SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 30, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., DeGrasse, Freedman, Manzanet-Daniels, Román, JJ.

2328 Michael Klussman, et al., Index 103338/05
Plaintiffs-Respondents,

-against-

A.T. Reynolds & Sons, Inc., et al.,
Defendants-Appellants,

Williams Real Estate and
Management LLC, et al.,
Defendants-Respondents.

_____

Paganni, Gambeski, Cioci, Cusumano & Farole, Lake Success (Peter A. Cusumano of counsel), for appellants.

Larkin, Axelrod, Ingrassia & Tetenbaum, LLP, New York (James Alexander Burke of counsel), for Klussman respondents.

Thomas D. Hughes, New York (Richard Rubinstein of counsel), for Williams Real Estate Co., Inc. and Aradco Limited, respondents.

Mintzer Sarowitz Zeris Ledva & Meyers LLP, New York (Erika L. Omundson of counsel), for Cure Connection, Inc., respondent.

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Order, Supreme Court, New York County (Joan Madden, J.), entered April 29, 2009, which, to the extent appealed from, denied the motion of defendants A.T. Reynolds & Sons, Inc. and Leisure Time Spring Water, Inc. (collectively, "Leisure Time") for summary judgment dismissing the complaint as against them and

granted the motion by defendants the Cure Connections, Inc. s/h/a the Cure Connection, Inc. and Aradco Limited for summary judgment dismissing the complaint as against them, unanimously modified, on the law, Leisure Time's motion granted and the complaint dismissed as against it, and as so modified, affirmed, without costs.

Plaintiff Michael Klussman, a tractor-trailer driver, was injured while offloading a rack of 40 five-gallon plastic bottles of water from the rear of his trailer to the loading dock of a building. Leisure Time, the distributor of the water, arranged for the delivery to Cure Connections, an occupant of the building. Klussman was not on Leisure Time's payroll but Leisure Time owned the rig Klussman used at the time of the accident. Assisted by Cure Connections' employee, Schlaff, Klussman had successfully unloaded three similarly loaded racks of water before he was injured while unloading the fourth rack. The equipment Klussman used in unloading the first three racks consisted of a manual pallet jack, that was furnished by Leisure Time, and a loading ramp that Klussman found at the dock. Unloading the first three racks was difficult because the floor of the trailer was 18 inches higher than the loading dock. Adding to the difficulty, the loading ramp was relatively short, creating a steep angle of descent from the trailer to the loading

dock. After the third rack was unloaded, Klussman discovered that Leisure Time's pallet jack was damaged. Klussman then replaced that pallet jack with another one owned by Cure Connections.

For the fourth rack of water, Klussman and Schlaff decided to employ a new tactic described as follows in Klussman's affidavit:

> "Given the serious problems we were having with the first three loads of water, Schlaff and I discussed a new way to unload the fourth rack of water. We would come straight off the ramp faster than the last time without turning left or right, and then I would release the pallet jack's handle and hydraulic pressure dropping the load and stopping it from moving. The idea was to descend the ramp, stop on the dock, and make a sharp 90-degree turn with the load from a stopped position rather than moving to keep it from tipping over."

When Klussman squeezed the pallet jack handle, however, the load did not stop moving. Instead, its momentum pushed him backwards and pinned his leg against a beam attached to the wall of the loading dock.

Leisure Time moved for summary judgment on the grounds that (a) Klussman was its special employee and thus barred from maintaining this negligence action against it by the exclusivity provisions of the Workers' Compensation Law and (b) the accident was not caused by any defective equipment furnished by Leisure

Time. The motion court denied Leisure Time's motion, finding an issue of fact as to each asserted ground. We now reverse.

The motion court correctly concluded that there is an issue of fact as to whether Klussman was Leisure Time's special employee. There is, however, no issue of fact as to whether Leisure Time owed Klussman a duty of care to provide him with adequate equipment or a different truck for the task of unloading the water. First, Leisure Time has demonstrated that the accident was proximately caused by the manner in which Klussman chose to offload the fourth rack of water as opposed to a failure to provide him with adequate equipment or a different truck. By Klussman's own estimate, each loaded rack weighed approximately one ton. Instead of offloading the fourth rack in the same manner by which he thrice avoided injury, Klussman decided to move the massive load down the incline at a *faster* rate of speed. Klussman's explanation of the accident is that "when I came out of the ramp straight the brake didn't come on or didn't come on fast enough and pinned me against the wall. . ." As a matter of law, the accident could not have been proximately caused by any act or omission on part of Leisure Time. It is also significant that Leisure Time did not furnish the pallet jack or the ramp used by Klussman at the time of the accident. Thus, any failure of the equipment used by Klussman could not have been caused by

Leisure Time's negligence. For the foregoing reasons, Leisure Time's motion for summary judgment should have been granted.

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

ENTERED: NOVEMBER 30, 2010

CLERK

Gonzalez, P.J., Mazzarelli, Nardelli, Renwick, DeGrasse, JJ.

3705 The People of the State of New York, Ind. 2914/08
Respondent,

-against-

James Frey,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Bruce D. Austern of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered October 8, 2009, as amended October 28, 2009, convicting defendant, upon his plea of guilty, of sexual abuse in the first degree, and sentencing him, as a second child sexual assault felony offender, to a term of 5 years, unanimously affirmed.

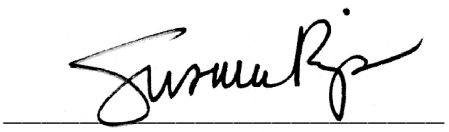
The court properly sentenced defendant as a second child sexual assault felony offender (*see* Penal Law § 70.07). It is undisputed that defendant's prior conviction involved a child less than 15 years old, and thus qualified as a predicate felony conviction under the statute. However, since the age of the victim was not an element of defendant's present sexual abuse conviction under Penal Law § 130.65(1), the People were also required to establish that the victim of the present crime was

under 15. Thus, for enhanced sentencing purposes, the age of the victim became an additional element to be proven. We conclude that defendant's plea allocution satisfied that requirement. When taken together, the statements of defendant, the prosecutor and the court unequivocally demonstrate that defendant admitted the victim was 12 years old at the time of the offense, even if defendant did not use those exact words (*see People v McGowen*, 42 NY2d 905 [1977]; *see also People v Seeber*, 4 NY3d 780, 781 [2005]).

Since the plea allocution established, by way of defendant's admission, that the victim was under 15, a special information (*see* CPL 200.62[1]) alleging that fact was unnecessary. For the same reason, there was no violation of the principles set forth in *Apprendi v New Jersey* (530 US 466 [2000]).

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

ENTERED: NOVEMBER 30, 2010



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Gonzalez, P.J., Mazzarelli, Nardelli, Renwick, DeGrasse, JJ.

3706 Isidro Abascal, Index 401171/06
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Isidro Abascal, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Elina Druker of counsel), for respondent.

_____

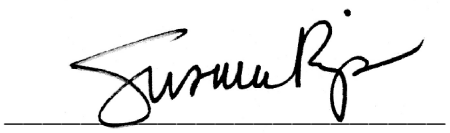
Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered August 13, 2009, which granted defendant City's motion for summary judgment dismissing the complaint, and denied plaintiff's motion to strike the answer and for summary judgment, unanimously affirmed, without costs.

The gravamen of plaintiff's complaint is that he was repeatedly denied parole on the basis of faulty information, eventually corrected by the Department of Probation, in his presentence report. Dating accrual of his claim from the last date on which plaintiff's application for parole or work release was denied, the court correctly found that plaintiff failed to file a notice of claim within the 90-day time limit imposed by General Municipal Law § 50-e; nor did plaintiff timely seek leave to file a late notice of claim. Hence, plaintiff's claim was

properly dismissed. Were we to consider the merits, we would find that although several reasons were articulated by the Parole Board for denying plaintiff's applications for parole, none referred to the inaccurate information in plaintiff's presentence report, and there is no basis in this record to disturb the Board's exercise of discretion. Although the court also dismissed what it construed, apparently on the basis of some of plaintiff's phrasing, to be a 42 USC § 1983 claim, plaintiff, on appeal, disclaims having advanced such a claim. In any event, we agree that the complaint fails to state a 1983 claim.

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

ENTERED: NOVEMBER 30, 2010



CLERK

Gonzalez, P.J., Mazzarelli, Nardelli, Renwick, DeGrasse, JJ.

3707 Robert E. Snauffer, Index 104400/08
Plaintiff-Appellant,

-against-

1177 Avenue of the Americas LP, et al.,
Defendants-Respondents.

_____

Harris/Law, New York (Matthew Gaisi of counsel), for appellant.

Fiedelman & McGaw, Jericho (James K. O'Sullivan of counsel), for respondents.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered October 21, 2009, which, in this action for personal injuries allegedly sustained when plaintiff slipped and fell on a wet floor in the lobby of defendants' building, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

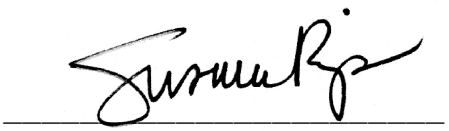
Defendants established their prima facie entitlement to judgment as a matter of law by submitting evidence that they neither created nor had notice of the alleged wet condition that caused plaintiff to slip (*see e.g. Garcia v Delgado Travel Agency*, 4 AD3d 204 [2004]). In opposition, plaintiff failed to raise a triable issue of fact. Although it was raining at the time of plaintiff's fall and defendants had placed mats in front of other entrances of the building and wet-floor warning signs on

the lobby floor, this does not require a finding that defendants had actual notice of the allegedly dangerous condition. Defendants demonstrated that the warning signs were put out as a safety precaution and not in response to complaints regarding the condition of the floor where plaintiff fell (*cf. Hilsman v Sarwil Assoc., L.P.*, 13 AD3d 692, 695 [2004]).

Furthermore, the affidavit of plaintiff's co-worker failed to raise a triable issue of fact as to whether defendants had actual notice of the alleged defect because the affirmant did not state that any of her observations were made on the date of plaintiff's accident. Nor is the affidavit of plaintiff's expert probative of the condition of the accident location because it is unclear when the expert inspected the location and thus, there is no evidence that the conditions he observed were the same as those that existed at the time plaintiff fell (*see Garcia v The Jesuits of Fordham*, 6 AD3d 163, 166 [2004]).

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

ENTERED: NOVEMBER 30, 2010



CLERK

Gonzalez, P.J., Mazzarelli, Nardelli, Renwick, DeGrasse, JJ.

3708 In re Bruce Hyman,
as co-Executor of the Estate of
Malcolm A. Hyman,
Deceased.

- - - -

Bruce Hyman, File No. 1024/02
Petitioner-Respondent,

-against-

Frederic Hyman,
Respondent-Appellant.

_____

Bryan Cave LLP, New York (David P. Kasakove of counsel), for appellant.

Schlesinger Gannon & Lazetera LLP, New York (Martin R. Goodman of counsel), for respondent.

_____

Decree, Surrogate's Court, New York County (Kristin Booth Glen, S.), entered on or about December 10, 2008, which, to the extent appealed from as limited by the briefs, limited the conditional release and discharge to petitioner Bruce Hyman, unanimously modified, on the facts and in the exercise of discretion, the limitation removed, and otherwise affirmed, without costs.

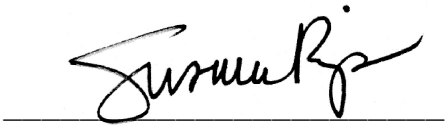
When there is an inconsistency between a judgment or order and the decision upon which it is based, the decision controls,

and such inconsistency may be corrected on appeal (*see Green v Morris*, 156 AD2d 331 [1989], *lv denied* 75 NY2d 705 [1990]; CPLR 5019[a]). The Surrogate's decision faulted the parties equally for the prolonged administration and rejected petitioner's request that the co-executors be released only as to estate tax matters, instead determining that the court "will discharge the fiduciary as to all matters and things." Nothing in the decision suggests that only petitioner was to be released and discharged, or that respondent, his co-executor, was not entitled to a release and discharge, as indicated in the handwritten emendation to the settled decree. To the extent there is any ambiguity in the decision, review of the record as a whole, including the underlying motion papers and the proposed decrees submitted on notice, makes clear that the Surrogate's decision intended both co-executors to be fully discharged (*see Garrick Aug Assoc. Store Leasing v Scali*, 278 AD2d 23 [2000]). Petitioner's argument on appeal that the court must have found respondent was not entitled to be discharged because of his conduct in connection with the administration of the estate was not raised before the Surrogate, and is inconsistent with the position in his motion papers

requesting discharge of both co-executors (*see Federal Deposit Ins. Corp. v J & D Einbinder Assoc.*, 224 AD2d 655, 656 [1996]).

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

ENTERED: NOVEMBER 30, 2010



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Gonzalez, P.J., Mazzarelli, Nardelli, Renwick, DeGrasse, JJ.

3709 Thuy-An Julien, Index 350029/09
Plaintiff-Appellant,

-against-

Terrence Julien,
Defendant-Respondent.

_____

Brett Kimmel, New York, for appellant.

March Valentine & Donohoe LLP, New York (Margaret M. Donohoe of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Saralee Evans, J.), entered March 2, 2010, dismissing the complaint for lack of in personam jurisdiction, unanimously affirmed, without costs.

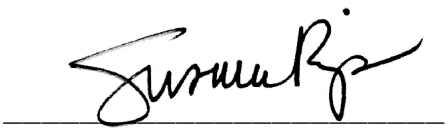
Plaintiff failed to demonstrate any of the grounds on which the court could exercise personal jurisdiction over defendant under CPLR 302(b). From 2002 to 2007, the matrimonial domicile was Florida, where the parties jointly rented an apartment into which they moved their possessions and pets, and which was listed as their residence on federal and New York State tax returns (*see Lipski v Lipski*, 293 AD2d 344 [2002]). Although the parties resided together in New York between 2001 and 2002, it is clear that New York was not the matrimonial domicile "before their separation," as that term is used in CPLR 302(b) (*see Klette v Klette*, 167 AD2d 197, 198 [1990]).

