



Defendant property owners failed to establish, as a matter of law, that they had no duty to maintain the electrical shunts that defendant Con Edison placed across the sidewalk in front of their property to provide emergency power for the tenants residing there. We have generally held that an issue of fact exists whether such equipment constitutes a special use of the sidewalk that creates a duty of care on the part of the property owner (see e.g. *Cook v Consolidated Edison Co. of NY, Inc.*, 51 AD3d 447 [1st Dept 2008]; *Eliassian v Consolidated Edison Co. of N.Y.*, 300 AD2d 51 [1st Dept 2002]).

*Lewis v City of New York* (89 AD3d 410 [1st Dept 2011]) has no bearing on this matter. There, this Court awarded summary judgment to the property owner, finding that it was prohibited from exercising control over a street grating and therefore bore no liability for the plaintiff's accident. The rule at issue there, 34 RCNY 2-07(b), squarely places responsibility for gratings and the area extending 12 inches from their perimeter on their owners.

In this case, it is far less certain whether the rules on which the property owners rely apply and would relieve them of liability. Those rules prohibit private citizens from "install[ing], repair[ing], us[ing] or work[ing] within three (3)

feet of any type of "City electrical equipment or non-City electrical equipment attached to City Property" (34 RCNY 2-20[a][2]). They further direct that "[n]o person shall break, deface, remove, or interfere with any lamp, gas, communication or electrical apparatus, or any part thereof, which shall be hung or fixed in any street or public place . . . except as authorized by the Department [of Transportation]" (34 RCNY 2-20[a][7]). The critical question here is whether a shunt is "electrical equipment" or an "electrical apparatus." The rules define "electrical equipment," when not owned by the City, as "property . . . which is attached to City Property and to which electrical connections can be made, including but not limited to, electrical devices and wood poles" (34 RCNY 2-01). The rules do not provide a definition for "electrical apparatus," but that term and the term "electrical equipment" appear to be used interchangeably, since 34 RCNY 2-20(a)(7), while prohibiting the destruction of "any lamp, gas, communication or electrical apparatus," also directs that "[a]ll instances of damaged gas, communication or electrical equipment shall be reported to . . . 311."

The property owners offer no support for their theory that the shunts on which plaintiff allegedly tripped constituted "electrical equipment," and so have failed to carry their burden

of establishing, as a matter of law, that they were prohibited from working within three feet of them, or otherwise "interfering" with them. Indeed, 34 RCNY 2-20(b), which addresses the placement of shunts, suggests that a shunt is not "electrical equipment." That rule specifically applies "to overhead, street and wrap-around shunts *attached to City electrical equipment* or running over/along a roadway or sidewalk" (34 RCNY 2-20[b][1][emphasis added]).

The italicized words strongly suggest that a shunt itself does not qualify as "electrical equipment," whether of the City or non-City variety. To the contrary, the term "electrical equipment" seems to connote permanent infrastructure. For example, 34 RCNY 2-20(c)(3) addresses "the event that the Department installs an overhead shunt to restore power to City electrical equipment containing an electrical traffic control device." Further evidence that the term "electrical equipment" refers to fixtures is that "street shunt" is defined as "a shunt that runs from a street light/lamppost or utility access cover along a roadway and/or sidewalk to a property or other street light/lamppost" (34 RCNY 2-01). Significantly, the definition of "City Electrical Equipment" explicitly encompasses "wood poles and metal street light/lampposts (34 RCNY 2-01)." It is

important to note that there is little concrete evidence in the record regarding what the shunt plaintiff tripped over was attached to. The witness produced by Con Edison read from records that he interpreted as possibly reflecting that the shunts were connected to a "service box" in the street, but he was unable to discuss in technical terms how power was restored to the house.

Accordingly, the record is devoid of any evidence that the property owners would have had to access "electrical equipment" to make safe the tripping hazard posed by the shunts. And while we are certainly not suggesting that ordinary homeowners should ever be required to tamper with shunts or move them, that was not required here, where plaintiff is only alleging that a protective board or other device covering up the shunts was required, which device defendants could, at the very least, have easily requested Con Edison to provide. In any event, even if a shunt is "electrical equipment," nothing in the rules appears to have prohibited the property owners from taking steps to warn pedestrians about the hazard posed by the shunts in a manner that did not involve working within three feet of them or "interfering" with them in any respect.

Like the property owners, the dissent declares that the

shunts over which plaintiff tripped were "electrical equipment" for purposes of 34 RCNY 2-20, without offering any support for that conclusion that can be found in the record or elsewhere. Again, the Con Edison witness on whose deposition testimony the dissent relies was a record searcher who readily admitted that he was unfamiliar with the technical jargon related to the manner in which power was restored to the property in question. Further, we disagree with the dissent's statement that the utility that places shunts on a sidewalk has the sole responsibility to protect pedestrians from tripping over them. The rules that the dissent cites in support of that proposition do not say that. 34 RCNY 2-20(b)(7) merely provides that "[t]he sidewalk areas over which the shunt runs and all wires shall be protected and ramped with a reflective covering." 34 RCNY 2-05(d)(17) only says that "[a]ll equipment hoses, cables, or wires placed on the sidewalk while in use shall be bridged and protected by warning signs and/or lights." Nothing in those rules even implies that utilities have exclusive control over sidewalk shunts so that homeowners deriving a special use from them have no obligation to protect pedestrians from harm posed by the shunts. Thus, because there is a question regarding the extent to which the property owners had control over the shunts, which the property owners

acknowledge were for their benefit, an issue of fact exists whether they made special use of them and thus created an obligation to prevent harm arising from the hazard (see *Cook*, 51 AD3d at 448; *Eliassian*, 300 AD2d at 51).

Finally, we reject the property owners' argument that, even if they had control over the shunts, they had no duty to maintain the condition, pursuant to section 7-210 of the Administrative Code of the City of New York. That section states that "[f]ailure to maintain [a] sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk." We have previously stated that the tripping hazard posed by electrical shunts traversing a sidewalk implicates the Administrative Code (see *Cook*, 52AD3d at 448). Accordingly, the property owners had a nondelegable duty to keep the sidewalk safe (see *id.*; *Collado v Cruz*, 81 AD3d 542 [1st Dept 2011]).

All concur except Andrias, J. who dissents in a memorandum as follows:

ANDRIAS, J. (dissenting)

Plaintiff alleges that she tripped over a shunt (a temporary electrical cable) that defendant Con Edison placed across the sidewalk in front of defendant owners' townhouse in order to restore electric power to the building. Although photographs taken by plaintiff a couple of days after the accident showed that there were black and orange covers over the shunt, plaintiff testified at her deposition that the covers were not there when she tripped.

The owners moved for summary judgment dismissing the complaint and cross claims against them on the ground that they could not be held liable under a "special use" theory because they did not have control over the shunt. They also asserted that even if they had control, they could not be held liable because a sidewalk shunt does not fall within the scope of the "Sidewalk Law" (Administrative Code of City of NY § 7-210), which, with certain exceptions, shifts responsibility for sidewalk maintenance and liability for injuries arising from a defective sidewalk from the City to the owner of the real property which abuts the defective sidewalk.

Supreme Court denied the owners' motion. The majority would affirm on the ground that the Sidewalk Law applies and a question

of facts exists whether the shunt constituted a special use of the sidewalk that created a duty of care on the part of the owners. Because I believe that the owners established that they may not be held liable under a special use theory of liability, I dissent and would grant their motion for summary judgment.

"[W]here the abutting landowner derives a special benefit from that [public property] unrelated to the public use, the person obtaining the benefit is required to maintain the used property in a reasonably safe condition to avoid injury to others" (*Kaufman v Silver*, 90 NY2d 204, 207 [1997] [internal quotation marks omitted and emphasis deleted]). "Imposition of the duty to repair or maintain a use located on adjacent property is necessarily premised, however, upon the existence of the abutting land occupier's access to and ability to exercise control over the special use structure or installation" (*id.*).

Pursuant to 34 RCNY 2-20(a)(2), "[o]nly public utilities, public benefit corporations, City agencies or licensed and insured contractors shall be permitted to install, repair, use or work within three (3) feet of any type of City electrical equipment or non-City electrical equipment attached to City Property." Pursuant to 34 RCNY 2-20(a)(7), "[n]o person shall break, deface, remove, or interfere with any lamp, gas,

communication or electrical apparatus, or any part thereof, which shall be hung or fixed in any street or public place . . . except as authorized by the Department [of Transportation].”

By virtue of these rules, Con Edison, the utility performing the emergency repair work to restore power to the townhouse, had exclusive maintenance responsibility over its shunt. The owners had no control over the shunt and were bound by 34 RCNY 2-20 not to interfere with it. Lacking control, the owners may not be held liable for any special use of the shunt that may have caused plaintiff’s fall (see *Noia v Maselli*, 45 AD3d 746 [2d Dept 2007]). Although the Sidewalk Law generally imposes liability for injuries resulting from negligent sidewalk repair on the abutting property owners, it is inapplicable as against the owners because 34 RCNY 2-20 mandates that liability be placed on another party (see *Lewis v City of New York*, 89 AD3d 410 [1st Dept 2011]; *Hurley v Related Mgt. Co.*, 74 AD3d 648 [1st Dept 2010]).

Positing that “electrical equipment” and “electrical apparatus” are interchangeable, the majority finds that it is uncertain whether 34 RCNY 2-20 would relieve the owners of liability since the owners offered no support for their theory that street shunts constitute “electrical equipment.” However,

the majority interprets the terms "electrical equipment" and "electrical apparatus" too narrowly.

