SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 16, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, McGuire, Manzanet-Daniels, Román, JJ.

2104 The Bank of New York, etc., Index 105433/06
Plaintiff-Appellant,

-against-

Ofer Resles, et al.,
Defendants,

Hamari Ventures, LLC,
Defendant-Respondent.

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Hofheimer Gartlir & Gross, LLP, New York (David L. Birch of counsel), for appellant.

Joel Zweig, New York, for respondent.

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Order, Supreme Court, New York County (Walter B. Tolub, J.), entered January 21, 2009, which granted the motion of defendant Hamari Ventures, LLC, for a determination that its mortgage takes precedence over plaintiff's mortgage, and ordered the sale of the mortgaged property to proceed, unanimously reversed, on the law, with costs, and the motion denied.

A summary of the odd procedural history of this foreclosure action is appropriate. Plaintiff Bank of New York (BONY)

commenced an action to foreclose on two mortgages on a condominium apartment (the property) that were executed by the property's owner, defendant Resles. The first of these mortgages (the first mortgage) was in the amount of $225,000, made in favor of Madison Home Equities, executed on April 12, 2004, recorded on June 1, 2004, and assigned on November 3, 2004 to Countrywide Home Loans, Inc. (Countrywide). Resles then executed a second mortgage on the property to Countrywide (the second mortgage) on November 3, 2004 in the amount of $215,000, which was not recorded until nearly a year later, on August 9, 2005, and was consolidated with Countrywide's first mortgage that same day.

On April 18, 2006, the consolidated mortgage was assigned to BONY and BONY commenced this foreclosure action that same day. Hamari Ventures, LLC (Hamari) was named as a defendant because it also held a mortgage on the property. Hamari's mortgage was in the amount of $150,000, executed by Resles on May 5, 2005, and recorded on July 1, 2005, five weeks before the second mortgage was recorded.

None of the defendants, Hamari included, answered BONY's summons and complaint. A judgment of foreclosure and sale was accordingly entered on May 17, 2007, awarding plaintiff $465,924.01 plus costs and interests, that is, an amount covering

the full amount of the first and second mortgages. A public auction was held on September 12, 2007, at which a bid for the property of $523,000 was accepted.

Thereafter, Hamari appeared in the action, and on October 9, 2007, moved by order to show cause to enjoin the closing of the sale pending a direction that funds from the sale be paid to it as the holder of what it claimed was the second mortgage on the property.

Although Hamari did not explicitly ask for vacatur of the default judgment, the parties treated the order to show cause as a motion to vacate. Similarly, the order determining that motion, the order from which BONY appeals, does not explicitly address vacatur, although it implicitly vacates the default judgment by modifying it, i.e., by determining that Hamari's mortgage takes precedence over the second mortgage and by directing that the closing proceed and that payment to Hamari be made in accordance with its mortgage from the funds remaining after the satisfaction of the first mortgage.

Because both the parties and Supreme Court treated Hamari's order to show cause as a motion to vacate the default judgment, we will do the same. The governing law is clear: a defendant seeking to vacate a default is required to demonstrate both a

reasonable excuse for the delay in appearing and answering the complaint and a potentially meritorious defense to the action (CPLR 5015[a][1]; *Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]). We need not reach the issue of reasonable excuse because Hamari failed to show a meritorious defense.

The funds realized from a sale of foreclosed property are used to satisfy liens in the order that the lien holders recorded their liens; thus, Hamari's mortgage would have precedence over the second mortgage if Hamari's mortgage was recorded before the second mortgage (*see* Real Property Law § 291). Additionally, Real Property Law § 317 provides:

> "Every instrument, entitled to be recorded, must be recorded by the recording officer in the order and as of the time of its delivery to him therefor, and is considered recorded from the time of such delivery."

Thus, provided that it is entitled to be recorded, an instrument is deemed recorded from the time it is delivered to the clerk for recording. When a party establishes that an instrument was entitled to be recorded and was delivered, subsequent lienholders are deemed to have constructive notice of the first-delivered lien (*see Homeowners Loan Corp. v Recckio*, 45 AD3d 1322 [2007]; *NYCTL 1998-1 Trust v Ibrahiem*, 15 Misc 3d 294 [2007]).

The City Registrar does not date stamp or otherwise record the time of delivery of mortgages submitted for recording. At the hearing, BONY adduced the following evidence that the second mortgage was delivered to the Registrar on or about June 10, 2005: the cover sheet prepared by Countrywide's title agency, dated June 9, 2005; and the check for payment of fees associated with the registration of the second mortgage, dated June 10, 2005, stamped by the City as received on the same date, stamped with an endorsement by the City on June 13, 2005, and paid on June 15, 2005. The hearing evidence also established that Hamari's cover sheet was dated June 16, 2005, and that its check was dated June 28, 2005, stamped with an endorsement by the City on July 1, 2005, and paid on July 5, 2005. On this evidence, it is clear that the second mortgage was delivered no later than June 15, 2005, i.e., before Hamari's mortgage, and Hamari does not contend otherwise.

Thus, the only remaining issue is whether the second mortgage was entitled to be recorded when it was delivered. Hamari failed to elicit any evidence of a defect in the second mortgage. Indeed, its expert witness conceded that the Registrar's system automatically updates the preparation date when the cover sheet is modified. Accordingly, the preparation

date of June 9, 2005 indicates that the Registrar did not subsequently ask for changes in the submitted documents. The absence of any reason to believe that the second mortgage was defective is sufficient to meet BONY's burden of showing that the second mortgage was entitled to be recorded when it was delivered.

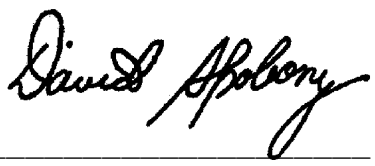
Consistent with its inability to find a defect in the second mortgage submission, Hamari does not argue on appeal that the second mortgage was not entitled to be recorded. Instead, Hamari's sole argument on appeal is that Real Property Law § 317 should be read as applying only in cases where clerical error can be shown. However, no case applying Real Property Law § 317 so holds. The most that could be said is that it may be that no case expressly rejects Hamari's reading of the statute. In any event, Hamari's reading of the statute is at odds with the unqualified language of the final clause, which sweepingly provides that every instrument that is entitled to be recorded "is considered recorded from the time of such delivery." Accordingly, Hamari's reading must be rejected because a requirement that clerical error be shown entails reading into Real Property Law § 317 words that the Legislature did not see fit to include (*see Matter of Chemical Specialties Mfrs. Assn. v*

Jorling, 85 NY2d 382, 394 [1995]).

As Hamari failed to show a meritorious defense justifying vacatur of the default judgment, its motion should have been denied, and the proceeds of the foreclosure sale should be used to satisfy the first and the second mortgages before any remaining funds are made available to satisfy Hamari's mortgage.

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

ENTERED: NOVEMBER 16, 2010



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Gonzalez, P.J., Friedman, DeGrasse, Manzanet-Daniels, JJ.

2853 In re Tajiri Swindell, Index 112883/09
Petitioner-Respondent,

-against-

John Antonelli, Acting Commissioner of the
New York City Department of Correction, et al.,
Respondents-Appellants.

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

Koehler & Isaacs, LLP, New York (Mercedes M. Maldonado of counsel), for respondent.

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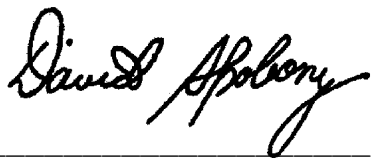
Order, Supreme Court, New York County (Alice Schlesinger, J.), entered on or about November 20, 2009, which directed a hearing pursuant to CPLR 7804(h) on petitioner's claim that respondents' denial of her promotion to captain was made in bad faith, and, pending the hearing, temporarily restrained respondent Department of Correction from certifying a new promotional list for captain, unanimously reversed, on the law, without costs, the direction for a hearing vacated and the petition dismissed.

In light of the open confidential investigation, the decision not to promote petitioner was rational, reasonable, and made in good faith. Petitioner's allegations to the contrary

were conclusory and speculative (*see Matter of Gomez v Hernandez*, 50 AD3d 404, 404 [2008]), and she is not entitled to a hearing on her claims. Since no hearing is warranted, it is unnecessary to address respondents' contentions regarding the propriety of requiring a representative of the Department of Investigations to testify at any such hearing.

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

ENTERED: NOVEMBER 16, 2010



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Gonzalez, P.J., Andrias, Acosta, Renwick, Abdus-Salaam, JJ.

3252 In re Jane Kurtin, doing business as Lila Realty Company, Petitioner, Index 109010/09

-against-

City of New York, et al., Respondents.

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Kucker & Bruh, LLP, New York (Robert H. Berman of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Fay Ng of counsel), for respondents.

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Determination of respondent Environmental Control Board (ECB), dated May 7 2009, finding that petitioner landlord illegally altered both apartments of a two-family residence in violation of former § 27-118.1 of the Administrative Code of City of New York, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Michael D. Stallman, J.], entered February 23, 2010), dismissed, without costs.

The notice of violation states that the dwelling was illegally converted into SROs, with three tenants sharing a kitchen and bath on the second floor, and four tenants doing the

same on the ground floor. This was essentially uncontroverted at the hearing, except that the owner's proof was that there were only three tenants on the ground floor. Petitioner testified that she had been unaware that a wall had been built on the second floor or that tenants other than the two listed on the leases were living in the apartments.

Respondents' failure to prove petitioner's knowledge of her tenant's illegal conversion does not negate the charges and the ECB's rejection of petitioner's defense was rational in light of the administrative precedent (*see Matter of Charles A. Field Delivery Serv. [Roberts]*), 66 NY2d 516, 518-520 [1985]).

Although the wall was removed on March 8, 2005, three days after the notice was issued, and petitioner commenced eviction proceedings against one of the upstairs tenants by serving a five-day notice to cure default on March 15, 2005, this does not warrant dismissal of the violations. Unlike *NYC v Hart* (ECB Appeal No. 20246 [1995]), relied on by petitioner, in which the ECB found a landlord not liable for an illegal occupancy created by a tenant where the landlord took all possible corrective measures beginning the year prior to issuance of the notice of violation, petitioner here did not take any steps to correct the illegal conditions until after her property was inspected by the

Department of Buildings and a notice of violation was issued. Furthermore, the eviction proceedings applied only to the second floor apartment, and there is no proof of any corrective action taken regarding the first floor apartment, where the tenant who petitioner claims had created the illegal SROs without petitioner's knowledge, was still residing as of the ECB hearing date.

Also unavailing is petitioner's argument that the penalty should be vacated or reduced because she took some corrective action in March 2005 prior to being properly served with the notice. Although the notice affixed to the premises on March 3, 2005 was not mailed to the proper address until April 8, 2005, as is noted by respondent, action taken prior to the date of the violation may establish a defense by showing that the owner was not maintaining an illegal conversion, the relevant date being the date of violation, not the date of completion of service.

Petitioner's remaining contention is unpreserved for review because it was not raised at the ECB hearing (*see Matter of 72A*

Realty Assoc. v New York City Envtl. Control Bd., 275 AD2d 284, 286 [2000]).

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

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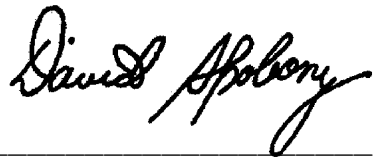

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Gonzalez, P.J., Mazzarelli, Andrias, Nardelli, Richter, JJ.

3611 The People of the State of New York, Ind. 2711/04
Respondent,

-against-

Nafis Wright,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (John B.F. Martin of counsel), for respondent.

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Order, Supreme Court, New York County (Lewis Bart Stone, J.), entered on or about February 4, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

Defendant applied for resentencing on his 2005 conviction for criminal sale of a controlled substance in the third degree, involving a 2004 incident. In that case, he was adjudicated a second felony offender based on a 1997 conviction for a nonviolent felony, also involving drugs. However, defendant also had two 1994 convictions for attempted robbery in the second degree, a violent felony. The court properly concluded that, even though the attempted robbery convictions never resulted in predicate felony adjudications, they were nonetheless "exclusion

offenses" making defendant ineligible for resentencing under the Drug Law Reform Act (*see* CPL 440.46[5][a]).

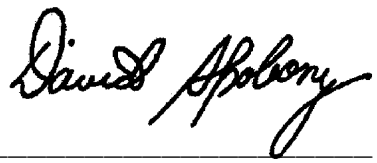
CPL 440.46(5) provides that "any person who is serving a sentence on a conviction for or has a predicate felony conviction for an exclusion offense" is ineligible for resentencing. The reference to "predicate felony conviction" does not require that the defendant be so adjudicated. This interpretation is supported by the fact that another class of exclusion offenses, set forth in CPL 440.46(5)(b), specifically refers to violent felonies for which the applicant "has previously been adjudicated." The omission of that adjudication requirement from the definition of exclusion offenses premised on a prior violent felony committed within the preceding 10 years of the instant offense demonstrates that, in enacting CPL 440.46(5)(a), the Legislature did not intend to require a previous adjudication (*see* McKinney's Cons Laws of NY, Book 1, Statutes, § 74).