"Having determined that the parties did not maintain a marital domicile in New York, it follows that plaintiff's claims for maintenance, equitable distribution, and other ancillary relief did not accrue under the laws of this State" (*Senhart v Senhart*, 4 Misc 3d 862, 870 [2004], *affd* 18 AD3d 642 [2005]). Nor was there any evidence that plaintiff was abandoned in New York.

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 30, 2010



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Gonzalez, P.J., Mazzarelli, Nardelli, Renwick, DeGrasse, JJ.

3710 The People of the State of New York, Ind. 5235/07
Respondent,

-against-

Troy Manning,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), and Weil, Gotshal & Manges LLP, New York (Mark B. Rosen of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sara M. Zausmer of counsel), for respondent.

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered April 7, 2009, convicting defendant, after a jury trial, of 2 counts of criminal sale of a controlled substance in the first degree, 5 counts of criminal sale of a controlled substance in the second degree, and 11 counts of criminal sale of marijuana in the second degree, and sentencing him, as a second felony drug offender, to an aggregate term of 42 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentences for the first-degree sale convictions from 24 years to 18 years and directing that all sentences run concurrently, resulting in a new aggregate term of 18 years, and otherwise affirmed.

The evidence at a *Hinton* hearing established an overriding

interest that warranted a limited closure of the courtroom (*see Waller v Georgia*, 467 US 39 [1984]; *People v Ramos*, 90 NY2d 490, 497 [1997], *cert denied sub nom Ayala v New York*, 522 US 1002 [1997]). The officer testified that he continued his undercover work in the specific area of defendant's alleged sales, and that in connection with his operations in that area he had open investigations, unidentified subjects, lost subjects and other cases pending in the courthouse. This demonstrated that his safety and effectiveness would be jeopardized by testifying in an open courtroom, and it satisfied the requirement of a particularized showing.

Even though defendant preserved his general claim that the courtroom should not have been closed, he did not preserve his specific complaint that the court failed to set forth adequate findings of fact to justify closure. A separate contemporaneous objection was necessary because "a timely objection . . . would have permitted the court to rectify the situation instantly by making express findings" (*People v Doster*, 13 AD3d 114, 115 [2004], *lv denied* 4 NY3d 763 [2005]). Accordingly, we decline to review this claim in the interest of justice. As an alternative holding, we find that the court's ruling "implicitly adopted the People's particularized showing" and was "specific enough that a reviewing court can determine whether the closure order was

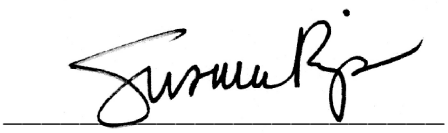
properly entered" (*id.*).

Defendant also argues that the court failed to consider reasonable alternatives to closure. However, the closure only applied during the undercover officer's testimony, and the court stated it would permit defendant's family members to attend and would consider admitting other persons on an individual basis. This was adequate to satisfy the *Waller* requirement of considering alternatives to the exclusion of all spectators (*see Presley v Georgia*, 558 US__, 130 S Ct 721, 724 [2010]).

We find the sentence excessive to the extent indicated.

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

ENTERED: NOVEMBER 30, 2010



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Gonzalez, P.J., Mazzarelli, Nardelli, Renwick, DeGrasse, JJ.

3711-
3712 In re Christopher R., and Others,

Children under Eighteen Years of Age, etc.,

Lecrieg B.B., also known as January W.,
Respondent-Appellant,

New York City Administration for Children's Services,
Petitioner-Respondent.

- - - -

In re Proceeding for Custody and/or Visitation Under Article 6 of the Family Court Act.

Curtis B., Sr.,
Petitioner-Respondent,

-against-

Lecrieg B.B.,
Respondent-Appellant,

New York City Administration for Children's Services,
Respondent-Respondent.

_____

January W., appellant pro se.

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

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

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Order of disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about January 15, 2009, which, upon a fact-finding determination of neglect against respondent mother, inter alia, released the subject children to their non-respondent father, and order, same court and Judge, entered on or about January 15, 2009, which awarded custody of the children to petitioner father, unanimously affirmed, without costs.

A preponderance of the evidence supports the court's finding that the children's physical, mental or emotional condition was in imminent danger of becoming impaired as a result of respondent mother's longstanding history of mental illness and resistance to treatment (*see* Family Court Act § 1012(f)(I); § 1046(b)(I)). Respondent testified to multiple extended hospitalizations for mental illness and stated that she would not resume medication or treatment even if it meant that the children would not be returned to her. The record also demonstrates that respondent kept one child home from school for most of the month of September, before she was approved for home schooling (*see Matter of Danny R.*, 60 AD3d 450 [2009]).

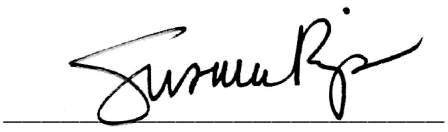
The evidence at the consolidated hearing on the disposition of the neglect petition and the father's custody petition, which showed that respondent has failed to address her mental illness and its effects on the children and that the children are

attending school and otherwise doing well while living with their father, supports the court's determination that the best interests of the children were served by releasing them to their father and awarding the father custody of them (*see Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]).

We have reviewed respondent's remaining arguments and find them without merit.

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

ENTERED: NOVEMBER 30, 2010



CLERK

Gonzalez, P.J., Mazzarelli, Nardelli, Renwick, DeGrasse, JJ.

3713 Mahamadou Doumbia, Index 26920/99
Plaintiff-Respondent,

-against-

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

J.J.C. Construction Corp.,
Defendant-Appellant.

_____

Michael H. Zhu, New York, for appellant.

Joseph Lichtenstein, Mineola, for respondent.

_____

Order, Supreme Court, Bronx County (Paul A. Victor, J.), entered August 31, 2009, which, in an action for personal injuries sustained when plaintiff was struck by a hit-and-run vehicle while walking in a roadway undergoing reconstruction, granted plaintiff's motion to renew a prior order, same court and Justice, entered January 6, 2006, which had granted defendant-appellant construction company's motion for summary judgment dismissing the complaint as against it, and, upon renewal, denied the motion, unanimously affirmed, without costs.

Even if, as defendant argues, plaintiff's newly offered evidence on renewal, consisting mostly of admissions allegedly made by defendant's principal that the temporary pedestrian walkway was closed on the day of the accident, was available at

the time of the prior motion in the sense that the admissions could have been elicited at the principal's pre-motion deposition, and therefore not technically new, the circumstances warrant relaxation of that requirement and consideration of the alleged admissions in the interest of justice (*see Atiencia v MBBCO II, LLC*, 75 AD3d 424, 424-425 [2010]). More particularly, defendant's prior motion for summary judgment should have been denied as plaintiff's testimony, by itself, was sufficient to raise issues of fact not only as to whether there was adequate signage directing pedestrian traffic to the walkway, but indeed whether the walkway was closed, and the newly offered admissions merely provide additional support for finding an issue of fact in the latter regard. Also bearing on the interest of justice is the trial justice's subsequent order that, on constraint of the prior order, dismissed the action as against the other remaining defendants. We have considered defendant's other contentions and find them unavailing.

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

ENTERED: NOVEMBER 30, 2010

CLERK

Gonzalez, P.J., Mazzarelli, Nardelli, Renwick, DeGrasse, JJ.

3714 Barbara Torain, Index 15637/06
Plaintiff-Appellant,

-against-

Amadou Bah also known as
Mamadou Bobo Bah,
Defendant-Respondent.

_____

Brandon J. Walters, New York, for appellant.

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

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Order, Supreme Court, Bronx County (Nelson S. Roman, J.), entered June 11, 2009, which granted defendant's motion for summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d), unanimously modified, on the law, to the extent of denying the motion in part and reinstating plaintiff's claims that she sustained a significant limitation of use of a body function or system and/or a permanent consequential limitation of use of a body organ or member, and otherwise affirmed, without costs.

Defendant established a prima facie entitlement to summary judgment by submitting the affirmed reports of an orthopedic surgeon and a neurologist, who, after conducting independent examinations of plaintiff and detailing the objective tests

performed, concluded that plaintiff had full range of motion in her neck, back and shoulder (*see Zhijian Yang v Alston*, 73 AD3d 562 [2010]). Defendant also submitted the affirmed report of a radiologist, who, upon reviewing plaintiff's MRI films, opined that plaintiff's complaints of pain were attributable to degenerative changes in her lumbar and cervical spine.

In opposition, plaintiff raised triable issues as to whether she sustained a serious injury under the categories of significant limitation of use of a body function or system and/or the permanent consequential limitation of use of a body organ or member (Insurance Law § 5102[d]). Plaintiff's orthopedic surgeon, who examined plaintiff and reviewed the MRI films of her cervical and lumbar spine taken approximately one month after the accident, opined that the cervical herniations were caused by the trauma of the accident, inasmuch as the nuclear pulposis was projected outward in a focalized way. The conflicting expert opinions as to the cause of plaintiff's cervical herniations raises an issue of fact for trial (*see e.g. Jacobs v Rolon*, 76 AD3d 905 [2010]). Triable issues are also raised by evidence, including the MRI of plaintiff's lumbar spine showing two disc bulges, that plaintiff was asymptomatic prior to the accident, that the results of the objective tests performed by plaintiff's experts indicated universal limitations in range of motion, and

that such experts opined that the cause of plaintiff's lumbar injuries were related to the accident (*see id.; Mercado-Arif v Garcia*, 74 AD3d 446 [2010]).

Dismissal of plaintiff's claim of serious injury under the 90/180-day category was appropriate inasmuch as the record establishes that plaintiff continued to work following the accident, albeit in a diminished capacity, and there was no medical determination that she was unable to engage in substantially all her material and customary daily activities for 90 out of the first 180 days after the accident (*see e.g. Blake v Portexit Corp.*, 69 AD3d 426 [2010]).

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

ENTERED: NOVEMBER 30, 2010

CLERK

Gonzalez, P.J., Mazzarelli, Nardelli, Renwick, DeGrasse, JJ.

3715 Hector Sanchez, Index 16054/06
Plaintiff-Respondent,

-against-

Avuben Realty LLC,
Defendant-Appellant.

_____

Eric W. Berry, New York for appellant.

Bader, Yakaitis & Nonnenmacher, LLP, New York (Robert E. Burke of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on April 21, 2009, which denied defendant's motion to vacate a default judgment entered against it on March 18, 2008, unanimously affirmed, without costs.

Defendant argues that under CPLR 5015(a)(1), it was entitled to vacatur of the default judgment, claiming that its default was excusable since service of process was effected by delivery of the summons and complaint to the Secretary of State (*see* Limited Liability Company Law § 303[a]), which undisputably maintained the wrong corporate address for defendant, and, as a result, it never received personal service.

An application brought pursuant to CPLR 5015 to be relieved from a judgment or order entered on default requires a showing of a reasonable excuse and legal merit to the defense asserted (see

Crespo v A.D.A. Mgt., 292 AD2d 5, 9 [2002]). While the failure to keep a current address with the Secretary of State is generally not a reasonable excuse for default under CPLR 5015(a)(1) (*id.* at 9-10), where a court finds that a defendant failed to "personally receive notice of the summons in time to defend and has a meritorious defense," relief from a default may be permitted (CPLR 317; see *Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 142 [1986]).

Here, notwithstanding the Secretary of State's maintenance of the wrong corporate address, the evidence of record demonstrates that defendant did receive notice of the summons in time to interpose a defense, and inexplicably failed to do so. It is undisputed that six months after the complaint's filing, counsel for defendant's insurer contacted plaintiff's counsel to discuss settlement, at which time he was informed of the then-pending motion for default judgment. The very fact that settlement options were discussed at this time evidences that defendant was aware of plaintiff's action. Moreover, vacatur of a default judgment is not warranted merely because the default was occasioned by lapses on the part of an insurance carrier (see *Klein v Actors & Directors Lab*, 95 AD2d 757 [1983], *lv dismissed* 60 NY2d 559 [1983]; *Lemberger v Congregation Yetev Lev D'Satmar, Inc.*, 33 AD3d 671, 672 [2006]). The evidence of record also

indicates that five months after filing of the summons and complaint, copies thereof were delivered to an undisputably valid address for defendant, as was notice of entry of the Supreme Court's March 26, 2007 order granting plaintiff's motion for default judgment and noticing an inquest as to damages. Still defendant took no action until approximately two-and-a-half years after the complaint's filing, when plaintiff attempted to collect on the Supreme Court's judgment.

Defendant failed to establish entitlement to vacatur of the default judgment under CPLR 5015(a)(3) due to an alleged fraud perpetrated by plaintiff in support of his complaint, as the affidavit it submitted in support of this claim was both conclusory and recounted hearsay.

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

ENTERED: NOVEMBER 30, 2010

CLERK

Gonzalez, P.J., Mazzarelli, Nardelli, Renwick, DeGrasse, JJ.

3716 The People of the State of New York, Ind. 2701/06
Respondent,

-against-

Ramon Adams,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered on or about August 30, 2006,

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 30, 2010

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CLERK

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

Gonzalez, P.J., Mazzarelli, Nardelli, Renwick, DeGrasse, JJ.

3717 Bruce Bernstein, et al., Index 103498/09
Plaintiffs-Respondents,

-against-

East 51st Street Development Company, LLC, et al.,
Defendants,

New York Crane & Equipment Corporation,
Defendant-Appellant.

[And A Third-Party Action]

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

Jaroslawicz & Jaros LLC, New York (David Tolchin of counsel), for respondents.

Order, Supreme Court, New York County (Karen Smith, J.), entered October 29, 2009, which, to the extent appealed from as limited by the briefs, denied so much of defendant New York Crane & Equipment's motion as sought to dismiss the claims by plaintiffs Bernstein and Clarence Kwei for emotional distress, unanimously modified, on the law, to dismiss any portion of such claim sounding in nuisance from the complaint, and otherwise affirmed, without costs.

On March 15, 2008, a tower crane operating at 303 East 51st Street in Manhattan collapsed into the building at 300 East 51st Street. Plaintiffs Bernstein and Clarence Kwei, residents of the

damaged building, claimed they were caused to suffer severe emotional distress and nuisance as a result of this incident.