34 RCNY 2-01 defines a "shunt" as a "temporary electrical cable or conduit that has been installed between two points to divert current from one path, which is no longer in use, to another path." The rule defines a "street shunt" as "a shunt that runs from a street light/lamppost or utility access cover along a roadway and/or sidewalk to a property or other street light/lamppost." "City Electrical Equipment" means "city property to which electrical connections can be made, including but not limited to, electrical devices, wood poles and metal street light/lampposts" (34 RCNY 2-01). "Non-city Electrical Equipment" means "property, not owned by the City, which is attached to City Property and to which electrical connections can be made, including but not limited to, electrical devices and wood poles" (*id.*) City property includes but is not limited to "roadways, sidewalks, street furniture and electrical equipment" (*id.*). "Electrical apparatus" is not defined.

Con Edison's witness explained that a shunt is made up of wires that feed power to a house from a central feeder location. It is undisputed that Con Edison installed the shunt two days before the accident, to restore electrical power to the premises

on an emergency basis, after it received a call from the owners' tenant stating that the townhouse had lost electric power, which also left the tenant without heat or hot water. The cause of the problem was not within the townhouse, and the shunt, which ran from an external power source in the adjacent street, across the sidewalk, and into the basement of the townhouse, was part of the "non-city electrical equipment" used to restore power. The placement of the shunt across the sidewalk as part of an emergency repair also falls well within the ambit of an "electrical apparatus, or any part thereof" ... hung or fixed in any street or public place" (34 RCNY 2-20[a][7] [emphasis added]).

While recognizing that ordinary homeowners should not be required to tamper with shunts or move them, the majority states that "that was not required here, where plaintiff is only alleging that a protective board or other device covering up the shunts was required," and that "nothing in the rules . . . prohibited the property owners from taking steps to warn pedestrians about the hazards posed by the shunts." However, pursuant to 34 RCNY 2-20(b)(7), "[t]he sidewalk areas over which the shunt runs and all wires shall be protected and ramped with a reflective covering." 34 RCNY 2-05(d)(17) requires that "[a]ll

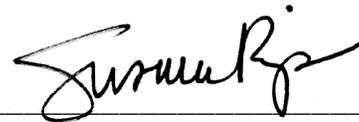
equipment hoses, cables, or wires placed on the sidewalk while in use shall be bridged and protected by warning signs and/or lights." Thus, the rules clearly place the obligations to cover the shunt and warn the public on the utility that installs the shunt. While 34 RCNY 2-20(a)(7) requires that "[a]ll instances of damaged gas, communication or electrical equipment shall be reported to the 311 Government Services & Information for New York City telephone number and/or the contact telephone number on any applicable permits," there is no allegation here that the shunt was damaged.

I am cognizant that in *Eliassian v Consolidated Edison Co. of N.Y.* (300 AD2d 51 [1st Dept 2002]) and *Cook v Consolidated Edison Co. of NY, Inc.* (51 AD3d 447 [1st Dept 2008]) this Court found a triable issue of fact whether the placement of shunt boards constituted a special use of the sidewalk by the owner giving rise to a duty on the owner's part to maintain the provisional sidewalk structure. However, neither decision addressed the requirement that the owner have the ability to exercise control over the installation (see *Kaufman*, 90 NY2d at 207-208), or 34 RCNY 2-20, which went into effect October 27, 2010. Further, in *Cook* the shunt boards were in place for nearly six months, and the denial of summary judgment was also

predicated on triable issues of fact whether the tenant had constructive notice of a recurring defective condition which was routinely left unaddressed (51 A3d at 448).

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

ENTERED: JUNE 13, 2013

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and decide all issues as if the proceeding had been properly transferred (see *Matter of Filonuk v Rhea*, 84 AD3d 502, 502 [1st Dept 2011]).

The determination denying petitioner succession rights is supported by substantial evidence (*Matter of Purdy v Kreisberg*, 47 NY2d 354, 358 [1979]). Petitioner conceded that her mother, the tenant of record, had never obtained respondent's written consent for her occupancy, and that she did not occupy the apartment for one year prior to her mother's death (see *Matter of Guzman v New York City Hous. Auth.*, 85 AD3d 514 [1st Dept 2011]). Although the denial of RFM status may present a hardship for petitioner and her family, mitigating factors do not provide a basis for annulling respondent's determination (*id.*). Nor may estoppel be invoked against respondent (see *Matter of Parkview Assoc. v City of New York*, 71 NY2d 274, 282 [1988], *cert denied* 488 US 801 [1988]; *Matter of Kolarick v Franco*, 240 AD2d 204, 204 [1st Dept 1997]).

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its discretion when it inquired whether the jury, which had been deliberating for several days, had agreed upon a verdict as to any of the counts submitted, and then accepted a partial verdict (see e.g. *People v Brown*, 1 AD3d 147 [1st Dept 2003], *lv denied* 1 NY3d 625 [2004]; *People v Mendez*, 221 AD2d 162, 163 [1st Dept 1995], *lv denied* 87 NY2d 923 [1996]). In accordance with CPL 310.70(1)(b), the court properly instructed the jury to resume deliberations on the remaining counts. The court's actions did not coerce a verdict as to any counts (see *People v Hall*, 105 AD3d 658 [1st Dept 2013]), and defendant has not shown how he was prejudiced by any of these actions.

The court responded meaningfully when, on the day after the partial verdict, the jurors sent a note stating, "If we are unable to come to an agreement on the remaining charges, we request instruction." Even if the court's response could be characterized as an abbreviated *Allen* charge (see *Allen v United States*, 164 US 492 [1896]), and even though the jury had not expressly stated that it was deadlocked, the response met the standard of meaningfulness (see *People v Malloy*, 55 NY2d 296, 302 [1982], *cert denied* 459 US 847 [1982]), particularly since the jury was in its fourth day of deliberations following a relatively short trial. The court's brief, balanced instruction

properly encouraged the jurors to continue their deliberations in an attempt to reach a verdict, it contained no coercive language, and it twice cautioned the jurors not to abandon their positions. Moreover, rather than reaching an immediate verdict (*compare People v Aponte*, 2 NY3d 304, 309 [2004]), the jury deliberated for four more hours and ultimately returned both convictions and acquittals on various counts.

The trial court properly exercised its discretion (see generally *People v Duncan*, 46 NY2d 74, 80 [1978], *cert denied* 442 US 910 [1979]) in denying defendant's request to introduce extrinsic evidence of an alleged prior inconsistent statement by a detective, since "the purported inconsistency rests on a slender semantic basis and lacks probative value" (*People v Jackson*, 29 AD3d 400 [1st Dept 2006], *lv denied* 7 NY3d 790 [2006]). The detective's answers on cross-examination sufficiently resolved the purported inconsistency, and defendant has not shown that he was prejudiced by being unable to introduce extrinsic evidence. Defendant's argument that the People were obligated to "correct" the detective's testimony is without merit. Furthermore, the ruling at issue was not rendered unfair by the court's ruling on a completely different issue involving the People's impeachment of defendant's testimony. In any event,

any error regarding the exclusion of extrinsic evidence was harmless in view of the overwhelming evidence of defendant's guilt (see *People v Crimmins*, 36 NY2d 230 [1975]). Finally, we note that since defendant never asserted a constitutional right to introduce the evidence at issue, his present constitutional claim is unpreserved (see *People v Lane*, 7 NY3d 888, 889 [2006]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits (see *Crane v Kentucky*, 476 US 683, 689-690 [1986]; *Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]).

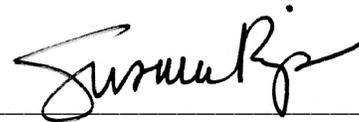
The court also properly exercised its discretion in admitting into evidence two recorded telephone calls made by defendant, which contained relevant evidence despite the presence of offensive content. The court properly concluded that the probative value of this evidence outweighed any prejudicial effect. Moreover, the court offered to minimize any prejudice by

delivering a limiting instruction, but defendant declined that offer. In any event, any error was harmless.

We find the sentence excessive to the extent indicated.

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threatening injury," crushing the ankle, as well as a multi-fragmented, comminuted fracture to the tibia. Such a fracture injures not only the bone but also the surrounding tissues, including nearby ligaments, tendons, veins, arteries, and nerves. Plaintiff also sustained a spiral fracture to the fibula, near the knee. He underwent a surgery involving open reduction and internal fixation, and a second surgery to remove the hardware. Plaintiff's injuries required rehabilitation and have resulted in permanent arthritis, tendonitis, and the potential need for future procedures.

A "good recovery" from the two surgeries for these severe injuries, and plaintiff's luck in escaping disabling pain, does not equate to an absence of pain and suffering. The last time plaintiff saw his orthopedic surgeon, Dr. Weiner, was in the fall of 2011, about 8 to 10 months before trial. He reported that he still experienced pain when walking on uneven surfaces, where his ankle twists, and when he walks or stands for more than 15 or 20 minutes. He also testified that he still feels pain in his leg. Moreover, Dr. Weiner stated that plaintiff is manifesting some problems with motion, weakness of tendons with inflammation, and that, if arthritis progresses as he expects it will, plaintiff will need future procedures.

