SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 28,2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Andrias, J.P., Friedman, Acosta, DeGrasse, JJ.

3220 John F. Schutty, Index 602485/08
Plaintiff-Appellant-Respondent,

-against-

Speiser Krause P.C., et al.,
Defendants-Respondents-Appellants.

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Lazare Potter & Giacovas LLP, New York (Robert A. Giacovas of counsel), for appellant-respondent.

Leitner & Getz LLP, New York (Gregory J. Getz of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered October 28, 2009, which, insofar as appealed from as limited by the briefs, granted defendants' motion to dismiss the second and third branches of the first cause of action (unpaid salary and 10% fee split) and the third, fourth, fifth, sixth and seventh causes of action, unanimously modified, on the law, the motion denied insofar as it is addressed to the second branch of the first cause of action (unpaid salary), and otherwise affirmed, without costs. Defendants' cross appeal from the same order, unanimously dismissed, without costs, as

academic.

Plaintiff, an attorney, was formerly employed by defendant law firm (collectively with the other defendants, Speiser) pursuant to a written agreement executed in 2003. Plaintiff alleges that, in March 2005, Speiser orally promised him that, if he remained with the firm, he would be paid, in addition to his salary, 10% of fees earned on certain work. Plaintiff remained with the firm, but the parties' subsequent efforts to agree on the terms of a new employment contract were unsuccessful. Ultimately, plaintiff resigned from Speiser in July 2007 and subsequently commenced this action for breach of contract and other causes of action. On plaintiff's appeal from the order granting Speiser's pre-answer motion to dismiss pursuant to CPLR 3211(a)(1), (5) and (7) with respect to most portions of the complaint, we modify to reinstate the cause of action for breach of contract insofar as it seeks to recover unpaid salary, and otherwise affirm.

Plaintiff's first cause of action, for breach of contract, has three branches, the second and third of which are at issue on this appeal. The second branch seeks to recover plaintiff's unpaid salary for the first six months of 2007; at the time, Speiser allegedly told plaintiff that it needed to suspend his salary due to cash flow problems. The motion court erred in

dismissing this claim based on documentary evidence that plaintiff issued an invoice in his own name in February 2007, apparently in violation of a term of his employment agreement. The invoice and other documents in the record do not establish whether plaintiff began this work with the intent to benefit only himself before Speiser told him that the payment of his salary would be suspended, and thus we cannot determine as a matter of law that plaintiff was in material breach of the contract. However, the third branch of the first cause of action, which seeks to enforce the alleged oral agreement to pay plaintiff 10% of the fees Speiser received for certain work, was correctly dismissed. The documentary evidence of the parties' unsuccessful negotiations on the terms of a contemplated new employment agreement (including multiple drafts of same, the parties' correspondence, and plaintiff's written letter of resignation) establish that the parties did not intend to be bound until there was a signed written contract and that there was never a meeting of the minds on all material terms of the new agreement of which the proposed 10% fee split was intended to be a part (*see e.g. Langer v Dadabhoy*, 44 AD3d 425 [2007], *lv denied* 10 NY3d 712 [2008]; *Spier v Southgate Owners Corp.*, 39 AD3d 277 [2007]; *Galesi v Galesi*, 37 AD3d 249 [2007]; *Yenom Corp. v 155 Wooster St. Inc.*, 23 AD3d 259 [2005], *lv denied* 6 NY3d 708 [2006]).

The remaining causes of action at issue were correctly dismissed. The third cause of action (entitled "promissory misrepresentation") and fourth cause of action (entitled "promissory fraud") seek recovery for Speiser's failure to honor the alleged oral promise to pay plaintiff 10% of fees for certain work, on which promise plaintiff allegedly relied by declining another offer of employment. To the extent these causes of action seek recovery under a theory of promissory estoppel, the documentary evidence of the parties' lengthy and fruitless negotiations establishes as a matter of law that there was no clear and unambiguous promise on which plaintiff reasonably could have relied (*see Azimut-Benetti S.p.A. v Magnum Mar. Corp.*, 55 AD3d 483, 484 [2008]; *Steele v Delverde S.R.L.*, 242 AD2d 414, 415 [1997]). Similarly, the third and fourth causes of action are legally insufficient to the extent they seek recovery under a theory of fraud or misrepresentation inasmuch as the documentary evidence of the parties' negotiations negates as a matter of law the element of justifiable reliance on the alleged false promise (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]). The fifth cause of action, for quantum meruit, was correctly dismissed because, in the absence of an agreement on new terms, plaintiff's employment continued to be governed by the 2003 agreement, and recovery under the theory of quantum meruit

is unavailable where an express contract covers the same subject matter (*see Parker Realty Group, Inc. v Petigny*, 14 NY3d 864 [2010]). The sixth cause of action, alleging breach of fiduciary duty, was correctly dismissed on the ground that plaintiff's allegations do not support the existence of a higher level of trust between the parties than in the normal employment relationship (*see Rather v CBS Corp.*, 68 AD3d 49, 55 [2009], *lv denied* 13 NY3d 715 [2010]). Finally, the seventh cause of action, alleging tortiouis interference with contract against defendant Halloran, was correctly dismissed on the ground that Halloran, as a member of the Speiser firm, acted to protect his own financial interest (*see White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]).

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

ENTERED: JULY 28, 2011

CLERK

Andrias, J.P., Saxe, Moskowitz, Acosta, Freedman, JJ.

3923 Admiral Insurance Company, et al., Index 8140/07
Plaintiffs-Respondents-Appellants,

-against-

State Farm Fire and Casualty Company, etc.,
Defendant-Appellant-Respondent.

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Saretsky Katz Dranoff & Glass, L.L.P., New York (Allen L. Sheridan of counsel), for appellant-respondent.

Kral, Clerkin, Redmond, Ryan, Perry & Van Etten, LLP, Melville (Leonard Porcelli of counsel), for respondents-appellants.

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Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered May 5, 2009, which, in an action seeking, inter alia, a declaration that defendant must defend and indemnify plaintiff P&K Contracting, Inc. (P&K) in the underlying personal injury action, denied plaintiffs' motion for summary judgment and denied defendant's cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In November 2000, the New York State Dormitory Authority hired P&K, insured by plaintiff Admiral Insurance Company, to perform construction work at North Central Bronx Hospital. On May 14, 2001, P&K entered a subcontract with Shahid Enterprises which required Shahid to procure additional insured coverage for P&K. Shahid obtained that coverage under a policy with defendant State Farm.

On October 19, 2002, Lakhwinder Singh, a Shahid employee, was injured when he fell from a ladder at the job site. In 2003, Singh sued P&K, the City of New York and New York City Health and Hospitals Corporation. It is unclear from the record when P&K first received notice of the accident or suit.

On or about September 22, 2003, United Claims Service (UCS), as "authorized representatives for Admiral Insurance Company, the liability insurance carrier for P&K," sent a letter to Shahid, with copies to Admiral and P&K, stating: "Please accept this letter as notice that in view of the fact that our insured [P&K] did not have any employees or equipment on this job site and that the ladder that the claimant fell from was owned by your company, we demand that you assume the defense and indemnification of this matter." UCS asked Shahid to turn the letter over to its insurance carrier.

On or about December 17, 2003, UCS sent a follow up letter to Shahid, with copies to State Farm, Admiral and Singh's counsel, stating that Shahid was responsible for Singh's injuries and that UCS had been attempting to secure Shahid's cooperation "in the form of reporting this matter to your insurance carrier." UCS asked for information as to the Workers' Compensation carrier to whom the accident was reported and stated that the letter would serve to advise Singh's counsel that his claim should be

pursued through State Farm. State Farm contends that its copy of the letter was forwarded to an inactive claims office and that it did not receive the tender until January 22, 2004.

On or about February 5, 2004, State Farm wrote to USC acknowledging receipt of the December 17, 2003 letter and requesting a copy of the file because it had no information about any alleged accident occurring on October 19, 2002. On the same date, State Farm wrote to P&K, requesting information, and to Shahid, asking its principal to call. State Farm also noted that it had been attempting unsuccessfully to contact Shahid.

By letter dated March 19, 2004, addressed to P&K with copies to UCS, Admiral, Singh's counsel and Shahid, State Farm reserved its rights to deny defense and indemnity to P&K based on late notice. By letter dated March 22, 2004, UCS advised State Farm that Shahid had been placed on notice on September 22, 2003 and reiterated its request that State Farm assume the defense of P&K based upon the contractual and indemnification agreement in the subcontract. By letter dated March 23, 2004, addressed to USC with a copy to P&K, State Farm responded that it needed to know when P&K was first given notice of the claim, and whether the matter was in suit.

By letter dated April 13, 2004, addressed to P&K with copies to UCS, Admiral, Shahid, and Singh's attorney, State Farm advised

P&K that it was disclaiming coverage based on P&K's alleged failure to give prompt notice. In February 2007, Admiral and P&K commenced this suit seeking a declaration that the State Farm policy offers primary coverage for the Singh action and that State Farm is obligated to defend and indemnify P&K for any damages awarded against P&K in that action and to reimburse Admiral and P&K for all attorneys' fees, costs, expenses and disbursements they had expended therein. State Farm alleged as an affirmative defense that plaintiffs failed to notify it promptly of the accident, claim and suit, as required by the policy.

Plaintiffs moved for summary judgment on the ground that State Farm's April 14, 2004 disclaimer was untimely, and that State Farm thus failed to comply with Insurance Law § 3420(d). State Farm opposed and cross moved for summary judgment dismissing the complaint, arguing that Insurance Law § 3420(d) was not applicable, and that, even if it were, any delay in issuing its denial of coverage was reasonable. Sometime prior to the determination of the motions, the Singh action was settled at mediation, attended by counsel for P&K and Admiral, for $975,000. P&K's share of the settlement was $900,000, which is within the limits of both the Admiral and State Farm policies.

Supreme Court denied both the motion and cross motion. The

court found that while Insurance Law § 3420(d) applied because this action was commenced long before the settlement in the underlying action, and P&K, a co-plaintiff, had a real stake in its outcome, there was a question of fact as to whether State Farm had disclaimed coverage as soon as was reasonably possible. We now affirm.

Insurance Law § 3420(d)(2) requires that an insurer intending to disclaim liability under a liability policy "shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant." "The purpose of Insurance Law § 3420 (d) is to protect the insured, the injured party, 'and any other interested party who has a real stake in the outcome' from prejudice resulting from a belated denial of coverage" (*Tops Mkts. v Maryland Cas.*, 267 AD2d 999, 1000 [1999], quoting *Excelsior Ins. Co. v Antretter Contr. Corp.*, 262 AD2d 124, 127 [1999]). Recognizing that this is not a risk to which a coinsurer is subject, New York courts have held that § 3420(d) does not apply to an insurer seeking contribution from a coinsurer for the defense and indemnification of an alleged joint

insured (*see American Guar. & Liab. Ins. Co. v State Natl Ins. Co., Inc.*, 67 AD3d 488 [2009]; *Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 AD3d 84, 92 [2005]; *AIU Ins. Co. v Investors Ins. Co.*, 17 AD3d 259, 260 [2005]; *Top Mkts.*, 267 AD2d at 1000).

In contrast, an insurer has been required to give timely notice of disclaimer pursuant to Insurance Law § 3420(d), where the letter requesting a defense and indemnity was sent by the plaintiff's insurance carrier on behalf of the plaintiff (*see Industry City Mgt. v Atlantic Mut. Ins. Co.*, 64 AD3d 433, 433 [2009] ["Industry correctly argues that a March 2005 letter to defendant, written on Industry's behalf by its own insurer's claims administrator, seeking coverage for Industry as an additional insured, constituted timely notice to the insurer within the meaning of Insurance Law § 3420(a)(3), and as such required a timely disclaimer from defendant"]; *J.T. Magen v Hartford Fire Ins. Co.*, 64 AD3d 266, 269 [2009] ["the tender letter insurer Travelers wrote on behalf of plaintiff and others to insurance carrier Hartford - asking that their mutual insureds be provided with a defense and indemnity, as additional insureds under the policy issued to Erath - fulfills the policy's notice of claim requirements so as to trigger the insurer's obligation

to issue a timely disclaimer pursuant to Insurance Law § 3420(d)"], *lv dismissed*, 13 NY3d 88 [2009]*; 233 E. 17th St., LLC v L.G.B. Dev., Inc.*, 78 AD3d 930, 932 [2010] ["Contrary to Mt. Hawley's contention, it was required to give timely notice of disclaimer pursuant to Insurance Law § 3420(d), even though the letter requesting a defense and indemnity was sent by the plaintiff's insurance carrier on behalf of the plaintiff"]).

