

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 15, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

6645 Kevin Haynie, Index 304124/08
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

Cullen and Dykman LLP, Brooklyn (Joseph Miller of counsel), for
appellant.

Asher & Associates, P.C., New York (Robert J. Poblete of
counsel), for respondent.

Order, Supreme Court, Bronx County (Howard R. Silver, J.),
entered December 7, 2010, which denied defendant's motion for
summary judgment dismissing the complaint, reversed, on the law,
without costs, and the motion granted. The Clerk is directed to
enter judgment in favor of defendant dismissing the complaint.

Plaintiff alleges that his trip and fall accident was caused
by a dangerous condition on a pathway to the backyard of
defendant's premises. The large chunks of concrete that
plaintiff knowingly traversed while carrying a 28-foot, 40- to

50-pound ladder was not a dangerous condition as a matter of law. This case is on all fours with *McGrath v Lake Tree Vill. Assoc.* (216 AD2d 877 [1995]) in which the Court held that a property owner was not liable for a dangerous condition where the plaintiff was injured when he walked on a pile of dirt while carrying a 24-foot scaffold pick on his shoulder. Similarly, in *Smith v Curtis Lbr. Co.* (183 AD2d 1018 [1992]), the Court held that the record did not establish the existence of a dangerous condition where a lumberyard patron was injured when he fell from a wet stack of wood that he knowingly stood upon. As the *Smith* Court aptly put it, “[a] defendant is not required to protect a plaintiff from his own folly” (*id.* at 1019; *see also Bisogno v 333 Tenants Corp. Co-Op.*, 72 AD3d 555 [2010] [a pile of Christmas trees placed near a curb held not to be a dangerous condition]; *Fisher v Southland Corp.*, 271 AD2d 403 [2000] [similar conclusion regarding a pile of newspapers]). *Lawson v Riverbay Corp.* (64 AD3d 445 [2009]), which the dissent cites, is distinguishable because the plaintiff in that case claimed to have momentarily

forgotten about a tripping hazard that was obscured by poor lighting conditions (*id.* at 446). Here, by contrast, plaintiff testified that he knew he had to step on the concrete chunks in order to enter the backyard.

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

MANZANET-DANIELS, J. (dissenting)

I would affirm the motion court's order. Triable issues of fact concerning whether the presence of rocks and debris blocking the entranceway to defendant's yard constituted an inherently dangerous condition preclude entry of summary judgment in defendant's favor.

Plaintiff cable technician came to the premises with the intent of disconnecting cable service and retrieving cable equipment from a customer who resided in the building. Since no adult was home who could pay the bill, company rules required that he disconnect the cable box. The cable box was located on the exterior wall of the building, alongside the customer's window. To access the cable box and disconnect the customer's cable service, plaintiff needed to position a ladder against the exterior wall of defendant's building. He needed to set the bottom of the ladder away from the building to prevent it from tipping over when he climbed it. Unfortunately, the pathway was not wide enough for safe placement, and plaintiff had to place the feet of the ladder in the yard on the other side of the pathway. Although a metal fence separated the yard from the pathway, the gate to the yard was open. Plaintiff was required by company rules to disconnect the box so long as it was not

"inaccessible." He testified that his superiors would not consider the box "inaccessible" given that the gate to the yard was open. There were concrete rocks, bricks, and other pieces of masonry debris piled up and blocking the open entranceway to the yard. The record showed that this gate was the only entrance to or exit from the yard, and that plaintiff had no other means of positioning the ladder in order to safely access the cable box other than to carry it over the debris and place it in the yard. The rocks, bricks, and masonry debris had been blocking the entrance to the front yard for between one and two months before the date of plaintiff's accident.

Plaintiff attempted to enter the yard by squeezing through the side of the entrance, where there was less debris, but unfortunately a piece of concrete on which he stepped slipped under his foot, causing him to lose his balance and to fall.

The majority reverses and grants defendant's motion on the basis that the condition in question was "open and obvious" and not inherently dangerous. However, while an open and obvious condition may relieve a landowner of the duty to warn of a dangerous condition, it does not absolve a landowner from the duty to maintain the premises in a reasonably safe condition (see *Cohen v Shopwell, Inc.*, 309 AD2d 560, 562 [2003] ["the duty to

maintain premises in a reasonably safe condition is analytically distinct from the duty to warn, and that liability may be premised on a breach of the duty to maintain reasonably safe conditions even where the obviousness of the risk negates any duty to warn"]; *Cupo v Karfunkel*, 1 AD3d 48, 52 [2003] ["Evidence that the dangerous condition was open and obvious cannot relieve the landowner of this burden. Indeed, to do so would lead to the absurd result that landowners would be least likely to be held liable for failing to protect persons using their property from foreseeable injuries where the hazards were the most blatant"]).

Although summary judgment may be warranted where an open and obvious condition is not inherently dangerous, defendant, in my view, has not demonstrated, as a matter of law, that the pile of rock and debris blocking the entranceway to the yard was not inherently dangerous (see *e.g. Lawson v Riverbay Corp.*, 64 AD3d

445, 446 [2009] [question of fact existed as to whether large cement block situated in walkway constituted an unreasonably dangerous condition]). I would accordingly affirm the order of the motion court denying defendant's motion for summary judgment.

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

ENTERED: MAY 15, 2012

A handwritten signature in black ink, appearing to read "Susan R.", written over a horizontal line.

CLERK

and a not-for-profit advocate for the New York City moving industry, brought this Article 78 proceeding against respondent John C. Liu, Comptroller of the City of New York, seeking to set aside his July 1, 2010 prevailing wage schedule for furniture movers engaged on building service contracts with the City. Petitioners maintained that the methodology used by the Comptroller to set the wage schedule was irrational, arbitrary and capricious, and resulted in wages inordinately higher than those prevailing in the industry. The Comptroller opposed the petition, asserting that his method for determining the prevailing wages was sound and within his broad discretion. The motion court granted the petition to the extent of annulling the wage schedule and remanding the matter to the Comptroller to determine a new schedule. The Comptroller appeals and we now affirm.

Article 9 of the Labor Law sets forth the prevailing wage requirement for building service employees, including furniture movers (see Labor Law § 230[1]). Specifically, Labor Law § 231(1) provides that “[e]very contractor shall pay a service employee under a contract for building service work a wage of not less than the prevailing wage in the locality for the craft, trade or occupation of the service employee.” “Prevailing wage”

is defined as "the wage determined by the fiscal officer to be prevailing for the various classes of building service employees in the locality" (Labor Law § 230[6]).¹

Each year, the Comptroller publishes a schedule setting forth the prevailing wage rates for various trade classifications engaged in work on City contracts. The purpose of the schedule is to establish the wage rate that employers must pay their employees when contracting to provide services to the City. On April 28, 2010, in order to determine the July 2010 prevailing wage schedule for furniture movers, the Comptroller mailed surveys to all known New York State licensed commercial moving industry employers operating in the City. The surveys sought information about how many employees worked with the company, the hourly wages for those employees, and the employees' labor union affiliations, if any.

Approximately 95 moving companies responded to the survey, representing about 2,241 employees. According to the petition, all statistical indicators in the data collected by the Comptroller showed that the wages that actually prevailed in the region were between \$10 and \$20 per hour. The average wage

¹ For the City of New York, the term "fiscal officer" means the Comptroller (Labor Law § 230[8]).

received by movers surveyed was \$19.19; the median wage was \$15.00; and the mode (*i.e.*, the most commonly paid wage) was \$12.00.

On July 1, 2010, the Comptroller published the final prevailing wage schedule for building service employees for the 2010-2011 fiscal year. The hourly wage rates for furniture movers in the Comptroller's schedule are significantly higher than those reflected in the survey results. They range from \$30.63 to \$38.90, based on the worker's status as a "driver" or "helper," as well as the worker's seniority.² Instead of looking to the survey results to determine the prevailing wage, the Comptroller simply used the wages earned by workers covered under the collective bargaining agreement of Local 814 of the International Brotherhood of Teamsters (Local 814). The Comptroller maintains that he used Local 814's agreement because the union represented at least 30% of the moving industry's work force,³ and that this methodology was permitted under the

² The prevailing wage rate has two components: the "hourly cash rate of pay," and the "supplements," which are fringe benefits, expressed as an hourly amount (see Labor Law § 230[5]). These figures represent the sum of these two components.

