SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**FEBRUARY 2, 2012**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

6694 The People of the State of New York, Respondent, Ind. 3131/03

-against-

Jose Aguilar,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Lindsey J. Ramistella of counsel), for respondent.

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Order, Supreme Court, Bronx County (Megan Tallmer, J.), entered on or about June 17, 2010, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the adjudication to that of a level two offender, and otherwise affirmed, without costs.

The court improvidently exercised its discretion (*see generally People v Johnson*, 11 NY3d 416, 421 [2008]) in imposing

an upward departure to level three. Initially, we note that defendant's point score of 85 was well below the threshold for a level three adjudication, and that neither the People nor the Board of Examiners of Sex Offenders recommended an upward departure.

The factors cited by the court, viewed in light of all the circumstances of the case, did not warrant an upward departure. Defendant's failure to accept responsibility for the underlying crime, including his denial of the charges at his trial, was adequately accounted for in the risk assessment instrument. Furthermore, the circumstances of defendant's failure to accept responsibility were not of a type that would indicate a strong likelihood of recidivism. Although the fact that defendant's victim was his girlfriend's granddaughter is a reprehensible feature of the underlying offense, it does not, by itself, support an upward departure in this case.

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

ENTERED: FEBRUARY 2, 2012

CLERK

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

6695 Property Clerk, New York City Police Department,
Plaintiff-Appellant,

-against-

Roy G. Ford,
Defendant-Respondent.

Index 402262/09

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Michael A. Cardozo, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for appellant.

The Bronx Defenders, Bronx (Anna Arkin-Gallagher of counsel), for respondent.

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Amended order and judgment (one paper), Supreme Court, New York County (Martin Shulman, J.), entered November 30, 2010, which granted defendant's motion dismissing this forfeiture action, with prejudice, and ordered the return of defendant's motor vehicle, unanimously affirmed, without costs.

Plaintiff failed to complete service of process within 15 days after the expiration of the 25-day statute of limitations set forth in 38 RCNY 12-36(a). Nor did it explain its late service or seek an extension of time for service. Accordingly, the court properly dismissed this action (*see* CPLR 306-b).

As is clear, contrary to plaintiff's contention, the 25-day period prescribed in 38 RCNY 12-36(a) is a statute of limitations

for the purposes of CPLR 306-b (*see Property Clerk, N.Y. City Police Dept. v Smith*, 62 AD3d 486 [2009]; *Property Clerk, N.Y. City Police Dept. v Seroda*, 131 AD2d 289 [1987]).

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

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

ENTERED: FEBRUARY 2, 2012

CLERK

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

6696 In re Croes Nest Realty, LP, Index 260279/10
Petitioner-Appellant,

-against-

New York State Division of Housing
and Community Renewal, et al.,
Respondents-Respondents.

_____

Sidrane & Schwartz-Sidrane, LLP, Hewlett (Karen Schwartz-Sidrane of counsel), for appellant.

Gary R. Connor, New York (Christina S. Ossi of counsel), for New York State Division of Housing and Community Renewal, respondent.

Joseph A. Altman, P.C., Bronx (Joseph A. Altman of counsel), for Branford House Tenant Association and Dorothy Ayala, respondent.

_____

Order, Supreme Court, Bronx County (Diane A. Lebedeff, J.), entered June 16, 2011, which denied the petition to annul respondent New York State Division of Housing and Community Renewal's (DHCR) determination, dated July 23, 2009, ordering a rent reduction, based on a finding of a reduction in services, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner owns a residential building, formerly governed by city regulations under the Mitchell-Lama program pursuant to which petitioner was required to, inter alia, provide the tenants access to a community room used for parties and other gatherings.

Access to the community room became one of the required services under the Rent Stabilization Law upon the building's withdrawal from the Mitchell-Lama program and entry into rent stabilization (*see* Rent Stabilization Code [9 NYCRR] § 2520.6[r]). The rent-stabilized tenants commenced a proceeding with DHCR, based on petitioner's closing of the community room. In answering tenant's complaint, petitioner conceded that it closed the room and changed the locks. Although it cited "security reasons," no details or other supporting facts were provided. DHCR found that petitioner had closed the room without notice, thereby decreasing services and entitling the rent-stabilized tenants to a reduction of rent. Petitioner appealed, filing a petition for administrative review (PAR), in which it maintained that the room was not closed, but rather, the locks were changed to prevent certain tenants from using the room as part of a commercial operation. DHCR denied the PAR, finding that there was no dispute that petitioner closed the community room to tenants and that petitioner's claim of improper use of the room was not timely raised and therefore outside the scope of its review.

DHCR has broad discretion in ascertaining whether a required service is not being properly provided (*see Matter of Melohn v New York State Div. of Hous. & Community Renewal*, 234 AD2d 23

[1996]; *Matter of ANF Co. v Division of Hous. & Community Renewal*, 176 AD2d 518 [1991]). Petitioner's arguments that DHCR's determination was improper are based upon evidence submitted for the first time in the PAR, which cannot be considered since disposition of the proceeding is limited to the facts and record adduced before the agency when the administrative determination was rendered (9 NYCRR 2529.6; *Matter of Fanelli v New York City Conciliation & Appeals Bd.*, 90 AD2d 756 [1982], *affd* 58 NY2d 952 [1983]). Petitioner makes no argument that any of this evidence, which included the affidavit of an employee of petitioner's managing agent, and records maintained in petitioner's office, was unavailable during the original proceeding (*see Matter of Melohn*, 234 AD2d at 24). The evidence before DHCR at the time of its determination established that petitioner locked the community room without prior notice or

explanation and without obtaining DHCR's permission (9 NYCRR 2522.4[d] and [e]).

We have considered petitioner's additional arguments and find them unavailing.

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

ENTERED: FEBRUARY 2, 2012

CLERK

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

6697 In re Hakeem F.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Kristin M. Helmers of counsel), for presentment agency.

_____

Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about December 22, 2010, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of menacing in the third degree, and imposed a conditional discharge for a period of 12 months, unanimously reversed, as an exercise of discretion in the interest of justice, without costs, the juvenile delinquency adjudication and conditional discharge vacated and the petition dismissed.

The court improvidently exercised its discretion in finding appellant to be a juvenile delinquent. An adjournment in contemplation of dismissal would have been the least restrictive alternative (*see e.g. Matter of Anthony M.*, 47 AD3d 434 [2008]).

The record reflects that appellant came from a stable home environment, that he had no prior history of criminality, that this incident was his first contact with the juvenile justice system, and that his misconduct did not involve weapons, violence, or injury. Further, there was no indication that appellant ever used drugs or alcohol or was affiliated with a gang. Appellant accepted full responsibility for his offense and demonstrated sincere remorse and insight into his misconduct. While appellant would have benefitted from monitoring with regard to his attendance at school and his academic performance, this could have been provided for in the terms and conditions of an ACD.

Since the period of the conditional discharge has now expired, we dismiss the petition.

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

ENTERED: FEBRUARY 2, 2012

CLERK

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

6698 The People of the State of New York, Ind. 2289/09
Respondent,

-against-

Omar Daniels,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles H. Solomon, J.), rendered on or about January 19, 2010,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

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

ENTERED: FEBRUARY 2, 2012

CLERK

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

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

6699 Lilian Pedroza, Individually and as Mother and Natural Guardian of Jose Bonilla, etc., et al., Plaintiff-Appellant, Index 35028/09

-against-

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

_____

Goidel & Siegel, LLP, New York (Jonathan M. Goidel of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered April 18, 2011, which, in an action alleging, inter alia, inadequate supervision, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established entitlement to judgment as a matter of law, in this action where plaintiff's son, a 10th-grade student, was injured after he lost his balance and fell while attempting to perform a martial-art maneuver during a physical education self-defense class at his school. His own testimony as to how the accident occurred demonstrates that no additional supervision could have prevented his injury (*see Esponda v City*

*of New York*, 62 AD3d 458, 460 [2009]; *McCollin v Roman Catholic Archdiocese of N.Y.*, 45 AD3d 478, 479 [2007]; *compare Llauger v Archdiocese of N.Y.*, 82 AD3d 656 [2011]).

In opposition, plaintiff failed to raise a triable issue of fact as to whether defendants failed to exercise the care "as a parent of ordinary prudence would observe in comparable circumstances" (*Mirand v City of New York*, 84 NY2d 44, 49 [1994] [internal quotation marks and citation omitted]). Moreover, plaintiff did not submit evidence indicating that defendants violated a statute, regulation, or mandatory guideline stating that floor mats or bare feet were necessary during the practice of the martial art being performed by students (*see Scarito v St. Joseph Hill Academy*, 62 AD3d 773, 775 [2009]; *Capotosto v Roman Catholic Diocese of Rockville Ctr.*, 2 AD3d 384, 386 [2003]).

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

ENTERED: FEBRUARY 2, 2012

CLERK

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

6701 Lapidus & Associates, LLP, Index 601955/05
Plaintiff-Respondent,

-against-

Elizabeth Street, Inc., et al.,
Defendants-Appellants.

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Law Offices of E. Michael Rosenstock, P.C., Rockville Centre (E. Michael Rosenstock of counsel), for appellants.

Law Offices of Theodore P. Kaplan, New York (Theodore P. Kaplan of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Emily J. Goodman, J.), entered February 18, 2010, awarding plaintiff the total amount of $108,015.24 in its action to recover fees for legal services rendered, and bringing up for review an order, same court and Justice, entered November 10, 2009, which, inter alia, granted plaintiff partial summary judgment on its claim for an account stated, and denied defendants' cross motion for further discovery, unanimously affirmed, without costs.

The record demonstrates that defendants failed to dispute that plaintiff sent them the subject invoices and that no objections were lodged thereto until after this action had been commenced (*see Bartning v Bartning*, 16 AD3d 249, 250 [2005]). Defendants' challenges to the reasonableness of plaintiff's fees

fail. In the context of an account stated pertaining to legal fees, a firm does "not have to establish the reasonableness of its fee" (*Thelen LLP v Omni Contr. Co., Inc.*, 79 AD3d 605, 606 [2010], *lv denied* 17 NY3d 713 [2011]), because "the client's act of holding the statement without objection will be construed as acquiescence as to its correctness" (*Cohen Tauber Spievak & Wagner, LLP v Alnwick*, 33 AD3d 562, 563 [2006], *lv dismissed* 8 NY3d 840 [2007] [internal quotation marks omitted]; *see also Tunick v Shaw*, 45 AD3d 145, 149 [2007], *lv dismissed* 10 NY3d 930 [2008]).

We have considered defendants' remaining contentions and find them unavailing.

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

ENTERED: FEBRUARY 2, 2012

CLERK

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

6704-
6704A Rafiq Awan, Index 112688/09
Plaintiff-Appellant,

-against-

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

_____

Thomas D. Wilson, P.C., Brooklyn (Thomas D. Wilson of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan B. Eisner of counsel), for respondents.

_____

Order, Supreme Court, New York County (Geoffrey Wright, J.), entered on or about February 14, 2011, which granted defendants' motion to convert the action to an article 78 proceeding pursuant to CPLR 103(c), and remanded "this matter to the Dept. of Finance for a live hearing before an Administrative Law Judge or such other procedure as agency procedure provides," and order, same court, Justice and entry date, which granted defendants' motion to vacate the note of issue, unanimously affirmed, without costs.

Both section 243 of the Vehicle and Traffic Law and section 19-209 of the New York City Administrative Code provide that judicial review of a decision by the appeals board of the Parking Violations Bureau "may be sought" via an article 78 proceeding. A plenary action to remedy purported violations of civil rights

by the Parking Violations Bureau is "foreclosed by the availability of review in an article 78 proceeding in the state courts" (*Liebers v Parking Violations Bur.*, 1994 US Dist LEXIS 3986 [1994]). Thus, plaintiff cannot pursue this matter as a plenary action, and Supreme Court providently exercised its discretion under CPLR 103(c) by converting the action to an article 78 proceeding.

Once converted to an article 78 proceeding, Supreme Court correctly ordered that the Parking Violations Bureau afford plaintiff a live hearing. In this regard, the Parking Violations Bureau Appeals Board abused its discretion in upholding the administrative law judge's decision, as plaintiff demonstrated that he had "inadvertently invoked the adjudication-by-mail procedure without intending to waive [his] right to a hearing . . . [and, thus, the hearing by mail was] in violation of lawful procedure [CPLR 7803(3)]" (*Meadow v NYC Dept. of Fin., Motor Vehs.*, 61 AD3d 551, 551 [2009].

Since the court correctly converted the action to an article

78 proceeding, the note of issue was properly vacated.

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

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

ENTERED: FEBRUARY 2, 2012

CLERK

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

6705 The People of the State of New York, Ind. 2968/03
Respondent,

-against-

Quan Hong Ye,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Daniel P. FitzGerald, J.), entered on or about December 28, 2010, which denied defendant's CPL 440.10 motion to vacate a judgment of conviction rendered April 8, 2004, unanimously affirmed.

The court properly exercised its discretion in denying defendant's CPL 440.10(1)(g) motion to vacate the judgment on the ground of newly discovered evidence. The evidence would not have created the "probability" of changing the result that is required by the statute (*see People v Taylor*, 246 AD2d 410 [1998], *lv denied* 91 NY2d 978 [1998]).

Years after defendant's trial, the People's main witness was convicted of serious charges. Most of the corrupt conduct that led to this detective's conviction occurred after defendant's

trial, and none of it was connected in any way with defendant's case. The newly discovered evidence would have merely impeached the detective as to his general credibility. Furthermore, this detective's testimony was corroborated by other witnesses, particularly as to the substance of defendant's incriminating statements. Accordingly, defendant did not establish that the new evidence would probably have resulted in a different verdict (*see People v Tai*, 273 AD2d 150, 151 [2000]; *compare People v Jackson*, 29 AD3d 328 [2006]).

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

ENTERED: FEBRUARY 2, 2012

CLERK

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

6706-
6706A Beys General Construction Corp., Index 601410/08
Plaintiff-Respondent,

-against-

Hill International, Inc.,
Defendant-Appellant.

_____

LePatner & Associates, LLP, New York (Barry B. LePatner and Jeffrey W. Kleiner of counsel), for appellant.

Milber Makris Plousadis & Seiden, LLP, Woodbury (Joseph J. Cooke of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Charles Edward Ramos, J.), entered November 8, 2010, awarding plaintiff the principal amount of $271,602.71 plus interest, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered June 11, 2010, which granted plaintiff's motion for partial summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff-subcontractor made a prima facie showing of entitlement to judgment as a matter of law by submitting a Certificate of Substantial Completion, a Final Inspection Report, and the affidavit of its secretary stating that the claimed amounts were owed and that all remaining work had been completed

in accordance with the terms and conditions of the parties' contracts.

In response, defendant-general contractor failed to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). In particular, the opposition papers failed to connect undated New York City Engineering Audit Office (EAO) item adjustments, setting forth a total adjustment of $82,537 sought to be deducted by defendant herein, to the specific payment requisitions under which plaintiff made its claims. In addition, defendant's engineer did not affirmatively state in his affidavit that those specific EAO item adjustments were still outstanding at the time plaintiff submitted the final requisitions. Moreover, the opposition papers failed to address why the Certificate of Substantial Completion and the Final Inspection Report, signed by both defendant and the City, were not dispositive.

We reject defendant's argument that plaintiff did not proffer adequate documentation in support of the payment requisitions. The alleged documentation requirements largely emanated from the prime contract between defendant and the City. Although the prime contract clauses were incorporated by reference into the construction subcontracts between plaintiff

and defendant, plaintiff is not bound by the documentation requirements in the prime contract, as they do not relate to the "scope, quality, character, and manner of the work to be performed by [plaintiff]" (*Bussanich v 310 E. 55th St. Tenants*, 282 AD2d 243, 244 [2001]).

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

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

ENTERED: FEBRUARY 2, 2012

CLERK

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

6708 The People of the State of New York, Ind. 1617/07
Respondent,

-against-

Lamiek Richardson,
Defendant-Appellant.

_____

Edward Land, New York, for appellant.

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

_____

Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered May 9, 2008, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third degree, two counts of criminal possession of a controlled substance in the fifth degree, and three counts of criminally using drug paraphernalia in the second degree, and sentencing him to an aggregate term of two years, unanimously affirmed.