Given the severity of plaintiff's injuries and the ongoing problems and expected future limitations, the amounts awarded for past and future pain and suffering are inadequate, deviating materially from what would be reasonable compensation (see e.g. *Rivera v New York City Tr. Auth.*, 92 AD3d 516 [1st Dept 2012]; *Orellano v 29 E. 37th St. Realty Corp.*, 4 AD3d 247 [1st Dept 2004], *lv denied* 4 NY3d 702 [2004]).

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Acosta, J.P., Saxe, Moskowitz, Freedman, Manzanet-Daniels, JJ.

10274N Candida Taveras, et al., Index 110598/07  
Plaintiffs-Appellants,

-against-

Norman W. Philibert,  
Defendant-Respondent.

[And a Third-Party Action]

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Michael Quintana, Brooklyn, for appellants.

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

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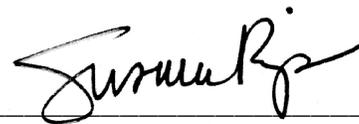
Order, Supreme Court, New York County (Paul Wooten, J.), entered October 20, 2011, which denied plaintiffs' motion to vacate an order, same court and Justice, entered November 24, 2008, granting, on plaintiffs' default, defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The motion court properly denied plaintiffs' CPLR 5015(a)(1) motion to vacate the prior order, granted on plaintiffs' default. Under that statutory provision, a party seeking such relief must move to vacate the order within one year of service of the order with notice of entry (see *Caba v Rai*, 63 AD3d 578, 580 [1st Dept 2009]). As the movant, it was plaintiffs' burden to establish

their right to the relief, including that their motion was timely made. Yet, plaintiffs do not dispute that, as found by the motion court, they received notice of entry and a copy of the prior order approximately two years before seeking vacatur. Nor can plaintiffs point to any evidence contained in the record establishing that their motion was made within one year of the date they received the order. We therefore do not reach the issues of reasonable excuse and a meritorious cause of action.

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absconding from drug treatment and work release outweighed the mitigating factors he cites (see e.g. *People v Marti*, 81 AD3d 418 [1st Dept 2011], *lv denied* 17 NY3d 798 [2011]).

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Tom, J.P., Friedman, Freedman, Feinman, JJ.

10339 Wassfam L.L.C.,  
Plaintiff-Respondent,

Index 112558/10

-against-

Orlando Rene Palacios,  
Defendant-Appellant.

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Michael Stepper, New York, for appellant.

Itkowitz PLLC, New York (Jay B. Itkowitz of counsel), for  
respondent.

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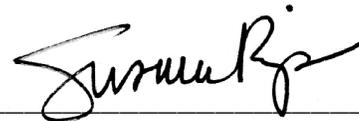
Order, Supreme Court, New York County (Manuel J. Mendez,  
J.), entered August 20, 2012, which, to the extent appealed as  
limited by the briefs, denied defendant's motion for leave to  
amend his answer, and granted plaintiff's cross motion for  
summary judgment on liability, unanimously affirmed, without  
costs.

The motion court properly enforced the lease guaranty  
despite the failure to join as plaintiffs the additional entities  
named in the lease because complete relief can be granted, they  
will be protected by res judicata, and defendant will not be  
prejudiced by being subject to duplicative actions. No excuse,  
much less a reasonable one, was provided for the extended delay  
in moving to amend one year after the filing of the answer and

after the note of issue had been filed (see *Oil Heat Inst. of Long Is. Ins. Trust v RMTS Assoc.*, 4 AD3d 290, 293 [1st Dept 2004]). Thus, we need not reach the issue of whether the proposed amendment, seeking to bar the collection of rent arrears pursuant to Multiple Dwelling Law § 302 on the ground that commercial premises had been used residentially, has merit.

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and/or visitation to the grandmother was not in the best interests of the child, in that during the fact-finding, she continued to deny that the child had been abused by the parents, and asserted that the child's injuries were sustained in a voodoo ritual undertaken by ACS and the agency. The grandmother's letters and emails to the court, counsel and others, raised concerns about her mental health. Moreover, the mother, who was found to have a depraved indifference to the child's welfare, lived with the grandmother, who refused to acknowledge the mother's deficiencies as a parent (see *Matter of F/B Children*, 161 AD2d 459 [1<sup>st</sup> Dept 1990]).

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Tom, J.P., Friedman, Freedman, Feinman, JJ.

10342 Herbert Leroy Austion, Jr.,  
Plaintiff-Appellant,

Index 306286/09

-against-

The Parkchester South  
Condominium, Inc. et al.,  
Defendants-Respondents.

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Clemente Mueller, P.A., New York (Nicole A. Spence of counsel),  
for appellant.

McGaw, Alventosa & Zajac, Jericho (Ross P. Masler of counsel),  
for respondents.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.),  
entered September 27, 2012, which granted defendants' motion for  
summary judgment dismissing the complaint, unanimously affirmed,  
without costs.

Dismissal of the complaint was proper in this action where  
plaintiff alleges that he was injured when, while playing  
basketball, he slipped on sand that was present on the court.  
Plaintiff assumed the risks inherent in playing on the outdoor  
court, and the sand he allegedly slipped on was a result of a  
naturally occurring condition of the outdoor setting (see *Flores  
v City of New York*, 266 AD2d 148 [1st Dept 1999]). Plaintiff had  
played on the subject court on numerous occasions and was

familiar with its problem of accumulating sand, which was dealt with by sweeping the court when necessary (see *Gibbs v New York City Hous. Auth.*, 272 AD2d 370 [2nd Dept 2000], lv denied 96 NY2d 702 [2001]; see also *Milliner v New York City Hous. Auth.*, 57 AD3d 383 [1st Dept 2008]).

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

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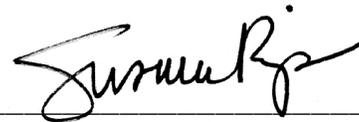
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unlawful (see *People v Lingle*, 16 NY3d 621, 630 [2011]). We perceive no basis for reducing the term of postrelease supervision.

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limited by the briefs, denied defendants JVN Restoration Environmental Service Contractors, Inc. and JVN Restoration, Inc.'s (JVN) motion and Bank of America's (BOA) cross motion for summary judgment dismissing plaintiff's common law negligence and Labor Law §§ 200 and 240(1) claims, and granted third-party defendant EFI Global, Inc.'s (EFI) motion to dismiss BOA's third-party claim for contractual indemnification, unanimously modified, on the law, to dismiss the complaint and all cross claims and counterclaims as against JVN, dismiss the Labor Law § 200 and common law negligence claims as against BOA, reinstate BOA's third-party claim for contractual indemnification, dismiss BOA's third-party claim for failure to procure insurance, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint and all cross claims as against JVN.

The court properly denied BOA's motion for summary judgment on plaintiff's Labor Law § 240(1) claim. BOA's contention that plaintiff's accident was not gravity related is unpersuasive, since plaintiff was not required to show that she fell completely off the ladder to the floor so long as the "harm directly flow[ed] from the application of the force of gravity to an

object or person'" (*Lacey v Turner Constr. Co.*, 275 AD2d 734, 735 [2d Dept 2000], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; see *Suwareh v State of New York*, 24 AD3d 380 [1st Dept 2005]). However, the court erred in denying JVN's motion, since JVN could not be considered a statutory agent for purposes of imposing liability under Labor Law § 240(1) (see *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]). There is no evidence that it had the authority to supervise, direct, or control the air testing and monitoring work that plaintiff, who was employed by EFI, was performing at the time of her injury (see *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 293 [2003]). The subcontract by which EFI hired JVN, for the specific purpose of removing asbestos, provided that JVN "shall be under the general direction of EFI."

Both BOA, as building owner, and JVN, as subcontractor, were entitled to summary judgment on plaintiff's Labor Law § 200 and common-law negligence claims (see *Bombero v NAB Constr. Corp.*, 10 AD3d 170, 171 [1st Dept 2004]; *Bodtman v Living Manor Love, Inc.*, 105 AD3d 434 [1st Dept 2013]).

As to JVN, the record makes clear that while JVN was responsible for supervising the asbestos removal process, it had no ability to supervise or control plaintiff or her work, which

did not include the actual removal of asbestos, but involved testing the air quality. Thus, it had no authority to control the activity bringing about plaintiff's injuries (see *Russin*, 54 NY2d at 318).

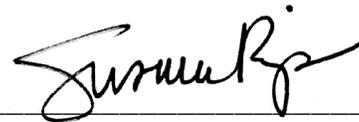
We disagree with the motion court's finding that the indemnity agreement at issue is void and unenforceable under General Obligations Law § 5-322.1, because it requires EFI to indemnify BOA for its own negligence. Since there is no evidence that BOA was negligent, the indemnity provision is enforceable (see *Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 794-795 [1997]; *Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]).

Finally, in light of the motion court's failure to address the issue, and contrary to BOA's contention, upon a search of the record, we find EFI's evidence sufficient to establish, as a matter of law, that it procured a commercial general liability policy providing coverage to BOA as an additional insured with

the agreed policy limits, pursuant to EFI's agreement with the CB Richard Ellis defendants. Thus, BOA's third-party breach of contract/failure to procure insurance claim is dismissed.

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

ENTERED: JUNE 13, 2013

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CLERK

Tom, J.P., Friedman, Freedman, Gische, JJ.

10346        Francesco Regini,  
                 Plaintiff-Respondent,

Index 112994/11

-against-

Board of Managers of Loft  
Space Condominium,  
Defendant,

SDS Leonard LLC,  
Defendant-Appellant.

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DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, White  
Plains (Michael J. Schwarz of counsel), for appellant.