Contrary to defendant's argument, neither Penal Law § 70.06(1)(b) nor CPL 400.21(7)(c) limits the term "predicate felony conviction" to convictions that have actually been so adjudicated. Instead, that combination of statutes uses the term "predicate felony conviction" to mean a conviction that meets

certain criteria, so that it would qualify for such an adjudication once the proper procedural steps are taken.

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

ENTERED: NOVEMBER 16, 2010



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Gonzalez, P.J., Mazzarelli, Andrias, Nardelli, Richter, JJ.

3612 Julio Bobet, Index 110819/04
Plaintiff-Respondent, 5590721/05
5908/05
-against- 7590159/07

Rockefeller Center, North, Inc., et al.,
Defendants-Appellants,

Restaurants Associates, Inc., et al.,
Defendants.

[And Other Actions]

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Newman Myers Kreines Gross Harris, P.C., New York (Charles W. Kreines of counsel), for appellants.

Law Offices of Joel L. Getreu, P.C., New York (Joel L. Getreu of counsel), for respondent.

Order, Supreme Court, New York County (Debra A. James, J.), entered March 23, 2009, which to the extent appealed from, as limited by the briefs, granted plaintiff's motion to vacate a prior order granting defendants summary judgment dismissing the complaint on default, unanimously affirmed, without costs.

To obtain relief from a default judgment, a party is required to demonstrate both a reasonable excuse for the default and a meritorious claim or defense to the action (*see* CPLR 5015[a] [1]; *Facsimile Communications Indus., Inc. v NYU Hosp. Ctr.*, 28 AD3d 391 [2006]).

The court properly found plaintiff's default excusable, particularly in view of the strong public policy of deciding cases on the merits (*see National Union Fire Insur. Co. of Pittsburgh, Pa. v Diamond*, 39 AD3d 360, 361 [2007]). There was no indication of a pattern of dilatory behavior or evidence that the default was willful, and there was no claim of prejudice.

Moreover, based on testimony of a recurring pattern of placing wet garbage in the area where plaintiff fell, the court properly determined that plaintiff had a meritorious claim (*see Cignarella v Anjoe-A.J. Mkt., Inc.*, 68 AD3d 560, 561 [2009]).

THIS CONSTITUTES THE DECISION AND ORDER
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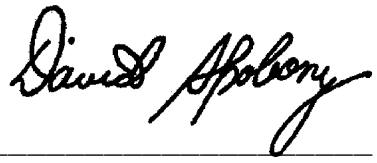

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Gonzalez, P.J., Mazzarelli, Andrias, Nardelli, Richter, JJ.

3613 Keith Mathus, etc., Index 603790/06
Plaintiff-Appellant,

-against-

Bouton's Business Machines, Inc., et al.,
Defendants,

Christopher Despirito, et al.,
Defendants-Respondents.

_____

Keith J. Mathus, appellant pro se.

Eckert Seamans Cherin & Mellott LLC, White Plains (Thomas M. Smith of counsel), for respondents.

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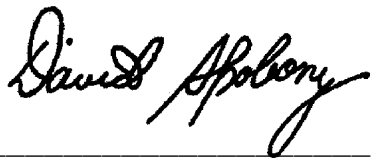
Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about March 9, 2009, which denied plaintiff's motion for a default judgment and granted defendant Patrick Despirito's cross motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff's failure to include the claims herein in his bankruptcy petition, when he knew or should have known of them at that time, deprives him of the legal capacity to sue herein (*see*

Gray v City of New York, 58 AD3d 448 [2009], *lv denied* 12 NY3d 802 [2009], citing, inter alia, *Whelan v Longo*, 7 NY3d 821 [2006]). 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: NOVEMBER 16, 2010



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Gonzalez, P.J., Mazzarelli, Andrias, Nardelli, Richter, JJ.

3614 In re Taquan A.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

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Presentment Agency

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Tamara A. Steckler, The Legal Aid Society, New York (Patricia Colella of counsel), for appellant.

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

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Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about November 12, 2008, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crimes of robbery in the third degree and attempted assault in the third degree, and placed him with the Office of Children and Family Services for a period of up to 18 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

There is no basis for disturbing the court's determinations on identification. The victim made a prompt and reliable

identification, which was corroborated by appellant's actions evincing a consciousness of guilt, as well as by observations by the arresting officer that warranted the inference that appellant possessed and discarded the victim's property. The latter evidence also supported the inference that when appellant hit the pursuing victim, he did so for the purpose of forcibly retaining (*see* Penal Law § 160.00[1]) the property he had just stolen from her. We have considered and rejected appellant's remaining claims.

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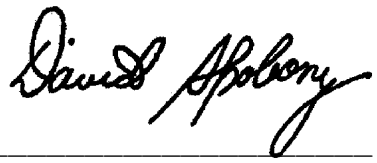
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 16, 2010



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Gonzalez, P.J., Mazzarelli, Andrias, Nardelli, Richter, JJ.

3615 New York State Society of Professional Engineers, Inc., et al., Plaintiffs-Appellants, Index 101179/09

-against-

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

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Kriss, Kriss & Brignola, LLP, Albany (Mark C. Kriss of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered August 12, 2009, which granted defendants' motion to dismiss the complaint and denied plaintiff's cross motion for summary judgment, unanimously affirmed, without costs.

Local Law 39 took effect on September 3, 2008, amending § 641 of the New York City Charter to require either the Commissioner of Buildings or the First Deputy Commissioner to be a licensed professional engineer or a registered architect. Previously, the Charter required that the Commissioner himself had to be a licensed professional engineer or registered architect. Further, § 642 was amended to authorize the Commissioner to delegate any duties to the First Deputy

Commissioner.

This action was brought to declare Local Law 39 unconstitutional on its face on the grounds that it was inconsistent with and preempted by Title VIII of the Education Law, which sets forth, specifically in Articles 145 and 147, the licensing requirements for professional engineers and registered architects. Plaintiffs suggest that by no longer requiring the Commissioner to be a licensed professional engineer or registered architect, the City Council has thereby permitted that official to engage in the practice of engineering without a license.

This argument is unavailing. For a statute to be declared unconstitutional on its face, a plaintiff must demonstrate that the law is invalid in toto, i.e., that under no circumstances would this law be valid (*see e.g. City of New York v United States*, 179 F3d 29, 33 [2d Cir 1999], *cert denied* 528 US 1115 [2000]). The express power, by an unlicensed Commissioner, to delegate any duties that involve the practice of engineering or architecture to a properly licensed Deputy First Commissioner, validates Local Law 39.

The local enactment does not permit the Commissioner of Buildings or anyone else to regulate the practice of engineering within New York City or to practice engineering or architecture without a license, in conflict with State law. Furthermore, it

cannot be said that the State law has preempted the City of New York from establishing the qualifications for the offices of Commissioner and First Deputy Commissioner of Buildings, as the City is specifically permitted to set and enforce its own Building Code (Executive Law § 383[1][c]; *cf. Dougal v County of Suffolk*, 102 AD2d 531 [1984], *affd* 65 NY2d 668 [1985]).

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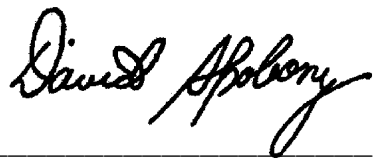

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Gonzalez, P.J., Mazzarelli, Andrias, Nardelli, Richter, JJ.

3616 Pacnet Network Ltd., Index 602182/08
Plaintiff-Appellant,

-against-

KDDI Corporation,
Defendant-Respondent.

_____

Orrick, Herrington & Sutcliffe LLP, New York (Michael C. Hefter of counsel), for appellant.

Morrison & Foerster LLP, New York (James E. Hough of counsel), for respondent.

_____

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered September 17, 2009, which, insofar as appealed from as limited by the briefs, granted defendant's motion to dismiss plaintiff's causes of action for fraudulent inducement, negligent misrepresentation, and gross negligence, and to strike the demand for consequential damages, unanimously affirmed, with costs.

Plaintiff and defendant entered into a contract pursuant to which defendant designed and constructed a fiber optic submarine cable system in East Asia (the system). Before final acceptance of the system by plaintiff, the parties identified problems with the performance of a critical component selected by defendant, namely, certain laser diodes. Plaintiff alleges that, rather than rescinding the contract or insisting on greater contractual

protections, it entered into a contract modification or "variation" in reliance on defendant's misrepresentations that minimal failures would occur and the laser diodes would stop failing over the course of the system's 25-year design life, and that the components did not represent a threat to the system's performance. The preamble to the contract variation recited that, whereas defendant believed the failure rate of the laser diodes would decrease gradually over time, and plaintiff considered it "difficult to estimate the long-term reliability at this moment, thus the agreement should be based on the currently available data," which data was annexed to the contract variation. Four years later, after an earthquake occurred in the area, a significant number of the laser diodes failed, resulting in one part of the system being put out of service for about 500 days and another part for a shorter period.

The fraudulent inducement and negligent misrepresentation causes of action were properly dismissed because they do not allege an intentional misrepresentation of any material existing facts (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]), but only "statements of prediction or expectation" (*Naturopathic Labs. Intl., Inc. v SSL Ams., Inc.*, 18 AD3d 404, 404 [2005]). The allegation that defendant knew the performance prediction was false is indefinite and conclusory, and therefore

not actionable (CPLR 3016[b]), absent allegations that the prediction was contradicted by a concrete, existing fact that defendant either intentionally failed to disclose or negligently failed to discover (*compare Coolite Corp. v American Cyanamid Co.*, 52 AD2d 486, 488 [1976], *with Hydro Invs., Inc. v Trafalgar Power Inc.*, 227 F3d 8, 20-21 [2d Cir 2000]; *see George Becker Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 220 [1978]). Further, since the language of the contract variation contradicts plaintiff's allegations that it relied on defendant's predictions concerning the "long-term reliability" of the laser diodes in entering into the contract variation, those allegations are not presumed to be true (*see O'Donnell, Fox & Gartner v R-2000 Corp.*, 198 AD2d 154, 154 [1993]).

The motion court also correctly dismissed the gross negligence claim relating to defendant's selection of the laser diodes and delay in performing its warranty obligations, since "claims based on negligent or grossly negligent performance of a contract are not cognizable" (*City of New York v 611 W. 152nd St.*, 273 AD2d 125, 126 [2000]), and plaintiff does not allege a breach of a duty independent of the contract (see *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389-390 [1987]; *Megaris Furs v Gimbel Bros.*, 172 AD2d 209, 211 [1991]).

Defendant also is entitled to dismissal, based on

documentary evidence (CPLR 3211[a][1]), of so much of the demand for damages as seeks consequential damages expressly precluded by the contractual provision limiting the parties' liability for consequential damages. Contractual limitation of liability provisions are generally enforceable unless the party seeking to avoid liability has engaged in grossly negligent conduct evincing a "reckless disregard for the rights of others" (*Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821, 823-824 [1993]). Plaintiff's allegations that the repairs took an unreasonably long time and that defendant did not accede to certain of its demands do not show the reckless disregard necessary to avoid the contractual limitation on consequential damages (*see Retty Fin. v Morgan Stanley Dean Witter & Co.*, 293 AD2d 341, 341 [2002]; *compare Banc of Am. Sec. LLC v Solow Bldg. Co. II, L.L.C.*, 47 AD3d 239, 244-245 [2007]).

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

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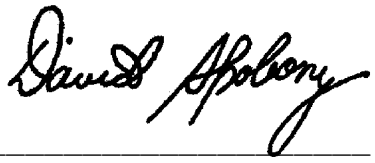

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, Nardelli, Richter, JJ.

3620 In re Richard W.,
Petitioner-Appellant,

-against-

Maribel G.,
Respondent-Respondent.

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John J. Marafino, Mount Vernon, for appellant.

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Order, Family Court, Bronx County (Myrna Martinez-Perez, J.), entered on or about December 18, 2009, which modified a March 17, 2009 order of visitation to the extent of, inter alia, requiring appellant to travel to Pennsylvania to pick up his child for visitation, and directed that all future issues of custody and visitation should be determined by the state of Pennsylvania, unanimously reversed, on the law, without costs, and the matter remanded to Family Court for further proceedings consistent herewith.