Defendant did not preserve his claim that the jury's mixed verdict was repugnant, including his assertion that CPL 310.50(2) obligated the court to resubmit the case to the jury (*see People v Alfaro*, 66 NY2d 985 [1985]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The jury reached different verdicts as to

events that occurred on different dates. The gist of defendant's argument is that, under the evidence presented, it was illogical for the jury to reach different verdicts. However, a verdict may only be set aside as repugnant where the repugnancy is legal rather than factual (*People v Muhammad*, 17 NY3d 532 [2011]).

To the extent defendant is also claiming the verdict was against the weight of the evidence, we reject that claim (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]; *see also People v Rayam*, 94 NY2d 557 [2000]).

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

ENTERED: FEBRUARY 2, 2012

CLERK

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

6710-
6710A TrizecHahn, Inc., Index 111425/04
Plaintiff-Respondent,

-against-

Timbil Chiller Maintenance Corp.,
Defendant-Appellant,

Tuthill Corp., etc., et al.,
Defendants.

_____

Maroney O'Connor LLP, New York (Ross T. Herman of counsel), for appellant.

Clausen Miller P.C., New York (Kimbley A. Kearney of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered March 29, 2010, which denied defendant Timbil Chiller Maintenance Corp.'s (Timbil) motion for summary judgment dismissing the complaint as against it, unanimously affirmed, with costs. Order, same court and Justice, entered May 26, 2010, which, insofar as appealed from as limited by the briefs, denied Timbil's motion to limit the amount of damages to $22,200, unanimously affirmed, with costs.

Timbil failed to establish its entitlement to judgment as a matter of law in this action arising out of an explosion of a machine that provided air conditioning for plaintiff's building.

Timbil was the service maintenance company charged with performing inspections of the machine pursuant to a contract with plaintiff. The record demonstrates that Timbil submitted the affidavit of its vice president stating that the overspeed trip test was performed during the winter maintenance inspection, as it was every year. However, defendant also submitted the transcript of that individual's deposition in which he admitted that he lacked personal knowledge of when Timbil last performed an overspeed trip test on plaintiff's machine before the August 11, 2001 explosion at issue (*see* CPLR 3212[b]). Defendant also attached the transcript of the deposition of plaintiff's assistant chief engineer, who said that the last annual inspection before August 2001 was performed in March 2000. In light of the foregoing, Timbil failed to show the absence of triable issues of fact and thus, denial of the motion was warranted "regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Moreover, although Timbil submitted, in reply, affidavits from two servicemen who said they performed an overspeed trip test on November 8, 2000, a movant may not "remedy a fundamental deficiency in the moving papers by submitting evidentiary

material with the reply" (*Ford v Weishaus*, 86 AD3d 421, 422 [2011] [internal quotation marks and citation omitted]).

The court properly declined to limit Timbil's liability to $22,200, which was the yearly contract price of the parties' agreement (*see* General Obligations Law § 5-323; *Melodee Lane Lingerie Co. v American Dist. Tel. Co.*, 18 NY2d 57, 69-70 [1966]).

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

ENTERED: FEBRUARY 2, 2012

CLERK

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

6711 Luis Ruiz, Jr., Index 20082/07
Plaintiff-Respondent,

-against-

RHQ Associates, LLC, et al.,
Defendants-Appellants,

Melvin McClain, et al.,
Defendants.

_____

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Marcia K. Raicus of counsel), for appellants.

Peña & Kahn PLLC, Bronx (Diane W. Bando of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered January 7, 2011, which partially denied defendants RHQ Associates, LLC and Jerome Associates LLC's (defendants) motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

In seeking summary judgment to dismiss the complaint, defendants failed to address plaintiff's claims alleging vicarious liability for negligent entrustment and negligent maintenance of the premises. Their arguments in their reply papers were insufficient to cure the deficiency (*see Dannasch v Bifulco*, 184 AD2d 415, 416-417 [1992]). In any event, triable

issues of fact exist as to whether the employee of defendants negligently entrusted the guns he found on the premises to his teenage son, and if so, whether defendants could be held vicariously liable for the employee's act (*see Ramos v Jake Realty Co.*, 21 AD3d 744 [2005]; *Burns v City of New York*, 6 AD2d 30 [1958]). There is also a triable issue of fact as to whether defendants negligently permitted the hazardous condition to exist on the premises through the employee's acts (*see Boderick v R.Y. Mgt. Co., Inc.*, 71 AD3d 144 [2009]).

Plaintiff's request for sanctions is denied.

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

ENTERED: FEBRUARY 2, 2012

CLERK

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

6712-
6713 Norma Crooks, Index 16898/05
Plaintiff-Appellant,

-against-

Gibraltar Contracting, Inc., et al.,
Defendants-Respondents,

Alison Construction Corporation,
Defendant.

_____

Asher & Associates, P.C., New York (Robert J. Poblete of counsel), for appellant.

Krez & Flores, LLP, New York (Edwin H. Knauer of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered on or about November 17, 2010, which, in an action for personal injuries allegedly sustained when plaintiff tripped and fell over a wooden board lying on the sidewalk near a work site, granted the motion of defendants Gibralter Contracting, Inc. and Ovan Construction Co., Inc. for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered August 10, 2011, which, upon reargument, adhered to the prior determination, unanimously dismissed, without costs, as academic.

Defendants established their entitlement to judgment as a

matter of law. Defendants submitted evidence, including safety reports and testimony, showing that they neither created the alleged dangerous condition nor had notice of its existence (*see Rabat v GNAC Corp.*, 180 AD2d 540 [1992]).

In opposition, plaintiff failed to raise a triable issue of fact as to whether defendants had notice of the wooden board. Plaintiff submitted an affidavit of an eyewitness to the accident who said that he saw the same board lying across the sidewalk in the week prior to the accident and that the board was painted with the same distinctive pattern as the barricade erected by Gibralter surrounding the work site. However, the witness did not specify at what point during the week preceding the accident he saw the board lying across the sidewalk. Therefore, since the evidence indicated that defendants' employees left the site on the Friday before the accident, which occurred on Monday, and did not return until Tuesday, in order to make a finding of constructive notice, a jury would have to improperly speculate that the board fell at a time when defendants' employees were still in the vicinity, so that they should have noticed and

remedied the allegedly dangerous condition (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *see also Casado v OUB Houses Hous. Co. Inc.*, 59 AD3d 272 [2009]). Moreover, plaintiff denied there was a board lying across the sidewalk at the time defendants' employees left the work site.

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

ENTERED: FEBRUARY 2, 2012

CLERK

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

6714N David P. Lennon, et al., Index 651794/10
Petitioners-Appellants,

-against-

Andrew M. Cuomo, as Attorney General
of the State of New York,
Respondent-Respondent.

_____

David P. Lennon, New York, appellant pro se.

Lennon & Klein, P.C., New York (David P. Lennon of counsel), for National Magazine Services, Inc. and Subscription Billing, LLC, appellants.

Eric T. Schneiderman, Attorney General, New York (Laura R. Johnson of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Ira Gammerman, J.H.O.), entered December 22, 2010, which, to the extent appealed from as limited by the briefs, denied the petition brought pursuant to CPLR 2304 to quash, fix conditions and/or modify subpoenas duces tecum issued by respondent, except as to demand number 14, and granted respondent's motion to compel compliance, unanimously affirmed, without costs.

Respondent's issuance of subpoenas in connection with an investigation into complaints from consumers and publishers alleging fraudulent and deceptive practices in petitioner magazine subscription agents' issuance of notices for the renewal

of magazine subscriptions was within his broad authority (*see* Executive Law § 63[12]; General Business Law § 349; *Matter of American Dental Coop. v Attorney General of State of N.Y.*, 127 AD2d 274, 280 [1987]). The information sought "bears a reasonable relationship to the subject matter under investigation and the public interest to be served" (*American Dental Coop.*, 127 AD2d at 280).

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

ENTERED: FEBRUARY 2, 2012

CLERK

Friedman, J.P., Catterson, Moskowitz, Abdus-Salaam, JJ.

5678N & M-4540 M-4541 M-4799 — Index 400806/11

Jasmine Zheng, et al.,
Plaintiffs-Appellants,

-against-

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

- - - - -

Sanctuary for Families, New Destiny Housing Corporation, Center Against Domestic Violence, Safe Horizon, Violence Intervention Program, Inc., New York Asian Women's Center, Good Shepherd Services, Barrier Free Living, and Homeless Services United,
Amici Curiae.

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The Legal Aid Society, New York (Steven Banks of counsel), and Weil, Gotshal & Manges, LLP, New York (Konrad Cailteux of counsel), for appellants.

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

Gibson, Dunn & Crutcher LLP, New York (Randy M. Mastro of counsel), for amici curiae.

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Appeal from order, Supreme Court, New York County (Judith J. Gische, J.), entered on or about May 2, 2011, which, inter alia, denied plaintiffs' motion for a preliminary injunction,

unanimously dismissed, without costs.

In this action for specific performance, and declaratory and injunctive relief, plaintiffs seek to bar termination of a rent subsidy program run by the NYC Department of Homeless Services

even though federal and state funding was withdrawn effective April 2011. Plaintiffs argue that the various documents appertaining to the subsidy program (Certification Letters, Participation Agreements and Lease Riders) contractually obligate the City to continue the subsidies.

Plaintiffs moved for a preliminary injunction, obtaining a TRO pending a hearing. On May 2, 2011, the court denied the preliminary injunction. The court was unconvinced of plaintiffs' likelihood of success on the merits because the language in the program documents was consistent with the City's position that the program was simply a social services program, so there was no showing that each party had an actual intent to be contractually bound.

On May 10, 2011, plaintiffs filed a notice of appeal, and on May 12, 2011 filed a motion with this Court seeking injunctive relief pending appeal of the denial of a preliminary injunction. On June 2, 2011, this Court granted plaintiffs' motion, ordering the City to continue making the subsidy payments to landlords.

On September 13, 2011, the trial court dismissed plaintiffs' complaint in its entirety, declaring that the City was not obligated contractually to continue making the payments. This Court is now obliged to dismiss plaintiffs' appeal since

well-established precedent mandates that, once a final judgment is entered, the right to directly appeal from an interlocutory order terminates (*Matter of Aho*, 39 NY2d 241, 248 [1976]). In this case, the trial court's decision was entered by order and judgment on October 6, 2011.

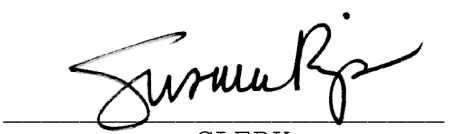
Further, the preliminary injunction granted by this Court pending the appeal must be dissolved since the purpose of a preliminary injunction is to maintain the status quo while an action is pending (*see New York Auto Ins. Plan v New York Schools Ins. Reciprocal*, 241 AD2d 313, 314 [1997]).

**M-4540**
**M-4541**
**M-4799** ***Zheng, et al. v The City of New York, et al.***

Motion seeking to dismiss appeal and vacate stay granted. Motion seeking to consolidate appeals and continue stay denied. Motion seeking leave to file amicus curiae brief granted.

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

ENTERED: FEBRUARY 2, 2012



CLERK

Tom, J.P., Friedman, Freedman, Richter, Manzanet-Daniels, JJ.

6357 The People of the State of New York, Ind. 5387/06
Respondent,

-against-

Richard Diaz,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered June 1, 2007, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him to a term of 2½ years, unanimously affirmed.

Defendant did not preserve his challenge to the voluntariness of his guilty plea, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. While the duty to advise a defendant of the possibility of deportation before accepting a plea of guilty is imposed on the trial courts by statute (CPL 220.50[7]), the court's "failure to do so does not affect the voluntariness of a guilty plea" (*People v Ford*, 86 NY2d 397, 404, n [1995]). Here,

the court told defendant, "if you're not here legally or if you have any immigration issues these felony pleas could adversely affect you." This warning sufficed to apprise defendant that the consequences of his guilty plea extended to his immigration status.

Contrary to defendant's argument, the duties of a trial court upon accepting a guilty plea are not expanded by *Padilla v Kentucky* (559 US __, 130 S Ct 1473 [2010]), which deals exclusively with the duty of defense counsel to advise a defendant of the consequences of pleading guilty when it is clear that deportation is mandated. We note that the issue of the effectiveness of trial counsel's representation based on his failure to advise defendant that the plea mandated deportation is not before us, having been resolved by an order of the motion court finding that as a result defendant sustained no prejudice (*Hill v Lockhart*, 474 US 52, 59 [1985]; *Strickland v Washington*, 466 US 668, 694 [1984]), from which leave to appeal to this Court

has been denied. Contrary to defendant's additional contention, nothing in the court's allocution misleadingly suggested that defendant would not be deported as a result of pleading guilty (*see e.g. Zhang v United States*, 506 F3d 162, 169 [2d Cir 2007]).

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

ENTERED: FEBRUARY 2, 2012

CLERK

Friedman, J.P., Sweeny, Acosta, Renwick, Abdus-Salaam, JJ.

6519 Invesco Advisers, Inc., Index 650503/10
Plaintiff-Appellant,

-against-

Marsh & McLennan Co., Inc.,
Defendant-Respondent.

_____

Sutherland Asbill & Brennan LLP, New York (Lawrence A. Dany III of counsel), for appellant.

Anderson & Ochs, LLP, New York (Mitchel H. Ochs of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered April 19, 2011, which granted defendant's motion to dismiss the complaint for failure to state a cause of action, and denied as moot plaintiff's cross motion, unanimously reversed, on the law, with costs, defendant's motion denied, plaintiff's cross motion for partial summary judgment on its first cause of action seeking declarations that defendant landlord is required to maintain and repair the fire-resistant material applied to structural columns and beams in accordance with the applicable sections of the Administrative Code of the City of New York, that the failure to do so constitutes a default under the lease, and that plaintiff tenant is entitled to indemnification for the costs it incurred in making the necessary repairs, is granted,

and it is so declared.

The parties entered into a lease for the rental of commercial space which provided that plaintiff tenant had inspected the premises, was taking it "as is," and would be undertaking construction work to prepare for its initial occupancy. The lease further provided that defendant landlord was not required to perform any work to prepare the premises for tenant and would furnish plaintiff with a "construction allowance" to reimburse it for a portion of costs incurred in "constructing long-term real property for use in [plaintiff's] trade or business." Plaintiff was responsible for obtaining all necessary permits, as well as compliance with all federal, state and city regulations with respect to its alterations and renovations. Defendant was responsible for repairs to the building, including the common elements "and structural Repairs of any kind or nature other than those Repairs required by [plaintiff]" as set forth in the lease. Defendant was also responsible for compliance with all federal, state and city regulations that did not arise from plaintiff's use, occupancy or alterations to the building.

Plaintiff commenced its construction work on the demised premises, part of which required removal of the existing,

nonstructural walls in the premises. This, in turn, exposed the underlying structural columns and beams. Defendant notified plaintiff that "the existing steel in areas undergoing alteration is subject to special inspections" for fireproofing under Administrative Code of the City of New York § 28-1704.11.6, and "will likely fail." True to defendant's prediction, an inspection revealed that the bond strength of the fireproofing material on the columns was less than that required by Administrative Code § 28-1704.11.5. Plaintiff sent defendant a cure notice and, when defendant did not remediate the fireproofing defect, plaintiff sent defendant a letter stating that its failure to cure this violation constituted a default under the lease and plaintiff would seek reimbursement for the costs of remediation.

Plaintiff commenced this action against defendant alleging three causes of action. The first cause of action seeks the following declarations: (1) that defendant bears responsibility for maintaining and repairing the premises' structure and structural materials under Administrative Code § 28-301.1; (2) that the lease requires defendant to maintain and repair at its own expense the fire-resistant material applied to structural columns and beams in a condition that satisfies Administrative

Code § 1704.11.5; (3) that defendant's failure to satisfy Administrative Code § 1704.11.5 constitutes a default under the lease; and (4) that plaintiff is entitled to indemnification for the cost of compliance.

The second cause of action alleges that defendant breached the lease by refusing to repair at its own expense the allegedly defective fireproofing and seeks to recover the costs plaintiff incurred to cure the breach. The third cause of action sought recovery of plaintiff's costs in quantum meruit.

Defendant moved to dismiss the complaint for failure to state a claim pursuant to CPLR 3211(a)(7) and plaintiff cross-moved for partial summary judgment on it first cause of action.