The defendant was not estopped from relitigating matters decided in *Battistello v East 51st St. Dev. Co., LLC* (24 Misc 3d 858 [2009]), which involved similar claims for emotional distress and nuisance asserted by tenants of the same building against this defendant as a result of the same crane incident (*see Ryan v New York Tel. Co.*, 62 NY2d 494, 500-501 [1984]). Nevertheless, the motion to dismiss these claims was properly denied, as "[a] cause of action for negligent infliction of emotional distress, which no longer requires physical injury as a necessary element, generally must be premised upon the breach of a duty owed to plaintiff which either unreasonably endangers the plaintiff's physical safety, or causes the plaintiff to fear for his or her own safety" (*Sheila C. v Povich*, 11 AD3d 120, 130 [2004]). A building owner or general contractor owes a duty of care to individuals on nearby property who would be in danger of injury (*see 532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, 96 NY2d 280, 290 [2001]). Bernstein and Clarence Kwei have alleged sufficient facts to imply that their claims for emotional distress were "genuine, substantial, and proximately caused by the defendant's conduct" (*Howard v Lecher*, 42 NY2d 109, 111-112 [1977]). The allegations that New York Crane and Equipment,

failed, among other things, to have competent safety personnel inspecting the crane, to issue a "stop work" order for this project as a result of an inadequately secured crane, to respond to complaints that the crane had inadequate ties to the building, to have inspectors adequately assess and determine the crane's stability, and to recognize that straps utilized in attempting to brace the crane had failed, were sufficient to satisfy the requirement of showing that the contractor's conduct was extreme and outrageous (*Sheila C.*, 11 AD3d at 130-131).

Bernstein and Clarence Kwei have not pleaded a separate cause of action or claimed separate damages for nuisance; instead, they simply use the term "nuisance" in the midst of their other claims, purportedly "in its plain meaning, not as a cause of action but as a measure of damages." On this basis, to the extent they now seem to want a separate claim for nuisance, that aspect of the claim should be dismissed (*see* CPLR 3014; *Sibersky v New York City*, 270 AD2d 209 [2000]).

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

ENTERED: NOVEMBER 30, 2010

CLERK

Gonzalez, P.J., Mazzarelli, Nardelli, Renwick, DeGrasse, JJ.

3718 Allstate Insurance Company et al., Index 600509/03
Plaintiffs-Respondents,

-against-

Belt Parkway Imaging, P.C., et al.,
Defendants-Appellants,

Parkway Magnetic Resonance Imaging, Inc., et al.,
Defendants.

_____

Hession Bekoff Cooper & LoPiccolo, LLP, Garden City (Jonathan M. Cader of counsel), and Baker, Sanders, Barshay, Grossman, Fass Muhlstock & Neuwirth, Mineola (Todd Fass of counsel), for appellants.

Cadwalader, Wickersham & Taft LLP, New York (William J. Natbony of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered March 26, 2009, which denied the motion by defendants Belt Parkway Imaging, P.C., Diagnostic Imaging, P.C., Metroscan Imaging, P.C., Parkway MRI, P.C. (the PC defendants) and Herbert Rabiner, M.D., for partial summary judgment, unanimously affirmed, without costs.

"A provider of health care services is not eligible for reimbursement under section 5102(a)(1) of the Insurance Law if the provider fails to meet any applicable New York State or local licensing requirement" (11 NYCRR 65-3.16[a][12]). Pursuant to this regulation, the Court of Appeals held that "insurance

carriers may withhold payment for medical services provided by fraudulently incorporated enterprises" (*see State Farm Mut. Auto Ins. Co. v Mallela*, 4 NY3d 313, 319, 321 [2005]). *Mallela* was decided on March 29, 2005. The Legislature subsequently enacted Insurance Law § 5109, which became effective on August 2, 2005.

There is no indication in § 5109 that the statute overrules *Mallela*. Nor is there any such indication in its legislative history, which "must be reviewed in light of the existing decisional law which the Legislature is presumed to be familiar with" (*Matter of Knight-Ridder Broadcasting v Greenberg*, 70 NY2d 151, 157 [1987]).

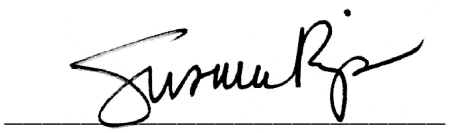
Section 5109(a) states, "The superintendent, in consultation with the commissioner of health and the commissioner of education, shall by regulation, promulgate standards and procedures for investigating and suspending or removing the authorization for providers of health services to demand or request payment for health services as specified in" Insurance Law § 5102(a)(1). However, the Superintendent of Insurance has issued no regulations pursuant to § 5109(a). Thus, if – as defendants contend – only the Superintendent can take action against fraudulently incorporated health care providers, then no one can take such action. In light of the fact that "[t]he purpose of the regulations of which [11 NYCRR] 65-3.16(a)(12) is

a part was to combat fraud" (*Allstate Ins. Co. v Belt Parkway Imaging, P.C.*, 33 AD3d 407, 409 [2006]), this would be an absurd result, and we reject it (Statutes § 145).

Defendants' contention that plaintiffs fail to state a cause of action for unjust enrichment because they have not alleged that the services rendered by the PC defendants were medically unnecessary is without merit. Paragraph 1 of the second amended complaint alleges that "numerous unnecessary referrals were made subjecting many patients to unnecessary testing and/or radiation."

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

ENTERED: NOVEMBER 30, 2010



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Gonzalez, P.J., Mazzarelli, Nardelli, Renwick, DeGrasse, JJ.

3719 The People of the State of New York, Ind. 305/09
Respondent,

-against-

Kevin Cooper,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Adrienne E. Rosen of counsel), for respondent.

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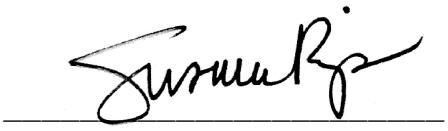
Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered November 19, 2009, as amended December 8, 2009, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of 6 years, unanimously affirmed.

The court properly exercised its discretion when, prior to defendant taking the stand, it modified its original *Sandoval* ruling in light of its further evaluation of the credibility issues to be raised by defendant's proposed testimony asserting an agency defense (*see People v Ramos*, 255 AD2d 203 [1998], lv denied 93 NY2d 856 [1999]). While we agree with defendant that the underlying facts of his prior conviction for fraudulent

accosting, in which he sold imitation narcotics to an undercover officer, were not admissible under a *Molineux* theory to rebut defendant's agency defense, they were nevertheless admissible to impeach his credibility. The modified ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]). Although the present case also involved an undercover sale, the facts of the fraudulent accosting case were highly probative of defendant's credibility and were not unduly prejudicial. Moreover, defendant's testimony that he did not like to "cheat people" enhanced the impeachment value of the facts underlying his fraudulent accosting conviction.

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

ENTERED: NOVEMBER 30, 2010



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Gonzalez, P.J., Mazzarelli, Nardelli, Renwick, DeGrasse, JJ.

3720 Metro Foundation Contractors, Inc., Index 600520/09
Plaintiff-Appellant,

-against-

Marco Martelli Associates, Inc.,
Defendant-Respondent,

Village Care of New York Inc.,
Defendant.

_____

Bryan Ha, New York, for appellant.

Mastropietro-Frade LLC, New York (Joshua D. Olsen of counsel), for respondent.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered December 21, 2009, which, upon reargument, denied plaintiff's motion for partial summary judgment, withdrew and vacated its order entered September 16, 2009 granting plaintiff partial summary judgment, and vacated the judgment entered thereon on September 17, 2009 in favor of plaintiff in the total amount of $877,041.87, unanimously affirmed, without costs.

Defendant Marco Martelli Associates, Inc. (MMA), the general contractor, hired plaintiff Metro Foundation Contractors, Inc. (Metro), to perform certain demolition and construction work on property owned by defendant Village Care of New York, Inc. (Village Care).

The court properly found the existence of issues of fact to preclude the award of partial summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) as to whether Metro inexcusably defaulted under the subject subcontracts, and as to the propriety of payments made by MMA to Metro's subcontractors and vendors.

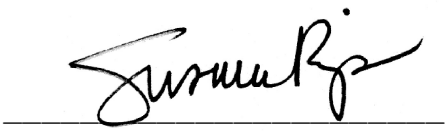
The Prompt Payment Act, General Business Law § 756-a, does not give Metro the extraordinary remedy of summary judgment for part performance where there are issues of fact as to whether Metro breached the subcontracts.

Nor did MMA violate Article 3-A of the Lien Law when it directly paid trust funds to Metro's subcontractors and vendors, who were the proper trust fund beneficiaries (*see* Lien Law § 71[2][a]), assuming the proper amounts were paid.

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

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

ENTERED: NOVEMBER 30, 2010



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Gonzalez, P.J., Mazzarelli, Nardelli, Renwick, DeGrasse, JJ.

3722 In re John Buric, Index 110995/07
Petitioner-Appellant,

-against-

Raymond Kelly, as the Police Commissioner of the City of New York, etc., et al.,
Defendants-Respondents.

_____

Wolin & Wolin, Jericho (Alan E. Wolin of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan Choi-Hausman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Marcy Friedman, J.), entered January 6, 2009, which denied the petition and dismissed the proceeding brought pursuant to CPLR article 78 seeking to annul respondent's determination that petitioner be retired with ordinary disability retirement benefits, unanimously affirmed, without costs.

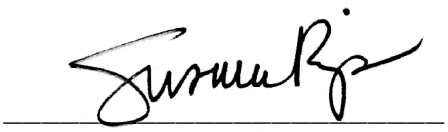
The court's findings of fact, based in large measure on its assessment of the credibility of the witnesses, that petitioner's election to file for a service retirement was voluntary and not the result of fraud, duress, coercion, or other misconduct on respondents' part, are supported by a fair interpretation of the

record evidence (*see e.g. Matter of De Marco v McLaughlin*, 49 NY2d 941 [1980]; *Matter of Girard v Board of Educ. of City School Dist. of City of Buffalo*, 168 AD2d 183 [1991]). There is no basis to override the court's determination that respondents' witnesses were credible in denying that petitioner was told that he had to make an immediate decision with respect to his pension election, that he could not indicate on his election letter that his decision was made under duress, or that it would be futile to consult an attorney prior to making such an election.

To the extent petitioner argues that he was given two unpalatable choices, or that he chose the service retirement due to financial considerations, neither constitutes duress (*see Matter of Wolfe v Jurczynski*, 241 AD2d 88, 90 [1998]; *Matter of Donato v Mills*, 6 AD3d 966, 967-968 [2004]).

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

ENTERED: NOVEMBER 30, 2010



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Gonzalez, P.J., Mazzarelli, Nardelli, Renwick, DeGrasse, JJ.

3723N Sarit Shmueli, Index 104824/03
Plaintiff-Appellant,

-against-

NRT New York, Inc., etc.,
Defendant,

Morris Duffy Alonso & Faley, LLP,
Respondent.

_____

Sarit Shmueli, appellant pro se.

Morris Duffy Alonso & Faley, New York (Anna J. Ervolina of counsel), for respondent.

_____

Order, Supreme Court, New York County (Louis Crespo, Special Referee), entered September 10, 2008, as amended by order, same Referee and entry date, which, inter alia, determined that respondent law firm was entitled to a charging lien fixed at 33 1/3% upon the proceeds of the underlying litigation, unanimously affirmed, without costs.

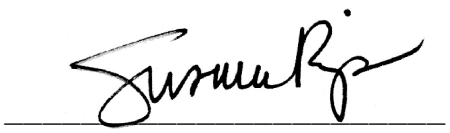
The record demonstrates that the Special Referee, as the trier of fact, considered the proof before him, as well as the credibility of the witnesses, and determined that the March 13, 2003 retainer agreement between plaintiff and her attorney in the underlying litigation, which included a 33 1/3% contingency fee, was binding and enforceable. The evidence presented at the

hearing supported the Referee's decision and his rejection of plaintiff's claim that she revoked the original retainer agreement and that the parties agreed upon a reduced contingency fee (*see Brookman & Brookman P.C. v Joseph Fleischer Natural Coiffures, Inc.*, 13 AD3d 196 [2004]). Nor does the record support plaintiff's claim that no fee should have been awarded because her attorney failed to disclose a conflict of interest to her.

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

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

ENTERED: NOVEMBER 30, 2010



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Gonzalez, P.J., Mazzarelli, Nardelli, Renwick, DeGrasse, JJ.

3724N-
3724NA Willow Media, LLC, et al., Index 103313/10
Plaintiffs-Appellants,

-against-

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

_____

Cohen, Hochman & Allen, New York (Bradley J. Green of counsel), for appellants.

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

_____

Orders, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about May 4, 2010 and July 27, 2010, which denied the motions by plaintiffs Willow Media, LLC, Signal Outdoor Advertising, LLC, Mogul Media, Inc., Elliot Media Inc., Vector Media, LLC, Atlantic Outdoor, Inc., and Scenic Outdoor, Inc., and plaintiffs Fuel Outdoor, LLC and Marathon Outdoor, LLC, respectively, for a preliminary injunction, unanimously affirmed, without costs.

Plaintiffs failed to demonstrate "a likelihood of ultimate success on the merits" of their challenge to the subject advertising regulations (*Doe v Axelrod*, 73 NY2d 748, 750 [1988]), since they failed to show either that the regulations violated their First Amendment rights or that there was no rational basis

for the regulations (*see Central Hudson Gas & Elec. Corp. v Public Serv. Commn. of N.Y.*, 447 US 557, 566 [1980]; *see also Matter of von Wiegen*, 63 NY2d 163, 170 [1984] [applying *Central Hudson* analysis]). Plaintiffs also failed to demonstrate either the prospect of imminent and irreparable harm or the balance of equities tipping in their favor (*see Doe v Axelrod*, 73 NY2d at 750). The record contains no evidence suggesting imminent harm. Indeed, the regulations provide that plaintiffs' signs may not be removed before certain administrative procedures are followed, which in turn are subject to an appeals process (*see e.g.* Administrative Code of City of NY § 26-261[a][5][c] [repealed and added as § 28-502.4.3(iii) of Miscellaneous Provisions, Chapter 5 (in Title 28 volume with Plumbing Code), by Local Law 33 of 2007, eff. July 1, 2008]).

We have considered plaintiffs' remaining contentions and find them without merit.

