SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 9, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Mazzarelli, Renwick, Freedman, Manzanet-Daniels, JJ.

4133 In re Gladys Cubilete, Index 101331/09
Petitioner,

-against-

Ricardo Elias Morales, etc.,
et al.,
Respondents.

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Dewey & LeBoef, New York (Ryan D. Fahey of counsel), for petitioner.

Sonya M. Kaloyanides, New York (Seth E. Kramer of counsel), for respondents.

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Determination of respondent New York City Housing Authority, dated September 16, 2008, which, after a hearing, terminated petitioner's tenancy upon findings of nondesirability, misrepresentation, non-verifiable income and breach of rules and regulations, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Joan B. Lobis, J.], entered November 9, 2009), dismissed, without costs.

The Hearing Officer's findings of willful misrepresentation, non-verifiable income and breach of rules and regulations are supported by substantial evidence. Moreover, given petitioner's misconduct over a four-year period, the penalty of termination does not shock one's sense of fairness, notwithstanding the hardship to petitioner (*see Bland* at 528; *Matter of Smith v New York City Hous. Auth.*, 40 AD3d 235 [2007], *lv denied* 9 NY3d 816 [2007]).

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

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

ENTERED: FEBRUARY 9, 2012

CLERK

Saxe, J.P., Sweeny, Acosta, DeGrasse, JJ.

6345N- 6346N
Mahamadu Trawally, et al.,
Plaintiffs,

-against-

East Clarke Realty Corp., et al.,
Defendants.

- - - - -

Mahamadu Trawally, et al.,
Plaintiffs-Appellants,

-against-

41 Elliot Place Corp., et al.,
Defendants,

41 Inc., et al.,
Defendants-Respondents,

Index 20156/96
25939/99

_____

Law Offices of Michael Stewart Frankel, New York (Richard H. Bliss of counsel), for appellants.

Rosenbaum & Sanders, LLP, New York (Cory Rosenbaum of counsel), for respondents.

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Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered July 14, 2010, which, to the extent appealed from, upon a motion by defendants 41 Inc., Jacob Selechnik, and Ellen Selechnik (defendants) to vacate a prior order entered August 18, 2010 on default, vacated so much of the order as struck their answers on condition that, within 20 days of the date of the order, their attorney pay $2,500 to the Lawyers Fund for Client

Protection, unanimously reversed, on the law, without costs, the motion denied, the prior order striking said defendants' answer reinstated, and the matter remanded for further proceedings consistent with this order. Appeal from order, same court and Justice, entered October 27, 2010, which granted defendants' motion to deem the foregoing monetary sanction paid, nunc pro tunc, as of July 26, 2010, unanimously dismissed, without costs, as academic.

Defendants moved pursuant to CPLR 5015(a)(1) to vacate the order striking their answer. A party seeking such relief must establish a reasonable excuse for its underlying default as well as a meritorious defense (*see Ogen v Nordstrom,* 85 AD3d 552 [2011]). Defendants' purported showing of a meritorious defense was insufficient because it was based on the affirmation of an

attorney who had no personal knowledge of the facts alleged (*see Thelen LLP v Omni Contr. Co., Inc.*, 79 AD3d 605, 606 [2010] *lv denied* 17 NY3d 713 [2011]).

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

ENTERED: FEBRUARY 9, 2012

CLERK

Saxe, J.P., Catterson, Moskowitz, Acosta, Renwick, JJ.

6400-
6400A

225 Fifth Avenue Retail LLC,
Plaintiff-Respondent,

Index 601659/07

-against-

225 5th, LLC, et al.,
Defendants-Appellants.

_____

Rosenberg & Estis, P.C., New York (Deborah E. Riegel of counsel), for appellants.

Shaw and Associates, New York (Martin Show of counsel), for respondent.

_____

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered February 17, 2011, which denied defendants' motion to renew the parties' motions for partial summary judgment, unanimously affirmed, without costs. Appeal from order of reference, same court and Justice, entered February 17, 2011, unanimously dismissed, without costs, as abandoned.

In their license agreement, the parties expressly provided that substantial completion of the work would be determined by "Gardiner & Theobald Inc., Architect," and that the determination would be binding. Plaintiff established its entitlement to partial summary judgment by submitting an affidavit by Tamela Johnson, a director of Gardiner & Theobald, attesting to the

incomplete condition of the flue work *(see 225 Fifth Ave. Retail LLC v 225 5th, LLC*, 78 AD3d 440 [2010]).

The "new" fact on which defendants' motion to renew was based is that Johnson is not an architect. However, defendants offered no reasonable justification for their failure to present this fact on the prior motion (CPLR 2221[e][3]). They could have discovered the nature of Gardiner & Theobald's business as a construction consulting firm, and Johnson's professional credentials, at the time the firm was named in their contract, or when Johnson's work was performed, and in any event, long before any motion practice was conducted. Accordingly, their belatedly-obtained information did not present the type of new evidence justifying a grant of renewal.

We have reviewed defendants' remaining arguments and find them unavailing.

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

ENTERED: FEBRUARY 9, 2012

CLERK

Saxe, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Román, JJ.

6484-
6485 Sharon Gray Williams, Index 304688/09
Plaintiff-Appellant,

-against-

Karl W. Tatham, et al.,
Defendants-Respondents.

_____

Mitchell Dranow, Sea Cliff, for appellant.

Richard T. Lau & Associates, Jericho (Keith E. Ford of counsel), for Karl W. Tatham, respondent.

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

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Appeal from amended order, Supreme Court, Bronx County (Norma Ruiz, J.), entered October 19, 2010, which, to the extent appealed from as limited by the briefs, inter alia, granted defendants' motions for summary judgment dismissing the complaint, deemed an appeal from judgment, same court and Justice, entered November 22, 2010 (CPLR 5501[c]), dismissing the complaint, and, as so considered, unanimously reversed, on the law, without costs, and the complaint reinstated. Appeal from the order, same court and Justice, entered May 5, 2011, unanimously dismissed, without costs, as taken from a nonappealable paper, and to the extent it denied renewal, dismissed, without costs, as academic.

Defendants established their prima facie entitlement to judgment as a matter of law, as to both the permanent and nonpermanent categories of serious injury, by submitting evidence, in the form of an affirmed report from a radiologist, demonstrating that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) since the MRI films revealed evidence of degeneration in plaintiff's back and right shoulder that preexisted the accident (*see Linton v Nawaz*, 62 AD3d 434, 438 [2009], *affd* 14 NY3d 821 [2010]; *Guadalupe v Blondie Limo, Inc.*, 43 AD3d 669 [2007]; *Shuji Yagi v Corbin*, 44 AD3d 440 [2007]; *Thompson v Abbasi*, 15 AD3d 95, 96 [2005]).