The motion court determined that, under the terms of the lease, plaintiff is responsible for the costs of its alterations and ensuring that such alterations comply with all legal requirements, including the fireproof testing and remediation that became necessary as a result of plaintiff's initial work. It granted defendant's motion to dismiss and denied plaintiff's cross motion as moot. We now reverse.

This case is materially distinguishable from the cases relied on by defendant (*Chemical Bank v Stahl*, 272 AD2d 1, 16 [2000]; *Marine Midland Bank v 140 Broadway Co.*, 236 AD2d 232

[1997]; *Wolf v 2539 Realty Assocs.*, 161 AD2d 11 [1990]; *Bush Terminal Assocs. v Federated Dept. Stores*, 73 AD2d 943 [1980]; *Rapid-American Corp. v 888 7th Ave. Assocs.*, 151 Misc 2d 966 [1991]). In each of those cases the leases contained seemingly all-encompassing provisions expressly requiring the tenant to bear all costs associated with work it performed, whether "ordinary or extraordinary," "structural or otherwise," or "in and about the Demised premises and the Building." Moreover, those leases required the tenant to comply with all applicable laws and regulations. In each case, the remediation of asbestos sprayed on structural components of the building was only required by law when that asbestos was exposed, such as during renovations or other work, and where not exposed, it was to be left undisturbed (New York City Local Law No. 76). This regulation is similar in nature to the fireproofing in this case. In each case, the landlord argued, as here, that the asbestos was exposed during the tenants's work, thus requiring the cost of remediation to be borne by the tenant. That argument was repeatedly rejected on the ground that the leases and the law placed the responsibility for such structural remediation on the landlord.

In this case, Administrative Code § 28-301.1 imposes upon

landlords the duty to maintain their buildings in a safe condition in compliance with the building code. Section 6.02(A) of this lease places the burden on the landlord to make any structural repairs "of any kind or nature," other than those required to be placed on the tenant by section 6.01, including those structural repairs "arising from . . . any Alterations." Here, plaintiff's alterations merely exposed the already existing structural defect, which defect, it appears, was known to defendant prior to plaintiff's alteration. These alterations did not create or cause the defect which is otherwise unrelated to the those alterations, as was also true in the above cited cases.

Therefore, a latent structural defect, which requires remediation when exposed, but was not caused by a tenant's alterations, does not fall within those lease provisions requiring a tenant to bear the cost of such remediation unless

the lease expressly provides otherwise. Since there is no such provision in this lease, defendant's motion should have been denied and plaintiff's cross motion should have been granted to the extent indicated.

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

ENTERED: FEBRUARY 2, 2012

CLERK

Tom, J.P., Catterson, DeGrasse, Richter, Manzanet-Daniels, JJ.

6551 In re Cerenithy Ecksthine B., and Another,

Dependent Children Under
Eighteen Years of Age, etc.,

Christian B.,
Respondent-Appellant,

Commissioner of Administration for
Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

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

Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), attorney for the children.

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Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about February 1, 2011, which, after a fact-finding hearing, determined that respondent father neglected the subject children due to untreated mental illness, unanimously affirmed, without costs.

The record establishes, by a preponderance of the evidence, that there was a "substantial probability" that the father's untreated mental condition would place the children at imminent risk of harm if they were released to him (*Matter of Ronald Anthony G. [Samantha J.]*, 83 AD3d 608 [2011]; Family Court Act §

1012[f]). The psychiatric records entered into evidence at the fact-finding hearing showed that the 20-year-old appellant-father had a history of multiple hospitalizations for unstable moods and aggressive behavior. Appellant was hospitalized in 2000 for choking his mother, and in 2003, after he again threatened to hurt his mother and siblings. During his 2003 hospitalization, he was diagnosed with bipolar disorder and attention deficit hyperactivity disorder. The nursing admission summary for this hospital stay stated that outpatient treatment had been unsuccessful due to appellant's noncompliance, and the psychiatric evaluation noted that appellant would not be "clear thinking" without his medication.

In 2007, appellant was again hospitalized and diagnosed with a major depressive disorder and a disruptive behavior disorder. The intake psychiatric assessment form noted that he had not taken his medication for six months, and as a result, had become increasingly threatening and volatile, had trouble controlling his anger and had a high frequency of suicidal thoughts. The Nursing Treatment Plan included a finding that appellant was unable to find insight into the behaviors which precipitated his hospitalization, and noted his continued resistance to taking his medication.

The treating psychologist conducted an evaluation of appellant at the end of his nearly three-week hospitalization in 2007. The psychologist concluded that, based on appellant's limited capacity for introspection, cognitive deficiencies, and difficulty dealing with his emotions, appellant may give way to "explosive outbursts, periods of transient psychological disorganization, or gross lapses in impulse control" when his feelings are aroused. Although appellant was not determined to be psychotic, he was at an increased risk for suicidal and self-destructive behaviors. Notably, the doctor further concluded that appellant's disruptive behavior disorder would likely re-emerge rapidly once he was out of the structured and supportive hospital environment and returned to a more complex and demanding one. Lastly, appellant's treatment plan upon discharge included individual and group therapy as well as prescribed medication.

The mother of the children testified that she knew appellant was bipolar and he was in denial about his mental condition. She testified that she had never seen him take any medication, and that prior to the neglect petition being filed, he was not in therapy. The mother also stated that appellant engaged in erratic behavior that usually involved volatile mood swings. Appellant would become angry about inconsequential things, and

then, moments later, act as if nothing happened. The foster mother for the children also testified regarding appellant's erratic and threatening behavior. The foster mother explained that she had received numerous text messages from appellant threatening her and her son.

Lastly, the caseworker's progress notes, which were admitted into evidence, stated that appellant admitted during an interview, the day before the neglect petition was filed, that he had been diagnosed as bipolar, and that he was hospitalized in 2008 for destruction of property, during which hospitalization he was again diagnosed as bipolar. Appellant also admitted during this interview that he was not receiving any mental health services.

Appellant's primary challenge to the neglect finding is that there is no link or causal connection between his mental problems and any risk to the children *(Nicholson v Scoppetta*, 3 NY3d 357, 369 [2004]). Here, the evidence of appellant's mental illness is overwhelming; yet he was not in treatment nor was he seeking it. He had been hospitalized, on more than one occasion, due to noncompliance with outpatient treatment and medication that resulted in violent physical assaults and threats to his

immediate family members (*Matter of Madeline R.*, 214 AD2d 445 [1995] ["proof of ongoing mental illness and the failure to follow through with after care medication, which results in a parent's inability to care for her children in the foreseeable future, is a sufficient basis for a finding of neglect"]).

In 2007, appellant's treating psychologist concluded that his behavior disorder would rapidly re-emerge once he was placed in more complex and demanding environments. At the time the petition was filed, the children were approximately 2½ years old and 4 months old. Nothing in the record supports the conclusion that appellant had the self-control, judgment and insight necessary to care for young children. Furthermore, as appellant's evaluating psychologist concluded, complex and potentially taxing situations could send appellant into a relapse fraught with psychological disorganization and gross lapses in impulse control. This is a scenario that could be very grave for appellant's young children, who are, due to their age, unable to defend against or report any mistreatment (*Matter of Noah Jeremiah J. [Kimberly J.]*, 81 AD3d 37, 44 [2010]). Although two years had passed since appellant's last hospital admission, the agency established that he did not enter into medical treatment nor was he compliant with medication requirements.

Appellant incorrectly contends that *Matter of Jayvien E. [Marisol T.]* (70 AD3d 430 [2010]) warrants reversal of the neglect finding. In *Jayvien E.*, after the appellant-mother gave birth to her son, a medical student reported overhearing her calling the baby "greedy" and "too much." As a result, the hospital conducted a psychiatric evaluation of the mother. The subsequent patient care sheets, completed by nurses tending to the mother, noted that she engaged appropriately with her child and did not display any psychiatric symptoms. Further, the mother explained her comment was in reference to her son being hungry shortly after she had already fed him, and the agency failed to produce a witness that observed the mother's allegedly bizarre behavior.

Here, by contrast, the record, which includes testimony from the children's mother and foster mother, demonstrates that appellant had been diagnosed with a major depressive disorder and disruptive behavior disorder, and admitted to being bipolar. He was, however, in denial about his mental condition, was not taking medication or in therapy, and required treatment to

prevent a rapid re-emergence of his disorders and the attendant explosive outbursts or gross lapses in impulse control that could accompany such re-emergence.

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

ENTERED: FEBRUARY 2, 2012

CLERK

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

6669 The People of the State of New York, Ind. 1486/08
Respondent,

-against-

Andre Smalls,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Andrew Fine of counsel), and Davis Polk & Wardwell LLP, New York (Margaret Lee of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Beth Fisch Cohen of counsel), for respondent.

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Judgment, Supreme Court, New York County (John Cataldo, J.), rendered November 21, 2008, convicting defendant, after a jury trial, of burglary in the second degree and assault in the second and third degrees, and sentencing him, as a second felony offender, to an aggregate term of 5½ years, unanimously affirmed.

The verdict was based on legally sufficient evidence. Defendant became enraged at an employee who was working at the front desk of a storage facility. Defendant struck the employee in the face with a hard plastic object, causing a cut, and pursued the employee through a series of nonpublic portions of the facility. In doing so, defendant knocked down a manager of the facility, causing a broken wrist. The still-irate defendant

confronted the first employee, pushed and poked him, and threw another hard object, striking the employee in the head.

Defendant was properly convicted of burglary. Defendant's course of conduct establishes that when he entered the restricted part of the facility, he did so with intent to commit a crime (*People v Lewis*, 5 NY3d 546, 552 [2005]). Accordingly, the intent element of burglary was satisfied.

Defendant argues that the People limited themselves to the theory that the intended crime was an assault on the front-desk employee. That claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The People never expressly limited themselves to that theory (*see People v Romero*, 84 AD3d 695 [2011]), and the court's charge contained no such limitation. In any event, the evidence fully supports the theory that defendant chased the employee into the nonpublic area for the purpose of continuing his assault on that person.

Defendant was also properly convicted of third-degree assault, based on his initial attack on the employee at the front desk. Defendant threw a hard plastic pamphlet holder at the employee's face from only a few feet away. The object left a cut near the employee's eye. The employee testified that he was

bleeding, that the cut was swollen and painful, and that the pain worsened soon after the incident. The evidence supports an inference that the cut caused "more than slight or trivial pain" (*see People v Chiddick*, 8 NY3d 445, 447 [2007]; *see also People v Guidice*, 83 NY2d 630, 636 [1994]).

Defendant failed to preserve his argument that there was insufficient evidence that he intended to cause physical injury to the employee, and we decline to review it in the interest of justice. As an alternative holding, we find that defendant's intent could be readily inferred from his conduct.

The court properly declined to submit third-degree criminal trespass as a lesser included offense of burglary. There was no reasonable view of the evidence that defendant unlawfully entered the nonpublic area, but did so without intent to commit a crime (*see People v Mongen*, 157 AD2d 82 [1990], *appeal dismissed* 76 NY2d 1015 [1990]).

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

ENTERED: FEBRUARY 2, 2012

CLERK

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

6670 In re Salvatore D'Alessandro, et al., Index 115845/09
Petitioners-Appellants,

-against-

New York State Division of Housing
and Community Renewal,
Respondent-Respondent.
- - - - -
Frederick J. Rudd, et al.,
Intervenors-Respondents.

_____

Collins, Dobkin & Miller LLP, New York (W. Miller Hall of counsel), for appellant.

Gary R. Connor, New York (Jeffrey G. Kelly of counsel), for respondent.

Belkin Burden Wenig & Goldman, LLP, New York (Alexa Englander of counsel), for intervenors-respondents.

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Order and judgment (one paper), Supreme Court, New York County (Judith J. Gische, J.), entered August 24, 2010, which granted the motion of intervenors, the owners as tenants-in-common of the subject apartment, to intervene, denied the petition, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

In a prior DHCR proceeding commenced in 2005, petitioner Andres Baltra sought to have "the legal rent removed" from his lease because it was "not valid," and have it replaced by the

"preferential rent" stated in the lease. DHCR rejected Baltra's claim that the registered legal rent was "not valid," and established the legal rent for the two-year period running from December 1, 2004, through November 30, 2006. Baltra never appealed from that order, which became final.

In the instant proceeding, petitioners again seek to "remove" the legal rent, asserting that it should be replaced with the preferential rent. This issue is identical to the claim rejected by DHCR in the 2005 order. Petitioners make no substantial argument that Baltra did not have a full and fair opportunity to litigate the issue of the validity of the legal rent in the 2005 proceeding. Thus, the doctrine of collateral estoppel precludes petitioners from relitigating the issue of the legal rent for the apartment which includes the newly advanced theory that the initial 1993 lease was fraudulent (*see Matter of Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 201-02 [2011]; *9-10 Alden*

*Place, LLC v Chen*, 279 AD2d 618, 619 [2001]).

We have considered petitioners' remaining arguments and find them unavailing.

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

ENTERED: FEBRUARY 2, 2012

CLERK

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

6671-
6672

In re Daquon W.,

A Person Alleged to be
a Juvenile Delinquent,
Respondent.

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Presentment Agency,
Appellant.

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Michael A. Cardozo, Corporation Counsel, New York (Ellen Ravitch of counsel), for appellant.

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

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Order, Family Court, New York County (Mary E. Bednar, J.), entered on or about September 29, 2010, which granted respondent's motion to suppress evidence, unanimously modified, on the law, to extent of denying the motion to suppress any in-court identification of respondent, and otherwise affirmed, without costs. Order, same court and Judge, entered on or about October 8, 2010, which dismissed the petition for failure to prosecute, unanimously reversed, on the law, without costs, the petition is reinstated and the matter is remitted to the Family Court for further proceedings.

The hearing court suppressed respondent's statement and all identification evidence on the ground that respondent's arrest

was unlawful. However, the court erred in suppressing the victim's potential in-court identification.

"As to [an] in-court identification . . ., it is settled that such an identification will not be precluded by the fact of an antecedent unlawful seizure, so long as the in-court identification proceeds from an independent recollection" (*People v Pleasant*, 54 NY2d 972, 973 [1981][citing *United States v Crews*, 445 US 463 [1980]). Here, the court found that "the two minutes the complainant saw his assailants, at close range, was an adequate amount of time for him to make an independent source identification." The hearing record fully supports that determination.

We have considered and rejected respondent's procedural claims. In particular, we find that appellant presentment agency's objections to the hearing court's ruling were sufficiently specific to preserve the issue raised on appeal, and that the court made an express finding of independent source.

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

ENTERED: FEBRUARY 2, 2012

CLERK

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

6673-
6673A-
6673B

Martin Hauptman,
Plaintiff-Appellant,

-against-

New York and Presbyterian Hospital,
Defendant,

Vincent J. Lewis, etc.,
Defendant-Respondent.

Index 402764/07

_____

Daniel A. Fried, New York, for appellant.

Martin Clearwater & Bell LLP, New York (Stewart G. Milch of counsel), for respondent.

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Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered September 22, 2010, dismissing the complaint pursuant to an order which granted defendant Vincent J. Lewis's (defendant) motion for summary judgment dismissing the complaint as against him, unanimously affirmed, without costs. Appeal from above order unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Appeal from order, same court and Justice, entered July 8, 2010, which, to the extent appealable, denied plaintiff's motion to renew, unanimously dismissed, without costs, as academic.

Defendant, by the affirmation of his physician expert, sustained his initial burden of establishing the absence of any

departure from good and accepted medical practice or that the plaintiff was not injured thereby (*Williams v Sahay*, 12 AD3d 366, 368 [2004]; *Feliz v Beth Israel Med. Ctr.*, 38 AD3d 396, 397 [2007]). In opposition, plaintiff's physician's affidavit failed to raise an issue of fact. Rather, plaintiff's expert set forth conclusory statements regarding whether the treatment rendered to plaintiff constituted such a departure (*Domaradzki v Glen Cove Ob/Gyn Assoc.*, 242 AD2d 282 [1997]).

Plaintiff's expert also failed to rebut defendant's prima facie case on the issue of lack of informed consent. Plaintiff's expert merely stated that "based on available information, the patient was not properly advised of the risks and hazards of the surgery and of available alternative treatments." This statement is a conclusion, and as such is insufficient to rebut defendant-respondent's prima facie case (Public Health Law § 2805-d [3]);

*see Orphan v Pilnik*, 66 AD3d 543, 544 [2009], *affd* 15 NY3d 907 [2010]).

