SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 8, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Andrias, J.P., Saxe, Catterson, Freedman, JJ.

2522 In re C. Virginia Fields, et al., Index 104389/08
Petitioners-Respondents,

-against-

New York City Campaign Finance Board,
Respondent-Appellant.

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

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Order, Supreme Court, New York County (James A. Yates, J.), entered January 16, 2009, which granted the petition to the extent of absolving petitioners from personal liability for repayment of unspent campaign funds, unanimously affirmed, without costs.

Respondent (CFB) administers the campaign finance program established in 1988 by the New York City Campaign Finance Act (Administrative Code of the City of New York § 3-701 *et seq.*). The program provides public matching funds for eligible candidates running for the offices of mayor, comptroller, public advocate, borough president, and City Council member who agree to comply with certain conditions, including limitations on expenses

and campaign contributions, and the submission of documentation and other proof of campaign expenditures as requested by CFB (Administrative Code § 3-703; *see generally New York City Campaign Fin. Bd. v Ortiz*, 38 AD3d 75 [2006]).

Payment to a candidate is based upon a preliminary review of the matchable contribution claims provided by the campaign (*see* CFB Rules [52 RCNY] §§ 5-01[b] and [g]). At the conclusion of a post-election audit of the receipts and expenditures reported by the candidate in disclosure statements, as well as any receipts and expenditures not reported but discovered by CFB during its post-election audit, a candidate may be required to return all or a portion of the public funds received, pursuant to Administrative Code § 3-710(2)(a) (liability for overpayments of public matching funds), (b) (liability for funds used for disqualified campaign expenditures) and/or (c) (liability for unspent funds up to the amount of public funds received).

In 2004, CFB ordered petitioner C. Virginia Fields's 2001 campaign to repay $92,547 in public funds in connection with her successful 2001 run for Manhattan Borough President. Because Fields could not qualify for public funding for her 2005 mayoral campaign unless that debt was repaid (52 RCNY 5-01[f][3]), on October 7, 2004, her 2005 campaign lawfully transferred $93,000 raised for the 2005 race to her 2001 committee to repay the debt.

On May 31, 2005, Fields submitted a candidate certification form to be eligible for public matching funds for the 2005 race (*see* Administrative Code § 3-703[1][c]; 53 RCNY 2-01). Fields listed petitioner Milton Wilson as the treasurer of petitioner New Yorkers for Fields, which was designated as Fields's principal 2005 campaign committee. Based on its preliminary review of Fields's certification, CFB approved three separate matching funds payments at a 4-to-1 ratio, totaling $1,459,636.

On December 26, 2006, CFB sent Wilson a report of a draft audit covering the period January 12, 2003 through January 11, 2006 that raised 12 possible campaign violations and determined that the 2005 campaign "may be required to repay the greater of $337,340 due to an overpayment of public funds . . . and $187,637 in unspent campaign funds . . . Any repayment obligations are owed by the committee, the candidate, and the treasurer who are jointly and severally liable pursuant to law." The $337,340 public funds obligation was computed as follows:

Claimed Matchable Contributions	$ 395,647
Less:	
Invalid Claims (52 RCNY 5-01[d])	$ 20,188
Subtotal	$ 375,459
Less:	
Matchable Adjustment (52 RCNY 5-01[n])	$ 93,155
Adjusted Gross Matchable	$ 282,304
X 4	$ 1,129,216

Less:	
Total Previous Regular Payable	$ 1,466,556
Overpayment	$ (337,340)

The $93,155 matchable adjustment was comprised of $155 in excess contributions to political committees and the $93,000 transfer to the 2001 Committee.

The $187,637 unspent funds calculation was computed as follows:

Itemized monetary contributions	$ 1,826,645
Other Receipts	112
Public Funds Payments	$ 1,459,636
Subtotal	$ 3,286,393
Less:	
Itemized Expenditures	$ 3,040,125
Total Receipts Adjustment	$ 76,150
Total Outstanding Bills	$ 65,269
Adjustments to Disbursements (52 RCNY 1-03[a]; 5-03[e])	$ (82,788)
Subtotal	$ 3,098,756
Total Unspent Funds	$ 187,637

The adjustments to disbursements of $82,788 was comprised of "Non-campaign Related Expenditures" of $3,041; "Unallowable Post Election Expenditures" of $61,196; and "Uncashed Checks/Not Appearing on Bank Statements" of $18,551. The audit also found that the campaign failed to report 126 transactions totaling $74,597 that had appeared on its bank statements.

Despite being granted two extensions, the campaign did not

respond to the draft audit report by the March 8, 2007 deadline or request additional time to respond. On June 11, 2007, CFB sent Fields and Wilson a "Notice of Alleged Violations, Proposed Penalties, and Opportunity to Respond," which sought $189,028 in penalties for 24 alleged violations, subject to reduction if the campaign responded to the notice by June 25, 2007. On June 12, 2007, CFB sent Fields and Wilson a letter affording them "a last and sole opportunity for the Campaign to respond [by July 3, 2007] to the repayment obligations [unspent campaign funds and public funds overpayments] before they are made final."

On or about June 26, 2007, the campaign submitted a response to the draft audit report in which it stated, among other things, that while CFB claimed unspent funds of $187,637 as of December 12, 2006, the committee's account balance was $0 as of that date. The committee also noted that in January 2006 it had conducted an internal audit "to correct all balances" in its financial disclosure statements for the period 2002 to 2005 and that as soon as mistakenly omitted entries were detected the campaign reported the additional expenditures to "correct the balances." As a result of this submission, at its July 20, 2007 meeting, CFB reduced the $189,028 penalty to $70,567 for 21 alleged violations.

On July 27, 2007, CFB issued s report of its final audit,

which found that the campaign owed $180,597 in unspent campaign funds and $337,340 in overpayment of public matching funds, and was required to repay the greater amount.[1] CFB also found that the campaign had to pay the $70,567 in penalties. By letter dated November 29, 2007, CFB reduced the penalties from $70,567 to $36,767.

On September 28, 2007, the campaign filed a petition challenging the Board's determination (*see* 52 RCNY 5-02[a]). Stating that there was good cause for the failure to timely respond to the draft audit report, namely a computer crash and difficulty in locating the person who organized and entered the committee's financial data, the campaign argued that the unreported $93,000 transfer to the 2001 committee should have been considered a receipt for matching funds purposes and an expenditure to reduce the alleged unspent campaign funds. The campaign also asserted that the unspent campaign funds should be reduced by the $46,631 in post election payments, $2,368 in alleged non-campaign-related expenditures, and $74,825 in unreported transactions.

On December 13, 2007, after hearing argument, CFB, finding

[1]The reduction in unspent funds from $187,637 to $180,597 was the result of the adjustment to disbursements being reduced from $82,788 to $75,748.

that no good cause existed for the late submission, denied the petition and reaffirmed the payment determination in the final audit report. On December 19, 2007, CFB issued its final determination letter which advised petitioners that "[t]he Campaign's public funds repayment obligation is therefore $330,420 [reduced from $337,340 due to withholding of $6,920 from the campaign's public funds payment during the election]. (The Campaign's unspent funds repayment obligation remains at $180,597; because this amount is less than the amount owed due to the overpayment, the Campaign's total public funds repayment obligation is $330,420.) In addition, the Campaign owes a total of $36,767 in penalties . . . ."

CFB demanded payment of the total of $367,187 no later than January 13, 2008. By letter dated January 3, 2008, in response to the campaign's request for clarification regarding its liability for the $330,420 public funds repayment obligation, CFB advised the campaign:

> "Following the December 19, 2006 ruling of the Apellate Divsion, First Department, in *NYC Campaign Finance Board v. Ortiz*, candidates and treasurers cannot be held personally liable for the repayment of public funds owed to the Board due to overpayments of public funds. Therefore, only Ms. Fields' campaign committee . . . is liable for the $330,420 repayment obligation resulting from the overpayment of public funds.

> "However, notwithstanding Ms. Fields' lack of personal liability for this return obligation, she would not be eligible to receive public funds in a future election unless the entire $330,420 is returned to the Board.
>
> "The *Ortiz* decision does not affect repayment obligations resulting from unspent funds. Therefore, Ms. Fields, her treasurer, and her campaign committee are jointly and severally liable for the $180,597 unspent funds repayment obligation. As you are aware, payment of the $330,420 repayment obligation would also satisfy this smaller repayment obligation."

