. Whether there was a misunderstanding among plaintiff, plaintiff's grand-niece and the bus operator as to which piece of equipment the bus was equipped with and which piece of equipment plaintiff requested, constitutes an issue of fact which cannot be resolved on a motion for summary judgment. If all the parties are indeed referring to the hydraulic wheelchair lift, then issues of fact exist as to whether plaintiff asked to use the wheelchair lift and, if so, whether the operator refused her request. At this juncture, it cannot be concluded, as a matter of law, that defendants did not breach their duty, as a common carrier, to exercise reasonable care under all of the circumstances of this particular case (see *Bethel v New York City Tr. Auth.*, 92 NY2d 348, 356 [1998]).

If defendants were negligent in failing to provide plaintiff

with access to the lift, thus forcing her to use the steps, the only other means of egress, a trier of fact may conclude that their conduct constituted a substantial factor in bringing about the harm to plaintiff, and thus, their negligence was the proximate cause of her injuries (*see Baptiste v New York City Tr. Auth.*, 28 AD3d 385 [2006]). Defendants' claim that plaintiff fell on the floor of the bus before even getting to the steps due to the narrowness of the aisle is contradicted by plaintiff's deposition testimony and testimony at the statutory hearing, as well as by the deposition testimony of defendant bus operator.

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED: MARCH 15, 2011

  
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Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Abdus-Salaam, JJ.

4506 In re Angel W.,

A Person Alleged to be  
a Juvenile Delinquent,  
Appellant.

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Presentment Agency

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Patricia W. Jellen, Eastchester, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Jane L. Gordon  
of counsel), for presentment agency.

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Order of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about January 27, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he had committed acts, which, if committed by an adult, would constitute the crimes of criminal possession of a weapon in the fourth degree and attempted assault in the third degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly denied appellant's motion to suppress identification testimony. The record unequivocally establishes that the victim initially identified appellant at a prompt, on-the-scene showup. Later that night, the victim accidentally viewed appellant at the precinct. This was not a police-arranged

identification procedure (see *People v Cannon*, 13 AD3d 159, 160 [2004], *lv denied* 4 NY3d 762 [2005]). Moreover, since the victim had just made a reliable identification at the scene of the crime, the second viewing was essentially confirmatory, and it was unlikely to have created a risk of misidentification (see *People v Gilbert*, 295 AD2d 275 [2002], *lv denied* 99 NY2d 558 [2002]). Furthermore, the hearing evidence demonstrated that the victim had an independent source for his identification of appellant.

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

ENTERED: MARCH 15, 2011

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Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Abdus-Salaam, JJ.

4507 Hampton Hall Pty Ltd., Index 602526/08  
Plaintiff-Appellant,

-against-

Global Funding Services, Ltd., et al.,  
Defendants,

Rick, Steiner, Fell & Benowitz LLP,  
Defendant-Respondent.

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Carter Ledyard & Milburn LLP, New York (Gerald W. Griffin of  
counsel), for appellant.

Gordon & Rees, LLP, New York (Bran C. Noonan of counsel), for  
respondent.

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Order, Supreme Court, New York County (Charles E. Ramos,  
J.), entered November 25, 2009, which, to the extent appealed  
from, granted defendant Rick, Steiner, Fell & Benowitz LLP's  
(RSF&B) motion for summary judgment dismissing the complaint  
against it, unanimously affirmed, with costs.

This appeal arises out of an escrow agreement entered into  
by plaintiff and defendant Jay Rick. Since RSF&B was not a  
signatory to the escrow agreement, no cause of action for breach  
of contract can be asserted against it (*see Balk v 125 W. 92<sup>nd</sup>*  
*St. Corp.*, 24 AD3d 193, 193 [2005]). The documentary evidence  
establishes that Rick entered into the escrow agreement in his  
individual capacity and that RSF&B is, thus, not liable to

plaintiff (see *Schuckman v Sayville Plaza Dev. Co.*, 201 AD2d 638 [1994]). The "whereas" clause in the agreement stating that "[plaintiff] has assigned as Escrow Agent, Jay Rick, a member of [RSF&B]," was descriptive and did not bind RSF&B (see generally *Grand Manor Health Related Facility, Inc. v Hamilton Equities Inc.*, 65 AD3d 445, 447 [2009]).