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

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

ENTERED: FEBRUARY 2, 2012

CLERK

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

6674-
6674A The People of the State of New York, SCI 3206/08
Respondent, Ind. 933/09

-against-

Julio Andujar,
Defendant-Appellant.

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

_____

Judgments, Supreme Court, New York County (Marcy L. Kahn, J.), rendered on or about June 29, 2009, as amended July 2, 2009, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after

service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: FEBRUARY 2, 2012

CLERK

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

6675-6676 Ahead Realty LLC, et al., Plaintiffs-Appellants, Index 113929/10

-against-

India House, Inc., et al., Defendants-Respondents.

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The Dweck Law Firm, LLP, New York (H.P. Sean Dweck of counsel), for appellants.

Wolf Haldenstein Adler Freeman & Herz LLP, New York (Debra M. Schoenberg of counsel), for respondents.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered July 20, 2011, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss plaintiff PJ Associates, Inc.'s (PJ) claims for tortious interference, unfair competition, breach of covenant of good faith, declaratory judgment and breach of contract (the first, second, fourth, fifth and sixth causes of action), and order, same court and Justice, entered August 9, 2011, which denied PJ's motion for a preliminary injunction tolling its cure period under a certain default notice, and which directed entry of judgment, unanimously affirmed, without costs.

This action arises from a Food Facilities Management and License Agreement (FFMLA) between PJ, a food services company,

and defendant India House, Inc., a private social club, pursuant to which, in consideration for running the food and beverage service at India House, PJ agreed to assume responsibility for a significant renovation of the building and the real estate taxes on the property during the 25-year term of the agreement.

The first cause of action, which alleges that India House wrongfully induced a third party not to hold its annual dinner at India House, is insufficient to state a claim for harassment or tortious interference with contract since persuasion alone is not enough to constitute wrongful means (*see Carvel v Noonan*, 3 NY3d 182, 190-192 [2004]). To the extent this cause of action alleges tortious interference with the FFMLA, it fails, because asserting that a defendant tortiously interfered with its own contract "quite clearly does not state a legally sufficient cause of action" (*Manley v Pandick Press, Inc.*, 72 AD2d 452, 454 [1980], *lv dismissed* 49 NY2d 981 [1980]).

The second cause of action, for intentional harm to business and unfair competition, fails to set forth the requisite showing of bad-faith misappropriation of a commercial advantage (*see LoPresti v Massachusetts Mut. Life Ins. Co.*, 30 AD3d 474, 476 [2006]).

The fourth cause of action for breach of the covenant of

good faith and fair dealing as against the individual defendants was properly dismissed since no contract exists between PJ and the individual defendants (*see Duration Mun. Fund, L.P. v J.P. Morgan Sec. Inc.*, 77 AD3d 474 [2010]). This cause of action as asserted against India House was also properly dismissed since it is duplicative of the breach of contract claim.

The fifth cause of action, for declaratory judgment, is insufficient because the complaint contains only conclusory allegations that fail to state a cause of action upon which relief may be granted (see *American News Co. v Avon Publ. Co., Inc.*, 283 App Div 1041 [1954]).

The sixth cause of action, for breach of contract, fails to allege any instance where a change was made without PJ's express written consent, or otherwise specify an incident where India House breached the FFMLA.

With respect to PJ's motion for a preliminary injunction, the court appropriately determined that, with respect to the outstanding default notice, PJ has not demonstrated irreparable harm, a likelihood of success on the merits or that the balance

of equities tips in its favor (*see Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862 [1990]).

We have considered plaintiffs' remaining arguments and find them unavailing.

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

ENTERED: FEBRUARY 2, 2012

CLERK

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

6677 The People of the State of New York, Ind. 2947/09
Respondent,

-against-

Joel Rodriguez,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellant Defender, New York (Eunice C. Lee of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Rena Uviller, J.), rendered June 9, 2010, convicting defendant, after a jury trial, of robbery in the third degree and grand larceny in the fourth degree, and sentencing him, as a second felony offender, to concurrent terms of 3 to 6 and 2 to 4 years, respectively, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence on the robbery conviction to 2 to 4 years, and otherwise affirmed.

The court properly denied defendant's motion to suppress his statement to the police. The record supports the court's finding that the statement, which defendant made prior to receiving *Miranda* warnings, was not the product of a custodial interrogation. In this street encounter near the scene of the

crime, the police did not restrain defendant or do anything to convey to him that he had been taken into custody (*see People v Taylor*, 57 AD3d 327 [2008], *lv denied* 12 NY3d 860 [2009]). We reject defendant's challenge to the legal sufficiency of the evidence supporting the robbery conviction. The evidence supports the inference that when defendant threatened to beat up or kill the victim, defendant's intent was to retain possession of the cell phone he had stolen from the victim (*see People v Flag*, 2 AD3d 153 [2003], *lv denied* 1 NY3d 627 [2004]). The jury was entitled to reject the theory that defendant was merely trying to get back his own phone, which he claimed to have been stolen by the victim. The evidence also establishes that defendant made the threat immediately after stealing the victim's phone (*see People v Jones*, 282 AD2d 382, *lv denied* 96 NY2d 920 [2001]).

We find the sentence excessive to the extent indicated.

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

ENTERED: FEBRUARY 2, 2012

CLERK

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

6678 BDO Seidman LLP, Index 603018/08
Plaintiff-Respondent,

-against-

Strategic Resources Corporation, et al.,
Defendants-Appellants.
- - - - -
Phoenix Four, Inc.,
Nonparty-Respondent.

_____

Mound Cotton Wollan & Greengrass, New York (Mark S. Katz and Sanjit Shah of counsel), for appellants.

Schulte Roth & Zabel LLP, New York (Harry S. Davis of counsel), for BDO Seidman LLP, respondent.

Cole, Schotz, Meisel, Forman & Leonard, P.A., New York (Leo V. Leyva and Jed Weiss of counsel), for Phoenix Four, Inc., respondent.

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Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered October 4, 2010, insofar as appealed from, enforcing an oral agreement among the parties and nonparty Phoenix Four, Inc., unanimously reversed, on the law, without costs, and the judgment vacated.

We vacate the judgment because we dismissed this action on a prior appeal (70 AD3d 556 [2010]).

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

ENTERED: FEBRUARY 2, 2012

CLERK

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

6679 Hussein Environment, Inc., etc., Index 114295/07
Plaintiff-Appellant,

-against-

Roxborough Apartments Corp.,
Defendant,

Katouna, Inc., etc.,
Defendant-Respondent.

_____

David H. Singer & Associates, LLP, New York (David H. Singer of counsel), for appellant.

Novick, Edelstein, Lubell, Reisman, Wasserman & Leventhal, P.C., Yonkers (Lawrence Schiro of counsel), for respondent.

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Judgment, Supreme Court, New York County (Jane S. Solomon, J.), entered July 26, 2010, dismissing the complaint as against defendant Katouna, Inc., dismissing the second, third, fourth and fifth causes of action as against defendant Roxborough Apartments Corp., and declaring, upon the first cause of action, that Roxborough violated the restrictive covenant in its lease to the extent it permitted Katouna to expand its seafood menu, alter its logo, and install an awning, unanimously affirmed, without costs.

Plaintiff operates a restaurant called Cleopatra's Needle at premises leased from defendant Roxborough's predecessor in interest at 2483-85 Broadway in Manhattan. The lease states that

plaintiff shall use the premises for "a table cloth restaurant operation serving only so-called 'Middle Eastern' and/or seafood menu, and, at Tenant's sole option, including liquor and/or beer and wine service." Pursuant to Article 43 of the lease, the building owner agreed not to enter into any lease containing a use clause "substantially identical" to the use clause.

At the time that plaintiff entered into the lease, defendant Katouna was operating a pizzeria called Perfecto Ristorante in the same building. Perfecto consisted of a few tables and a counter along one side of the space, with an oven, grill, and refrigerator behind it. Plaintiff commenced this action after Katouna expanded Perfecto, began operating a full bar and an unenclosed sidewalk café that abutted Cleopatra's Needle's enclosed sidewalk café, and installed awnings with the words "Mediterranean Cuisine" and "Brick Oven Pizza * Caffe * Bar" on them.

Plaintiff argues that Katouna competed with every aspect of its operation of Cleopatra's Needle by converting Perfecto from a small take-out pizzeria to an eat-in restaurant serving food similar to that served by Cleopatra's Needle, with a full liquor license and outdoor sidewalk café. However, nothing in the restrictive covenant prohibits Roxborough from permitting

Perfecto to operate a sidewalk café. Nor, under the circumstances, was Perfecto's procurement of a liquor license inconsistent with Roxborough's covenant. Perfecto offers a more casual dining experience than that offered by Cleopatra's Needle ("a table cloth restaurant") and, in contrast to Cleopatra's Needle, does not provide live entertainment or hold happy hours, and is closed by midnight. Given the different ambiance of the two restaurants, the mere fact that both have bars is insufficient to render Perfecto's use of its space inconsistent with Roxborough's covenant (*see Topol v Smoleroff Dev. Corp.*, 264 App Div 164, 167 [1942]). Furthermore, Perfecto's bar operation is incidental to its restaurant operation, while Cleopatra's Needle's bar operation plays an integral part in its business (*see Waldorf-Astoria Segar Co. v Salomon*, 109 App Div 65, 68-69 [1905], *affd* 184 NY 584 [1906]).

Nonetheless, by increasing Perfecto's seafood offerings, installing the new awnings, and altering its logo, Katouna brought Perfecto into the realm of a more formal Mediterranean restaurant than the casual Italian restaurant it had been, thereby rendering its use of the space inconsistent with the restrictive covenant.

Plaintiff's argument that Katouna should have been

permanently enjoined from using the expanded space as a restaurant is unavailing. To the extent the covenant was violated, an injunction would not be proper because the record shows that Katouna had no notice of the covenant (*see Fox v Congel*, 75 AD2d 681, 682 [1980]). Plaintiff's argument that Roxborough should have been enjoined from granting a lease permitting the rented space to be used as a restaurant is moot, since Roxborough had already granted a lease to Katouna. In any event, the court's finding that Roxborough did not willfully violate the covenant is supported by the evidence (*see Garza v 508 W. 112th St., Inc.*, 71 AD3d 567 [2010]).

In view of that finding, plaintiff's claim for money damages based on wilful and intentional violation of the covenant fails. Even if the court erred in refusing to admit evidence of Perfecto's post-expansion sales to prove plaintiff's lost profits, the error was harmless, since the evidence would not have established with certainty the sales that plaintiff lost as

a result of the breach of the covenant (*see Borne Chem. Co. v Dictrow*, 85 AD2d 646, 650 [1981]). The covenant was violated only to the extent stated above, and plaintiff failed to submit any financial records showing loss of profits.

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

ENTERED: FEBRUARY 2, 2012

CLERK

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

6680 John McFarland, et al., Index 650916/10
Plaintiffs-Appellants,

-against-

Opera Owners, Inc.,
Defendant-Respondent.

_____

William M. Pinzler, New York, for appellants.

White Fleischner & Fino, LLP, New York (Evan A. Richman of counsel), for respondent.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered July 18, 2011, which granted defendant's motion for summary judgment dismissing the complaint, but without prejudice as to the first and second causes of action, unanimously affirmed, with costs.

The IAS court properly dismissed the breach of contract claim because plaintiffs concededly failed to comply with express conditions precedent to the contract (*see Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690 [1995]).

The court properly dismissed the fraud claim as barred by the merger clause, "as is" clause, and other disclaimers (*see Rivietz v Wolohojian*, 38 AD3d 301 [2007]). Moreover, plaintiffs' allegations of defendant's intent to breach the contract are

insufficient to state a cause of action for fraud (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]; *Board of Mgrs. of the Chelsea 19 Condominium v Chelsea 19 Assoc.*, 73 AD3d 581, 582 [2010]).

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

ENTERED: FEBRUARY 2, 2012

CLERK

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

6681 Maria Ruiz, Index 8847/05
Plaintiff-Appellant,

-against-

The Summit Appliance Division, et al.,
Defendants,

3001 Valentine Realty, LLC,
Defendant-Respondent.

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Rheingold, Valet, Rheingold, McCartney & Giuffra, LLP, New York (Thomas P. Giuffra of counsel), for appellant.

Herzfeld & Rubin, P.C., New York (Linda M. Brown of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered February 8, 2010, after a jury trial, dismissing the complaint as against defendant 3001 Valentine Realty, LLC (Valentine), and bringing up for review an order, same court and Justice, entered October 19, 2009, which denied plaintiff's motion seeking, inter alia, to set aside the verdict, unanimously affirmed, without costs.

Plaintiff was injured while cooking in her apartment when flames shot out of the side of the stove, startling plaintiff and causing her to fall over backward and drop a pot of boiling water on herself. Following a jury trial, a verdict was reached

finding that plaintiff and her landlord, Valentine, were both negligent, but that Valentine's negligence was not a substantial factor in the happening of the accident. Despite this finding, in response to the special interrogatories in support of the general verdict, the jury sought to award plaintiff damages for past pain and suffering and apportioned a percentage of fault to Valentine.

The court then instructed the jury that it could not assign a percentage of fault to Valentine and also find that its negligence was not a substantial factor in causing plaintiff's injuries. The jury returned a second verdict sheet, identical to the first, except that no percentage of fault was assigned to Valentine.

Plaintiff's challenges to the court's instructions to the jury following its initial verdict are raised for the first time on appeal (*see AGFA Photo USA Corp. v Chromazone, Inc.*, 82 AD3d 402 [2011]), and we decline to review the instructions. Were we to review this argument, we would find that the jury was appropriately instructed that there can be concurrent causes of the accident.

Moreover, plaintiff did not object to the second verdict before the jury was discharged, which would have permitted the

court to take further corrective action, including resubmitting the matter to the jury with such additional instructions as might be required (*see Barry v Manglass*, 55 NY2d 803, 805-806 [1981]). Accordingly, plaintiff has waived her challenge to the verdict, and we decline to review it in the interests of justice.

If we were to review it, we would reject plaintiff's contention that the verdict was the product of juror confusion or compromise. Based on the evidence at trial, the verdict can be reconciled with a reasonable view of the evidence, thereby entitling Valentine, the successful party, "to the presumption that the jury adopted that view" (*Rodriguez v New York City Tr. Auth.*, 67 AD3d 511, 511 [2009]). Such evidence showed that plaintiff failed to properly clean or maintain the stove in her apartment, despite being advised to do so by the agents of Valentine and the service personnel who repaired the stove, and that this was the only substantial factor in causing the accident.

The award of damages to plaintiff was also not indicative of confusion or compromise. While the jury may have wanted to award damages to plaintiff on some theory of its own, it clearly understood that Valentine's negligence was not a substantial

factor in causing plaintiff's injuries (*see Mayer v Goldberg*, 241 AD2d 309, 312 [1997]).

Defense counsel's comments during summation, that plaintiff was trying to get a new stove through her repeated complaints, was a fair comment on the evidence at trial (*see e.g. Bennett v Wolf*, 40 AD3d 274 [2007], *lv denied* 9 NY3d 818 [2008]).

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

ENTERED: FEBRUARY 2, 2012

CLERK

Mazzarelli, J.P., Catterson, Renwick, Román, JJ.

6682 The Padded Wagon, Inc., Index 21006/03
Plaintiff-Appellant, 83445/03

-against-

Associates Commercial Corporation, et al.,
Defendants,

Citicapital Commercial Corporation,
Defendant-Respondent.
- - - - -
Citicapital Commercial Corporation,
Counterclaim-Plaintiff-Respondent,

-against-

The Padded Wagon, Inc., et al.,
Counterclaim-Defendants-Appellants.

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Agulnick & Gogel, LLC, Great Neck (William A. Gogel of counsel), for appellants.

Foster & Wolkind, P.C., New York (Peter B. Foster of counsel), for respondent.

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Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered June 24, 2010, which, in this action alleging the wrongful repossession of delivery trucks, denied the motion of plaintiff and counterclaim defendants to vacate the dismissal of the action and restore it to the trial calendar pursuant to CPLR 3404, unanimously affirmed, with costs.