Family Court erred in modifying the March 17, 2009 order of visitation without first conducting a full evidentiary hearing to ascertain the child's best interests (*see Matter of Gross v Gross*, 7 AD3d 711 [2004]) and to determine whether there had been a subsequent change in circumstances (*see Matter of Wilson v McGlinchey*, 2 NY3d 375 [2004]). Additionally, there was no

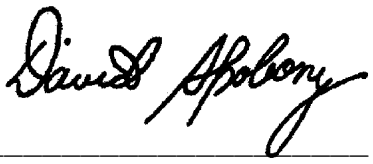
petition for modification of the visitation provisions of the prior order properly before the court (*see Matter of Nakis-Batos v Nakis*, 191 AD2d 443 [1993).

Family Court also erred by failing to determine whether it had exclusive continuing jurisdiction (DRL § 76-a; *see Stocker v Sheehan*, 13 AD3d 1 [2004]), and the court should do so upon remand. Similarly, it was improper to refer "subsequent issues regarding custody and visitation" to Pennsylvania. Indeed, such a determination must await an actual controversy (*Matter of King v King*, 251 AD2d 1028 [1998]).

The court should have advised the parties of the right to counsel, which would have included the right for an adjournment if necessary to consult with a lawyer.

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

ENTERED: NOVEMBER 16, 2010



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Gonzalez, P.J., Mazzarelli, Andrias, Nardelli, Richter, JJ.

3621 The People of the State of New York, Respondent, Ind. 6358/03 490/04

-against-

Anthony Steward, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (David J. Klem of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (John B.F. Martin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Bruce Allen, J.), entered on or about February 18, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

Defendant is ineligible for resentencing because of his prior violent felony convictions, even though they did not serve as the basis for his adjudication as a second felony offender on the instant conviction (*see People v Wright*, __ AD3d __ [Appeal No. 3611, decided herewith]).

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

ENTERED: NOVEMBER 16, 2010

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, Nardelli, Richter, JJ.

3624 The People of the State of New York, Ind. 1377/09
Respondent,

-against-

Nelson Couvertier,
Defendant-Appellant.

_____

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

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

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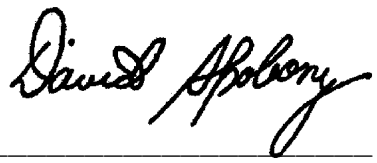
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Arlene Goldberg, J.), rendered on or about August 8, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTERED: NOVEMBER 16, 2010



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

Gonzalez, P.J., Mazzarelli, Andrias, Nardelli, Richter, JJ.

3626 Donald Kolb, et al., Index 21145/06
Plaintiffs-Appellants,

-against-

Beechwood Sedgewick LLC, et al.,
Defendants-Respondents.

_____

Kahn Gordon Timko & Rodriques, P.C., New York (Lester C. Rodriques of counsel), for appellant.

Kral Clerkin Redmond Ryan Perry & Girvan, LLP, Smithtown (Henry M. Primavera of counsel), for Beechwood Sedgwick, LLC, respondent.

Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for Otis Elevator Company, respondent.

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Order, Supreme Court, Bronx County (Edgar Walker, J.), entered July 9, 2009, which granted defendants' motions for summary judgment dismissing the complaint and denied plaintiff's cross motion to amend the complaint, unanimously affirmed, without costs.

During a lunch break at his construction site, plaintiff watched his supervisor trying to force open an elevator, which had not been functioning and had been "sitting in the lobby" for about two weeks, by using a "drop key" designed to open the locks to elevator doors. There was no particular reason why the supervisor wanted to open the door. When he could not do so,

plaintiff offered to try. Plaintiff placed the drop key in the hole at the upper left of the elevator door, then physically pushed the door open. As he did so, someone behind him said "you got it." Plaintiff turned around to respond, and, as he did so, stepped through the door into the dark without looking. The elevator was not there. Plaintiff fell 9 or 10 feet into the pit at the bottom of the elevator shaft, from which he was helped out and subsequently transported to the hospital. When an elevator repairman who had been repairing the elevator from the penthouse elevator room noticed that the elevator, which had been in test runs, had been abruptly stopped by what he believed was a break in the "open door circuit," he went to the lobby to investigate. Upon seeing the injured plaintiff, the repairman asked what, exactly, plaintiff had been trying to do. Plaintiff repeatedly acknowledged that he was an "idiot," and did not know what he had been thinking.

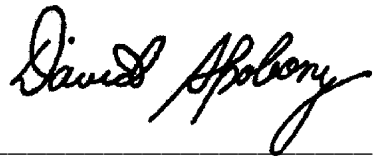
The court properly granted summary judgment to defendants dismissing the complaint sounding in negligence. There is not a scintilla of evidence warranting assignment of fault to anyone other than plaintiff, whose independent and intervening conduct was entirely unforeseeable, especially since no emergency was presented justifying his actions (*see Egan v A.J. Constr. Corp.*, 94 NY2d 839 [1999]; *Jennings v 1704 Realty, L.L.C.*, 39 AD3d 392

[2007]; *Weingarten v Windsor Owners Corp.*, 5 AD3d 674 [2004]), and plaintiff did not make even the slightest effort at exercising caution before stepping blindly through the elevator door (*see Schwartz v Paul Tishman* Co., *Inc.*, 147 NYS2d 71 [1955]).

The court also properly denied plaintiff's belated and unjustified attempt to alter the theory of liability by amending his complaint to interpose claims under Labor Law §§ 200, 240(1), and 241(6) (*see Jennings*, 39 AD3d at 393). Plaintiff's contention that notice was provided by reference to the claims in his supplemental bill of particulars is unavailing, since that is a device to amplify existing claims rather than add new theories of liability (*see Castleton v Broadway Mall Props., Inc.*, 41 AD3d 410, 411 [2007]). In any event, the new claims are meritless.

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

ENTERED: NOVEMBER 16, 2010



CLERK

Gonzalez, P.J., Mazzarelli, Andrias, Nardelli, Richter, JJ.

3628 Manuel Emilio Gomez, Index 101525/02
Plaintiff, 590531/09

-against-

The City of New York,
Defendant/Third-Party
Plaintiff-Respondent,

-against-

Columbus Construction Corporation,
Third-Party Defendant-Appellant.

_____

Cartafalsa Slattery Turpin & Lenoff, New York (B. Jennifer Jaffee of counsel), for appellant.

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

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Order, Supreme Court, New York County (Karen S. Smith, J.), entered August 31, 2009, which denied the motion of third-party defendant Columbus Construction Corp. (Columbus) pursuant to CPLR 1010 to dismiss the third-party complaint, unanimously reversed, on the law and the facts, without costs, the motion granted, and the third-party complaint dismissed, without prejudice. The Clerk is directed to enter judgment accordingly.

Plaintiff was allegedly injured in August 2001 when, while walking on a public street, he tripped and fell in a hole located near the curb on the milled roadway. Plaintiff filed a timely

notice of claim and commenced this action against defendant City of New York in January 2002. Approximately six years later, a Request for Judicial Intervention was filed and a preliminary conference was held.

During the course of discovery, documents were exchanged in December 2008 indicating that Columbus had milled the subject road, and, at an April 2009 deposition, a witness from the Department of Transportation's Street Maintenance Unit testified that, upon completion of the milling work, the milling contractor would have been responsible for filling holes like the one into which plaintiff claimed to have tripped.

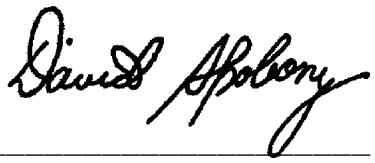
The City filed the third-party complaint in June 2009 and in August 2009, Columbus brought the subject motion to dismiss the third-party complaint. In an affidavit, Columbus's Chief Operating Officer stated that Columbus was being run by a bonding company which was in the process of closing the business, that Columbus had no employees or records of any work performed at the location, and that if Columbus had worked there, any records would have been destroyed under its ordinary document retention policy or lost because the company was no longer in business.

CPLR 1010 affords the court with discretionary authority to sever or dismiss a third-party action without prejudice where the controversy "will unduly delay the determination of the main

action or prejudice the substantial rights of any party." Based on the circumstances presented, the motion should have been granted because the substantial rights of Columbus were severely prejudiced by the almost 8-year delay between plaintiff's accident and the filing of the third-party complaint, leaving Columbus unable to mount a defense (*compare Annanquartey v Passeser*, 260 AD2d 517, 518 [1999]). The record demonstrates that Columbus no longer has records regarding the alleged work, nor employees who could testify as to events in 2001 to either disprove that it performed the work, or performed the work improperly.

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

ENTERED: NOVEMBER 16, 2010



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Gonzalez, P.J., Mazzarelli, Andrias, Nardelli, Richter, JJ.

3629N- Index 103091/10
3629NA 424 West 33rd Street, LLC,
Petitioner-Appellant,

-against-

Planned Parenthood Federation
of America, Inc.,
Respondent-Respondent.

_____

Friedman Kaplan Seiler & Adelman LLP, New York (Bruce S. Kaplan of counsel), for appellant.

Arent Fox LLP, New York (Hunter T. Carter of counsel), for respondent.

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Judgments, Supreme Court, New York County (Alice Schlesinger, J.), entered July 16, 2010, insofar as they denied and dismissed the amended petition to stay arbitration pursuant to CPLR 7503(b) and granted respondent's cross motion to compel arbitration pursuant to CPLR 7503(a), unanimously affirmed, without costs. Appeal from the same judgments, insofar as they denied and dismissed the original petition to stay arbitration pursuant to CPLR 7503(b), unanimously dismissed, without costs, as abandoned.

The court properly denied and dismissed the amended petition to stay arbitration and granted the cross motion to compel arbitration. Contrary to landlord's contention, tenant's right

to seek arbitration under the parties' lease is not barred by the statute of limitations (*see Cooper v Bruckner*, 21 AD3d 758, 758-59 [2005]; *see also* CPLR 7803). A demand for arbitration is subject to the six-year statute of limitations (*see* CPLR 213(1); *see also Matter of Continental Ins. Co. v Richt*, 253 AD2d 818, 819 [1998], *lv denied* 93 NY2d 805 [1999]). Tenant's right to seek arbitration did not accrue until "all of the facts necessary to the cause of action . . . occurred so that [tenant] would be entitled to obtain relief in court" (*Aetna Life & Cas. Co. v Nelson*, 67 NY2d 169, 175 [1986]).

The subject arbitration clause provides that "[i]f the parties have not agreed on the contents of the Contract or the Condominium Documents by the first anniversary of the date of this Lease, the parties shall select as arbitrator of the disagreement a law firm real estate partner," and that "[i]f the parties are unable to agree on the selection of an arbitrator within 30 days, such arbitrator shall be designated by the American Arbitration Association upon application by either party." Thus, expiration of the first year of the lease was a condition precedent to invoking the right to arbitration (*see e.g. Matter of County of Rockland [Primiano Constr. Co]*, 51 NY2d 1, 7-8 [1980]), but the clause did not require that a party seek

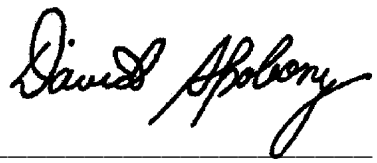
arbitration immediately following the expiration of one year from the date of execution of the lease if there was no dispute between the parties over a specific term of the contract they were negotiating. Such a construction of the arbitration clause is consistent with general principles of contractual interpretation because it gives fair meaning to all of the language employed by the parties in light of the obligation as a whole, and results in a practical interpretation of the parties' expressions so that their reasonable expectations will be realized (*see Strong v Dubin*, 75 AD3d 66, 68-69 [2010]; *Sassi-Lehner v Charlton Tenants Corp.*, 55 AD3d 74, 80 [2008]).

Accordingly, all of the facts necessary to the cause of action such that tenant would be entitled to relief in court did not occur, and thus the claim did not accrue, until there existed a disagreement between the parties over a specific term of the contract. Because the parties' negotiations were ongoing over a period of seven years, and no such disagreement arose until February of 2010, tenant's right to compel arbitration is clearly not barred by the six-year statute of limitations.

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

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

ENTERED: NOVEMBER 16, 2010



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Tom, J.P., Mazzarelli, Andrias, Saxe, DeGrasse, JJ.

2624 Timothy Albino, etc., et al., Index 27774/03
Plaintiffs,

-against-

The New York City Housing Authority,
Defendant/Third-Party
Plaintiff-Appellant,

-against-

Juan Soler,
Third-Party Defendant.
- - - - -
The New York City Housing Authority,
Third-Party Plaintiff-Appellant,

-against-

Dimension Mechanical Corporation,
Third-Party Defendant-Respondent.
- - - - -
[And A Fourth-Party Action]
- - - - -
The New York City Housing Authority,
Third Third-Party Plaintiff-Appellant,

-against-

Harlem Dowling West Side Center, et al.,
Third Third-Party Defendants-Respondents.