Plaintiff failed to establish the existence of Rick's apparent authority to bind RSF&B. There is no evidence of any misrepresentations by RSF&B or reliance thereon (see *Ford v Unity Hosp.*, 32 NY2d 464, 473 [1973]). Plaintiff also failed to establish that RSF&B was vicariously liable for Rick's acts. Plaintiff was not a client of the law firm, nor had it entered into a fee arrangement or any other agreement with the law firm. Thus, Rick was not acting within the ordinary course of the business of the firm, or engaging in authorized conduct (compare *Clients' Sec. Fund of State of N.Y. v Grandeau*, 72 NY2d 62 [1988]).

Plaintiff has failed to show "that facts essential to justify opposition may exist" (CPLR 3212[f]). Accordingly, summary judgment is not premature (see *Moukarzel v Montefiore Med. Ctr.*, 235 AD2d 239, 240 [1997]).

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

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

ENTERED: MARCH 15, 2011

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CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Abdus-Salaam, JJ.

4508- In re Estate of Carl Levine, File 4620/04  
4509 Deceased.

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David Fink,  
Nonparty-Appellant,

Caren Stanley, et al.,  
Nonparty-Respondents.

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David Fink, appellant pro se.

Markewich and Rosenstock, LLP, New York (Lawrence M. Rosenstock of counsel), for Caren Stanley, respondent.

Lewis Brisbois Bisgaard & Smith LLP, New York (Mark K. Anesh of counsel), and Goldfinger & Lassar LLP, New York (Christine M. Finn of counsel), for Stanley Salomon, respondent.

Pollack Pollack Isaac & DeCicco, LLP, New York (Jillian Rosen of counsel), for Betty Weinberg Ellerin, respondent.

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Order, Surrogate's Court, New York County (Troy K. Webber, S.), entered on or about December 28, 2009, which, inter alia, confirmed the reports of the Special Referee dated February 25, 2009, March 11, 2009, and May 8, 2009, granted the Special Referee's request for fees in the total amount of \$89,985.40, and ordered that appellant pay \$69,226.40 as his share of such fees, unanimously affirmed, with costs. Appeal from order, same court and Surrogate, entered June 9, 2009, which, inter alia, confirmed the parties' settlement agreement, unanimously dismissed, without costs, as taken from an order that is not appealable as of right.

The matter is remanded for determination of reasonable expenses and attorneys' fees incurred in responding to these appeals, to be payable by appellant to respondents pursuant to 22 NYCRR 130-1.1, and for entry of judgment in that amount.

Initially, we note that the June 2009 order "is not appealable as of right because it is not an order which determined a motion made upon notice" (*Postel v New York Univ. Hosp.*, 262 AD2d 40, 41 [1999]; see *Santoli v 475 Ninth Ave. Assoc., LLC*, 38 AD3d 411, 414 [2007]).

Surrogate's Court properly consolidated the multiple proceedings relating to the estate, since they involved common questions of law and fact (see SCPA 501), and properly referred the entire matter to the Special Referee with the caption "In the Matter of the Estate of Carl Levine, Deceased," containing the same file number used for all the various proceedings. Appellant never objected to this consolidation or to the reference.

Further, the parties' settlement agreement expressly confirmed that it was resolving all of the various proceedings together, provided that the court and referee retained jurisdiction over the matter, and authorized the referee to determine various issues as set forth in the agreement. Stipulations of settlement are not lightly cast aside (*Hallock v State of New York*, 64 NY2d 224, 230 [1984]) and parties are free

to chart their own procedural course and to stipulate as they please (*Mitchell v New York Hosp.*, 61 NY2d 208, 214 [1984]).