Here too, the relevant correspondence demonstrates that the tender was issued on P&K's behalf and fulfilled the State Farm policy's notice-of-claim requirements so as to trigger State Farm's obligation to issue a timely disclaimer to P&K pursuant to Insurance Law § 3420(d). In its September 22, 2003 letter to Shahid, UCS, as Admiral's representative, sought a defense and indemnification for P&K. UCS's December 17, 2003 follow-up, which referenced the September 22, 2003 letter, was sent to Shahid and State Farm. When State Farm received the letter, it acknowledged the claim and, among other things, wrote directly to P&K, requesting information. By letter dated March 19, 2004, State Farm addressed its reservation of rights letter to P&K. In its March 22, 2004, UCS reiterated its request that State Farm assume the defense of P&K based upon the contractual and indemnification agreement in the subcontract. State Farm's April 13, 2004 disclaimer letter was addressed to P&K.

P&K is also a named plaintiff in this declaratory judgment action. At the time the action was commenced, the Singh action remained pending. While the action was later settled, the rider to the mediation agreement expressly states that State Farm declined to participate in the mediation or contribute to the settlement, which was without prejudice to P&K's and Admiral's right to pursue this declaratory judgment action.

Although Insurance Law § 3420(d) is applicable to the tender on behalf of P&K, triable issues of fact exist regarding the timeliness of State Farm's disclaimer, given the factual dispute as to whether any delay in issuing its denial of coverage was brought about by the deliberate failure of Admiral and UCS to respond to State Farm's reasonable and good faith request for assistance in investigating the underlying claim.

The timeliness of a disclaimer is generally a question of fact (*see Continental Cas. Co. v Stradford*, 11 NY3d 443, 449 [2008]), unless the basis for the disclaimer was, or should have been, readily apparent before the onset of the delay (*see First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 69 [2003]; *West 16th St. Tenants Corp. v Public Serv. Mut. Ins. Co.*, 290 AD2d 278, 279 [2002], *lv denied* 98 NY2d 605 [2002]). "An insurer is not required to disclaim on timeliness grounds before conducting a prompt, reasonable investigation into other possible grounds

for disclaimer; in fact, a reasonable investigation is preferable to piecemeal disclaimers" (*DiGuglielmo v Travelers Prop. Cas.*, 6 AD3d 344, 346 [2004], *lv denied* 3 NY3d 608 [2004] [internal quotation marks omitted]).

Here, plaintiffs' claim that State Farm delayed 113 days is based on their contention that State Farm could have disclaimed upon receiving the December 17, 2003 letter. However, an issue of fact exists as to whether State Farm acted reasonably in seeking to investigate further inasmuch as that letter contained no information regarding when P&K received notice of the incident or suit, and thus did not make it "readily apparent" that State Farm had the right to disclaim coverage. Moreover, this Court has disapproved of the policy urged by plaintiffs to "disclaim now and investigate later" (*Ace Packing Co., Inc. v Campbell Solberg Assoc., Inc.*, 41 AD3d 12, 15-16 [2007] [internal quotation marks omitted]).

Finally, we note that if coverage is available under the State Farm policy, it would be a co-primary insurer with Admiral (*see 233rd St. Partnership, L.P. v Twin City Fire Ins. Co.*, 52 AD3d 292, 293 [2008]).

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

ENTERED: JULY 28, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

4154 Savik, Murray & Aurora Construction Management Co., LLC,
Plaintiff-Appellant,

-against-

ITT Hartford Insurance Group, et al.,
Defendants-Respondents,

INSCORP of New York, etc.,
Defendant.

Index 110593/06

Goetz Fitzpatrick LLP, New York (Neal M. Eiseman of counsel), for appellant.

Churbuck Calabria Jones & Materazo, P.C., Hicksville (Nicholas P. Calabria of counsel), for ITT Hartford Insurance Group, respondent.

Kalison, McBride, Jackson & Robertson, P.C., New York (Andrew F. McBride III of counsel), for QBE Insurance Corp., respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered February 2, 2010, which, insofar as appealed from as limited by the briefs, upon reargument, effectively adhered to its judgment, entered May 12, 2009, declaring the verified amended complaint dismissed, modified, on the law, to declare that Hartford and QBE had no duty to defend plaintiff in the underlying arbitration, and, as so modified, affirmed, without costs.

This is an action for a judgment granting reimbursement of defense costs and declaring that defendants, plaintiff's

insurers, were obligated to defend and indemnify plaintiff in an arbitration proceeding brought by Farmingdale Development Corporation (FDC). On this record, we find, as a matter or law, that Hartford and QBE did not receive timely notice of the underlying occurrence as required by their respective policies.

Plaintiff is a limited liability company managed by Frank Vero, Sr. and two other managing members. In 1998, plaintiff began its work as the construction manager in the development of a shopping center pursuant to a written agreement with FDC, the owner. As to this project, plaintiff was an additional insured under standard commercial general liability policies issued by Hartford and QBE. A third carrier, defendant The Insurance Corp. of New York, is now in rehabilitation. Aurora Construction, Inc. performed construction management duties on behalf of plaintiff. Vero, who was Aurora's president, owned its stock solely or jointly with his son at different times. Plaintiff left the job site in May 2000, three months after the project was substantially completed. As confirmed by a September 1999 letter signed by Joseph Koslow, plaintiff's project executive, the project had been plagued by numerous ongoing roof leaks.[1]

[1]In the letter, Koslow advised the addressee, a subcontractor, to notify its insurance company of the problem, which Koslow described as an apparent "disaster on *our* hands" (emphasis added).

On or about May 12, 2004, FDC served plaintiff with an arbitration demand, which cited plaintiff's failure to take action with respect to the construction of the project's roofing system and parapets. According to the arbitration demand, extensive roof leaks occurred in all of the project's buildings. It was not until June 4, 2004 that plaintiff notified Hartford and QBE of FDC's claim or the occurrence. Both carriers thereupon issued reservation of rights letters and, after plaintiff commenced this action, moved for summary judgment. The grounds for summary judgment asserted by Hartford and QBE included plaintiff's purported breach of a provision in each of their policies that required plaintiff, as the insured, to notify the respective carrier, as soon as practicable, of "an 'occurrence' or an offense which may result in a claim." The motion court granted summary judgment and dismissed the complaint on the ground that the underlying claim came under the work product exclusion of each of the applicable policies. Upon granting leave to reargue, the court again ruled in favor of Hartford and QBE, finding that the costs FDC sought to recover in the underlying arbitration arose out of plaintiff's work product. For reasons that follow, the judgment below should be modified on the late notice-of-occurrence ground that was asserted by Hartford and QBE but never addressed by the motion court.

"Where a policy of liability insurance requires that notice of an occurrence be given 'as soon as practicable,' such notice must be accorded the carrier within a reasonable period of time" (*Great Canal Realty Corp. v Seneca Ins. Co., Inc.* 5 NY3d 742, 743 [2005] [citation omitted]). "The insured's failure to satisfy the notice requirement constitutes 'a failure to comply with a condition precedent which, as a matter of law, vitiates the contract'" (*id.* [citation omitted]). Nevertheless, circumstances that give rise to an insured's "good-faith belief of nonliability may excuse or explain a seeming failure to give timely notice" (*Security Mut. Ins. Co. of N. Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 441 [1972]).

By an August 11, 2003 letter to the roofing manufacturer, John A. Buchholz, the project's architect stated, among other things, that FDC was prepared to have the roof leaks repaired and begin litigation with plaintiff and others. The letter indicates that it was carbon copied to Vero. Plaintiff does not challenge the admissibility of the letter. Instead, plaintiff coyly asserts that there is nothing in the record to confirm that Vero received a copy of the letter. This assertion rings hollow as plaintiff has not submitted an affidavit on this or any other issue by Vero or, for that matter, either of plaintiff's other two members. To be sure, plaintiff never denied that it received

Buchholz's letter in 2003. Plaintiff skirted the issue of notice of the occurrence by submitting the affidavit of Nicholas R. Aldorisio, Aurora's CFO, who merely stated that "[t]he first actual notice to [plaintiff] of an affirmative claim by Farmingdale occurred when [plaintiff] received Farmingdale's demand for arbitration on or about May 2004." Aldorisio's affidavit begs the question because it addresses plaintiff's receipt of a formal claim as opposed to its knowledge of an "'occurrence' or offense which may result in a claim." An insured's duty to timely report an occurrence is distinct from its duty to report a claim (*American Tr. Ins. Co. v Sartor,* 3 NY3d 71, 75 [2004]).

Hartford and QBE made prima facie showings of entitlement to judgment as a matter of law based upon plaintiff's 4½-year delay in notifying them of the occurrence (*see e.g. Sorbara Constr. Corp. v AIU Ins. Co.,* 11 NY3d 805, 806 [2008]). In opposition, plaintiff was required to demonstrate the existence of actual issues of fact by assembling and laying bare proofs in order to show that its claims are capable of being established at trial (*cf. Machinery Funding Corp. v Loman Enters.,* 91 AD2d 528, 528 [1982]). On the basis of the construction management agreement, the dissent posits that there is an issue of fact as to whether plaintiff had a reasonable belief in its nonliability. The

record does not support the dissent's conclusion because there is no affidavit setting forth what plaintiff believed or did not believe at the time of the occurrence or thereafter. For this reason, plaintiff's failure to submit an affidavit by any of its members is fatal. Hence, plaintiff has failed to raise a triable factual issue as to whether there was a reasonable excuse for its delay in notifying Hartford and QBE of the occurrence.

We also reject plaintiff's claim of a reasonable excuse. In *Ferreira v Mereda Realty Corp.* (61 AD3d 463, 463 [2009]), we found that "the insureds could not have reasonably believed that there would be no litigation arising out of the accident," once they acquired knowledge of the seriousness of the underlying injury. In *Eveready Ins. Co. v Levine* (145 AD2d 526, 528 [1988]), the Second Department found that an insured's "bare reliance upon the fact that no one complained of any bodily injuries at the time of the accident" did not excuse the insured's failure to notify its carrier until after suit was commenced. By contrast, in *Kambousi Rest. v Burlington Ins. Co.* (58 AD3d 513, 515 [2009]), we held that a good-faith belief in nonliability was established by statements and actions of an injured patron and her husband that led the insured restauranteur to believe that the couple would not seek to hold the insured liable for a trip-and-fall accident. Like the insureds in

Ferreira and *Eveready*, plaintiff appreciated the seriousness of the occurrence and its potential for liability. Indeed, as footnoted above, early on in the project, plaintiff's project executive saw fit to advise a subcontractor to notify its own carrier about the "disaster." Unlike the insured in *Kambousi*, however, plaintiff offered no evidence of any representation that could have reasonably led it to believe that FDC would not seek to hold it liable.

Correspondence sent by Aurora also establishes when plaintiff acquired notice of the underlying occurrence. On or about December 4, 2003, Aurora apparently faxed a letter from Buchholz to plaintiff's counsel. The fax cover sheet reads as follows: "Attached please find a letter received from John Buchholz regarding the roof leak issue at Airport Plaza. We have written correspondence in the past detailing our position as construction manager. Please draft an appropriate response." By way of another fax cover sheet, dated February 2, 2004, Aurora informed counsel that it appeared that the owner was blaming Aurora for the leaks. Although they are separate entities, Aurora was plaintiff's agent. It is settled that knowledge acquired by an agent acting within the scope of its authority is presumptively imputed to its principal (*Kirschner v KPMG LLP*, 15 NY3d 446, 465 [2010]). Plaintiff has failed to rebut this

presumption particularly in light of its close relationship with Aurora.

"An insurer's duty to defend is liberally construed and is broader than the duty to indemnify," in order to ensure an adequate defense of the insured, "without regard to the insured's ultimate likelihood of prevailing on the merits of a claim" (*Fieldston Prop. Owners Assn., Inc. v Hermitage Ins. Co., Inc.*, 16 NY3d 257, 264 [2011]). A liability insurer has a duty to defend its insured in pending litigation if the pleadings allege a covered occurrence, even though the facts outside the four corners of those pleadings indicate that the claim may be meritless or not covered (*Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 63 [1991]). Thus, timely notice of the occurrence would have required Hartford and QBE to defend plaintiff in the arbitration proceeding inasmuch as the owner's arbitration claim included the costs of the repair of water damage and the remediation of mold conditions in various tenant spaces. Such costs would be associated with a legal liability incurred by property damage to something other than plaintiff's work product (*see e.g. George A. Fuller Co. v United States Fid. & Guar. Co.*, 200 AD2d 255, 259, *lv denied* 84 NY2d 806 [1994]). In any event, plaintiff's failure to provide Hartford and QBE with timely notice of the underlying occurrence is dispositive.

As this is an action for a declaratory judgment, the rights of the parties should have been declared (*see Medical World Publ. Co. v Kaufman,* 29 AD2d 859 [1968]). The mere dismissal of the complaint, as recited by the judgment the court adhered to, is not an affirmative declaration of the parties' rights (*id.*). Accordingly, the rights of the parties are declared as indicated above (*see e.g. 600 W. 115th St. Corp. v 600 W. 115th St. Condominium,* 180 AD2d 598, 598 [1992]).