_____

Herzfeld & Rubin, P.C., New York (Neil R. Finkston of counsel), for appellant.

Law Offices of Lori D. Fishman, Tarrytown (Silvia C. Souto of counsel), for Harlem Dowling West Side Center, respondent.

Michael A. Cardozo, Corporation Counsel, New York (Norman Corenthal of counsel), for City of New York and the New York City Administration for Children's Services, respondents.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered February 27, 2009, which granted the motions of third third-party defendants Harlem Dowling West Side Center, the City of New York, and The New York City Administration for Children's Services (ACS) dismiss the third third-party complaint against them, denied plaintiffs' motion to sever the third third-party action as moot, and denied NYCHA's motion to unseal the Family Court files pertaining to all Family Court proceedings involving plaintiffs Carmen Albino and Timothy Albino, affirmed, without costs.

In 1997, the infant plaintiff, Timothy Albino, who is developmentally disabled and dependent on others for care, was placed in foster care with plaintiff Carmen Albino. Although Ms. Albino had been trained and certified as a foster mother by third third-party defendant Harlem Dowling, she was not instructed on bathing a special needs child. When Ms. Albino requested a home attendant for Timothy, she was told that she would get an exceptional-child level subsidy instead.

In 2000, Ms. Albino adopted Timothy, notwithstanding her prior statement to the adoption caseworker that she would not

adopt the child if she did not receive a home attendant. After the adoption, ACS repeatedly declined to provide a home attendant for Timothy. In 2001 and 2002, ACS advised Ms. Albino that she could request home care by foster care workers who, at different times, assisted other foster children residing in the home.

Ms. Albino obtained a medical recommendation for "home health aide services" on June 9, 2003. On June 10, 2003, Timothy was burned by hot water after he was allegedly momentarily left unattended in the bathtub by Ms. Albino and the neighbor she hired to assist her, Juan Soler. As a result, Ms. Albino, individually and on behalf of Timothy, brought this action against NYCHA alleging defective plumbing.

In May 2008, after bringing third-party actions against Mr. Soler and plumbing contractor Dimension Mechanic Corporation, NYCHA brought the third third-party action for contribution and common-law indemnification against the City, ACS and Harlem Dowling alleging, among other things, that they negligently trained Ms. Albino and failed to provide services for Timothy, including a trained and certified home-health aide, in connection with Timothy's foster care and subsequent adoption. The City and ACS moved to dismiss, arguing that NYCHA had no standing to bring against them claims which, according to NYCHA, were "on behalf of the injured party, the infant plaintiff." Even if there was

standing, those parties asserted, their determination to place Timothy in Ms. Albino's home for adoption was a discretionary act that was absolutely immune from civil liability. Furthermore, the City and ACS contended, the third-party complaint failed to allege that the City and ACS owed plaintiffs a special duty. Harlem Dowling joined in the argument by the City and ACS that NYCHA had no standing to bring this third-party action, and also asserted that there was no evidence that it negligently placed Timothy in Ms. Albino's care and negligently failed to remove him from her care.

The motion court granted the motions to dismiss the third-party complaint, finding that NYCHA lacked standing to assert the claims against the City, ACS or Harlem Dowling. The court determined that NYCHA "has not suffered any injury in fact based upon the City's[,] ACS's or Harlem Dowling's conduct in this case" and that "[a]ny injury from the alleged improper conduct of ACS or Harlem Dowling runs to the plaintiff directly, not through the NYCHA."

The court correctly dismissed the third third-party complaint, but erred in doing so on the ground that NYCHA did not have standing to assert its contribution and indemnity claims. There is no "standing" issue here because a third-party plaintiff almost always has the right to seek contribution from a possible

joint tortfeaser, whether the third-party plaintiff itself has suffered a redressable injury. Indeed, recognizing the issue's inapplicability, third-party defendants City of New York and ACS, which introduced this red herring below, have abandoned that argument in their brief to this Court. It is manifestly obvious that NYCHA does not claim that the foster care system owed it a direct duty with respect to the infant plaintiff's adoption. Rather, it claims that by breaching a duty to plaintiffs, third-party defendants "had a part in causing or augmenting the injury" for which NYCHA may have to compensate plaintiffs, and so equity dictates that they pay a pro rata portion of any damages awarded (*Raquet v Braun*, 90 NY2d 177, 182 [1997]). This is not a question of "standing" but of a defendant's ability to invoke rights explicitly granted by article 14 of the CPLR.

In any event, there is no need to rule on the issue of whether NYCHA has "standing" to assert that it was "injured" by the third-party defendants' alleged failure to provide adequate services to the child's foster mother, because the third-party defendants have no liability. In *McLean v City of New York* (12 NY3d 194, 203 [2009]), the Court of Appeals held that "[g]overnment action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty

to the public in general" (*see also DiNardo v City of New York*, 13 NY3d 872, 874 [2009]). In *Valdez v City of New York* (74 AD2d 76, 78 [2010]), this Court stated that "both *McLean* and *Dinardo* support the position that the starting point of any analysis as to governmental liability is whether a special relationship existed, and not whether the governmental action is ministerial or discretionary."[1]

A special relationship between a claimant and a municipality "'can be formed in three ways: (1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation" (*McLean*, 12 NY3d at 199, quoting *Pelaez v Seide*, 2 NY3d 186, 199-200 [2004]).

Although the City and ACS were statutorily obligated to

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[1]In *Dinardo*, the Court of Appeals stated that there was "no occasion" to decide whether discretionary negligence could ever lead to liability because "even assuming the school officials' actions in this case were ministerial," there was no special relationship between the Board of Education and the plaintiff (13 NY3d at 874; *see also* 13 NY3d at 876-877, Lippman, Ch. J., concurring ["the broad immunity recognized for discretionary acts should not extend to situations where a special relationship is present"]).

provide post-adoption services for Timothy at the time of his injury (see 18 NYCRR 421.8[h][2]), "'[t]o form a special relationship through breach of a statutory duty, the governing statute must authorize a private right of action'" which "'may be fairly implied when (1) the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) recognition of a private right of action would promote the legislative purpose of the governing statute; and (3) to do so would be consistent with the legislative scheme. If one of these prerequisites is lacking, the claim will fail'" (*McLean*, 12 NY3d at 200, quoting *Pelaez,* 2 NY3d at 200 [internal citations omitted]). To the extent NYCHA alleges that the City and ACS violated their statutory obligation to provide post-adoption services, that claim must fail because 18 NYCRR 421.8, promulgated in part pursuant to the authority of Social Services Law § 372-b (Adoption Services), does not authorize a private right of action. It is fair to infer that the Legislature considered carefully the best means for enforcing the provisions of Social Services Law § 372-b and would have created a private right of action against erring government agencies if it found it prudent to do so (*see McLean*, 12 NY3d at 200; *see also Mark G. v Sabol*, 93 NY2d 710 [1999]).

Nor did the City and ACS voluntarily assume a special duty. A special duty may arise from a municipality voluntarily assuming a duty where there is "'(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking'" (*McLean*, 12 NY3d at 201, quoting *Cuffy v City of New York*, 69 NY2d 255, 260 [1987]). The record does not show that the third-party defendants assumed, through promises or actions, an affirmative duty to act on plaintiffs' behalf to provide a certified home attendant. It cannot be said that anything third-party defendants did or said caused plaintiffs to be "lulled . . . into a false sense of security . . . induc[ing] [her] either to relax [her] own vigilance or to forego other available avenues of protection" (*Cuffy*, 69 NY2d at 261). Nor does the record demonstrate that the City or ACS assumed positive direction and control in the face of a known, blatant and dangerous safety violation. NYCHA's reliance on pre-adoption progress notes which state that correspondence was received "indicating Court Mandated Home Health Services for Timothy" does not require otherwise.

NYCHA's contention that it should be allowed further discovery to establish the existence of a special duty is unavailing. As this Court previously held, a party "will not be allowed to use pretrial discovery as a fishing expedition when they cannot set forth a reliable factual basis for what amounts to, at best, mere suspicions" (*Devore v Pfizer Inc.*, 58 AD3d 138, 144 [2008], *lv denied* 12 NY3d 703 [2009]).

To the extent NYCHA alleges that the third third-party defendants were negligent in investigating instances of child abuse, that claim is not actionable due to the statutory immunity provided in Social Services Law § 419 (*see Lamot v City of New York*, 62 AD3d 572 [2009]). To the extent NYCHA alleges that the third third-party defendants negligently evaluated, assessed, approved or permitted the foster-care and adoption arrangements, those claims are subject to judicial immunity, which extends to ACS and Harlem Dowling, child protective service agencies that assisted the court in effecting the placement (*see Mosher-Simons v County of Allegany*, 99 NY2d 214, 219-220 [2002]).

Even if there were grounds for a special duty, NYCHA has not established that the third third-party defendants had sufficiently specific knowledge or notice of the dangerous conduct which caused injury (*see Simpson v County of Dutchess*, 35 AD3d 712, 713 [2006]). The scalding hot bath water was an

intervening act or event that is divorced from and not the foreseeable risk associated with the third third-party defendants' alleged negligence *(see generally Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). Any conclusion that Timothy's injuries would not have occurred had Ms. Albino been properly trained or a certified aide been provided is based on mere speculation. The momentary inattention of both Ms. Albino and Soler were not acts that should have been foreseeable by the third third-party defendants in the exercise of reasonable care (*see Ogletree v Rush Realty Assoc. LLC*, 29 AD3d 875, 876 [2006]; *Charles v City of New York*, 272 AD2d 287 [2000], *lv denied* 95 NY2d 768 [2000]). Further, any duty of Harlem Dowling terminated when the court sanctioned a legal adoption three years prior to the incident (Social Services Law § 383[2]), and the post-adoption requests for a home health aide were not directed to Harlem Dowling.

Even if, as the concurrence contends, a legitimate standing issue existed here, it would be imprudent to reach it, having determined that NYCHA's third-party claims fail on the merits. This Court has consistently avoided determining the issue of standing once it has determined that no liability exists in any event (*see e.g. Mehlman v 592-600 Union Ave. Corp.*, 46 AD3d 338, 343 [2007]; *Herald Sq. S. Civic Assn. v Consolidated Edison Co.*

of N.Y., 307 AD2d 213 [2003]). Indeed, any conclusion here regarding whether NYCHA does or does not have standing would be nothing more than dicta. Further, to treat the basic contribution principle at issue here as one of "standing" is likely to cause unnecessary confusion.

"It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal. This principle, which forbids courts to pass on academic, hypothetical, moot, or otherwise abstract questions, is founded both in constitutional separation-of-powers doctrine, and in methodological strictures which inhere in the decisional process of a common-law judiciary" (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713-714 [1980] [internal citations omitted]). By considering, and then deciding, the "standing" issue in this case, we would ignore this well-settled jurisprudential tenet.

Finally, given that the third third-party action was properly dismissed, the motion court properly denied plaintiffs' motion to sever the third third-party action as moot. The court also providently exercised its discretion in denying NYCHA's motion to unseal plaintiffs' Family Court file. NYCHA has failed

to show good cause for inspection or disclosure of plaintiffs' Family Court records (*see* Family Court Act § 166; Domestic Relations Law § 114).

All concur except Andrias and Saxe, JJ. who concur in a memorandum by Andrias, J. as follows:

ANDRIAS, J. (concurring)

Plaintiffs sued the New York City Housing Authority (NYCHA) to recover for personal injuries suffered by the developmentally disabled infant-plaintiff, Timothy Albino, who was burned by hot water after he was allegedly left momentarily unattended in the bathtub by plaintiff Carmen Albino and the neighbor she hired to assist her. We all agree that third-party defendants, Harlem Dowling West Side Center, The City of New York, and The New York City Administration for Children's Services, are entitled to dismissal, on the merits, of NYCHA's claims for contribution and common-law indemnification against them. Having determined the merits, the majority believes that it would be imprudent to reach the issue of whether NYCHA had standing to bring those claims in the first instance and that to treat the basic contribution issue here as one of "standing" is likely to cause "unnecessary confusion." I disagree, and therefore concur separately.

"Standing to sue is critical to the proper functioning of the judicial system. It is a threshold issue" (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 812 [2003], *cert denied* 540 US 1017 [2003]). Here, unlike the cases on which the majority relies, *Mehlman v 592-600 Union Ave. Corp.* (46 AD3d 338 [2007]) and *Herald Sq. S. Civic Assn v Consolidated Edison Co. of N.Y.* (307 AD2d 213 [2003]), the motion court, citing *Lujan v*

Defenders of Wildlife (504 US 555 [1992]), based its decision dismissing the third party complaint on a finding that NYCHA lacked standing to bring the third-party claims. In its appeal, NYCHA challenges that finding. In its opposing brief, Harlem Dowling continues to argue that NYCHA lacked standing to commence the third-party action against it. Thus, the issue is squarely before us and should be addressed.