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

ENTERED: NOVEMBER 30, 2010

CLERK

Friedman, J.P., McGuire, Renwick, Richter, Manzanet-Daniels, JJ.

1558 Associated Mutual Insurance Cooperative, etc., Plaintiff-Respondent, Index 302052/07

-against-

198, LLC, Defendant-Appellant,

Hughes Realty LLC, et al., Defendants.

_____

Scher & Scher, P.C., Great Neck (Robert A. Scher of counsel), for appellant.

Adam W. Scheinbach, Bronx, for respondent.

_____

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered on or about June 5, 2009, which, inter alia, denied defendant's motion for summary judgment dismissing the complaint, affirmed, with costs.

As an adjacent land owner, defendant owed plaintiff's insured "a duty to exercise reasonable care in the maintenance of its property to prevent foreseeable injury that might occur on the adjoining property" (*Brown v Long Is. R.R. Co.*, 32 AD3d 813 [2006]). In light of the long history of criminal activity on the premises and defendant's awareness of that activity, whether the damage that occurred to the insured's premises as a result of a fire was foreseeable, and whether the measures defendant took

to secure its vacant building were reasonable either under Administrative Code of City of N.Y. former § 26-235[1] or the common law, are questions of fact warranting the denial of summary judgment.

We do not agree with the limitation on liability that the concurrence's reading of Section 26-235 of the Administrative Code would impose. The concurrence interprets this provision as requiring the issuance of an administrative order as a precondition to a finding of a statutory violation. However, the statute nowhere provides that the issuance of a sealing or other order is a prerequisite for liability to attach, or that in the absence of an order a landowner is excused from compliance with the statute. Rather, it simply states,

> "A vacant building which is not continuously guarded shall have all openings sealed in a manner approved by the commissioner, and it shall be the duty of the owner thereof promptly to make any repairs that may be necessary for the purpose of keeping such building sealed. Any vacant building not continuously guarded or not sealed and kept secure against unauthorized entry as hereinbefore provided shall be deemed dangerous and unsafe as a fire hazard and dangerous and detrimental to human life, health and morals within the meaning of this article."

[1]Chapter 1 of Title 26 has since been repealed, effective July 1, 2008, and superseded by new provisions.

The concurrence relies not on the plain words of section 26-235, but rather, on a rule promulgated by the Department of Buildings, to argue that the agency intended a sealing order to be a precondition to liability. The rule, 1 RCNY 3-01, states that "[w]here buildings are vacant, unguarded, open to unauthorized entry *and are required to be sealed pursuant to the provisions of an unsafe building order*" (emphasis added), such buildings must be secured in the manner provided in the rule. The rule, by its clear terms, pertains only to those situations in which a sealing order has been issued, which is not the case here.

The concurrence argues that this rule reflects an agency policy that a sealing order is a prerequisite to liability. Since the rule is on its face inapplicable, it is unnecessary to address this argument. We simply note that the rule, like Section 26-235 itself, nowhere provides that a sealing order is a prerequisite to statutory liability. Assuming, arguendo, that this rule reflects an agency policy that a sealing order is necessary before statutory liability may be found, this Court, under settled law, would not be required to defer to agency policy concerning a statute the meaning of which is plain. "[W]here the question is one of pure statutory reading and analysis, . . . there is little basis to rely on any special

competence or expertise of the administrative agency," and "courts are free to ascertain the proper interpretation from the statutory language and legislative intent" (*see Matter of Smith v Donovan*, 61 AD3d 505, 508-09 [2009] [internal quotation marks and citations omitted], *lv. denied* 13 NY2d 712 [2009]; *see also Seittelman v Sabol*, 91 NY2d 618, 625 [1998] [holding state regulation, which limited Medicaid reimbursement for period preceding Medicaid application to only those services rendered by Medicaid-enrolled providers, unenforceable since it was unsupported by the language and the policy of the controlling federal statute it was intended to implement]; *Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451 [1980] [disregarding regulation of Superintendent of Insurance, limiting recovery for lost earnings to $800 per month, where it conflicted with clear wording of the relevant provisions of the Insurance Law]).

The meaning of Section 26-235 of the Administrative Code is patent. The statute nowhere provides that a sealing order is a prerequisite to liability, and we reject any attempt to graft an addendum onto the statute, in violation of the plain meaning doctrine.

We decline to engage in the layers of speculative discourse the concurrence's position requires about hypothetical fact patterns that are not before us. Suffice to say we disagree,

based on the words of Section 26-235 itself, and will not engage in further unnecessary rejoinder.

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

All concur except Friedman, J.P. and McGuire, J. who concur in a separate memorandum by McGuire, J. as follows:

McGUIRE, J. (concurring)

I agree with defendant-appellant's contention that liability cannot be predicated on a violation of former § 26-235 of the Administrative Code of the City of NY because the obligation to seal a vacant building in a manner approved by the Commissioner is not triggered simply by a building being vacant and not continuously guarded. Plaintiff's position that the issuance of an administrative order is not a necessary condition to this obligation is contradicted by the plain language of 1 RCNY 3-01. This rule, promulgated by the Department of Buildings, the agency responsible for enforcing § 26-235, states that "[w]here buildings are vacant, unguarded, open to unauthorized entry *and* are required to be sealed pursuant to the provisions of an unsafe building order issued by the Department of Buildings . . ., they shall be sealed and protected in the following manner" (emphasis added).[1]

Moreover, § 26-235 does not address subjects it is reasonable to conclude it would address -- such as the length of time a building must be vacant before it must be sealed and whether a building that is vacant because it is newly constructed must be sealed -- if the obligation to seal were triggered simply

[1]The original version of 1 RCNY § 3-01, promulgated in July 1991, is not materially different from the current version.

by a building being vacant and not continuously guarded. In this regard, I note that § 26-235 does not distinguish between commercial and residential buildings. Suppose the occupants of a residential building are away on vacation for two weeks, a month or six weeks. Is the building a vacant one that the owner must seal in a manner approved by the Commissioner even absent an order or any notice from the Commissioner? It may be conceivable that the City Council left building owners to guess at the answers to such questions, but it is not reasonable so to conclude (*see Zappone v Home Ins. Co.*, 55 NY2d 131, 137 [1982] [notwithstanding literal terms of a statute, "[i]t is . . . always presumed that no . . . unreasonable result was intended and the statute must be construed consonant with that presumption"]).

Further and compelling support for defendant's reading of § 26-235 is provided by its opening sentence, which states: "Any structure or part of a structure or premises that from any cause may at any time become dangerous or unsafe, structurally or as a fire hazard, or dangerous or detrimental to human life, health or morals, shall be taken down and removed or made safe and secure." If the command of the second sentence ("A vacant building which is not continuously guarded shall have all openings sealed in a manner approved by the commissioner") can be violated in the

absence of any administrative order or notice, it must be that the command of the first sentence also is violated in the absence of any such order or notice. After all, nothing in the statutory text would allow the conclusion that an order or notice is required for a violation of one but not the other sentence. Thus, under the reading of § 26-235 urged by plaintiff and adopted by the majority, if any building thus becomes "dangerous or unsafe" or "dangerous or detrimental to human life, health or morals," the owner is in violation despite the sweeping and thus uncertain scope of these terms. Nor would it matter a whit under the majority's reading of § 26-235 if the owner has no knowledge at all of the condition or circumstance rendering the building "dangerous or unsafe" or "dangerous and detrimental." For all these reasons, the majority's reading of the statute is manifestly unreasonable (*see Zappone v Home Ins. Co.*, *supra*).

Defendant's interpretation of § 26-235 is supported as well by its companion provisions in former articles 8 and 9 of subchapter 3 of chapter 1 of title 26 of the Administrative Code. Former § 26-236(a) mandates that the owner of a building that is unsafe or dangerous (such as a building that is vacant within the meaning of § 26-235) be served with a notice and "an order requiring [that] such structure or premises be made safe and secure"; former § 26-236(b) specifies the manner in which the

order and notice are to be served; and former article 9 provides for judicial enforcement, at the behest of the Corporation Counsel, of orders issued under former subchapter 3. Suffice it to say, nothing in these provisions suggests that a violation of § 26-235 occurs in the absence of a failure to comply with a notice or order.[2]

Considerable deference is due to the interpretation of § 26-235 by the Department of Buildings that is reflected in 1 RCNY 3-01. Section 26-235 is part of a comprehensive scheme, subchapter 3, "Building Construction," that entrusts to the Department of Buildings a host of responsibilities relating to technical and other matters within its expertise (*see Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 [1980] ["Where the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices . . ., the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute"]). Deference is all the more appropriate given that the terms of § 26-235 do not purport to be alone sufficient to create a

[2]Construing § 26-235 to be violated in the absence of a notice or order would undercut former § 26-237, which grants to owners a period of time in which "to commence the abatement of the unsafe, dangerous or detrimental condition" if they, after being served with a notice, certify their assent to the notice.

statutory obligation, let alone to define a violation, but instead expressly condition the obligation on an action by the Department of Buildings that requires its expertise. Because the evident interpretation of § 26-235 by the Department of Buildings is consistent with its text, we should defer to it (*see Matter of Trump-Equitable Fifth Ave. Co. v Gliedman*, 62 NY2d 539, 545 [1984] ["Interpretation given a statute by the agency charged with its enforcement is, as a general matter, given great weight and judicial deference, so long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute"]).

Of course, defendant's reading of § 26-235 does not permit landowners to escape liability for fire hazards and dangerous conditions on their property whenever a formal sealing order has not been issued. Rather, landowners will remain liable if they breach their common-law duty. Indeed, as discussed below, I would affirm the denial of defendant's motion for summary judgment precisely because material issues of fact exist as to whether it breached that common-law duty.

The majority defends its position with little more than bare assertions about the statute's meaning. Perhaps the most striking feature of the majority's memorandum is that it has no response at all to the points I make about the oddities (at best)

inherent in its position. Thus, it makes no attempt to explain how it can be reasonable to construe the statute to be violated when, *eo instante*, a building becomes, by someone's lights, "dangerous or unsafe" or "dangerous or detrimental to human life, health or merits." Nor does the majority make any attempt to explain how it can be reasonable to conclude that the City Council left owners of residential as well as commercial buildings to guess whether the statute is violated if a building is left vacant for two weeks, a month or six weeks. Far from engaging in a reasoned debate, the majority simply characterizes my arguments as "speculative discourse" to which no "rejoinder" is necessary.

With respect to 1 RCNY 3-01, the majority asserts that it, "by its clear terms, pertains only to those situations in which a sealing order has been issued." Of course, the rule does not state *in haec verba* that issuance of a sealing order is a prerequisite to liability. But that is the clear import of the rule. Obviously, § 26-235 cannot be violated unless a building is not "sealed in a manner approved by the commissioner." And under the rule, a building need not be "sealed and protected" in the "manner" prescribed by the Commissioner unless it is "required to be sealed pursuant to the provisions of an unsafe building order" (1 RCNY § 3-01). On this point, too, the

majority has no substantive response. Finally, because it is wrong in asserting that "by its plain terms" the rule is "inapplicable," it also is wrong on the question of whether the agency's interpretation of the rule is a reasonable one to which we should defer.

As noted above, I nonetheless agree that Supreme Court properly denied defendant's motion for summary judgment. As an adjacent landowner, defendant owed plaintiff's insured a common-law "duty to exercise reasonable care in the maintenance of its property to prevent foreseeable injury that might occur on the adjoining property" (*Brown v Long Is. R.R. Co.*, 32 AD3d 813 [2006]). In light of the long history of criminal activity on the premises and defendant's awareness of that activity, whether the damage that occurred to the insured premises as a result of the fire was foreseeable, and whether the measures defendant took to secure its vacant building were reasonable, are questions of fact warranting the denial of summary judgment (*see e.g. New York Cent. Mut. Fire Ins. Co. v City of Albany*, 247 AD2d 815 [1998]).

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

ENTERED: NOVEMBER 30, 2010

CLERK

Sweeny, J.P., McGuire, Renwick, Abdus-Salaam, JJ.

3293 Liberty Insurance Underwriters Inc., Index 601266/08
Plaintiff-Respondent,

-against-

Corpina Piergrossi Overzat & Klar LLP, et al.,
Defendants-Appellants.

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

Ropers, Majeski, Kohn & Bentley, New York (Andrew L. Margulis of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered June 23, 2009, which, upon the parties' respective motions for summary judgment, granted plaintiff insurer's (the insurer) motion for summary judgment and declared that is not obligated to defend or indemnify defendants attorneys (the attorneys) in an underlying action for legal malpractice, unanimously modified, on the law, to deny the insurer's motion, and otherwise affirmed, with costs.

The insurer argues that it is not obligated to defend or indemnify the attorneys because, prior to the effective date of the first legal malpractice policy issued by the insurer to the attorneys in July 2004, the attorneys had a reasonable basis to foresee that a former client would make a claim against them, and

that coverage is therefore excluded under the policy's "Known Claims or Circumstances" clause. In relevant part, the clause excludes coverage for "any claim arising out of a wrongful act occurring prior to the policy period if . . . you had a reasonable basis to believe that you had breached a professional duty, committed a wrongful act, violated a Disciplinary Rule, engaged in professional misconduct, or to foresee that a claim would be made against you."

The underlying legal malpractice action arose out of the attorneys' representation of the former client in connection with a medical malpractice claim for personal injuries allegedly caused by vaccinations administered to the former client in 1991 when he was an infant. More specifically, the malpractice complaint alleges that the attorneys failed to meet a three-year deadline for filing a claim under the federal National Vaccine Injury Compensation Program, 42 USC §§ 300aa-10 *et seq*. (the NVICP or the Program), and that their failure both foreclosed compensation under the NVICP and barred any civil actions for damages, including a medical malpractice action. The underlying representation apparently began in August 1993; it ended when the attorneys, without bringing an action, resigned from the representation in June 1994 after the three-year NVICP deadline had expired. In December 2006, the former client's attorney

advised the attorneys by letter that he had been retained to prosecute a legal malpractice claim based on their failure to file a NVICP claim. The attorneys promptly notified the insurer of this letter, and the insurer has been representing the attorneys in the underlying legal malpractice action under a reservation of rights.