All concur except Andrias, J.P. and Moskowitz, J. who dissent in a memorandum by Andrias, J.P. as follows:

ANDRIAS, J.P. (dissenting)

Although the majority finds that the work product exclusions in the subject commercial general liability (CGL) policies are inapplicable and would not, in and of themselves, bar plaintiff's claim for its defense costs in the underlying arbitration, they would nevertheless grant summary judgment dismissing this action on the ground that plaintiff did not provide defendants ITT Hartford Insurance Group (Hartford) and QBE Insurance Corp. (QBE) with notice of the underlying occurrences as soon as practicable. Because I believe that issues of fact exist as to whether there was an "occurrence" within the meaning of the policies, whether the work product exclusions apply, and, if there was an occurrence, whether plaintiff's delay in notifying defendants Hartford and QBE is excusable, I respectfully dissent and would reinstate the complaint.

On or about April 1, 1998, Farmingdale Development Corp. (FDC) retained plaintiff, Savik, Murray & Aurora Construction Management Co., LLC (SMA), as construction manager for its Airport Plaza shopping center project (the Project). Under the Construction Management Agreement (CMA), SMA, as FDC's agent, was to arrange for, coordinate and supervise the provision of all labor, materials, services and equipment for the Project "in accord with plans and specifications" prepared by FDC's architect

or other professional designer, and assist FDC in its dealings with contractors and suppliers to enforce warranties. SMA retained Aurora Construction, Inc. (Aurora), owned by Frank Vero, Sr., a managing member of SMA, to provide personnel to perform SMA's duties under the CMA. Aurora or Expressway Acoustics (Expressway), a division of Aurora, was retained by FDC as a carpentry contractor.

The project was substantially completed by February 2000. SMA left the job site in May 2000. On or about May 12, 2004, FDC filed a demand for arbitration seeking $872,249,96 in damages from SMA for "breach of the [CMA] which required SMA to, among other things, supervise tradesman in the construction of the Airport Plaza by assuring that said tradesman comply with the architectural plans . . . " FDC alleged that SMA failed to "take action against the relevant tradesman concerning the construction of the roofing system and parapets on Phase I and II of the project," which resulted in persistent and extensive roof leaks; failed "to require tradesman to perform their respective tasks in accordance with approved methods [which] resulted in other structural damage to the buildings"; and failed to "obtain the required roof warranties . . . "

SMA was an additional insured under CGL policies issued by Hartford and QBE which covered "Property damage," including

"physical injury to tangible property, including all resulting loss of use of that property," caused by an occurrence during the policy period. An "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

The policies exclude property damage to:

> "That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations; or . . . [t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it" (Work Product Exclusion).

They also contain a notice provision which provides: "You Must see to it that we are notified as soon as practicable of an 'occurrence' . . . which may result in a claim." The Hartford policy was effective from March 16, 1998 to May 3, 2000; the QBE policy from March 15, 2002 to March 15, 2005.

On June 4, 2004, SMA put QBE and Hartford on notice of FDC's claim. By letters dated June 16, 2004 and June 28, 2004, respectively, QBE and Hartford reserved their rights with respect to providing a defense and indemnification. In January 2005, FDC particularized its arbitration claims, asserting that as a result of SMA's breach of the CMA, certain "flashing terminations," "entrance peaks," gutters and sidewalks were not installed in

accordance with the contract documents and that leaks passed through the roof and walls of the shopping center, causing mold and water and other property damage. FDC also claimed that due to inadequate insulation a pipe burst in freezing weather, causing additional water damage, and that SMA failed to obtain a "Johns Manvill[e] 15 year no dollar limit warranty with respect to all buildings except buildings A, B and C." FDC estimated that the cost of repair, including "the replacement of the parapet cap assembly and repairing the water damage to various tenant spaces and remediating the mold conditions is $512,500.00." By letter dated March 17, 2005, Hartford disclaimed coverage on the grounds that there was no claim for "property damage" caused by an "occurrence," there was no allegation of property damage during the policy, and the work product exclusion excluded coverage.

On or about June 8, 2006, an arbitration award in the amount of $214,689 was entered in FDC's favor against SMA for breach of contract in connection with the improper installation of the roofing system ($130,737), needed emergency repairs ($11,318), the cost of obtaining the roof warranties ($62,374), and the cost of investigating and remediating the damage ($9,900). SMA then commenced this action seeking reimbursement of defense and indemnification costs.

Supreme Court dismissed the complaint, finding that "the CGL policies did not cover [FDC]'s claims, because SMA was responsible for the entire Project as construction manager, and any damage to the Project was, in effect, damage caused by SMA's work product, which was excluded from coverage." Upon granting reargument, Supreme Court adhered to this determination, stating that "the damages sought in the underlying arbitration were costs to correct defective installation of walkway canopies, parapet wall sections and metal cap flashing causing water and mold to infiltrate, and did not arise from an 'occurrence' resulting in damage to property distinct from SMA's own work product . . . The damages were allegedly caused by, inter alia, SMA's failure to supervise contractors, their services and the installation of materials in accordance with the project plans and specifications . . . Thus, the costs that [FDC] sought were the costs allegedly incurred to remediate SMA's own work product." Supreme Court did not reach the late notice issue.

While the duty to defend is broader than the duty to indemnify, "it is equally well settled that the obligation of an insurer to defend does not extend to claims which are not covered by the policy or which are expressly excluded from coverage" (*30 W. 15th St. Owners Corp. v Travelers Ins. Co.*, 165 AD2d 731, 733 [1990]). "[A]n insurer can be relieved of its duty to defend if

it establishes as a matter of law that there is no possible factual or legal basis on which it might eventually be obligated to indemnify its insured under any policy provision" (*Allstate Ins. Co. v Zuk*, 78 NY2d 41, 45 [1991]).

CGL policies provide coverage for physical damage to others and not for contractual liability of the insured for economic loss due to faulty workmanship or non-bargained for outcomes. (*see George A. Fuller Co. v United States Fid. & Guar. Co.*, 200 AD2d 255, 259 [1994], *lv denied* 84 NY2d 806 [1994]). Hence, Courts have typically found no "occurrence" or that the work product exclusion applies in cases involving damage to the product the contractor was to construct (*see Exeter Bldg. Corp. v Scottsdale Ins. Co.*, 79 AD3d 927 [2010] ["because the complaint seeks relief for conduct that falls solely and exclusively under the work product exclusions of the CGL policies, and the damages sought therein do not arise from an occurrence resulting in damage to property distinct from the work product of Exeter or its hired subcontractors, Scottsdale is not obligated to provide Exeter with a defense or to indemnify it in the underlying action"]; *Bonded Concrete, Inc. v Transcontinental Ins. Co.*, 12 AD3d 761 [2004]). In contrast, a covered occurrence may be found where the faulty workmanship "creates a legal liability by causing bodily injury or property damage to something other than

the work product" (*Fuller*, 200 AD2d at 259; *see Baker Residential Ltd. Partnership v Travelers Ins. Co.*, 10 AD3d 586 [2004]).

In addition to seeking to recover damages in connection with the improper installation of the roofing system, emergency repairs and the cost of obtaining the roof warranties, FDC sought to recover for "damage to various tenant spaces." On the record before us, issues of fact exist as to whether that damage was an "occurrence" within the meaning of the policy or within the scope of the work product exclusion. Although the insurers claim that SMA was responsible for construction of the entire building, the plans and specifications that would establish the scope of SMA services under section 2.02 of the CMA are not included in the record. While Aurora's Vice-President, when asked if Aurora was responsible for supervising Expressway's work, replied that SMA "was responsible for everything, and . . . hired Aurora to supervise," he also stated that he did not think that SMA did any work directly for tenants. According to Aurora's project manager, "SMA did not coordinate and had nothing whatsoever to do with the construction of the interior spaces" and Expressway was retained by certain tenants to perform work in some of the interior spaces, including the installation of Sheetrock and ceiling tiles. The project manager also stated that other tenants retained their own contractors to renovate the raw space

delivered by Farmingdale. Thus, there is an issue of fact as to whether the damages sought in the underlying arbitration arise from an occurrence resulting in damage to property distinct from the work product of SMA.

That the arbitrators did not award FDC anything for the cost of replacing damaged interior tile and drywall does not prove otherwise. An insurer may be obligated to defend its insured even if, at the conclusion of an underlying action, it is found to have no obligation to indemnify its insured *(see Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006]; *Global Constr. Co. LLC v Essex Ins. Co.*, 52 AD3d 655, 655-656 [2008]).

The majority would nevertheless dismiss on the ground that Hartford and QBE did not receive timely notice of the underlying occurrence as required by their respective policies. I disagree.

Although there is proof that the project was plagued by leaks, it is unclear when SMA learned that the leaks had caused damage to various tenant spaces, as opposed to SMA's work product. Even if Hartford and QBE are deemed to have satisfied their prima facie burden on the late-notice issue by pointing to SMA's multi year delay in providing them with notice (*see Tower Ins. Co. of New York v Classon Hgts, LLC*, 82 AD3d 632, 634 [2011]), an issue of fact exists as to whether the delay was excusable.

"[A]n insured's good-faith belief in nonliability, when reasonable under the circumstances, may excuse a delay in notifying the insurer" (*Spa Steel Prods. Co. v Royal Ins.*, 282 AD2d 864, 865 [2001] [internal quotation marks omitted]). The issue of whether an insured had a good faith belief in nonliability, and whether that belief was reasonable, ordinarily presents an issue of fact (*id.* at 865; *see also Deso v London & Lancashire Indem. Co. of Am.*, 3 NY2d 127, 129 [1957]; *Morehouse v Lagas*, 274 AD2d 791, 794 [2000]). It is only when the facts are undisputed and not subject to conflicting inferences that an issue can be decided as a matter of law (*see Greenwich Bank v Hartford Fire Ins. Co.*, 250 NY 116, 131 [1928]).

Here, both Aurora's CFO and its Vice-President averred that the first actual notice of an affirmative claim by FDC against SMA occurred when SMA received the arbitration demand in May 2004. In a signed statement, Aurora's CFO stated that "[s]ubsequent to the completion of the project, [SMA] received correspondence directed to the roofing manufacturer regarding leaks. None of the correspondence was directed to [SMA] . . . Due to the fact that Aurora was not involved with the roof construction, we felt that there was no exposure on the part of Aurora." An issue of fact exists as to whether this belief was reasonable in light of section 15.06 of the CMA, which provides

that the contractors hired by SMA would assume liability and responsibility for their own work and that "in the event of any loss or damage arising out of the construction of the Project, [FDC] shall look first to those contractors for recovery of any damages"; that SMA did not "insure, guarantee or warrant" the work of the independent contractors; and that in the event of a dispute between FDC and any such contractor, SMA was obligated to assist FDC "in the preparation of any claim . . . and otherwise consult with [FDC] and the counsel about the course of those proceedings."

Given these contractual provisions, even if SMA can be charged with its agent Aurora's knowledge that there was a problem with leaks on the project, that would not establish, as a matter of law, that SMA was aware of an occurrence that would lead to a claim against it as construction manager, rather than a claim against the contractors who actually performed the work and their suppliers. For example, in the September 1999 letter cited by the majority, Aurora's project manager advised a subcontractor to notify its insurance company of the leak problem, implying that the contractor would be held accountable.

True, an August 11, 2003 letter from the project architect to the roofing contractor, which indicates that it was copied to Vero, a managing member of SMA and principal of Aurora, did state

that over 100 roof leaks had been documented and that FDC was prepared to perform repairs and bring suit against SMA and others. However, the letter does not identify SMA as a copied party and there is nothing in the record that would confirm that Vero received the copy.

The majority would disagree, stating that plaintiff "coyly" asserts that there is nothing in the record to confirm receipt by Vero, who has not submitted an affidavit, and that the affidavit of Aurora's CFO begs the question because it addresses plaintiff's receipt of a formal claim as opposed to its knowledge of an "occurrence" which may result in a claim. However, neither Hartford nor QBE offered anything that would suffice to raise a presumption that the August 11, 2003 letter was actually mailed to and received by Vero (*see Hospital for Joint Diseases v Nationwide Mut. Ins. Co.*, 284 AD2d 374 [2001]), such as a certificate of mailing or "proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed" (*Residential Holding Corp. v Scottsdale Insurance Company*, 286 AD2d 679, 680 [2001]).

Nor do the December 4, 2003 and February 2, 2004 faxes from Aurora to its counsel establish that SMA had notice of an occurrence that could lead to a claim. The December 4, 2003 fax does not reference the August 11, 2003 letter and was sent in

response to a fax from the Project Architect to Vero which covered the minutes of a meeting concerning roof issues. While the minutes discuss leaks, they do not place SMA on notice that FDC would seek to hold SMA, rather than the contractors or suppliers, responsible for them.