The motion court erred when it dismissed the third third-party complaint on the ground that NYCHA did not have standing to assert its contribution and indemnity claims because any injury from the third third-party defendants' alleged improper conduct "runs to the plaintiff directly, not through the NYCHA." The critical requirement for contribution under *Dole v Dow Chem. Co.* (30 NY2d 143 [1972]), now codified in CPLR 1401, is "that the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought" (*Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 603 [1988]; *Nelson v Chelsea GCA Realty, Inc.*, 18 AD3d 838, 840-841 [2005]). The claim may be based on a breach of a duty owed to either the plaintiff or the defendant (*see Sommer v Federal Signal Corp.*, 79 NY2d 540 [1992]; *Duenas v North Harbor Co.*, 278 AD2d 193 [2000]), and will lie whether or not the culpable parties are allegedly liable for the injury

under the same or different theories (*see Raquet v Braun*, 90 NY2d 177 [1997]), "and whether or not the party from whom contribution is sought is allegedly responsible for the injury as a concurrent, successive, independent, alternative, or even intentional tort-feasor" *(Nassau Roofing & Sheet Metal Co.*, 71 NY2d at 603; *see also Schauer v Joyce*, 54 NY2d 1 [1981]).

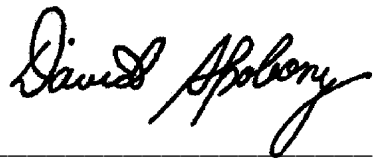
"Similarly, the key element of a common-law cause of action for indemnification" is a duty owed from the indemnitor to the indemnitee arising from "the principle that `every one is responsible for the consequences of his own negligence, and if another person has been compelled . . . to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him'" (*Raquet v Braun*, 90 NY2d at 183, quoting *Oceanic Steam Nav. Co. [Ltd.] v Compania Transatlantica Espanola*, 134 NY 461, 468 [1892]).

In the third third-party action, NYCHA alleges that a breach of duty by the third third-party defendants to plaintiffs contributed in whole or in part to Timothy being scalded in the bathtub in that the presence of a qualified home aide may have prevented the accident, which allegedly resulted from Timothy's movement of the hot water lever. The fact that plaintiffs' theory of recovery (defective plumbing) differs from NYCHA's

does not deprive NYCHA of standing where both the plaintiffs and NYCHA are seeking to recover for the same personal injury to Timothy. NYCHA is not seeking to contest the underlying foster placement or adoption.

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

ENTERED: NOVEMBER 16, 2010



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Mazzarelli, J.P., Renwick, Freedman, Richter, Abdus-Salaam, JJ.

3199-
3200 Kathleen Rice, etc., et al.,
Plaintiffs-Appellants,

-against-

West 37th Group, LLC, et al.,
Defendants-Respondents.

[And Other Actions]

- - - - -

Kathleen Rice, etc., et al.,
Plaintiffs-Respondents,

-against-

West 37th Group, LLC, et al.,
Defendants-Appellants.

Cord Contracting Co., Inc.,
Defendant.

[And Other Actions]

Index 101207/05
590813/05
590592/08

_____

Law Offices of Louis Grandelli, New York (Louis Grandelli of counsel), for Rice appellants/respondents.

Goldberg Segalla, LLP, White Plains (William T. O'Connell of counsel), for West 37th Group, LLC and GJF Construction Corp., respondents/appellants.

Brown Gavalas & Fromm LLP, New York (David H. Fromm of counsel), for Cord Contracting Co., Inc., respondent.

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Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered July 31, 2009, which, upon reargument, adhered to a

prior order granting plaintiff's cross motion for summary judgment on liability on her Labor Law § 240(1) cause of action, unanimously affirmed, without costs. Order, same court and Justice, entered May 14, 2009, which, to the extent appealed from, denied that portion of plaintiff's cross motion for sanctions for defendants' alleged spoliation of evidence, unanimously dismissed, without costs.

On November 23, 2004, plaintiff's decedent, James Rice, was injured while working as a steamfitter for Five Boro Associates, Inc. Five Boro was the subcontractor hired to install a sprinkler system in connection with the construction of a theater facility. At the time of the accident, Rice and Timothy Gleason, a colleague, were attempting to connect the building's water main to a riser on the seventh floor of the structure. This entailed drilling a hole in the wall at the spot where the connection was to be made. Since that spot was located approximately 13 or 14 feet above a stairwell landing, Rice and Gleason required an elevation device to reach it. They first attempted to use a scissor lift which they had been using for other purposes. However, the scissor lift had earlier demonstrated mechanical problems, and was too large to fit into the stairwell. They determined that a ladder was necessary, but Five Boro's inventory of ladders at the job site did not include any larger than 10

feet, which was too short. The two men went in search of a sufficiently tall ladder, and found a wooden, 12 foot, A-frame ladder, one or two floors below their own work area. According to both Rice and Gleason, the ladder belonged to the carpentry subcontractor, defendant Cord Contracting, Inc. Gleason further testified that Cord also had a baker's scaffold[2] in its possession, but that it was in use and he was certain that the Cord employees would not have made it available to him and Rice. Rice did not recall there having been any scaffolds on the construction site.

When Rice and Gleason went to position the ladder in the stairwell landing, they discovered that the space was too narrow to open the ladder. Therefore, they kept the ladder closed and leaned it up against the wall. Gleason could not steady the ladder himself, because he needed to be outside the stairwell to help locate the spot on the other side of the wall where the hole was to be drilled. The men did attempt to secure the ladder legs by placing one against a column in the stairwell and by placing cinder blocks and two-by-fours behind the other. After using the ladder for approximately 30 minutes, Rice heard a sound that

[2] A baker's scaffold is a small scaffold that all parties agree would have fit inside the small area where the work needed to be done.

sounded like wood cracking. He then fell, injuring himself.

Rice commenced this action against the building owner, the general contractor, and Cord, alleging violations of Labor Law sections 200, 240(1) and 241(6).[3]

Defendants moved for summary judgment to dismiss the complaint in its entirety. With respect to the section 240(1) claim, they asserted that they fulfilled their duty to provide adequate safety devices but that Rice's conduct, in failing to make use of an available baker's scaffold, was the sole proximate cause of the accident. The primary evidence submitted by defendants in support of this argument was the deposition testimony of Peter Barbarito, who on the day of the accident was a foreman for Five Boro. Barbarito testified that while Five Boro did not have any baker's scaffolds available at the job site, the workers knew that they could ask him for whatever they needed, and he would "order it." Defendants also pointed to the deposition testimony of plaintiff himself, who testified that, on prior occasions during the project when the workers did not have the proper equipment, they had informed the foreman, who had sought out the equipment from another trade and given the workers

[3] Rice died during the pendency of the action, and his wife, as the administrator of his estate, was granted leave to amend the complaint to reflect her substitution as plaintiff.

something else to do in the meantime. As to plaintiff's Labor Law § 200 and common-law negligence claims, all defendants argued that they did not exercise any supervisory authority over Rice's work and so could not be held liable as a matter of law.

Plaintiff cross-moved for summary judgment on her section 240(1) claim, asserting that because defendants did not provide Rice with an adequate safety device to perform work at an elevation, they were absolutely liable to him. She argued that the evidence demonstrated that there was no baker's scaffold available on the job site for him. Plaintiff also moved to strike defendants' answers. This was based on the fact that the general contractor admitted that it instructed Cord to destroy the ladder immediately after the accident, ostensibly to prevent anybody else from being injured.

Supreme Court granted summary judgment dismissing the complaint as against Cord, stating that it was not a statutory agent of either the owner or general contractor for purposes of Labor Law sections 240(1) and 241(6). It also dismissed the Labor Law section 200 and common-law negligence claims against Cord, as there was no evidence that the ladder it loaned to Rice was defective. With respect to the owner and the general contractor, the court held that those defendants exercised no supervisory authority over Rice's work. Accordingly, the court

dismissed plaintiff's claims against them pursuant to Labor Law § 200 and for common-law negligence.

The court denied the motion of the owner and the general contractor for summary judgment dismissing plaintiff's claim under Labor Law §240(1), and granted plaintiff's cross motion for summary judgment on that claim. The court held that this was "not a case where equipment was available, but a plaintiff chose not to use it," and that any carelessness by Rice in using the ladder in the manner he did was irrelevant once it was determined that defendants had violated the statute. The court denied plaintiff's motion for spoliation sanctions, holding that, even if it had not already determined that plaintiff's section 200 and common-law negligence claims should be dismissed, it would find that plaintiff failed to demonstrate that the destruction of the ladder materially prejudiced her ability to prosecute a negligence claim against defendants.

The owner and general contractor moved for reargument of their motion to dismiss the section 240(1) claim, contending that the court overlooked allegedly conflicting deposition testimony concerning the availability of baker's scaffolds on the job site. The court granted reargument, but adhered to its original determination.

It is not disputed that the accident was elevation-related

and that it directly resulted from the lack of an adequate safety device. Thus, the sole question before us is whether Rice's attempt to perform the task without a baker's scaffold device was the sole proximate cause of the accident because, as defendants argue, he could have procured one by asking his supervisor or borrowing one from another trade.

The Court of Appeals has clearly stated that a party charged under Labor Law section 240(1) with the duty to provide enumerated safety devices will be absolved of liability where a worker attempts to perform a task at elevation without proper protection, if the proper safety device was "readily available" and it would have been the worker's "normal and logical response" to get it (*Montgomery v Federal Express Corp.*, 4 NY3d 805, 806 [2005] [internal quotation marks omitted]). In *Montgomery*, the plaintiff's section 240(1) claim was dismissed because he chose to jump four feet from the roof of an elevator room to the next level, despite the availability of ladders on the job site. Similarly, in *Robinson v East Med. Ctr., LP* (6 NY3d 550 [2006]), the Court held that the plaintiff's failure to avail himself of adequate safety devices rendered him the sole proximate cause of his injuries, and dismissed his claim under section 240(1). In that case, the plaintiff, even though he knew there were eight-foot ladders on the job site and precisely where they were,

elected instead to stand on the top cap of a six-foot ladder, causing him to lose his balance and fall.

Here, defendants argue that there is an issue of fact as to whether a baker's scaffold was available to plaintiff such that he should not have attempted to do the work without first attempting to get one. We disagree. There is no question that neither Five Boro nor the general contractor maintained any baker's scaffolds on site. Moreover, the only evidence here that defendants could have made a baker's scaffold or other safety device available to Rice had he requested one, are vague assertions by the Five Boro foreman that there was a procedure for obtaining necessary safety devices. Barbarito testified that if workers needed something they would let him know and he would contact his son, the owner of Five Boro, and request it. However, Barbarito did not specifically state whether Five Boro actually possessed any baker's scaffolds such that one could be delivered directly to the site, or whether one had to be acquired from a third party. Assuming that Five Boro did maintain a baker's scaffold somewhere, Barbarito gave no indication of where it was, and how long it would have taken for one to be delivered.

These facts stand in stark contrast to *Montgomery* and *Robinson*, where the records were clear that the adequate safety evidence could be made available to the plaintiffs in a

relatively short period of time. Similarly unavailing to defendants is Rice's testimony that on other occasions where proper equipment was not immediately available, the foreman "would arrange something." That statement is much too vague to stand as evidence that, in this instance, plaintiff would have been furnished a baker's scaffold in short order had he simply asked for one.

The record evidence in this case is also fundamentally different from the cases cited by defendants where an issue of fact was found as to whether an adequate safety device was available to the plaintiff, even though one was not necessarily in the worker's immediate vicinity. In *Miro v Plaza Constr. Corp.* (38 AD3d 454 [2007], *mod* 9 NY3d 948 [2007]), the plaintiff fell off a ladder with slippery fireproofing material on it. A divided Court dismissed plaintiff's section 240(1) claim, based on the plaintiff's testimony that his employer, Con Edison, had "a lot of ladders" (38 AD3d at 455) on site, and that, in any event, the employer maintained a stockroom containing ladders which could be delivered to the job site upon request. The Court of Appeals modified, finding there to be an issue of fact because it was "not clear from the record how easily a replacement ladder could have been procured" (9 NY3d at 949). Here, in contrast to *Miro*, defendants have offered no evidence that a baker's scaffold

was readily available.