On March 24, 2008, petitioners commenced this proceeding to challeng CFB's determination that they jointly and severally owed $180,597 in unspent funds and requested that CFB reduce the amount by (a) the $93,000 transfer, (b) valid expenditures totaling $48,999 that had been previously found to be non-campaign-related or improper post election expenditures, and (c) $74,825 in previously unreported transactions. Petitioners did not challenge the finding that the committee was required to return the $330,420 overpayment of public funds. Nor did they challenge the assessment of $36,767 in penalties.

CFB asserted a counterclaim seeking an order directing the committee to repay $330,420 for the overpayment in funds, and directing the committee and Fields to repay $180,597 in unspent campaign funds. CFB stated again that payment of the larger

amount would satisfy the smaller repayment obligation.

Supreme Court granted the petition to the extent of holding that petitioners were not personally liable for the repayment of unspent funds, pursuant to Administrative Code §§ 3-710(2)(b) and (c) and 3-711(1), and 52 RCNY 5-02(a)(2). The court found that CFB circumvented *Ortiz v New York City Campaign Fin. Bd.* (36 AD3d 75 [2006], *supra*] and improperly penalized the campaign twice by denying a match for the $93,000 transfer and then deducting it from recognized expenditures, although public funds were not used to pay the prior debt. The court further found that Administrative Code § 3-710(2)(c) specifically provided that public matching funds were to be repaid using "excess" funds, not the candidate's personal assets.

Administrative Code § 3-710(2)(c), as in effect in 2005, provided:

> "If the total of contributions, other receipts, and payments from the fund received by a participating candidate and his or her principal committee exceed the total campaign expenditures of such candidate and committee for all covered elections held in the same calendar year or for a special election to fill a vacancy such candidate and committee shall use such *excess funds* to reimburse the fund for payments received by such committee from the fund during such calendar year or for such special election. Such reimbursement shall be made not later than ten days after all liabilities have been paid and in any event, not later than either the

> closing date of the final disclosure report, or the day on which the campaign finance board issues its final audit report for such participating committee, for such covered election, as shall be set forth in rules promulgated by the campaign finance board. No such *excess funds* shall be used for any other purpose, unless the total amount of the payments received from the fund by the principal committee has been repaid." (emphasis added).

Where statutory language is "clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used" (*Matter of Aquilone v Board of Educ. of City school Dist. of City of N.Y.* [internal quotation marks and citations omitted], 86 NY2d 198, 204 [1995]). Although a long-standing interpretation of an agency charged with administering a statute "may be entitled to great weight unless manifestly wrong," such "commonsense" interpretation is of no avail if the statute is unambiguous (*see* McKinney's Cons Laws of NY, Book 1, Statutes § 129). "[W]here, as here, the question is one of pure statutory construction, dependent only on accurate apprehension of legislative intent, judicial review is less restricted and there is little basis to rely upon any special competence or expertise of the administrative agency" (*Ortiz*, 38 AD3d at 81; *see also Matter of KSLM-Columbus Apts., Inc. v New York State Div. of Hous. & Community Renewal*, 5 NY3d 303, 312 [2005]; *Matter of Excellus Health Plan v Serio*, 2 NY3d 166, 171

[2004] ["a determination by the agency that runs counter to the clear wording of a statutory provision is given little weight"] [internal quotation marks & citations omitted]).

The express language of § 3-710(2)(c) requires that in the case of unspent funds, the "candidate and committee shall use *such excess funds* to reimburse the fund" (emphasis added). This language clearly and unambiguously requires the candidate and all the committees to return funds left over after the election, up to an amount equal to the total public funds received, regardless of whether the left-over dollars came from private contributions made directly to the candidate or from public funds sent to the committee. However, it does not does not obligate the candidate to reach into other funds, such as personal assets, to repay CFB.

Here, the campaign stated in its response to the draft audit report that while CFB claimed unspent funds of $187,637, as of December 12, 2006, the committee's account balance was $0 and that after an internal audit it reported the additional expenditures to "correct the balances." Petitioners allege that "[a]t the time the draft audit report was sent to the campaign, it had no money in its bank account," and that the final audit report concluded that the campaign owed $180,567 [*sic*] in unspent campaign funds, "even though the campaign in fact had no money whatsoever." There is no claim that either Fields or Wilson

wrongly converted campaign funds to personal assets or used them for private expenditures. As there were no excess funds available at the time of the final audit, petitioners are not personally liable for the unspent funds.

Matter of Eisland v New York City Campaign Fin. Bd. (31 AD3d 259 [2006]), which involved a dispute over an unspent funds obligation, does not require otherwise. While we found in *Eisland* that the petitioner was "liable [for that repayment] because she is the candidate" (31 AD3d at 263), the Eisland campaign had approximately $475,000 in private funds for the 2001 election, received $316,548 in public funds, and spent approximately $650,000. Therefore, the campaign had "excess funds" that it was obligated to return, pursuant to Administrative Code § 3-710(2)(c).

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

ENTERED: FEBRUARY 8, 2011

CLERK

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

3511 Javier Perez, an Infant by his Mother and Natural Guardian, Gabriella Torres, Plaintiff-Appellant, -against- New York City Health and Hospitals Corporation, etc., Defendant-Respondent. Index 16565/03

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Fitzgerald & Fitzgerald, P.C., Yonkers (Mitchell Gittin of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Cheryl Payer of counsel), for respondent.

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Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered February 11, 2009, which, in this medical malpractice action, denied plaintiff's motion to deem her previously-served notice of claim timely, or, in the alternative, for leave to file a new notice of claim, and granted defendant's cross motion to dismiss the complaint, unanimously reversed, on the law and in the exercise of discretion, without costs, the motion granted, the notice of claim deemed timely served, the cross motion denied and the complaint reinstated.

In determining whether a notice of claim should be deemed timely served under General Municipal Law § 50-e(5), a court should consider, inter alia, whether the municipality acquired

actual knowledge of the facts underlying the claim within 90 days after the claim arose or a reasonable time thereafter, whether the claimant is an infant, whether there exists a reasonable excuse for the failure to serve the notice timely and whether the delay in serving the notice would substantially prejudice the municipality in its defense (*Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 535 [2006]; *Matter of Dubowy v City of New York*, 305 AD2d 320, 321 [2003]). The presence or absence of any one factor is not determinative (*Dubowy*, 305 AD2d at 321), and since the notice statute is remedial in nature, it should be liberally construed (*Pearson v New York City Health & Hosps. Corp. [Harlem Hosp. Ctr.]*, 43 AD3d 92, 94 [2007], *affd* 10 NY3d 852 [2008]).

Here, the motion court improvidently exercised its discretion in denying plaintiff's motion. Contrary to defendant's contention, the hospital records provided "actual knowledge of the facts -- as opposed to the legal theory -- underlying the [malpractice] claim" (*Williams*, 6 NY3d at 537). Plaintiff submitted affirmations from two physicians establishing that the records, on their face, evinced defendant's failure to provide the infant's mother with proper prenatal and labor care (*see Lisandro v New York City Health & Hosps. Corp. [Metropolitan Hosp. Ctr.]*, 50 AD3d 304 [2008], *lv denied* 10 NY3d 715 [2008]; *Talavera v New York City Health & Hosps. Corp.*, 48 AD3d 276, 277

[2008]). In particular, the experts focused on the staff's failure to properly diagnose and take appropriate measures in the face of obvious signs of lack of fetal growth, which they allege "inflicted . . . injury on [the infant]" (*Williams*, 6 NY3d at 537).

In response, defendant did not submit any expert affirmations to challenge the conclusions of plaintiff's medical experts. Instead, defendant relied solely on the opinions of its attorney, a non-medical professional, who drew her own conclusions from the records. Since the medical issues presented here are not within the ordinary knowledge and experience of a layperson, an expert affidavit was necessary to refute the opinions of plaintiff's experts (*see e.g. Mosberg v Elahi*, 80 NY2d 941, 942 [1992]; *Fiore v Galang*, 64 NY2d 999, 1001 [1985]).