The February 2, 2004 fax was in response to a January 30, 2004 letter from the Project Architect to Peter Levine of FDC concerning remedial work performed and to be performed to the roof and the need "to review evidence we are going to pursue with Aurora." On February 2, 2004, Aurora forwarded that letter to counsel, noting: "It appears . . . that Airport Plaza is blaming the leaks . . . on Expressway Acoustics (Aurora). . . Please review and determine if any action needs to be taken at this time." The vague reference to the need "to review evidence we are going to pursue with Aurora" does not provide clear cut proof that SMA received notice that FDC would seek to hold it accountable for the roof defects. In light of the language of the CMA referenced above, the reference may have related to SMA's duty to cooperate in pursuing claims against the roofing contractors that actually did the work, not as a claim against SMA for breach of the CMA. Indeed, even if notice to Aurora may be deemed notice to SMA, when Aurora forwarded the January 30, 2004 letter to counsel for review, it was concerned with a claim

against Expressway, as a contractor that provided carpentry work on the roof for FDC, not a claim against SMA, as construction manager.

Accordingly, I would reinstate the complaint.

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

ENTERED: JULY 28, 2011

CLERK

Saxe, J.P., Friedman, Catterson, Acosta, Richter, JJ.

4176 Illinois Union Insurance Company, Index 100213/08
Plaintiff-Appellant,

-against-

Assurance Company of America,
Defendant-Respondent.

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Hodgson Russ LLP, Buffalo (Kevin D. Szczepanski of counsel), for appellant.

Melito & Adolfsen P.C., New York (S. Dwight Stephens of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered October 6, 2009, which, insofar as appealed from as limited by the briefs, denied in part plaintiff's motion for summary judgment and found that, under California law, plaintiff Illinois Union Insurance Company was entitled only to reimbursement for defense costs associated with the slander claim in the underlying action, reversed, on the law, with costs, to declare that defendant Assurance Company of America is obligated to reimburse Illinois Union for the defense costs it paid in the underlying action.

Under California law, which the parties agree governs this action, whether the plaintiff in the underlying action was an "Employee" under the Illinois Union policy is a dispositive issue; if the plaintiff was an employee, then Illinois Union had

the duty to defend, but if the plaintiff was not an employee, Illinois Union had no such duty, and thus would be entitled to full reimbursement (*see County of San Bernardino v Pacific Indem. Co.*, 56 Cal App 4th 666, 680 [1997], *lv denied* 1997 Cal LEXIS 6282 [1997]; *Devin v United Servs. Auto. Assn.*, 6 Cal App 4th 1149, 1157 [1992], *lv denied* 1992 Cal LEXIS 4241 [1992]). The record establishes that Cronnelly, the plaintiff in the underlying action, was not an "Employee" within the definition of Illinois Union's policy.

We have considered the remaining contentions and find them unavailing.

All concur except Saxe, J.P. and Acosta, J. who dissent in a memorandum by Saxe, J.P. as follows:

Saxe, J.P. (dissenting)

I agree with my colleagues that the question of whether the plaintiff in the underlying action was an "employee" under the Illinois Union policy is a dispositive issue; if that plaintiff was an employee, then Illinois Union had the duty to defend, but if plaintiff was not an employee, Illinois Union had no such duty, and thus would be entitled to full reimbursement of its defense costs (*see County of San Bernardino v Pacific Indem. Co.*, 56 Cal App 4th 666, 680 [1997], *lv denied* 1997 Cal LEXIS 6282 [1997]; *Devin v United Servs. Auto. Assn.*, 6 Cal App 4th 1149, 1157 [1992], *lv denied* 1992 Cal LEXIS 4241 [1992]). However, I disagree with their conclusion that the record permits that determination to be made as a matter of law.

Victoria Cronnelly, the nurse-anesthetist who was the plaintiff in the underlying action, sued plaintiff's insured, the El Dorado Surgery Center, based on an oral agreement under which she would be entitled to perform anesthesia services on the Center's patients in a "second room" that would be for her exclusive use. She alleged that the defendants had breached that oral agreement by permitting others to perform anesthesia in the second room, and further asserted that one of the Center's officers damaged her by making defamatory misstatements about her. She was ultimately awarded a $30,000 verdict on her claim

of negligent misrepresentation only.

The question of whether the Illinois Union policy issued to El Dorado covered Cronnelly's claim turns on its definition of the term "employees": "Employees means all persons who were, now are or shall be: a) employees of the Company, including voluntary, seasonal and temporary employees[,] b) any individuals applying for employment with the Company, and c) any individuals who are leased or are contracted to perform work for the Company, or are independent contractors for the Company, but only if such individuals perform work or services solely for or on behalf of the Company." This exceedingly broad definition's use of the phrase "all persons who were, now are *or shall be*" (emphasis added) employees of the insured, would seem to cover claims not only by current employees performing work solely for El Dorado, but also individuals who were to *subsequently become* employees performing services solely for El Dorado.

The limited information offered on these motions fails to

definitely establish whether Cronnelly qualified as an employee under that definition, but based on Cronnelly's complaint, it appears that she may fall within its parameters. I would therefore deny summary judgment.

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

ENTERED: JULY 28, 2011

CLERK

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

4220 Sandra Delgado, etc., et al., Index 14684/95
Plaintiffs-Respondents,

-against-

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

New York City Police Department, et al.,
Defendants.

_____

Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo of counsel), for The City of New York and James Masiello, appellants.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for New York City Housing Authority and Nicholas Witkowich, appellants.

Ronald P. Berman, New York, for Brian Washington, appellant.

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph III of counsel), for respondents.

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Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered June 13, 2008, which, to the extent appealed from, as limited by the briefs, denied defendants-appellants' motions for summary judgment dismissing the complaint as against them, unanimously modified, on the law, to grant so much of the City defendants' motion as sought to dismiss the complaint against defendant James Masiello, to grant so much of the motion of defendant New York City Housing Authority (NYCHA) and Nicholas Witkowich as sought to dismiss the claims alleging violation of

42 USC § 1983 as against NYCHA, and otherwise affirmed, without costs.

This is an action to recover compensatory and punitive damages for personal injuries and property damage arising from the execution of a "no knock" search warrant at plaintiffs' apartment, 5E, at 1065 Manor Avenue in Bronx County on May 25, 1994, at or around 12:30 A.M. Because we conclude that the information furnished by the confidential informant in this case did not meet the two-prong test of reliability set forth in *Aguilar-Spinelli*, we modify as described below.

On the evening of May 18, 1994, an individual was arrested for possession of crack cocaine. The arresting officer was defendant Brian Washington. Washington's partner that day was Officer Robert Masiello.[1] On the following day, May 19, 1994, prior to the individual's arraignment in Criminal Court, this individual, identified only as "John/Jane Doe," agreed to furnish the officers with information concerning narcotics sale trafficking in the area of his arrest. At his EBT, Washington could not recall whether Doe was registered as a confidential informant, or whether any attempt was made to investigate his or

[1]James Masiello, not Robert Masiello, is named as a defendant herein. As discussed below, we dismiss the complaint as against him.

her reliability. As the court below noted, the record is unclear as to whether this individual offered information as part of some cooperation agreement, whether he or she was ultimately convicted of anything, what his or her past criminal history may have been or anything else of substance concerning him or her. Nonetheless, defendant Nicholas Witkowich, then captain, approved the application for the warrant.

The sum and substance of the information provided by Doe was that he or she had received the drugs in question from a skinny 5-foot 8-inch male Hispanic, approximately 20 years of age, referred to only as "Green Eyes," in an apartment at 1065 Manor Avenue in the Bronx. Doe did not furnish the apartment number of the building at 1065 Manor Avenue where "Green Eyes" could be found. Rather, he or she told Masiello and Washington that Green Eyes' apartment was the first one on the left after exiting the elevator on the fifth floor and turning left. He or she further stated that the door to the apartment was brown, and that the windows of the apartment faced the rear of the building. Doe did not indicate that there were stickers on the door of the apartment. Doe described the other occupants of the apartment as a female Hispanic called "Shorty" and a small female infant. Doe specified that no dogs were present and that "Green Eyes" possessed two guns, a nine millimeter handgun and a Tech 9

semiautomatic. Doe told the police that "Green Eyes" sold drugs from the apartment from midnight to 8:00 A.M.

The record does not indicate that the officers conducted an investigation to corroborate the information provided by Doe prior to seeking a search warrant. The officers did not conduct surveillance of the subject apartment, did not attempt to supervise the informant or to make controlled buys from the apartment, or even try to confirm the identity of the apartment's occupants by speaking to the superintendent or other residents of the building. Washington testified that he did not know of any evidence that would corroborate what the informant had told him concerning drug dealing from the subject premises.

Based on the information provided by Doe, Officer Robert Masiello sought a warrant from Criminal Court to search the specific apartment premises at 1065 Manor Avenue described by Doe. The officer's affidavit stated:

> "I am informed by a confidential informant, who is known to me, but whose name is omitted to preserve his/her confidentiality, that on other occasions he/she has been inside the apartment on the fifth floor of 1065 Manor Avenue, Bronx, New York for the purpose of obtaining red top vials of crack/cocaine to sell on the street. I am further informed by the CI that to get to the apartment you enter 1065 Manor Avenue and take the elevator to the fifth floor exit elevator to the left and the apartment is the first apartment on left, a brown door. CI further informs me that

> he/she was last inside the apartment on May 18th, at approximately midnight for the purpose of receiving 1 row of vials to sell on the street where each row consists of 25 vials of red top crack/cocaine and each vial sells for $5.00. CI further informs me that while inside the apartment "Green Eyes" a male hispanic light skinned approximately 5'8" tall, skinny took out a brown bag from the bedroom and went to the kitchen and removed a row of vials and CI observed approximately an additional 6-7 rows of vials. CI further informs me that while he/she was inside the apartment "Green Eyes" went in the bedroom in the apartment and came out and on the kitchen table placed a 9 millimeter automatic tech 9 semi-automatic machine pistol [*sic*]. Deponent further states that said informant's reliability is supported by this statement against penal interest as well as the strict detail and description with which said informant articulates his/her observations."

On May 19, 1994, at 4:50 P.M., a justice of the Supreme Court, Bronx County, granted the application for the no-knock warrant. The warrant was valid for a period of 10 days and gave the police authority to enter the apartment without first announcing their presence based upon the allegations in the moving affidavit that the drugs were easily disposable and the alleged presence of two guns in the apartment. The warrant authorized a search for narcotics and firearms, to be exercised "at all hours" within the next 10 days, at the premises described as "the apartment []on the fifth floor, to get to the apartment

take the elevator to the 5th floor, exist [*sic*] elevator, make left and the apartment is the first apartment on the left, brown door." The issuing court expressly found that adequate grounds existed for authorizing any executing officer to enter the subject premises without giving notice of his authority or purpose.

On March 19, 1994, Washington conducted a check to ensure that no other law enforcement agency had an active investigation on the 5th floor of the premises. The results were negative, neither confirming nor calling into question the reliability of Doe's information.

On May 20, 1994, Sergeant Tennant went to 1065 Manor Avenue and confirmed that the "[apartment] on the 5th floor is marked 5E it's a brown door," and also remarked upon the presence of "old stickers on the door." These stickers, it should be noted, were not described by Doe, despite their prominence on the door as evident in the photographs in the record. On May 24, 1994, a check was made to see if there was a telephone listing for apartment 5E, with no records found.

The warrant was executed by a team of about 12 armed officers of the Housing Police (then a branch of the Housing Authority) at about 12:50 A.M. on May 25, 1994 at apartment 5E. Plaintiff Sandra Delgado and her six children, ranging in age

from 9 to 16 years old, were sleeping in their two-bedroom apartment when the officers battered down the door and entered the apartment. Plaintiffs testified that they hit the floor, face down, upon the command of the officers. Juan, the eldest child (then age 17), was pushed from behind by two officers and taken to the ground, where guns were put to his head. Gregory (then 15), face down on the floor, had a gun held to his head until officers could handcuff him, and was informed that he was under arrest. At no time was plaintiff mother shown the warrant. Plaintiff mother and all but the two youngest children were handcuffed and all of them, with the exception of the youngest child, were held in the hallway outside the apartment for three hours while the officers searched the apartment, overturning furniture, slashing sofas and mattresses, and destroying property in the bedrooms including the children's posters and baseball cards.

Plaintiff mother was brought to the fourth floor of the building and questioned concerning the presence of drugs or guns on the premises. When plaintiff mother replied in the negative, officers informed her that if they found drugs or guns she would "lose [her] kids." Several of the children were questioned regarding the presence of drugs and guns in the apartment. The children testified that officers told their mother, in their

presence, that if they found any crack bottles, the children would be going to a foster home. Candida (then age 11) heard officers say she could be taken away from her mother and "started crying." At the end of the search, finding no drugs or weapons on the premises, the police left.

Plaintiffs testified that subsequent to the search they suffered emotional trauma. Plaintiff mother testified that she had trouble sleeping for two years after the incident and that she still suffered from depression and periodic nightmares. Enrique (then 13) testified that he had trouble sleeping and was able to sleep only "three, four hours" nightly. Juan testified that his asthma worsened after the search and that he also suffered from sleep disturbances. Plaintiffs Gregory and Candida felt sufficiently unsafe that they slept away from the apartment for some period of time after the incident. Candida testified that she had nightmares and difficulty studying; Enrique (then age 13) testified that he could not walk down the streets because he feared the police were "watching" him.