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Order, Supreme Court, New York County (Eileen A. Rakower,  
J.), entered April 17, 2012, which denied defendant SDS Leonard  
LLC's motion to dismiss the complaint as against it, and granted  
plaintiff's cross motion for leave to amend the complaint,  
unanimously modified, on the law, to grant SDS's motion as to the  
first and sixth causes of action in the amended complaint, and  
otherwise affirmed, without costs.

Plaintiff alleges that his condominium unit was damaged by  
leaks from the building's common elements. In moving to dismiss  
the complaint as against it, SDS tendered a copy of what it  
represents is the management agreement between defendant Board of  
Managers of Loft Space Condominium and nonparty Certified

Management LLC to disprove plaintiff's claim that it is the building's managing agent. However, the management agreement tendered by SDS is undated and specifies no term, and thus, even if genuine, does not on its face dispose of plaintiff's claims. Nor does the affidavit submitted by SDS constitute documentary evidence within the meaning of CPLR 3211(a)(1) (see *Flowers v 73rd Townhouse LLC*, 99 AD3d 431 [1st Dept 2012]). Moreover, plaintiff submitted pages of emails tending to show that an entity called "SDS Brooklyn" routinely holds itself out as responsible for maintenance and repair of the building.

Plaintiff's negligence claim should be dismissed as duplicative of his contract claim, since he does not posit any source of duty other than SDS's alleged management agreement with the Board (see *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389-390 [1987]; *Pacnet Network Ltd. v KDDI Corp.*, 78 AD3d 478, 479 [1st Dept 2010]).

We reject SDS's argument that, as the agent of a disclosed principal, it cannot be held liable to plaintiff for any alleged breach of a management agreement with the Board. At this early procedural juncture, the scope of the contractual duties that SDS owed to plaintiff, if any, has not been established.

Plaintiff's claim for injunctive relief against SDS should

be dismissed, since, as evidenced by his claims for damages, he has an adequate remedy at law (see *Lemle v Lemle*, 92 AD3d 494, 500 [1st Dept 2012]; *Mini Mint Inc. v Citigroup, Inc.*, 83 AD3d 596 [1st Dept 2011]).

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

ENTERED: JUNE 13, 2013

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CLERK

Tom, J.P., Friedman, Freedman, Feinman, JJ.

10347-

Index 600243/08

10348-

10349      Castor Petroleum Ltd.,  
            Plaintiff-Appellant,

-against-

Petroterminal De Panama, S.A.,  
Defendant-Respondent.

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McGuire Woods LLP, New York (Richard L. Jarashow of counsel), for appellant.

Reitler Kailas & Rosenblatt LLC, New York (Jocelyn L. Jacobson of counsel), for respondent.

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Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered November 19, 2012, dismissing the complaint and bringing up for review orders, same court and Justice, entered on or about October 11 and 12, 2012, which denied plaintiff's motion for partial summary judgment as to liability on its first cause of action, and granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, with costs. Appeals from the aforesaid orders, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The relatively broad force majeure provision relieves defendant of its obligations under the parties' Transportation and Storage Agreement (TSA) in the event of, among other things,

a "government embargo or interventions or other similar or dissimilar event or circumstances." The attachment of plaintiff's oil by a Panamanian court prevented defendant from carrying out its obligation to make that oil available to plaintiff; accordingly, the attachment of plaintiff's oil by a Panamanian court as a result of lawsuits against plaintiff in Panama falls within the meaning of "government embargo or interventions or other similar or dissimilar event or circumstances" (see *Reade v Stoneybrook Realty, LLC*, 63 AD3d 433, 434 [1st Dept 2009]). Plaintiff's oil was attached because it was not licenced to do business in Panama. Moreover, relief from the TSA included relief from that contract's indemnification clause, because any other reading of the TSA would render the force majeure provision (as well as other provisions of the contract) meaningless, in contravention of long-standing laws of

contract interpretation (see *150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 6 [1st Dept 2004]).

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

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

ENTERED: JUNE 13, 2013

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CLERK

Tom, J.P., Friedman, Freedman, Feinman, JJ.

10350-

10351 In re Amondie T., and Others,

Children under Eighteen  
years of Age, etc.,

Karen S., et al.,  
Respondents-Appellants,

Administration for Children's Services,  
Petitioner-Respondent.

---

Mary Ann Barile, Bronx, for Karen S., appellant.

Anne Reiniger, New York, for Dwayne S., appellant.

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

Israel P. Inyama, New York, attorney for the child Amondie T.

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

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Order of disposition, Family Court, Bronx County (Jane  
Pearl, J.), entered on or about April 2, 2012, insofar as it  
brings up for review the fact-finding determination that  
respondents neglected the subject children, Amondie T. and  
Brittany H., and that by their actions, derivatively neglected a  
third child, Tatiana F., unanimously affirmed, without costs, and  
the appeal from that portion of the order placing the subject  
children in the custody of the Commissioner of Social Services

until the completion of the next permanency hearing scheduled for April 11, 2012, unanimously dismissed, without costs, as moot. Appeal from order of fact-finding, same court and Judge, entered on or about January 17, 2012, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The finding of neglect against respondent mother is supported by a preponderance of the evidence. The record establishes that between March 2010 and May 2010, she locked her seventeen-year-old son and fifteen-year-old daughter out of the home for substantial periods of time, or overnight, on several occasions and did not provide them with money, clothing or food (see *Matter of Sophia P.*, 66 AD3d 908, 908-909 [2d Dept 2009]). A preponderance of the evidence demonstrates that respondent father also neglected the children because he knew or should have known that the mother was locking them out of the home and did not provide them with financial support, clothing or food during this time period (see *Matter of Joseph Benjamin P. [Allen P.]*, 81 AD3d 415, 416 [1st Dept 2011], *lv denied* 16 NY3d 710 [2011]). The fact that respondent father worked nights and allowed respondent mother to be in charge of disciplining the children is not a defense to the charge of neglect.

In addition, the Family Court properly determined that respondents failed to plan for the children's future. In fact, in a meeting with ACS, respondent mother told a caseworker that she would rather not have the children back in the home and wanted them to be voluntarily placed with their maternal uncle; respondent father agreed. However, "voluntary placement is appropriate only where a parent is unable to care for his or her child, and not where a parent is simply unwilling to do so," which is the case here (*Matter of Lamarcus E. [Jonathan E.]*, 94 AD3d 1255, 1257 [3d Dept 2012]).

The court properly exercised its discretion in denying the application to dismiss the petition as to respondents' son after he turned eighteen-years old, because he was seventeen-years old when the petitions were filed, and consented to continuing his placement in foster care (see Family Court Act § 1013 (c); *Matter of Sayeh R.*, 91 NY2d 306, 310 n 1 [1997]).

The determination that respondents, by locking their seventeen-year old son and fifteen-year old daughter out of the home for extended periods of time, derivatively neglected their sixteen-year old daughter, is supported by a preponderance of the

evidence. Respondents' actions showed that they have a fundamental defect in their understanding of their parental obligations (see *Sophia P.*, 66 AD3d at 909).

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

ENTERED: JUNE 13, 2013

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CLERK



undercover officers, the court only permitted defendant's family to attend, and it excluded three of his coworkers. Defendant made no showing of a significant personal relationship. The only information offered by defendant was that these persons had been his coworkers for approximately a year and a half. This did not meet defendant's burden of showing that the proposed spectators were "linked to him by some tie of more significance than ordinary friendship" (see *People v Nazario*, 4 NY3d 70, 74 [2005]), and there was no need for further inquiry by the court.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 13, 2013

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Tom, J.P., Friedman, Freedman, Feinman, JJ.

10358 Luis Rivera,  
Plaintiff-Appellant,

Index 304358/09

-against-

Miguel A. Gonzalez, et al.,  
Defendants-Respondents.

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Mitchell Dranow, Sea Cliff, for appellant.

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

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Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered March 7, 2012, which granted defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

In opposition to defendants' prima facie showing that plaintiff did not suffer a serious injury to his lumbar spine in a March 2007 automobile accident, plaintiff submitted an affirmed report by his radiologist finding a herniated lumbar disc. That finding alone is insufficient to establish a serious injury; additional objective medical evidence of significant physical

limitations resulting from the herniation is required (*Pommells v Perez*, 4 NY3d 566, 574 [2005]; *Wetzel v Santana*, 89 AD3d 554, 555 [1st Dept 2011]). Plaintiff also presented an affirmation by his initial treating physician, who found range of motion limitations within weeks after the accident. However, plaintiff's medical records show that, two months after the subject accident, he had only insignificant limitations in range of motion (see *Phillips v Tolnep Limo Inc.*, 99 AD3d 534, 534 [1st Dept 2012]). The affirmed reports of Dr. Shahid Mian, an orthopedist who examined plaintiff nearly two years after the accident, in March 2009, and again in 2011, are insufficient to raise an issue of fact because he failed to compare his measurements to normal ranges of motion (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]; *Soho v Konate*, 85 AD3d 522, 523 [1st Dept 2011]). Nor did he provide any explanation for any decrease in mobility following plaintiff's improvement in 2007 (see e.g. *Jno-Baptiste v Buckley*, 82 AD3d 578 [1st Dept 2011]).

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: JUNE 13, 2013

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

CLERK

Tom, J.P., Friedman, Freedman, Feinman, JJ.

10362N 43rd Street Deli, Inc.,  
Plaintiff-Appellant,

Index 110073/06

-against-

Paramount Leasehold, L.P.,  
Defendant-Respondent.