In *Masullo v 1199 Hous. Corp.* (63 AD3d 430 [2009]), summary judgment was denied to the plaintiff and defendants on the plaintiff's section 240(1) claim, also because the record was unclear as to whether a safety device was readily available. However, this Court observed that the plaintiff "acknowledged that if he needed any type of equipment, he knew he could call [his employer's] owners, and it would be delivered later in the day or the next morning" (63 AD3d at 432). This and other facts rendered summary judgment inappropriate to any party. Again, here, defendants presented no evidence suggesting that a baker's scaffold may have been readily available to plaintiff. Accordingly, they failed to raise an issue of fact sufficient to deny summary judgment to plaintiff. Finally, in *Cherry v Time Warner, Inc.* (66 AD3d 233 [2009]), this Court found an issue of fact as to whether a baker's scaffold with adequate railings was readily available to the plaintiff. The majority cited to evidence presented by the defendants which, again, is absent here: that scaffolds with railings were available to workers at all times, and that workers were shown where to find guardrails.

Defendants do not seriously argue that it would have been possible to use the ladder from which Rice fell in a safe manner, and they effectively concede that a baker's scaffold, which

undisputedly would have fit inside the stairwell where the accident occurred, was necessary to safely complete the job. Thus, their reliance on *Meade v Rock-McGraw, Inc.* (307 AD2d 156 [2003]), is misplaced. In that case, this Court found that there was an issue of fact regarding whether a ladder could have been used in the open position and thus constituted an adequate safety device, had it not been misused by the plaintiff by leaving it in the closed position. Here, defendants do not suggest that Rice could have safely used the ladder in the open position.

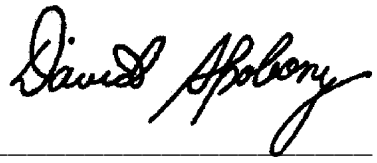
Defendants are incorrect that an issue of fact exists based on Gleason's acknowledgment that he and Rice were aware that Cord maintained a baker's scaffold on the construction site. Defendants did not offer any evidence to refute Gleason's testimony that the scaffold was in use at the time he and Rice were looking for a safety device, nor, more importantly, did they establish that the scaffold would have soon become available. Accordingly, Rice's testimony that, on "a couple" of prior occasions during the subject project he had been instructed to wait to complete a task until equipment could be freed up, while performing an alternative assignment, is irrelevant. Without some indication that the baker's scaffold would have eventually become available to Rice, it is impossible to infer that following such a course would have been practical under the

circumstances. We note that there is no evidence in the record that, on the day of the accident, Rice was instructed not to work in the stairwell while he waited for a safety device.

Plaintiff's cross motion for sanctions related to the destruction of the ladder is related to her claims pursuant to Labor Law § 200 and for common-law negligence. However, plaintiff has not appealed that part of Supreme Court's order dismissing those claims. Accordingly, her appeal from that part of the order denying her request for striking defendants' answer to those claims is academic.

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

ENTERED: NOVEMBER 16, 2010



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Friedman, J.P., Sweeny, Catterson, Renwick, Román, JJ.

3594 The People of the State of New York, Ind. 3927/07
Respondent,

-against-

Charles Rasako,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (David A. Crow of counsel), and Patterson Belknap Webb & Tyler, LLP, New York (Stephanie Marie Gyetvan of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered August 28, 2008, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of 6 years, unanimously affirmed.

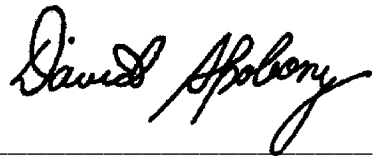
In this observed sale case, the court properly exercised its discretion in receiving evidence that, minutes before the charged sale, the observing officer saw defendant engage in suspicious behavior with another individual. This testimony provided necessary background information that completed the narrative and explained why the officer focused his attention on defendant (*see*

e.g. People v Birch, 69 AD3d 425 [2010], *lv denied* 14 NY3d 797 [2010]; *People v Toppy*, 68 AD3d 635 [2009], *lv denied* 14 NY3d 806 [2010]; *People v Urena*, 306 AD2d 137 [2003], *lv denied* 100 NY2d 625 [2003]). Furthermore, the nearly contemporaneous transaction carried relatively little suggestion of general criminal propensity, and its probative value outweighed any prejudice (*see People v Pressley*, 216 AD2d 202 [1995], *lv denied* 86 NY2d 800 [1995]).

The court properly declined to give an adverse inference charge with respect to the absence of surveillance videotapes. There was no evidence that the video cameras placed in the park where this sale occurred recorded anything relevant to this case, and the evidence suggested otherwise (*see People v Scott*, 309 AD2d 573, 574 [2003], *lv denied* 2 NY3d 806 [2004]).

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

ENTERED: NOVEMBER 16, 2010



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Friedman, J.P., Sweeny, Catterson, Renwick, Román, JJ.

3595 Oxxford Information Technology, Ltd., Index 602481/07
Plaintiff-Appellant,

-against-

Novantas LLC, et al.,
Defendants-Respondents.

[And A Counterclaim Action]

_____

Paul, Hastings, Janofsky & Walker LLP, New York (Daniel B. Goldman of counsel), for appellant.

Wolf Haldenstein Adler Freeman & Herz LLP, New York (Eric B. Levine of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered March 5, 2010, which denied plaintiff's motion to modify a so-ordered confidentiality stipulation under which the parties agreed that business information exchanged in discovery would be returned to the party that produced it or destroyed after the termination of litigation (the "Confidentiality Order"), unanimously affirmed, with costs.

After plaintiff demanded that defendants produce certain confidential business information, the parties negotiated and stipulated to the Confidentiality Order, and defendants produced much information in reliance thereon. The action eventually settled, whereupon plaintiff's counsel discovered that they had

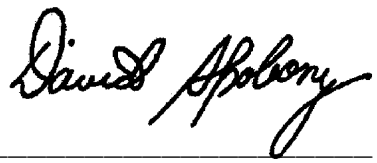
inadvertently backed up defendants' information onto numerous back-up tapes to their law firm's computer system. Claiming it would be too costly to delete the information from the tapes, plaintiff moved to modify the Confidentiality Order to permit its counsel to retain the information on the tapes subject to proposed safeguards designed to protect the confidentiality of the information.

We find that such cost does not outweigh defendants' bargained-for interest in the post-litigation destruction of its business information in outsiders' hands, or otherwise warrant the proposed modification (*see Bayer AG & Miles, Inc. v Barr Labs., Inc.*, 162 FRD 456, 464 [SD NY 1995]; *see also Rice v Rice*, 288 AD2d 112, 112 [2001], *lv dismissed* 97 NY2d 725 [2002], citing *Bayer AG* at 462-463). Plaintiff voluntarily consented to the Confidentiality Order (*see Bayer AG* at 465-466), and its counsel, who have demonstrated experience in and sophisticated knowledge of electronic discovery matters, should have foreseen the problem and addressed it when the Confidentiality Order was being negotiated (*see id.* at 466-467). Defendants relied on the Confidentiality Order in affording access to their core business

secrets, and the proposed safeguards against access by third parties amount to something considerably less than a guarantee.

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

ENTERED: NOVEMBER 16, 2010



CLERK

Friedman, J.P., Sweeny, Catterson, Renwick, Román, JJ.

3597-
3598 In re Ganesha B., etc.,

Nyesha H.,
Respondent-Appellant,

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

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Wendy Abels, New York, for appellant.

John R. Eyerman, New York, for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Doneth N. Gayle of counsel), Law Guardian.

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Order of disposition, Family Court, New York County (Karen I. Lupuloff, J.), entered on or about March 10, 2009, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child and committed the guardianship and custody of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

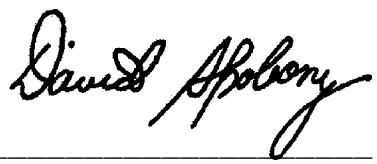
Clear and convincing evidence established that the agency satisfied its statutory obligation to make diligent efforts to encourage and strengthen the parental relationship by providing referrals to parenting skills and drug rehabilitation programs,

scheduling visitation, and scheduling mental health evaluations, and that nevertheless respondent failed to plan for the child's future; she failed to participate in and complete the required programs, was inconsistent in visitation, failed to appear for mental health evaluations, was engaged in an incident that required a police response, and failed to obtain adequate housing (Social Services Law § 384-b[7][a], [c]; *Matter of Star Leslie W.*, 63 NY2d 136, 142 [1984]; *Matter of Dena Shamika A.*, 301 AD2d 464 [2003]).

A preponderance of the evidence, including the fact that the child has spent her entire life in a stable kinship foster home, establishes that the termination of respondent's parental rights is in the child's best interests; in view of respondent's prolonged failure to comply with the service plan, her belated assurance that she is now ready to complete the plan is insufficient to warrant a suspended judgment (*see Matter of Mykle Andrew P.*, 55 AD3d 305 [2008]).

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

ENTERED: NOVEMBER 16, 2010



CLERK

Friedman, J.P., Sweeny, Catterson, Renwick, Román, JJ.

3599 The Provident Loan Society of New York, Plaintiff-Appellant, Index 114195/08

-against-

190 East 72nd Street Corporation, Defendant-Respondent.

_____

Anderson Kill & Olick, P.C., New York (John M. O'Connor of counsel), for appellant.

Kaye Scholer LLP, New York (Richard Seltzer of counsel), for respondent.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered June 3, 2009, which granted defendant's motion to dismiss the complaint for failure to state a cause of action, unanimously affirmed, with costs.

Plaintiff landlord's first cause of action seeking a declaration of equitable relief was properly dismissed, inasmuch as the "reappraisal" dispute between the parties was governed by the clear, unambiguous terms of their agreement. The parties were sophisticated entities represented by counsel when they entered into a 75-year commercial lease that called for the annual rent to be determined by a specified percentage of the appraised value of the property, which would be determined

approximately once every 10 years. Either party had a right to seek reappraisal at the designated 10-year intervals, and the reappraisal notice provisions in the lease specifically required that such notice be served between three and six months prior to the expiration of the current 10-year interval. Furthermore, the lease expressly provided that if the parties both failed to serve a timely notice for reappraisal, the existing land appraisal would continue to dictate the amount of the fixed annual rent until the next contract date for reappraisal.

The lease terms expressly govern the late-notice issues raised by plaintiff on this appeal. As such, the clear and unambiguous time requirements for reappraisal, and the attendant notice-default provision, should be enforced according to the parties' intent as expressed in the lease (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157 [1990]). Plaintiff's reliance on *J.N.A. Realty Corp v Cross Bay Chelsea* (42 NY2d 392 [1977]) in arguing that equity should intervene because application of the lease terms would result in its forfeiture of a substantial rent increase, to which it had a vested right, is unavailing. Plaintiff's right to increased rent would not vest until such time as it first satisfied the condition precedent of making a timely request (i.e., giving notice) for reappraisal, and thereafter proffering proof, via appraisal(s), to substantiate

its claim for increased rent (*see id.* at 396-397). Absent timely notice and proof demonstrating an increase in land value, plaintiff had no vested right to a rent increase, and thus could not argue a forfeiture of the same. The *J.N.A. Realty* holding is an exception to the general contract principle that the clear and unambiguous terms of a contract that govern the parties' dispute will be controlling and determinative of the issues between them. Equitable relief was afforded in *J.N.A. Realty* only because the tenant therein established a vested interest in the leasehold by way of proof that it had made recent substantial improvements to the premises and had accrued customer goodwill, all of which existed prior to the time the option to renew accrued.

To the extent plaintiff argues that the reappraisal notice provisions did not constitute an "option," meaning that strict compliance with the provisions was unwarranted or that time-of-the-essence considerations would not come into play, such is unavailing. Where a contract expressly requires written notice to be given within a specified time, the notice is ineffective unless the writing is actually received within the time prescribed (*see Maxton Bldrs. v Lo Galbo*, 68 NY2d 373 [1986]). The instant reappraisal provisions not only called for timely notice, but provided a specific remedy in the event of an untimely notice. Interpretation of an unambiguous contract is a

question of law for the court, and the provisions of the contract setting forth the rights of the parties would prevail over allegations asserted in a complaint (*see Ark Bryant Park Corp v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [2001]).

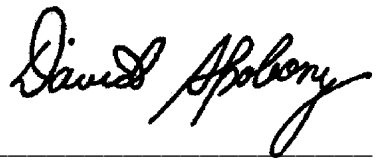
Plaintiff's argument that the tenant should be equitably estopped from asserting strict adherence to the reappraisal time requirements because, in 1997, the tenant had "accepted" the landlord's unilateral goodwill decision to treat the tenant's own late notice as timely, meaning the tenant essentially acquiesced to an interpretation that the subject notice should not be strictly construed, is unavailing. Plaintiff could not reasonably rely on the tenant's innocuous, passive conduct in 1997 to find a purported agreement between the parties to modify the lease. The complaint fails to plead adequately a rightful reliance by the landlord upon the acts or deeds of the tenant corporation that brought about a change in plaintiff's own position (*see generally Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175 [1982]), or a clear intent by the defendant to relinquish its rights under the Lease's reappraisal provisions. Absent allegations to support an equitable estoppel claim, the lease's no-oral-modification clause precludes modification of the lease terms other than by a written instrument signed by the party to be charged (*see generally*

Hollinger Digital v LookSmart, Ltd., 267 AD2d 77 [1999]; *cf. Lusker v Tannen*, 90 AD2d 118, 121-124 [1982]).