Defendant's claim that it was substantially prejudiced because the resident obstetrician who delivered the baby is no longer in its employ is insufficient, since there is no assertion or showing that the obstetrician was actually unavailable (*see Caminero v New York City Health & Hosps. Corp. [Bronx Mun. Hosp. Ctr.]*, 21 AD3d 330, 333 [2005]). Nor did defendant assert that her testimony would be material. Moreover, it was undisputed that both the attending obstetrician and the nurse midwife were available. The absence of a reasonable excuse for the delay is

not, standing alone, fatal to the application (*see id.* at 332), particularly in light of the lack of prejudice to defendant. Nor does the lack of a causative nexus between infancy and the delay warrant denial of the motion (*see Lisandro*, 50 AD3d at 304).

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

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

ENTERED: FEBRUARY 8, 2011

CLERK

Saxe, J.P., Friedman, McGuire, Abdus-Salaam, Román, JJ.

4006 In Selena R., and Another,

Children Under the Age of
Eighteen Years, etc.,

Angela T.,
Respondent,

Joseph L.,
Respondent-Appellant,

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

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George E. Reed, Jr., White Plains, for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Marcia Egger of counsel), attorney for the children.

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Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about March 31, 2009, which, after a fact-finding determination that respondent father sexually abused his son, Tyler T., derivatively abused Selena R., the daughter of respondent mother Angela T., and neglected both children, inter alia, released the children to the custody of respondent mother under the strict supervision of petitioner ACS for a period of 12 months and ordered that the father have no contact with Tyler T. without application to the Family Court and no contact at all

with Selena R., unanimously modified, on the law, so as to vacate the finding of neglect based upon the claim of excessive corporal punishment, and otherwise affirmed, without costs.

Corroboration of the victim's out-of-court statements of sexual abuse by respondent was provided by the testimony of a social worker that the children's behavior, including age-inappropriate knowledge of ejaculation by the four-year-old boy and other sexual behavior manifested verbally, in activities with drawings, and in aggressive outbursts by both children, was symptomatic of sexual abuse (*see Matter of Nicole V.*, 71 NY2d 112, 117-118 [1987]; *Matter of Shirley C.-M.*, 59 AD3d 360 [2009]).

However, the testimony offered in support of the claim that respondent inflicted excessive corporal punishment on the children failed to establish by a preponderance of the evidence the necessary elements of the charge (*see Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]).

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

ENTERED: FEBRUARY 8, 2011

CLERK

Sweeny, J.P., Moskowitz, DeGrasse, Freedman, Richter, JJ.

4192 The People of the State of New York, Ind. 804/07
Respondent,

-against-

Kareem Canty,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Risa Gerson of counsel), and Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Elizabeth P. Kozlowski of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered January 15, 2009, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the first degree (two counts) and criminal sale of a controlled substance in the second degree, and sentencing him, as a second felony drug offender, to an aggregate term of 12 years, unanimously affirmed.

The court properly exercised its discretion in allowing an undercover officer to testify using his shield number rather than his name. Through the evidence adduced during the *Hinton* hearing, the People also satisfied their burden, under *People v Waver* (3 NY3d 748 [2004]), of establishing a need for the officers' anonymity (see *People v Smith*, 33 AD3d 462 [2006], *lv*

denied 8 NY3d 849 [2007]), and defendant failed to establish any prejudice from not knowing the officer's name (*see People v Granger*, 26 AD3d 268 [2006], *lv denied* 6 NY3d 894 [2006]). This determination did not violate defendant's right of confrontation (*see United States v Rangel*, 534 F2d 147, 148 [9th Cir 1976], *cert denied* 429 US 854 [1976]).

Defendant did not preserve his challenges to the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

Defendant's claim that the court departed from the requirements of section 220.10 of the Uniform Rules for the New York State Trial Courts (22 NYCRR 220.10) regarding jury note taking is a claim that requires preservation (*People v Valiente*, 309 AD2d 562 [2003], *lv denied* 1 NY3d 602 [2004]) and we decline to review this unpreserved claim in the interest of justice. There was nothing even approaching a mode of proceedings error

that "went to the essential validity of the process and was so fundamental that the entire trial is irreparably tainted" (*People v Brown*, 7 NY3d 880, 881 [2006]). As an alternative holding, we find that defendant was not prejudiced in any manner.

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

ENTERED: FEBRUARY 8, 2011

CLERK

Sweeny, J.P., Moskowitz, DeGrasse, Freedman, Richter, JJ.

4193 In re Jaylin E.,

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

Jessica G.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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John J. Marafino, Mt. Vernon, for appellant.

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

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

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Order of disposition, Family Court, New York County (Jody Adams, J.), entered on or about November 16, 2009, which, to the extent appealed from as limited by the briefs, determined that respondent mother neglected the subject child, unanimously affirmed, without costs.

The court's finding of neglect is supported by the requisite preponderance of evidence (Family Court Act §§ 1012[f][i][B]; 1046[b]). The 21-month-old child was found in an apartment by police investigating marijuana dealing. The officer who executed the search warrant testified that there was marijuana in the bedroom where the child was staying and that there was a strong

odor of marijuana on the child's body, hair and clothing (*see e.g. Matter of Taliya G. [Jeannie M.]*, 67 AD3d 546, 546 [2009]; *Matter of Michael R.*, 309 AD2d 590 [2003]). Moreover, the evidence plainly established that at least some of the adults in the apartment were engaged in the sale of marijuana. "Respondent's conduct, placing the child[] in near proximity to accessible narcotics and to the very dangerous activity of narcotics trafficking, posed an imminent danger to the child[]'s physical, mental and emotional well-being" (*Michael R.*, 309 AD2d at 591). There is no basis for disturbing the court's credibility determinations.

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

ENTERED: FEBRUARY 8, 2011

CLERK

Sweeny, J.P., Moskowitz, DeGrasse, Freedman, Richter, JJ.

4194-
4194A Ruth Colon, Index 24563/04
Plaintiff-Respondent,

-against-

Shlo-Yank Holding, Ltd., et al.,
Defendants-Appellants.

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Clausen Miller P.C., New York (Edward M. Tobin of counsel), for appellants.

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Orders, Supreme Court, Bronx County (Alexander W. Hunter Jr., J.), entered February 9, 2010 and April 30, 2010, which, to the extent appealed from, imposed sanctions in the amount of $7,500 against defendants' counsel payable to the Lawyers' Fund for Client Protection, unanimously affirmed, without costs.

The imposition of sanctions was warranted in light of the "frivolous conduct" engaged in by defendants' counsel in connection with this action (22 NYCRR 130-1.1[a], [c]). The record demonstrates that counsel blatantly disregarded the court's preclusion ruling and advanced meritless arguments during

trial and her summation (*see Matter of Rachel's Trousseau [Warshaw Woolen Assoc.]*, 249 AD2d 148 [1998], *lv denied* 92 NY2d 810 [1998]).

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

ENTERED: FEBRUARY 8, 2011

CLERK

Sweeny, J.P., Moskowitz, DeGrasse, Freedman, Richter, JJ.

4196 Cheong Mei Inc., Index 109860/06
Petitioner,

-against-

Environmental Control Board
of the City of New York,
Respondent.

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Polly Eustis, New York, for petitioner.

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

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Determination of respondent, dated March 16, 2006, which imposed a total of $46,275 in fines for 435 violations of Administrative Code of the City of New York § 10-117 and § 10-119, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Donna M. Mills, J.], entered on or about July 26, 2007), dismissed, without costs.

The determination was supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). Although petitioner's name did not itself appear on the face of the numerous handbills that were unlawfully affixed to City property, each handbill contained sufficient "identifying information" to raise the rebuttable

presumption that petitioner was responsible for posting the handbills (*see* Administrative Code § 10-119[b]). Indeed, even without the statutory presumption, sufficient circumstantial evidence establishing petitioner's responsibility for the handbills was adduced at the hearing. Accordingly, it was incumbent on petitioner to tender evidence to rebut respondent's showing which petitioner failed to do (*see Smart Workout, Inc. v Environmental Control Bd. of City of N.Y.*, __ AD3d __, 2010 NY Slip Op 9075 [1st Dept 2010]).

We have considered petitioner's remaining arguments, including that it was deprived of due process, and find them unavailing.

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

ENTERED: FEBRUARY 8, 2011

CLERK

Sweeny, J.P., Moskowitz, DeGrasse, Freedman, Richter, JJ.

4197 The People of the State of New York, Ind. 432/08
Respondent,

-against-

Tony William,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), and Davis Polk & Wardwell LLP, New York (Jonathan K. Chang of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Herbert J. Adlerberg, J.H.O. at suppression hearing; Charles Solomon, J. at suppression ruling, plea, and sentence), rendered April 14, 2009, convicting defendant of robbery in the first degree, and sentencing him, as a second violent felony offender, to a term of 10 years, unanimously affirmed.