In opposition, however, plaintiff submitted an affidavit from her treating chiropractor who medically examined her several times, employed objective range of motion testing, found restricted range of motion in plaintiff's lumbar and cervical spine, and thereafter concluded that "as a direct result of the accident [plaintiff] sustained permanent injury to her spine, muscular, and neurological systems." Accordingly, with respect to the permanent categories of serious injury alleged, plaintiff, by submitting expert opinion "attributing the injuries to a different, yet altogether equally plausible, cause, that is, the accident" (*Linton* at 439-440; *Yuen v Arka Memory Cab Corp.* 80

AD3d 481, 482 [2011]), raised an issue of fact with respect to whether she sustained a serious injury thereby precluding summary judgment in defendants' favor (*id.*; *Lavali v Lavali*, 89 AD3d 574, 575 [2011] [expert opinion that plaintiff's injuries were degenerative in nature and thus unrelated to her accident sufficiently rebutted by opinion of plaintiff's expert, who upon a physical examination of the plaintiff opined that plaintiff's injuries were caused by the accident]).

Plaintiff also established that she sustained a medically determined injury, which prevented her from performing her usual and customary daily activities for not less than 90 days during the 180 days immediately following this accident. She thus raised an issue of fact precluding summary judgment with respect to this nonpermanent category of serious injury (*Padilla v Style Mgt. Co., Inc.*, 256 AD2d 27, 27 [1998]). Specifically, plaintiff's chiropractor stated that upon an examination performed two days after plaintiff's accident, he concluded that as a result of this accident plaintiff sustained an injury to her spine, and he therefore advised her to refrain from engaging in certain activities, such as cleaning, shopping, and walking. Moreover, plaintiff, by affidavit, stated, that subsequent to this accident she was confined to her home for approximately six

months and was unable to clean, shop, or carry bags (*cf. Mercado-Arif v Garcia*, 74 AD3d 446, 447 [2010] ["chiropractor's statement that plaintiff was told to limit her physical activities for approximately four months was too general to constitute the requisite competent medical proof to substantiate the claim"]).

To the extent that plaintiff seeks to appeal from the motion court's denial of her motion to reargue, that portion of her appeal is hereby dismissed because a denial of reargument is not appealable (*see* CPLR 5701 [a][2][viii]; *Prime Income Asset Mgt., Inc. v American Real Estate Holdings L.P.*, 82 AD3d 550, 551 [2011], *lv denied* 17 NY3d 705 [2011]). In view of our reversal of the motion court's determination as to summary judgment, plaintiff's appeal from the court's order, tacitly denying renewal is dismissed as academic.

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

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

ENTERED: FEBRUARY 9, 2012

CLERK

Tom, J.P., Sweeny, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

6664 Stephen Kempisty, Index 107465/07
Plaintiff-Appellant,

-against-

246 Spring Street, LLC, et al.,
Defendants-Respondents.

_____

The Perecman Firm, PLLC, New York (David H. Perecman of counsel), for appellant.

Rafter and Associates PLLC, New York (Howard K. Fishman of counsel), for respondents.

Order, Supreme Court, New York County, (Martin Shulman, J.) entered November 22, 2010, which denied plaintiff's motion for summary judgment on his Labor Law § 241(6) claim based on violations of Industrial Code (12 NYCRR) § 23-8.2(c)(3) and § 23-8.1(f)(1)(iii), and deemed plaintiff's § 241(6) claim based on violations of other sections of the Industrial Code abandoned, and, upon a search of the record, granted summary judgment to defendants dismissing plaintiff's Labor Law § 240(1) claim, unanimously modified, on the law, to the extent of reinstating the § 240(1) claim, granting plaintiff summary judgment on that claim, and reinstating the § 241(6) claims deemed abandoned except for those premised on violations of Industrial Code §§ 23-3.3, 23-3.4 and 23-6.1, and otherwise affirmed, without costs.

The motion court erred in finding that Labor Law § 240(1) does not apply in this case because there was no appreciable height differential between plaintiff and the object being hoisted, a four-ton steel block, that crushed plaintiff's foot. The elevation differential cannot be considered de minimis when the weight of the object being hoisted is capable of generating an extreme amount of force, even though it only traveled a short distance (*see Runner v New York Stock Exch., Inc.*, 13 NY3d 599 [2009]; *see also Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1 [2011]).

Having concluded that § 240(1) applies, the question is whether or not defendants established the existence of an issue of fact sufficient to deny plaintiff summary judgment. They have not. Plaintiff established that the accident was proximately caused by the application of the force of gravity to the block. Plaintiff's expert asserts the block was not properly secured, through the use of tag lines or other safety devices, to prevent it from moving while being hoisted.

In opposition, defendants' expert merely attempts to shift proximate cause of the accident to plaintiff for walking in the path of the block, and he states, in conclusory fashion, that tag lines were not required to be used during the load test. This

does not sufficiently challenge the conclusions of plaintiff's expert that the accident was the direct result of the application of gravity to the block.

Regarding plaintiff's § 241(6) claim, we agree that defendants raised an issue of fact sufficient to defeat plaintiff's motion. The motion court providently exercised its discretion in considering the affidavit submitted from defendant's expert. Contrary to the motion court's determination, however, plaintiff did not abandon the § 241(6) claim insofar as premised on the remaining Industrial Code sections. This case differs from *Musillo v Marist Coll.* (306 AD2d 782, 784 n.1 [2003]), upon which the motion court relied, insofar as here it was plaintiff who moved for summary judgment. Where a defendant so moves, it is appropriate to find that a plaintiff who fails to respond to allegations that a certain section is inapplicable or was not violated be deemed to abandon reliance on that particular Industrial Code section. However, that is not the case where the plaintiff is the moving party. Nevertheless we find, upon a search of the record, that the 241(6) claims premised on § 23-3.3, which pertains to

demolition by hand, § 23-3.4, which pertains to mechanical methods of demolition, and § 23-6.1, which, by its terms, does not apply to cranes, are inapplicable under the circumstances presented, and should be dismissed.

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

ENTERED: FEBRUARY 9, 2012

CLERK

Tom, J.P., Sweeny, Acosta, Renwick, Román, JJ.