In arguing that the attorneys had a reasonable basis for foreseeing a claim by the former client, the insurer relies on a letter to the former client's father written in October 1993 by an associate employed by the attorneys. The associate confirmed a prior conversation in which he advised that an "important deadline" was approaching in January 1994. That is, after stating that the former client "may be entitled to compensation under the terms of the Vaccine Injury Compensation Program," the associate stated that "[i]n order to make a claim under this program, the petition must be filed within 36 months from the time symptoms first appeared." The associate requested complete copies of all applicable medical records "[i]n order to prepare a proper petition." In arguing the absence of any such reasonable basis, the attorneys stress what is not said in the associate's letter and rely on a June 1994 letter, written by one of the attorneys to the former client's father. That letter, which makes no mention of the NVICP, "confirm[ed]" a prior discussion

in which the father had been advised that the attorneys "cannot represent your son in this potential medical malpractice action." The letter did not explain why the firm could not represent the former client, but went on to state that, assuming the information provided by the father was correct, the "statute of limitations will expire on January 22, 2001, based upon the statute of limitations of medical malpractice actions on behalf of infants." This shows, the attorneys argue, that they did not know that the failure to file a claim under NVICP would preclude a state court medical malpractice action. Because they did not know otherwise until after the inception of coverage -- when they received the December 2006 claim letter -- they maintain that the known-claims exclusion does not apply.

The parties agree that the burden is on the insurer to show the applicability of the known-claims exclusion and that a two-pronged test governs the applicability of the exclusion. Under that test, the court "must first . . . consider the subjective knowledge of the insured and then the objective understanding of a reasonable attorney with that knowledge" (*Executive Risk Indem. Inc. v Pepper Hamilton LLP*, 13 NY3d 313, 322 [2010] [construing Pennsylvania law] [internal quotation marks omitted; ellipsis in original]). More particularly, the first prong requires the insurer to show the insured's knowledge of the relevant facts

prior to the policy's effective date, and the second requires the insurer to show that a reasonable attorney "might expect such facts to be the basis of a claim" (*id.*; *see also Colliers Lanard & Axilbund v Lloyds of London*, 458 F3d 231, 237 [3d Cir 2006], construing New Jersey law).

The attorneys do not dispute the insurer's contention that the knowledge of the associate must be imputed to them. Nor do they dispute that the letter establishes that the associate knew both of NVICP and of a requirement that a petition be filed within three years of the first appearance of symptoms "[i]n order to make a claim under this program." Their contention is that the letter does not establish that they also knew that the failure to file a timely administrative claim under the Program had the additional legal consequence of foreclosing any civil action for damages. As a matter of logic, this contention is plainly correct. The associate, of course, may have known this fact about the law, but the letter does not establish that he did know. Nor did anything else submitted in support of the insurer's motion establish that the associate (or any attorney at the firm) knew this legal fact. It may be that a competent attorney who became aware that making a claim under the Program required a petition to be filed within a deadline would make sure he knew all the legal consequences of not meeting that deadline.

What a competent, or reasonable, attorney would have known, however, is far from dispositive of the question of what the attorneys in fact knew.

The inference that the attorneys did know that the failure to file a petition in accordance with the NVICP would preclude a civil action for damages may be a reasonable one. The evidentiary support for that inference includes the fact that the statement in the June 1994 letter that the attorneys could not undertake the representation is unexplained. Moreover, the attorneys' assertion in their letter to the insurer after learning of the malpractice claim that they "were only investigating a medical malpractice claim," rather than an administrative claim, is at odds with the associate's request for copies of all medical records "[i]n order to file a proper petition [under the Program]." Regardless of whether the inference is reasonable, it is not inescapable and it cannot be the basis for granting summary judgment to the insurer (*Branham v Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931, 932 [2007] [all favorable inferences must be drawn in favor of party opposing summary judgment]).

The insurer unpersuasively argues the irrelevance of the attorneys' reasonable expectation of a claim as a result of not filing a petition under the Program. Contrary to its contention,

the attorneys' insistence on the relevance of their actual ignorance of the legal consequences of not filing does not "entirely remove" the objective component of the test. Rather, the most that can be said is that in some cases the subjective prong of the test will be dispositive; the insured's lack of knowledge will make it unnecessary to consider the objective prong.

The insurer also objects that the attorneys "are in essence seeking to be rewarded for their ignorance . . . in connection with the medical malpractice action for which they were retained." The "reward" of coverage, however, is the necessary and intended consequence of a test with a subjective component. The insurer is in essence objecting to the practical reality that enables it to sell any malpractice coverage, including retroactive coverage on a claims made basis. To obtain protection from the consequences of their ignorance is a key reason why attorneys purchase and insurers are able to sell malpractice insurance. A purely objective test would provide insurers with far greater protection against the risks of both "adverse selection" (*see generally Simpson v Phoenix Mut. Life Ins. Co.*, 24 NY2d 262, 268-269 [1969]) and outright fraud. But if attorneys had to run that gauntlet to obtain coverage, they would have little or no reason to buy malpractice insurance.

After all, the promised retroactive coverage would be illusory if it could be denied solely because a reasonable attorney would have known at the time of the act or omission that a malpractice claim could be made (*cf. Colliers Lanard*, 458 F3d at 242 ["retroactive coverage for professional errors would be illusory if such coverage could be denied on the ground that a reasonable professional would have known that the error had been committed prior to obtaining the policy"]).

Nor does the attorneys' position require insurers to provide coverage whenever the insured raises a claim of ignorance. The claim of ignorance might not be credible and the insurer, perhaps aided by discovery into the insured's handling of other cases, may be able to refute it. Moreover, ignorance at the time of the malpractice is not sufficient to entitle the insured to coverage. Rather, subject to the application of the objective prong, the insured will not be entitled to coverage if its ignorance is dispelled before the beginning of the policy period. Thus, as the attorneys concede, the exclusion would apply if they had learned at any time prior to the beginning of the policy period that the failure to file a petition under the Program would foreclose a civil action for damages. In addition, although an attorney might not know that a particular act or omission would result in the dismissal of the client's claim, the attorney might

know (or be unable to deny knowing) that some adverse consequence would or was likely to result. In such a case, regardless of whether a malpractice claim was reasonably foreseeable, a reasonable attorney with that more limited knowledge might believe nonetheless that the attorney "had breached a professional duty, committed a wrongful act, violated a Disciplinary Rule, [or] engaged in professional misconduct." Indeed, as discussed below, the insurer makes a similar argument. For this additional reason, we disagree with the insurer's argument that the attorneys' position on the subjective prong "eviscerates" the objective prong.

Despite making that very argument, the insurer contends that "any reasonable lawyer with knowledge of the facts admittedly known to [the attorneys] would believe that the failure to timely file a claim [in accordance with the NVICP] would have some consequences and could lead to a malpractice claim against the lawyer." This fallback position also is unpersuasive. The reasonable lawyer who believed that not filing a petition under the Program would affect only what he believed his client did not want, an administrative remedy, certainly would not expect to be a defendant in a malpractice action alleging that no civil action could be prosecuted because that petition had not been filed. Mere knowledge of "some consequences" is inconsequential. The

attorneys' knowledge of the banality that actions have consequences does not provide "a reasonable basis to believe that [they] had breached a professional duty, committed a wrongful act, violated a Disciplinary Rule, [or] engaged in professional misconduct."

Just as we cannot draw against the attorneys the inference that they did know the actual consequences of not filing a petition under the Program, we cannot draw against the insurer the inference that they did not know. For that reason alone, we reject the attorneys' argument that their cross motion for summary judgment should have been granted. To avoid confusion, we address briefly the attorneys' contention that "a mistaken belief that a professional did not commit malpractice is sufficient to avoid the [known-claims-or-circumstances] exclusion." Suffice it to say that if a reasonable attorney with the subjective knowledge of the insured would expect a claim against the insured on the basis of the facts known to the insured, coverage would be excluded regardless of any belief that no professional standards were violated.

Finally, the attorneys argue that the insurer should be estopped from disclaiming coverage because they have been prejudiced by the insurer's delay in disclaiming. This argument is meritless as the insurer has never disclaimed coverage and has

been defending the underlying malpractice action from the outset under an undisputedly timely reservation of rights (*see O'Dowd v American Sur. Co. of N.Y.*, 3 NY2d 347, 355 [1957]).

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

ENTERED: NOVEMBER 30, 2010

CLERK

Saxe, J.P., Acosta, Freedman, Richter, Abdus-Salaam, JJ.

3518N Clara Bailon, Index 23824/02
Plaintiff-Appellant-Respondent,

Clara V. Bailon,
Plaintiff,

-against-

Guane Coach Corp. et al.,
Defendants,

Oliverio Calderon et al.,
Defendants-Respondents-Appellants.

_____

Simonson Hess Leibowitz & Goodman, P.C., New York (Edward S. Goodman of counsel), for appellant-respondent.

Cobert, Haber & Haber, Garden City (Eugene F. Haber of counsel), for respondents-appellants.

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Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered June 26, 2009, which, in effect, denied plaintiffs' motion to settle judgment against defendants Oliverio and Sylvia Calderon in the amount of $29,575,000, unanimously affirmed, without costs.

We find no error in the default taken against the Calderons. However, the motion court properly declined to enter judgment against the Calderons for the amount of the $29 million jury verdict in favor of plaintiff Clara Bailon.

The default order against the Calderons directed that an inquest and assessment of damages against them be conducted at

the time of trial against the nondefaulting defendants, but the record reflects no action taken by plaintiffs at trial regarding their claim against the Calderons. To the extent that plaintiffs' theory against the Calderons was based on alter ego liability, arising out of the Calderons' disregard of the corporate form of Guane Coach Corp., there would have been no need for a separate damages determination against them, since the Calderons would be responsible for the corporation's liabilities (*see Sterling Doubleday Enters. v Marro*, 238 AD2d 502, 503 [1997]). However, under the alter ego theory, the Calderons must be treated as having stepped into the shoes of the corporation, and their liability would be that of Guane (*see Trans Intl. Corp. v Clear View Tech.*, 278 AD2d 1, 1-2 [2000]). By executing a release in favor of Guane upon payment by its insurer of $100,000, plaintiffs necessarily released the Calderons as well (*see DePinto v Ashley Scott, Inc.*, 222 AD2d 288, 289-290 [1995]). Nor may plaintiffs rely on some other theory against the Calderons, since they failed to establish at inquest the extent of their liability under any other theory. Accordingly, plaintiffs were not entitled to the judgment they sought against the Calderons.

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

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

ENTERED: NOVEMBER 30, 2010

CLERK

Mazzarelli, J.P., Friedman, Catterson, DeGrasse, Manzanet-Daniels, JJ.

3529 In re Daniel Hasberry, et al., Index 405070/06
Petitioners-Appellants,

Linda Branch,
Petitioner,

-against-

New York City Department of
Education, et al.,
Respondents-Respondents.

_____

John C. Gray, South Brooklyn Legal Services, Brooklyn (Nicole Salk of counsel), for appellants.

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

Anthony J. Cincotta, P.C., Shrewsbury, NJ (Anthony J. Cincotta of counsel), for Thomas Buses, Inc., respondent.

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Judgment, Supreme Court, New York County (Marylin G. Diamond, J.), entered June 23, 2009, to the extent appealed from, denying the petition and dismissing this proceeding to annul determinations by respondent Department of Education (DOE) rejecting individual applications for certification as New York City school bus drivers or bus escorts, unanimously modified, on the law, the petition reinstated as against DOE and granted to the extent of annulling those determinations, and remitting to DOE for further proceedings consistent herewith, and as so modified, affirmed, without costs.

Petitioners were each denied certification by DOE on the basis of criminal convictions that purportedly rendered them unsuitable to perform the duties associated with the transportation of school age children. Chancellor's Regulation C-105 provides:

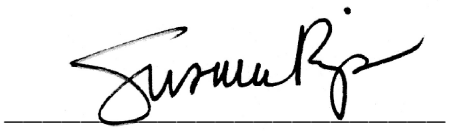
> "If, prior to the conclusion of any background investigation, information of a derogatory nature is obtained which may result in denying the application for license, certification or employment, an applicant will be given an opportunity to review such information with the [Office of Personnel Investigation] and to include in the investigatory file, any written statements or documents which refute or explain such information."

DOE did not afford petitioners this opportunity prior to making its determinations. While we understand respondents' concerns and the need to protect the safety of children to be transported, DOE is bound by its own rules and regulations, including its procedural rules (*see e.g. Matter of Bouck v Dept. of State, Div. of Licensing Servs.,* 37 AD3d 1095 [2007]). Accordingly, this matter is remanded to DOE with directions to give petitioners an opportunity to review the information upon which DOE's determinations were based and to submit statements and documents pursuant to Chancellor's Regulation C-105. The petition was properly dismissed as against respondent Thomas

Buses, Inc. which did not make any determination challenged in this proceeding.

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

ENTERED: NOVEMBER 30, 2010



CLERK

Tom, J.P., Saxe, Friedman, Sweeny, Abdus-Salaam, JJ.

3725 The People of the State of New York, Respondent, Ind. 3773/06

-against-

Tyheem Smith, Defendant-Appellant.

_____

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

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

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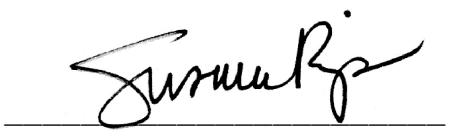
Judgment of resentence, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered June 9, 2009, certifying defendant as a sex offender pursuant to Correction Law § 168-d (1), unanimously affirmed.

The court properly determined that the Sex Offender Registration Act applies to defendant because of his kidnapping convictions, which involved the taking of two children as hostages along with their parents, and we reject his claim that the statute is unconstitutional as applied to him. In *People v Knox* (12 NY3d 60, 69 [2009], *cert denied* _US_, 130 S Ct 552 [2009]), the Court of Appeals held that "the Legislature could constitutionally provide that all those convicted of kidnapping or unlawfully imprisoning children not their own, or of

attempting to commit those crimes, be conclusively deemed sex offenders." We see no basis to create an exception for a fact pattern where a kidnapper does not initially choose a child as a target, and the child becomes an "incidental" victim. We note that the circumstances of this kidnapping were at least as egregious as those described in *Knox* and its companion cases, and that once this defendant came upon a family he intended to take hostage, and discovered that the family included children, the children became targets of the kidnapping.