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Cornicello, Tendler & Baumel-Cornicello, LLP, New York (Susan Baumel-Cornicello of counsel), for appellant.

Rosenberg & Estis, P.C., New York (Jeffrey Turkel of counsel), for respondent.

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Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered April 9, 2012, which granted defendant's motion seeking use and occupancy to the extent of setting the matter down for a hearing before a referee to hear and determine the amount owed by plaintiff for monthly use and occupancy pending the outcome of this action, unanimously affirmed, without costs.

A court has broad discretion in awarding use and occupancy pendente lite (*see Alphonse Hotel Corp. v 76 Corp.*, 273 AD2d 124 [1st Dept 2000]). Although the court may look to the amount of rent paid under a prior lease between the parties in setting use and occupancy (*see Kuo Po Trading Co. v Tsung Tsin Assn.*, 273 AD2d 111 [1st Dept 2000]), prior rent is only probative, not

dispositive, on the issue (see *Mushlam, Inc. v Nazor*, 80 AD3d 471, 472 [1st Dept 2011]). Moreover, the court may refer the issue to a referee.

Here, under the lease in question, a new rent value is set when a tenant exercises its right of renewal. However, that right is only available to a tenant who is not in default. Since this suit is, in part, based upon plaintiff tenant's alleged default, and defendant landlord alleges that the lease has lapsed, making plaintiff a holdover tenant, it would be premature to find that the rent under the lease is the correct pendente lite payment (compare *New York Physicians LLP v Ironwood Realty Corp.*, 103 AD3d 410 [1st Dept 2013]).

To the extent that plaintiff is ultimately successful at trial, it may be provided with a refund or rent credit (see *Morris Hgts. Health Ctr., Inc. v DellaPietra*, 38 AD3d 261 [1st Dept 2007], *lv dismissed* 9 NY3d 887 [2007]).

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

ENTERED: JUNE 13, 2013



CLERK

Tom, J.P., Friedman, Freedman, Feinman, JJ.

10363N Arkin Kaplan Rice LLP, et al., Index 652316/12  
Plaintiffs-Respondents,

-against-

Howard Kaplan, et al.,  
Defendants-Appellants.

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Kaplan Rice LLP, New York (Christopher J. Roche of counsel), for appellants.

Kasowitz, Benson, Torres & Friedman LLP, New York (Joseph A. Piesco, Jr., of counsel), for respondents.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about January 28, 2013, which, among other things, referred to a judicial hearing officer the issue of whether plaintiff Lisa Solbakken was entitled to certain disclosure, unanimously affirmed, without costs.

Supreme Court providently exercised its discretion by directing defendants' counsel, Ciampi, LLC, to submit certain communications in plaintiff Lisa Solbakken's legal file for an in camera review and referring resolution of the discovery issue to a judicial hearing officer (see *CDR Creances S.A.S. v Cohen*, 77 AD3d 489, 491 [1st Dept 2010]; *Veras Inv. Partners, LLC v Akin Gump Strauss Hauer & Feld LLP*, 52 AD3d 370, 373 [1st Dept 2008]).

Although we only address the propriety of the in camera

review, we note that communications between defendants Howard Kaplan, Michelle Rice, Solbakken, and Ciampi LLC, made during the course of Ciampi's joint representation of them, fall within the scope of the attorney-client privilege because Kaplan, Rice, Solbakken, shared "a common interest" (*American Re-Insurance Co. v United States Fid. & Guar. Co.*, 40 AD3d 486, 490-491 [1st Dept 2007]; *Finn v Morgan*, 46 AD2d 229, 235 [4th Dept 1974]), and consulted Ciampi for their "mutual benefit" (*Martin v Slifkin*, 249 App Div 860 [2d Dept 1937]).

Those communications are not privileged within the context of Solbakken's adverse litigation against Kaplan and Rice (see *Matter of McCormick*, 287 AD2d 457 [2d Dept 2001]; *Matter of Beiny [Weinberg]*, 129 AD2d 126, 139-140 [1st Dept 1987]; *Goldberg v American Home Assur. Co.*, 80 AD2d 409, 413 [1st Dept 1981]; *Matter of Friedman*, 64 AD2d 70, 84 [2d Dept 1978]). However, those communications are privileged as against Solbakken's co-plaintiffs, who were not clients being jointly represented by Ciampi (see *Wallace v Wallace*, 216 NY 28, 35-36 [1915]; *Doheny v Lacy*, 168 NY 213, 224 [1901]; *Hurlburt v Hurlburt*, 128 NY 420, 424 [1891]; *Root v Wright*, 84 NY 72 [1881]; *La Barge v La Barge*, 284 App Div 996 [3d Dept 1954]; see also Restatement [Third] of Law Governing Lawyers § 75[1]). "The privilege belongs to the

client" and Solbakken cannot unilaterally waive it on defendants' behalf so as to benefit her coplaintiffs (*People v Osorio*, 75 NY2d 80, 84 [1989]; see CPLR 3101[b], 4503[a][1]; *Matter of Vanderbilt [Rosner-Hickey]*, 57 NY2d 66 [1982]).

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

ENTERED: JUNE 13, 2013

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Tom, J.P., Freedman, Friedman, Feinman, JJ.

10364N A.L. Eastmond & Sons, Inc.,  
Plaintiff-Appellant,

Index 304461/08

-against-

Keevily, Spero-Whitelaw, Inc.,  
Defendant-Respondent.

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Day Pitney LLP, New York (Nexus U. Sea of counsel), for  
appellant.

Keidel, Weldon & Cunningham, LLP, White Plains (Darren P. Renner  
of counsel), for respondent.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.),  
entered October 25, 2012, which, upon granting plaintiff's motion  
to reargue, denied its motion to amend the complaint and add a  
new defendant, unanimously affirmed, with costs.

Under the circumstances, plaintiff's motion to amend its  
complaint to assert fraud claims and add a defendant, made  
approximately three and one half months after depositions were  
taken, was not unduly delayed (*see Kocourek v Booz Allen Hamilton  
Inc.*, 85 AD3d 502, 504 [1st Dept 2011]). Nonetheless, plaintiff  
failed to demonstrate that its proposed amendment is supported by  
a sufficient showing of merit (*see MBIA Ins. Corp. v Greystone &  
Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]).

Contrary to plaintiff's contention, the doctrine of the law of the case does not apply to bar the denial of the motion for leave to amend based on a prior order denying defendant's motion to dismiss the cause of action for breach of fiduciary duty pursuant to CPLR 3211 given the difference in procedural posture (see *Bodtman v Living Manor Love, Inc.*, 105 AD3d 434 [1st Dept 2013]). Even if this principle applies, plaintiff's proposed fraud claims fail since plaintiff failed to plead a breach of duty distinct from, or in addition to, the breach of contract or failure to perform under the contract (see *Non-Linear Trading Co., Inc. v Braddis Assocs., Inc.*, 243 AD2d 107, 116 [1st Dept 1998]). Plaintiff also failed to plead the elements of its proposed fraud counts with the particularity required by CPLR 3016(b).

The proposed amended complaint alleges no acts or omissions by defendant's chief executive officer that are independent of any acts he performed within the scope of his employment for defendant and the fact that he was paid commissions does not

demonstrate that such remuneration was exclusive to him (see *Henry v Allen*, 151 NY 1, 11 [1896]; *Ali v Pacheco*, 19 AD3d 439, 440 [2nd Dept 2005]; *Lewiarz v Travco Ins. Co.*, 82 AD3d 1464, 1468 [3rd Dept 2011]).

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

ENTERED: JUNE 13, 2013

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any disparate treatment by the prosecutor of similarly situated panelists.

The court properly denied defendant's motion to set aside the verdict based on juror misconduct. In a postverdict discussion with a sworn juror, defense counsel learned that the juror knew someone who had been the victim of a rape that had shared some material similarities with this case. Since the only voir dire question on this subject asked whether any prospective juror had a close friend who had been a crime victim, defendant did not establish that the juror failed to answer a voir dire question honestly; in any event, defendant did not establish that any such concealment was deliberate. Defendant's arguments based on the juror's body language during the postverdict interview are highly speculative. Furthermore, defendant did not establish that the allegedly concealed information would have been a proper basis to excuse the juror for cause. The juror's knowledge of a date-rape victim's failure to report the crime would not have established an implied bias, or otherwise supported a challenge for cause, particularly in light of the juror's assurances during voir dire that she could be fair. Thus, the juror's apparently inadvertent omission did not affect a substantial right, and does

not provide grounds for reversal (see CPL 330.30[2]; *People v Rodriguez*, 100 NY2d 30, 35 [2003]; see also *McDonough Power Equip., Inc. v Greenwood*, 464 US 548, 556 [1984]). Finally, defendant was "not entitled to a hearing based on expressions of hope that a hearing might reveal the essential facts" (*People v Johnson*, 54 AD3d 636, 636 [2008], lv denied 11 NY3d 898 [2008]).

The People did not violate their disclosure obligations under *Brady v Maryland* (373 US 83 [1963]), and the court properly rejected defendant's request for an adverse inference charge with respect to a surveillance videotape made, and then erased, by the store where the incident occurred. The record establishes that this tape was never in the possession of the police or prosecution. Regardless of whether the police were in a position to ascertain the existence of this tape or acquire it, they had no duty to do so (see *People v Hayes*, 17 NY3d 46, 50-52 [2011]; *People v Walloe*, 88 AD3d 544 [1st Dept 2011], lv denied 18 NY3d 963 [2012]).