In any event, to the extent appellant challenges the caption utilized by the court, even were the caption somehow erroneous, it is well settled that captions should be liberally construed and defects, mistakes and irregularities in form should be disregarded unless demonstratively prejudicial or a timely objection has been made (*see Tilden Dev. Corp. v Nicaaj*, 49 AD3d 629 [2008]; *Hoot Group, Inc. v Caplan*, 9 AD3d 448 [2004], *lv denied* 3 NY3d 611 [2004]). Here, appellant failed to make a timely objection to the caption and was not prejudiced, as he was able to participate in the proceeding.

Thus, there is no basis for appellant's contention that a separate special proceeding was needed to effectuate the confirmation of the referee's reports and the terms of the parties' settlement agreement. Nor is there merit to appellant's claim that the orders on appeal were improperly made "outside a pending special proceeding."

The referee did not act outside of her authority, as the settlement agreement explicitly granted the referee the authority to determine various disputes after the execution of the agreement. Nor was the referee required to commence a special proceeding to obtain an award of fees.

Appellant's assertion that no one has standing to oppose this appeal is frivolous. Pursuant to CPLR 5511, a respondent is not required to be an aggrieved party. Rather, pursuant to that provision, a respondent is the adverse party to the appellant, a requirement which respondents clearly meet.

Pursuant to 22 NYCRR 130-1.1(a), a court "in its discretion, may award to any party or attorney in any civil action or proceeding before the court . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct[,]" and, in "addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part." "Under part 130 of the Rules, frivolous appellate litigation may be found to exist where the appellate arguments raised are completely without merit in law or fact, where the appeal is undertaken primarily to delay or prolong the litigation or to harass or maliciously injure another, or where the party or attorney asserts material factual statements that are false (22 NYCRR 130-1.1[c] [additional citations omitted])" (*Yenom Corp. v 155 Wooster St.*, 33AD3d 67, 70 [2006]).

In this case, appellant, a pro se attorney, failed to

prepare an appropriate appendix, and in response to a motion questioning the sufficiency of the appendix suggested that the proceeding never existed and thus there was no record on appeal for him to provide. His arguments on appeal raise jurisdictional issues which are entirely without merit and find no support in the procedural history of this matter. The Surrogate's Court, in its October 19, 2009 memorandum decision, swiftly rejected each of the arguments appellant makes to this Court. In addition, the record reveals that appellant harassed the court, the referee and the parties, and behaved maliciously and disrespectfully.

There can be no good faith basis for any of the arguments made on appeal, and the only fair conclusion is that the prosecution of this appeal was meant to delay or prolong the litigation or to harass respondents. Accordingly, we find that these appeals were entirely frivolous within the meaning of 22 NYCRR 130-1.1.

The appropriate remedy for maintaining a frivolous appeal is the award of costs in the amount of the reasonable expenses and attorneys' fees incurred in responding to the appeal (see *Yenom Corp. v 155 Wooster St. Inc.*, 33 AD3d 67 [2006], *supra*). Thus, we remand the matter to Surrogate's Court for a determination of the amount of expenses and attorneys' fees incurred by

respondents in responding to these appeals, and for entry of an appropriate judgment as against appellant.

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

ENTERED: MARCH 15, 2011

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Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Abdus-Salaam, JJ.

4511 In re Arlene Botkin,  
Petitioner,

Index 402175/09

-against-

Cadman Plaza North, et al.,  
Respondents.

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Arlene Botkin, petitioner pro se.

Kagan Lubic Lepper Lewis Gold & Colbert, LLP, New York (Fran I. Lawless of counsel), for Cadman Plaza North, respondent.

Michael A. Cardozo, Corporation Counsel, New York (Julie Steiner of counsel), for municipal respondent.