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

ENTERED: NOVEMBER 30, 2010



CLERK

Tom, J.P., Saxe, Friedman, Sweeny, Abdus-Salaam, JJ.

3726 Buenaventura Yolanda Rodriguez, Index 301118/08
Plaintiff-Appellant,

-against-

Francesco Moreno, et al.,
Defendants-Respondents.

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Brad A. Kauffman, New York for appellant.

Lester Schwab Katz & Dwyer, New York (Steven B. Prystowsky of counsel), for respondents.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered March 31, 2010, which denied plaintiff's motion for summary judgment on the issue of liability, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff's undisputed testimony establishes her entitlement to judgment as a matter of law on the issue of liability (*Beamud v Gray*, 45 AD3d 257, 257 [2007]). Defendants submitted no evidence to support their contention that plaintiff was comparatively negligent (*see id.*).

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

ENTERED: NOVEMBER 30, 2010

CLERK

Tom, J.P., Saxe, Friedman, Sweeny, Abdus-Salaam, JJ.

3727 In re Paul Antoine Devontae R., etc.,

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

Catholic Guardian Society and Home Bureau,
Petitioner-Respondent,

Paul R.,
Respondent-Appellant.

_____

Dora M. Lassinger, East Rockaway, for appellant.

Magovern & Sclafani, New York (Frederick J. Magovern of counsel) for respondent.

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Order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about June 8, 2009, which, inter alia, upon a finding of permanent neglect, terminated respondent father's parental rights to the subject child and committed his custody and guardianship to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence supports the court's finding that despite the agency's diligent efforts, respondent permanently neglected his son (*see* Social Services Law § 384-b[7][a]). The record establishes that although respondent was required to "maintain contact with the child through consistent

and regular visitation" (*Matter of Aisha C.*, 58 AD3d 471, 472 [2009], *lv denied* 12 NY3d 706 [2009]), he did not offer a viable excuse for his failure to visit his son from June 2006, after the case conference, until October 2006, when he was incarcerated. Respondent's incarceration during the statutory period did not relieve him of his responsibility to communicate with his child (*Matter of Fonchasity H.*, 57 AD3d 1525, 1526 [2008]), and once respondent did establish contact with the agency via a March 2007 telephone call, a visit between his son and his children with his fiancé was scheduled, but the meeting was never attended. Furthermore, respondent's duty to plan did not abate with his incarceration, and he failed to plan for his child's future by not obtaining appropriate housing (*see Matter of Jazmin Marva B. [Cecile Marva B.]*, 72 AD3d 569 [2010]).

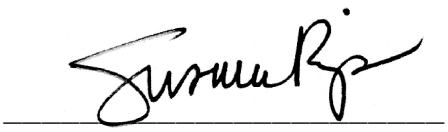
A preponderance of the evidence shows that the termination of respondent's parental rights was in the child's best interests (*see generally Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The record shows that the child's best chance for a stable family life lies in his adoption by his foster mother, in whose care he has been since he was two years old and who tends to his needs (*see Matter of Prudical Antonio D.*, 37 AD3d 244, 245 [2007], *lv denied* 8 NY3d 813 [2007]).

Respondent was not denied his due process rights when the

court denied his request to adjourn the dispositional hearing so that he could be present in person rather than by telephone, as respondent participated in the fact-finding hearing via telephone and failed to demonstrate a compelling reason for further delay of the proceedings (*Matter of Jasper QQ.*, 64 AD3d 1017, 1019 [2009], *lv denied* 13 NY3d 706 [2009]). Equally unavailing is respondent's argument that it was error to preclude him from calling the foster mother as a witness to testify as to an incident that occurred in her home between a former foster child and another child, since the subject child was not present at the time of the incident, the foster mother was subsequently found without fault and any further testimony was irrelevant to the purpose of the dispositional hearing (*see e.g. Matter of Jayden R.*, 61 AD3d 486, 487 [2009]).

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

ENTERED: NOVEMBER 30, 2010



CLERK

Tom, J.P., Saxe, Friedman, Sweeny, Abdus-Salaam, JJ.

3731 Dianne M. Smith, Index 14879/07
Plaintiff-Appellant,

-against-

Orlando M. Arce, et al.,
Defendants-Respondents.

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Fellows, Hymowitz & Epstein, P.C., New City (Joanne R. Horowitz of counsel), for appellant.

Richard T. Lau & Associates, Jericho (Kathleen E. Fioretti of counsel), for respondents.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered June 17, 2009, which granted defendants' motion to dismiss the complaint and denied plaintiff's cross motion for leave to enter a default judgment against defendant Rizzo-Espinoza and to extend the time to serve defendant Arce, unanimously reversed, on the facts, without costs, defendants' motion denied and plaintiff's cross motion granted.

Plaintiff demonstrated sufficient cause for her delay in moving for a default judgment against Rizzo-Espinoza and a meritorious cause of action (*see* CPLR 3215[c]). The delay in moving resulted from law office failure in the aftermath of the sudden death of one of the children of a partner in the firm. The verified complaint and medical records show that, as a result

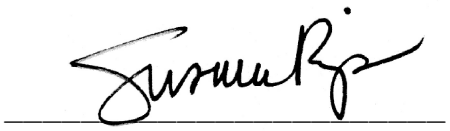
of the accident, one of plaintiff's cervical vertebrae was fractured and she suffered severe post-traumatic migraines for which she still receives treatment.

Plaintiff demonstrated that it is in the interest of justice to extend the time for service of the summons and complaint upon defendant Arce (*see* CPLR 306-b; *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105-106 [2001]). The most significant factor in the failure to timely serve him is the misleading, if not wholly inaccurate, information Arce gave to the police at the scene of the accident, a factor beyond plaintiff's control. The process server stated in an affidavit that when he was unable to locate Arce at the address Arce had given, he spoke to tenants and neighbors of the building, checked with the post office to verify the apartment number, searched telephone directories and internet services, and called and spoke to many individuals with the surname Arce, all of which was unavailing. In addition, plaintiff has shown a meritorious cause of action, the statute of limitations has expired, and Arce has not demonstrated that there

would be any prejudice to him as a result of the extension of time.

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

ENTERED: NOVEMBER 30, 2010



CLERK

Tom, J.P., Saxe, Friedman, Sweeny, Abdus-Salaam, JJ.

3733 The People of the State of New York, Ind. 1298/09
Respondent, 5401/08

-against-

Willie Jenkins,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Brian E. Rodkey of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered on or about October 14, 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 30, 2010

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

Tom, J.P., Saxe, Friedman, Sweeny, Abdus-Salaam, JJ.

3734 Inner City Redevelopment Corp., Index 103830/07
Plaintiff-Respondent,

-against-

Thyssenkrupp Elevator Corporation,
Defendant-Appellant,

Lexington Insurance Company,
Defendant.

_____

Geringer & Dolan LLP, New York (John T. McNamara of counsel), for appellant.

Barry, McTiernan & Moore, New York (David H. Schultz of counsel) for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered March 9, 2010, which, upon reargument, adhered to the original determination granting plaintiff's motion for summary judgment declaring that defendant Thyssenkrupp has a duty to defend plaintiff in the underlying personal injury action and in addition declared that said defendant is obligated to indemnify plaintiff for up to $1.25 million dollars, unanimously affirmed, with costs.

As defendant Thyssenkrupp is not an insurer, its duty to defend its contractual indemnitee is no broader than its duty to indemnify (*Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 809 [2009]). The contract limits the indemnity to losses

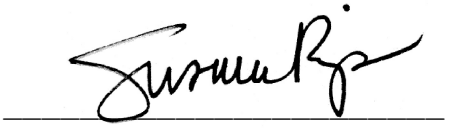
caused in whole or in part by defendant's negligence. Because there has been no showing that defendant was negligent, any order requiring defendant to defend or indemnify is premature (*see Francescon v Gucci Am., Inc.*, 71 AD3d 528 [2010]).

However, the contract contains a promise by defendant not only to indemnify, but also to procure insurance that fully covers the scope of the indemnity. The policy that defendant obtained, in the correct face amount, has a $1.25 million deductible. Thus, defendant is obligated to defend and indemnify for any covered liability within the deductible, i.e., up to $1.25 million (*see Hoverson v Herbert Constr. Co.*, 283 AD2d 237, 238 [2001]).

Nor does plaintiff's failure to comply with the notice provisions of the insurance policy provide a defense. Defendant's contractual obligation is separate and distinct from the insurer's obligations under the policy (*Singh v New York City Tr. Auth.*, 17 AD3d 262, 263-264 [2005]). In any event, the amount of the claim is within the deductible.

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

ENTERED: NOVEMBER 30, 2010



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Tom, J.P., Saxe, Friedman, Sweeny, Abdus-Salaam, JJ.

3735 MAP Marine Limited, Index 602517/08
Plaintiff-Respondent,

-against-

China Construction Bank Corp.,
Defendant,

Banca Monte dei Paschi di Siena SpA,
Defendant-Appellant.

[And A Third-Party Action]

_____

Reed Smith LLP, New York (Steven Cooper of counsel), for appellant.

Blank Rome LLP, New York (Jack A. Greenbaum of counsel), for respondent.

_____

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered May 27, 2010, which denied defendant Banca Monte dei Paschi di Siena SpA's (Banca Monte) motion to vacate the judgment, same court and Justice, entered August 14, 2009, awarding plaintiff judgment in the principal sum of $5,950,000, unanimously affirmed, with costs.

In this action, MAP Marine Ltd., the disponent owner of a vessel, seeks to recover on a $5,950,000 transfer letter of credit against the issuer's advising and transferring bank, Banca Monte. This sum is based on money due pursuant to a time charter of the vessel between MAP and a non-party and includes a daily

usage fee, a "ballast bonus" to compensate MAP for the return portion of the trip, and a "bunkers on delivery" charge for the amount of fuel on board at the time of delivery.

Shortly after answering the complaint, MAP moved for summary judgment in its favor. In opposition, Banca Monte asserted, inter alia, that it was likely that MAP "undoubtedly mitigated any damages" via a subsequent charter, "may have even been paid a ballast bonus" and "seized upon an opportunity to obtain payment for multiple ballast voyages" and sought an opportunity to conduct discovery. MAP's motion for summary judgment was granted and the ensuing judgment was affirmed by this Court. On the prior appeal, we found that the letter of credit "was for the shipping service" and "[t]he invoice for payment upon 'delivery' of the vessel meant unambiguously . . . that payment was due for the availability of the vessel, not for its having been loaded or having completed its journey" (70 AD3d 404, 404-405 [2010]).

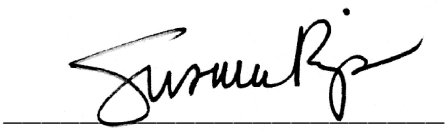
After completion of the record on the prior motion, MAP provided Banca Monte with documentation that included details of the payment of a ballast bonus and a bunkers on delivery charge made pursuant to the subsequent time charter of the vessel. This evidence is not material and would not have changed the result reached on the prior motion as Banca Monte's present argument, that a judgment in the full amount of the letter of credit

constituted a double recovery, was previously raised and rejected.

Accordingly, the trial court did not abuse its discretion in finding that Banca Monte had not established entitlement to a vacatur of the judgment (*see* CPLR 5015[a]; *Olwine, Connelly, Chase, O'Donnell & Weyher v Valsan, Inc.*, 226 AD2d 102 [1996]).

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

ENTERED: NOVEMBER 30, 2010



CLERK

Tom, J.P., Saxe, Friedman, Sweeny, Abdus-Salaam, JJ.

3739-
3740 New York University, Index 106628/08
Plaintiff-Respondent,

-against-

American Building Maintenance et al.,
Defendants,

Continental Insurance Company,
Defendant-Appellant.

_____

Carluccio Keener & Morrow, New York (Marian S. Hertz of counsel), for appellant.

The Chartwell Law Offices, LLP, New York (Jack Gross of counsel), for respondent.

_____

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered October 21, 2009, which, in a declaratory judgment action involving defendant insurer's (Continental) obligation to defend and indemnify plaintiff (NYU) in an underlying action for personal injuries sustained on NYU's premises, insofar as appealed from, denied Continental's motion for summary judgment declaring that it is not so obligated, unanimously reversed, on the law, with costs, the motion granted, and it is declared that Continental is not so obligated. Appeal from order, same court (Eileen A. Rakower, J.), entered January 15, 2010, which denied Continental's motion to renew, unanimously dismissed, without

costs, as academic in view of the foregoing.

Continental has no obligation to defend NYU in the underlying action under a policy that provides, "We [i.e., Continental] shall have the right, but not the duty, to: 1. Defend or participate in the defense of any 'suit' against the insured" (*see In Re Sept. 11th Liab. Ins. Coverage Cases*, 458 F Supp 2d 104, 123-124, 128 [SD NY 2006]; *see also AJ Contr. Co., Inc. v Forest Datacom Servs.*, 309 AD2d 616, 618 [2003]).

Concerning the obligation to indemnify, it appears that NYU and defendant maintenance contractor (ABM) entered into a contract that provides for ABM's procurement of insurance naming NYU as an additional insured, also provides that notice from ABM to the insurer would be deemed notice by NYU, and also provides that ABM "shall not commence any work . . . until it has obtained all of the insurance required by this paragraph and such insurance has been approved by [NYU]'s Director of Insurance." ABM obtained a policy from Continental that, as amended, provides for a self insured retention (SIR) of $1 million per occurrence, and also provides that "You [i.e., the insured] must see to it that we [i.e., Continental] are notified as soon as practicable of an 'occurrence,' . . . act, [or] error or omission . . . which may result in a claim: 1. For which the damages can reasonably be expected to exceed fifty percent . . . of the [SIR]."