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: NOVEMBER 16, 2010



CLERK

Friedman, J.P., Sweeny, Catterson, Renwick, Román, JJ.

3600 The People of the State of New York, Ind. 4139/06
Respondent,

-against-

Starlin Nunez,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Jalina Hudson of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered January 30, 2008, as amended April 23, 2008, convicting defendant, upon his plea of guilty, of attempted conspiracy in the second degree and sentencing him, as a second felony offender, to a term of 4 to 8 years, unanimously affirmed.

The sentencing court properly exercised its discretion in denying defendant's motion to withdraw his guilty plea, after affording him a full opportunity to present his claims in writing. Although it denied the motion on the written submissions, it also effectively permitted defendant to supplement it with an oral statement at sentencing, after which the court adhered to its prior decision. "When a defendant moves to withdraw a guilty plea, the nature and extent of the

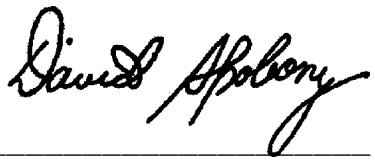
fact-finding inquiry rests largely in the discretion of the Judge to whom the motion is made and a hearing will be granted only in rare instances" (*People v Brown*, 14 NY3d 113, 116 [2010] [internal quotation marks omitted]).

The record establishes that the plea was knowing, intelligent and voluntary. Defendant's claim that his plea resulted from threats from his codefendants was vague and unsubstantiated, and even if his assertions are accepted as true, they are insufficient to demonstrate that his plea was involuntary (*see People v Baret*, 11 NY3d 31 [2008]). Moreover, defendant's claims of coercion and innocence were contradicted by his detailed plea allocution. On appeal, defendant seeks to substantiate his coercion claims by citing to the violent propensities of one or more of his codefendants, and evidence that early in the pendency of the case the People wished to keep the defendants separated for security reasons. However, this information was not included in the plea withdrawal motion, and it primarily involved proceedings before a different justice that were not necessarily within the sentencing court's knowledge (*cf.*

People v Rodriguez, 47 AD3d 406, 407 [2008], *lv denied* 10 NY3d 770 [2008]). In any event, this additional information still does not substantiate any claim of coercion.

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

ENTERED: NOVEMBER 16, 2010



CLERK

Friedman, J.P., Sweeny, Catterson, Renwick, Román, JJ.

3601 In re Arelis Carmen S.,
Petitioner-Respondent,

-against-

Daniel H.,
Respondent-Appellant.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Frederic P. Schneider, New York, for respondent.

Steven N. Feinman, White Plains, Law Guardian.

_____

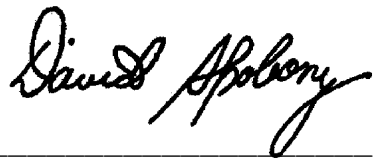
Order, Family Court, New York County (Ivy I. Cook, Referee), entered on or about July 13, 2009, which, after a hearing, granted the petition to the extent of suspending visitation between respondent father and his under-18-year-old male child until further order of the court, unanimously affirmed, without costs.

The best interests of a child, which is the foremost consideration in matters of custody and visitation, is within the discretion of the hearing court whose determination will not be set aside unless it lacks a sound and substantial evidentiary basis (*Corsell v Corsell*, 101 AD2d 766, 767 [1984]). There is an evidentiary basis here for the court's finding that unsupervised visitation would have a negative impact on the child's well-being

(*see Matter of Frank M. v Donna W.*, 44 AD3d 495 [2007]). Respondent refused an offer of supervised visitation. Under these circumstances, the court providently exercised its discretion in suspending his visitation.

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

ENTERED: NOVEMBER 16, 2010



CLERK

Friedman, J.P., Sweeny, Catterson, Renwick, Román, JJ.

3602N Mara Rubin, Index 350047/09
Plaintiff-Appellant,

-against-

Anthony Della Salla,
Defendant-Respondent.

_____

Law Offices of Peter M. Nissman, New York (Peter M. Nissman of counsel), for appellant.

Kasowitz Benson Torres & Friedman LLP, New York (Maxine R. Shapiro of counsel), for respondent.

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Order, Supreme Court, New York County (Ellen Gesmer, J.), entered July 10, 2009, which, to the extent appealed from, directed defendant to pay interim child support of $5,000 per month, unanimously affirmed, without costs.

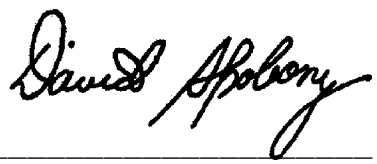
Plaintiff's contention that the motion court erred in not setting forth any analysis of the Child Support Standards Act (CSSA) factors (*see* Family Ct Act §§ 413[1][b][3],[c],[f]) to explicate its award lacks merit. Courts considering applications for pendente lite child support may, in their discretion, apply the CSSA standards and guidelines, but they are not required to do so (*see George v George*, 192 AD2d 693 [1993]; *Rizzo v Rizzo*, 163 AD2d 15, 16 [1990]). In any event, direct application of the CSSA factors would have been difficult here because plaintiff

made little effort to demonstrate the amount of expenses attributable to the care of the parties' son, instead combining expenses attributable to herself and her daughter (from a previous marriage) together with expenses attributable to the son. In directing defendant to pay $5,000 per month in pendente lite child support, the motion court did provide a detailed review of the expense statements that were before it, as well as noting defendant's substantial income. The motion court further took the son's reasonable housing needs into consideration by directing defendant to guarantee a one-year apartment lease at a monthly rental amount of up to $6,500. We find that the motion court did not abuse its discretion in making the award.

To the extent the award may be inadequate, the best remedy would be for a speedy and plenary trial on the merits of these issues. Contrary to plaintiff's contentions, we do not perceive any "overly complex" issues that would present an obstacle to a speedy trial (*Asteinza v Asteinza*, 173 AD2d 515, 516 [1991]).

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

ENTERED: NOVEMBER 16, 2010



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Friedman, J.P., Sweeny, Catterson, Renwick, Román, JJ.

3605 Deborah Bush, Index 252101/09
Petitioner-Appellant,

-against-

Division of Human Rights,
Respondent,

Stevenson Commons Associates, L.P.,
Respondent-Respondent.

_____

Deborah Bush, appellant pro se.

Law Offices of Arnold N. Kriss, New York (John C. Theodorellis of counsel), for Stevenson Commons Associates, L.P., respondent.

_____

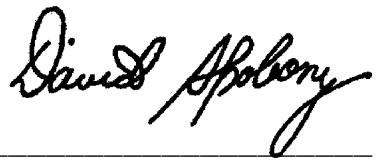
Order, Supreme Court, Bronx County (John A. Barone, J.), entered on or about February 4, 2009, which denied petitioner's application to annul the determination of respondent New York State Division of Human Rights finding no probable cause to believe that respondent housing complex had discriminated against petitioner by denying her application for an apartment, unanimously affirmed, without costs.

The record shows that the Division conducted an appropriate and fair investigation, and that it had a rational basis for finding no probable cause to believe that petitioner's housing application was rejected because of her race, sex, marital status, religion, or disability (*see Matter of McFarland v New*

York State Div. of Human Rights, 241 AD2d 108, 111-112 [1998]; *see also Gaskin v Westbourne Assoc., L.P.*, 59 AD3d 362 [2009]]). Petitioner's other requests for relief are not properly before this Court.

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

ENTERED: NOVEMBER 16, 2010



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Friedman, J.P., Sweeny, Catterson, Renwick, Román, JJ.

3606 Kirsten A. Turner, et al., Index 301504/07
Plaintiffs-Respondents,

-against-

Benycol Transportation Corp., et al.,
Defendants-Appellants,

_____

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for Benycol Transportation Corp. and Julio E. Delarosa, appellants.

Law Offices of Nancy I. Isserlis, Long Island City (Lawrence R. Miles of counsel), for Pearl Two Inc. and G.E. Gorja-Crespo, appellants.

Antin, Ehrlich & Epstein, LLP, New York (Frank Trief of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Dominic R. Massaro, J.), entered December 28, 2009, which denied defendants' motions 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 reversed, on the law, without costs, and the motions granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

Defendants established their prima facie entitlement to judgment as a matter of law by submitting evidence, including the affirmed reports of an orthopedic surgeon and a neurologist, who

following examinations of plaintiff, specified the objective tests performed, reported normal ranges of motion in all tested body areas and concluded that plaintiff's injuries resolved without permanency (*see DeJesus v Paulino*, 61 AD3d 605, 606-607 [2009]). Moreover, a radiologist who reviewed plaintiff's MRI report concluded in unequivocal terms that plaintiff's spine showed dessication and mild narrowing of two of the mid-thoracic discs, which were all pre-existing to the subject accident. Defendants also made a prima facie showing that plaintiff did not sustain a serious injury under the 90/180-day prong of Insurance Law § 5102(d) by presenting plaintiff's deposition testimony in which she stated that following the accident, she did not lose any time from work and was not confined to her home (*see e.g. Alloway v Rodriguez*, 61 AD3d 591, 592 [2009]).

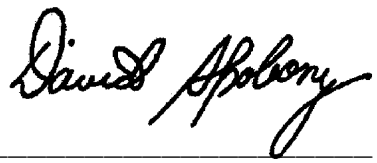
In opposition, plaintiff failed to raise a triable issue of fact. Although plaintiff's chiropractor quantified her limitations of motion, concluded that they were significant and related the injuries to the subject accident, he failed to address defendants' evidence that plaintiff's disc dessication was pre-existing. Notably, plaintiff conceded at her deposition that she sustained injuries to her neck and back in a prior accident, and based on the radiologic findings of pre-existing degenerative disease, it was incumbent upon plaintiff to present

proof addressing the asserted lack of causation, which she failed to do (*see Becerril v Sol Cab Corp.*, 50 AD3d 261 [2008]).

Plaintiff also failed to raise a triable issue of fact with respect to her 90/180-day claim. Her subjective statements that she was limited in her ability to exercise or perform personal maintenance were insufficient to defeat the motion (*see Alloway*, 61 AD3d at 592).

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

ENTERED: NOVEMBER 16, 2010



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Friedman, J.P., Sweeny, Catterson, Renwick, Román, JJ.

3607 New York and Presbyterian Hospital, Index 260418/08
Petitioner-Appellant,

-against-

New York State Division of
Human Rights, et al.,
Respondents-Respondents.

_____

Epstein Becker & Green, P.C., New York (Aime Dempsey of counsel), for appellant.

Caroline J. Downey, Bronx (Michael K. Swirsky of counsel), for respondents.

_____

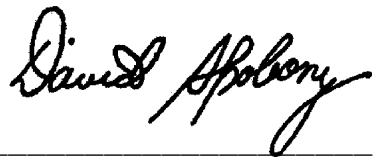
Judgment, Supreme Court, Bronx County (Mark Friedlander, J.), entered March 10, 2009, dismissing this article 78 proceeding to annul an administrative order, dated July 28, 2008, unanimously affirmed, without costs.

The Commissioner's sua sponte order to reopen a hearing on unlawful discrimination against an employee of petitioner for the purpose of completing the record was not a final determination within the meaning of CPLR 7801(1) (*see* Executive Law § 298), rendering petitioner's challenge premature (*Matter of New York City Tr. Auth. v New York State Div. of Human Rights*, 33 AD3d 617 [2006]). Nor does it fall within any of the exceptions to the

rule of finality or the requirement to exhaust administrative remedies (*see Matter of Bettina Equities Co. LLC v State of N.Y. Exec. Dept., State Div. of Human Rights*, 9 AD3d 296 [2004]).

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

ENTERED: NOVEMBER 16, 2010



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Friedman, J.P., Sweeny, Catterson, Renwick, Román, JJ.

3608 The People of the State of New York, Ind. 1528/08
Respondent,

-against-

Luis Pratt,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

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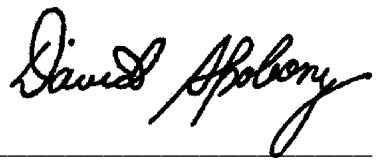
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Lewis Bart Stone, J.), rendered on or about December 12, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTERED: NOVEMBER 16, 2010



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

Andrias, J.P., Saxe, Sweeny, Nardelli, Catterson, JJ.