6761 The People of the State of New York, Respondent,

-against-

Anthony Mack, Defendant-Appellant.

Ind. 3291/07

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

Anthony Mack, appellant pro se.

Cyrus R. Vance, Jr., District Attorney, New York (Nicole A. Coviello of counsel), for respondent.

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered February 22, 2008, as amended April 2, 2008, convicting defendant, after a jury trial, of attempted robbery in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 14 years to life, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the jury's determinations concerning issues of credibility, including any inconsistencies in testimony.

The court providently exercised its discretion in denying defendant's request to charge the jury that attempted theft of

services would not establish that defendant attempted to steal money. The court charged the jury that the People were required to prove an attempt to steal cash, and that was the only theory that the People advanced (*see People v James*, 35 AD3d 189 [2006], *lv denied* 8 NY3d 946 [2007]). Accordingly, the additional language requested by defendant was unnecessary.

The court also providently exercised its discretion in precluding defendant from eliciting his own out-of-court statement, given that the People did not open the door to that statement (*see People v Massie*, 2 NY3d 179, 184 [2004]). The prosecutor's single, innocuous question on redirect examination of an officer was responsive to defendant's cross-examination. The prosecutor did not advance a "failure-to-deny" claim (*see People v Carroll*, 95 NY2d 375, 385-387 [2000]) or mislead the jury. Defendant's constitutional challenges to the court's ruling are unpreserved, and we decline to review them in the interest of justice. As an alternate holding, we reject these constitutional claims on the merits.

Defendant's constitutional challenge to his sentencing as a persistent violent felony offender is without merit (*see People v Bell*, 15 NY3d 935 [2010], *cert denied* __ US __, 131 S Ct 2885 [2011]).

Defendant's pro se claims are unpreserved, unreviewable for lack of a sufficient record, or otherwise procedurally defective, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 9, 2012

CLERK

Tom, J.P., Sweeny, Acosta, Renwick, Román, JJ.

6762 Pablo O. Aponte, Index 301907/09
Plaintiff-Respondent,

-against-

Government Employees Insurance Company,
Defendant-Appellant,

Allstate Insurance Company,
Defendant.

_____

The McDonough Law Firm, L.L.P., New Rochelle (Howard S. Jacobowitz of counsel), for appellant.

Levine & Gilbert, New York (Richard Gilbert of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered January 25, 2011, which, to the extent appealed from as limited by the briefs, denied defendant Government Employees Insurance Company's (GEICO) motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint as against GEICO.

GEICO made a prima facie showing of entitlement to judgment as a matter of law by submitting evidence of plaintiff's 13-month delay in notifying it of the incident with the letter carrier

(*see e.g. Tower Ins. Co. of N.Y. v Classon Hgts., LLC*, 82 AD3d 632, 634 [2011]). Plaintiff's contention that he had a reasonable excuse for failing to give timely notice because he acted in self-defense and did not think the letter carrier "would have the audacity to sue him," failed to raise a triable issue of fact (*see Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742, 744 [2005]; *Tower Ins. Co.*, 82 AD3d at 634-635). Plaintiff's purported belief in nonliability was unreasonable as a matter of law, given that the police arrested him, not the letter carrier, for the incident and that he was indicted in federal court for assaulting the letter carrier.

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

ENTERED: FEBRUARY 9, 2012

CLERK

Tom, J.P., Sweeny, Acosta, Renwick, Román, JJ.

6763 In re Sergio G.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Pamela Seider Dolgow of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about April 14, 2011, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute forcible touching, and placed him with the Office of Children and Family Services for a period of 12 months, unanimously affirmed, without costs.

The placement was a proper exercise of the court's discretion that constituted the least restrictive alternative consistent with appellant's needs and best interests and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). The court followed the recommendations of Mental Health Services and the Department of Probation.

Appellant had two prior delinquency adjudications, and the current offense occurred while he was already in custody on one of those adjudications. These factors outweighed the mitigating factors cited by appellant.

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

ENTERED: FEBRUARY 9, 2012

CLERK

Tom, J.P., Sweeny, Acosta, Renwick, Román, JJ.

6764 The People of the State of New York, Ind. 4645/09
Respondent,

-against-

Newton Kinsey,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Allen J. Vickey 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 (Thomas A. Farber, J.), rendered on or about May 18, 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 9, 2012

CLERK

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

Tom, J.P., Sweeny, Acosta, Renwick, Román, JJ.

6765 Adam Paul Plotch, Index 602909/07
Plaintiff-Appellant,

-against-

375 Riverside Drive Owners, Inc.,
et al.,
Defendants-Respondents.

_____

Paula A. Miller, P.C., Smithtown (Paula A. Miller of counsel), for appellant.

Cantor, Epstein & Mazzola, LLP, New York (Rachael E. Gurlitz of counsel), for respondents.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered July 8, 2010, which granted defendants' motion for summary judgment dismissing the complaint, and denied plaintiff's cross motion for summary judgment on his breach of contract, conversion, and unjust enrichment causes of action, unanimously affirmed, with costs.

The terms of sale for the purchase of the cooperative apartment unit unambiguously stated that the balance of the purchase price must be paid within 30 business days from the date of sale, and that "time is of the essence" with respect to the closing date. Contrary to plaintiff-purchaser's contention, the lack of a date certain in the terms of sale did not render the

"time is of the essence" provision invalid or unenforceable. Because the record establishes that plaintiff failed to submit the balance of the purchase price within 30 days of the auction, the court properly determined that plaintiff breached the terms of sale and that defendant-cooperative was entitled to retain the down payment as liquidated damages (*see Grace v Nappa*, 46 NY2d 560, 565 [1979]; *see also Chaves v Kornfeld*, 83 AD3d 522 [2011]).

The terms of sale contained an "unambiguous non-waiver clause that courts uniformly enforce" (*Rosenzweig v Givens*, 62 AD3d 1, 7 [2009], *affd* 13 NY3d 774 [2009]). In any event, plaintiff has failed to identify any words or conduct that unequivocally evinced defendants' intent to waive his contractual obligations under the terms of sale (*see Taylor v Blaylock & Partners*, 240 AD2d 289, 290 [1997]).

The liquidated damages clause is valid and enforceable, and entitled the cooperative to retain plaintiff's down payment upon his failure to timely pay the balance of the purchase price or diligently submit his application to the cooperative (*see Atlantic Dev. Group, LLC v 296 E. 149th St., LLC*, 70 AD3d 528, 529 [2010]).