While we agree with NYU that summary judgment in Continental's favor on the issue of coverage is precluded by an issue of fact as to whether the damages in the underlying action will exceed the $1 million SIR (*see Long Is. Light. Co. v Allianz Underwriters Ins. Co.*, 35 AD3d 253, 254 [2006], *appeal dismissed* 9 NY3d 1003 [2007]), we find that Continental did not receive timely notice of the underlying accident and, for that reason, has no obligation to indemnify. The underlying accident occurred on March 6, 2003, and although NYU knew about the accident, at the latest, by February 14, 2006, the date of its answer in the underlying action, the only notice that NYU gave Continental was to sue it, which NYU did not do until August 14, 2008. Nor did ABM give Continental notice of the accident. To be sure, ABM initially told NYU that its insurer was ACE USA, and NYU did not find out until May 27, 2008 that ABM was insured by Continental. However, if NYU had exercised its right under its contract with ABM to approve ABM's insurance, NYU would have known back in 2000 that ABM's insurer was Continental. As it is clear that NYU could have prevented the mishap, we find that it did not give

notice as soon as practicable (*cf. Briggs Ave. LLC v Insurance Corp. of Hannover*, 11 NY3d 377, 381 [2008]).

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

ENTERED: NOVEMBER 30, 2010

CLERK

Tom, J.P., Saxe, Friedman, Sweeny, Abdus-Salaam, JJ.

3741 The Paul and Irene Bogoni Foundation, etc., et al., Plaintiffs-Appellants, Index 102095/08

-against-

St. Bonaventure University, etc., et al., Defendants-Respondents.

_____

Arnold E. DiJoseph, III, New York for appellants.

Damon Morey LLP, Buffalo (Michael J. Willett of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered October 22, 2009, dismissing the complaint in its entirety and granting defendant University the principal sum of $900,000 on its counterclaim for outstanding pledges, unanimously affirmed, with costs.

Plaintiffs sought a declaration that charitable contributions they had pledged to the University were subject to certain conditions and restrictions that were neither stated nor indicated in the written and executed gift commitment and endowment agreements. "[A]s with contracts generally, when the pledge is made in writing, unless conditions are expressed, or at least implicit, in the agreement itself, parol evidence may not be used to supply them except to show conditions precedent to the

effectiveness of the agreement" (*Woodmere Academy v Steinberg*, 41 NY2d 746, 750 [1977]). The cause of action for an accounting also failed because the pledged gift did not create a fiduciary relationship between the parties giving rise to such an obligation (*see Abercrombie v Andrew Coll.*, 438 F Supp 2d 243, 275 [SD NY 2006]). Although the court reserved ruling on the cause of action for specific performance, that was also subject to dismissal because it was based on supposition and allegations contradicted by undisputed evidence in record.

The court correctly granted summary judgment on defendants' motion to dismiss; notice of request for summary dismissal was unnecessary because the parties had clearly laid bare their proof before the court in the form of affidavits and extensive documentary evidence (*Toledo v West Farms Neighborhood Hous. Dev. Fund Co., Inc.*, 34 AD3d 228 [2006]; *Kavoukian v Kaletta*, 294 AD2d 646, 647 [2002]). Defendants were also entitled to summary judgment on their counterclaims for $900,000 in yet outstanding pledges toward a library expansion project. The amount pledged was memorialized in an unambiguous gift commitment agreement. It is undisputed that defendants acted in reliance thereon when securing additional pledges and constructing the expansion. Under New York law, charitable pledges are enforceable because they constitute an offer of a unilateral contract that -- when

accepted by the charity by incurring liability in reliance thereon -- becomes a binding obligation (*Matter of Versailles Found. [Bank of N.Y.]*, 202 AD2d 334 [1994]; *see I. & I. Holding Corp. v Gainsburg* (276 NY 427, 433 [1938]).

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

ENTERED: NOVEMBER 30, 2010

CLERK

Tom, J.P., Saxe, Friedman, Sweeny, Abdus-Salaam, JJ.

3742 Maria Polanco, Index 105660/04
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Lauren P. Raysor, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered September 1, 2009, which, in this action for personal injuries that was dismissed upon the failure of plaintiff's counsel to appear for trial, denied plaintiff's motion seeking, inter alia, to restore the action to the trial calendar, unanimously affirmed, without costs.

The motion court exercised its discretion in a provident manner in denying the subject motion, as the record establishes that there was no reasonable excuse for the failure of plaintiff's attorney to appear for the jury trial on the subject action, which had already been repeatedly adjourned at the request of plaintiff's counsel. Nothing contained in counsel's affirmation of engagement addressed why the action in which she allegedly had to appear in Nassau County had priority over the

matter herein (*see Watson v New York City Tr. Auth.*, 38 AD3d 532 [2007]; 22 NYCRR 125.1; *see also Benson Park Assoc., LLC v Herman*, 73 AD3d 464 [2010]). Furthermore, plaintiff failed to demonstrate a meritorious cause of action, since there is a lack of evidence that defendant had prior written notice of the alleged defect in the crosswalk that caused her fall (*see Katz v City of New York*, 87 NY2d 241 [1995]; Administrative Code of the City of New York § 7-201[c][2]).

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

ENTERED: NOVEMBER 30, 2010

CLERK

Tom, J.P., Saxe, Friedman, Sweeny, Abdus-Salaam, JJ.

3743 The People of the State of New York, Ind. 3130/07
Respondent,

-against-

Edwin Pollard,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Thomas R. Villecco of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (David Stadtmauer, J.), rendered February 5, 2009, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him to a term of 5 years, unanimously affirmed.

Defendant's ineffective assistance of counsel claim is unreviewable on direct appeal because it involves matters outside the record concerning counsel's strategic reasons for declining to employ a justification defense (*see People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown the "absence of

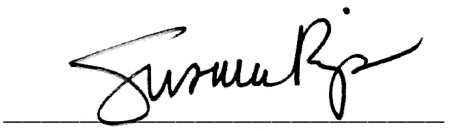
strategic or other legitimate explanations" for counsel's choice of defenses (*see People v Rivera*, 71 NY2d 705, 709 [1988]). A justification defense would have had little or no hope of success unless the jury was persuaded that even though defendant swung a knife at his unarmed opponent that cut him just below the heart, this did not constitute deadly physical force as defined in Penal Law § 10.00(11). Moreover, a competent attorney might have concluded that his client was better off with the jury not knowing about the legal limitations on the use of deadly physical force (*see* Penal Law § 35.15[2][a]). Defendant has not shown either that his attorney should have pursued a justification defense, or that the absence of such a defense caused him any prejudice.

Defendant's challenge to the court's denial of his request for substitution of his original counsel is moot because the Legal Aid Society assigned him a new attorney, who represented him at trial. Defendant has not established that he ever made an express or implied request to replace the second attorney as

well, or that there was any reason for the court to inquire into that attorney's representation of defendant.

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

ENTERED: NOVEMBER 30, 2010



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Tom, J.P., Saxe, Friedman, Sweeny, Abdus-Salaam, JJ.

3745N Sotirios Tsioumas, Index 26811/04
Plaintiff-Respondent,

-against-

Time Out Health & Fitness, et al.,
Defendants-Appellants.

_____

Callan, Koster, Brady & Brennan LLP, New York (Michael P. Kandler of counsel), for appellants.

Sacco & Fillas, LLP, Whitestone (Joseph Randazzo of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered July 24, 2009, which, to the extent appealed from, vacated, upon renewal, the order, same court and Justice, entered March 30, 2009, dismissing this personal injury action for failure to restore it to the trial calender within one year of being marked off, and restored it to the calendar, unanimously affirmed, without costs.

Plaintiff was allegedly injured when he tripped on a racquetball court at defendants' sports facility because a portion of a floor plank was missing. Even if we were to find that plaintiff, on his motion to renew, did not offer reasonable justification for not providing his "new" evidence earlier on his original motion, we would find that renewal should nonetheless be

granted so as not to defeat substantial fairness (*Garner v Latimer*, 306 AD2d 209 [2003]). Plaintiff demonstrated an intent not to abandon the action by completing initial discovery, attempting to restore the action within nine months of its being marked off the calendar, appearing at a status conference within one year of the action being marked off, stating at the status conference a need to assemble funds for a medical consult and surgery, and appearing at the next scheduled court conference held two months thereafter. In any event, once the complaint was dismissed at the February 3, 2009 court conference, plaintiff expeditiously moved to restore the action after it had been marked off the calendar. Plaintiff's excuse for the delay in making a formal motion to restore the action was that a paralegal in plaintiff's counsel's office allegedly saw the case as "active" on the court's Web site, thereby leading counsel to believe that no formal motion to restore was needed. Such law office failure may constitute a reasonable excuse for delay in moving to restore an action so as to justify the IAS court's favorable exercise of discretion here (*see e.g. Kaufman v Bauer*, 36 AD3d 481 [2007]). The court's decision to restore the matter to the calendar was consistent with the strong judicial policy

that favors determination of actions on the merits (*see Matter of Lancer Ins. Co. v Rovira*, 45 AD3d 417 [2007]).

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

ENTERED: NOVEMBER 30, 2010

CLERK

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

3051-
3052 In re Nur Ashki Jerrahi Community, Index 108599/08
Petitioner-Respondent-Appellant,

-against-

New York City Loft Board,
Respondent-Appellant-Respondent,

Patricia Thornley,
Respondent-Respondent-Appellant.

_____

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

Belkin Burden Wenig & Goldman LLP, New York (Joseph Burden of counsel), for Nur Ashki Jerrahi Community, respondent-appellant.

Simon, Eisenberg & Baum, LLP, New York (Sheldon Karasik of counsel), for Patricia Thornley, respondent-appellant.

_____

Judgment, Supreme Court, New York County (Edward H. Lehner, J.), entered December 30, 2008, reversed, on the law, without costs, the Loft Board's findings confirmed, and the petition dismissed, and the order, of the same court and Justice, entered on or about August 21, 2009, affirmed, without costs.

Opinion by Catterson, 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.

3051-
3052
Index 108599/08

_____x
In re Nur Ashki Jerrahi Community,
Petitioner-Respondent-Appellant,

-against-

New York City Loft Board,
Respondent-Appellant-Respondent,

Patricia Thornley,
Respondent-Respondent-Appellant.
_____x

Respondent New York City Loft Board appeals from a judgment of the Supreme Court, New York County (Edward H. Lehner, J.), entered December 30, 2008, annulling as time-barred the Loft Board's determination of overcharge. Petitioner Nur Ashki Jerrahi Community and respondent Patricia Thornley appeal from an order of the same court and Justice, entered on or about August 21, 2009, which, upon reargument, inter alia, found that the subject unit had not been deregulated from coverage under the Loft Law.

Michael A. Cardozo, Corporation Counsel, New York (Jane L. Gordon, Edward F.X. Hart and Kristin M. Helmers of counsel), for appellant-respondent.

Belkin Burden Wenig & Goldman, LLP, New York (Joseph Burden, Robert A. Jacobs, Sherwin Belkin and Magda L. Cruz of counsel), for Nur Ashki Jerrahi Community, respondent-appellant.

Simon, Eisenberg & Baum, LLP, New York (Sheldon Karasik and Harry J. Gaffney of counsel), for Patricia Thornley, respondent-appellant.

CATTERSON, J.

The issue raised by the New York City Loft Board in this article 78 proceeding is whether the four-year statute of limitations in CPLR 213-a titled "Actions to be commenced within four years; residential rent overcharge" applies to overcharge claims brought by Loft Law covered tenants. We find that the rationale that led this Court to conclude recently in Matter of Hicks v. New York State Div. of Hous. & Community Renewal (75 A.D.3d 127, 901 N.Y.S.2d 186 (1st Dept. 2010)) that the four-year statute of limitations does not apply to rent-controlled residences may be similarly applied to interim multiple dwellings covered under the Loft Law.

Patricia Thornley is the tenant of unit 5B, an interim multiple dwelling (hereinafter referred to as "IMD") under article 7-C of the New York Multiple Dwelling Law (hereinafter referred to as "MDL" or "Loft Law"), at 5-7 White Street in Manhattan. Sal Cucinotta, a prior owner, registered the building as an IMD with the Loft Board in 1983, listing the loft as a covered unit, Alfred Hyatt as the tenant, and the rent as $770 per month.

After Hyatt's death in 1986, his estranged wife and his live-in partner fought over successor rights to the loft. However, in a holdover proceeding, possession was granted to

Cucinotta. Following the evictions, Thornley entered into a lease of unit 5B in July 1990 containing a rider acknowledging the building's IMD status, but waiving coverage under the Loft Law. She has since executed three lease renewals, each containing the same waiver. Cucinotta sold the building in 1992 to Masjid Al-Farah a/k/a/ 5-7 White Street Company.

On March 6, 2006, Thornley filed two applications with the Loft Board: a coverage application requesting a determination that she was a protected tenant under the Loft Law, and an overcharge application requesting a determination that she had been overcharged in excess of the IMD registered rent of $770 per month for the four-year period from February 2002 through February 2006.

The applications were consolidated and referred to the Office of Administrative Trials and Hearings (hereinafter referred to as "OATH"). At the conclusion of the proceedings, the Administrative Law Judge (hereinafter referred to as "ALJ") found that Thornley was covered by the Loft Law and recommended that the Loft Board grant Thornley's motion for summary judgment. The ALJ further recommended an award of $62,880.80, the amount Thornley was overcharged in the four years prior to her filing of the application pursuant to New York City Loft Board Regulations (29 RCNY) 1-06.1(c).

After the issuance of the ALJ's report and recommendation, but pending the Loft Board's final decision, the building was sold to petitioner Nur Ashki Jerrahi Community (hereinafter referred to as the "Owner"), which sent a letter to the Loft Board asserting that CPLR 213-a rendered Thornley's application untimely. Upon review of the ALJ's recommendations, the Loft Board, without addressing the statute of limitations issue raised by the Owner, issued its final order consistent with the ALJ's recommendations.

The Owner petitioned for article 78 judicial review, and in its November 19, 2008 decision, Supreme Court annulled the order on the grounds that Thornley's claim for overcharge was untimely under CPLR 213-a. Upon reargument, the court upheld the Loft Board's finding that Thornley's tenancy was protected by the Loft Law, but affirmed its earlier determination that her rent overcharge claim was time-barred.