The court correctly denied defendant's suppression motion. The police properly stopped a cab in which defendant and his codefendant were passengers. When the police first saw the cab, they observed that the passengers matched some general aspects of the radioed description of two men who had just committed a robbery at the same location. Given the close temporal and spatial proximity of these observations to the reported crime,

and the absence of other persons, there was a strong likelihood that the men in the cab were the same men wanted for the robbery. This likelihood was sufficient to provide reasonable suspicion (*see People v Brown*, 22 AD3d 349 [2005], *lv denied* 6 NY3d 774 [2006]). Accordingly, defendant is not entitled to suppression of any of the evidence obtained as the result of the stop of the cab.

The police conducted a showup in a manner that was permissible and not unduly suggestive, given the fast-paced chain of events (*see e.g. People v Sanchez*, 66 AD3d 420 [2009], *lv denied* 13 NY3d 862 [2009]).

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

ENTERED: FEBRUARY 8, 2011

CLERK

Sweeny, J.P., Moskowitz, DeGrasse, Freedman, Richter, JJ.

4198 Curtis Rhodes, Index 8980/07
Plaintiff-Appellant-Respondent,

-against-

East 81st, LLC, et al.,
Defendants-Respondents-Appellants,

Capital Construction Management
of New York, LLC,
Defendant-Respondent,

Skyline Scaffolding, LLC,
Defendant.

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Ronemus & Vilensky, Garden City (Lisa M. Comeau of counsel), for appellant-respondent.

Kral Clerkin Redmond Ryan Perry & Van Etten, Melville (James V. Derenze of counsel), for respondents-appellants.

Faust Goetz Schenker & Blee LLP, New York (Peter Kreymer of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered on or about June 24, 2009, which, to the extent appealed from as limited by the briefs, granted the respective motions by defendant Capital Construction Management of New York, LLC (Capital) and defendants East 81st, LLC and Ben Zion Suky (the East 81st defendants) for summary judgment dismissing the common-law negligence and Labor Law § 200 claims as against them and denied the part of the motion by the East 81st defendants that sought summary judgment on their cross claim for contractual

indemnification against defendant Capital, unanimously affirmed, without costs.

Plaintiff was injured when he jumped from a stalled elevator allegedly at the direction of an employee of the subcontractor. While the record presents issues of fact whether the East 81st defendants had notice that the elevator was problematic and whether they violated their nondelegable duty to inspect the elevator, and whether Capital exercised supervisory control over the work site and had notice that the elevator was problematic (*see Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 555, 556 [2009]), there is no evidence that raises an inference that the elevator was the proximate cause of plaintiff's injuries. Plaintiff was not faced with any immediate danger in the stalled elevator. He jumped from the elevator because of an alleged directive from the subcontractor to do so, and his jump "superseded defendants' conduct and terminated defendants' liability for his injuries" (*see Egan v A.J. Constr. Corp.*, 94 NY2d 839, 841 [1999]).

Conflicting deposition testimony, conflicting documentary

evidence and questions as to the parties' intent in drafting the contractual language preclude summary judgment in favor of the East 81st defendants on their claims for contractual indemnification against Capital.

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

ENTERED: FEBRUARY 8, 2011

CLERK

Sweeny, J.P., Moskowitz, DeGrasse, Freedman, Richter, JJ.

4199 The People of the State of New York, Ind. 918N/08
Respondent,

-against-

Bryan Smith,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Jane Levitt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sylvia Wertheimer 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 (Robert M. Stolz, J.), rendered on or about November 26, 2008,

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

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

ENTERED: FEBRUARY 8, 2011

CLERK

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

Sweeny, J.P., Moskowitz, DeGrasse, Freedman, Richter, JJ.

4201 Sona Shah, Index 113231/02
Plaintiff-Appellant,

-against-

Wilco Systems, Inc.,
Defendant-Respondent.

_____

Sanford Hausler, New York, for appellant.

Fox Rothschild LLP, New York (Jonathan Meyers of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered October 14, 2009, which, insofar as appealed from as limited by the briefs, granted defendant's motion to enforce a settlement agreement to the extent of deeming the agreement binding upon the parties and directing defendant to serve a list of companies affiliated with it using the legal definition of affiliated company as provided by 15 USC § 80a-2(a)(2), (3) of the Investment Company Act, unanimously affirmed, with costs.

At the close of a private mediation, counsel for the parties executed an agreement which provided, in part, that they had "fully and completely resolved the dispute" and released one another from any and all claims, and that the agreement was "final and binding," and "enforceable in any court of law of general jurisdiction." Plaintiff also agreed to execute a

confidentiality agreement and an "agreement not to seek future employment with Wilco and its affiliated companies."

The motion court correctly found that the mediation agreement is a valid settlement agreement, with no basis to invalidate it. It is in writing and executed (*see* CPLR 2104), and the language of the mediation agreement manifests the intent of the parties to be bound by its terms and sets forth all the material terms of the contract (*see Bed Bath & Beyond Inc. v Ibex Constr., LLC.*, 52 AD3d 413 [2008]). The fact that it is necessary for the parties to exchange general releases and execute a confidentiality agreement does not render the agreement invalid (*see Tooker v Castile*, 260 AD2d 298 [1999]; *see also Friedman v Garey*, 8 AD3d 129 [2004]).

Furthermore, it was an appropriate exercise of discretion for the court to clarify the term "affiliate" by referencing a statutory definition of that term (*see Matter of 166 Mamaroneck*

Ave. Corp. v 151 E. Post Rd. Corp., 78 NY2d 88, 91-92 [1991]).

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: FEBRUARY 8, 2011

CLERK

Sweeny, J.P., Moskowitz, DeGrasse, Freedman, Richter, JJ.

4203 The People of the State of New York, Ind. 1729/04
Respondent,

-against-

John Tolbert,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of resentence of the Supreme Court, New York County (Ruth Pickholz, J.), rendered on or about March 24, 2010,

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: FEBRUARY 8, 2011

CLERK

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

Sweeny, J.P., Moskowitz, DeGrasse, Freedman, Richter, JJ.

4205 The People of the State of New York, Ind. 1734/09
Respondent,

-against-

Romel Mompoint,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (John B.F. Martin 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 (Ronald A. Zweibel, J.), rendered on or about October 22, 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: FEBRUARY 8, 2011

CLERK

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

Sweeny, J.P., Moskowitz, DeGrasse, Freedman, Richter, JJ.

4206-
4206A In re Accounts of Separate Trusts Created Under Agreements, etc., et al.,

File 3187/01
Index 402498/09

- - - - -

Pedro Arellano Lamar, et al.,
Movants-Appellants,

-against-

Trustee, JP Morgan Chase Bank, etc.,
Respondent.

_____

Dorsey & Whitney LLP, New York (Mark S. Sullivan of counsel), for appellants.

Kelley Drye & Warren LLP, New York (Robert E. Crotty of counsel), for respondent.

_____

Order, Surrogate's Court, New York County (Troy K. Webber, S.), entered on or about August 27, 2009, which denied the motion by descendants of the grantor of certain 1927 trusts for summary judgment on their supplemental objection to respondent trustee bank's petitions to approve its trust accounts and granted respondent's cross motion to dismiss the supplemental objection to the extent of referring the matter to Supreme Court, New York County (Carol R. Edmead, J.), unanimously affirmed, without costs. Order, Supreme Court, New York County (Carol R. Edmead, J.), entered March 25, 2010, which denied the motion for summary judgment and granted the cross motion to dismiss the supplemental

objection, unanimously affirmed, without costs.

Movants seek to set aside certain trust investments, which were judicially approved in accounting decrees issued in 1953 and 1975, on the ground that the investments were tainted by self-dealing on respondent's part. They allege that recently discovered evidence shows that in making these investments respondent had a conflict of interest, which it failed to disclose during the 1953 and the 1975 proceedings. Contrary to movants' contention, the motion is correctly characterized as an attempt to open the prior decrees; thus, the Surrogate properly transferred this matter to Supreme Court (*see* CPLR 5015[a]).