It is black letter law that "[a] party seeking to have a

case restored to the trial calendar must demonstrate a meritorious cause of action, a reasonable excuse for the delay, a lack of intent to abandon the action and the absence of prejudice to the opposing party" (*Kamara v Ambert*, 89 AD3d 612, 612 [2011]). Furthermore "[a]ll four conditions must be satisfied" (*Campbell v Crystal Realty Assoc. Ltd. Partnership*, 276 AD2d 328, 328 [2000]).

Here, plaintiff failed to offer any excuse for passively waiting for a trial date and then first seeking relief more than three years after the dismissal for failure to appear (*see Spivey v Bouteureira*, 259 AD2d 425 [1999]). To the extent that plaintiff's excuse for the delay may be attributed to law office failure, it is unsubstantiated (*see Okun v Tanners*, 11 NY3d 762 [2008]). Plaintiff's attempt to demonstrate merit for the first time in its attorney's reply, unaccompanied by an affidavit from a person claiming knowledge of the facts, was insufficient (*see Rozina v Casa 74th Dev. LLC,* 89 AD3d 508 [2011]).

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

ENTERED: FEBRUARY 2, 2012

CLERK

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

6683 Movado Group, Inc., etc., Index 603070/09
Plaintiff-Appellant,

-against-

Shapur Mozaffarian, etc., et al.,
Defendants-Respondents.

_____

Gregg J. Borri Law Offices, New York (Gregg J. Borri of counsel), for appellant.

Storch Amini & Munves PC, New York (Jason Levin of counsel), for respondents.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered November 24, 2010, which denied plaintiff's motion for a default judgment against defendants, and granted defendants' motion to dismiss the complaint for lack of personal jurisdiction, unanimously reversed, on the law, without costs, defendants' motion denied, and the matter remanded for a determination of plaintiff's motion on the merits.

Defendants signed a credit agreement in which they expressly acknowledged receipt of, and agreed to be bound by, terms and conditions contained in an extrinsic document, which defendants neither read nor requested a copy to read. After the credit application was approved, defendants saw, for the first time, the terms and conditions, which contained a New York forum selection

clause.

Plaintiff proved by a preponderance of the evidence (*see Matter of Pickman Brokerage [Bevona]*, 184 AD2d 226, 226-227 [1992]), that the terms and conditions of the extrinsic document were incorporated into the credit agreement, and that defendants' acknowledged receipt and agreed to be bound by the same. The credit agreement, which identified the terms and conditions as those contained on each invoice, was sufficient to put defendants on notice that there was an additional document of legal import to the contract they were executing (*see Shark Information Servs. Corp. v Crum & Forster Commercial Ins.*, 222 AD2d 251, 252 [1995]; *see also American Dredging Co. v Plaza Petroleum*, 799 F Supp 1335, 1338 [ED NY 1992], *vacated in part on other grounds*, 845 F Supp 91 [ED NY 1993]). Defendants' decision not to inquire as to the terms and conditions is one by which they are bound (*see Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 266 [2008], *lv dismissed* 12 NY3d 748 [2009]; *see also Hotel 71 Mezz Lender LLC v Falor*, 64 AD3d 430, 430 [2009] [a signer's duty to read and understand that which he signs is not "diminished merely because []he was provided with only a [portion of that document]").

The parties' dispute is not, as found by the lower court, governed by UCC 2-207(1)-(2)(b), which provides that, between

merchants, where there is an "expression of acceptance or a written confirmation . . . [even if it] states terms additional to or different from those offered or agreed upon . . . [the additional or different terms] become part of the contract unless . . . they materially alter it" (*id.*). Here, the forum selection clause was not an "additional or different term" added to the contract, nor was it a confirmatory writing; rather, it was one of the terms and conditions incorporated by reference into the contract at its inception (*see Guerra v Astoria Generating Co., L.P.*, 8 AD3d 617, 618 [2004]). Neither of the issues generally decided pursuant to UCC 2-207 are at issue here (*see e.g. K.I.C. Chems., Inc. v ADCO Chem. Co.*, 1996 US Dist LEXIS 3244, at *10 [SD NY 1996] ["a classic 'battle of the forms'"]; *Hugo Boss Fashions v Sam's Eur. Tailoring*, 293 AD2d 296, 297 [2002] [a written alteration to an oral agreement]).

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

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

ENTERED: FEBRUARY 2, 2012

CLERK

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

6684 The People of the State of New York, Respondent, Ind. 6526/07 2554/05

-against-

Gilbert Carandang, Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered October 1, 2008, convicting defendant, after a nonjury trial, of grand larceny in the third degree, and sentencing him, as a second felony offender, to a term of 3½ to 7 years, with restitution in the amount of $36,753.15, concurrent with a term of 1⅓ to 4 years for violation of probation, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence established that defendant embezzled money from his employer by making unauthorized use of the firm's credit card and checking account for his own benefit.

Defendant argues that his use of the credit card was not a taking of "property" under Penal Law § 155.00(1). However, as defendant concedes, his actions caused his employer to become indebted to the bank that issued the credit card. Thus, defendant deprived his employer of property in the amount of that indebtedness (*see People v Parker*, __ AD3d __, 2012 NY Slip Op 00016 [Jan 3, 2012]).

Defendant also argues that his use of the checking account was not a taking from an "owner" under Penal Law § 155.00(5), because defendant and his employer allegedly had equal possessory interests in the firm's checking account. However, the evidence established that the employer permitted defendant to be an authorized signer on the checking account for business purposes only; defendant was not granted any interest in the firm's funds (*compare People v O'Brien*, 102 Misc 2d 246 [Nassau Dist Ct 1979] [taking from joint bank account by one of the joint owners is not

larceny]). Regardless of whether defendant and the employer had equal access to the account as far as the bank was concerned, the employer's testimony made it clear that the employer's right of possession was, at the very least, greater than defendant's.

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

ENTERED: FEBRUARY 2, 2012

CLERK

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

6690-
6691 Christopher Rich, Index 21482/06
Plaintiff-Respondent,

-against-

125 West 31st Street Associates, LLC, et al.,
Defendants-Appellants.

_____

Shaub, Ahmuty, Citrin & Spratt LLP, Lake Success (Robert M. Ortiz of counsel), for appellants.

Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for respondent.

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Order, Supreme Court, Bronx County (Diane A. Lebedeff, J.), entered June 21, 2010, which denied defendants' motion for summary judgment dismissing plaintiff's common-law negligence and Labor Law §§ 240(1), 241(6) and § 200 claims, granted plaintiff's motion for summary judgment on his Labor Law § 240(1) claim, and granted summary judgment to plaintiff on his claims pursuant to Labor Law § 241(6) and § 200 and his common-law negligence claim, unanimously modified, on the law, to the extent of vacating the award of summary judgment to plaintiff on his common-law negligence and Labor Law § 200 claims, defendant 125 West 31st Street Associates, LLC granted summary judgment dismissing the common-law negligence and Labor Law § 200 claims as against it, and otherwise affirmed, without costs. Appeal from order, same

court and Justice, entered February 1, 2011, which denied defendants' motion to renew and reargue, unanimously dismissed, without costs, as academic.

Plaintiff, an ironworker, was injured while working at a construction site where four hoists had been installed to carry personnel and equipment necessary to erect a 58-story building. While plaintiff was riding one of the hoists, it began to function erratically, stopping and starting again. Ultimately, the hoist free fell into the sub-basement, coming to rest on the springs on the bottom of the hoist way.

Plaintiff moved for summary judgment on his claim pursuant to Labor Law § 240(1) and defendants, the owner of the building and the construction manager, cross-moved for summary judgment dismissing all of plaintiff's claims. The unrefuted evidence establishes that the hoist came to a stop only when it reached the emergency cushion springs located in the sub-basement, an event which does not constitute normal and safe operation of the hoist. The hoist mechanism proved inadequate to shield plaintiff from the harm directly flowing from the application of the force of gravity and thus summary judgment on

plaintiff's section 240(1) claim was properly granted (*see Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009]; *Williams v 520 Madison Partnership*, 38 AD3d 464 [2007]). Although the hoist's safety mechanism engaged, and prevented plaintiff and his coworkers from suffering more serious injuries, this does not defeat plaintiff's entitlement to summary judgment (*see Lopez v Boston Props. Inc.*, 41 AD3d 259 [2007]; *Kyle v City of New York*, 268 AD2d 192 [2000], *lv denied* 97 NY2d 608 [2002]). Moreover, neither a lack of certainty as to exactly what preceded the accident nor the fact that plaintiff did not point to a specific defect in the hoist creates an issue of fact (*see Arnaud v 140 Edgecomb LLC*, 83 AD3d 507 [2011]).

The court also properly granted summary judgment to plaintiff on his Labor Law § 241(6) claim. While a party is permitted to plead inconsistent theories of recovery (CPLR 3014), a litigant must elect among inconsistent positions upon seeking expedited disposition. Having previously advanced the position that the accident was caused by an unlicensed operator, a violation of the Industrial Code that forms the basis for plaintiff's Labor Law claim, defendants cannot obtain relief on the newly advanced ground that there is no evidence that the absence of a certified elevator operator was the proximate cause

of the accident (*see Unisys Corp. v Hercules, Inc.*, 224 AD2d 365, 367 [1996]; *Vanriel v A. Weissman Real Estate*, 283 AD2d 260 [2001]).

The motion court appears to have granted plaintiff summary judgment on his § 241(6) claim based, in part, on a mistaken belief that plaintiff had moved for such relief when he had not. However, such relief was warranted in light of the arguments and evidence proffered by defendants and may be granted to a nonmoving party upon a search of the record (CPLR 3212[b]).

It was error for the court to grant summary judgment in favor of plaintiff on his common-law negligence and Labor Law § 200 claims, as questions of fact exist precluding summary disposition of these claims. Further, defendant 125 West 31st Street Associates, LLC, the owner, was entitled to summary judgment dismissing these claims as against it, as the evidence established that the owner neither controlled the work nor, to the extent the accident can be considered to have arisen from a premises defect, had notice of that premises defect. However, defendant Gotham Construction Company, LLC, the general contractor, was not entitled to summary judgment on the common-law negligence and Labor Law § 200 claims as against it, since issues of fact exist as to whether, among other things, the

accident was caused in part by a Gotham employee's negligence in permitting unauthorized persons to operate the hoist.

We have considered defendants' remaining contentions and find them unavailing.

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

ENTERED: FEBRUARY 2, 2012

CLERK

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

6692 Galina Panova Fedoff, Index 314185/03
Plaintiff-Respondent,

-against-

Boris Winthrop Fedoff,
Defendant-Appellant.

_____

Boris Winthrop Fedoff, New York, appellant pro se.

DLA Piper LLP (US), New York (Nicholas F. Aldrich, Jr. of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Laura E. Drager, J.), entered June 7, 2010, to the extent appealed from as limited by the briefs, granting plaintiff a divorce on the ground of constructive abandonment, and awarding her exclusive use and occupancy of the parties' marital residence, unanimously affirmed, with costs.

Plaintiff was properly granted the divorce on the ground of constructive abandonment after defendant consented to the divorce on that ground at the inquest. Plaintiff sufficiently met her burden of proof by testifying that defendant continuously denied her sexual relations for over a year before the commencement of the action and that there was no physical reason why they could not have such relations (*see Haymes v Haymes*, 252 AD2d 439 [1998]; *Lyons v Lyons*, 187 AD2d 415, 416 [1992]). The complaint

was properly amended, with leave of the court, to conform to the proof elicited at the inquest.

Defendant's arguments regarding equitable distribution of the parties' marital residence cannot be reviewed on appeal as they have already been reviewed and rejected by this Court (*see Fedoff v Fedoff*, 41 AD3d 114 [2007], *lv dismissed* 9 NY3d 1027 [2008]; *see also* CPLR 5501[a][1]).

We have considered defendant's remaining arguments, including that the court should have considered his alleged contributions to the marriage, and find them unavailing.

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

ENTERED: FEBRUARY 2, 2012

CLERK

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

6693N Maribel Caguioa Astillero, Index 102728/10
Plaintiff-Respondent,

-against-

David Abramov, et al.,
Defendants-Appellants.

_____

DeSena & Sweeney, LLP, Hauppauge (Shawn P. O'Shaughnessy of counsel), for appellants.

Elana Sharara, Great Neck, for respondent.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered January 4, 2011, which, in an action for personal injuries arising out of a motor vehicle accident, denied defendants' motion to change venue from New York County to Nassau County, and granted that part of plaintiff's cross motion to change venue to Queens County, unanimously affirmed, without costs.

Plaintiff initially chose an improper venue in New York County. However, plaintiff selected this venue based on Department of Motor Vehicle records, which indicated that defendant Asia Abramov resided in New York County. Defendant Abramov had recently moved to Queens County, but failed to notify

the Department of Motor Vehicle as required by VTL § 505(5). Under these circumstances, plaintiff did not forfeit her right to choose a venue by her initial choice of a venue that turned out to be improper (*see Vasquez v Sonin*, 259 AD2d 340, 341 [1999]).

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

ENTERED: FEBRUARY 2, 2012

CLERK

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

3609N-
3610N Latipac Corp., Index 101213/09
Plaintiff-Appellant,

-against-

BMH Realty LLC, et al.,
Defendants-Respondents.

_____

Goldberg Weprin Finkel Goldstein LLP, New York (Kevin J. Nash of counsel), for appellant.

Greenblatt & Agulnick, P.C., Great Neck (Matthew W. Greenblatt of counsel), for respondents.

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Orders, Supreme Court, New York County (Joan A. Madden, J.), entered March 9, 2009 and August 14, 2009, affirmed, with costs.

Opinion by Friedman, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
John W. Sweeny
James M. Catterson
Dianne T. Renwick
Nelson S. Román, JJ.

3609N-
3610N
Index 101213/09

_____x

Latipac Corp.,
Plaintiff-Appellant,

-against-

BMH Realty LLC, et al.,
Defendants-Respondents.
_____x

Plaintiff appeals from orders of the Supreme Court, New York County (Joan A. Madden, J.), entered March 9, 2009, and August 14, 2009, which denied its successive motions for preliminary injunctive relief.

Goldberg Weprin Finkel Goldstein LLP, New York (Kevin J. Nash of counsel), for appellant.

Greenblatt & Agulnick, P.C., Great Neck (Matthew W. Greenblatt of counsel), for respondents.

FRIEDMAN, J.P.

The parties entered into an agreement for the purchase and sale of an apartment building for which the owner received J-51 tax benefits. The agreement included a representation that, as of its date, nine of the building's apartments were fair-market rental units; the owner had deemed those units deregulated pursuant to the luxury decontrol provisions of the Rent Stabilization Law. Before the transaction closed, this Court issued a decision (subsequently affirmed by the Court of Appeals) holding that rent-stabilized apartments in a building receiving J-51 tax benefits were not subject to luxury decontrol (*Roberts v Tishman Speyer Prop., L.P.*, 62 AD3d 71 [2009], *affd* 13 NY3d 270 [2009] [*Tishman*]). The primary question on this appeal is whether *Tishman*, which rejected the interpretation of the Rent Stabilization Law then followed by the State Division of Housing and Community Renewal (DHCR), had any effect on the purchaser's contractual obligation to close. We hold that it did not.

Plaintiff Latipac Corp., as purchaser, and defendant BMH Realty LLC, as seller, entered into a written agreement, dated July 15, 2008, for the purchase and sale of the apartment building located at 417-419 East 74th Street in Manhattan, for a purchase price of $6.2 million. Paragraph 41 of the agreement provides:

> "Seller represents that the monthly rents listed on the annexed *Schedule B* are those rents being currently billed to said tenants for the month of July, 2008, but Seller makes no representation as to the continued occupancy of said Premises or any parts thereof by any tenant or tenants now in possession. In the event that there is any inconsistency between the terms and conditions set forth in the leases and the rent schedule annexed hereto, the terms and conditions set forth in the leases shall prevail. Seller shall notify Purchaser of any vacancy that arises, but same shall not affect Purchaser's obligations to close hereunder."

The annexed Schedule B, entitled "Rent Roll," sets forth, among other information, the monthly rental of each of the building's units (22 residential and two commercial) and each residential unit's regulatory "status," either "FM" (fair market) or "RS" (rent-stabilized). Nine of the residential units are identified as having "FM" status; the "legal rent" of each of these nine units is described as "above $2000."