Plaintiffs brought actions against the various defendants, later consolidated, alleging, inter alia, false arrest, unlawful imprisonment, negligence, assault and battery, and violations of 42 USC § 1983.

Defendants moved for summary judgment on the ground that

they were protected by qualified immunity when executing a valid search warrant. The motion court granted summary judgment in favor of the individual officers who entered the apartment in reliance on the facially valid warrant, but denied the motions of defendant Witkowich, the captain in charge of the investigation and search, and defendants Washington and Masiello. The court concluded that the justice who had issued the warrant had no independent basis upon which to make a quantitative or qualitative analysis of the information before him as to the reliability of the informant or of the information he or she provided, and thus, that the search warrant was not properly issued and the search conducted pursuant thereto was invalid.

It is elementary that no warrant shall issue except on probable cause. New York Courts apply the two-prong *Aguilar-Spinelli* test in evaluating the hearsay information provided by an undisclosed informant (*see Aguilar v Texas*, 378 US 108 [1964], *and Spinelli v United States*, 393 US 410 [1969]). The application for a search warrant must demonstrate to the issuing magistrate both (1) the veracity or reliability of the informant, and (2) the basis of the informant's knowledge.

> "[T]he magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the

> officer concluded that the informant, whose identity need not be disclosed, was 'credible' or his information 'reliable'" (*Aguilar*, 378 US at 114 [internal citations omitted]).

The reliability dimension requires a showing either that the informant is credible or, in the absence of such a showing, that the specific information given is credible (*People v DiFalco*, 80 NY2d 693, 696-97 [1993]). Factors to consider in evaluating reliability include whether the informant has supplied accurate information to the police in the past, whether the informant's statements were made under oath, whether the informant has made an admission against penal interest, or whether the details of the informant's story have been corroborated by the police (*see People v Calise*, 256 AD2d 64, 65 [1998], *lv denied* 93 NY2d 851 [1999]). In analyzing this component, corroboration means "the traditional sort of independent corroboration by the police in checking out the truth of the informant's tip through information obtained from a source *other than the informant's statement*" *(DiFalco*, 80 NY2d at 698).

The basis of knowledge component is distinct from the veracity component and must be independently satisfied; this dimension requires that the information provided by the informant be corroborated or confirmed through details sufficient in number and suggestive of, or directly related to, the criminal activity

informed about (*see People v Elwell*, 50 NY2d 231, 234 [1980]). In a proper case, the specificity and accumulation or quality of detail may "corroborate" or "self-verify" the basis for the informant's knowledge by showing that the informant must have obtained the information from firsthand observation of that activity (*id.* at 241-42).

We find that the police did not have sufficient independent verification to satisfy the veracity component of *Aguilar-Spinelli*, nor did they possess the requisite knowledge necessary to satisfy the basis of knowledge component of the test. The police had no basis to believe that the confidential informant was reliable – indeed, he had never before provided information leading to an arrest (*compare People v Hanlon*, 36 NY2d 549, 550 [1975] [finding that an affidavit established the reliability of an informer where the informer stated that he had purchased narcotics from defendant, there had been a previous communication of accurate information, and there was corroborative verification by the police]; *People v Salcedo*, 309 AD2d 542, 543 [2003], *lv denied* 1 NY3d 634 [2004] [the informant's veracity was established where, inter alia, two other informants with histories of providing accurate information corroborated information of a third informant, and the information provided by all three informants was corroborated by independent police

investigation]; *and People v Stroman*, 293 AD2d 350 [2002], *lv denied* 98 NY2d 702 [2002] [informant's veracity was established by a declaration against penal interest together with corroboration from a source other than the informant's statement]).

Plaintiffs' expert, Henry Branche, a retired sergeant in the police force, averred that pursuant to standard procedures, confidential informants may not be utilized before they are properly registered and approved. In an emergency (which this was not, given that six days elapsed between issuance and execution of the warrant), a confidential informant may be utilized provided permission is obtained from a commanding officer. Branche noted that where a prospective CI is the defendant in an active criminal case, permission for registration must first be obtained from the assistant district attorney.

Defendants assert that the informant's statements were against penal interest, and therefore, reliable. On this record, however, we cannot state that the informant's statements were sufficiently contrary to his or her penal interest so as to establish reliability under the first prong of *Aguilar-Spinelli* (*see People v Burks*, 134 AD2d 604, 605 [2d Dep't 1987] [the informant's statement that she had, on unspecified past occasions, purchased cocaine from the defendant, was not

sufficiently against penal interest to establish reliability]). According to the affidavit in support of the search warrant, Doe informed that "on other occasions" he or she had been inside the premises for the purpose of obtaining red top vials from Green Eyes to sell on the street, and that on one occasion, May 18th, he or she had purchased one row of vials to sell on the street. It is not clear, on this record, that this statement, admitting possession of small quantities with intent to sell them on the street, was likely to be used against Doe.

Even if it could be said that the first prong of *Aguilar-Spinelli* was satisfied by the alleged statement against penal interest, no corroborative verification whatsoever was performed by the police prior to issuance of the warrant. The only confirmation of information provided by the informant occurred subsequent to the issuance of the warrant, and that investigation consisted solely of verifying that no landline was associated with the apartment, and that the apartment in fact had a brown door and was located to the left as one exited the elevator. The police also ascertained that no other agency had the premises under investigation. This information, as noted by the lower court, was entirely unhelpful in establishing the informant's reliability or the reliability of his information, even assuming that the corroboration occurred prior to the issuance of the

warrant. Furthermore, the fact that the officer dispatched to the apartment noted the presence of prominent stickers on the door, which had not been described by Doe, should have raised questions about the reliability of the information.

The second dimension of *Aguilar-Spinelli*, the informant's basis of knowledge, was never established by corroborative details of such quantity and quality as to be indicative of criminality (*see Elwell*, 50 NY2d at 234-35). Indeed, the only attempt to determine whether criminal activity was afoot was to ascertain whether other law enforcement agencies were conducting investigations of the same premises, the results of which, as noted above, were negative, neither proving nor disproving anything. The police failed to inquire concerning the occupants of the subject apartment, failed to speak to the building superintendent, failed to conduct surveillance of the apartment, made no attempt to conduct controlled buys from the apartment, and otherwise failed to corroborate the information supplied by Doe.

It was on the basis of this criminal's information – an informant with no track record, no proven reliability and whose information concerning drug trafficking on the premises was not even minimally corroborated – that approximately 12 members of the Housing Authority Police Department crashed through the door

of plaintiffs' apartment in the middle of the night, terrified a mother and six children, held them for hours while they searched their apartment, destroying their property and threatening plaintiff mother that they would put her children in foster care if she did not tell the truth about the presence of drugs or guns in the apartment.

The individual defendants argue that they are entitled to dismissal of the charges against them because they enjoy a qualified immunity when executing a facially valid search warrant. "[A] government official performing a discretionary function is entitled to qualified immunity provided his or her conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" (*Liu v New York City Police Dept.*, 216 AD2d 67, 68 [1995], *lv denied* 87 NY2d 802 [1995], *cert denied* 517 US 1167 [1996]). To be entitled to qualified immunity, it must be established that it was objectively reasonable for the police officer involved to believe that his or her conduct was appropriate under the circumstances, or that officers of reasonable competence could disagree as to whether his or her conduct was proper (*see Simpkin v City of Troy*, 224 AD2d 897, 898 [1996]).

The lower court properly determined that only those police officers or other government agents who executed the no-knock

warrant are entitled to qualified immunity. The officers who executed the warrant did so with the understanding that a valid search warrant had been issued. However, the same cannot be said for defendants Witkowich and Washington, who initiated the issuance of the search warrant and did little, if anything, to establish the reliability of the confidential informant or the information supplied by him or her (*see Rossi v City of Amsterdam*, 274 AD2d 874, 877 [2000] [where the officers executed a no-knock warrant at the wrong premises, albeit premises identified in the warrant, the court found that the officers who had conducted the investigation, applied for the no-knock warrant, supplied the description of the premises and supervised execution of the warrant were not entitled to summary judgment on the basis of qualified immunity]).

We are further disquieted by the manner in which the search warrant was executed. Upon entering the apartment, the police encountered not "Green Eyes," and "Shorty" with an infant, as described by the informant, but plaintiff mother and her six sleeping children. At that point, a reasonable police officer should have realized that an error had been made (*cf. Maryland v Garrison*, 480 US 79, 88 [1987]). "Qualified immunity does not provide a safe harbor for police to remain in a residence after they are aware that they have entered the wrong residence by

mistake. A decision by law enforcement officers to remain in a residence after they realize they are in the wrong house crosses the line between a reasonable mistake and affirmative misconduct" (*Simmons v City of Paris, Texas*, 378 F3d 476, 481 [5th Cir 2004]). We note that while the informant identified the occupants of the apartment as "Green Eyes," "Shorty" and an infant, the warrant itself merely identifies the premises to be searched and not the occupants. Thus, it does not appear that the officers executing the warrant were aware of the error.

As to the section 1983 claim, a person has a private right of action under 42 USC § 1983 against police officers who, acting under color of law, violate federal constitutional or statutory rights. A complaint alleging gratuitous or excessive use of force by a police officer states a cause of action under the statute against that officer (*see Hodges v Stanley*, 712 F2d 34, 35 [2d Cir 1983]).

Captain Witkowich argues that the section 1983 claim should be dismissed as to him. We disagree. Although the captain was not present at the execution of the warrant, he was directly in charge of and authorized the operation. Indeed, the official police report of the execution of the warrant states:

> "Entry to the location was made at 0150 hours by members of the Bronx Narcotics Enforcement Unit under the direction and supervision of

Captain NICHOLAS WITKOWICH."

The section 1983 claim, however, should be dismissed as against defendant NYCHA. Plaintiffs have not demonstrated that any custom or official policy of NYCHA caused the claimed violation of their constitutional rights (*see Rossi*, 274 AD2d at 878).[2]

We grant the motion of defendant James Masiello to dismiss the complaint as to him. Robert Masiello, not James Masiello, was the officer who submitted the affidavit in support of the search warrant. Thus, James Masiello is not the proper party.

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

ENTERED: JULY 28, 2011

CLERK

[2]To the extent the officers executing the warrant were acting within the scope of their employment, the negligent hiring claim against NYCHA is not viable (*see Karoon v New York City Tr. Auth.*, 241 AD2d 323, 324 [1997]).

Andrias, J.P., Catterson, Moskowitz, Abdus-Salaam, Román, JJ.

4464- Talon Air Services LLC, Index 602619/07
4465- Plaintiff-Appellant,
4466

-against-

CMA Design Studio, P.C., etc., et al,
Defendants-Respondents.

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Kaplan Landau LLP, New York (Eugene Neal Kaplan of counsel), for appellant.

Gogick, Byrne & O'Neill, LLP, New York (Stephen P. Schreckinger of counsel), for CMA Design Studio, P.C., respondent.

L'Abbate, Balkan, Colavita & Contini, LLP, Garden City (Lee J. Sacket of counsel), for Kevin Koubek, P.E., respondent.

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Appeal from order, Supreme Court, New York County (Jane S. Solomon, J.), entered September 8, 2009, which granted defendant Koubek's motion for summary judgment dismissing the complaint as against him, deemed appeal from judgment, same court and Justice, entered January 6, 2010 (CPLR 5501[c]), and, so considered, said judgment unanimously affirmed, with costs. Order, same court and Justice, entered September 8, 2009, which granted defendant CMA Design Studio's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, with costs.

Plaintiff Talon Air Services LLC brought this action for professional malpractice and breach of contract against defendants Kevin Koubek, P.E. (Koubek) and CMA Design Studio,

P.C. (CMA) in connection with the construction of an aircraft hangar owned and operated by plaintiff. Plaintiff alleges that defendants submitted plans and specifications to the Suffolk County Department of Health Services (DHS) for a single-walled sanitary waste trench, but, because the hangar was to be used for maintenance, a double-walled hazardous waste trench was required pursuant to the State Sanitary Code § 720-1210 (Article 12). Plaintiff alleges that it suffered damages when it had to replace the single-walled trench with a double-walled trench.

The following facts are established in the record: In or around January 2004, plaintiff entered into an agreement with Atlantic Aviation Services (Atlantic) to jointly sublease land and construct a 30,000 square-foot hangar and 8,000 square feet of office space. On February 3, 2004, plaintiff entered into an agreement with Koubek for mechanical, electrical and plumbing engineering design services including "design[ing] and detail[ing] [...] required site drainage for the new tarmac area and any required oil separators for the hangar region." On July 9, 2004, plaintiff entered into an agreement with CMA for architectural services. Mechanical and structural engineering services were specifically excluded from CMA's contract.

Construction of the hangar commenced in June 2004. On July 26, 2004, Atlantic submitted an application to DHS for sewage

disposal facilities and water supply systems, which described the hangar as a "New aircraft storage hangar, w/o service or maintenance work." When asked in a Department of Public Works application to list "all . . . processes" to be performed at the hangar, Atlantic responded "N/A Aircraft washing."