The record shows that there was sufficient information disclosed in the accounts filed by respondent and in the extensive correspondence between respondent and the grantor of the trusts to put movants on inquiry notice of respondent's business relationships with the entities through which it purchased the challenged investments (*see Matter of Weir*, 182 Misc 845, 847 [1943]). Thus, movants failed to satisfy the criteria for seeking relief from the judicial decrees (CPLR 5015[a][2]; *see Matter of de Sanchez*, 57 AD3d 452 [2008]).

Furthermore, movants' evidence of alleged self-dealing fails to demonstrate that respondent had "an interest [in the entities in question] of such a substantial nature that there would be a

temptation to consider its own advantage in making the sale and not to consider solely the advantage to the beneficiaries of the trust" (*Matter of Ryan*, 291 NY 376, 406 [1943], quoting Restatement of Trusts § 170, comment on subsection [1][i]). Movants argue that pursuant to the "no further inquiry" rule the appearance of conflict is enough to invalidate the challenged investments (*see Munson v Syracuse, Geneva & Corning R.R. Co.*, 103 NY 58, 73-74 [1886]). However, the evidence does not show that, while acting as a fiduciary to the trust, respondent acted in its own interest (*see e.g. Matter of Kirkman*, 143 Misc 342, 347-348 [1932]).

As movants failed to establish their claim of self-dealing by respondent, their supplemental objection is barred by the doctrine of res judicata (see *Matter of Hunter*, 4 NY3d 260, 269-270 [2005]; *Matter of Garretson*, 92 App Div 1 [1904], *affd* 179 NY 520 [1904]).

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

ENTERED: FEBRUARY 8, 2011

CLERK

Sweeny, J.P., Moskowitz, DeGrasse, Freedman, Richter, JJ.

4207 In re Eyal Ovadia, et al., Index 101890/10
Petitioners,

-against-

Office of the Industrial Board of Appeals ("IBA"), et al.,
Respondents.

_____

D'Agostino, Levine, Landesman & Lederman, LLP, New York (Bruce H. Lederman of counsel), for petitioners.

Andrew M. Cuomo, Attorney General, New York (C. Michael Higgins of counsel), for respondents.

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Determination of respondent Industrial Board of Appeals, dated December 14, 2009, which affirmed an order of respondent Commissioner of the Department of Labor, dated July 18, 2008, directing petitioners to pay the claimants' unpaid wages, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Saliann Scarpulla, J.], entered April 30, 2010), dismissed, without costs.

Respondents correctly relied on federal law in determining whether petitioners were the claimants' employers (*see* CPLR 7803[3]). The definition of "employer" is the same under New York State and federal law (*see* Labor Law §§ 2[7]; 190[3]; 29 USC § 230[g]). "[T]he test for determining whether an entity or

person is an 'employer'" is the same under New York State and federal law (*Chu Chung v New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 318 n 6 [2003]). Petitioners contend that *Bynog v Cipriani Group* (1 NY3d 193 [2003]) is controlling here. However, the issue in *Bynog* was whether the putative employees were independent contractors, not whether a joint employment relationship existed in the context of a subcontract.

Respondents' determination that petitioners were the claimants' joint employers is supported by substantial evidence (*see* CPLR 7803[4]). A worker may be employed by more than one individual or entity at the same time (*Zheng v Liberty Apparel Co., Inc.*, 355 F3d 61, 66 [2d Cir 2003]). The determination is based on "the circumstances of the whole activity, viewed in light of economic reality," as "illuminat[ed]" by a number of factors (*id.* at 71). Here, petitioners supplied the materials used by the claimants in their work; the claimants performed discrete jobs as masons and bricklayers within petitioners' integrated construction project; the claimants were hired to work full time for petitioners until the masonry work was completed, and thus could not work on other projects at the same time; and

petitioners' principal was on the job site daily and supervised the work with the subcontractor (*see id.* at 72).

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

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

ENTERED: FEBRUARY 8, 2011

CLERK

Sweeny, J.P., Moskowitz, DeGrasse, Freedman, Richter, JJ.

4208 The People of the State of New York, Ind. 2120/07
Respondent,

-against-

Gilbert Lacen,
Defendant-Appellant.

_____

Franzblau Dratch, P.C., New York (Stephen N. Dratch of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Noah J. Chamoy of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Michael R. Sonberg, J.), rendered January 20, 2009, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him, as a second violent felony offender, to a term of 15 years, unanimously affirmed.

Defendant's challenge to the legal sufficiency of the evidence is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. We further find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342 [2007]). The evidence supported the inference that defendant and two other men assaulted the victim for the purpose of robbing him, and that defendant personally took the victim's chain as part of the robbery (*see e.g. Matter of Juan J.*, 81 NY2d

739 [1992]; *People v Allah*, 71 NY2d 830 [1988]). There is nothing to suggest that defendant was acting separately from the others.

Defendant's claims that the court should have instructed the jury on circumstantial evidence and submitted the lesser included offense of petit larceny are both waived and unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find that the evidence did not warrant either charge.

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 8, 2011

CLERK

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

4212-
4213 David Hefter, Index 117014/09
Plaintiff-Appellant,

-against-

Citi Habitats, Inc., et al.,
Defendants,

Jonathan E. Green, et al.,
Defendants-Respondents.

_____

Ralph Gerstein, Garden City, for appellant.

Jonathan E. Green, Short Hills, NJ, respondent pro se, and for Samantha A. Green, respondent.

Hinshaw & Culbertson, LLP, New York (Marka Belinfanti of counsel), for Felix Nihamin and Graubard & Nihamin, P.C., respondents.

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Orders, Supreme Court, New York County (Louis B. York, J.), entered May 24, 2010, which granted the motions of defendant sellers Jonathan Green and Samantha Green (the Greens) and defendants Felix Nihamin and Graubard & Nihamin, P.C. (collectively Nihamin) to dismiss the complaint as against them, unanimously affirmed, with costs.

Plaintiff's allegations of legal malpractice against Nihamin, the attorney who represented him in the purchase of a cooperative apartment owned by the Greens, are conclusory and were properly dismissed. There is no allegation that Nihamin had notice of any facts which might reasonably have caused him to

question the veracity of the managing agent's response to a question about future maintenance increases. The "selection of one among several reasonable courses of action does not constitute malpractice" (*Rosner v Paley*, 65 NY2d 736, 738 [1985]), and plaintiff acknowledges that further inquiry by Nihamin would have been futile. Furthermore, plaintiff's contention that Nihamin "had a potential conflict of interest" because he was recommended by the broker is, by itself, insufficient to state a claim for legal malpractice (*see Schafrann v N.V. Famka, Inc.*, 14 AD3d 363, 364 [2005]).

Plaintiff's claim for fraud against the sellers was properly dismissed. Plaintiff failed to allege that prior to the sale of the apartment the sellers had actual knowledge that a consultant hired by the cooperative had made preliminary projections that future maintenance fee increases could range from 14 percent to 142 percent (*see Nicosia v Board of Mgrs. of the Weber House*

Condominium, 77 AD3d 455, 456 [2010]).

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: FEBRUARY 8, 2011

CLERK

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

4215 In re Hells Kitchen Neighborhood Association, et al., Petitioners-Respondents-Appellants, Index 108333/09

-against-

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

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Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for municipal appellants-respondents.

Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Richard G. Leland of counsel), for MMPI Piers LLC, appellant-respondent.

Urban Environmental Law Center, New York (Albert K. Butzel of counsel), for respondents-appellants.

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Order and judgment (one paper), Supreme Court, New York County (Paul G. Feinman, J.), entered May 21, 2010, which granted the petition and, inter alia, annulled the determination of the New York City Department of Small Business Services (DSBS) to issue a negative declaration of environmental impact, and annulled the approvals and resolutions issued pursuant thereto by the New York City Planning Commission and the New York City Council, unanimously reversed, on the law, without costs, the petition denied, the determination and the approvals and resolutions issued pursuant thereto reinstated, and the proceeding dismissed. The Clerk is directed to enter judgment accordingly.

This litigation arises out of the City's plan to redevelop Piers 92 and 94, which are located along the Hudson River between West 52nd and West 55th Streets, as a mid-size trade show facility.

It was not necessary to designate the Department of Environmental Conservation (DEC) an "involved agency" as DEC had no approval authority over the action involved in this project (6 NYCRR § 617.2(s); *see Matter of Scenic Hudson, Inc. v Town of Fishkill Town Bd.*, 266 AD2d 462, 464 [1999], *lv denied* 94 NY2d 761 [2000]). As pertains here, DEC's permitting authority under the Tidal Wetlands Act and its implementing regulations only applies to "tidal wetlands and areas adjacent thereto" (ECL §§ 25-0103.1, 25-0202.1; 6 NYCRR §§ 661.1, 661.3).