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

ENTERED: JUNE 13, 2013



CLERK

Acosta, J.P., Saxe, Renwick, Richter, Clark, JJ.

10367 Eve & Mike Pharmacy, Inc.,  
Plaintiff-Appellant,

Index 651845/10

-against-

Greenwich Pooh, LLC,  
Defendant-Respondent.

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Stephen G. Dickerman, Brooklyn, for appellant.

Ingram Yuzek Gainen Carroll & Bertolotti, LLP, New York (Lindsay Bass of counsel), for respondent.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered August 5, 2011, which granted summary judgment dismissing the complaint, unanimously affirmed, with costs.

Defendant landlord issued a notice of termination of plaintiff's lease that it subsequently withdrew after the commencement of this action. Upon withdrawal of the notice, plaintiff's request for a judicial declaration as to the legal effect or "nullity" of the notice was rendered moot. Accordingly, plaintiff's first cause of action seeking a declaratory judgment was properly dismissed (*see New York Foreign Trade Zone Operators, Inc. v State Liq. Auth.*, 285 NY 272, 276 [1941]).

Plaintiff claims that by taking more than the 30 days allotted by the lease to respond to its request for an assignment of the lease, defendant "waived the benefits of Lease rider paragraph 54." This is inconsistent with the plain language of paragraph 54 which provides that if defendant "does not so elect to terminate the Lease by giving notice of such termination within thirty (30) days after receipt of the Assignment/Subletting Statement or if [defendant] does not have the right to terminate the Lease . . ., then [defendant] shall either consent or withhold consent to the proposed transaction" (see *Provident Loan Socy. of N.Y. v 190 E. 72nd St. Corp.*, 78 AD3d 501, 501-02 [1st Dept 2010]).

By failing to submit the issue of defendant's denial of consent to arbitration, as required by the lease, plaintiff waived its opportunity to challenge defendant's action. Even if plaintiff had submitted the dispute to arbitration and received a determination that defendant unreasonably withheld consent, it would not be entitled to damages because the lease limits plaintiff's remedies and specifically provides that "the party who shall have refused or failed to give such consent shall not have any liability to the other party therefor." Thus, plaintiff's second cause of action, to the extent it relates to

any damages alleged to flow from the loss of its potential assignee, was properly dismissed.

Plaintiff is not entitled to a judicial declaration regarding defendant's withholding of consent because it failed to submit the matter to arbitration as required by the lease.

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

ENTERED: JUNE 13, 2013

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Acosta, J.P., Saxe, Renwick, Richter, Clark, JJ.

10368-

Index 114357/09

10369-

10370 Joanne Payson,  
Plaintiff-Appellant,

-against-

50 Sutton Place South  
Owners, Inc., et al.,  
Defendants-Respondents.

---

Wachtel Masyr & Missry LLP, New York (John H. Reichman of  
counsel), for appellant.

Herzfeld & Rubin, P.C., New York (Miriam Skolnik of counsel), for  
respondents.

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Amended order, Supreme Court, New York County (Cynthia S.  
Kern, J.), entered December 20, 2012, which, to the extent  
appealed from as limited by the briefs, granted defendants'  
motion for summary judgment dismissing the assigned subrogated  
claim, unanimously affirmed, without costs. Appeal from order,  
same court and Justice, entered October 3, 2012, unanimously  
dismissed, without costs, as superseded by the appeal from the  
order entered December 20, 2012. Order, same court and Justice,  
entered December 14, 2012, which, to the extent appealable,  
denied plaintiff's motion for renewal, unanimously affirmed,  
without costs.

The motion court's understanding of the unambiguous waiver of subrogation clause comported with the rule strictly construing such waivers (see *State Farm Ins. Co. v J.P. Spano Constr., Inc.*, 55 AD3d 824 [2nd Dept 2008]). The court correctly interpreted plaintiff's insurance policy (see *Federal Ins. Co. v International Bus. Machs. Corp.*, 18 NY3d 642, 646 [2012]) by applying the clause to the claims of damage to plaintiff's cooperative apartment, despite the clause's reference to "condominiums." The policy, under which the insurer had paid plaintiff nearly \$1.5 million, refers to plaintiff's premises as a condominium and states that the coverage is for condominiums, and the clause's reference to "corporation" can only refer to a cooperative corporation. As the assignee of the subrogated claims, plaintiff is in no better position than her assignor (see *New York & Presbyt. Hosp. v Country-Wide Ins. Co.*, 17 NY3d 586, 592 [2011]).

The court properly considered defendants' reply quoting the clause, since plaintiff availed herself of the opportunity to respond to the submission (see *Riley v Segan, Nemerov & Singer, P.C.*, 82 AD3d 572 [1st Dept 2011]). The lack of ambiguity in the clause rendered inadmissible plaintiff's averment in support of

her renewal motion. In view of the foregoing, it is unnecessary to address the additional ground urged for affirmance.

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: JUNE 13, 2013

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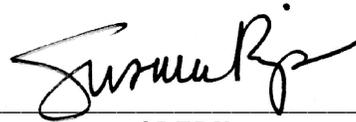
assigned to Temco without the requisite competitive bidding will suffer a loss of work and income (see *New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]; *Mulgrew v Board of Educ. of City School Dist. of the City of N.Y.*, 75 AD3d 412, 413 [1st Dept 2010]; *Matter of District Council No. 9, Intl. Bhd. of Painters & Allied Trades v Metropolitan Transp. Auth.*, 115 Misc 2d 810, 813 [Sup Ct, NY County 1982], *affd* 92 AD2d 791 [1st Dept 1983]). Petitioner is also within the zone of interest of the competitive bidding statutes here at issue (see General Municipal Law § 103; Education Law § 2556[10]; *District Council No. 9*, 115 Misc 2d at 813).

Petitioner has also shown associational standing, since, crediting the petition's allegations, Local 891 members at schools where custodial services are assigned to Temco without the requisite competitive bidding would have individual standing to sue, Local 891 is "an appropriate representative" of its members' employment interests, and the "participation in the proceeding of all interested individual members of [the union] is not necessary to afford complete relief" (see *Mulgrew*, 75 AD3d at 413; *Nurse Anesthetists*, 2 NY3d at 211).

We have considered respondents' contentions relating to mootness and justiciability and find them unavailing.

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

ENTERED: JUNE 13, 2013

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CLERK

Acosta, J.P., Saxe, Renwick, Richter, Clark, JJ.

10372 Eusebia Colon,  
Plaintiff-Appellant,

Index 108714/09

-against-

36 Rivington Street, Inc., et al.,  
Defendants,

Indochina Sino-American Senior  
Citizen Center, et al.,  
Defendants-Respondents.

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Law Office of William A. Gallina, PLLC, Bronx (Frank V. Kelly of  
counsel), for appellant.

Law Offices of Charles Siegel, New York (Richard O'Connell of  
counsel), for Indochina Sino-American Senior Citizen Center,  
respondent.

Law Office of James J. Toomey, New York (Evy L. Kazansky of  
counsel), for Olson's Creative Landscaping and Olson's Creative  
Landscaping, Inc., respondents.

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Order, Supreme Court, New York County (Barbara Jaffe, J.),  
entered May 17, 2012, which, to the extent appealed from as  
limited by the briefs, granted the motion of defendants Hui's  
Rich Mansion Condominium s/h/a Hui's Realty, Inc. and Rich  
Mansion Condominium for summary judgment dismissing the complaint  
and all cross claims as against them, unanimously affirmed,  
without costs. The appeal from the aforesaid order, insofar as  
it granted the motions of the Olson's Creative Landscaping

defendants for summary judgment dismissing the complaint and all cross claims, and of Indochina Sino-American Senior Citizen Center for summary judgment dismissing the complaint, unanimously dismissed, without costs, as abandoned.

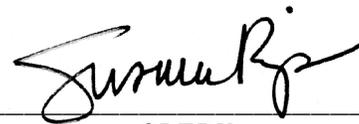
Plaintiff alleges that, at about 10:00 a.m. on a Sunday morning in January 2009, she slipped and fell on about two inches of snow and ice covering the sidewalk abutting a building owned by the Hui defendants. In support of their motion for summary judgment, defendants submitted certified climatological records which showed that precipitation, including freezing rain and snow, had fallen for some 15 hours during the 24-hour period preceding plaintiff's fall, and had stopped at about 6:00 a.m. Pursuant to Administrative Code of City of NY § 16-123(a), defendants had until 11:00 a.m. to clear the snow and ice from the sidewalk. Since that period had not yet expired at the time that plaintiff fell, defendants established their entitlement to judgment as a matter of law (see *Rodriguez v New York City Hous. Auth.*, 52 AD3d 299 [1st Dept 2008]).

In opposition, plaintiff failed to raise a triable issue of fact. Her argument that the snow may have accumulated from earlier storms is speculative and refuted by the climatological

records (see *Lenti v Initial Cleaning Servs., Inc.*, 52 AD3d 288 [1st Dept 2008]). Further, her contention that the condition may have resulted from the melting and refreezing of piles of snow made by defendant's handyman is not supported by his testimony, which described his general method of shoveling, not the conditions existing at the time of the accident. The theory is also contradicted by the climatological records, which show that only trace amounts of snow had fallen in the previous weeks and would have melted when the temperature rose above freezing, and that little accumulation developed in the day preceding plaintiff's fall (see *Daley v Janel Tower L.P.*, 89 AD3d 408 [1st Dept 2011]).