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Determination of respondent New York City Housing Preservation and Development, dated June 16, 2009, which found petitioner's behavior constituted a nuisance, issued a certificate of eviction against her, stayed enforcement of the certificate, and placed her on probation for a period of five years, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Carol R. Edmead, J.], entered January 20, 2010), dismissed, without costs.

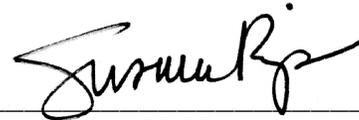
The determination that petitioner engaged in behavior that constituted a nuisance was supported by substantial evidence, including the testimony of a mail carrier, a doorman in the building, and other cooperators, who all described instances of

petitioner's objectionable conduct (see generally *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). There exists no basis to disturb the Hearing Officer's credibility determinations, including the finding that it was not credible that every witness who testified that petitioner was the aggressor in their interactions with her was mistaken or lying (see *Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

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

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

ENTERED: MARCH 15, 2011

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Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Abdus-Salaam, JJ.

4512           The People of the State of New York,           Ind. 606/00  
4512A                           Respondent,                           768/00  
4512B

-against-

Orlando Deuras,  
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

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

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Judgments of resentence, Supreme Court, New York County (Charles H. Solomon, J.), rendered February 2, 2010, resentencing defendant to concurrent terms of 10 years, with concurrent terms of 5 years' postrelease supervision, unanimously reversed, on the law, the resentences vacated and the original sentences without postrelease supervision reinstated. Appeal from order (same court and Justice), entered on or about May 18, 2010, which denied defendant's CPL 440.20 motion to vacate the resentences, unanimously dismissed as academic in light of the foregoing.

Defendant is entitled to relief under *People v Williams* (14 NY3d 198 [2010]), which invalidates the imposition of postrelease supervision (PRS) upon resentencing of defendants who have been released after completing their terms of imprisonment. The fact that the resentencing proceeding commenced shortly before

defendant's release does not require a different result, since defendant was released before he was resentenced.

There is nothing in *Williams* or related Court of Appeals cases to suggest that the double jeopardy rule stated in those cases is affected by a defendant's awareness, at some point prior to his or her release from prison, that the sentence will include PRS. While commencement of a Correction Law § 601-d resentencing proceeding puts a defendant on notice that PRS will be added to the sentence, we see no reason to treat that type of notice any differently.

We do not find that defendant is primarily responsible for the fact that he was resentenced after being released. Defendant did not cause the resentencing proceeding to be commenced more than nine years after his original sentence, more than one and one-half years after the Court of Appeals ruled that the PRS component of a sentence must be orally pronounced by a court (*People v Sparber*, 10 NY3d 457, [2008]), and less than two months before defendant's scheduled release. With full knowledge of his impending release, the court granted defendant two reasonable adjournments of the resentencing proceeding, as a result of which the resentencing came after defendant's release.

We have considered and rejected the People's remaining arguments.

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

ENTERED: MARCH 15, 2011

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Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Abdus-Salam, JJ.

4513 Veritas Capital Management, L.L.C., Index 650058/08  
4513A et al., 600673/08  
Plaintiffs-Appellants-Respondents,

-against-

Thomas J. Campbell,  
Defendant-Respondent-Appellant.

- - - - -

Thomas J. Campbell,  
Plaintiff-Respondent-Appellant,

-against-

Robert B. McKeon, et al.,  
Defendants-Appellants-Respondents.

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Schulte Roth & Zabel LLP, New York (Ronald E. Richman of  
counsel), for Veritas appellants-respondents.

Stillman, Friedman & Shechtman, P.C., New York (Paul Shechtman  
and Nathaniel Ian Kolodny of counsel), for Robert B. McKeon,  
appellant-respondent.

Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, P.C., New  
York (Edward M. Spiro and Ellen N. Murphy of counsel), for  
respondent-appellant.