6 NYCRR § 661.4(b)(1) defines an area "adjacent" to a tidal wetland in pertinent part as follows:

> "Adjacent area shall mean any land immediately adjacent to a tidal wetland within whichever of the following limits is closest to the most landward tidal wetland boundary, as such most landward tidal wetlands boundary is shown on an inventory map . . .
>
> "(i) 300 feet landward of said most landward boundary of a tidal wetland, provided, however, that within the boundaries of the City of New York this distance shall be 150 feet . . .; or
>
> "(ii) to the seaward edge of the closest lawfully and presently existing (i.e., as of August 20, 1977), functional and substantial fabricated structure (including, but not

> limited to, paved streets and highways, railroads, bulkheads and sea walls, and rip-rap walls) which lies generally parallel to said most tidal wetland landward boundary and which is a minimum of 100 feet in length as measured generally parallel to such most landward boundary, but not including individual buildings."

Pursuant to the foregoing statute, the bulkhead which runs along the Hudson River from Battery Place to West 59th Street, serves as the boundary of DEC's Tidal Wetland jurisdiction since it has existed since at least 1920, runs parallel to the Hudson River, and is several miles long. The Pier 94 headhouse, which will be renovated and reconfigured as part of the project, lies on the landward edge of the bulkhead, and is thus not in an "adjacent area" to a tidal wetland.

Nor is a tidal wetland permit required pursuant to 6 NYCRR 661.5, as the project does not involve expansion or significant alteration of the existing use of the space. Moreover, we find no evidence in the record to support petitioners' claim that the project would involve any in-water construction or would cause any impact on the Hudson River.

We agree with Supreme Cout's finding that DSBS identified the relevant areas of environmental concern, took a "hard look" at them, and made a "reasoned elaboration" of the basis for its determination (*see Matter of Riverkeeper, Inc. v Planning Bd. of*

Town of Southeast, 9 NY3d 219, 231-32 (2007); *Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986]). Further, we find that DSBS's determination was not arbitrary, capricious, an abuse of discretion, nor affected by an error of law (*see Akpan v Koch*, 75 NY2d 561, 570 [1990]).

There is no basis, and petitioners provide no legal support, for their argument that a project that falls into multiple Type I categories requires some sort of heightened scrutiny or that there is a greater presumption that an EIS is required. Indeed, while Type I projects are presumed to require an EIS, an EIS is not required when, as here, following the preparation of a comprehensive Environmental Assessment Statement (EAS), the lead agency establishes that the project is not likely to result in significant environmental impacts or that any adverse environmental impacts will not be significant. In this case, DSBS properly issued a negative declaration that no significant environmental impact will result from the project (*see* 6 NYCRR § 617.7(a)-(c)*; Spitzer v Farrell*, 100 NY2d 186, 191 [2003]).

As for petitioners' concerns about potential impacts on Clinton Cove Park, the EAS analyzed the park as an open space and found that no significant negative impacts were expected at this site and, in fact, the project would result in "new resources [that] would create an extension of Clinton Cove Park and provide

a valuable community amenity." The EAS also found that the project "would increase the total amount of open space in the study area" by over one half an acre and that a 3,390-square foot public walk would be created that would link Clinton Cove Park with a new 14,600-square foot public access area along Pier 94. It was not necessary for the EAS to mention Clinton Cove Park in every technical area analysis, or in every section of the EAS. Indeed, "an agency's responsibility under the State Environmental Quality Review Act must be viewed in light of a 'rule of reason'; not every conceivable environmental impact, mitigating measure or alternative, need be addressed in order to meet the agency's responsibility" (*Matter of C/S 12th Avenue LLC v City of New York*, 32 AD3d 1, 5 [2006]).

In any event, petitioners' concerns about Clinton Cove Park are not supported by any factual or expert evidence, and are based only on their conjecture as to how the project may impact the park. "[G]eneralized community objections" are insufficient to challenge an environmental review that is based on empirical data and analysis, such as the one here (*see Matter of WEOK Broadcasting Corp. v Planning Bd. of Town of Lloyd*, 79 NY2d 373, 385 [1992]).

Finally, the EAS included a comprehensive traffic and transportation analysis and reasonably used the existing

environmental setting as a baseline to project future traffic conditions with and without the project in 2011, the year the project would be built, and determined that no "significant impacts from project generated travel demand are expected to occur." Notably, the analysis took into account the traffic circulation improvements that would be implemented at Piers 92 and 94.

Petitioners' arguments related to traffic concerns ignore the reality that both piers are currently used for trade shows and generate traffic, and thus fail to take account of the existing conditions. Nor is there support in the record for petitioners' claim that Pier 92 is not already used as an exhibition space. To the contrary, the EAS found that Pier 92 is "also used for trade shows in conjunction with Pier 94."

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

ENTERED: FEBRUARY 8, 2011

CLERK

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

4216-
4216A In re Alex R., and Others,

Dependent Children Under the
Age of Eighteen Years, etc.,

Maria R.,
Respondent-Appellant,

Phillip R.,
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Susan Clement of counsel), attorney for the children.

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Order, Family Court, Bronx County (Monica Drinane, J.), entered on or about November 4, 2009, which, after a fact-finding hearing, determined that respondent mother had neglected the subject children, and order of disposition, same court and Judge, entered on or about January 14, 2010, which placed the children in the custody of the Administration for Children's Services until completion of the next permanency hearing, unanimously affirmed, without costs.

The presentment agency sustained its burden of demonstrating

by a preponderance of the evidence (*see Matter of Tammie Z.*, 66 NY2d 1, 3-5 [1985]) that appellant neglected the subject children by inflicting excessive corporal punishment, failing to provide the children with proper medical and dental care, and failing to provide them with adequate food. The caseworker testified that two of the children stated that appellant hit one child with a broomstick, and sometimes hit both children with her hand or with a belt. The caseworker stated that she observed the injured child and heard appellant admit to the police that she struck the child. Appellant admitted to the caseworker that she failed to take the children for medical and dental appointments for at least a year, and the caseworker noted that when she visited the home, there was no food in the refrigerator or the kitchen cabinets.

Appellant argues that the out-of-court statements of the children are inadmissible hearsay. However, such statements are admissible if properly corroborated, and they may support a finding of abuse or neglect (*see Matter of Nicole V.*, 71 NY2d 112, 118 [1987]). Here, the children's statements were corroborated by the caseworker's observations, her testimony that

she heard the mother admit to striking the child with a broomstick, the children's medical and dental records, and photographs of the injured child.

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

ENTERED: FEBRUARY 8, 2011

CLERK

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

4217 The People of the State of New York, Appellant, Ind. 7375/02 5394/98

-against-

Gilberto Sosa, Defendant-Respondent.

- - - - - - - -

4218 The People of the State of New York, Appellant,

-against-

Keith Brock, Defendant-Respondent.

_____

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes of counsel), for appellant.

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

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Judgment of resentence, Supreme Court, New York County (Marcy L. Kahn, J.), rendered January 22, 2010, resentencing defendant Sosa pursuant to CPL 440.46 to an aggregate term of 7 years, and judgment of resentence, same court and Justice, rendered February 3, 2010, resentencing defendant Brock pursuant to CPL 440.46 to a term of 7½ years, unanimously affirmed.

The resentencing court properly determined that both defendants were eligible for resentencing under the 2009 Drug Law Reform Act. These consolidated appeals involve the interpretation of the 10-year lookback provision of CPL

440.46(5)(a), which affects the eligibility of drug offenders with prior violent felony convictions for resentencing under the 2009 DRLA. We conclude that the lookback period runs back from the date of a defendant's resentencing application, and not from the date of the drug offense upon which the defendant seeks resentencing. In doing so, we agree with the reasoning set forth in the resentencing court's opinion (27 Misc 3d 638 [Sup Ct NY County 2010]), as well as with numerous other trial court decisions reaching the same conclusion (*see e.g. People v Brown*, 26 Misc 3d 1204[A], 2010 NY Slip Op 50000[U], [Sup Ct, NY County 2010]).