³ According to the Comptroller, the survey revealed that 31% of the workers belonged to Local 814.

prevailing wage provisions of the Labor Law.

The motion court properly granted the petition to annul the Comptroller's prevailing wage schedule. In an article 78 proceeding, an administrative action can be set aside if it was affected by an error of law, was made in violation of lawful procedure, or was arbitrary, capricious or an abuse of discretion (CPLR 7803). An action is arbitrary if it "is without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Although deference is normally given to an administrative agency's determination, where such determination "runs counter to the clear wording of a statutory provision, it should not be accorded any weight" (*Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270, 285 [2009] [quotation marks omitted]).

We find that the Comptroller's use of Local 814's collective bargaining agreement as the sole basis for determining the prevailing wage schedule was arbitrary, capricious, and lacked a rational basis. There is no question that the survey results show that workers in the moving industry received much lower wages than those listed on the Comptroller's schedule. The data

compiled by the Comptroller indicates that wages of between \$10 and \$20 per hour were prevailing in the moving industry, roughly half of the \$31 to \$39 range that he adopted. According to the survey results, over 70% of the workers received less than \$20.63 per hour, a wage that is a full \$10 less than the lowest wage picked by the Comptroller as "prevailing." More than 80% of the workers received hourly wages lower than the low end of the Comptroller's schedule. Virtually all - 96% - of the workers surveyed were paid wages lower than the high end of the Comptroller's schedule. And, as noted earlier, no matter what statistical method is chosen - average, median or mode - the survey results reveal figures substantially lower than the wages chosen by the Comptroller.

By ignoring the data from his own survey and instead blindly adopting Local 814's rates, the Comptroller failed to comply with the statutory mandate to determine the wage "to be prevailing" (Labor Law § 230[6]), meaning the actual prevailing wage (see *Matter of Action Elec. Contr. Co. v Goldin*, 64 NY2d 213 [1984] [annulling Comptroller's prevailing wage determination because it was based on arbitrary and irrational interpretation of statute]). The Comptroller's exclusive reliance on a labor union agreement that does not reflect wages that are actually

prevailing was arbitrary and capricious (see *Matter of Louis v New York City Employees' Retirement Sys.*, 26 Misc 3d 1236[A], 2010 Slip Op 50426[U][2010] [2010] [agency decision set aside where agency "considered only those tests and reports that supported its denial and ignored those tests and reports that contradicted its position"]).

The Comptroller concedes that he did not base his prevailing wage schedule on the results from the survey. Nevertheless, he argues that in setting the schedule, he had the discretion to use the "30% rule" set forth in Labor Law § 220(5)(a). That provision defines "prevailing rate of wage" as "the rate of wage paid in the locality . . . by virtue of collective bargaining agreements between bona fide labor organizations and employers of the private sector . . . provided that said employers employ at least thirty per centum of workers, laborers or mechanics in the same trade or occupation in the locality where the work is being performed." Thus, the Comptroller argues, since Local 814's workers constituted 31% of the industry's workers, he could rely exclusively on the union's labor agreement to set the schedule.

The primary problem with the Comptroller's position is the statutory provision containing the 30% rule (Labor Law § 220[5][a]) is found in article 8 of the Labor Law, which applies

to laborers, workmen, and mechanics, but does not cover building service employees, such as the movers herein. As noted earlier, prevailing wage schedules for movers are governed by article 9 of the Labor Law, which has its own definition of "prevailing wage" that is different from the definition in article 8. Indeed, § 220(5)(a) explicitly states that the 30% rule applies "for the intents and purposes of *this* article (i.e., article 8)" (emphasis added). Thus, in the face of survey results showing much lower wages than those in the collective bargaining agreement, it was improper for the Comptroller to graft onto article 9 the definition of "prevailing rate of wage" contained in article 8 (see *Matter of Jones v Berman*, 37 NY2d 42, 53 [1975] ["Administrative agencies can only promulgate rules to further the implementation of the law as it exists; they have no authority to create a rule out of harmony with the statute"]).

Finally, there is no merit to the Comptroller's contention that Labor Law § 234(1)(a) gives him the unbridled discretion to use the 30% rule. That section provides that in determining the "wages prevailing," the Comptroller "may utilize wage and fringe benefit data from various sources including, but not limited to, data and determinations of federal, state or other governmental agencies." However, merely because the Comptroller has the

discretion to use various methods does not divest him of his statutory responsibility to determine the wage rate "to be prevailing" (Labor Law § 230[6]). Where, as here, the union contract contains wage rates grossly disproportionate to the other data collected, the Comptroller cannot blindly use the 30% rule while ignoring the other data.

In light of this conclusion, we need not address petitioners' alternative grounds for affirmance.

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

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

ENTERED: MAY 15, 2012


CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

7180 Eduardo Ramos,
Plaintiff-Appellant,

Index 302092/09

-against-

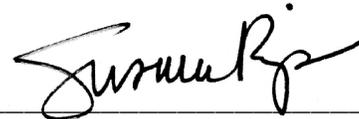
Juan F. Hernandez, et al.,
Defendant-Respondents.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered on or about August 18, 2011,

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 4, 2012,

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 15, 2012



CLERK

Restoration, Inc. and West New York Restoration of CT, Inc. (collectively West New York), which, pursuant to a contract with the Archdiocese, repaired and replaced the sidewalk in 1998.

In opposition to the Church defendants' submission of evidence demonstrating that the sidewalk defect was trivial, plaintiff submitted the affidavit of an engineer who measured the defect at 11/16 of an inch, and opined that it constituted a "substantial defect" under 34 RCNY 2-09(f)(5)(iv). Accordingly, we cannot find, as a matter of law, that the defect was trivial (see *Narvaez v 2914 Third Ave. Bronx, LLC*, 88 AD3d 500 [2011]; *Tese-Milner v 30 E. 85th St. Co.*, 60 AD3d 458 [2009]), and the issue is a question for a finder of fact (*Trincere v County of Suffolk*, 90 NY2d 976, 977-978 [1997]).

The Church defendants also failed to demonstrate that they did not have actual or constructive notice of the condition, which is visible in photographs and which plaintiff testified she had noticed previously (see *Jacobsen v Krumholz*, 41 AD3d 128 [2007]).

Supreme Court properly granted defendant West New York's motion because it offered evidence that it did not have a contract to maintain the sidewalk and had not created the alleged condition as a result of its work on the subject sidewalk about a

decade earlier, and plaintiff failed to submit any evidence to raise an issue of fact as to its responsibility (see *Church v Callanan Indus.*, 99 NY2d 104, 111-112 [2002]; *Izzo v Proto Constr. & Dev. Corp.*, 81 AD3d 898, 899 [2011]; *Dennebaum v Rotterdam Sq.*, 6 AD3d 1045 [2004]). We have considered the parties' remaining contentions and find them unavailing.

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Hudson, 51 NY2d 233, 240 n [1980]). Any discrepancy, regarding timing, between the testimony of the eyewitness and that of the getaway driver presented a factual question for the jury, and we likewise decline to disturb its resolution of that issue.

The evidence also established defendant's accessorial liability (see Penal Law § 20.00) for her codefendant's shooting of the victim. The evidence established that defendant, the codefendant shooter and the driver went to a bar to find the victim. Defendant gave the codefendant a ski mask to cover his face, had a conversation with the codefendant about being ready "to go through with this" and "do what [she] gotta do," went into the bar and located the victim, advised the codefendant of the victim's location in the crowded bar, waited in the car while the codefendant went into the bar, and made sure that the driver continued to wait for the codefendant after the sound of gunfire came from the bar.

Thus, the jury could have readily inferred that defendant's course of conduct evinced knowing and intentional participation in a planned assassination, and not merely her participation in what she believed to be an attempt to obtain money from the victim. The evidence similarly established that, at the time of the crime, defendant specifically intended to cause the death of

this particular victim, even if she formed that intent as the result of mistaking the victim for his brother, who may have been the actual target of the conspiracy.