On appeal, the petitioner Owner argues that Supreme Court erred in upholding the Loft Board's determination that Thornley is protected under the Loft Law. Respondents Loft Board and Thornley appeal, asserting that the Owner's statute of limitations defense was not timely raised but, in the alternative, that Supreme Court erred in applying CPLR 213-a, which states that an "action on a residential rent overcharge

shall be commenced within four years of the *first* overcharge alleged" (emphasis added). The respondents assert instead that 29 RCNY 1-06.1(c) applies, pursuant to which the four-year limitation limits recovery but does not restrict how far back the Loft Board can examine the rent history in order to compute overcharges. For the reasons set forth below, we agree with respondents that CPLR 213-a does not apply to Loft Board overcharge proceedings.

As a threshold matter, the petitioner Owner failed to demonstrate that the unit was deregulated from coverage depriving the tenant of protection under the Loft Law. The Owner specifically asserts that three de-regulatory events, the death of the predecessor IMD tenant, the sale of rights, and waiver by Thornley, preclude such a finding. However, the record contains no finding of abandonment under 29 RCNY 2-10(f)(1) and no reliable evidence of a prime lessee's sale of improvements under MDL 286(6) (see 29 RCNY 2-10(b)). In addition, the Loft Law contains no broad waiver exception. It is a governmental residential regulatory scheme that is not subject to waiver by the tenant. Matter of Jo-Fra Props., Inc., 27 A.D.3d 298, 299, 813 N.Y.S.2d 63, 64 (1st Dept. 2006), lv. denied, 8 N.Y.3d 801, 830 N.Y.S.2d 9, 862 N.E.2d 88 (2007).

Furthermore, the Owner's statute of limitations defense was

timely raised. Judicial review of administrative determinations is limited to the facts adduced and the record made before the administrative agency, and arguments raised before the agency are preserved on appeal. Matter of L & M Bus Corp. v. New York City Dept. of Educ., 71 A.D.3d 127, 135-136, 892 N.Y.S.2d 60, 66-67 (1st Dept. 2009).

Although it was not raised before the ALJ at the OATH hearing, the statute of limitations defense was raised in a letter sent to the Loft Board before its final decision. The Loft Board guidelines state that the purpose of the hearing before the administrative judge is merely to provide a recommendation for the Loft Board to consider in making its final decision. 29 RCNY 1-06(n). 48 RCNY 1-52 also specifically provides for submission of motions brought after issuance of the ALJ's report and recommendations to "the deciding authority," which in this case was the Loft Board. Therefore, the fact that the letter was not considered by the ALJ does not render the defense untimely.

However, this does not help the petitioner Owner since CPLR 213-a does not apply to IMD covered units subject to Loft Board rent regulation, just as it does not apply to rent controlled apartments or New York Division of Housing and Community Renewal (hereinafter referred to as "DHCR") administrative rent control

proceedings. See Matter of Hicks, 75 A.D.3d at 131, 901 N.Y.S.2d at 189 (holding that CPLR 213-a does not apply to rent controlled dwellings or DHCR administrative proceedings).

In Matter of Hicks, this Court held that the 1997 amendment to CPLR 213-a was not intended to supersede rent regulation limitations in all other regulatory schemes. See id. at 131, 901 N.Y.S.2d at 189. Moreover, there is no indication that in amending CPLR 213-a, the Legislature intended to expand the scope of the CPLR beyond judicial actions to administrative proceedings. 75 A.D.3d at 133, 901 N.Y.S.2d at 191. Matter of Hicks concluded, "the CPLR does not purport to dictate the procedure to be applied in administrative matters; and ... it clearly does not supplant the procedures specified by ... regulations promulgated in the exercise of an agency's administrative prerogative." 75 A.D.3d at 133, 901 N.Y.S.2d at 190-191; see also Matter of Sori-Goalya Realty v. New York City Loft Bd., 284 A.D.2d 137, 137-138, 726 N.Y.S.2d 93, 94 (1st Dept. 2001), lv. denied, 97 N.Y.2d 601, 735 N.Y.S.2d 490, 760 N.E.2d 1286 (2001) (holding that CPLR 213-a does not apply to Loft Board proceedings and is limited to civil judicial proceedings).

As this Court held in Matter of Hicks, the limited scope of CPLR 213-a is evident from the Legislature's failure to amend the Rent Control Law when it amended the Rent Stabilization Law

leaving intact inconsistent limitations periods for rent controlled units. Matter of Hicks 75 A.D.3d at 132, 901 N.Y.S.2d at 190, citing People v. Finnegan, 85 N.Y.2d 53, 58, 647 N.E.2d 758, 761, 623 N.Y.S.2d 546, 549 (1995), cert. denied, 516 U.S. 919, 116 S. Ct. 311, 133 L. Ed. 2d 214 (1995) ("the failure of the Legislature to include a substantive, significant prescription in a statute is a strong indication that its exclusion was intended"). Rent stabilization and rent control apply to different types of housing and, while consolidated for administration by the DHCR, remain separate and distinct bodies of law with different regulations. See 9 NYCRR 2200 (ch. VII Rent Control) and 9 NYCRR 2520 (ch. VIII Rent Stabilization); see also Matter of Hicks, 75 A.D.3d at 132, 901 N.Y.S.2d at 189. Therefore, an "amendment to the Rent Stabilization Law [cannot] be deemed to amend the Rent Control Law by implication." Matter of Hicks, 75 A.D.3d at 132, 901 N.Y.S.2d at 189-90.

Similarly, as this court previously decided in Sori-Goalya Realty, the Rent Regulation Reform Act of 1997 (L. 1997, ch. 116) (hereinafter referred to as "RRRA"), which amended the Rent Stabilization Law (hereinafter referred to as "RSL") and CPLR, did not by implication amend the Loft Law or Loft Board regulations because the RRRA does not refer to the Loft Law. Sori-Goalya Realty, 284 A.D.2d at 137-138, 726 N.Y.S.2d at 94.

Despite our precedent to the contrary, the petitioner urges us to construe the Loft Law in pari materia with the RSL as we did for the purpose of providing the remedy of eviction when a loft tenant engages in rent gouging. See BLF Realty Holding Corp. v. Kasher, 299 A.D.2d 87, 92-93, 747 N.Y.S.2d 457, 462 (1st Dept. 2002), lv. dismissed, 100 N.Y.2d 535, 762 N.Y.S.2d 876, 793 N.E.2d 413 (2003) (noting that because "profiteering, in the context of both rent stabilization and rent control constitutes an incurable ground for eviction, the same result should obtain under the Loft Law"), citing Matter of Lower Manhattan Loft Tenants v. New York City Loft Bd., 66 N.Y.2d 298, 304, 487 N.E.2d 889, 892, 496 N.Y.S.2d 979, 982 (1985). We decline to do so here.

It is clear that the RRRA's amendment of CPLR 213-a was intended to complement the RSL as indicated in the Sponsor's Memorandum, which in relevant part states:

> "When it amended the Rent Stabilization law, the Legislature intended not only to limit an award for a rent overcharge to the four-year period preceding the complaint, but also the examination of the rental history to that four-year period. This is evident not only from the express terms of the statute itself, which precludes an award 'based upon an overcharge having occurred more than four years before the complaint,' but also by the provisions which limited an owner's obligation to produce rent records to the four-year period. [I]t is the intention of the Legislature to preclude the examination of the prior rental history."

Sponsor's Mem., Bill Jacket, L. 1997, ch. 116; see also Matter of

Hicks, 75 A.D.3d at 131, 901 N.Y.S.2d at 189 (noting that "the legislative history makes clear that [CPLR 213-a] applies only to rent-stabilized dwellings").

Thus the purpose of implementing the four-year statute of limitations was to relieve owners from having to retain rent records indefinitely. Matter of Ador Realty, LLC v. Division of Hous. & Community Renewal, 25 A.D.3d 128, 136, 802 N.Y.S.2d 190, 197 (2d Dept. 2005), citing Matter of Gilman v. New York State Div. of Hous. & Community Renewal, 99 N.Y.2d 144, 149, 753 N.Y.S.2d 1, 3, 782 N.E.2d 1137, 1139 (2002). Under the RSL, rent overcharges are calculated from the base date rent which is the rent registered with the DHCR four years prior to the most recent registration statement: "Where the amount of rent set forth in the annual rent registration statement filed four years prior to the most recent registration statement is not challenged within four years of its filing, neither such rent nor service of any registration shall be subject to challenge at any time thereafter." (Administrative Code of the City of New York) RSL 26-516(a)(i).

However, as Supreme Court correctly observed, unit 5b is not regulated under the RSL because it is not yet legalized for residential use. IMD lofts are governed by article 7-C of New York Multiple Dwelling Law, State legislation made applicable to

New York City as a municipality with a population of one million or more. MDL 281(1). *Recovery* for rent overcharges in a proceeding before the Loft Board is restricted to the four years prior to the date the claim is filed:

> "[A]n application for rent overcharges shall be filed within four years of such overcharge. Overcharges shall not be awarded for the period prior to the date of filing of a coverage or registration application, nor for more than four years before the date on which the application for overcharge was filed." 29 RCNY 1.06.1(c).

In Sori-Goalya Realty, we held that "[t]he rental history limitations in these statutes [CPLR 213-a and RSL 26-516(a)(i)] should not be read into the Loft Board [s]tatute of [l]imitations," thereby permitting the Loft Board to look beyond four years at the rental history in order to determine whether there has been a rent overcharge. Sori-Goalya Realty, 284 A.D.2d at 138, 726 N.Y.S.2d at 94.

Our interpretation of the scope of CPLR 213-a in Matter of Hicks is entirely logical and consistent with the process by which an IMD loft becomes rent stabilized. A loft is removed from coverage under the Loft Law and eligible for rent stabilization when a certificate of occupancy is issued legalizing the premises for residential use. See Rent Stabilization Code (9 NYCRR) § 2520.11(q). Upon a determination of legalization, the Loft Board issues a final order setting the

initial legalized rent for registration with the DHCR. See MDL 286 (3); Rent Stabilization Code (9 NYCRR) 2521.1(c)("[t]he initial legal regulated rent for a housing accommodation first made subject to the RSL and this Code pursuant to article 7-C of the MDL shall be the rent established by the Loft Board"). Therefore, as the municipal respondent Loft Board asserts and petitioner Owner does not dispute, a determination of the initial legal rent for an IMD is conducted before the rent is registered for rent stabilization, and an IMD rent is often not examined until an owner places the tenant on notice of what the owner claims is the legal rent.

It is axiomatic, then, that the rent first registered with the DHCR, establishing the legal registered rent for future increases and starting the running of RSL's four-year statute of limitations, should be calculated by an examination of the entire rent history given the long period of time that the entire process takes. See Matter of Verbalis v. New York State Div. Of Hous. & Community Renewal, 1 A.D.3d 101, 102, 769 N.Y.S.2d 474, 476 (1st Dept. 2003)("[t]he initial stabilized rent is ... of crucial importance because it establishes the base on which all subsequent lawful stabilized rents are determined").

As respondent Loft Board explains, the remedial nature of the Loft Law, allowing for rent adjustments favoring either

tenant or owner, is best served when the complete rental history of an IMD is examined by the Loft Board prior to its registration for rent stabilization. To hold otherwise would permit an owner to legalize an illegal rent merely by perpetrating a wrongful increase beyond the four year period under the Loft Law, and then establishing it as the initial legal rent upon registration for rent stabilization with the DHCR. See Thornton v. Baron, 5 N.Y.3d 175, 181, 800 N.Y.S.2d 118, 121-122, 833 N.E.2d 261, 264-265 (2005) (considering that "a landlord whose fraud remains undetected for four years – however willful or egregious the violation – would, simply by virtue of having filed a registration statement, transform an illegal rent into a lawful assessment that would form the basis for all future rent increases").

The Owner's reliance on Mozes v. Shanaman (21 A.D.3d 854, 804 N.Y.S.2d 3 (1st Dept. 2005), lv. denied, 6 N.Y.3d 715, 823 N.Y.S.2d 356, 856 N.E.2d 920 (2006)) and Brinkerhoff v. New York State Div. of Hous. & Community Renewal (275 A.D.2d 622, 713 N.Y.S.2d 56 (1st Dept. 2000), appeal dismissed, 96 N.Y.2d 729, 722 N.Y.S.2d 795, 745 N.E.2d 1017 (2001), lv. denied, 96 N.Y.2d 712, 729 N.Y.S.2d 439, 754 N.E.2d 199 (2001)) is unavailing. Brinckerhoff does not stand for the proposition that CPLR 213-a applies to all administrative agency determinations. Matter of

Hicks, 75 A.D.3d at 134, 901 N.Y.S.2d at 191 (explaining that the four-year statute of limitations on rent overcharge claims is applicable to civil judicial proceedings per CPLR 213-a, and to rent stabilization administrative claims per RSL 26-516 [a][2]). Mozes, which relied upon a broad construction CPLR § 213-a, was essentially rejected by Matter of Hicks which determined that the term "residential rent overcharges" applies only to rent stabilized residences. Matter of Hicks, 75 A.D.3d at 131, 901 N.Y.S.2d at 189. Therefore, as the Loft Board and Thornley correctly assert, Sori-Goalya Realty remains the controlling case law regarding overcharge claims for IMD rents regulated by the Loft Board.

In an article 78 proceeding, the reviewing court must uphold an agency's decision unless the determination was irrational and unreasonable. Matter of Bear v. New York City Loft Bd., 202 A.D.2d 260, 260, 608 N.Y.S.2d 468, 469 (1st Dept. 1994); Matter of Chi Jung Chiang v. Loft Bd. of City of N.Y., 198 A.D.2d 181, 182, 604 N.Y.S.2d 78, 79 (1st Dept. 1993), lv. denied, 83 N.Y.2d 751, 611 N.Y.S.2d 133, 633 N.E.2d 488 (1994). The Loft Board's determination of IMD coverage, review of the complete rental history, and assessment of rent overcharges was not irrational or unreasonable.

Accordingly, the judgment of the Supreme Court, New York

County (Edward H. Lehner, J.), entered December 30, 2008, annulling as time-barred the Loft Board's determination of overcharge should be reversed, on the law, without costs, the Loft Board's findings confirmed, and the petition dismissed, and the order of the same court and Justice, entered on or about August 21, 2009, which, upon reargument, inter alia, found that the subject unit had not been deregulated from coverage, should be affirmed, without costs.

All concur.

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

ENTERED: NOVEMBER 30, 2010

CLERK