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Order, Supreme Court, New York County (Herman Cahn, J.),  
entered February 2, 2009, which, to the extent appealed from, as  
limited by the briefs, denied so much of defendant Robert  
McKeon's motion as sought to dismiss plaintiff's claims for  
breach of fiduciary duty and breach of oral contract, denied  
defendant Veritas' motion to dismiss plaintiff's claims for

quantum meruit and judicial dissolution as to Fund III, and granted that part of defendant Robert McKeon's motion which sought to dismiss plaintiff's claim for wrongful termination, unanimously modified, on the law, to dismiss the claim for breach of fiduciary duty and to reinstate only that part of the wrongful termination claim that alleged a breach of the vesting provisions of the Veritas LLC operating agreement, and otherwise affirmed, without costs. Order, same court and Justice, entered November 28, 2008, which to the extent appealed from as limited by the briefs, granted that part of defendant Campbell's motion as sought to dismiss the causes of action for breach of duty of loyalty and fraudulent inducement as to Fund II, unanimously modified, on the law, to reinstate the fraudulent inducement claim, and otherwise affirmed, without costs.

As Campbell is a Connecticut resident, his breach of fiduciary duty claim is barred unless it is timely under the shorter of the New York or Connecticut statute of limitations (*Global Fin. Corp. v Triarc Corp.*, 93 NY2d 525 [1999]). Under New York law, his claim for money damages, which only incidentally involves misrepresentations, is governed by a three year statute of limitations (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132 [2009]). Connecticut's statute is also three years. Contrary to Campbell's assertion, defendant's

express announcement that he was engaged in the precise misconduct complained of precludes any equitable tolling under New York or Connecticut law (*Shared Communications Serv. of ESR, Inc. v Goldman, Sachs & Co.*, 38 AD3d 325 [2007]), as well as any "course of conduct" tolling under Connecticut law (*Fenn v Yale Univ.*, 283 F Supp 2d 615, 638 [D Conn 2003], *affd* 187 F Appx 21 [2<sup>nd</sup> Cir 2006]). As such, the claim is time barred.

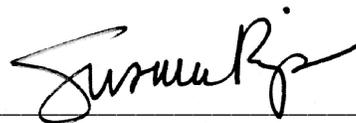
Campbell did adequately plead an oral contract with McKeon and a breach of it. The fact that the terms and validity of the contract are in dispute allows Campbell to plead a parallel quantum meruit claim (*Loheac v Children's Corner Learning Ctr.*, 51 AD3d 476 [2008]). Moreover, his claim for judicial dissolution, based on his allegation that he formed a partnership with McKeon, without a writing and for an indefinite duration, was also properly allowed to stand (*Briscoe v White*, 34 AD3d 712 [2006]). Campbell failed to plead that his employment agreement had a fixed duration, and thus he was an at will employee (*Murphy v American Home Prods. Corp.*, 58 NY2d 293 [1983]). Nor does his status as a member of an LLC alter his at will status (*Ingle v Glamore Motor Sales, Inc.*, 73 NY2d 183, 189 [1981]). However, Campbell does plead a claim that, if terminated without cause, he nonetheless vests in his income allocation under the vesting schedule of the Veritas LLC operating agreement.

In the Veritas action, Veritas' claim for breach of the duty of loyalty was properly dismissed. That claim is available only where the employee has acted directly against the employer's interests - as in embezzlement, improperly competing with the current employer, or usurping business opportunities (*Sullivan & Cromwell LLP v Charney*, 15 Misc 2d 1128A [2007]). There is no such allegation here.

The IAS court erred in dismissing the claim for fraudulent inducement, because the misrepresentation was the concealment of Campbell's alleged breaches of the prior fund agreements, not his undisclosed intention not to perform the Fund II contracts (*cf. 767 Third Ave. LLC v Greble & Finger, LLP*, 8 AD3d 75 [2004]).