The court properly exercised its discretion in admitting into evidence a hat and/or ski mask as a model or demonstrative aid (see *People v Del Vermo*, 192 NY 470, 482-483 [1908]). The People's eyewitness was cross-examined about the precise type of mask worn by the gunman alleged to have been the codefendant. On redirect, the court permitted the People to show the witness a mask and ask if it looked like the mask worn by the gunman. The precise description of the mask was at issue and difficult to visualize, so that a model was necessary to assist the jury (compare *People v Mirenda*, 23 NY2d 439, 453 [1969]). Moreover, the defense was permitted to introduce a different kind of mask and elicit testimony from a bartender and a bouncer that this mask, rather than the one introduced by the People, resembled the gunman's mask.

Defendant was not prejudiced by the People's unsuccessful attempt to link defendant and the jointly tried codefendant with the particular mask the People introduced. The court instructed the jury that this mask was not connected to the defendants, and

the jury is presumed to have followed that instruction (see *People v Davis*, 58 NY2d 1102, 1104 [1983]).

We perceive no basis for reducing the sentence.

None of defendant's remaining arguments warrant reversal.

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

ENTERED: MAY 15, 2012

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CLERK

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

7632 Samuel Cosentino, Index 121296/03
Plaintiff-Appellant,

-against-

Sullivan Papain Block
McGrath & Cannavo, P.C.,
Defendant-Respondent.

Law Office of Bernard V. Kleinman, PLLC, White Plains (Bernard V. Kleinman of counsel), for appellant.

Lewis Brisbois Bisgaard & Smith, LLP, New York (Jamie R. Wozman of counsel), for respondent.

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered May 24, 2010, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant made a prima facie showing that between March 25, 1996, when it obtained an order granting a default judgment in plaintiff's favor against the defendants in the underlying personal injury action, and February 8, 2000, the date of the inquest on damages, the underlying defendants did not possess any property that could have satisfied the judgment (*see Lindenman v Kreitzer*, 7 AD3d 30, 35-36 [2004]; *see also Cosentino v Sullivan Papain*, 47 AD3d 599 [2009]). They had neither insurance covering the building in which plaintiff was injured nor assets with which

to respond to the judgment. In opposition, plaintiff failed to present evidence sufficient to raise an issue of fact as to the underlying defendants' ability to satisfy even a portion of the judgment.

To the extent plaintiff argues that he would have recovered on the judgment but for defendant's alleged failure to advise him that a viable fraudulent conveyance action existed against the underlying defendants, the argument is unavailing, since there is no record support for any fraudulent conveyance claim (see *Cabrera v Ferranti*, 89 AD2d 546, 547 [1982], appeal dismissed 67 NY2d 869 [1986]).

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

ENTERED: MAY 15, 2012



CLERK

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

7633 Erving Van Buren, Index 18924/07
Plaintiff-Respondent,

-against-

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

Wallace D. Gossett, Brooklyn (Jane Shufer of counsel), for
appellants.

Law Offices of Michael G. O'Neill, New York (Theresa B. Wade of
counsel), for respondent.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-
Hughes, J.), entered November 22, 2010, which granted plaintiff's
motion for leave to amend the notice of claim and to reargue a
prior order granting defendants summary judgment, and, upon
reargument, denied defendants' motion for summary judgment,
unanimously modified, on the law, to deny plaintiff's motion to
amend his notice of claim, and otherwise affirmed, without costs.

The motion court erred in granting leave to amend the notice
of claim pursuant to General Municipal Law § 50-e(6) "since the
statute only 'authorizes the correction of good faith,
nonprejudicial, technical defects or omissions, not substantive

changes in the theory of liability'” (*Donaldson v New York City Hous. Auth.*, 91 AD3d 550 [2012], quoting *Scott v City of New York*, 40 AD3d 408, 410 [2007]). Plaintiff’s proposed amendment impermissibly sought to change the theory of liability from a slip and fall on water that had accumulated inside defendants’ bus through an open vent, to add the additional causative factor of the bus driver suddenly moving the bus forward before plaintiff had exited the rear doors (see *Santana v New York City Tr. Auth.*, 88 AD3d 539 [2011]; *Torres v New York City Hous. Auth.*, 261 AD2d 273 [1999], *lv denied* 93 NY2d 816 [1999]).

Nevertheless, the court properly denied summary judgment to defendants, who failed to meet their burden of demonstrating entitlement to summary judgment on plaintiff’s theory of the accumulated water (see *Torres v New York City Tr. Auth.*, 79 AD3d 553 [2010]).

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

ENTERED: MAY 15, 2012



CLERK

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

7634-

7635 In re Marah B.,

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

Lee D.,
Respondent-Appellant,

Edwin Gould Services for
Children and Families,
Petitioner-Respondent.

Carol Kahn, New York, for appellant.

John R. Eyerman, New York, for respondent.

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

Appeal from order, Family Court, Bronx County (Monica
Drinane, J.), entered on or about March 10, 2011, which,
following a fact-finding hearing, determined that respondent
father had permanently neglected the subject child, and decision,
same court and Justice, entered on or about July 15, 2011, deemed
to be an appeal taken from the final order of disposition, same
court and Justice, entered on or about August 19, 2011, which
terminated respondent's parental rights to the child and placed
her in the custody of petitioner and the Administration for
Children's Services for the purpose of adoption by her foster

mother, and as so considered, order of disposition unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence. Petitioner engaged in diligent efforts to strengthen respondent's relationship with the child by making referrals for appropriate services, monitoring his progress with the services, scheduling visitation, and providing a visiting coach to assist respondent during visits with the child (see *Matter of Victor B. [Yvonne B.]*, 91 AD3d 458, 458-459 [2012]; *Matter of Emily Rosio G. [Milagros G.]*, 90 AD3d 511 [2011]).

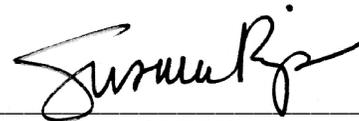
Despite these diligent efforts, respondent failed to consistently comply with the services, including mental health services, failed to benefit from the services, and sporadically attended visitation. The court properly found that respondent's efforts over the more than four-year period were insufficient, and that, as a result, he failed to plan for the child's future (*id.*).

A preponderance of the evidence demonstrates that it is in the best interests of the child to terminate the respondent's parental rights in order to free the child for adoption by her

maternal grandmother with whom she has lived nearly her entire life and who wishes to adopt her. A suspended judgment is not warranted because respondent failed to make sufficient progress in overcoming his mental health issues.

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ENTERED: MAY 15, 2012

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CLERK

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

7636 & Federated Retail Holdings, Inc., Index 604104/06
M-1859 et al.,
Plaintiffs-Respondents,

-against-

Weatherley 39th Street, LLC, etc.,
Defendant-Appellant.

Wilk Auslander LLP, New York (M. William Scherer of counsel), for
appellant.

Loeb & Loeb LLP, New York (David M. Satnick of counsel), for
respondents.

Order, Supreme Court, New York County (Bernard J. Fried,
J.), entered April 11, 2011, granting plaintiff tenant's motion
and declaring it cured a lease default concerning the self-
insured retention provisions of commercial insurance policies
obtained for the benefit of defendant landlord and that landlord
cannot terminate plaintiff's lease based upon that default,
unanimously affirmed, with costs.

The primary issue on this appeal is whether tenant was able
to cure a lease default caused by the presence of a self-insured
retention in the excess/umbrella insurance policies obtained for
the benefit of landlord. Landlord makes vague, ultimately
irrelevant, policy arguments and cites to an opinion of the New

York State Insurance Department which is not binding on any court (see *Goll v N.Y. State Bar Assn.*, 193 AD2d 126, 128 [1993]).

Landlord cites no case law, regulation or other rule of law standing for the proposition that a self-insured retention may not be eliminated through the use of an endorsement to the original occurrence based policy, which covers the same policy period. Accordingly, the motion court properly granted the motion and correctly declared that the lease default has been cured and the lease cannot be terminated based upon that default.

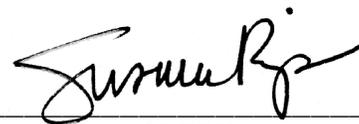
We have considered landlord's remaining arguments and find them unavailing.

M-1859 - *Federated Retail Holdings, Inc., et al., v Weatherley 39th Street, LLC, etc.*

Motion for an order modifying a *Yellowstone* injunction denied.

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

ENTERED: MAY 15, 2012



CLERK

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

7637- Rita W. Gordon, Index 106645/06
7637A Plaintiff-Appellant,

-against-

Samuel Kadet, et al.,
Defendants-Respondents.