Summary judgment was properly granted as to the individual defendants, since there was no evidence that any of them engaged

in any independent tortious conduct (*see Murtha v Yonkers Child Care Assn.*, 45 NY2d 913, 915 [1978]; *Pelton v 77 Park Ave. Condominium*, 38 AD3d 1, 10 [2006]).

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 9, 2012

CLERK

Tom, J.P., Sweeny, Acosta, Renwick, JJ.

6766 In re Carmen Pagan, Index 403397/10
Petitioner,

-against-

John B. Rhea, etc., et al.,
Respondents.

_____

Jeanette Zelhof, MFY Legal Services, Inc., New York (Garen McClure of counsel), for petitioner.

Sonya M. Kaloyanides, New York (Andrew M. Lupin of counsel), for respondents.

_____

In this proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Judith J. Gische, J.], entered August 12, 2011), to annul the determination of respondent New York City Housing Authority (NYCHA), dated August 2, 2010, which, after an informal hearing, found petitioner ineligible for Section 8 benefits, the petition is unanimously granted, without costs, the determination of NYCHA annulled, and the matter remanded to NYCHA for reconsideration.

In 2009, petitioner and her daughter received a Child Advantage housing subsidy through the Department of Homeless Services (DHS) and moved into an apartment. Petitioner then applied for Section 8 benefits for herself and her daughter, and was rejected on the ground that she was ineligible for benefits

for six years following completion of her sentences for two drug-related felony convictions. Petitioner timely requested an informal hearing under the procedures established pursuant to *McNair v New York City Hous. Auth.* (613 F Supp 910 [SD NY 1985]).

At the hearing, petitioner presented documentary evidence demonstrating rehabilitation, of the type described in NYCHA Guidelines applicable to such hearings. The evidence showed that in the years since she completed her sentence, she had participated in social work programs; volunteered in the community and sought job preparation programs; sought treatment for her long-term drug addiction; obtained mental health treatment and medication for her diagnosed schizophrenia; conducted herself as a "model tenant"; and been a good parent to her child. Social workers who had worked with petitioner and her daughter, including one employed by her landlord, opined that petitioner had come a long way, sought to better herself, and had become a productive member of society. They also found that returning to a shelter would be harmful to her daughter, who also has mental health issues. Petitioner also submitted results of toxicology tests, and letters from two substance abuse counselors stating that she attends the program six days a week, was in full compliance with the program's rules and regulations, and has had

consistently negative toxicology test results; the second letter explained that recent positive results for opiates were because she was taking pain medication, and reiterated that petitioner remained in full compliance.

Based on the foregoing, the Hearing Officer's conclusion that there was an unexplained discrepancy concerning petitioner's toxicology reports is not supported by substantial evidence, "adequate to support a conclusion or ultimate fact" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]), but based on "speculative inferences unsupported by the record" (*Matter of Sled Hill Café v Hostetter*, 22 NY2d 607, 612 [1968]). Since there must be a rational basis for the agency's exercise of discretion (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 33 NY2d 222, 230-231 [1974]), we remand the matter for reconsideration of whether petitioner has submitted sufficient evidence to overcome the presumption of undesirability by presenting objective documentary evidence supporting the conclusion required by NYCHA's guidelines, i.e. that "there is a

reasonable probability that [her] future conduct would not be likely to affect adversely" the safety or welfare of other tenants or of NYCHA's property or staff.

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

ENTERED: FEBRUARY 9, 2012

CLERK

Tom, J.P., Sweeny, Acosta, Renwick, Román, JJ.

6767-
6768 David S. Dinhofer, M.D., Index 602456/09
Plaintiff-Appellant,

-against-

Medical Liability Mutual Insurance Company, et al.,
Defendants-Respondents.

_____

M. Suzanne Landwehrle, Vestal, for appellant.

Dewey & LeBoeuf, LLP, New York (John M. Aerni of counsel), for Medical Liability Mutual Insurance Company, Fager & Amsler, LLP, Donald Fager & Associates, Inc., Donald J. Fager, Edward J. Amsler, Beth Murphy, Louis Neuburger, Pam Knoop and Ronald Femia, respondents.

Furman Kornfeld & Brennan LLP, New York (Andrew S. Kowlowitz of counsel), for Brown & Tarantino, LLC, Jeffrey S. Albanese, Dennis Gruttadaro and Phylis Hines, respondents.

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Orders, Supreme Court, New York County (Paul Wooten, J.), entered January 20, 2011 and February 2, 2011, which granted defendants Medical Liability Mutual Insurance Company (MLMIC), Fager & Amsler, LLP, Donald Fager & Associates, Donald J. Fager, Edward J. Amsler, Beth Murphy, Louis Neuburger, Pam Knoop and Ronald Femia's (the MLMIC defendants) and defendants Brown & Tarantino, LLC, Jeffrey S. Albanese, Dennis Gruttadaro and Phylis Hines's (the B&T defendants) respective motions for summary judgment dismissing the complaint as against them, unanimously

affirmed, with costs.

Plaintiff's claims against the MLMIC defendants of fraud, deceitful business practices, and breach of their duty to defend him in good faith are barred by the doctrine of equitable estoppel. The MLMIC defendants established that in reasonable reliance upon plaintiff's execution of the Consent to Settle the underlying medical malpractice action they made a prejudicial change in their position by, inter alia, disbanding the advisory committee that, pursuant to the policy, would have resolved the matter of settlement absent plaintiff's consent, and paying to settle the claim against him (*see River Seafoods, Inc. v JPMorgan Chase Bank*, 19 AD3d 120, 122 [2005]). These claims are also barred by the doctrine of ratification, since plaintiff failed to act promptly to seek rescission of the Consent (*see Matter of Guttenplan*, 222 AD2d 255, 257 [1995], *lv denied* 88 NY2d 812 [1996]), and indeed accepted and retained the benefits of the settlement (*see Napolitano v City of New York*, 12 AD3d 194 [2004]).

Plaintiff failed to establish that but for the B&T defendants' alleged negligence he would have prevailed or

received a better result in the underlying action (*see AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]; *Leder v Spiegel*, 31 AD3d 266, 267-268 [2006], *affd* 9 NY3d 836 [2007], *cert denied* 552 US 1257 [2008]). Thus, even assuming plaintiff raised an issue of fact whether the B&T defendants wrongfully concealed their joint representation of multiple defendants in the medical malpractice action, or otherwise were negligent in their defense of him, his legal malpractice claim was correctly dismissed.