Several other provisions of the agreement are relevant to this appeal. Paragraph 35 provides, in pertinent part:

> "This Contract, as written, contains all the terms of the Contract entered into between the parties, and the Purchaser acknowledges that the Seller has made no representations, is unwilling to make any representations, and held out no inducements to the Purchaser, other than those herein expressed, and the Seller is not liable or bound in any manner by expressed or implied warranties, guarantees, promises, statements,

> representations or information pertaining to the said Premises as to the physical condition, income, expense, operation, or to what use the Premises can be applied, including but not limited to any matter or thing affecting or relating to the said Premises, except as herein specifically set forth."

Paragraph 43 provides:

> "If there are any complaints, challenges or proceedings pending for the reduction of any of the rentals or if any are filed prior to the closing of title the Seller will comply with and discharge same prior to closing at the Seller's own cost and expense; and if said complaints, challenges or proceedings are not discharged by the Seller, the Seller shall give to the Purchaser a credit for the cost of such discharge of complaints or proceedings at the closing of title. Seller shall remain responsible for any rent rollbacks, overcharges or refunds for the period prior to the closing of title."

Finally, paragraph 48 provides, in pertinent part:

> "If the Seller . . . shall be unable to comply with the obligations, representations or conditions on the part of the Seller to be performed as set forth herein, the sole obligation of the Seller shall be to refund Purchaser's down payment made hereunder, and to reimburse the Purchaser for the cost of title examination, and upon making such refund and reimbursement, this Contract shall wholly cease and terminate . . ."

The closing of the transaction, which the agreement set for September 16, 2008, was postponed by a series of adjournments. By year-end, relations between the parties had become

adversarial, with Latipac raising a number of issues that, if not resolved, it deemed grounds for withdrawing from the deal. By letter dated December 29, 2008, BMH set January 30, 2009 as the time-of-the-essence closing date. Latipac responded by letter dated January 6, 2009, in which it claimed that, by reason of, inter alia, unresolved decreased service orders by DHCR concerning two of the apartments (one dating back to 1988, the other to 1992), BMH was in breach of certain representations in the agreement. Based on the claims of breach, Latipac demanded the return of its $310,000 deposit.

On January 29, 2009 -- the day before the closing date set by BMH -- Latipac commenced this action in Supreme Court, New York County, seeking, inter alia, the return of its deposit and, by implication, a ruling that it had no further obligations under the agreement. By order to show cause of the same date, Latipac moved for a preliminary injunction staying the closing and precluding BMH from declaring Latipac to be in default pending resolution of the claims set forth in the complaint. The order to show cause contained a temporary restraining order (TRO) precluding BMH, pending a hearing on the motion, from declaring Latipac to be in default or obtaining release of the escrowed deposit funds. In support of the motion, Latipac argued, among other things, that the agreement was unenforceable because

paragraph 43 -- the provision for a credit to the purchaser at closing for any unresolved DHCR proceedings -- was "indefinite, and nothing more than an agreement to agree." As previously noted, decreased service orders concerning two of the building's apartments remained unresolved at the time.

The motion court heard oral argument on Latipac's motion for a preliminary injunction on March 4, 2009. Ruling from the bench, the court denied the motion and vacated the TRO. As relevant to this appeal, the court found that paragraph 43 was enforceable because "a method of computing the credit [for the two decreased service orders] may be ascertained under [Rent Stabilization Law §] 25-516(a) by determining the maximum possible exposure to Latipac in the event that the tenant files and succeeds in a rent overcharge claim before the DHCR." Promptly after the motion court rendered its March 4 decision, BMH notified Latipac, by letter of the same date, that it was setting April 6, 2009, as the new closing date.

On March 5, 2009 -- the day after the denial of plaintiff's preliminary injunction motion -- this Court issued the aforementioned *Tishman* decision. In *Tishman*, we held that a rent-stabilized apartment in a building for which the owner receives J-51 tax benefits (*see* Administrative Code of City of NY § 11-243) is not subject to the luxury decontrol provisions of

the Rent Stabilization Law (Administrative Code of City of NY §§ 26-504.1, 26-504.2) until the tax benefit expires or, if the lease contained a notice that the unit would be deregulated upon expiration of the tax benefit, until the apartment becomes vacant after expiration of the tax benefit (*see* 28 RCNY 5-3[f][3][i][A], [B]). The decision, which reversed a judgment of Supreme Court, represented a rejection of the construction of the Rent Stabilization Law followed up to that time by DHCR. Under DHCR's pre-*Tishman* practice, luxury decontrol was deemed applicable to a building enjoying J-51 tax benefits so long as units in the property had not become subject to rent stabilization solely by virtue of the building's participation in the J-51 program (*see Tishman*, 62 AD3d at 78-79, *affd* 13 NY3d at 281-282).[1]

On April 1, 2009, Latipac moved a second time for a preliminary injunction against being held in default for failing to close. In conjunction with the motion, the motion court again issued a TRO against BMH's proceeding with the closing, declaring Latipac to be in default, or obtaining release of the deposit.

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[1]As the Appellate Term, First Department, recently observed, DHCR's pre-*Tishman* "longstanding and unambiguous interpretation of the luxury decontrol statute" had been "codified in Rent Stabilization Code (9 NYCRR) § 2520.11(o) and [went] unchallenged for the better part of a decade until determined to be erroneous by the [*Tishman*] court" (*72A Realty Assoc. v Lucas*, 32 Misc 3d 47, 49 [2011]).

On this second application, Latipac contended, as here pertinent, that it was no longer obligated to go through with the closing because "the representations set forth in the rent roll concerning the deregulated status of close to half of the apartments [are] no longer accurate in light of [the] important new ruling just issued by the Appellate Division, First Department, in [*Tishman*]." Pointing to the building's receipt of J-51 tax benefits from 1998 through 2008, Latipac argued that, under *Tishman*, "those representations [that nine apartments had fair-market rental status] are no longer valid," thereby giving Latipac "significant new grounds to hold BMH in default for breach of the Contract." Latipac further asserted that, although the parties' agreement predated *Tishman*, "the representations and accuracy of the Rent Roll [i.e., Schedule B to the Agreement] must be true as of the date of closing and, therefore, need to conform to [*Tishman*] as the current governing law in the First Department."[2]

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[2]While Latipac acknowledged that the building's J-51 tax benefits had expired at the end of 2008, it argued that, under *Tishman*, the apartments in question would not become subject to luxury decontrol until the first vacancy after the expiration of the tax benefit because their leases -- which were based on the understanding that the apartments were already deregulated -- did not contain a notice that the units would become deregulated upon expiration of the J-51 tax benefits (*see* 28 RCNY 5-3[f][3][i][A], [B]).

In opposing the second preliminary injunction, BMH did not dispute that it had deemed the nine apartments at issue subject to luxury decontrol while the building was receiving J-51 tax benefits during the period from 1998 through 2008. Nor did BMH contend that any of the nine apartments at issue had become vacant since the building's J-51 tax benefits terminated at the end of 2008, which vacancy would make the apartment once again eligible for luxury decontrol (*see* 28 RCNY 5-03[f][3][i][A]). BMH did argue that Latipac's argument based on *Tishman* was "not ripe" for consideration because the Appellate Division, on consent of the parties to the *Tishman* action, had stayed the *Tishman* decision's effect pending determination of a motion for leave to appeal to the Court of Appeals and any ensuing appeal. In reply, Latipac argued that the stay of *Tishman* affected only the parties to that action, was conditioned on the landlord's compliance with a number of burdensome requirements, and did not affect the precedential force of the decision's holding.

At oral argument on April 9, 2009, the motion court requested further briefing on the question of whether *Tishman* had any effect on the parties' contractual rights and obligations. Latipac, in its submission, argued that, under the doctrines of impossibility of performance and frustration of purpose, the issuance of *Tishman* excused its performance of the agreement.

BMH disputed the applicability of those doctrines, suggesting that Latipac's true reason for wanting to get out of the deal was the "downturn in real estate" that had occurred since the signing of the agreement in July 2008.

On June 17, 2009, the motion court, again ruling from the bench, denied Latipac's second preliminary injunction motion. The court found that, even assuming the issue to be ripe for decision notwithstanding the stay entered in *Tishman*, Latipac had failed to show a likelihood of success on the merits of its claim that, under the doctrines of impossibility and frustration of purpose, *Tishman* relieved it of the obligation to close.[3] About four months later, in October 2009, the Court of Appeals affirmed this Court's decision in *Tishman* (13 NY3d 270 [2009]).

Now before us are Latipac's consolidated appeals from the decisions of March and June 2009 denying, respectively, its first and second preliminary injunction motions. For the reasons discussed below, we affirm.

We first address Latipac's appeal from the March 2009 order denying its first motion for a preliminary injunction. The only

[3]The motion court also rejected Latipac's alternative argument that a hearing before a referee was required to determine the amount of credit due Latipac based on the two unresolved decreased service orders. Latipac does not press this argument on appeal.

ground on which we are urged to reverse this order is that the motion court erred in determining that the parties' agreement was enforceable notwithstanding the failure of the above-quoted paragraph 43 to specify a method for calculating the amount of credit due Latipac at closing for unresolved DHCR proceedings. This argument is unavailing. The motion court properly determined that the amount of credit for the unresolved decreased services orders concerning two apartments should be determined by reference to section 26-516(a) of the Rent Stabilization Law (Administrative Code of City of NY § 26-516[a]), which sets forth the penalty to which a landlord is subject for collecting rent in excess of the lawful regulated amount (*see Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 483 [1989], *cert denied* 498 US 816 [1990] ["Before rejecting an agreement as indefinite, a court must be satisfied that the agreement cannot be rendered reasonably certain by reference to an extrinsic standard that makes its meaning clear"]).

We turn now to Latipac's appeal from the June 2009 order denying its second motion for a preliminary injunction, which was based on the issuance of the *Tishman* decision. In its reply brief, Latipac clarifies that, on this appeal, it no longer presses the argument that, by reason of *Tishman*, it is excused from performing under the doctrines of frustration of purpose and

impossibility.[4] Rather, with respect to the second order under review, Latipac argues only that *Tishman* establishes that BMH is in breach of its representation in the agreement that the building contained nine deregulated apartments, for which fair-market rentals could lawfully be charged. Specifically, Latipac argues that, in light of *Tishman*,

> "[BMH] cannot abide by its representations regarding delivery of nine fair market apartments . . . In other words, although the Contract required and obligated [BMH] to deliver nine fair market units, [BMH] could not deliver a single one. Given this circumstance, the return of the Deposit was the least [BMH] should be obligated to do."

In support of its argument that the issuance of *Tishman* placed BMH in breach of the agreement, Latipac contends that the *Tishman* holding should be given retroactive effect. We agree

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[4]If the frustration of purpose and impossibility arguments were still at issue, we would find that the motion court correctly rejected them. Manifestly, the return of nine apartments to rent-stabilized status does not render impossible plaintiff's contemplated use of the building; it simply reduces the profitability of that use to a certain extent. Neither can it be said that BMH's inability to deliver nine free-market rental units frustrated the fundamental purpose of the transaction. In this regard, plaintiff, in its arguments to the motion court and in its initial appellate brief, misplaced its reliance on *Anderson v Steinway & Sons* (178 App Div 507 [1917], *affd* 221 NY 639 [1917]). In *Anderson*, the buyer's contemplated use of the property was rendered altogether unlawful, and hence impossible, by a zoning ordinance adopted after the execution of the contract. In that situation, the Court of Appeals held that "it would be inequitable . . . to decree specific performance" in favor of the seller (221 NY at 640).

that the *Tishman* holding is entitled to retroactive effect in a proper case, for example, where a tenant, on an appropriate set of facts, invokes that holding in a timely-commenced proceeding seeking to restore an apartment to rent stabilization. Indeed, this Court has so held, most recently on a subsequent appeal in *Tishman* decided while the instant appeal was sub judice (*Roberts v Tishman Speyer Properties L.P.*, 89 AD3d 444 [2011]; *see Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 196-198 [2011]; *72A Realty Assoc. v Lucas*, 32 Misc 3d at 49).

The appeal before us, however, does not arise from a landlord-tenant dispute. Rather, we are presented with a controversy between parties that entered into a contract for the purchase and sale of an apartment building. In resolving such a buyer-seller dispute, the accuracy of the contract's representation that the building contained nine deregulated apartments should be determined as of the time the buyer and seller understood that representation to speak, whether the time in question was the date of the contract's execution or the date of closing. Moreover, the truth of the representation should be determined from the point of view of the parties *at the relevant time*, not -- as would be appropriate in a landlord-tenant dispute -- viewed retrospectively from a later date following a judicial decision that overturned the understanding of the law that the

parties (along with the responsible administrative agency and the entire real estate industry) reasonably shared at the time they contracted. Given that the rent stabilization laws were enacted to protect tenants, not prospective landlords, there is no reason to read back into a previous time a subsequent judicial decision that, although it construed unchanged statutory language, radically altered the legal landscape against which the parties contracted.

It remains to be determined as of which time -- the time of contracting or the time of closing -- the contractual representation at issue (that the building contained nine deregulated apartments) speaks. On its face, the representation addresses only the time of contracting (July 2008), and does not constitute a promise to deliver nine fair-market rental units at closing. The above-quoted paragraph 41 of the agreement, which incorporates by reference the annexed Schedule B, identifies nine apartments as having "FM" (fair-market) regulatory status as of July 2008. Nothing in that paragraph gives so much as a hint that the seller guaranteed that the regulatory status of those apartments -- or any of the matters set forth in Schedule B -- would remain unchanged from July 15, 2008 (the date of the contract) until the time of closing. The parties could easily have drafted the contract to provide, in unmistakable language,

that the buyer's obligation was conditioned on any or all of these matters remaining unchanged on the date of closing. That they did not do so gives rise to a compelling inference that they did not intend the buyer's obligation to be so conditioned. Moreover, in paragraph 35 of the agreement, Latipac expressly "acknowledges that the Seller has made no representations, is unwilling to make any representations, and held out no inducements to the Purchaser, other than those herein expressed, and [that] the Seller is not liable or bound . . . except as herein specifically set forth."

In sum, we are satisfied that the agreement's representation that the building contained nine deregulated apartments spoke only as of the time of contracting (July 2008). To the extent this does not resolve the parties' dispute, the next question is whether it was the buyer or the seller that bore the risk that a legal development would effect a change in the regulatory status of those apartments during the interval between contracting and closing. We conclude, for the reasons explained below, that Latipac, the buyer, bore that risk.

It is well established that, unless a contract for the sale of real property expressly provides otherwise, the buyer bears the risk that the property's value will be reduced by a change in the law between the execution of the contract and the closing

(*see Urbis Realty Co. v Globe Realty Co.*, 235 NY 194 [1923] [buyer bore risk of change in regulation of landlord-tenant relations]; *Froehlich v K.W.W. Holding Co., Inc.*, 116 Misc 275 [Sup Ct, Kings County 1921], *affd* 201 App Div 855 [1922] [same]; *DiDonato v Reliance Std. Life Ins. Co.*, 433 Pa 221, 249 A2d 327 [1969] [buyer bore risk of zoning change]; *Kend v Crestwood Realty Co.*, 210 Wis 239, 246 NW 311 [1933] [same]; 14 Nehf, Corbin on Contracts § 77.10, at 288 [rev ed 2001] ["In the absence of some statute or expression in the contract to the contrary, the risk of the (enactment of a new) restriction (on use of the property) will usually be allocated to the purchaser"]; Stoebuck and Whitman, Law of Property § 10.13, at 793 [3d ed 2000] ["Losses due to changes in the property's legal status are often imposed on the purchaser under equitable conversion"]; 77 Am Jur 2d, Vendor and Purchaser § 171).

Imposing the risk of a change in the law on the buyer (absent a contractual provision to the contrary) follows from the common-law doctrine of equitable conversion, "under which the execution of the contract of sale makes the buyer the equitable owner of the property and the seller the holder of legal title as security for the purchase price" (1 Smith, Friedman on Contracts and Conveyances of Real Property § 4:10.1, at 4-64 [7th ed 2011]). Before the enactment of statutes addressing the issue,

the majority of states, including New York, pursuant to the doctrine of equitable conversion, required the buyer, where the contract was silent, to bear the risk of casualty befalling the property between the execution of the contract and the closing (*id.* at 4-63; 2 Warren's Weed, New York Real Property § 25.41, at 25-90 [5th ed]; *see Sewell v Underhill*, 197 NY 168 [1910]; *Heerdt v Brand*, 272 App Div 143, 145 [1947] [noting that, before adoption of the uniform statute, New York followed "(t)he rule that risk of loss falls on the vendee and not the owner, the vendor," which rule "became, likewise, the law of the majority of American jurisdictions"]). Of course, the Uniform Vendor and Purchaser Risk Act (General Obligations Law § 5-1311, formerly Real Property Law § 240-a) displaces the common law rule where applicable, but that statute does not cover the risk of a change in the law.