Balestriere Fariello, New York (John G. Balestriere of counsel),
for appellant.

Proskauer Rose LLP, New York (Bettina B. Plevan of counsel), for
respondents.

Order, Supreme Court, New York County (Milton A. Tingling,
J.), entered May 26, 2011, which granted defendants' motion for
summary judgment dismissing the complaint, and order, same court
and Justice, entered June 1, 2011, which denied plaintiff's
motion to amend the complaint as moot, unanimously affirmed, with
costs.

In this discrimination action, plaintiff alleges that the
defendant law firm terminated her because of her age and gender.
The motion court properly determined that plaintiff failed to
meet her burden of showing that she was discharged under
circumstances giving rise to an inference of discrimination (see
Bennett v Health Mgt. Sys., Inc., 92 AD3d 29, 35 [2011]; *Hazen v
Hill Betts & Nash, LLP*, 92 AD3d 162 [2012]). Even assuming

arguendo that plaintiff had met that burden, defendant law firm offered legitimate, non-discriminatory reasons for plaintiff's termination since she had engaged in misconduct by, over a period of several years, using a car service hundreds of times in violation of defendant's policy. Plaintiff would commute to and from her home, and to her personal appointments and the office, and then charge those trips to various clients. Plaintiff failed to show that defendants' stated reasons for her termination were false or pretextual or that defendants were motivated by discrimination (see *Bennett*, 92 AD3d at 39).

The motion court did not abuse its discretion in denying plaintiff's motion to amend the complaint to add a claim under New York Judiciary Law § 487 and to add a partner at the law firm as a party. Plaintiff failed to allege facts demonstrating that the law firm or its partners intended to commit deception in a

letter to the Departmental Disciplinary Committee reporting plaintiff's misconduct.

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

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 15, 2012

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CLERK

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

7638 Brady Rosario, etc., Index 350192/09
Plaintiff-Appellant,

-against-

Chico Car Inc., et al.,
Defendants-Respondents.

Law Offices of Arnold Treco, Jr., PLLC, Bronx, (Arnold Treco of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for Chico Car Inc. and Farides Perez, respondents.

Cartafalsa, Slattery, Turpin & Lenoff, New York (Paul Loumeau of counsel), for Autorama Enterprises and Manuel A. Reyes, respondents.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered March 22, 2011, which, in an action for personal injuries arising out of a motor vehicle accident, granted the motion of defendants Autorama Enterprises and Manuel A. Reyes and the cross motion of defendants Chico Car Inc. and Farides Perez for summary judgment dismissing the complaint, unanimously modified, on the law, to the extent of reinstating plaintiff's claim of serious injury to his lumbar spine, and otherwise affirmed, without costs.

Defendants established prima facie their entitlement to

judgment as a matter of law. Although two of defendants' experts found significant limitations in the range of motion of plaintiff's lumbar spine, defendants nevertheless established that plaintiff's alleged injury was not caused by the accident (see *Spencer v Golden Eagle, Inc.*, 82 AD3d 589 [2011]).

Defendants' radiologist viewed the MRI image of plaintiff's lumbar spine, taken about one month after the accident, and found that it revealed "a congenital variant, a transitional vertebra" that "has no traumatic basis or association with the accident."

Plaintiff, who was seven years old at the time of the accident, raised a triable issue of fact. Plaintiff submitted, inter alia, the affirmation of a doctor who, upon a physical examination and review of plaintiff's medical records, including MRI reports, opined that plaintiff suffered permanent and significant injury to his lumbar spine as a direct result of the accident (see *Pommells v Perez*, 4 NY3d 566, 576, 577 n 5 [2008]; *Williams v Perez*, 92 AD3d 528, 529 [2012]). Moreover, plaintiff adequately explained the alleged gap in treatment. His father testified that plaintiff attended physical therapy for about five months after the accident, but stopped because it became palliative, his benefits expired, and he could not afford to pay

out of pocket (see *Pommells* at 577; *Mercado-Arif v Garcia*, 74 AD3d 446, 447 [2010]).

Defendants met their burden with respect to the 90/180-day claim. Defendants relied on the deposition testimony of plaintiff and his father, and plaintiff failed to raise an issue of fact in opposition (see *Gaddy v Eycler*, 79 NY2d 955, 958 [1992]).

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

ENTERED: MAY 15, 2012

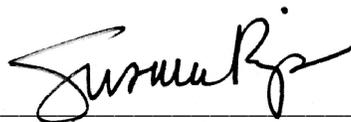
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CLERK

level two. The court properly determined that although defendant received points relating to the facts of the underlying sex crime, the risk assessment instrument failed to adequately take into account the crime's unusual brutality and heinous quality (see e.g. *People v Miller*, 48 AD3d 774 [2008], lv denied 10 NY3d 711 [2008]; *People v Sanford*, 47 AD3d 454, lv denied 10 NY3d 707 [2008]). These aggravating factors outweighed the mitigating factors cited by defendant.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 15, 2012

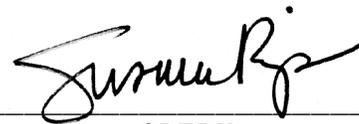
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defense to plaintiff's federal claims. Initially, equitable estoppel does not apply to the "Doe" defendants, as it is the City, not the "Doe" defendants, who are alleged to have concealed the names of the two correction officers involved in the alleged assault. In any event, the application of equitable estoppel would be inappropriate as a matter of law, since plaintiff has failed to show due diligence in ascertaining the names of the officers (see *Pahlad v Brustman*, 33 AD3d 518, 520 [2006], *affd* 8 NY3d 901 [2007]). Further, there is no evidence in the record that defendants lulled plaintiff into inaction in order to allow the statute of limitations to expire (*East Midtown Plaza Hous. Co. v City of New York*, 218 AD2d 628, 628 [1995]).

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

ENTERED: MAY 15, 2012

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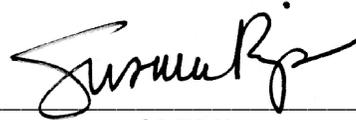
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law, without costs, and the motion denied.

Although defendant met its prima facie burden, plaintiffs' submissions are sufficient to raise questions of fact.

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

ENTERED: MAY 15, 2012

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CLERK

article 78 proceeding (see *People v Nieves*, 2 NY3d 310, 313 n 2 [2004]; *People v Young*, 161 AD2d 367 [1990]).

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

ENTERED: MAY 15, 2012

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The MTA defendants established prima facie entitlement to judgment as a matter of law by submitting evidence showing that the bus operated by Torres and owned by MTA Bus Company had come to a complete stop before it was struck in the rear by a police vehicle in which plaintiff police officer was a passenger (see *Morales v Morales*, 55 AD3d 306, 307 [2008]). In opposition, plaintiff failed to provide a nonnegligent explanation for the rear-end collision sufficient to establish an issue of fact regarding the MTA defendants' negligence (*id.*). That the bus came to a sudden stop was insufficient to raise a triable issue of fact (see *Francisco v Schoepfer*, 30 AD3d 275, 276 [2006]). Nor did Torres' alleged failure to yield to the emergency police vehicle raise a triable issue of fact, as such a failure would not relieve defendant Martucci, the operator of the police vehicle, from driving with reasonable care (see Vehicle and Traffic Law § 1144[b]). Furthermore, it was unconverted that the bus could not have moved any further to the right side of Lexington Avenue because of a double-parked car in front of it on the right side.

The City defendants established prima facie entitlement to judgment as a matter of law by submitting evidence showing that the failure of the police vehicle's brakes was unanticipated and

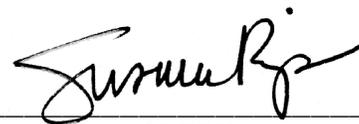
that the City had exercised reasonable care in keeping the brakes and the rest of the vehicle in good working order (see 34 RCNY 4-09[a]; Vehicle and Traffic Law § 375[1][a]; see generally *Normoyle v New York City Tr. Auth.*, 181 AD2d 498, 498 [1992]; *Liana v Atacil Contr.*, 212 AD2d 673, 673-674 [1995]). In opposition, plaintiff failed to raise a triable issue of fact.

To the extent plaintiff seeks to impose liability on the City for Martucci's alleged negligence in operating the police vehicle while responding to an emergency call, such a claim is barred by the firefighters' rule (see *Cooper v City of New York*, 81 NY2d 584, 589-592 [1993]; see generally *Flynn v City of New York*, 258 AD2d 129, 135-136 [1999]).