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

ENTERED: MARCH 15, 2011

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after accrual of the claim (see General Municipal Law § 50-e[5];  
§ 50-i[1]; *McCrae v City of New York*, 44 AD3d 306 [2007]).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2011

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Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Abdus-Salaam, JJ.

4515 Theodore Berger, Index 303178/07  
Plaintiff-Respondent,

-against-

New York City Housing Authority, et al.,  
Defendants,

Paul R. Anderson, et al.,  
Defendants-Appellants.

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Fixler & LaGattuta, LLP, New York (Paul F. LaGattuta III of  
counsel), for Paul R. Anderson, appellant.

Law Offices of Thomas K. Moore, White Plains (Neil Dinces of  
counsel), for Rosen appellants.

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

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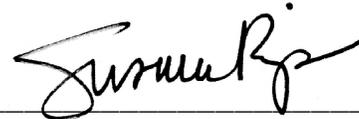
Order, Supreme Court, Bronx County (Robert E. Torres, J.),  
entered April 7, 2010, which, in an action for personal injuries  
sustained in a multi-vehicle accident, denied defendants-  
appellants' motions for summary judgment dismissing the complaint  
and all cross claims as against them, unanimously affirmed,  
without costs.

It is well established that evidence of a rear-end collision  
with a stopped vehicle constitutes a prima facie case of  
negligence on the part of the operator of the moving vehicle (see  
*De La Cruz v Ock Wee Leong*, 16 AD3d 199 [2005]), which may be  
rebutted by evidence that the vehicle in front stopped suddenly

(see *Barry v City of New York*, 283 AD2d 300 [2001]). Here, the motion court properly determined that issues of fact exist concerning whether the first three vehicles in this five-car accident, including appellants' cars, stopped suddenly and their reasons for doing so.

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

ENTERED: MARCH 15, 2011

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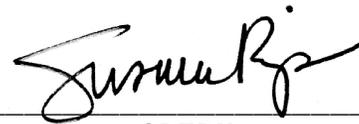
Workers' Compensation Law (see Worker's Compensation Law §§ 11, 29[6]; *Cruz v Regent Leasing Ltd. Partnership*, 39 AD3d 396 [2007]). Further, defendant failed to establish that it and JFA were, for the purposes of the Workers' Compensation Law, alter egos (see *Gonzalez v 310 W. 38th, L.L.C.*, 14 AD3d 464 [2005]; compare *Paulino v Lifecare Transp.*, 57 AD3d 319 [2008] [special employment relationship established where defendant and nonparty employer were operated under control of same parent corporation, shared payroll services and employee manual, and were covered by same workers' compensation insurance policy]).

Plaintiff established prima facie that he was engaged in the painting and plastering of a building when injured because of a collapsing ladder and thus was entitled to summary judgment on the issue of defendant's liability under Labor Law § 240(1). In opposition, defendant failed to raise an issue of fact whether plaintiff was a recalcitrant worker or the sole proximate cause

of his injuries (see *Stolt v General Foods Corp.*, 81 NY2d 918 [1993]; *Torres v Monroe Coll.*, 12 AD3d 261 [2004]; *Garcia v 1122 E. 180th St. Corp.*, 250 AD2d 550 [1998]).

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

ENTERED: MARCH 15, 2011

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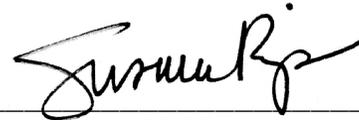


was exposed under the indictment, and the favorableness of the plea bargain" (*People v Crafton*, 159 AD2d 271, 271-272 [1990], *lv denied* 76 NY2d 733 [1990]). In light of all the relevant factors, including, among other things, the reasonableness of the bargain and defendant's experience (see *People v Garcia*, 92 NY2d 869 [1998]), we find that defendant's plea was voluntarily made. The court did not exhibit undue hostility to defendant or improperly urge him to plead guilty.

We perceive no basis for reducing the sentence.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 15, 2011

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Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Abdus-Salaam, JJ.