On May 2, 2005, plaintiff's vice president wrote to DHS to confirm that "the only operations conducted in [the hangar] will be the washing of aircraft." In a reply letter dated May 3, 2005, DHS verified that there would be no "aircraft engine maintenance performed that would necessitate oil changes, hydraulic and brake fluid replacement, painting of aircraft exteriors or any other activity using toxic or hazardous materials." DHS further verified that, based upon plaintiff's declarations, the operation would be viewed as a "vehicle wash station."

DHS stated in the letter that "double-walled equipment [was not required] to be installed within the hangar" and that the "single-walled oil water separator can remain in place and does not need a permit from this office." DHS further stated that "[s]hould the use of the hangar building change to include maintenance activities using toxic or hazardous materials, your operation will be reclassified and the proper double-walled equipment will have to be installed." In a separate memorandum

from DHS to Koubek dated May 6, 2005, DHS confirmed that the "vehicle/airplane wash system incorporation is exempt from Article 12 requirements."

The hangar and trench were put into operation in June 2005 and inspected by DHS on July 5, 2005. DHS concluded that plaintiff was occupying the hangar and improperly discharging waste into a sewage facility without "final approval." Because plaintiff was authorized to discharge only sanitary waste, "any wastewater generated from the hangar area [could] not be discharged to the sewer."

The drain for the trench was subsequently plugged and capped while a double-walled trench and oil water separator were installed. On August 2, 2007, plaintiff initiated this action alleging that as a result of defendants' failure to properly design the trench, the hangar was not fully functional until July 2007 when the double-walled trench was completed.

Plaintiff's president testified at deposition that plaintiff "always" intended to use the hangar for maintenance, and that "[e]veryone knew it." However, later in the deposition, he admitted that the decision to perform maintenance was made after May 2005. Plaintiff's president conceded that as of May 6, 2005, plaintiff did not intend to use or store any toxic or hazardous materials in the hangar.

On March 26, 2009, Koubek moved for summary judgment dismissal of the complaint against him on the grounds that plaintiff represented to DHS that the hangar would only be used for storage and washing, and that DHS had determined that Article 12 was not applicable. Koubek asserts that his plans and specifications, including the single-walled trench, were consistent with good and accepted engineering practices.

On March 31, 2009, CMA also moved for summary judgment dismissal on the grounds that, inter alia, Koubek, not CMA, was responsible for the design and specifications of the trench. CMA maintains that it rendered services in accordance with accepted architectural design standards.

Plaintiff cross-moved for summary judgment on May 14, 2009. In support, plaintiff submitted, inter alia, the expert opinion of the engineer who was hired by plaintiff to design the double-walled trench that replaced the single-walled trench. Based on his review of defendants' site drawings as well as a site visit, plaintiff's expert opined that defendants' work did not meet generally accepted industry standards because the trench did not comply with Article 12. He stated that Koubek's use of another engineer's designs deviated from standard practices, and that it is "patently improper for any licensed design professional . . . to advise a client to commence construction prior to the issuance

of any necessary . . . permits."

Plaintiff's expert concluded that completion of the project in compliance with Article 12 "enabled the [h]angar to operate as originally intended by [plaintiff]," including the storage of toxic or flammable materials. The expert further opined that Article 12 would "likely" be applicable to the project even if the hangar was only used for washing aircraft because washing aircraft "could" release toxic materials.

On September 8, 2009, the motion court granted defendants' motions for summary judgment. The court found that CMA was not contractually responsible for designing the trench and performed no work on the trench. The court also found that the allegation that Koubek breached his contract by failing to design the trench in accordance with Article 12, "for which there was an applied for, documented, and utilized exemption, is implausible on its face."

The court concluded that the proximate cause of plaintiff's injury was not "the completion of the project in compliance with the declared intended use," but plaintiff's "change in the intended use, for which [plaintiff] alone is responsible." On appeal, plaintiff argues that the motion court erred in disregarding the opinion of its expert. Plaintiff also argues that the motion court "conflated" the claims against Koubek and

CMA, and that the claims against CMA stem from its selection of Koubek for the project and its advice to plaintiff to commence construction prior to the issuance of necessary permits.

For the following reasons, we affirm. Defendants established prima facie that they were neither negligent nor breached their contracts (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Defendants submitted evidence that plaintiff represented to DHS that it intended to use the hangar only for the storage and washing of aircraft and that there would be no toxic or hazardous materials on the premises. Defendants further demonstrated that based on these representations, DHS determined that the project was exempt from the requirements of Article 12, and a double-walled trench was not required. CMA also submitted evidence that it had no contractual duty regarding the planning and installation of the trench.

In opposition, plaintiff failed to raise a triable issue of fact. A claim of professional malpractice "requires proof that there was a departure from accepted standards of practice and that the departure was a proximate cause of the injury" (*D.D. Hamilton Textiles v Estate of Mate*, 269 AD2d 214, 215 [2000], citing *Georgetti v United Hosp. Med. Ctr.*, 204 AD2d 271 [1994]). No such showing was made here.

Plaintiff failed to adduce credible expert testimony that

defendants deviated from locally prevailing standards of practice (*see Tower Bldg. Restoration v 20 E. 9th St. Apt. Corp.*, 7 AD3d 407 [2004], citing *530 E. 89 Corp. v Unger*, 43 NY2d 776 [1977]. An expert's opinion, which is not supported, and indeed is refuted by facts established in the record, has little probative value (*see Cassano v Hagstrom*, 5 NY2d 643, 646 [1959] [a witness may not reach his conclusion by assuming material facts not supported by evidence]; *Cillo v Resjefal Corp.*, 16 AD3d 339, 340 [2005], citing *Castro v New York Univ.*, 5 AD3d 135 [2004]); *see e.g. Gerber Trade Fin., Inc. v Skwiersky, Alpert & Bressler, LLP*, 12 AD3d 286 [2004], *lv denied* 4 NY3d 705 [2005]).

Here, plaintiff's expert's opinion, that the trench design was inadequate because it did not comply with Article 12, presumes that Article 12 was applicable to plaintiff's project when the trench was designed. However, as plaintiff testified, the decision to perform maintenance was not made until the month before construction was completed. The record establishes that until that time, the intended use of the hangar was limited to aircraft washing, Article 12 did not apply, and no permits for double-walled equipment were required. Furthermore, his assertion that defendants should have anticipated that Article 12 would "likely" apply to aircraft washing is plainly controverted

by the DHS's contrary determination (*see e.g. Lynn G. v Hugo*, 96 NY2d 306, 310 [2001]).

Plaintiff's expert opined that Koubek's use of plans from a different project and failure to familiarize himself with Article 12 were deviations from accepted practice. Even were we to agree, such deviations were not the proximate cause of plaintiff's injury. Rather, it is plaintiff's own conduct -- changing the intended use of the hanger -- that proximately caused its injury (*see e.g. D.D. Hamilton Textiles*, 269 AD2d at 215 ["(p)laintiffs' ultimate failure to address . . . whether their dilemma was the result of their own malfeasance . . . highlights the insufficiency of their contention that there was a departure from accepted standards"]; *Gerber Trade Fin., Inc.*, 12 AD3d at 286).

The same infirmities afflict plaintiff's contract claim against Koubek. Koubek's design of a single-walled trench is not breach of "an implied promise to exercise due care" (*17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 84 [1999] [internal quotation marks and citation omitted]), because, based on plaintiff's representations, DHS had determined that a double-walled trench was not required.

Plaintiff's argument that CMA improperly selected Koubek as the mechanical engineer on the project is unavailing. Neither

the complaint nor the bill of particulars includes such a claim. In any event, CMA was not responsible, under its agreement, for the selection of the mechanical engineer; plaintiff contracted directly with Koubek.

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

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

ENTERED: JULY 28, 2011

CLERK

Tom, J.P., Mazzarelli, Acosta, Renwick, Freedman, JJ.

4831 In re Eddie Maldonado, Index 109717/09
Petitioner-Appellant,

-against-

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

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Chet Lukaszewski, P.C., Lake Success (Chet Lukaszewski of counsel), for appellant.

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

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Order and judgment (one paper), Supreme Court, New York County (Michael D. Stallman, J.), entered January 5, 2011, which denied the petition seeking, inter alia, to annul respondents' determination denying petitioner's application for accident disability retirement benefits, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner, a police officer, was assigned to the World Trade Center site shortly after September 11, 2001. In connection with the recovery effort, he performed security duties, escorted electrical engineers and food trucks, and distributed supplies. In late summer 2001, but before September 11, petitioner noticed a pulling sensation in his left thigh.

Shortly after the terrorist attack, he felt a walnut-sized lump in the same area. In November 2001, a biopsy was performed on the lump, revealing it to be a high-grade, soft-tissue sarcoma, which is a malignant tumor arising in connective tissue. On February 12, 2002, petitioner underwent a surgical procedure to remove the sarcoma, which included removal of most of the muscles from his anterior thigh. After the surgery, petitioner began receiving chemotherapy. The sarcoma in his left thigh then metastasized to his sacrum, lumbosacral spine, and other bones.

On December 15, 2006, petitioner filed an application for accident disability retirement (ADR) pension benefits with the Police Pension Fund. He stated in the application that he was disabled from performing police duties due to cancer and related conditions that developed as a result of his working at the World Trade Center site. The Police Commissioner issued an order directing the Medical Board to examine petitioner and his medical record to determine whether the disability was obtained in the line of duty, which would entitle petitioner to an ADR pension; if not, he would be retired on ordinary disability retirement (ODR).[1]

[1] A WTC ADR pension provides a recipient with a three-quarters final salary tax-free pension, while an ODR pension provides a recipient with a one-half pay taxable pension.

On April 18, 2007, the Police Pension Fund Medical Board evaluated petitioner's application. As reflected in its minutes, the Medical Board examined the medical evidence, provided a brief summary of the history and findings therein, interviewed and examined petitioner, gathered additional history of his complaints, and noted various medical findings. The Medical Board acknowledged that petitioner was disabled from performing police duties due to the diagnosis of cancerous sarcoma. However, in paragraph 54 of the minutes, the Board concluded that "the proximity of the diagnosis of the disease to the September 11, 2001 World Trade Center exposure is competent evidence that the exposure was not the etiology of the sarcoma." Accordingly, the Board recommended ODR.

On October 9, 2007, petitioner's physician, who had been treating him since 2003, sent a letter to the Police Department in response to the Board's findings. The letter stated, in its entirety,

> "With regard to [paragraph] 54 of the [minutes]: While the proximity of the diagnosis of soft tissue sarcoma to the September 11, 2001 World Trade Center exposure suggests that the exposure not to be [*sic*] the etiology of the sarcoma, it does not rule out the possibility the exposure at the World Trade Center may have stimulated factors such as angiogenesis factors which may have accelerated the metastatic potential of the sarcoma. [Petitioner] did develop

> metastatic disease to the bone and lungs soon after the initial diagnosis."

In January 2008, the Medical Board reconsidered the application, taking into consideration the letter and another interview of petitioner. The Board was not persuaded by the letter and reaffirmed its decision. In May 2008, at petitioner's request, the Pension Fund Board of Trustees remanded the case to the Medical Board for further evaluation of the application and re-examination of petitioner, and for new evidence to be submitted.

In September 2008, plaintiff's physician sent another letter to the Medical Board, in which he stated,

> "As I had stated in my letter from 10/9/07, it is scientifically difficult to ascribe the etiology of this rare tumor (liposarcoma) to any specific environmental exposure, such as the World Trade Center disaster, but the rapid growth of the tumor is remarkable and suggests that this is not an indolent slow-growing tumor which may have started many months prior to the diagnosis."

On September 17, 2008, petitioner's case was again considered by the Medical Board. In adhering to its decision to grant petitioner only an ODR retirement, the Medical Board noted that petitioner's physician could only "*speculate* that the exposure may have accelerated the growth of the preexisting

tumor." On March 11, 2009, the Board of Trustees, by a six-to-six vote, determined that petitioner's World Trade Center exposure was not the etiology of his condition, and it denied his application for ADR.[2]

Petitioner filed this article 78 petition, alleging that respondents' denial of his application for ADR was "arbitrary, capricious, unreasonable and unlawful." The petition sought the annulment of respondents' determination and an order directing respondents to award him an ADR pension. Petitioner invoked the World Trade Center presumption, codified at Administrative Code of the City of New York § 13-252.1, which provides:

> "Accidental disability retirement; World Trade Center presumption. 1. (a) Notwithstanding any provisions of this code or of any general, special or local law, charter or rule or regulation to the contrary, if any condition or impairment of health is caused by a qualifying World Trade Center condition as defined in section two of the retirement and social security law, it shall be presumptive evidence that it was incurred in the performance and discharge of duty and the natural and proximate result of an accident not caused by such member's own willful negligence, unless the contrary be proved by competent evidence."

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[2] It is "a time-honored procedural practice" that, where the Board of Trustees is deadlocked, the applicant is denied ADR and granted ODR (*Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 144-145 [1997]).