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 15, 2012



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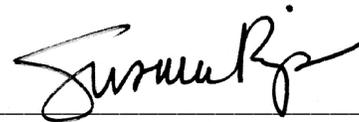
supported by substantial evidence showing that the police recovered marijuana during an execution of a search warrant in February 2008, and methadone during an execution of a warrant in June 2008 (*Matter of Diaz v Hernandez*, 66 AD3d 525, 525-526 [2009]). Further, the finding that petitioner violated a permanent exclusion is supported by substantial evidence showing that the father of petitioner's youngest child was the target of the search warrants and was in petitioner's apartment during both searches, although he was permanently excluded from the apartment under a 2006 stipulation (see *Matter of Romero v Martinez*, 280 AD2d 58 [2001], *lv denied* 96 NY2d 721 [2001]). No basis exists to disturb the hearing officer's findings of credibility (*Matter of Porter v New York City Hous. Auth.*, 42 AD3d 314 [2007]).

The penalty imposed does not shock our sense of fairness (see *Matter of Featherstone v Franco*, 66 AD3d 550, 555 [2009]).

We have considered petitioner's remaining contentions, including those involving her rent delinquency, and find them unavailing.

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

ENTERED: MAY 15, 2012

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CLERK

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

7652-

7652A Julio Nieves,
Plaintiff-Appellant,

Index 100118/06

-against-

The City of New York,
Defendant-Respondent.

The Law Offices of Christie L. McEvoy-Derrico, Mamaroneck
(Christie L. McEvoy-Derrico of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Jessica
Wisniewski of counsel), for respondent.

Order, Supreme Court, New York County (Lottie E. Wilkins,
J.), entered on or about September 17, 2009, which granted
defendant's motion pursuant to CPLR 4401 to dismiss the
complaint, made before the close of the plaintiff's case,
unanimously reversed, on the law, without costs, defendant's
motion denied, the complaint reinstated, and the matter remanded
for a new trial. Appeal from an order, same court and Justice,
entered April 22, 2010, which denied plaintiff's motion pursuant
to CPLR 5015(a)(2) and (3) to vacate the order entered on or
about September 17, 2009, unanimously dismissed, without costs,
as academic.

The order granting defendant's motion to dismiss the

complaint is properly before this Court, as an appeal was taken from that order. In any event, we exercise our discretion to disregard any defect in the notice of appeal (see CPLR 5520[c]).

Dismissal of the complaint pursuant to CPLR 4401, after the jury was impaneled, but before plaintiff had rested and his engineering expert had testified, was premature (see *Alevy v Uminer*, 88 AD3d 477, 477-478 [2011]). "A motion for judgment as a matter of law is to be made at the close of an opposing party's case or at any time on the basis of admissions (see CPLR 4401), and the grant of such a motion prior to the close of the opposing party's case generally will be reversed as premature even if the ultimate success of the opposing party in the action is improbable" (*Burbige v Siben & Ferber*, 89 AD3d 661, 662 [2011]). Here, the dismissal was not based on admissions by plaintiff and the judgment must be reversed and a new trial granted.

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

ENTERED: MAY 15, 2012



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as a matter of law. The indictment of plaintiff by a grand jury "create[d] a presumption of probable cause" for his arrest (*Colon* at 82), and plaintiff's opposition failed to raise a triable issue of fact to rebut this presumption. There is a lack of support for plaintiff's argument that there was no probable cause for his arrest because the search warrant underlying his arrest and indictment was based on false information provided by an confidential informant who was not shown to be reliable. Indeed, there is no indication that plaintiff made an effort in this action to discover the identity of the confidential informant or ascertain whether the informant's information was false.

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 15, 2012

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circumstances, as to be shocking to one's sense of fairness" (see *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974] [internal quotation marks omitted]; *Matter of Alarape v New York City Dept. of Hous. Preserv. & Dev.*, 55 AD3d 316 [2008], *lv denied* 12 NY3d 801 [2009]).

Petitioner failed to preserve her argument that the termination of her Section 8 rent subsidy was contrary to HPD's administrative plan, as she never asserted this claim at the agency level (see *Matter of Melendez v Cestero*, 79 AD3d 603, 603 [2010]). As an alternative holding, we conclude that HPD's determination was in accordance with the administrative plan, since the documents petitioner submitted in connection with the pretermination conference confirmed that she did not comply with the requirement to report all household income (*id.* at 603-604).

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

ENTERED: MAY 15, 2012



CLERK

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

7656 Churchill Financial Cayman, Ltd., Index 602998/09
Plaintiff-Appellant,

-against-

BNP Paribas,
Defendant-Respondent.

Foley & Lardner LLP, New York (Peter N. Wang of counsel), for
appellant.

Davis & Gilbert LLP, New York (David S. Greenberg of counsel),
for respondent.

Order, Supreme Court, New York County (Charles Edward Ramos,
J.), entered December 2, 2010, which granted defendant's motion
to dismiss the amended complaint's first cause of action,
unanimously affirmed, with costs.

The motion court correctly held that defendant had no duty
to speak regarding the class action. "[A]bsent a fiduciary duty
or some other independent duty owed by [defendant alleged aider
and abettor] to the [plaintiff]," there is no duty to disclose,
and, thus, defendant's silence does not constitute the requisite
"substantial assistance" to sustain a claim for aiding and
abetting fraud (see *Stanfield Offshore Leveraged Assets, Ltd. v
Metropolitan Life Ins. Co. Credit Suisse First Boston (USA)*, 64
AD3d 472, 476 [2009], *lv denied* 13 NY3d 709 [2009]; see also *King*

v Schonberg & Co., 233 AD2d 242, 243 [1996]). Contrary to plaintiff's contention, the documentary evidence proffered by defendant demonstrated that defendant was silent in response to plaintiff's question regarding outstanding legal matters, and thus had no duty to address the class action.

In any event, even assuming defendant had a duty to address the class action, plaintiff could not have justifiably relied on defendant's silence. The existence and particulars of that lawsuit were matters of public record which plaintiff could have discovered using ordinary diligence (see *National Union Fire Ins. Co. of Pittsburgh, Pa. v Red Apple Group*, 273 AD2d 140, 141 [2000]). Moreover, the principle that parties, who are not in a fiduciary or confidential relationship, and deal with each other at arms length, cannot justifiably rely on the other side's failure to disclose matters of public record and/or matters discoverable by using ordinary diligence, assumes added significance, where, as here, plaintiff is a sophisticated commercial entity (see *HSH Nordbank AG v UBS AG*, ___ AD3d ___, ___, 2012 NY Slip Op 02276, *7 [2012]; *Alpha GmbH & Co. Schiffsbesitz KG v BIP Indus. Co.*, 25 AD3d 344, 345 [2006], *lv dismissed* 7 NY3d 741 [2006]; see also *Ventur Group, LLC v Finnerty*, 68 AD3d 638, 639 [2009]).

Furthermore, plaintiff was specifically advised in the Confidential Information Memorandum of certain unspecified litigation. Thus, a sophisticated lender, such as plaintiff, had a duty to follow-up and make its own independent analysis regarding the "materiality" of that litigation. Under the circumstances, plaintiff's failure to perform any independent analysis of whether a specifically disclosed risk factor (i.e., litigation) could have a material adverse effect on the borrower's financial condition defeats its assertion of justifiable reliance (see *HSH Nordbank AG*, __ AD3d __, __, 2012 NY Slip Op 02276, *17-18; *Ventur Group LLC*, 68 AD3d at 639).

Moreover, plaintiff could not justifiably rely on defendant's lack of specific response to its general question regarding "any outstanding legal, tax, related matters," as meaning that previously disclosed, but unspecified, litigations were not material. Here again, plaintiff had a duty to conduct, at a minimum, a basic independent investigation and assessment of the borrower's litigation risk and exposure, and not to blindly rely on the inference it allegedly drew from defendant's silence

(see *Permasteelisa S.p.A. v Lincolnshire Mgt., Inc.*, 16 AD3d 352 [2005]).

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

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

ENTERED: MAY 15, 2012



CLERK

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

7657 In re Jada Dorithah Solay McC.,

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

Crystal Delores McC.,
Respondent-Appellant,

Edwin Gould Services for Children and Families,
Petitioner-Respondent.