4518 Miguel Menard, Index 18683/05  
Plaintiff-Appellant,

-against-

Highbridge House, Inc., et al.,  
Defendants-Respondents.

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Sullivan Papain Block McGrath & Cannavo, P.C., New York (Stephen C. Glasser of counsel), for appellant.

Kaufman Borgeest & Ryan, LLP, Valhalla (Jacqueline Mandell of counsel), for respondents.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered on or about July 24, 2009, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

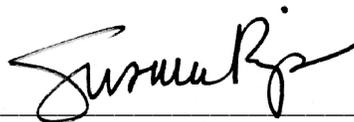
Plaintiff firefighter was injured in a common stairwell between two floors after a tenant, descending in a panic because of the smoke filling the hallway on the floor above, collided with him and he fell. He alleges, pursuant to General Municipal Law § 205-a, that his injuries resulted from defendants' violations of Administrative Code of City of N.Y. §§ 27-127 and 27-128 (renumbered § 28-301.1 by Local Law No. 33 [2007] § 11, eff July 1, 2008). These provisions require building owners to maintain their premises in a safe condition. Plaintiff claims that the storage of combustible clothing on the exterior balcony

of an apartment violated these provisions, that the clothing caught fire, encouraged the spread of the fire, and created the heavy smoke conditions that prompted the tenant to flee down the stairs, knocking him down as she tried to pass him.

The record demonstrates that any such alleged violation "did not directly or indirectly cause plaintiff's injuries" (see *Giuffrida v Citibank Corp.*, 100 NY2d 72, 82 [2003]), but that they were caused by the collision with a panicked tenant heedlessly fleeing the scene of a likely fire. This is among the risks ordinarily encountered by firefighters (see generally *Mullen v Zoebel, Inc.*, 86 NY2d 135, 142 [1995]).

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accident, the occupants of the other vehicle attacked the officers resulting in petitioner sustaining serious head injuries. While prosecuting the case against the assailants, an Assistant District Attorney discovered that petitioner's medical records revealed that he was intoxicated at the time of the accident and informed an NYPD sergeant, who then reported the finding to the Internal Affairs Bureau.

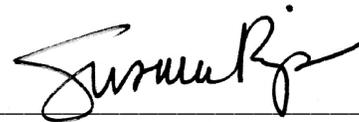
Given that respondents did not dispute the facts and evidence submitted with the petition, which included evidence of petitioner's elevated blood alcohol content at the time of the accident, and argued only that the facts were insufficient to show that the termination of petitioner's probationary employment was violative of law, arbitrary and capricious, or made in bad faith, the court properly converted the cross motion to dismiss to an answer and then decided it on the merits (*see Matter of Chu v New York State Urban Dev. Corp.*, 12 Misc 3d 1229[A], 2006 NY Slip Op 52055[U] [2006], *affd* 47 AD3d 542 [2007]; *cf. 211 W. 56th St. Assoc. v Department of Hous. Preserv. & Dev. of City of N.Y.*, 78 AD2d 793, 794 [1980]).

Even assuming that the Assistant District Attorney violated the Health Insurance Portability and Accountability Act of 1996 upon disclosing the contents of petitioner's medical records to the NYPD, respondents properly relied on records lawfully

obtained from an independent source to conduct the investigation (see 45 CFR 164.506[c][1]). The medical records showing that petitioner was driving while intoxicated provided a rational basis for his dismissal as a probationary police officer and established that the termination was not made in bad faith (see *Matter of Sills v Kerik*, 5 AD3d 247 [2004], *lv denied* 3 NY3d 610 [2004]; see also *Matter of Batista v Kelly*, 16 AD3d 182 [2005]).