As previously discussed, the agreement's representation concerning the regulatory status of the nine deregulated apartments, on its face, spoke only as of the time the parties contracted -- at which time the representation was accurate under the construction of the Rent Stabilization Law by which DHCR and the real estate industry had operated for a decade. Moreover, the inference that the parties did not intend to make the buyer's obligation conditional on the unchanged regulatory status of the

building's apartments becomes well-nigh inescapable when one considers that the *Tishman* case that ultimately resulted in the relevant change in the law was the object of significant media attention long before the parties entered into their contract. The New York Times ran a news article about *Tishman* when that action was commenced in January 2007 (*see* Bagli, *Suit Challenges Rent Jumps in Complexes MetLife Sold*, New York Times, Jan. 23, 2007 [reproduced in the record on appeal]). *Tishman* was also the subject of a front-page New York Law Journal news article when Supreme Court rendered its subsequently reversed August 2007 decision in the case (*see* Hamblett, *Benefit Held No Bar to Market Rents at Stuyvesant Town*, NYLJ, Aug. 24, 2007, at 1, col 3), and of another New York Law Journal article legally analyzing the Supreme Court decision in October 2007 (*see* Mollen, *Realty Law Digest*, NYLJ, Oct. 10, 2007, at 5, col 1). As sophisticated investors in the New York City real estate market, the parties to this action presumably were aware of *Tishman* when they entered into their agreement in July 2008, nearly a year after the initial *Tishman* decision and during the pendency of the appeal of that decision to this Court. The agreement's terse recital of the status of the apartments under the rent stabilization laws as of July 2008 -- a reference that was, at that time, entirely consistent with the relevant government records and the then-

prevailing construction of applicable law -- does not justify a leap to the conclusion that the parties intended to condition the buyer's obligation on the outcome of the *Tishman* appeal.

Instructive here is *Urbis Realty Co. v Globe Realty Co.* (235 NY 194 [1923], *supra*), a case from the early days of rent regulation that bears an uncanny resemblance to this one. *Urbis* holds that a change in the law enacted between the execution of the contract and the closing did not relieve the buyer of its obligation to carry out the agreement. In *Urbis*, "[t]he contract for the conveyance of the [apartment] building contained a provision that the premises should be taken 'subject also to existing leases all of which [save one] expire or contain provisions for cancellation on or before October 1st, 1920'" (*id.* at 198 [quoting Appellate Division's findings of fact]). On the very date set for closing, however, a new rent-regulation law was enacted and went into effect that made it "practically impossible for the landlord to select his own tenants after the expiration of [the existing] leases or to freely contract with desirable tenants in possession as to the rentals to be paid" (*id.* at 199). On this basis, the Appellate Division held that the plaintiff buyer was entitled to the return of its deposit, since the new law "ma[d]e it impossible for the plaintiff to obtain possession of the apartments . . . on the first day of October, 1920, as

provided in said contract" (*id.* at 198-199). The Court of Appeals reversed, rejecting the Appellate Division's view that the contract's recital that all leases but one would expire or be subject to cancellation on or before October 1, 1920, meant that

> "the parties (*i.e.*, both parties) were aware that plaintiff agreed to purchase the premises with the understanding that it could have possession of all the premises excepting the apartment on the ground floor by October first. If such was the understanding of plaintiff, why did it not insist that the contract should in unmistakable terms so provide? Why did it execute a contract and covenant to purchase the property *subject* to existing leases, the terms of which were truthfully and specifically stated therein? The circumstances surrounding the case would rather tend to show that such understanding by plaintiff was not conceived until the passage of the statute in April" (*id.* at 201).

In this case, BMH's representation in the agreement that nine apartments had fair-market rental status as of July 2008 was true when made, consistent with the understanding of the law under which DHCR and the real estate industry had been operating for years. Although the parties were presumably on notice when they entered into the agreement of the pendency of litigation that might bring the validity of the fair-market rental status of the nine apartments into question, they put nothing in the agreement that could be construed as a warranty that such status would not change before closing (*see Froehlich v K.W.W. Holding*

*Co., Inc.*, 116 Misc at 279 ["While none of the housing legislation had actually been enacted when this contract was made, it was being discussed publicly and generally, and the possibility of some statutes being passed affecting the question must have been within the contemplation of the parties when they signed the contract. But they made no exception to cover such a possibility"]). We decline Latipac's invitation to read into the agreement an unspoken promise to deliver at closing nine fair-market rental apartments. Accordingly, Latipac, as buyer, bore the risk of a legal development occurring between contracting and closing that would affect the fair-market rental status of the nine apartments at issue -- a risk, to reiterate, of which both parties reasonably should have been aware when the agreement was executed. Hence, when that risk came to fruition with the issuance of this Court's *Tishman* decision on March 5, 2009, Latipac was not discharged of its obligation to perform the agreement.

Even if the agreement could be construed to obligate BMH to deliver nine fair-market rental apartments at closing (and, as already discussed, we find such a construction untenable), the fact remains that as of January 30, 2009 -- the date for which BMH issued a "time of the essence" closing notice -- this Court had not yet issued its decision in *Tishman*. Thus, as of January

30, 2009, DHCR continued to deem luxury decontrol applicable to rental properties enjoying J-51 tax benefits so long as the property had not become subject to rent stabilization solely by virtue of participation in the J-51 program (*see Tishman*, 13 NY3d at 281-282). Of course, the closing did not occur on January 30, 2009, but that was due to the TRO that Latipac had obtained the day before in support of its first preliminary injunction motion, which was denied on March 4, 2009. On this appeal, we have rejected the only argument Latipac raises to challenge the denial of that motion. Thus, for present purposes, it is established that Latipac's first preliminary injunction motion -- the sole basis for the delay of closing beyond January 30 -- had no merit.

It is well established that a party that has been erroneously enjoined is entitled, upon dissolution of the injunction, to recover restitution from the party that sought the injunction for any unjust enrichment thereby obtained, without regard to the posting of an undertaking or proof of malice (*see Cooper v Schube*, 101 AD2d 737 [1984] [owner was entitled to recover, as "restitution for unjust enrichment," the fair market value of tenant's use and occupancy of apartment during pendency of injunction against eviction]; *Bedell Co. v Harris*, 228 App Div 529, 536 [1930] [same]; *Village of Johnson City v Glanville*, 108 Misc 2d 531 [Sup Ct, Broome County 1981] [village was entitled to

recover payments it made to employee pursuant to subsequently reversed preliminary injunction]; 1 Dobbs, Remedies § 2.11[3], at 266-267 [2d ed 1993]; 42 Am Jur 2d, Injunctions § 317; 67A NY Jur 2d, Injunctions § 220; 12A Carmody-Wait 2d § 78:246; Note, *Interlocutory Injunctions and the Injunction Bond*, 73 Harv L Rev 333, 348-351 [1959]). As stated by this Court:

> "Although damages may not be awarded because an injunction was wrongfully obtained unless the case is one of malicious prosecution, when rights and duties have been re-established after litigation, a party is entitled to seek restitution for any wrongful deprivation, even if the deprivation resulted from a court order upon which its adversary relied" (*Dzubey v Teachers' Coll.*, 87 AD2d 783, 784 [1982] [citation omitted]).

In this case, even assuming that BMH had obligated itself to deliver nine fair-market rental apartments at closing, it would unjustly enrich Latipac to allow it to recover its deposit based on a change in the law that occurred before closing due solely to Latipac's having procured a TRO against the noticed January 30 closing in support of a motion that was ultimately denied -- a denial that has been affirmed on this appeal. In essence, Latipac -- which, but for the TRO, plainly would have been in default had it refused to close on January 30 -- now asks this Court to reward it for having delayed the closing by making a meritless motion. Latipac was entitled to make the motion --

there is no contention that the TRO was procured maliciously -- but, the motion having been denied and the denial having been affirmed on appeal, there is no reason, in equity and good conscience, to allow dilatory tactics of this sort to shift to BMH, as seller, the risk of an adverse change in the law or other development that would excuse Latipac's performance as buyer (*cf. Tinker v McLellan*, 165 Cal App 2d 291, 331 P2d 464 [1958] [where the purchasers delayed closing by failing to honor their promise to pay certain closing costs, and the property was damaged by a flood after the date on which closing was to have occurred, the purchasers were estopped to rely on the contractual provision that placed the risk of pre-closing loss upon the sellers]).

We emphasize that, in deciding this appeal, we express no view as to whether any or all of the tenants of the nine apartments identified as fair-market rental units in the parties' agreement will be successful in the event they bring proceedings to restore their units to rent stabilization. The effect of the *Tishman* holding on particular properties must be determined on a case-by-case basis. As the Court of Appeals observed, *Tishman*'s impact on a given rental unit will depend on factors including "the statute of limitations, and other defenses that may be applicable to particular tenants" (13 NY3d at 287). For example, in the event DHCR rendered an order deregulating a particular

apartment that either went unchallenged within the applicable limitation period or, if timely challenged, was affirmed on administrative or judicial review, the tenant will presumably be precluded by principles of res judicata from seeking the restoration of rent stabilization (*see Gersten*, 88 AD3d 189 [2011], *supra*). The present record does not disclose whether DHCR rendered such an order as to any of the nine apartments at issue.[5] In any event, given that the tenants of the nine apartments are not parties to this action, it would be inappropriate to comment on the viability of their potential claims.

Finally, given our determination that Latipac was not entitled to a preliminary injunction even if our March 2009 *Tishman* decision had immediate force as binding precedent, we need not reach BMH's argument that *Tishman* provided no basis for granting Latipac relief by reason of the stay of its enforcement pending the appeal to the Court of Appeals.

Accordingly, the orders of the Supreme Court, New York

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[5]The record contains a due diligence report prepared for Latipac that refers to one of the apartments as having been "registered" by the owner as "[d]eregulated" in 2003. However, the report does not state whether that apartment was deregulated pursuant to an order of DHCR, nor does the report disclose whether any of the other apartments were deregulated by order of DHCR.

County (Joan A. Madden, J.), entered March 9, 2009, and August 14, 2009, which denied plaintiff's successive motions for preliminary injunctive relief, should be affirmed, with costs.

All concur.

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

ENTERED: FEBRUARY 2, 2012

CLERK

Tom, J.P., Saxe, Catterson, Moskowitz, Manzanet-Daniels, JJ.

5117-
5117A-
5117B Mathias Berenger, et al., Index 110744/09
Plaintiffs-Respondents,

-against-

261 West LLC, et al.,
Defendants-Appellants,

BH 261 Manager LLC, et al.,
Defendants.

_____

Greenberg, Trager & Herbst, LLP, New York (Richard J. Lambert of counsel), for appellant.

Law Offices of Bryan W. Kishner and Associates, New York (Bryan W. Kishner of counsel), for respondents.

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Orders, Supreme Court, New York County (Paul G. Feinman, J.), entered June 15, 2010, modified, on the law, to grant 261 West LLC's motion dismissing the claim for fraud and misrepresentation, and to grant the individual defendants' motion in its entirety, and otherwise affirmed, without costs. The Clerk is directed to enter judgment in the individual defendants' favor dismissing the complaint as against them.

Opinion by Catterson, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David B. Saxe
James M. Catterson
Karla Moskowitz
Sallie Manzanet-Daniels, JJ.

5117-
5117A-
5117B
Index 110744/09

_____x

Mathias Berenger, et al.,
Plaintiffs-Respondents,

-against-

261 West LLC, et al.,
Defendants-Appellants,

BH 261 Manager LLC, et al.,
Defendants.
_____x

Defendants 261 West LLC, Evan A. Haymes, Matthew Bronfman and Edward Curty appeal from orders of the Supreme Court, New York County (Paul G. Feinman, J.), entered June 15, 2010, which, to the extent appealed from as limited by the briefs, denied defendant 261 West's motion for summary judgment dismissing the fraud and misrepresentation, trespass and nuisance claims as against it and the individual defendants' motion for summary judgment dismissing the fraud and misrepresentation, trespass, nuisance and breach of fiduciary duty claims as against them and the claim for injunctive relief as against Haymes.

Greenberg, Trager & Herbst, LLP, New York (Richard J. Lambert of counsel), for appellants.

Law Offices of Bryan W. Kishner and Associates, New York (Bryan W. Kishner and Ryan O. Miller of counsel), for respondents.

CATTERSON, J.

This action for, inter alia, trespass and nuisance arises out of alleged emanations of noise and glycol, a liquid antifreeze, from a cooling tower located on the roof of a condominium on West 28th Street in Manhattan. This causes us once again to reiterate the elements of those common law claims. The plaintiffs purchased a penthouse unit in the condominium on November 15, 2006 from defendant, 261 West LLC, the sponsor of Onyx Chelsea Condominium, pursuant to a purchase agreement and offering plan. The defendants Bronfman and Haymes are members of 261 West LLC, and, along with defendant Curty, also members of the board of managers of the Onyx Chelsea Condominium.

Among other provisions, the offering plan set forth the rights and obligations of the sponsor, 261 West. The plan stated that the sponsor "will correct, repair, or replace any and all defects relating to construction of the [b]uilding, [c]ommon [e]lements or the [r]esidential [u]nits," and that "[n]othing contained in this section will be construed so as to render sponsor liable for money damages (whether based on negligence, breach of contract, breach of warranty, or otherwise)."

The following facts are established in the record: On January 24, 2005, Cerami and Associates (hereinafter referred to as "Cerami"), an acoustical engineering firm, prepared a report

for the management company containing recommendations for the building. The report expressed concern that sound transmission from the cooling tower on the rooftop to the penthouse windows would not meet building code requirements. Cerami noted that although there were no specific code requirements for the terrace, a level of 65 dBA would interfere with conversation.[1] Based on the manufacturer's data, Cerami estimated that the noise level on the terrace would be 70 dBA and recommended installing the "manufacturer's intake package" in order to reduce the noise. In a November 10, 2006 follow-up report, Cerami noted that 261 West did not install the recommended noise reduction package and reiterated the necessity of the package to meet the building code requirements.

It is undisputed that the offering plan did not depict the cooling tower in architectural renderings nor the penthouse floor plan. However, the plaintiffs testified at deposition that they visited the unit a number of times prior to closing, and plaintiff Harris testified that she saw the tower during a pre-closing inspection. The plaintiffs purchased the penthouse unit and commenced occupancy in December 2007.

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[1] A decibel ("dBA") is a unit used to measure the intensity of sound.

Beginning on March 13, 2008, the plaintiffs e-mailed a series of complaints to the managing agent about the noise emanating from the cooling tower. On June 23, 2008, the plaintiffs' counsel sent a letter to Haymes, then president of the condominium board, advising him of the plaintiffs' noise complaints, and demanding immediate correction of the problem. Counsel sent another letter to Haymes on July 3, 2008, reiterating the complaints and alleging noise levels of 85 dBA.

On or around July 31, 2008, the plaintiffs filed a complaint with the New York Attorney General's Office, alleging, inter alia, "unacceptable decibel levels," which was forwarded to counsel for 261 West. On December 8, 2008, Cerami sent a letter to the New York Attorney General's Office stating that its test of the cooling tower area revealed no noise violations. In an affidavit, the plaintiffs' licensed engineer stated that on June 10, 2009, the decibel level was 78 to 80 dBA in violation of the noise ordinance and building code.

The record also indicates that from September 12 to December 3, 2008, the plaintiffs sent four complaints to the managing agent about leaks in their apartment. On June 5, 2009, the plaintiffs e-mailed the managing agent complaining about "foul smells" emanating from their vents, and the sound of running water in the pipes. On June 8, 2009, the plaintiffs sent another

e-mail to the managing agent stating that they learned that glycol was leaking from the cooling tower. They attributed the odor in the penthouse, which had been ongoing since January 2009, to the glycol. The e-mail also advised the managing agent that a hazardous materials representative from the New York City Department of Environmental Protection (hereinafter referred to as "DEP") inspected the leak and confirmed the presence of glycol. DEP instructed the mechanical corporation to clean up the area and repair the leak.