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

ENTERED: JUNE 13, 2013

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

CLERK

Acosta, J.P., Saxe, Renwick, Richter, Clark, JJ.

10373 In re Nina Berman,  
Petitioner,

Index 402655/11

-against-

New York State Department  
of Social Services,  
Respondent.

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Nina Berman, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (David Lawrence  
III of counsel), for respondent.

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Determination of the New York State Office of Temporary and  
Disability Assistance, dated June 8, 2011, which, after a fair  
hearing, affirmed a decision of the New York City Human Resources  
Administration/Department of Social Services (NYCDSS) to  
discontinue petitioner's public assistance benefits for 180 days,  
and not provide her with transportation reimbursement or a  
restaurant allowance, 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 [Alice Schlesinger, J.], entered on or about December 21,  
2011), dismissed, without costs.

Although petitioner failed to sue any proper respondent,  
instead bringing this proceeding against the nonexistent "New

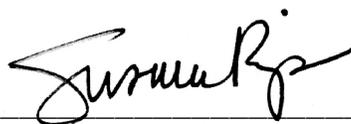
York State Department of Social Services," the New York State Attorney General has appeared and does not seek dismissal of the proceeding on this ground, and NYCDSS is not a necessary party (see *Matter of Feliz v Wing*, 285 AD2d 426, 426 [1st Dept 2001], *lv dismissed* 97 NY2d 693 [2002]).

On the merits, the determination to discontinue petitioner's public assistance benefits is supported by substantial evidence (see generally *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179-182 [1978]). Indeed, petitioner, who failed to comply with at least two other employment requirements, testified that she failed to appear on the first day of her March 2011 work assignment (see Social Services Law § 342[3][c]). Petitioner did not have "good cause" for her absence from work (*id.* at § 342[1]). Further, once petitioner's employment ended in December 2010, NYCDSS was not required to give her transportation benefits (see *id.* at § 332-a; 18 NYCRR 385.4). Nor was petitioner entitled to a restaurant allowance, since she testified that she had a stove and refrigerator and was able to

"make small dishes" (see 18 NYCRR 352.7[c]). Petitioner failed to preserve her procedural arguments (see *Matter of Ortiz v Carrion*, 105 AD3d 490 [1st Dept 2013]).

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

ENTERED: JUNE 13, 2013

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CLERK

Acosta, J.P., Saxe, Renwick, Richter, Clark, JJ.

10374 Cantor Fitzgerald Securities, et al., Index 105447/94  
Plaintiffs-Appellants,

-against-

The Port Authority of New York  
and New Jersey,  
Defendant-Respondent.

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Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC  
(Jonathan G. Cedarbaum of the bar of the District of Columbia,  
admitted pro hac vice, of counsel), for appellants.

Weil, Gotshal & Manges LLP, New York (Gregory Silbert of  
counsel), for respondent.

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Appeal from order, Supreme Court, New York County (Debra A. James, J.), entered December 4, 2012, which, upon renewal of defendant's motion for partial summary judgment and to set aside a liability verdict, granted defendant's motion, finding that defendant was entitled to governmental immunity from plaintiffs' claims, dismissed the complaint, and denied plaintiffs' cross motion for renewal, deemed an appeal from judgment, entered February 26, 2013, dismissing the action, and so considered, said judgment unanimously affirmed, with costs.

Plaintiffs had a full and fair opportunity to litigate the liability issue through a Steering Committee appointed by the trial court to represent the interests of the numerous plaintiffs

and their actions, including the Cantor plaintiffs, on the liability aspect of the bifurcated trials. Indeed, Cantor's counsel was appointed a member of the Steering Committee. The issue of defendant's liability in connection with the 1993 World Trade Center bombings, and whether the defendant had a viable governmental immunity defense (see generally McKinney's Uncons Laws of NY §§ 7101, 7106 [2000]; N.J. Stat. Ann. §§ 32:1-157, 1-162 [West 2011]), was fully litigated (see *Matter of World Trade Ctr. Bombing Litig.*, 3 Misc 3d 440, 442 [Sup Ct, NY County 2004], *affd* 13 AD3d 66 [1<sup>st</sup> Dept 2004], *revd* 17 NY3d 428 [2011], *cert denied sub nom Ruiz v Port Auth. of N.Y. & N.J.*, \_\_\_ US \_\_\_, 133 S Ct 133 [2012]) and the doctrine of collateral estoppel applies to preclude further argument on the issue (see generally *Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485 [1979]); *Matter of Moore v Evans*, 95 AD3d 579 [1<sup>st</sup> Dept 2012]). Moreover, the Court of Appeals' reversal of the interlocutory judgment of liability (see 17 NY3d 428 [2011]) warranted dismissal of the instant action (see generally *Nash v Port Auth. of N.Y. & N.J.*, 102 AD3d 420 [1<sup>st</sup> Dept 2013]; *McMahon v City of New York*, 105 AD2d 101 [1<sup>st</sup> Dept 1984]). Plaintiffs' argument that the governmental

immunity issue presented a federal law issue in light of the bi-state compact which gives rise to the Port Authority's existence was considered by the Court of Appeals on a motion to reargue (see 18 NY3d 898 [2012]), and reargument was denied.

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

ENTERED: JUNE 13, 2013

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in nominal defendant Massapequa Plaza Associates LP to restore to the partnership, among other things, fees and commissions it allegedly improperly paid to the general partner, defendant Ross, and his property management company, Intercapital Realty Corp. The operative agreements authorized Ross to take actions that resulted in the limited partnership's payment to him of leasing commissions, mortgage commissions, and construction management fees. However, conflicting expert testimony as to the reasonableness of the actual fees charged raises triable issues of fact whether the specified payments of those fees and commissions were excessive and improper under the terms of the applicable agreements.

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: JUNE 13, 2013



CLERK

Acosta, J.P., Saxe, Renwick, Richter, Clark, JJ.

10378 In re Joelin V.,

A Person Alleged to  
be a Juvenile Delinquent,  
Appellant.

- - - - -

Presentment Agency

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

Michael A. Cardozo, Corporation Counsel, New York (Deborah A. Brenner of counsel), for presentment agency.

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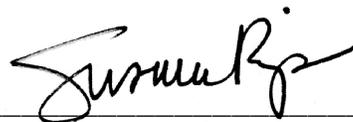
Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about July 19, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed acts that, if committed by an adult, would constitute the crimes of robbery in the third degree, grand larceny in the fourth degree and criminal possession of stolen property in the fifth degree, and placed her with the Office of Children and Family Services for a period of up to 18 months, unanimously reversed, on the law, without costs, and the matter remanded for a new fact-finding hearing.

As the presentment agency concedes, the Family Court erred in ordering testimony to proceed in appellant's absence. While the court briefly inquired into appellant's whereabouts and

learned that defense counsel did not know where she was, the court did not make a determination that appellant's absence was deliberate, or state any grounds for reaching such a conclusion (see *People v Brooks*, 75 NY2d 898, 899 [1990]). Accordingly, there was a violation of appellant's right to be present (see Family Ct Act § 341.2[1]). We note that appellant arrived in court approximately one hour late, and had a reasonable excuse for her lateness.

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

ENTERED: JUNE 13, 2013

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limitation to her left knee, and otherwise affirmed, without costs.

Plaintiff Castillo (plaintiff) alleges she suffered serious injuries to her left knee, cervical spine and lumbar spine, when she was a passenger in a taxi that was hit by a vehicle owned and operated by defendants.

Defendants made a prima facie showing of their entitlement to judgment as a matter of law by submitting the affirmed reports of a neuroradiologist who opined that changes to plaintiff's left knee and cervical and lumbar spine were degenerative in origin, and of a neurologist and an orthopedic surgeon who found full range of motion in all body parts (*see generally Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 351-352 [2002]). Defendants' experts were not required to review plaintiff's medical records, since they described the various tests performed on plaintiff and found full range of motion (*see Brand v Evangelista*, 103 AD3d 539, 539 [1st Dept 2013]). The variance between the experts' findings and standards on one diagnostic test was not significant (*id.*).

Plaintiff raised an issue of fact with respect to whether she sustained a permanent consequential or significant limitation to her left knee. Her treating orthopedic surgeon found a

lateral meniscus tear and causally related this finding to the accident. Further, he addressed the defense claims of degeneration (see *Salman v Rosario*, 87 AD3d 482, 483-484 [1st Dept 2011]), and found quantified limitations in range of motion of the left knee both before and after arthroscopic surgery, contrary to defendants' physicians' findings (see *James v Perez*, 95 AD3d 788, 788-789 [1st Dept 2012]). The surgeon also adequately explained plaintiff's gap in treatment with respect to the left knee (see *Ayala v Cruz*, 95 AD3d 699, 700 [1st Dept 2012]).

To the extent plaintiff continues to assert a serious injury claim under the 90/180-day category, the court properly dismissed the claim because plaintiff did not allege that she was disabled for the minimum duration necessary to state such a claim (see *Arenas v Guaman*, 98 AD3d 461 [1st Dept 2012]).

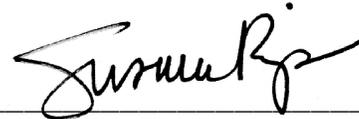
Serious injuries to plaintiff's left knee having been established, we need not address whether the other injuries claimed by plaintiff were sufficient to meet the no fault

threshold (see *Rubin v SMS Taxi Corp.*, 71 AD3d 548, 548-549 [1<sup>st</sup> Dept 2010]).