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reveals no conflict of interest between the class members and the class representatives. Indeed, plaintiffs seek the same relief as the class members -- to receive the wages and benefits allegedly owed to them under public works contracts. The fact that plaintiffs only worked for defendants until 2004 does not preclude them from serving as the proposed class representatives of those employees who were employed by defendants in 2007, because defendants have not disputed that the commonality requirement of CPLR 901(a)(2) and the typicality requirement of CPLR 901(a)(3) have been met (see *Iglesias-Mendoza v La Belle Farm, Inc.*, 239 FRD 363, 370-371 [SD NY 2007]).

It is the function of the class action representative to act as a check on the attorneys in order to provide an additional assurance that in any settlement or other disposition the interests of the members of the class will take precedence over those of the attorneys (see *Tanzer v Turbodyne Corp.*, 68 AD2d 614, 620-621 [1979]). However, rigid application of this requirement is inappropriate where, as here, the class is comprised of laborers. Indeed, "[s]uch inflexibility runs counter to a principal objective of the class action mechanism -- to facilitate recovery for those least able to pursue an individual action" (*Noble v 93 Univ. Place Corp.*, 224 FRD 330, 344 [SD NY 2004]). Although defendants allude to the proposed

class representatives needing translation of their affidavits from English to Polish, a tenuous grasp of the English language is insufficient to render a putative class representative inadequate (see e.g. *In re Crazy Eddie Sec. Litig.*, 135 FRD 39, 41 [ED NY 1991]).

In addition, it is irrelevant that plaintiffs were employed by defendants as bricklayers yet seek to represent all the trades that were present at the public works construction sites. Indeed, “[t]he fact that different trades are paid on a different wage scale and thus have different levels of damages does not defeat certification” (*Kudinov v Kel-Tech Constr. Inc.*, 65 AD3d 481, 482 [2009]).

As an initial matter, defendants failed to argue before the motion court that plaintiffs could not meet the superiority requirement of CPLR 901(a)(5), because they did not exhaust their administrative remedies under the Labor Law. Therefore, this argument is unpreserved for appellate review (see *Matter of Rucker v NYC/NYPD License Div.*, 78 AD3d 535 [2010]). In any event, that plaintiffs did not exhaust their administrative remedies is again irrelevant, because “the Labor Law is not the exclusive remedy to recover prevailing wages” (*De La Cruz v Caddell Dry Dock & Repair Co., Inc.*, 22 AD3d 404, 405 [2005]). Instead, a “plaintiff class can proceed on . . . common-law

breach of contract claims for underpayment of wages and benefits” (*Pesantez v Boyle Env'tl. Servs.*, 251 AD2d 11, 12 [1998]). Here, the complaint’s first cause of action asserts a claim for breach of the public works contracts. Thus, defendants’ assertion, that because they failed to exhaust their administrative remedies under the Labor Law, plaintiffs failed to show that certification as a class action was superior to individualized causes of action, is without merit. Rather, since the damages allegedly suffered by an individual class member are likely to be insignificant, and the costs of prosecuting individual actions would result in the class members having no realistic day in court, we find that a class action is the superior vehicle for resolving this wage dispute (see *Weinberg v Hertz Corp.*, 116 AD2d 1, 7 [1986], *affd* 69 NY2d 979 [1987]).

We have reviewed defendants’ remaining arguments and find them unavailing.

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ENTERED: MARCH 15, 2011



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notice of claim (see *De La Cruz v New York City Health & Hosps. Corp*, 13 AD3d 130 [2004]; *Matter of McMillan v City of New York*, 279 AD2d 280 [2001]; General Municipal Law § 50-e[5]; cf. *Williams v Nassau County Med. Ctr.*, 6 NY3d 531 [2006]). Contrary to respondent's argument, the delay will not prejudice its defense due to an inability to reconstruct events.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

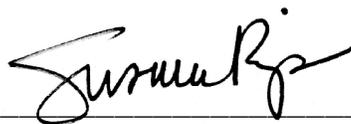
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before March 21, 2011 for said June Term, and the application is otherwise denied, without costs or disbursements.

ENTERED: MARCH 15, 2011

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