The court denied the petition and dismissed the proceeding, finding that petitioner had not met his burden of demonstrating that the Board of Trustees' pension determination was arbitrary and capricious or contrary to law. The court held that, based on the Medical Board's repeated consideration of the medical examinations, interviews and tests, including those performed by petitioner's physicians, the Board of Trustees had a rational basis for its determination that the World Trade Center presumption of causation had been overcome and that petitioner's World Trade Center work did not cause or exacerbate his cancer or its metastasis. Noting that the onset of petitioner's symptoms and the size and advanced state of the cancer appeared in close temporal proximity to September 11, 2001, the court found that petitioner's physician's speculation that petitioner's World Trade Center work could have caused or exacerbated his condition was properly rejected by respondents.

Disability retirement applications by police officers invoking World Trade Center-related injuries differ from usual applications insofar as the burden of proof is shifted to the police department respondents. So long as the petitioner can establish that he or she worked the requisite number of hours at the site and was diagnosed with one of the enumerated medical conditions, the respondents bear the ultimate burden of

establishing that a qualifying injury was *not* incurred in the line of duty (*see* Administrative Code § 13-252.1[1][a]). However, a determination by the Board of Trustees that the Medical Board properly found a lack of causation is entitled to the deference ordinarily due an agency determination in an article 78 proceeding. In other words, so long as the determination is rationally based, is not arbitrary, capricious, an abuse of discretion or contrary to law, a reviewing court is obliged to affirm it (*Matter of Jefferson v Kelly*, 51 AD3d 536 [2008]). The existence of "credible evidence" supporting the Medical Board's decision is a sufficient basis for a reviewing court to determine that the Board of Trustees correctly found that the Medical Board rebutted the World Trade Center presumption (*see Matter of Claudio v Kelly*, __ AD3d __, 924 NYS2d 60 [2011]; *Kelly v Kelly*, 82 AD3d 544 [2011]).

In this proceeding, respondents do not dispute that petitioner worked the minimum number of hours required for the World Trade Center presumption to attach, or that his condition is one of the qualifying injuries enumerated in the Retirement and Social Security Law. Furthermore, there is no dispute, as petitioner has effectively conceded, that there is no causal link between the initial onset of petitioner's cancer and the conditions at the World Trade Center site on and after September

11, 2001. Rather, it is petitioner's position that his work at the World Trade Center site aggravated his cancer. However, in attempting to support this theory before the Medical Board, petitioner offered only his own treating physician's letters, which acknowledged that there was no proof that the World Trade Center site environment caused petitioner's cancer, and only speculated that the cancer spread rapidly because of that environment. Indeed, the doctor's comment in his September 2008 letter to the Medical Board that "rapid growth of the tumor is remarkable and suggests that this is not an indolent slow-growing tumor" is not supported by any medical evidence. Nor did petitioner's doctor even state that, in his medical opinion, it was more likely than not that the rapid growth of the tumor was related to petitioner's work at the World Trade Center site.

The 2008 letter from petitioner's doctor did not buttress his letter of October 2007, which was suffused with equivocal language. In that letter he stated that petitioner's "exposure does not rule out the *possibility* the exposure at the World Trade Center *may have* stimulated factors such as angiogenesis factors which *may have* accelerated the metastatic potential of the sarcoma" (emphasis added). Together, these two letters cannot be viewed as anything but bare conjecture. The existence of evidence so equivocal lends credence to the Board of Trustees'

determination that the presumption was rebutted (*see Matter of Callaghan v Bratton*, 253 AD2d 390 [1998]). Further, the Medical Board was not required to identify the actual cause of the rapid metastasis; it was sufficient for it to demonstrate that nothing in the record constituted evidence of causation (*see Matter of Stegmuller v Brown*, 216 AD2d 23 [1995], *lv denied* 87 NY2d 807 [1996]). Thus, we find that credible evidence supports the Medical Board's determination, adopted by the Board of Trustees, that the aggravation of petitioner's cancer was not caused by the World Trade Center site conditions.

This decision should not be viewed as a diluting of the World Trade Center presumption, which was enacted in recognition of the enormous sacrifice made by those public employees who assisted in the recovery from the World Trade Center attacks. Rather, it reflects the unique facts of this case, where not even petitioner's own physician could offer more than a wholly

equivocal, speculative opinion on causation. Accordingly, the court properly found that respondents rebutted the World Trade Center presumption.

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

ENTERED: JULY 28, 2011

CLERK

Andrias, J.P., Friedman, Freedman, Richter, Román, JJ.

5126 Skilled Investors Inc., Index 601326/08
Plaintiff-Appellant-Respondent,

-against-

Weiser LLP,
Defendant-Respondent-Appellant.

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Cross appeals having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Richard B. Lowe, III, J.), entered on or about June 30, 2009,

And said appeals having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated July 12, 2011,

It is unanimously ordered that said appeals be and the same are hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: JULY 28, 2011

CLERK

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

5362 In re Daijah D.,

A Person Alleged to be a
Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

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Tamara A. Steckler, The Legal Aid Society, New York (Selene D'Alessio of counsel), for appellant.

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

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Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about September 17, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed acts that, if committed by an adult, would constitute the crimes of criminal possession of a weapon in the second and fourth degrees and committed the act of unlawful possession of a weapon by a person under 16 (two counts), and placed her on enhanced supervision probation for a period of 18 months, unanimously reversed, on the law, without costs, appellant's motion to suppress granted, and the petition dismissed.

We need not address the propriety of the challenged police conduct in questioning appellant after she walked away from a group of loud and disorderly teenagers as the police approached

the group because the People failed to sustain their heavy burden of establishing that appellant's consent to a search of her purse was voluntary and that she waived her constitutional rights (*see Bumper v North Carolina*, 391 US 543, 550 [1968]; *People v Gonzalez*, 39 NY2d 122 [1976]).

Consent is "a true act of the will, an unequivocal product of an essentially free and unconstrained choice. Voluntariness is incompatible with official coercion, actual or implicit, overt or subtle" (*Gonzalez*, 39 NY2d at 128).

In assessing the voluntariness of consent, a court should consider: (1) whether the consent was given while the individual was in police custody, and how many officers were present; (2) the personal background of the consenter, including his age and prior experience with the law; (3) whether the consenter offered resistance; and (4) whether the police advised the consenter of his right to refuse consent (*id.* at 129-30). Applying these factors, we find that the People failed to prove that appellant's consent was "more likely to be the product of calculation than awe" (*id.* at 129).

Appellant is 14 years old, and no evidence was presented at the suppression hearing to demonstrate that she had prior experience with the law. Sergeant Burns testified that when he called to her from the unmarked car, she stopped and approached;

thus she offered no resistence. He further testified that when he exited the car to question her on the city sidewalk at about 11:30 P.M., the three officers with him also exited the car. While Sergeant Burns knew Officer Merrick was located to his right, he did not see where the other two officers were, and thus was no position to say exactly where they were or what they were doing. Nor is there any evidence that appellant was told she did not have to consent when Sergeant Burns asked if he could look in her purse. Under these particular circumstances, "the ineluctable inference, except to the jaded," is that appellant's consent, which in reality was her arguably equivocal act of handing her purse to Sergeant Burns, was not the product of a "free and unconstrained choice" (*Gonzalez*, 39 NY2d at 129; *People v Barreras*, 253 AD2d 369 [1998]).

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

ENTERED: JULY 28, 2011

CLERK

Saxe, J.P., Sweeny, Catterson, Freedman, Manzanet-Daniels, JJ.

5424-5425 The People of the State of New York, Respondent, SCI 3200C/05

-against-

Dayshawn Jenkins, Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Davis Polk & Wardwell LLP, New York (Shingira Masanzu of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Seth L. Marvin, J.), entered on or about September 28, 2010, which granted defendant's motion for reargument, and adhered to its original determination denying defendant's CPL 440.46 motion for resentencing, unanimously reversed, as a matter of discretion in the interest of justice, and the matter remanded for further proceedings. Appeal from order, same court and Justice, entered on or about August 12, 2010, which denied the motion for resentencing, unanimously dismissed, without costs, as subsumed in the appeal from the September 28, 2010 order.

When a defendant moves for resentencing under the Drug Law Reform Act, the defendant is entitled to be brought before the court and given an opportunity to be heard (*People v Figueroa*, 21

AD3d 337, 339 [2005], *lv denied* 6 NY3d 753 [2005]). In this case defendant was never before the court on his resentencing motion. Thus the determination denying resentencing must be vacated and the matter remanded for a hearing on defendant's CPL 440.46 motion.

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

ENTERED: JULY 28, 2011

CLERK

Saxe, J.P., Sweeny, Catterson, Freedman, Manzanet-Daniels, JJ.

5431- John F. Schutty, Index 602485/08
5432- Plaintiff-Appellant,
5432A-
5432B -against-

Speiser Krause P.C., et al.,
Defendants-Respondents.

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Lazare Potter & Giacovas, LLP, New York (Robert A. Giacovas of counsel), for appellant.

Leitner & Getz LLP, New York (Gregory J. Getz of counsel), for respondents.

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Orders, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered June 1, 2010 and on or about June 11, 2010, which, after a nonjury trial, denied as moot plaintiff's motion for summary judgment dismissing the first counterclaim and dismissed the complaint, respectively, and orders, same court and J.H.O., entered February 18, 2011, which, respectively, upon stipulation of the parties, referred four counsel fee disputes to the courts handling the underlying litigations and reaffirmed the stipulation and the order of referral, unanimously affirmed, without costs.

Plaintiff attorney brought this breach of contract action against his former law firm and certain of its partners. Defendants asserted a counterclaim for a share of attorneys' fees on four matters plaintiff took with him when he left the firm.

The parties stipulated that the fee disputes would be referred to the individual courts handling each of the matters. The stipulation was entered into in open court during a status conference (*see Matter of Dolgin Eldert Corp.*, 31 NY2d 1, 4-5 [1972]). Plaintiff is bound by it (*Hallock v State of New York*, 64 NY2d 224, 230 [1984]).

Plaintiff's motion for summary judgment dismissing the counterclaim was not rendered moot by the trial. However, the motion was rendered moot by the stipulation.

The court's conclusion that defendants did not breach the parties' employment agreement was based on its credibility determinations and the evidence adduced as to the parties' conduct of their practice. We cannot say that the conclusion could not have been reached under any fair interpretation of the evidence (*see Serrante v GJF Constr. Corp.*, 72 AD3d 543 [2010], *lv denied* 15 NY3d 704 [2010]).

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

ENTERED: JULY 28, 2011

CLERK

Mazzarelli, J.P., Saxe, Acosta, Freedman, JJ.

4593 Michael Mulgrew, etc., et al., Index 260000/10
Petitioners-Respondents,

-against-

Board of Education of the City School
District of the City of New York, et al.,
Respondents-Appellants.

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State Education Department and Commissioner
of the State Education Department,
Amici Curiae.

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Michael A. Cardozo, Corporation Counsel, New York (Alan G. Krams of counsel), for appellants.

Stroock & Stroock & Lavan LLP, New York (Charles G. Moerdler of counsel), for respondents.

Eric T. Schneiderman, Attorney General, New York (Alison J. Nathan of counsel), for Amici Curiae.

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Order, Supreme Court, Bronx County (John A. Barone, J.), entered July 29, 2010, reversed, on the law, without costs, the cross motion granted and the proceeding dismissed.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela Mazzarelli, J.P.
David B. Saxe
Rolando T. Acosta
Helen E. Freedman, JJ.

4593
Index 260000/10

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Michael Mulgrew, etc., et al.,
Petitioners-Respondents,

-against-

Board of Education of the City School District of the City of New York, et al.,
Respondents-Appellants.

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State Education Department and Commissioner of the State Education Department,
Amici Curiae.

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Respondents appeal from an order of the Supreme Court, Bronx County (John A. Barone, J.), entered July 29, 2010, which denied their cross motion to dismiss the article 78 proceeding.

Michael A. Cardozo, Corporation Counsel, New York (Alan G. Krams, Kristin M. Helmers and Emily Sweet of counsel), for appellants.

Stroock & Stroock & Lavan LLP, New York (Charles G. Moerdler, Alan M. Klinger and Dina Kolker of counsel), Meyer, Suozzi, English & Klein, P.C., New York (Basil A. Paterson and Barry Peek of counsel), Carol L. Gerstl, New York and Adam S. Ross, New York, for respondents.

Eric T. Schneiderman, Attorney General, New York (Alison J. Nathan, Barbara D. Underwood and Benjamin N. Gutman of counsel), for Amici Curiae.

SAXE, J.

Following the Court of Appeals' decision in *Campaign for Fiscal Equity v State* (100 NY3d 893, 919 [2003]), finding that the State Legislature's financing system for the State's public schools failed to afford New York City public school children the constitutionally-mandated opportunity for a meaningful education, in 2007 the Legislature enacted a law entitled "Contract for Excellence" (*see* Education Law § 211-d, as added by L 2007, ch 57, pt A, § 12). The Contract for Excellence program provided additional funding to underperforming school districts throughout the state, targeting the expenditure of those additional funds for approved enhancements (*id.*).