3057 Prometheus Realty Corp., et al., Index 111132/08
Plaintiffs-Appellants,

-against-

City of New York,
Defendant-Respondent,

Association for Neighborhood and
Housing Development (ANHD), et al.,
Intervenors-Defendants-Respondents.

_____

Davidoff Malito & Hutcher LLP, New York (Charles Capetanakis of counsel), for appellants.

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

John C. Gray, South Brooklyn Legal Services, Inc., Brooklyn (Edward Josephson of counsel), for intervenors-respondents.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered August 5, 2009, affirmed, without costs.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David B. Saxe
John W. Sweeny, Jr.
Eugene Nardelli
James M. Catterson, JJ.

3057
Index 111132/08

_____x

Prometheus Realty Corp., et al.,
Plaintiffs-Appellants,

-against-

City of New York,
Defendant-Respondent,

Association for Neighborhood and
Housing Development (ANHD), et al.,
Intervenors-Defendants-Respondents.
_____x

Plaintiffs appeal from an order of the Supreme Court, New York County (Eileen A. Rakower, J.), entered August 5, 2009, which denied their motion for summary judgment and granted defendants' cross motions dismissing the complaint.

Davidoff Malito & Hutcher LLP, New York (Charles Capetanakis, Howard Weiss, Joshua Krakowsky and Dimitra Tzortzatos of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Karen M. Griffin and Francis F. Caputo of counsel), for Municipal respondents.

John C. Gray, South Brooklyn Legal Services, Inc., Brooklyn (Edward Josephson and Michael Grinthal of counsel), for intervenors-respondents.

SAXE, J.

This appeal considers plaintiffs' challenge to the enactment by the New York City Council of the New York City Tenant Protection Act, Local Law No. 7 of 2008 (Local Law 7), the aim of which is to provide legal remedies for tenants experiencing harassment by landlords attempting to force them out. Plaintiffs Prometheus Realty Corp., Reshit Gjinovic, Asia Gjinovic, and 68-60 108th Realty, LLC are owners of various residential buildings in New York City. Plaintiff Rent Stabilization Association of NYC, Inc. is a not-for-profit organization representing the interests of approximately 25,000 landlords who own or manage apartment buildings in the City. Plaintiffs seek a judgment declaring that Local Law 7 violates both the New York State and United States Constitutions and enjoining the City from enforcing the law.

In addition to the opposition to the challenge submitted by the City, the court received opposition from two intervenors: intervenor-defendant the Association for Neighborhood and Housing Development (ANHD), a membership group of more than 90 community organizing and housing development groups, and intervenor-defendant Teresa Perez, the president of the Queens Vantage Tenants Council, an organization of tenants in more than 50 buildings bought and owned by Vantage Properties, LLC.

All parties moved for summary judgment, and the motion court granted the City's and the intervenor-defendants' motions for summary judgment dismissing the complaint. On appeal, plaintiffs argue that Local Law 7 improperly grants a type of authority to the Housing Part of New York City Civil Court that may only be granted by the State Legislature.

The law, which became effective on March 13, 2008, amended portions of New York City Administrative Code title 27, chapter 2, which contain the Housing Maintenance Code, to provide new and greater protection for tenants experiencing harassment by landlords attempting to force them to abandon their apartments (Council of City of NY Press Release No. 098-2007 [October 17, 2007]).

Administrative Code § 27-2005, "Duties of owner," was amended to provide that "[t]he owner of a dwelling shall not harass any tenants or persons lawfully entitled to occupancy of such dwelling" (subd [d]). Section 27-2004 was amended to define the term harassment as "any act or omission by or on behalf of an owner that . . . causes or is intended to cause any person lawfully entitled to occupancy of a dwelling unit to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy," and includes a long list of possible acts and omissions, such as the use of force, interruptions of essential

services, baseless court proceedings, and removing the door or the tenant's possessions (subd [a][48]). Section 27-2115 was amended to add a private right of action based on a claim of harassment (subd [h]), and to provide for injunctive relief and attorneys' fees (subd [m][3], [4]).

Plaintiffs' challenge is based on the contention that the powers afforded by the New York State Constitution permit only the State Legislature to modify the jurisdiction of the Housing Part of the New York City Civil Court, and that, by enacting Local Law 7, the City Council has usurped that authority. This argument assumes that Local Law 7 expands the jurisdiction of the Housing Part. We reject that assumption.

The Housing Part was created by the Legislature in 1972 with the enactment of New York City Civil Court Act § 110. Its purpose is to hear "actions and proceedings involving the enforcement of state and local laws for the establishment and maintenance of *housing standards*, including, but not limited to, the multiple dwelling law and the housing maintenance code, building code and health code of the administrative code of the city of New York" (CCA 110[a] [emphasis added]). Plaintiffs' position is that the phrase "housing standards" must be read narrowly, to include physical, objective, and readily ascertainable standards related to the physical plant and

operation of buildings, but not "subjective" conditions and circumstances such as the question of whether harassment has occurred.

However, as this Court has previously observed, CCA 110 "grants the Civil Court broad powers in landlord-tenant proceedings" (*Missionary Sisters of Sacred Heart v Meer*, 131 AD2d 393, 396 [1987]). By authorizing the Housing Part to enforce local as well as state laws, "*including, but not limited to*, the multiple dwelling law and the housing maintenance code, building code and health code" (CCA 110[a] [emphasis added]), the Legislature was granting broad authority in regard to the enforcement of "housing standards."

Although the Civil Court Act does not include a definition of the term "housing standards," in our view, the creation of remedies for harassment of tenants by landlords is a matter that falls squarely within the concept of "housing standards" as the term has been understood and applied since the Act was enacted.

First, review of the language of the statute itself to determine the Legislature's intent (McKinney's Cons Laws of NY, Book 1, Statutes § 97) establishes that CCA 110 contemplates more than simply standards for the physical plant or condition of buildings. For example, § 110(a)(2) specifically authorizes the Housing Part to hear actions involving "the elimination or

correction of a nuisance." This authority has regularly been invoked to consider subjective claims of nuisance unconnected to the physical condition of the building, such as those concerning excessive noise and noxious odors (*see e.g. Goodhue Residential Co. v Lazansky*, 1 Misc 3d 907[A]; 2003 NY Slip Op 51559[U] [2003]; *Smalkowski v Vernon*, 2001 NY Slip Op 40071[U] [2001]).

Moreover, in other statutes the Legislature has already empowered the Housing Part to hear matters beyond the physical conditions of buildings and objective facts, reflecting its view that "housing standards" is broad enough to cover less tangible living conditions. For example, the Housing Part is authorized under Real Property Law § 235-b(1) to determine whether tenants are being "subjected to any conditions endangering or detrimental to their life, health, or safety" (*Park W. Mgt. Corp. v Mitchell*, 47 NY2d 316, 325 [1979], *cert denied* 444 US 992 [1979]). This has also been relied on in cases involving intangible and subjective considerations such as noise levels emanating from an apartment (*see e.g. Matter of Nostrand Gardens Co-Op v Howard*, 221 AD2d 637 [1995]). The Housing Part is authorized under RPAPL 711 to determine whether a tenant is objectionable so as to entitle the landlord to terminate the lease and eject the tenant -- also a matter requiring the court to determine issues involving neither the physical plant nor objective facts. That

the court's jurisdiction to render determinations under RPAPL 711 requires a lease provision permitting termination of the tenancy in the event of objectionable conduct (*Dass-Gonzalez v Peterson*, 258 AD2d 298 [1999]) does not negate the fact that the Legislature explicitly authorized the Housing Part to determine the essentially subjective question of whether particular tenant conduct is "objectionable."

Since such issues as whether a tenant's conduct is objectionable or constitutes a nuisance have already been established to be within the jurisdiction of the Housing Part, and therefore necessarily an issue of "housing standards," the equivalent issue of whether a particular landlord's conduct constitutes harassment must similarly be recognized as an issue of "housing standards" within the previously-established jurisdiction of the Housing Part.

We observe that the Housing Part's authority to adjudicate the specific issue of harassment was in place even before Local Law 7 was enacted; in particular, Rent Stabilization Code (9 NYCRR) § 2524.3(b) authorized landlords to commence eviction proceedings when a rent-stabilized tenant engaged in wrongful conduct "the primary purpose of which is intended to harass the owner or other tenants . . . by interfering substantially with their comfort or safety." The DHCR promulgated this provision in

1987 under the authority granted it by the Legislature (Omnibus Housing Act, L 1983, ch 403, § 3; L 1985, ch 888, § 2). Since then, there has been no suggestion that DHCR improperly imparted to the Housing Part greater authority than the Civil Court Act grants it.

We conclude then that Local Law 7 does not exceed the authority previously accorded to the Housing Part, but falls within the previously-defined jurisdiction of the Housing Part entitling it to enforce laws to establish and maintain housing standards.

Having concluded that Local Law 7 does not impermissibly expand the jurisdiction of the Housing Part to hear claims of harassment against landlords, we also reject the parallel argument that it impermissibly expands the Housing Part's equitable jurisdiction. CCA 110(a)(4) authorizes the Housing Part to issue equitable relief such as restraining orders and injunctions in order to enforce "housing standards." This authority is no more limited to proceedings involving the physical condition of buildings than the remainder of the authority granted by § 110(a) to hear actions in order to enforce housing standards. The cases plaintiffs cite for the unassailable proposition that certain types of relief are not available in the Housing Part or, indeed, in the Civil Court, are

all distinguishable from this situation, in which the court has specifically been granted the authority to hear such matters and award such relief.

Plaintiffs also argue that the impropriety of Local Law 7 is demonstrated by its inconsistency with the remainder of the Housing Maintenance Code into which it was inserted. The purpose of the Housing Maintenance Code, they assert, is to provide for inspections of buildings, service upon building owners of notices of Code violations, and follow up with enforcement mechanisms where those violations are not cured. The provisions of Local Law 7 incorporated in the Housing Maintenance Code, they contend, are the only portions of the Code *not* amenable to such handling by a housing inspector.

However, it is demonstrably untrue that the Housing Maintenance Code has been, until now, strictly limited to governing matters of building structure. Initially, as the motion court observed, the legislative declaration in the Housing Maintenance Code indicates an intent to protect tenants' actual *occupancy*, as well as the physical condition of the premises, in that it explicitly declares a need to protect tenants in areas of "health and safety, fire protection, light and ventilation, cleanliness, repair and maintenance, *and occupancy* in dwellings" (Administrative Code § 27-2002).

Moreover, even if the Housing Maintenance Code was initially limited to matters of building structure that could be discerned by inspectors and remedied by issuing violations, the Code has since been amended to add a provision concerning matters beyond buildings' physical structure. Indeed, Administrative Code § 27-2093, added by Local Law 19 of 1983, specifically concerns tenant harassment, creating a procedure by which the Department of Housing Preservation and Development may consider whether the owner of a single room occupancy building is entitled to a certificate of no harassment. Of course, this provision gives no authority to the Housing Part. We merely observe that the Housing Maintenance Code has not for some time been as limited as plaintiffs suggest.

We reject plaintiffs' assertion that in enacting Local Law 7, the City Council exceeded its authority "to adopt and amend local laws not inconsistent with the provisions of the constitution or not inconsistent with any general law" (Municipal Home Rule Law § 10[1][i]), since we perceive no inconsistency.

Finally, there is no merit to the contention that Local Law 7 violates plaintiffs' substantive and procedural due process rights. It is, in fact, rationally related to a legitimate State objective, namely, maintaining rent-regulated housing in New York City. Preventing landlords from forcing tenants out by such

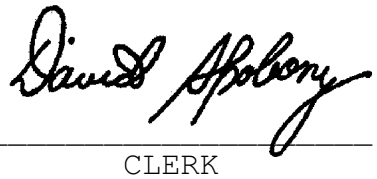
means as refusing to make repairs, so they can deregulate their buildings, is also rationally related to this goal (*see Daniels v Williams*, 474 US 327, 331 [1986]; *Natale v Town of Ridgefield*, 170 F3d 258, 262 [2d Cir 1999]). Moreover, Local Law 7 does not lack procedural safeguards for protecting landlords' due process rights (Administrative Code § 27-2115[m][2]; *see Matter of Daxor Corp. v State of N.Y. Dept. of Health*, 90 NY2d 89, 98 [1997], *cert denied* 523 US 1074 [1998]; *Matter of Cadman Plaza N. v New York City Dept. of Hous. Preserv. & Dev.*, 290 AD2d 344 [2002]).

Accordingly, the order of the Supreme Court, New York County (Eileen A. Rakower, J.), entered August 5, 2009, which denied plaintiffs' motion for summary judgment and granted defendants' cross motions dismissing the complaint, should be affirmed, without costs.

All concur.

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

ENTERED: NOVEMBER 16, 2010



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