Plaintiff's remaining claims against the B&T defendants also were correctly dismissed. His fraud claim is duplicative of his legal malpractice claim since it arose from the same underlying facts and alleged similar damages (*see InKine Pharm. Co. v Coleman*, 305 AD2d 151 [2003]). His Judiciary Law § 487 claim is unsupported by evidence of "the requisite chronic and extreme pattern of legal delinquency" (*see Nason v Fisher*, 36 AD3d 486, 487 [2007] [internal quotation marks and citation omitted]). His General Business Law § 349 claim is unsupported by evidence that the alleged conduct had "a broad impact on consumers at large" (*see Natural Organics Inc. v Anderson Kill & Olick, P.C.*, 67 AD3d 541, 542 [2009], *lv dismissed* 14 NY3d 881 [2010]).

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

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

ENTERED: FEBRUARY 9, 2012

CLERK

Tom, J.P., Sweeny, Acosta, Renwick, Román, JJ.

6769 In re Evangeline R.,
Petitioner-Appellant,

-against-

Jonathan R., et al.,
Respondents-Respondents.

_____

Daniel R. Katz, New York, for appellant.

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Order, Family Court, New York County (George L. Jurow, J.), entered on or about October 14, 2010, which, inter alia, dismissed petitioner's custody petition without prejudice, unanimously affirmed, without costs.

The petition does not sufficiently allege any extraordinary circumstances so as to require a full evidentiary hearing under *Matter of Bennett v Jeffreys* (40 NY2d 543 [1976]). While petitioner claims that the child's parents both suffer from mental illnesses, and that the father has anger management issues, the record shows that an ACS caseworker has been actively

monitoring the parents' situation, and has referred them for preventive services, including mental health counseling. The caseworker also confirmed that the child's safety is not at risk.

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

ENTERED: FEBRUARY 9, 2012

CLERK

Tom, J.P., Sweeny, Acosta, Renwick, Román, JJ.

6774 Slotnick, Shapiro & Crocker, LLP, Index 603314/09
Plaintiff-Respondent,

-against-

Michael C. Stiglianese,
Defendant-Appellant.

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Mark C. Fang, White Plains, for appellant.

Buchanan Ingersoll & Rooney PC, New York (Cameron E. Grant of counsel), for respondent.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered August 27, 2010, which, to the extent appealed from as limited by the briefs, denied defendant's cross motion to dismiss the complaint pursuant to CPLR 3211(a)(7), and for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Pursuant to the written guarantee between the parties, defendant guaranteed payment to plaintiff-firm in accordance with the retainer agreement between plaintiff and defendant's former girlfriend. Defendant further guaranteed to make payments to plaintiff for services rendered according to a schedule specifying three monthly payments of $25,000 and, thereafter, "monthly payments of no less than $15,000 . . . until such time

as all fees incurred by [defendant's former girlfriend] pursuant to the Retainer Agreement have been paid." Defendant made payments to plaintiff in the amount of $135,000, and then stopped making payments.

We reject defendant's contention that he was not required to make additional payments under the written guarantee because plaintiff failed to advise him of expenditures of time over and above the time covered by the retainer and provide him with periodic statements of account. Under the plain and unambiguous terms of the retainer agreement, plaintiff was required to advise and mail periodic statements of account to defendant's former girlfriend, not defendant. Accordingly, the court properly denied defendant's cross motion for summary judgment dismissing the complaint (*cf. Walcutt v Clevite Corp.*, 13 NY2d 48, 56 [1963]). Given the unambiguous terms of the retainer agreement and guarantee, there was no basis for considering parol evidence (*see Greenfield v Philles Records*, 98 NY2d 562, 569-570 [2002]).

Plaintiff's allegations that, among other things, defendant owes it "the outstanding balance" on his former girlfriend's account were sufficient to state a cause of action for breach of

the guarantee (*see generally Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

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

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

ENTERED: FEBRUARY 9, 2012

CLERK

Tom, J.P., Sweeny, Acosta, Renwick, Román, JJ.

6775 Jennifer Cangro, Index 107912/10
Plaintiff-Appellant,

-against-

Gina Marie Reitano,
Defendant-Respondent.

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Jennifer Cangro, appellant pro se.

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Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered October 4, 2010, which, insofar as appealed from as limited by the brief, granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Because this action raises the same claims as those raised in a previous action that was dismissed as time-barred, it is foreclosed by res judicata (*see Ginezra Assoc. LLC v Ifantopoulos*, 70 AD3d 427, 429 [2010]; CPLR 3211[a][5]). In any event, the complaint states no causes of action upon which relief may be granted, as it merely sets forth bare legal conclusions (*see Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233 [1994]; CPLR 3211[a][7]). Moreover, even considering the merits

of the defamation claims, the alleged defamatory statements were privileged as they were made in the course of court proceedings (*see Mintz & Gold, LLP v Zimmerman*, 56 AD3d 358, 359 [2008]).

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 9, 2012

CLERK

Tom, J.P., Sweeny, Acosta, Renwick, Román, JJ.

6777- In re Anne S., Index 350287/04
6777A- Plaintiff-Appellant,
6777B

-against-

Peter S.,
Defendant-Respondent.

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Cohen Rabin Stine Schumann LLP, New York (Gretchen Beall Schumann of counsel), for appellant.

Kenneth Lyle Bunting, White Plains, for respondent.

Schpoont & Cavallo LLP, New York (Sandra L. Schpoont of counsel), attorney for the children.

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Orders, Supreme Court, New York County (Matthew F. Cooper, J.), entered August 29, 2011 and August 31, 2011, which, insofar as appealed from as limited by the briefs, denied plaintiff's application to relocate to Luxembourg with the parties' children, and order, same court and Justice, entered October 27, 2011, insofar as it determined plaintiff's access schedule, unanimously affirmed, without costs.

Plaintiff failed to demonstrate that the determination denying her application to relocate lacks a sound and substantial basis in the record (*see Matter of David J.B. v Monique H.*, 52 AD3d 414 [2008]) or that relocation would be in the children's

best interests (*see Matter of Tropea v Tropea*, 87 NY2d 727, 740-741 [1996]). She failed to demonstrate that relocation was warranted based on economic necessity (*compare Matter of Harrsch v Jesser*, 74 AD3d 811 [2010]) or that she would receive increased support in Luxembourg from her extended family, who live nearby in Luxembourg and France (*compare Amato v Amato*, 202 AD2d 458 [1994], *lv denied* 83 NY2d 759 [1994]). The record shows that defendant has a stable job and has, for the past four years, maintained a stable home for the children, in the community in which they have always lived, near their school, their extracurricular activities and their friends; moreover, the children are happy and successful in their current school (*see e.g. Matter of Solomon v Long*, 68 AD3d 1467 [2009]; *Impastato v Impastato*, 62 AD3d 752 [2009]).