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

John R. Eyerman, New York, for respondent.

Carol Kahn, New York, attorney for the child.

Order of disposition, Family Court, Bronx County (Monica
Drinane, J.), entered on or about April 18, 2011, which, upon a
fact-finding determination of permanent neglect, terminated
respondent mother's parental rights to the subject child, and
placed her in the custody of petitioner agency and the
Commissioner of Social Services for the purpose of adoption,
unanimously affirmed, without costs.

Clear and convincing evidence established that despite
diligent efforts on the part of the agency, respondent failed to
complete her service plan by failing to complete drug treatment.
Respondent continually failed to attend intake appointments set

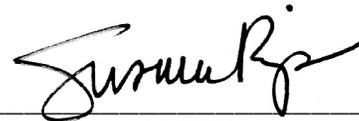
up via the agency's numerous referrals. Respondent's actions evinced a failure to plan for the child's return, thereby demonstrating permanent neglect within the meaning of the Social Services Law (see *Social Services Law* § 384-b[7][a]; *Matter of Fernando Alexander B. [Simone Anita W.]*, 85 AD3d 658, 659 [2011]; *Matter of Adaliz Marie R. [Natividad G.]*, 78 AD3d 409, 410 [2010]).

In addition, a preponderance of the evidence established that it is in the child's best interest that respondent's parental rights be terminated so that the child could be freed for adoption (see *In re Guardianship of Star Leslie W.*, 63 NY2d 136, 147-48 [1984]). Respondent still had not completed a drug treatment program by the time of disposition. Meanwhile, the child, who was removed from respondent's care six days after birth, is now over three years old, and has lived virtually her entire life in the same pre-adoptive foster home with her other siblings. In addition, the foster parents, who wish to adopt the child, have been tending to her special needs and she has been

thriving in their care. Under such circumstances, a suspended judgment is not appropriate (see e.g. *In re Jayden C.*, 82 AD3d 674, 675 [2011], *Matter of Omar Saheem Ali J. v Matthew J.*, 80 AD3d 463 [2011]).

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

ENTERED: MAY 15, 2012

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CLERK

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

7659 Nouveau Elevator Industries, Inc., Index 381012/09
 Plaintiff-Appellant,

-against-

Tracey Towers Housing Co., etc., et al.,
Defendants-Respondents,

New York State Department of
Taxation and Finance, et al.,
Defendants.

Chesney & Nicholas, LLP, Baldwin (Joyce G. Bigelow of counsel),
for appellant.

Reed Smith LLP, New York (James M. Andriola of counsel), for
respondents.

Order, Supreme Court, Bronx County (Ben R. Barbato, J.),
entered May 9, 2011, which, insofar as appealed from as limited
by the briefs, denied plaintiff's motion for a default judgment,
granted defendants-respondents' cross motion to compel plaintiff
to accept their answer, and granted defendants-respondents R.Y.
Management Co., Inc. and Leon D. DeMatteis Construction Corp.'s
motion to dismiss the complaint as against them, unanimously
modified, on the law, to the extent of granting plaintiff's
motion for a default judgment in the sum of \$2,314,955.43 as
against defendant-respondent Tracey Towers Housing Co., Inc. on
all causes of action, and as against defendants-respondents

Tracey Towers Associates and Leon D. DeMatteis Construction Corp. on the fourth cause of action, denying the cross motion to compel plaintiffs to accept defendants-respondents' answer, denying respondents R.Y. Management Co., Inc. and Leon D. DeMatteis Construction Corp.'s motion to dismiss the complaint as against them, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly in favor of plaintiff against Tracey Towers Housing Co., Inc., Tracey Towers Associates and Leon D. DeMatteis Construction Corp.

Plaintiff demonstrated entitlement to a default judgment on the first cause of action for account stated as against Tracey Towers Housing Co. by submitting proof of service, proof of default, and proof that it presented Tracey Towers Co. with an account balance of \$2,314,955.43 without objection (see CPLR 306, 3215; *Gurney, Becker & Bourne v Benderson Dev. Co.*, 47 NY2d 995, 996 [1979]; *Interman Indus. Prods. v R.S.M. Electron Power*, 37 NY2d 151, 153-156 [1975]; *Public Broadcast Mktg., Inc. v Trustees of Univ. of Pa.*, 216 AD2d 103, 103 [1995]). Plaintiff is also entitled to that sum as against Tracey Towers Housing Co. by virtue of the third cause of action for breach of the parties' December 3, 2008 agreement, and failure to pay for goods and services rendered thereafter.

Plaintiff also demonstrated a meritorious claim as against Tracey Towers Housing Co. for \$2,314,955.43, pursuant to CPLR 3016(f), by submitting the itemized schedule detailing their entitlement thereto, along with the verified complaint explaining the validity thereof and alleging failure to pay for those goods and services (see *Merrill/New York Co. v Celerity Sys.*, 300 AD2d 206 [2002]; *Marinelli v Shifrin*, 260 AD2d 227 [1999]).

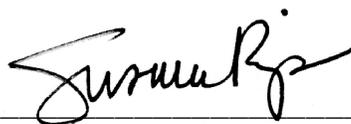
Plaintiff also established its entitlement to foreclosure of the mechanic's liens as against Tracey Towers Co., Tracey Towers Associates, and Leon D. DeMatteis Construction Corp., each of which is alleged by the verified complaint to have an ownership interest in the subject properties. Plaintiff commenced this action within one year of filing the liens, and submitted documentary evidence, including the service contract, the invoices, and the settlement letter, showing that it was hired by Tracey Towers Housing Co. to service the properties' elevators, but was not fully paid for its work (see Lien Law §§ 3, 19[2], 24, 41; *First Sealord Sur., Inc. v Vesta 24 LLC*, 55 AD3d 423 [2008]; *240-35 Assoc. v Major Bldrs. Corp.*, 234 AD2d 234 [1996]).

Supreme Court should have denied respondents' cross motion to compel plaintiff to accept their untimely answer because they failed to show a reasonable excuse for defaulting (CPLR 3012

[d]). The summons and complaint were served on May 29, 2009, and to avoid defaulting, defendants were required to appear no later than June 29, 2009 (see CPLR 311[a], 320[a]; General Construction Law § 25-a[1]). Thus, any reasonable excuse for defaulting must have occurred before June 29, 2009 (see *McGuire v Cousar Painting Co.*, 282 AD2d 906 [2001]). The record belies defendants' contentions that any settlement negotiations occurred before June 29, 2009, and, thus, defendants failed to offer a reasonable excuse for defaulting (see *Collier, Cohen, Crystal & Bock v Fisher*, 206 AD2d 260 [1994]). This default also warrants denial of defendants R.Y. Management Co., Inc. and Leon D. DeMatteis Construction Corp.'s untimely motion to dismiss (see CPLR 3211[e]).

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

ENTERED: MAY 15, 2012

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CLERK

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

7660 In re Giannis F.,

Child Under The Age of
Eighteen Years, etc.,

Vilma C.,
Respondent-Appellant,

Manny M.,
Respondent,

The Administration for Children's
Services,
Petitioner-Respondent.

Debevoise & Plimpton LLP, New York (Marta M. Castaing of
counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Avshalom Yotam
of counsel), for Administration for Children Services,
respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Claire V.
Merkine of counsel), attorney for the child.

Order, Family Court, Bronx County (Carol R. Sherman, J.),
entered on or about October 14, 2011, which granted the
application of the attorney for the child alleged to have been
abused to permit the child to testify at the fact-finding hearing
through two-way closed circuit television, subject to
contemporaneous cross-examination by the parties, unanimously
affirmed, without costs.

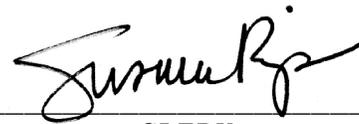
The court properly balanced respondent mother's due process rights with the emotional well-being of the child in permitting the child to testify to years of sexual abuse by her stepbrother, which the mother did not believe took place, outside their presence, but visible via closed-circuit television and subject to contemporaneous cross-examination (*Matter of Q.-L.H.*, 27 AD3d 738, 739 [2006] ["(t)he Family Court must balance the due process rights of an article 10 respondent with the mental and emotional well being of the child [witness]"]. The affidavit of the social worker who interviewed the child on multiple occasions and who spoke with a social worker at the facility where the child was being treated sufficiently established the potential trauma to the child, which would likely interfere with her ability to testify accurately and without inhibition (see *id.*; *Matter of Arlenys B. [Aneudes B.]*, 70 AD3d 598, 599 [2010]).