Initially, we reject defendants' arguments that these appeals should be dismissed. The People are entitled to appeal from an allegedly unlawful sentence (CPL 450.20[4]; 450.30[2]), and an appeal from a sentence includes an appeal from a resentence (CPL 450.30[3]). We find nothing in any of the three versions of the DRLA that limits the People's preexisting right to appeal from a resentence.

Turning to the merits, we begin by examining the statutory language. CPL 440.46(5) states that its resentencing provisions "shall not apply to any person who is serving a sentence on a conviction for or has a predicate felony conviction for an exclusion offense." As applicable here, an "exclusion offense"

is a violent felony offense "for which the person was previously convicted *within the preceding ten years*, excluding any time during which the offender was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony" (CPL 440.46[5][a] [emphasis added]).

While the People seek to interpret that provision to mean the 10 years preceding the commission of the present felony, that interpretation strains the plain meaning of the statute. The provision uses the simple phrase "preceding ten years," without reference to the date of commission of the present felony. By its plain meaning, it would mean the 10 years preceding the resentencing application, since no other time period is set forth. In contrast, where the Legislature has intended for a period to run from the date of commission of an offense back to the date of sentence of an earlier crime, it has expressly said so, or incorporated such lookback provisions by reference (*see e.g.* Penal Law § 70.04[1][b][iv]). Accordingly, the maxim expressio unius est exclusio alterius also supports the court's determination (*see generally* McKinney's Cons Laws of NY, Book 1, Statutes § 240).

This interpretation of the statute is consistent with its ameliorative purpose, as well as its concern for protection of

the public from violent drug offenders. Measuring the lookback period from the date of the application would permit drug offenders with violent pasts to eventually become eligible as those pasts fade into history, rather than making them permanently ineligible. This interpretation would also be consistent with the statute's public safety concerns, since it would still exclude persons with recent violent backgrounds.

Finally, we note that our decision in *People v Wright* (78 AD3d 474 [2010]) contains language that could be viewed as supporting the People's interpretation of the statute. That language was dictum, at most. The lookback period was not at issue in *Wright*. The phrase in question was peripheral to a discussion of a completely different issue, and was not intended to state an interpretation of the lookback provision.

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

ENTERED: FEBRUARY 8, 2011

CLERK

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

4221 In re Linda Ruiz, Index 100672/09
Petitioner-Appellant,

-against-

New York City Housing Authority,
Respondent-Respondent.

_____

Proskauer Rose LLP, New York (Jonathan G. Ellison of counsel), for appellant.

Sonya M. Kaloyanides, New York (Laura R. Bellrose of counsel), for respondent.

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Judgment, Supreme Court, New York County (Jane S. Solomon, J.), entered November 10, 2009, denying the petition to annul respondent's determination, dated November 26, 2008, which denied petitioner succession rights as a remaining family member to the apartment formerly leased to her deceased brother, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner admits that she does not qualify as a remaining family member for purposes of succession rights to her deceased brother's apartment because, contrary to respondent's policies, she never received written consent to reside in the apartment and did not live there for more than one year prior to her brother's death. Instead, she claims that "special circumstances," such as verbal assurances from an employee of respondent that she could

remain in the subject apartment, obviated her need to comply with those policies. However, the hearing officer did not act arbitrarily and capriciously in concluding that petitioner failed to establish that respondent waived its right to insist on strict compliance with its policies (*see Torres v New York City Housing Authority* (40 AD3d 328 [2007]).

Moreover, the record belies petitioner's contention that the hearing officer failed to consider the evidence of her alleged special circumstances. In her decision, the hearing officer expressly concluded that "[petitioner's] reliance upon the interpretation of information gathered through telephone conversations does "not negate the responsibility of the Tenant to secure the written approval of management prior to adding anyone to the household." We find therefore that the hearing officer considered the evidence before her and that the determination has a rational basis (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]).

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

ENTERED: FEBRUARY 8, 2011

CLERK

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

4222 The People of the State of New York, Ind. 6066/08
Respondent, 6172/08

-against-

Kerwin Johnson,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie G. Wittner, J.), rendered on or about October 20, 2009, as amended November 19, 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: FEBRUARY 8, 2011

CLERK

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

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

4229 The People of the State of New York, Ind. 2212/07
Respondent,

-against-

Joshua Martell,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Jane Levitt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Richard Nahas 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 (Charles H. Solomon, J.), rendered on or about December 18, 2007,

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: FEBRUARY 8, 2011

CLERK

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

Mazzarelli, J.P., Acosta, Richter, Abdus-Salaam, Román, JJ.

3791-
3792- 166 Enterprises Corp., Index 120841/02
3792A Plaintiff-Respondent-Appellant, 103121/04

-against-

I G Second Generation Partners, L.P.,
Defendant-Appellant-Respondent.

[And Another Action]

I G Second Generation Partners, L.P., et al., Index 100749/09
Plaintiffs-Respondents,

-against-

166 Enterprises Corp.,
Defendant-Appellant.

_____

Livoti Bernstein & Moraco P.C., New York (Robert F. Moraco of counsel), for appellant-respondent/respondents.

Oved & Oved LLP, New York (Darren Oved of counsel), for respondent-appellant/appellant.

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Judgment, Supreme Court, New York County (Judith J. Gische, J.), entered December 10, 2008, modified, on the law, to vacate the declarations concerning the *Yellowstone* injunction, the cure period and the notice of termination, and to declare instead that the cure period expired January 9, 2003 and that, pursuant to the notice of termination served on January 15, 2003, the lease was terminated on January 20, 2003, and otherwise affirmed, without costs. Appeal from the October 21, 2008 decision, same court and Justice, dismissed, without costs, as taken from a nonappealable paper. Appeal from the order and judgment (one paper), same court (Louis B. York, J.), entered January 20, 2010, dismissed, without costs, as academic.

Opinion by Richter, J. All concur. Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Rolando T. Acosta
Rosalyn H. Richter
Sheila Abdus-Salaam
Nelson S. Román, JJ.

3791-
3792-
3792A

Index 120841/02
103121/04
100749/09

_____x

166 Enterprises Corp.,
Plaintiff-Respondent-Appellant,

-against-

I G Second Generation Partners, L.P.,
Defendant-Appellant-Respondent.

[And Another Action]

I G Second Generation Partners,
L.P., et al.,
Plaintiffs-Respondents,

-against-

166 Enterprises Corp.,
Defendant-Appellant.
_____x

Cross-appeals from a judgment of the Supreme Court, New York County (Judith J. Gische, J.), entered December 10, 2008, after a nonjury trial, to the extent appealed from as limited by the

briefs, declaring that plaintiff 166 Enterprises Corp. breached a substantial obligation under its lease with defendant I G Second Generation Partners, L.P. by failing to maintain insurance in the coverage amounts required by the lease, that a *Yellowstone* injunction was granted nunc pro tunc as of September 24, 2002, that the running of the cure period was retroactively tolled and did not expire on January 9, 2003, that the notice of termination served on January 15, 2003 was a nullity and did not effect a termination of the lease on January 20, 2003, and that the *Yellowstone* injunction and cure period remained in effect until a copy of the judgment with notice of entry was served upon 166 Enterprises Corp.'s attorney. I G Second Generation Partners, L.P. appeals from a decision, same court and Justice, entered October 21, 2008. 166 Enterprises Corp. appeals from an order and judgment (one paper), same court (Louis B. York, J.), entered January 20, 2010, inter alia, awarding I G Second Generation Partners, L.P. possession of the premises.

Livoti Bernstein & Moraco PC, New York (Robert F. Moraco of counsel), for appellant-respondent/respondents.

Oved & Oved LLP, New York (Darren Oved and Andrew J. Urgenson of counsel), for respondent-appellant/appellant.

RICHTER, J.

Plaintiff 166 Enterprises Corp. (Tenant) and defendant I G Second Generation Partners, L.P. (Landlord) are parties to a commercial lease for two stores on the first floor of a building located on Second Avenue in Manhattan. Tenant subleased the premises to an entity that operated a chain clothing store. On September 10, 2002, Landlord served a 15-day notice to cure alleging that Tenant had failed to pay rent and late fees and failed to procure the required amount of liability insurance. On September 24, 2002, one day before the cure period was to expire, Tenant brought an action seeking declaratory relief and sought a *Yellowstone* injunction (Action No. 1). A temporary restraining order was issued staying the cure period pending the hearing and determination of the motion.