Contrary to plaintiff's argument, the court considered seriously and addressed the court-appointed evaluator's concerns about defendant's alcoholism and his past failure to communicate appropriately with plaintiff (*see Neuman v Neuman*, 19 AD3d 383 [2005]). Among other things, the court placed strict conditions on defendant's continued custody of the children, including that he maintain sobriety and continue intensive treatment, attend thrice-weekly therapy sessions, submit to mandatory testing, and

install an Interlock breathalyzer ignition system in his car. The court also ordered that defendant maintain open communication with plaintiff about the education and care of their children.

We find that plaintiff's visitation schedule is reasonable under the circumstances and that there is no basis on which it should be disturbed.

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

ENTERED: FEBRUARY 9, 2012

CLERK

Tom, J.P., Sweeny, Acosta, Renwick, Román, JJ.

6778 Joseph Kramer, Index 20228/07
Plaintiff-Respondent, 84132/08

-against-

Virginia Cury,
Defendant-Respondent,

Marty Chan, et al.,
Defendants,

V.S.R. Mechanical Corp.,
Defendant-Appellant.

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[And a Third Party Action]

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Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for appellant.

The Dauti Law Firm, P.C., New York (Ylber Albert Dauti of counsel), for Joseph Kramer, respondent.

Law Office of James J. Toomey, New York (Evy Kazansky of counsel), for Virginia Cury, respondent.

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Order, Supreme Court, Bronx County (John A. Barone, J.), entered October 27, 2010, which, insofar as appealed from, denied the motion of defendant plaintiff V.S.R. Mechanical Corp. (VSR) for summary judgment dismissing the complaint and all cross claims as against it, unanimously affirmed, without costs.

Dismissal of the complaint as against VSR is not warranted in this action where plaintiff sustained injuries when he

allegedly fell in a trench in the workshop of a boat motor repair shop. "[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). However, "an exception exists where a contractor who undertakes to perform services pursuant to a contract negligently creates or exacerbates a dangerous condition by launching its own 'force or instrument of harm'" (*Cornell v 360 W. 51st St. Realty, LLC*, 51 AD3d 469, 470 [2008], quoting *Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168 [1928]). Here, the record presents triable issues of fact as to whether VSR directed the digging of the subject trench, and did further digging in it once the trench was created (*see Grant v Caprice Mgt. Corp.*, 43 AD3d 708 [2007]).

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

ENTERED: FEBRUARY 9, 2012

CLERK

Tom, J.P., Sweeny, Acosta, Renwick, Román, JJ.

6779 Julio Herencia, Index 103976/11
Plaintiff-Respondent,

-against-

Centercut Restaurant Corp.,
et al.,
Defendants-Appellants,

Ahmet Erkaya,
Defendant.

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Stillman & Friedman, P.C., New York (Erik M. Zissu of counsel), for appellants.

Kordas & Marinis, LLP, Long Island City (Peter Marinis of counsel), for respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered July 12, 2011, which, to the extent appealed from, denied defendants Centercut Restaurant Corp., Samuel M. Janetta, and Robert Lombardi's (defendants) motion to dismiss the claims for an accounting, access to corporate books and records, breach of fiduciary duty, and fraud, unanimously modified, on the law, to grant the motion as to the fraud claim, and otherwise affirmed, with costs to be paid by defendants-appellants.

Since the terms of the shareholders' agreement were not met, the exercise of redemption rights by defendants was ineffectual

(*see Cho v 401-403 57th St. Realty Corp.*, 300 AD2d 174 [2002]; *Tornick v Dinex Furniture Indus.*, 148 AD2d 602 [1989]; *see also Stephenson v Drever*, 947 P2d 1301 [Cal 1997]; *compare Gallagher v Lambert*, 74 NY2d 562, 567 [1989]; *Ingle v Glamore Motor Sales*, 73 NY2d 183, 189 [1989]).

Under the terms of the agreement, defendants' termination of plaintiff's employment did not divest plaintiff of his status as a minority shareholder. Defendants, majority shareholders who managed the corporation, therefore owed him a fiduciary duty (*see Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.*, 17 NY3d 269, 278 [2011]). In addition, the sale of his stock to defendants presented a valid reason for plaintiff to inspect financial records relating to the value of his individual holdings (*see Matter of Waldman v Eldorado Towers*, 25 AD2d 836, 837 [1966], *affd* 19 NY2d 843 [1967]), particularly since the method of valuation agreed upon in the repurchase agreement was not used (*see Matter of Glassman v Louis Shiffman, Inc.*, 56 AD2d 824, 824-25 [1977], *appeal dismissed* 42 NY2d 910 [1977]).

The fraud claim both lacks the necessary particularity and fails to allege the breach of a duty independent of the agreement (CPLR 3016[b]; *Empire 33rd LLC v Forward Assn. Inc.*, 87 AD3d 447, 448-49 [2011]).

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

ENTERED: FEBRUARY 9, 2012

CLERK

Tom, J.P., Sweeny, Acosta, Renwick, Román, JJ.

6780N & M-5809 In re New York County Asbestos Litigation — Index 190165/10

- - - - -

Keith H. Clark,
Plaintiff,

-against-

A.O. Smith Water Products, et al.,
Defendants,

Kentile Floors, Inc., et al.,
Defendants-Respondents.

- - - - -

Joan M. Gasior,
Non-Party Appellant.

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Ranni Law Firm, Florida (Joseph Ranni of counsel), for appellant.

McGivney & Kluger, New York (William D. Sanders of counsel), for respondents.

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Appeal from order, Supreme Court, New York County (Louis B. York, J.), entered November 8, 2010, which granted defendants Kentile Floors, Inc., Courter & Company, Inc., the Fairbanks Company, and DAP, Inc.'s motion to disqualify appellant and the law firm of Napoli, Bern, Ripka LLP in this action and in *Pastore v A.O. Smith Water Products Co.* (Index No. 190194/10) and *Powell v A.O. Smith Water Products Co.* (Index No. 190198/10), unanimously dismissed, without costs, as moot.