An evidentiary hearing was not required where the mother failed to present evidence that raised issues concerning the social worker's assessment of the risk of harm to the child or to

her expertise (see e.g. *Matter of Jessica R.*, 78 NY2d 1031, 1033 [1991]).

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

ENTERED: MAY 15, 2012

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CLERK

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

7663 Kateri Residence, etc., et al., Index 102836/06
 Plaintiffs-Respondents-Appellants,

-against-

 Antonia C. Novello, M.D., etc., et al.,
 Defendants-Appellants-Respondents.

Eric T. Schneiderman, Attorney General, New York (Sudarsana Srinivasan of counsel), for appellants-respondents.

Bernfeld, Dematteo & Bernfeld, LLP, New York (Jeffrey L. Bernfeld and David B. Bernfeld of counsel), for respondents-appellants.

Order and judgment (one paper), Supreme Court, New York County (Paul G. Feinman, J.), entered April 15, 2010, which, inter alia, granted plaintiffs' motion for partial summary judgment to the extent of adjudging and declaring that defendants' inclusion of reserved bed patient days in the total of patient days in the calculation of plaintiffs' base per diem Medicaid rate is invalid, and directing defendants to recalculate plaintiffs' Medicaid rates accordingly, and granted defendants' cross motion for partial summary judgment to the extent of dismissing as moot the "rebasings" claims of plaintiffs Skyview Haven Nursing Home, Palm Gardens Nursing Home, Palm Tree Nursing Home, Elant at Newburgh, Inc., Eastchester Park Nursing Home, Split Rock Nursing Home, German Masonic Home Corp., Cedar Manor,

Inc., New Sans Souci Nursing Home, Terence Cardinal Cooke Health Care Center, St. Vincent de Paul Nursing Home, Glen Arden, Inc., and Elant at Goshen, Inc., unanimously modified, on the law and the facts, to the extent of vacating the grant of defendants' cross motion, reinstating the "rebasings" claims for time periods that were not yet rebased, remanding the cross motion for further proceedings, and otherwise affirmed, without costs.

While deference is generally given to an agency's interpretation of its regulations, Supreme Court properly concluded that the Department of Health's (DOH) inclusion of reserved bed patient days in the total of patient days when calculating plaintiff nursing facilities' base per diem Medicaid reimbursement rate, is irrational, unreasonable and contrary to the plain language of 10 NYCRR 86-2.8 – the controlling regulation (see *Matter of Nazareth Home of the Franciscan Sisters v Novello*, 7 NY3d 538, 544 [2006]; *Matter of Visiting Nurse Serv. of N.Y. Home Care v New York State Dept. of Health*, 5 NY3d 499, 506 [2005]). Indeed, the regulation makes clear that "patient days" and "reserved bed patient days" are mutually exclusive, are to be calculated separately, and bear no relation to each other (10 NYCRR 86-2.8[a],[d]).

In addition, DOH is collaterally estopped from relitigating

this issue. In a prior administrative decision by the Department of Social Services (DSS) entitled *Matter of Ramapo Manor Nursing Home* (FH No. 2239398Y at 7), the Administrative Law Judge (ALJ) determined that 10 NYCRR 86-2.8(d) prohibits reserved bed days from being included in and treated as patient days. There is no dispute that the issue in *Ramapo* was identical to the issue here, that there was a full and fair opportunity to litigate the issue before the ALJ, and that DOH was in privity with DSS (see *Jeffreys v Griffin*, 1 NY3d 34, 39 [2003]; *Ryan v New York Tel. Co.*, 62 NY2d 494, 499 [1984]). Contrary to defendants' contention, the issue in *Ramapo* – namely, whether auditors accurately computed the number of patient days – was a mixed question of law and fact and was within DSS's purview (see *Matter of Nyack Nursing Home v Dowling*, 230 AD2d 42, 43 n 1 [1997]). Further, we note that DOH never took any action to abrogate or challenge the administrative decision, and, in fact, complied with the decision and recalculated Ramapo Manor's rate for the years covered in the administrative proceeding and all subsequent years.

While defendants concede that 4 of the 13 rebasing claims at issue are not moot to the extent they involve time periods before the effective date of rebasing, they do not support their

contention that the remaining claims are moot, and we find that no basis exists for finding them moot. Accordingly, we reinstate the claims to the extent indicated. Because Supreme Court did not reach defendants' other arguments for dismissal of the 13 claims, we remand for consideration of those arguments.

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

ENTERED: MAY 15, 2012

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CLERK

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

7664-

7665-

7666-

7666A 1861 Capital Master Fund, LP, Index 650214/08
 Plaintiff-Appellant,

-against-

Wachovia Capital Markets, LLC,
Defendant-Respondent.

- - - - -

1861 Capital Master Fund, LP,
Plaintiff-Respondent-Appellant,

-against-

Wachovia Capital Markets, LLC,
Defendant-Appellant-Respondent.

Dewey Pegno & Kramarsky LLP, New York (David S. Pegno of
counsel), for appellant/respondent-appellant.

Rosner Nocera & Ragone, LLP, New York (John A. Nocera of
counsel), for respondent/appellant-respondent.

Orders, Supreme Court, New York County (Bernard J. Fried,
J.), entered August 5, 2011 and August 8, 2011, which, insofar as
appealed from, denied that part of the motion of defendant
Wachovia Capital Markets, LLC for partial summary judgment
dismissing the claim of plaintiff 1861 Capital Master Fund, LP
for consequential damages, granted that part of Wachovia's motion
seeking dismissal of 1861 Capital's claim for the initial

\$250,000 commitment fee paid by 1861 Capital to Wachovia, and denied in part plaintiff's motion for summary judgment on the issue of liability, unanimously modified, on the law, to the extent of granting 1861 Capital summary judgment on the issue of liability with damages recoverable to extent it can be shown that 1861 Capital was ready, willing and able to perform, and otherwise affirmed, without costs. Order, same court and Justice, entered November 16, 2011, which granted Wachovia's motion to preclude the report of 1861 Capital's damages expert to the extent of limiting 1861 Capital's use of the report to the way damages were originally proposed and asserted, unanimously affirmed, with costs. Order, same court and Justice, entered December 22, 2011, which denied plaintiff's motion to vacate the November 16 ruling, unanimously affirmed, with costs.

In this action involving Wachovia's alleged breach of its obligations to fund a municipal bond repurchase credit facility, the terms of the subject agreements do not clearly, explicitly and unambiguously express an exclusion of the recovery lost profit consequential damages. Rather, the record presents factual issues as to whether such damages were fairly contemplated by the contracting parties in the event of a breach

(see *Awards.com v Kinko's, Inc.*, 42 AD3d 178, 183 [2007], lv dismissed 9 NY3d 1025 [2008]; see also *Gosden v Elmira City School Dist.*, 90 AD3d 1202, 1204 [2011]).

Contrary to the finding of the motion court, the evidence established that Wachovia's breach of the pricing provision of the parties' Master Repurchase Agreement was material. Accordingly, Wachovia is liable for damages to the extent that 1861 Capital can show that but for the breach, "it would have been ready, willing and able to fulfill its obligations under the contract" (*Ross Bicycles v Citibank*, 200 AD2d 379, 380 [1994]).

However, dismissal of 1861 Capital's claim for the initial commitment fee was proper. There is a lack of evidence that Wachovia breached any duty in connection with the initial term of the agreement or that the renewed amended agreement and the initial agreement should be considered as one.

The court providently exercised its discretion in precluding the use of the report of 1861 Capital's damages expert to the extent it set forth a new theory of damages. 1861 Capital failed

to timely disclose the new theory and failed to provide an adequate explanation for the delay (see *LaFurge v Cohen*, 61 AD3d 426 [2009], *lv denied* 13 NY3d 701 [2009]).

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

ENTERED: MAY 15, 2012

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CLERK

Regardless of whether defendant made a valid waiver of his right to appeal, we find that defendant's argument concerning the suppression hearing is unavailing and that there is no basis for reducing the sentence.