By decision and order dated January 8, 2003, Supreme Court (Marilyn Shafer, J.) denied the *Yellowstone* motion on the ground that Tenant had failed to show that it was ready and able to cure the default regarding the liability insurance. Since there was only one day left in the cure period when the TRO was initially obtained, the cure period expired the next day, January 9, 2003. On January 15, 2003, Landlord served Tenant with a notice of termination, effective January 20, 2003.

On January 21, 2003, despite the fact that the lease had

already been terminated, Tenant moved to renew and reargue its application for a *Yellowstone* injunction. In its motion, Tenant conceded that the original motion papers had inadvertently failed to address its ability to cure the alleged insurance default. Tenant belatedly attached a copy of a certificate of liability insurance to its moving papers. By decision and order dated April 17, 2003, Justice Shafer granted the motion, finding that Tenant's submission of the insurance certificate was sufficient to show that Tenant was ready and able to cure the default. The court did not address whether it was empowered to issue a *Yellowstone* injunction where the cure period had expired and the lease had been terminated. Nor did the court discuss whether the injunction could be made retroactive to the date of the original *Yellowstone* motion.

Tenant's declaratory judgment action proceeded to trial, and in a decision entered October 21, 2008, Supreme Court (Judith J. Gische, J.) found that Tenant had breached the insurance provision, justifying termination of the lease. Justice Gische interpreted Justice Shafer's April 17, 2003 decision as having granted the *Yellowstone* injunction nunc pro tunc as of September 24, 2002, the date of Tenant's initial *Yellowstone* application. Thus, Justice Gische concluded that Tenant still had a right to cure, limited to the period remaining in the cure period at the

time the first *Yellowstone* application was brought (*i.e.*, one day). On December 10, 2008, a judgment was entered consistent with the decision. In addition, the judgment expressly found that the January 15, 2003 notice of termination was a nullity because, according to Justice Gische, the cure period had not yet expired at the time the notice was served.

Landlord then served a second notice of termination terminating the lease as of December 31, 2008 because no cure was effected by Tenant. Landlord thereafter commenced an ejectment action (Action No. 3) and moved for summary judgment. In an order and judgment entered January 20, 2010, Supreme Court (Louis B. York, J.) awarded Landlord possession of the premises.

Initially, we reject Tenant's contention that Landlord's appeal is academic because, by serving a second notice of termination in 2008, Landlord waived any right to enforce the 2003 notice of termination, and because Landlord is judicially estopped from seeking to enforce the 2003 notice of termination by the January 20, 2010 order and judgment terminating the lease pursuant to the 2008 notice of termination. Landlord's service of a second notice of termination after losing at the trial on the first notice does not constitute a waiver of its argument that the decision on the first notice was in error. There is also no merit to Tenant's claim that Landlord's appeal is not

properly before us. Because Justice Gische expressly reached the issue whether or not the court should give retroactive effect to the earlier order granting *Yellowstone* relief, Landlord may raise the issue on appeal from the resulting judgment.

Justice Gische correctly found that Tenant failed to obtain insurance in the required amount and that such failure constituted a material breach justifying termination of the lease (*see C & N Camera & Elecs., Inc. v Farmore Realty*, 178 AD2d 310 [1991]). Even if Tenant had been able to prove that its subtenant was carrying adequate insurance in Landlord's favor, the defect would not have been cured, because "landlord is not required to accept subtenant's performance in lieu of tenant's" (*Federated Retail Holdings, Inc. v Weatherly 39th St., LLC*, 77 AD3d 573, 574 [2010]). Nor was Landlord required to exercise its option under the lease of obtaining its own insurance and billing it to Tenant as additional rent (*see Jackson 37 Co., LLC v Laumat, LLC*, 31 AD3d 609 [2006]).

However, Justice Gische improperly concluded that Tenant still had the right to cure its breach. It is well-settled that a tenant is not entitled to a *Yellowstone* injunction after the cure period has expired (*KB Gallery, LLC v 875 W. 181 Owners Corp.*, 76 AD3d 909 [2010]; *Retropolis, Inc. v 14th St. Dev., LLC*, 17 AD3d 209 [2005]; *Prince Fashions, Inc. v 542 Holding Corp.*, 15

AD3d 214 [2005]). Here, after the initial *Yellowstone* application was denied, the stay of the cure period was lifted and the cure period expired on January 9, 2003. Since Tenant's motion to renew/reargue its *Yellowstone* application was brought after this date, the court could not grant *Yellowstone* relief in this case (*see e.g. Gyncor, Inc. v Ironwood Realty Corp.*, 259 AD2d 363 [1999]).

Nor, under the circumstances here, should Justice Gische have given retroactive effect to the *Yellowstone* injunction. This case does not fall within the limited exceptions for which such nunc pro tunc relief has been authorized. In each of the cases relied upon by Tenant (*SHS Baisley, LLC v Res Land, Inc.*, 18 AD3d 727 [2005]; *Prince Lbr. Co. v CMC MIC Holding Co.*, 253 AD2d 718 [1998]; *Mann Theatres Corp. of Cal. v Mid-Island Shopping Plaza Co.*, 94 AD2d 466 [1983], *affd* 62 NY2d 930 [1984]), retroactive relief was allowed as a result of improper actions by the court or due to judicial inadvertence. Here, in contrast, no such court error was shown. Justice Shafer's initial denial of the *Yellowstone* application was entirely proper since even Tenant concedes that it failed to establish in its original motion that it was ready and able to cure the default.

Moreover, the failure to ensure that the cure period did not lapse was entirely Tenant's fault. After Justice Shafer denied

the first *Yellowstone* application, Tenant waited almost two weeks before filing its motion to renew/reargue. By this time, the cure period had expired and the lease had already been terminated. Tellingly, after Justice Shafer initially denied *Yellowstone* relief, Tenant never sought any further stay of the running of the cure period either from the trial court or from this Court. Under these circumstances, the *Yellowstone* injunction should not have been afforded retroactive application (*see T.W. Dress Corp. v Kaufman*, 143 AD2d 900 [1988] [lapse of *Yellowstone* TRO was not a mere technicality where the plaintiff's counsel failed to obtain an extension of the TRO and allowed the cure period to expire]).

Finally, Justice Gische should not have found that Landlord's 2003 notice of termination was a nullity. At the time Landlord served the notice, the cure period had expired and Tenant had not cured its breach. Since there was no temporary restraining order in place at that time, the notice was validly served and the lease was terminated. Once the lease was terminated in accordance with its terms, the court lacked the power to revive it (*see Dove Hunters Pub v Posner*, 211 AD2d 494 [1995]; *Austrian Lance & Stewart v Rockefeller Ctr.*, 163 AD2d 125 [1990]).

Because Landlord's first notice of termination was valid and

the lease was terminated on January 20, 2003, its 2008 notice of termination should not have been necessary. In light of this determination, Tenant's appeal from the January 20, 2010 order and judgment should be dismissed as academic.

We have considered Tenant's remaining arguments for affirmative relief and find them unavailing.

Accordingly, the judgment of the Supreme Court, New York County (Judith J. Gische, J.), entered December 10, 2008, after a nonjury trial, to the extent appealed from as limited by the briefs, declaring that plaintiff 166 Enterprises Corp. breached a substantial obligation under its lease with defendant I G Second Generation Partners, L.P. by failing to maintain insurance in the coverage amounts required by the lease, that a *Yellowstone* injunction was granted nunc pro tunc as of September 24, 2002, that the running of the cure period was retroactively tolled and did not expire on January 9, 2003, that the notice of termination served on January 15, 2003 was a nullity and did not effect a termination of the lease on January 20, 2003, and that the *Yellowstone* injunction and cure period remained in effect until a copy of the judgment with notice of entry was served upon Tenant's attorney should be modified, on the law, to vacate the above declarations concerning the *Yellowstone* injunction, the cure period and the notice of termination, and to declare instead

that the cure period expired January 9, 2003 and that, pursuant to the notice of termination served on January 15, 2003, the lease was terminated on January 20, 2003, and otherwise affirmed, without costs. The appeal from the decision, same court and Justice, entered October 21, 2008, order should be dismissed, without costs, as taken from a nonappealable paper. The appeal from the order and judgment (one paper), same court (Louis B. York, J.), entered January 20, 2010, inter alia, awarding Landlord possession of the premises, should be dismissed, without costs, as academic.

All concur.

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

ENTERED: FEBRUARY 8, 2011

CLERK