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: JUNE 13, 2013

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CLERK

Acosta, J.P., Saxe, Renwick, Richter, Clark, JJ.

10381-

Index 110344/06

10381A-

10381B-

10382 Ann Jennings-Purnell, M.D.,  
Plaintiff-Appellant,

-against-

Eric C. Jennings, et al.,  
Defendants,

Richard W. Donner,  
Defendant-Respondent.

[And a Third-Party Action]

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William R. Bronner, Brooklyn, for appellant.

L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City  
(Kimberly Johnson Glenn of counsel), for respondent.

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Judgment, Supreme Court, New York County (Milton A. Tingling, J.), entered February 7, 2012, dismissing the amended complaint as against defendant Richard W. Donner, and bringing up for review an order and amended order, same court and Justice, entered November 21, 2011 and January 10, 2012, respectively, which granted defendant's motion to dismiss the amended complaint as against him, unanimously reversed, on the law, without costs, the judgment vacated, the motion denied, and the complaint reinstated as against defendant Donner. Appeals from the

aforesaid orders, unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Appeal from order, same court and Justice, entered April 18, 2012, which denied plaintiff's motion to, among other things, vacate a prior order striking her motion to amend her amended complaint, unanimously dismissed, without costs, as moot.

Plaintiff's amended complaint, as supplemented by her affidavit in opposition to the motion to dismiss, stated a claim against defendant for notarial misconduct. Accordingly, the court should have denied the motion to dismiss the amended complaint (*see Embee Advice Establishment v Holtzmann, Wise & Shepard*, 191 AD2d 194 [1st Dept 1993]).

In light of the foregoing determination, the appeal from the order denying plaintiff's motion to vacate a prior order striking her motion to interpose a second amended complaint is moot. In any event, the motion should have been granted, as there is no dispute that plaintiff's counsel had a meritorious excuse for missing the argument date on the motion for leave to amend (*see* CPLR 5015[a][1]). Further, the proposed pleading sufficiently stated a claim for notarial misconduct. It also related back to the prior amended complaint for the purposes of the statute of

limitations. While the prior amended complaint did not mention notarial misconduct, it clearly gave notice to defendant of the transaction and occurrence in which the notarial misconduct took place (see CPLR 203[f]).

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

ENTERED: JUNE 13, 2013

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Acosta, J.P., Sweeny, Renwick, Richter, Clark, JJ.

10383N Larry Scarlino, et al., Index 105939/10  
Petitioners-Respondents,

-against-

Behrouz Fathi,  
Respondent-Appellant,

Frank Thomas, etc., et al.,  
Respondents.

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Rivkin Radler LLP, Uniondale (Evan H. Krinick of counsel), for  
appellant.

Advocates for Justice, Chartered Attorneys, New York (Arthur Z.  
Schwartz of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York  
County (Lucy Billings, J.), entered May 31, 2012, which granted  
petitioners' CPLR Article 78 petition seeking injunctive relief  
prohibiting respondent Behrouz Fathi(respondent) from serving as  
an officer in Civil Service Technical Guild, Local 375,  
unanimously reversed, on the law, without costs, the order and  
judgment vacated, and the petition dismissed without prejudice.

Petitioners, officers of Local 375, a public employee local  
union representing engineering and technical employees affiliated  
with the American Federation of State, County and Municipal  
Employees (AFSCME) and with AFSCME's regional governing body,

District Council 37 (DC 37), initiated this proceeding seeking to have respondent, the Acting President of Local 375, enjoined from serving as an officer in the union on the ground that his decades-old convictions of "crimes of dishonesty" barred him from such service under a provision of the DC 37 Constitution (Article XIII, Section 7) applicable to local affiliate unions.

Petitioners also sought to have the only other named respondents, the Chairman of Local 375's Executive Committee and Local 375's treasurer, enjoined from authorizing respondent's service as an officer, or paying him for it.

Petitioners commenced this proceeding after their efforts to have respondent removed were rejected by Local 375's Executive Committee. Shortly thereafter, the motion court stayed the proceedings to enable petitioners to exhaust their administrative remedies, which, inter alia, required determinations by DC 37's Ethical Practices Officer and AFSCME's Judicial Panel. Ultimately, it was determined that Section 7 does not bar respondent's service as an officer.

The threshold question before us is whether the motion court erred in rejecting respondents' argument that DC 37 and ACSCME are necessary parties that petitioners were required to join. We conclude that they are necessary parties. Although complete

relief, i.e., injunctive relief against respondent and the two other Local 374 officers named in the petition, can be accorded in the absence of DC 37 and AFSCME, they may be inequitably affected by the judgment (CPLR 1001(a); see *27th St. Block Assn. v Dormitory Auth. of State of N.Y.*, 302 AD2d 155, 160 [1st Dept 2002]). Without the intermediate determination by DC 37 and the final determination by AFSCME, petitioners could not have proceeded with this action. Further, it is the interpretation of DC 37's constitution that is at issue -- an interpretation that will necessarily have implications beyond this case for the members of DC 37, its local affiliates and AFSCME, its governing body. Thus, DC 37 and AFSCME must be given "the opportunity to be heard before [their] rights or interests are adversely affected" (*27th Street Block Assn.*, 302 AD2d at 160 [citations omitted]).

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

ENTERED: JUNE 13, 2013



CLERK

Acosta, J.P., Saxe, Renwick, Richter, Clark, JJ.

10384N Board of Managers of The Index 307210/08  
Shorehaven Condominium,  
Plaintiff-Respondent,

-against-

Hector Pina, et al.,  
Defendants,

- - - - -

Amit Louzon,  
Nonparty Appellant.

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Amit Louzon, appellant pro se.

Ronald Francis, New York, for respondent.

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Order, Supreme Court, Bronx County (Robert E. Torres, J.),  
entered October 19, 2011, which, insofar as appealed from, denied  
the motion of nonparty Amit Louzon seeking, inter alia, to direct  
the return of his deposit paid at a foreclosure auction,  
unanimously affirmed, without costs.

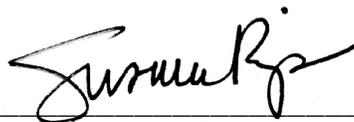
The court properly denied Louzon's motion, since he did not  
perform at the scheduled closing, thereby defaulting under the  
clear terms of sale that he had agreed to. Under these clear  
terms, plaintiff made no representations or warranties with  
respect to the marketability and insurability of title, or to  
existing mortgages on the property, and Louzon was required to  
pay the balance of the purchase price on the closing date or

forfeit his deposit.

Although, on the same date as the closing, the court signed defendants' order to show cause directing that the closing be stayed, the record demonstrates that service of that order to show cause was not effectuated until after the closing had taken place. Thus, the closing had not been stayed and Louzon remained obligated to perform (*see Lenders Capital LLC v Ranu Realty Corp.*, 99 AD3d 566 [1st Dept 2012]).

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

ENTERED: JUNE 13, 2013

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CLERK

Acosta, J.P., Saxe, Renwick, Richter, Clark, JJ.

10385N Yaron Ari,  
Petitioner-Appellant,

Index 108727/10

-against-

Itamar Itzchak Cohen,  
Respondent-Respondent.

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Daniel Friedman, Far Rockaway, for appellant.

Weisman Law Group P.C., Cedarhurst (Rachel J.B. Weisman of  
counsel), for respondent.

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Order, Supreme Court, New York County (Carol E. Huff, J.),  
entered December 21, 2011, which vacated an order (same court and  
Justice), entered February 4, 2011, confirming an arbitration  
award issued on or about June 18, 2010, unanimously affirmed,  
without costs.

On July 1, 2010, petitioner brought a petition to confirm  
an arbitration award issued by the Beth Din Zedek of America on  
or about June 18, 2010, awarding money to petitioner as repayment  
for his investment in a Brooklyn restaurant that he and  
respondent had owned. The motion court granted the petition as  
unopposed but subsequently vacated the default judgment on the  
ground that the one year statute of limitations for confirming  
the arbitration award had expired since an original award was

issued by the Beth Din Zedek in 2006. The court noted that the 2010 award neither tolled the statute of limitations nor began it anew.

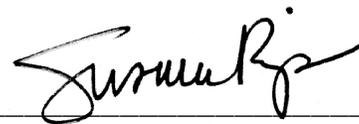
On appeal, petitioner no longer seeks to confirm the 2010 award; instead, he contends that his time to confirm the 2006 award should have been tolled by CPLR 207 and equitable tolling. These arguments are not preserved for appellate review.

Respondent could have factually countered petitioner's argument that CPLR 207 tolled his time to move to confirm the award by submitting evidence showing that he was still subject to New York jurisdiction, even though he had moved to Israel (see CPLR 207[3]; *Yarusso v Arbotowicz*, 41 NY2d 516 [1977]; *City of New York v Stack*, 178 AD2d 355 [1st Dept 1991], *lv denied* 80 NY2d 753 [1992]). With respect to petitioner's equitable tolling argument, the applicable doctrine is equitable estoppel since petitioner's cause of action is a state, not federal, one (see *Shared Communications Servs. of ESR, Inc. v Goldman, Sachs & Co.*, 38 AD3d 325, 326 [1st Dept 2007]). However, it is improper to raise this doctrine for the first time on appeal (*id.*).

Finally, petitioner contends that the order appealed from should be reversed due to factual errors. This argument is unavailing; the errors are irrelevant to the points decided on this appeal.

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

ENTERED: JUNE 13, 2013

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