The statute includes one provision in particular, section 211-d(2)(b), that is applicable only to New York City's school district, the enforcement of which is at issue here. That provision required the New York City school district to create a five-year plan to reduce average class sizes, and specified the means by which class size reduction was to be accomplished, such as through creation or construction of more classrooms and school buildings, placement of more than one teacher per classroom, or by other means (Education Law § 211-d[2][b][ii]). This portion of the statute also included a provision that the "sole and exclusive remedy" for violation of this paragraph would be a

petition to the State Education Commissioner, whose decision would be "final and unreviewable."

Pursuant to amendments to the statute in 2009, the Legislature added a requirement that the City school district "report to the commissioner on the status of the implementation of its plan to reduce average class sizes pursuant to subparagraph (ii) of this paragraph" (§ 211-d[2][b][iii]). This newly-added subparagraph set forth the required contents of this report, specifying that it must identify all schools that received the targeted funds and indicate the amount each of those schools received; provide a detailed description of how the funds contributed to achieving class size reduction; report student enrollment and average class sizes for each school year; and identify those schools that made insufficient progress toward achieving the class size reduction goals, and provide a detailed description of the additional actions that will be taken to reduce class sizes in such schools. The required report was to be submitted to the Commissioner by November 17, 2009. (*Id.*)

Further, subdivision (6) of § 211-d requires an addition to the annual audit report that the Board is required to submit each January 1st for the prior fiscal year pursuant to Education Law § 2116-a. In particular, the subdivision requires that the audit report contain a certification by either the City Comptroller or

the accountant who conducted the audit, stating that "the increases in total foundation aid and supplemental educational improvement plan grants have been used to *supplement, and not supplant* funds allocated by the district in the base year for such purposes" (emphasis added).

The Contract for Excellence legislation initially became effective on April 9, 2007, and remained in effect only through the 2009-2010 school year; the legislation was not extended to the 2010-2011 school year.

In compliance with the statute, the Board of Education (predecessor to the current Department of Education) adopted, and the State Education Department approved, Contracts for Excellence for each covered school year, which included the required "Five Year Class Size Reduction Plan," prepared and approved in 2007 and updated in 2008. This plan committed to specific expenditures earmarked for class size reduction; petitioners assert that, over the three school years the Contracts for Excellence were in effect, the Board of Education received approximately $760 million in Contract funds specifically designated for class size reduction.

The article 78 petition, dated January 4, 2010, alleges that respondent Board of Education violated Education Law § 211-d by utilizing Contract for Excellence funds to offset budget cuts

rather than to reduce class sizes as required by the statute. Petitioners offer in support of their claim the City Comptroller's report dated September 9, 2009, regarding its audit of the Department of Education's administration of the Early Grade Class Size Reduction Program (EGCSR), the funding program that preceded the Contract for Excellence program. In that report, the Comptroller stated that during the 2008-2009 school year, some $46.8 million of EGCSR funds were used to supplant tax levy funds. Specifically, the audit report explained that

> "DOE used nearly $46.8 million of the $179.9 million in EGCSR funds earmarked for reducing early grade class size to supplant $46.8 million in tax levy funds. By using EGCSR funds in place of tax levy funds, schools free-up less restrictive money to spend on other budget items instead of further reducing classroom averages. The $46.8 million should have been spent on creating an additional 414 general education classes at 245 schools across the City, but these funds were improperly used instead to pay for teacher positions that would have existed without the EGCSR program."

Petitioners seek a declaration that respondent Board of Education has failed to comply with its obligations under Education Law § 211-d and its class size reduction plan, a determination that this failure is arbitrary and capricious, and a direction that it comply with these obligations.

Respondents moved to dismiss the petition on the grounds that (1) Supreme Court lacked original jurisdiction over this challenge, in view of the language in § 211-d(2)(b)(ii) that "the

sole and exclusive remedy for a violation of the requirements of this paragraph shall be pursuant to a petition to the commissioner," and (2) petitioners failed to exhaust their administrative remedies at the State Education Department. The motion court denied the motion, concluding that the placement of the "sole and exclusive remedy" language within the framework of the statute indicates that it applies only to challenges to the Board's class size reduction *plan*, not to challenges regarding its *implementation* of that plan.

Respondents appeal from that ruling. For the reasons that follow, we reverse.

Initially, we reject petitioners' interpretation, adopted by the motion court, that the word "paragraph" in Education Law § 211-d(2)(b)(ii), where it refers to "a violation of the requirements of *this paragraph*" (emphasis added), applies only to a violation of subparagraph (ii). The word "paragraph" is not carelessly employed in this context; in formulating statutes, the Legislature carefully refers to sections, subdivisions, paragraphs and subparagraphs. Indeed, the language of § 211-d establishes that this section of the Education Law is broken down into subdivisions 1 through 9, and that each subdivision is broken down into paragraphs denominated by lower case letters, which are in turn broken down into subparagraphs denominated by

lower case roman numerals (*see* Education Law § 211-d(1)(e) [referencing "the requirements of subparagraph (vi) of paragraph a of subdivision two of this section"]). Consequently, the provision's reference to "this paragraph" is incontrovertibly intended to apply to the entire portion of the statute contained within section 211-d, subdivision (2), paragraph (b), which includes subparagraphs (I), (ii) and (iii). Therefore, contrary to the motion court's view, the portion of § 211-d(2)(b)(ii) that limits the remedy for a violation to a petition to the Commissioner, applies to both that portion requiring the Board of Education to formulate a plan to reduce class sizes ([b][ii]) as well as that requiring it to report on the implementation of those plans ([b][iii]). Petitioners' argument that the Legislature intended to distinguish between the review of actions taken by the Board in the pre- and post-approval stages (i.e. the formulation and implementation) of its contract and plan is unavailing.

The Legislature's explicit limitation of available remedies for claimed violations by the Board of Education of the directive to formulate and implement a plan to reduce class sizes, is well within the discretion of the Legislature.

> "[T]he constitutionally protected jurisdiction of the Supreme Court does not prohibit the Legislature from conferring exclusive original jurisdiction upon an

> agency in connection with the administration of a statutory regulatory program. In situations where the Legislature has made that choice, the Supreme Court's power is limited to article 78 review, except where the applicability or constitutionality of the regulatory statute, or other like questions, are in issue"

(*Sohn v Calderon*, 78 NY2d 755, 767 [1991]).

Petitioners assert that while the Commissioner may have original jurisdiction[1] over challenges to either the class-size-reduction plan the Board presents under § 211-d(2)(b)(ii]), or to the reports it submits regarding its implementation of that plan under § 211-d(2)(b)(iii]), their petition does *not* charge a violation of either subparagraph. Rather, they argue that they allege a violation of § 211-d(6).

Subdivision (6) of § 211-d requires that in the annual audit report that the Board is required to submit each January 1st for the prior fiscal year pursuant to Education Law § 2116-a, the City Comptroller or the accountant who conducted the audit include a certification "that the increases in total foundation

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[1] The Education Law provision does not preclude Supreme Court's jurisdiction over the matter. "Even where judicial review is proscribed by statute, the courts have the power and the duty to make certain that the administrative official has not acted in excess of the grant of authority given * * * by statute or in disregard of the standard prescribed by the legislature" (*Matter of New York City Dept. of Envtl. Protection v New York City Civ. Serv. Commn.*, 78 NY2d 318, 323, quoting *Matter of Guardian Life Ins. Co. Of Am. v Bohlinger*, 308 NY 174, 183 [1954]).

aid and supplemental educational improvement plan grants have been used to *supplement, and not supplant* funds allocated by the district in the base year for such purposes" (emphasis added). Because the September 1, 2009 certification *could not* affirmatively make that statement, but rather, stated that during the 2008-2009 school year, some $46.8 million of Contract funds "were used to supplant rather than supplement City tax levy funds," petitioners argue, that a petition to the Commissioner was not necessary before commencing this proceeding.

However, in asserting their claimed violation, petitioners improperly rely on subdivision (6) of section 211-d. Indeed, that subdivision merely directs that the entity providing the annual audit include a certification to that effect. Assuming the truth of petitioners' allegations that the Board of Education used Contract for Excellence funds to replace previous sources of funding, that failure is not a direct violation of § 211-d(6) because it is not a failure to provide an audit report containing a certification from the auditor. The alleged improper use of Contract for Excellence funds is more accurately characterized as noncompliance with the dictates of § 211-d(2)(b)(iii), because if those funds were *not* spent on the contemplated class size reduction methods, it would be disclosed when the Board of Education reported on how the targeted funds were spent for the

purpose of achieving class size reduction.

Even without the explicit "sole and exclusive remedy" clause in § 211-d(2)(b)(ii), the Legislature's intent to grant the State Education Department original jurisdiction over claimed failures of compliance with its directives is apparent from the overall legislative scheme. Section 211-d gives the State Education Department extensive oversight and monitoring responsibilities over the Contracts for Excellence, including approving each contract (§ 211-d[5]), and reviewing reports regarding implementation (§ 211-d[2][b][iii]) and audits (§ 211-d[6]). In addition, the statute directs the Department to "develop a methodology for reporting school-based expenditures by all school districts subject to the provisions of this section" (§ 211-d[9]). Indeed, the intent to give the State Education Commissioner original jurisdiction to adjudicate claims regarding alleged failures to comply with the Contract for Excellence requirements "is bolstered by the fact that all of the relevant and pertinent information to such . . . determination[s] is readily available to him and he possesses the requisite competence and expertise necessary for such . . . determination[s]" (*Matter of Onteora Cent. School Dist. at Boiceville [Onteora Non-Teaching Empls. Assn.]*, 79 AD2d 415, 417-418 [1981], *affd* 56 NY2d 769 [1982]).

Even if the State Education Department had not been given original jurisdiction over challenges such as that raised here, the doctrine of exhaustion of administrative remedies would in any event require that the review procedures dictated by Education Law §§ 211-d(7) and 310(7) be employed before permitting judicial review. Section 211-d(7) requires that the Trustees, Board of Education or Chancellor of each school district adopt procedures allowing "parents or persons in parental relation" to challenge implementation of the district's Contract for Excellence, by which an initial complaint may be brought to the principal or superintendent, with review by the Chancellor, whose decision may in turn be appealed to the State Education Commissioner. Accordingly, parents and organizations suing as their representatives should be compelled to utilize this statutory review process to obtain a final administrative determination before seeking judicial review.

Education Law § 310(7), which gives the State Commissioner of Education authority over grievances arising under the Education Law, does not provide for exclusive or original jurisdiction. Nevertheless, in this context, it would be consistent with the statute's scheme to require those petitioner-organizations whose complaints do not fall under section 211-d(7) to exhaust their remedies under Education Law § 310(7) before

proceeding to court.

The motion court reasoned that the exhaustion of administrative remedies was not required because it deemed the question presented as purely one of statutory interpretation. However, the issue raised by petitioners is whether the Board of Education improperly utilized funds allocated for the particular purpose of reducing class size to make up for reductions from its other funding sources. Determination of this point falls squarely within the purview of the State Education Department, as it will require review and comparison of budgets, expenditures, and funding allocations.

Petitioners argue that a petition to the State Education Department would be futile. While a proper showing of futility may justify making an exception to the exhaustion of remedies requirement (*see Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]), it is not established here. In support of their argument, petitioners assert that the State Education Department does not have the power to intrude into the New York City budgetary process and require the City to expend additional funds to ensure that the Board of Education spends Contract for Excellence funds as contemplated by the Legislature. Notably, however, no such assertion is made in the present Article 78 petition. Therefore, this argument fails to establish that no

relief would be possible through a petition to the Commissioner of Education.

Nor is there reason to conclude that requiring petitioners to exhaust their administrative remedy would cause irreparable harm (*Watergate II*, 46 NY2d at 57). Unlike *Lehigh Portland Cement Co. v New York State Dept. of Envtl. Conservation* (87 NY2d 136 [1995]), there is nothing here to indicate either that the Commissioner would act less expeditiously than the court, or that the Commissioner would be unable to redress established violations of the statute.

Finally, petitioners cannot succeed in their efforts by citation to a September 22, 2010 Daily News article reporting that the State Education Department and the Board of Education covertly agreed in a February 23, 2010 letter to allow the Board to increase class sizes (Gonzalez, *City Took Money for Nothing as it Got Aid to Cut Class Sizes, OK'ed Packing More Students Together*, New York Daily News, Sept. 22, 2010, available at http://articles.nydailynews.com/2010-09-22/local/27076031_1_ class-size-reduction-plan-fiscal-equity-state-aid). The article's report of steps taken by the Commissioner cannot be relied on to establish any inability on the Commissioner's part to properly determine petitioners' claimed violations of Education Law § 211-d.

Accordingly, the order of the Supreme Court, Bronx County (John A. Barone, J.), entered July 29, 2010, which denied respondents' cross motion to dismiss the article 78 proceeding, should be reversed, on the law, without costs, the cross motion granted and the proceeding dismissed.

All Concur.

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

ENTERED: July 28, 2011

CLERK