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

ENTERED: MAY 15, 2012



CLERK

to the trial calendar in October 2006. In December 2006, the matter was marked off to permit defendants to obtain further discovery concerning a purported additional surgery to plaintiff's left knee after his deposition was taken in 2002. The matter was dismissed pursuant to CPLR 3404 on February 26, 2008, after plaintiff's counsel, having failed to have the matter restored for more than a year, failed to appear at a status conference scheduled by the court. Plaintiff's motion to vacate the dismissal was denied by order dated July 2, 2008, due to his failure to proffer competent medical evidence of serious injury. Plaintiff did not perfect his appeal from that order, which was dismissed as abandoned in October 2010, but moved to renew by order to show cause brought September 25, 2010.

Plaintiff's arguments that the matter was improperly dismissed pursuant to CPLR 3404, since the note of issue had been stricken, and that he was not required to present competent medical evidence in support of his motion to vacate the dismissal, could have been raised on the prior appeal. The dismissal of the prior appeal precludes consideration of those arguments on this appeal (*see Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363 [2007]; *Nieman v Sears, Roebuck & Co.*, 4 AD3d 255, 256 [2004]). To the extent plaintiff's motion to renew

raises distinct issues, it was properly denied since plaintiff's counsel failed to provide a reasonable justification for not providing the "new" medical evidence in support of the motion to vacate the dismissal order, or for the more than two-year delay in moving to renew that motion (see *Levy v New York City Health & Hosps. Corp.*, 40 AD3d 359 [2007], *lv dismissed* 9 NY3d 1001 [2007]; see also *Vargas v Ahmed*, 41 AD3d 328, 328-329 [2007]). We have considered plaintiff's other arguments and find them unavailing.

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

ENTERED: MAY 15, 2012

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CLERK

rate for any “regularly scheduled school days’ on which the Chancellor or his designee(s) shall order . . . pupils not to be in attendance for any reason.” The contracts further defined a “regularly scheduled school day” as “any day on which schools are scheduled to be open in accordance with the official [DOE] Calendar as originally adopted and published annually and prior to amendment thereof.” September 8, 2009, was a regularly scheduled school day pursuant to the originally adopted 2009-2010 calendar which had it slated to be the first day of the school year. Subsequently, the calendar was revised or amended to provide for school to begin one day later, on September 9, 2009. Under the plain language of the contract, this amendment triggered the provision requiring plaintiffs to receive 85% of their daily rate for September 8, 2009.

However, plaintiffs’ argument that the court should have granted their motion for leave to amend the complaint to add three additional plaintiffs is without merit. The proposed plaintiffs filed notices of claim more than three months after

their claims for payment were denied (see Education Law § 3813[1]). Consequently, the proposed amendment is palpably insufficient as a matter of law (see *Buchanan v Beacon City School Dist.*, 79 AD3d 961, 962-963 [2010]).

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

ENTERED: MAY 15, 2012

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CLERK

Tom, J.P., Andrias, Richter, DeGrasse, Abdus-Salaam, JJ.

7670 Patricia Araujo, Index 108536/07
Plaintiff-Respondent,

-against-

Mercer Square Owners Corp., et al.,
Defendants,

Mercer Square LLC,
Defendant-Appellant,

Bath & Body Works, LLC,
Defendant-Respondent.

Tese & Milner, New York (Michael M. Milner of counsel), for
appellant.

Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of
counsel), for Patricia Araujo, respondent.

Marshall, Dennehey, Warner, Coleman & Goggin, New York (Steven M.
Christman of counsel), for Bath & Body Works, LLC, respondent.

Order, Supreme Court, New York County (Paul G. Feinman, J.),
entered September 2, 2011, which, to the extent appealed from as
limited by the briefs, denied defendant Mercer Square LLC's
motion for summary judgment dismissing the complaint and all
cross claims against it, unanimously reversed, on the law,
without costs, and the motion granted. The Clerk is directed to
enter judgment accordingly.

This is a personal injury action arising from a slip and

fall on a public sidewalk in front of a condominium building consisting of a residential unit, owned by defendant Mercer Square Owners Corp., and a commercial unit, owned by defendant Mercer Square LLC (LLC). The LLC's motion for summary judgment should have been granted, as it owed no duty to plaintiff.

Indeed, the condominium declaration provided that the board of managers of the condominium was required to maintain and repair the common elements of the condominium, including the public sidewalk "outside of and immediately appurtenant" to the building. The LLC, as an owner of an individual unit in the building, is not an "owner" for purposes of Administrative Code of the City of New York § 7-210; thus, it is not liable for injuries sustained as a result of defects in the sidewalk (see *Rothstein v 400 E. 54th St. Co.*, 51 AD3d 431 [2008]).

Although the condominium's declaration contained a provision purporting to give the LLC an "exclusive easement" for the sidewalks, this provision was ineffective to transfer any rights to the LLC. Indeed, an easement can be created only by one who has title to, or an estate in, the servient estate, so that one who has neither cannot create an easement (see *Stilbell Realty Corp. v Cullen*, 43 AD2d 966, 967 [1974]; *Fred F. French Inv. Co., Inc. v Jetter*, 270 AD 1048, 1048 [1946]). Because neither the

condominium, nor its sponsor, held title to the public sidewalk,
it could not grant an easement to the LLC.

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

ENTERED: MAY 15, 2012

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CLERK

Tom, J.P., Andrias, DeGrasse, Abdus-Salaam, JJ.

7671N Anna Pezhman,
Plaintiff-Appellant,

Index 402354/09

-against-

Department of Education of the
City of New York, et al.,
Defendants-Appellants.

Anna Pezhman, appellant pro se.

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

Order, Supreme Court, New York County (Geoffrey D. Wright,
J.), entered December 14, 2011, which denied plaintiff's motion
to strike defendants' answer, unanimously affirmed, without
costs.

Plaintiff failed to "show[] conclusively that [defendants']
failure to disclose was willful, contumacious or due to bad
faith" (*Dauria v City of New York*, 127 AD2d 459, 460 [1987]).
For example, defendants are not in possession of nonparty Shirley
Hood's mentoring logs, nor can defendants control whether Hood,
who is no longer employed by defendant Department of Education,
contacts them. "The willful failure to comply with a discovery
order assumes 'an ability to comply and a decision not to
comply,'" and thus "'a showing that it is impossible to make the

particular disclosure will bar the imposition of a sanction under CPLR 3126'" (*id.*). Similarly, defendants offered a reasonable explanation for not having included the name of nonparty Karen Glazer in their response to one of plaintiff's interrogatories.

Nonparty Louissa Albritton's destruction of her logs for the 2003-04 school year does not warrant the striking of defendants' answer; plaintiff failed to show that, at the time Albritton destroyed her logs (which, it appears, was before plaintiff filed the instant action), defendants knew that the logs were "needed in order to establish plaintiff's cause of action" (*Mohammed v Command Sec. Corp.*, 83 AD3d 605 [2011], *lv denied* 17 NY3d 708 [2011]).

It is true that defendants disobeyed the court's February 17, 2011 order by failing to bring any documents to the deposition of defendant Jackquelyn H. Young. However, "[e]xtreme conduct is required before imposition of the ultimate penalty - striking the answer" (*Dauria v City of New York*, 127 AD2d 459, 460 [1987]). Defendants' failure to bring another copy of documents they had previously produced does not constitute extreme conduct.

Defendants' alleged harassment of plaintiff is not a ground for striking their answer; rather, striking an answer is an

appropriate remedy where a party refuses to obey a disclosure order or wilfully fails to disclose information which the court finds should have been disclosed (CPLR 3126).

Defendants failed to cross appeal from the motion court's *sub silentio* denial of their de facto cross motion to enjoin plaintiff from filing further motions. Therefore, we cannot grant the relief they request (see *Hecht v City of New York*, 60 NY2d 57, 60 [1983]).

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that the initial intended restriction of use of the property was modified from that of a community center to include senior housing. Accordingly, the request for information and documents relating to the financing of respondent's purchase of the property was relevant and material to petitioner's investigation into the sale of the property (see e.g. *Carl Andrews & Assoc., Inc. v Office of the Inspector Gen. of the State of N.Y.*, 85 AD3d 633 [2011], *lv denied* 18 NY3d 805 [2012]).

We have considered respondent's remaining arguments, including that petitioner's investigation resulted in its investors being harassed, and find them unavailing.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 15, 2012

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