The discontinuances in two of the actions and substitution

of counsel in the other deprive appellant of any further controversy to have determined; there does not appear to be any exception to the mootness doctrine (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]). If we were to address the merits, we would find that the motion court properly granted the motion in light of appellant's intimate familiarity with the moving defendants' settlement strategies.

M-5809 - *Clark v A.O. Smith Water Products, et al.*

Motion to supplement record or take judicial notice of certain documents denied.

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

ENTERED: FEBRUARY 9, 2012

CLERK

Tom, J.P., Andrias, Catterson, Acosta, Renwick, JJ.

5807N Zaquira Cartagena, an Infant by her Mother and Natural Guardian, Wanderous Gilliam,
Plaintiff-Respondent,

Wanderous Gilliam,
Plaintiff,

-against-

New York City Health and Hospitals Corp.,
Defendant-Appellant.

Index 350726/08

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

Wolf & Fuhrman, LLP, Bronx (Carole R. Moskowitz of counsel), for respondent.

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Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered April 1, 2010, reversed, on the law and the facts, without costs, and the motion denied.

Opinion by Catterson, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Richard T. Andrias
James M. Catterson
Rolando T. Acosta
Dianne T. Renwick, JJ.

5807
Index 350726/08

_____x

Zaquira Cartagena, an Infant by
her Mother and Natural Guardian,
Wanderous Gilliam,
Plaintiff-Respondent,

Wanderous Gilliam, etc.,
Plaintiff,

-against-

New York City Health and
Hospitals Corp.,
Defendant-Appellant.

_____x

Defendant appeals from an order of the Supreme Court, Bronx County (Douglas E. McKeon, J.), entered April 1, 2010, which, insofar as appealed from, granted plaintiff Zaquira Cartagena's motion for leave to serve a late notice of claim upon defendant.

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

Wolf & Fuhrman, LLP, Bronx (Carole R. Moskowitz of counsel), for respondent.

CATTERSON, J.

In this appeal arising from an application to file a late notice of claim, we reiterate that in order for a defendant municipal hospital's medical record to provide actual notice of a claim, the essential facts underlying the claim, including that the plaintiff was injured, must be documented in the defendant's own medical record. Absent such documentation, the defendant in this case would be prejudiced by the nine-year delay in the filing of a notice of claim.

The infant plaintiff was allegedly injured during her mother's labor and delivery as a result of the defendant's medical malpractice. The infant was born on July 18, 1999 at North Central Bronx Hospital (hereinafter referred to as "NCBH"), a New York City Health and Hospitals Corporation (hereinafter referred to as "HHC") facility. The record reflects that, at three weeks old, the infant was admitted for "shaking" and/or possible seizure disorder to Montefiore Medical Center, another hospital, unaffiliated with HHC. The Montefiore medical records show that the mother told doctors there that the infant had been "shaking since birth." Those records also show that the mother told doctors the infant had fallen on the floor when she was two-to-three days old; and that there was some family history of epilepsy. According to a diagnosis by a Montefiore doctor when

the infant was approximately seven months old, she was found to have a seizure disorder.

Nine years after the infant's birth, on November 21, 2008, the plaintiffs, the infant and mother, moved for leave to serve a late notice of claim on HHC. The plaintiffs alleged that the infant had suffered fetal distress, but that NCBH had allowed mother to labor for 48 hours which had resulted in injury to the infant. In further support of the motion, plaintiffs asserted in an affidavit that the hospital should have performed an emergency cesarean section. The mother stated that when the infant was born "she was purple... and she would shake all over her body, and her eyes would roll back." She further stated that she had complained about the infant's condition to the nurses at the time, but they told her there was nothing wrong. Hence, plaintiffs asserted that leave to file a late notice should be granted because they had met their burden of showing that HHC had actual, contemporaneous notice of the facts underlying the claim.

In opposition to the motion, HHC asserted that its hospital's records do not support the plaintiffs' allegations that it allowed prolonged fetal distress, and that, moreover, the plaintiffs failed to attach an expert affidavit establishing a nexus between any alleged complications during labor/delivery and the infant's injuries. More significantly, HHC asserted that the

records directly contradict the contention that there was anything wrong with the infant, or that they include any reference to the mother's report of the infant "shaking" or rolling back her eyes. On the contrary, HHC argued that the medical records established that the infant was a healthy newborn.

In reply, the plaintiffs, for the first time, annexed records from Montefiore Medical Center. These records document, inter alia, that three weeks after her discharge from NCBH, the mother told doctors at the unaffiliated hospital that the infant had a "history of seizures since birth." The plaintiffs annexed the Montefiore records to show that "the infant has throughout her life been documented as having suffered seizures since birth and/or the second day of life."

The motion court granted the motion to file a late notice of claim pursuant to General Municipal Law § 50-e(5), as to the infant plaintiff, but denied the motion as to the mother as time-barred. The motion court, relying on HHC records of the mother's labor and delivery as well as the mother's affidavit that she had complained about her infant's "shaking" to the NCBH nurses at the time, reasoned that the defendant had "actual notice of the facts underlying the claim." Hence, the court concluded that the delay in notice would cause HHC only "some prejudice in investigating

the claim." HHC appeals. For the reasons set forth below, we find that HHC had no actual notice of the facts underlying the malpractice claim, and would be substantially prejudiced by receipt of the notice of the infant plaintiff's (plaintiff) claim nine years after the alleged malpractice took place.

Well-established precedent prohibits the plaintiff's use of undocumented purported statements made to unnamed medical personnel to meet her burden of establishing that HHC had actual notice of the facts underlying the claim. Where a court in its discretion, permits a plaintiff to serve a late notice of claim on a municipal entity, it must consider a number of factors. See General Municipal Law § 50-e(5). Among the factors that the court considers is whether the entity acquired actual knowledge/had actual notice of the facts underlying the claim within 90 days or a reasonable time thereafter. General Municipal Law § 50-e(5); see also Williams v. Nassau County Med. Ctr., 6 N.Y.3d 531, 535, 814 N.Y.S.2d 580, 581, 847 N.E.2d 1154, 1155 (2006).

A municipal hospital corporation has "actual knowledge" of a claim when it creates a contemporaneous medical record containing the essential facts constituting the alleged malpractice. Caminero v. New York City Health & Hosps. Corp. [Bronx Mun. Hosp. Ctr.], 21 A.D.3d 330, 332-333, 800 N.Y.S.2d 173, 175 (1st Dept.