In an affidavit, the mechanical corporation attested that it began repairing the cooling tower on June 9, 2009. On June 12, 2009, the Department of Health issued a notice of violation to 261 West which listed, inter alia, "some form of condensation noted dripping from a drainpipe out of the roof on the apt [sic] below, bubbling paint noted in the study area and odor noted."

On June 16, 2009, the plaintiffs again e-mailed the managing agent complaining about the odor. On June 23, 2009, the plaintiffs' chemical engineers sent a letter to them reporting a strong glycol odor around the cooling tower and in the plaintiffs' unit.

On July 29, 2009, the plaintiffs commenced this lawsuit against 261 West, Bronfman, Curty, Haymes, Onyx Chelsea Condominium, the board of managers for the Onyx Chelsea

Condominium (hereinafter referred to as the "Condo Board"), and managing agents BH 261 Manager LLC, alleging causes of action for trespass, nuisance, fraud and misrepresentation, and breach of fiduciary duty.[2] The plaintiffs also sought punitive damages and injunctive relief. Also on July 29, 2009, an air-conditioning consultant sent a letter to the managing agent confirming that the repairs were satisfactory. In an affidavit dated August 6, 2009, a representative of the mechanical corporation stated that their repairs "stopped the leak and prevented further leakage."

On August 10, 2009, the DEP issued a report noting that on June 26, 2009, the cooling tower was leaking glycol and that the "odors ... were most likely from the glycol that was spilled and had spilled in past incidents." On August 11, 2009, the New York City Environmental Control Board (hereinafter referred to as "ECB") issued a notice of noise code violation. The violation noted that the decibel level inside the plaintiffs' penthouse was 55 dBA, exceeding the 42 dBA permissible under Administrative Code of the City of New York § 24-227(a)(b). The plaintiffs amended their complaint on August 19, 2009, and on September 2, 261 West offered to install a sound attenuator on the cooling tower to alleviate the noise.

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[2]Defendants Onyx Chelsea Condominium, the Condo Board, and BH 261 Manager LLC are not parties to this appeal.

Defendants 261 West, Haymes, Bronfman and Curty moved for summary judgment dismissing all of the claims against them. Insofar as relevant, the court granted summary judgment only to the extent of dismissing the claims for punitive damages.

On appeal, the defendants contend that the plaintiffs' trespass and nuisance claims are in effect a breach of contract claim and, under the terms of the offering plan, monetary damages are not available. They also argue that there was only a single glycol leak, which was repaired. The defendants further argue that the Martin Act preempts the fraud and misrepresentation claims, since they are based on the plaintiffs' allegation that they acquired the penthouse in reliance on omissions in the offering plan. They also assert that there are no grounds upon which Bronfman, Curty, and Haymes may be held liable.

For the reasons set forth below, the motion court's decision is modified to the extent of granting summary judgment dismissing the fraud and misrepresentation claim as against 261 West and all claims as against Bronfman, Curty, and Haymes. As a threshold matter, the defendants' argument that the plaintiffs' claim is for breach of contract and recovery is limited by the election of remedies clause is unavailing. Although the plaintiffs allege defective construction of the cooling tower, their claims of trespass and nuisance are based upon the defendants' alleged

intentional and recurring misconduct in permitting the leaks and noise to continue. Moreover, while provisions restricting recovery are generally enforceable, as a matter of public policy, a party will not be permitted to escape liability for damages arising from grossly negligent conduct or intentional wrongdoing. See Gross v. Sweet, 49 N.Y.2d 102, 106, 424 N.Y.S.2d 365, 367, 400 N.E.2d 306, 308 (1979) ("[t]o the extent that agreements purport to grant exemption for liability for willful or grossly negligent acts they have been viewed as wholly void"); Banc of Am. Sec. LLC v. Solow Bldg. Co. II, L.L.C., 47 A.D.3d 239, 244, 847 N.Y.S.2d 49, 53 (1st Dept. 2007). Thus, the motion court correctly concluded that because the plaintiffs allege intentional wrongdoing as to their trespass and nuisance claims and raise triable issues of fact as to whether the defendants' conduct was intentional, the defendants' liability could not be limited by the contract.

Although summary judgment as to the trespass and nuisance claims was therefore correctly denied, the motion court failed to properly distinguish between the trespass and nuisance claims. In this case, the plaintiffs specifically allege trespass as to the glycol leak and nuisance as to the noise from the cooling tower. Accordingly, our analysis focuses on the distinct claims.

Trespass is the invasion of a person's right to exclusive

possession of his land (Bloomingdales, Inc. v. New York City Tr. Auth., 13 N.Y.3d 61, 886 N.Y.S.2d 663, 915 N.E.2d 608 (2009)), and includes the entry of a substance onto land. See Crown Assoc., Inc. v. Zot, LLC, 83 A.D.3d 765, 921 N.Y.S.2d 268 (2011)(water); Duane Reade v. Reva Holding Corp., 30 A.D.3d 229, 818 N.Y.S.2d 9 (1st Dept. 2006) (debris and water). Trespass does not require an intent to produce the damaging consequences, merely intent to perform the act that produces the unlawful invasion. Phillips v. Sun Oil Co., 307 N.Y. 328, 121 N.E.2d 249 (1954). Thus, "the act done must be such as 'will to a substantial certainty result in the entry of the foreign matter.'" See 307 N.Y. at 331, 121 N.E.2d at 251, quoting Restatement of Torts, § 158, comment h.

In Phillips, the Court stated that in order to hold a defendant liable for trespass, "the intrusion must at least be the immediate or inevitable consequence of what [defendant] willfully does, or which [defendant] does so negligently as to amount to willfulness." 307 N.Y. at 331, 121 N.E.2d at 251 (citations omitted). The Court found that the defendant in Phillips could not be held liable for trespass since there was no indication that the defendant "had good reason to know or expect" that the oil from its tanks was leaking and polluting its neighbor's well. Id.

Here, the defendants do not dispute that glycol leaked into the plaintiffs' penthouse, but assert that glycol leaked only once in June 2009 and that the cooling tower was immediately repaired. The defendants argue that because there is no evidence that they had notice of a glycol leak before June 2009 or that the leak was recurring, the plaintiffs cannot show that the defendants intentionally allowed the leak to continue.

However, the DEP report referring to "past incidents" of glycol spillage indicates that the glycol leaked on several occasions prior to June 2009. The plaintiffs' documented complaints of leaks and/or odors as early as September 2008 raise questions as to whether 261 West knew or should have known of the glycol leak and whether the leak was recurring such that 261 West had good reason to expect that the glycol would leak again. The plaintiffs therefore raise triable issues of fact as to whether 261 West, by intentionally not repairing the cooling tower until June 2009, caused glycol to enter the plaintiffs' property.

Unlike trespass, which arises from the exclusiveness of possession and requires a physical entry onto property, a claim of private nuisance arises from an interest in the use and enjoyment of property. The elements of a common-law claim for a private nuisance are: "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4)

with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act." Copart Indus. v. Consolidated Edison Co. of N.Y., 41 N.Y.2d 564, 570, 394 N.Y.S.2d 169, 173, 362 N.E.2d 968, 972 (1977). Nuisance is characterized by a pattern of continuity or recurrence of objectionable conduct. Domen Holding Co. v. Aranovich, 1 N.Y.3d 117, 769 N.Y.S.2d 785, 802 N.E.2d 135 (2003) (repeated verbal abuse and threats); see also 61 W. 62 Owners Corp. v. CGM EMP LLC, 77 A.D.3d 330, 906 N.Y.S.2d 549 (1st Dept. 2010) (noise occurring late every night), mod. on other grounds, 16 N.Y.3d 822, 921 N.Y.S.2d 184, 946 N.E.2d 172 [2011]; Broxmeyer v. United Capital Corp., 79 A.D.3d 780, 914 N.Y.S.2d 181 (2d Dept. 2010) (noise created by the operation of HVAC units); JP Morgan Chase Bank v. Whitmore, 41 A.D.3d 433, 838 N.Y.S.2d 142 (2d Dept. 2007) (noise from exhaust fans).

In 61 W. 62 Owners Corp., the plaintiff tenant submitted the affidavits of nine tenants as to the late-night recurrence of excessive noise from a nearby rooftop bar. 77 A.D.3d at 332, 906 N.Y.S.2d at 551. The plaintiff also produced an affidavit from an acoustical consultant who reported that the decibel levels of the music played at the bar late at night consistently exceeded the noise level permitted by ordinance. 77 A.D.3d at 332, 906 N.Y.S.2d at 551-552. There, we found that the plaintiff

sufficiently established the elements of a claim for nuisance on the merits. 77 A.D.3d at 334, 906 N.Y.S.2d at 553. Similarly, in Broxmeyer (79 A.D.3d at 783, 914 N.Y.S.2d at 184) and JP Morgan Chase Bank (41 A.D.3d at 435, 838 N.Y.S.2d at 144), the plaintiffs presented evidence that noise generated by the continuing operation of rooftop air conditioning units and/or exhaust fans prevented them from enjoying their apartments. This evidence, together with expert testimony that the noise levels violated applicable code provisions, satisfied the elements of a private nuisance claim.

In this case, the defendants argue that there is no evidence of excessive noise prior to the commencement of this action. They contend that Cerami's December 2008 testing indicated that tower was in compliance with the noise code and that the ECB violation was not issued until August 2009. However, the plaintiffs provided documentation that their repeated complaints of ongoing excessive noise from the cooling tower began in March 2008, and that in July 2008 they advised the defendants that the decibel level of the noise was 85 dBA. The plaintiffs also submitted the affidavit of their licensed engineer who stated that on June 10, 2009, he recorded decibel levels of 78 to 80 dBA in violation of the applicable code and ordinance. The plaintiffs also presented evidence of the issuance of the ECB

noise violation. This documentation raises issues of fact as to whether the noise was excessive and recurring, and therefore, substantial and unreasonable.

In order to bring a cause of action for private nuisance, a plaintiff must also show that the defendant's interference was intentional. Copart Indus., 41 N.Y.2d at 570, 394 N.Y.S.2d at 173. An interference is intentional when "'the actor (a) acts for the purpose of causing it; or (b) knows that it is resulting or is substantially certain to result from his conduct.'" Copart, 41 N.Y.2d at 571, 394 N.Y.S.2d at 174 quoting Restatement of Torts, § 825.

Here, there are questions of fact as to whether, based on the 2005 and 2006 Cerami reports, 261 West was substantially certain that excessive noise would emanate from the cooling tower without installation of the recommended noise reduction package. The plaintiffs' documentation of noise complaints to the defendants also raises triable issues as to whether the defendants knew that excessive noise was "resulting," and thus whether allowing the noise to continue was intentional.

However, the motion court erred in denying summary judgment to 261 West as to fraud and misrepresentation, and to the individual defendants as to all causes of action. There is no private right of action where the fraud and misrepresentation

relies entirely on alleged omissions in filings required by the Martin Act. Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. Partnership, 12 N.Y.3d 236, 247, 879 N.Y.S.2d 17, 23, 906 N.E.2d 1049, 1055 (2009). The Martin Act is a disclosure statute designed to protect the public from fraud in the sale of real estate securities and the Attorney General enforces its provisions and implementing regulations. CPC Intl. v. McKesson Corp., 70 N.Y.2d 268, 276-277, 519 N.Y.S.2d 804, 807, 514 N.E.2d 116, 119 (1987); Kerusa Co. LLC, 12 N.Y.3d at 245, 879 N.Y.S.2d at 22. However, a private action may be maintained where the claim alleges a basis for fraud that is distinct from the Martin Act. Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgt. Inc., 80 A.D.3d 293, 915 N.Y.S.2d 7 (1st Dept. 2010).

Here, as the defendants correctly assert, the gravamen of the plaintiffs' claims for common-law fraud and misrepresentation is predicated on alleged omissions in the offering plan as to the location and operation of the cooling tower. Because disclosures concerning the cooling tower are specifically required under the Martin Act (*see* 13 NYCRR 20.7), the plaintiffs' claims for fraud and misrepresentation against 261 West must be dismissed.

Even were the fraud and misrepresentation claims not precluded, in order to make a prima facie showing, the plaintiffs must establish, among other elements, that they relied upon the

fraudulent misrepresentation, and that as a result, they were induced to engage in a specific course of conduct. Ross v. Louise Wise Servs., Inc., 8 N.Y.3d 478, 836 N.Y.S.2d 509, 868 N.E.2d 189 (2007); Meyercord v. Curry, 38 A.D.3d 315, 832 N.Y.S.2d 29 (1st Dept. 2007). Here, it is undisputed that the plaintiffs purchased the unit having previously seen the cooling tower. Thus, the plaintiffs cannot claim to have relied on any failure to depict the cooling tower in the offering plan or architectural plans when they decided to purchase the unit.

Furthermore, the motion court erred in denying summary judgment dismissal of all causes of action against Bronfman, Curty, and Haymes. The business judgment rule protects individual board members from being held liable for decisions, such as those concerning the manner and extent of repairs, that were within the scope of their authority. See Matter of Levandusky v. One Fifth Ave. Apt. Corp., 75 N.Y.2d 530, 554 N.Y.S.2d 807, 553 N.E.2d 1317 (1990); Perlbinder v. Board of Mgrs. of 411 E. 53rd St. Condominium, 65 A.D.3d 985, 886 N.Y.S.2d 378 (1st Dept. 2009). Here, it is undisputed that decisions concerning the repair and remediation of the cooling tower were within the individual defendants' authority as members of the Condo Board, and, therefore, their decisions are "shielded from judicial review by the business judgment rule." See e.g. Konrad

v. 136 E. 64th St. Corp., 254 A.D.2d 110, 110, 678 N.Y.S.2d 629, 630 (1st Dept. 1998), lv. dismissed and denied, 92 N.Y.2d 1042, 685 N.Y.S.2d 417, 708 N.E.2d 173 (1999).

Nor do the plaintiffs make a case for "piercing the corporate veil" to hold Bronfman, Curty, or Haymes liable. In order to "pierce the veil," the plaintiff must show that an individual defendant exercised domination with respect to the transaction in question and that such domination was used to commit a fraud against the plaintiff. Matter of Morris v. New York State Dept. of Taxation & Fin., 82 N.Y.2d 135, 141, 603 N.Y.S.2d 807, 810-811, 623 N.E.2d 1157, 1160-1161 (1993). Unsubstantiated allegations are not sufficient to defeat a defendant's motion for summary judgment (see Albstein v. Elany Contr. Corp., 30 A.D.3d 210, 818 N.Y.S.2d 8 (1st Dept. 2006), lv. denied, 7 N.Y.3d 712, 824 N.Y.S.2d 604, 857 N.E.2d 1135 (2006)), and the plaintiffs do not provide evidence of any factors which would justify holding the defendants individually liable.

Absent any allegation of independent tortious conduct, the individual defendants cannot be held liable for breach of fiduciary duty. See Pelton v. 77 Park Ave. Condominium, 38 A.D.3d 1, 825 N.Y.S.2d 28 (2006). Here, the plaintiff's complaint does not allege any conduct by Bronfman, Curty, and Haymes other than the allegations that are made against the board.

The plaintiffs' cause of action for an injunction against Haymes should also be dismissed. An injunction will be denied where the remedy sought is a "legal impossibility." See Divito v. Farrell, 50 A.D.3d 405, 406, 857 N.Y.S.2d 61, 62 (1st Dept. 2008). In this case, the offering plan places control of the cooling tower with the Condo Board and not with 261 West or with Haymes personally. Thus, there is no indication that it is within Haymes' power to comply with the injunction.

Accordingly, the orders of the Supreme Court, New York County (Paul G. Feinman, J.), entered June 15, 2010, which, to the extent appealed from as limited by the briefs, denied defendant 261 West LLC's motion for summary judgment dismissing the fraud and misrepresentation, trespass and nuisance claims as against it and defendants Evan A. Haymes, Matthew Bronfman and Edward Curty's motion for summary judgment dismissing the fraud and misrepresentation, trespass, nuisance and breach of fiduciary duty claims as against them and the claim for injunctive relief as against Haymes, should be modified, on the law, to grant 261 West's motion dismissing the claim for fraud and misrepresentation, and to grant the individual defendants' motion

in its entirety, and otherwise affirmed, without costs. The Clerk is directed to enter judgment in the individual defendants' favor dismissing the complaint as against them.

All concur.

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

ENTERED: FEBRUARY 2, 2012

CLERK