2005). In such a case, a delay in investigation is not prejudicial because the hospital has been in possession of the medical record since the claim arose. See Matter of Kelley v. New York City Health & Hosps. Corp., 76 A.D.3d 824, 907 N.Y.S.2d 11 (1st Dept. 2010); Schwartz v. Montefiore Hosp. & Med. Ctr., 305 A.D.2d 174, 761 N.Y.S.2d 5 (1st Dept. 2003).

Conversely, merely creating and possessing a medical record where there is nothing in that record to suggest that "the medical staff, by its acts or omissions, inflicted any injury on plaintiff during the birth process," does not constitute actual knowledge of facts underlying a claim. Williams, 6 N.Y.3d at 537, 814 N.Y.S.2d at 583. It is the plaintiff's burden to show that HHC had actual notice. Matter of Lauray v. City of New York, 62 A.D.3d 467, 878 N.Y.S.2d 65 (1st Dept. 2009).

Thus, to establish that HHC had actual notice of the facts underlying the claim, the plaintiff was obliged to show that *its hospital records* indicated or noted an injury to the infant plaintiff. See e.g. Medley v. Cichon, 305 A.D.2d 643, 644, 761 N.Y.S.2d 666, 667 (2d Dept. 2003) (medical records reflected that the infant had to be resuscitated at birth and had an Apgar score of 0); Matter of Tomlinson v. New York City Health & Hosps. Corp., 190 A.D.2d 806, 807, 593 N.Y.S.2d 565, 566 (2d Dept. 1993) (infant's disability, cerebral palsy, was apparent at her birth);

cf. Williams, 6 N.Y.3d at 537, 814 N.Y.S.2d at 582 (infant's Apgar score of 8 was satisfactory, and there was little to suggest that he would develop epilepsy a year later); Bucknor v. New York City Health & Hosps. Corp. [Queens Hosp. Ctr.], 44 A.D.3d 811, 844 N.Y.S.2d 100 (2d Dept. 2007) (infant's Apgar score was 7 and he was discharged with no medical problems; thus, there no reason to predict that he would develop autism).

In this case, the hospital records directly contradict the plaintiff's assertion that the infant suffered any injury. Therefore, even if the HHC's records contained any evidence that its facility deviated from the standard of care in the mother's delivery it would be irrelevant because the records establish that the infant in this case had a normal Apgar score of 9 at birth.[1] Further, the records show that during the infant's time in the hospital nursery, she was alert and active, with no neurological abnormalities. The record does not reflect that the infant experienced any distress or other problems. There are no seizures or seizure-like symptoms recorded in the hospital record that would provide HHC with notice that the infant had suffered or was suffering an injury. The mother and infant were

[1] Apgar is a test performed at one and five minutes after birth. A score of 8 or 9 out of 10 is normal and indicates the newborn is in good condition.

discharged on July 21, 1999, and did not return to the hospital for any treatment or care.

The plaintiff's reliance on undocumented contradictory observations made to unnamed personnel, or the records of a different unaffiliated hospital as a basis for imputing actual notice or knowledge to HHC, is misplaced. Well established precedent dictates that actual notice may be attributed to a municipal entity when the contemporaneous medical record containing the essential facts was *created by the municipal entity*, and the record has been *in its possession* since the claim arose. See Matter of Kelley, 76 A.D.3d at 827, 907 N.Y.S.2d at 13-14; and Caminero, 21 A.D.3d at 332-333, 800 N.Y.S.2d at 175.

In this case, neither the mother's sworn affidavit, nor the undocumented contradictory observations referred to in the affidavit, were part of the record created by HHC, and therefore they certainly were not in HHC's possession until the plaintiffs filed their motion. Thus, the mother's observations about her infant purportedly made to NCBH nurses – even if the observations were accurate and even if they were, indeed, made to the hospital staff at the time of the birth – cannot be viewed as actual notice or actual knowledge of facts underlying the plaintiff's claim.

For the same reasons, the plaintiff's attempt to impute

actual notice of the facts to HHC by annexing the records of a different hospital must fail. In annexing these records to their motion papers, the plaintiffs stated that "an infant's claim should not be defeated because of a lack of documentation of a mother's complaints of injury, which clearly occurred at or near the time of birth at a NYCHHC facility."

However, a lack of documentation is precisely what is fatal to the plaintiff's claim, since documentation in records created by the hospital and in the hospital's possession is the only way the plaintiff can establish that HHC acquired actual knowledge of the facts underlying the claim within the statutory 90-day period.

Finally, where there is no "actual knowledge," a long delay is substantially prejudicial because the medical personnel who could testify to the facts at the time of the alleged malpractice may no longer be available, or, if they are, their memories are no longer fresh. See e.g. Williams, 6 N.Y.3d at 539, 814 N.Y.S.2d at 584 (10-year delay substantially prejudiced defendant hospital); Matter of Kelley, 76 A.D.3d at 829, 907 N.Y.S.2d at 15 ("the likelihood of the staff having any recollection of petitioner is diminished by the passage of [one year]"), citing Matter of Nieves v. New York Health & Hosps. Corp., 34 A.D.3d 336, 825 N.Y.S.2d 40 (1st Dept. 2006); Ocasio v. New York City

Health & Hosps. Corp. [Morrisania Neighborhood Family Care Ctr.], 14 A.D.3d 361, 788 N.Y.S.2d 82 (1st Dept. 2005)(9 1/2-year delay substantially prejudiced defendant); Matter of Matarrese v. New York City Health & Hosps. Corp., 215 A.D.2d 7, 633 N.Y.S.2d 837 (2d Dept. 1995), lv. denied 87 N.Y.2d 810, 642 N.Y.S.2d 859, 665 N.E.2d 661 (1996)(eight-year delay was prejudicial because the physicians who delivered, examined, and treated the infant were no longer employed by the hospital).

In this case, as the motion court noted, the attending physician who admitted the mother and made the decision to induce labor is no longer employed at the hospital, and the obstetrician who delivered the infant resides outside of the state. Therefore, the defendant's ability to defend itself against the mother's allegations is substantially prejudiced by the passage of nine years.

Accordingly, the order of Supreme Court, Bronx County (Douglas E. McKeon, J.), entered April 1, 2010, which, insofar as appealed from, granted the infant plaintiff's motion for leave to

serve a late notice of claim upon defendant, should be reversed, on the law and the facts, without costs, and the motion denied.

All concur.

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

ENTERED: FEBRUARY 9, 2012

CLERK