SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 22, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Renwick, Manzanet-Daniels, Román, JJ.

7858 Joyce Asabor, Index 104088/06
Plaintiff-Appellant,

-against-

Archdiocese of New York, et al.,
Defendants-Respondents.

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Aria Ugo LLP, Brooklyn (Ifey Ugokwe of counsel), for appellant.

Kelley Drye & Warren LLP, New York (Jean Y. Park of counsel), for respondents.

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Order, Supreme Court, New York County (Richard F. Braun, J.), entered November 21, 2011, which, to the extent appealed from, granted so much of defendants' motion for summary judgment as sought to dismiss the sixth cause of action (retaliatory discharge) and to dismiss the complaint in its entirety as against the individual defendants, reversed, on the law, without costs, and the motion denied.

On July 6, 2004, plaintiff, Joyce Asabor, a Nigerian-born black woman, was hired to work as a mental health nurse at the Beacon of Hope House (Beacon), a defendant, and inpatient adult

mental health facility located in Staten Island. Beacon is an operating division of defendant Catholic Charities Community Services, which, along with defendant Archdiocese of New York, funds health care services at a number of facilities, including Beacon.

Defendants Joy Jasper, Beacon personnel director, and Dennis Scimone, Beacon director (sued herein as Simone), interviewed Asabor and conferred with defendant Anne Tommaso, Beacon executive director, before determining to hire her. After she was hired, plaintiff reported to defendant Ron Morgan, an assistant director of residential services at the facility.

At her deposition, plaintiff testified that from the outset of her employment, coworkers openly discussed plans to sabotage her job, especially Sharon Quattrachi, a longtime Beacon employee and Scimone's secretary. Gloria Mascara, Quattracchi's close friend, often joined in plaintiff's mistreatment. On plaintiff's second day of work, someone hung a decomposing bird on the back of her office door. Plaintiff recounted that Quattracchi smoked at the entrance to the building every morning, and that she blocked plaintiff's entrance with a folded elbow. She also stated that Quattracchi failed to give her business related messages, repeatedly called her an "African b***h," stated that

"something smells" when plaintiff walked by and directed her to "go back to the jungle." Plaintiff testified that throughout her employment at Beacon, coworkers openly declared their hatred of blacks. Defendants Morgan and Scimone were present on some of these occasions.

Within months, plaintiff complained to Scimone and Jasper about the work environment. Jasper directed plaintiff to start documenting the racist behavior, which she did. Plaintiff also noticed that staff members were stealing medication from patients and engaging in other violations of the Health Insurance Portability and Accountability Act (HIPAA). The record contains a number of citations issued by the New York State Office of Mental Health confirming that medication counts were inaccurate, that the medicine cabinet was unlocked, and that there were multiple illegible signatures on the medication administration record.

In or about August 2004, Tommaso, Jasper, and Scimone called a meeting with plaintiff at the head office of the Archdiocese, to discuss plaintiff's complaints. Plaintiff testified that she informed all of the participants at the meeting about rampant racial hostility at Beacon. She recounted the insulting language and behavior, as well as Mr. Scimone's dismissive attitude

towards her verbal complaints -- she testified that he would "shrug his shoulder[s] and make a face," but did nothing to address comments made in his presence. Tomasso asked plaintiff whether she intended to contact an attorney, and plaintiff said yes -- "because no one was listening to [her]." Tomasso assured plaintiff that things were going to change.

On September 7, 2004, plaintiff got into a heated argument with Quattracchi. Scimone issued plaintiff a disciplinary notice in which he recounted the incident and stated that plaintiff ignored his directive to lower her voice, and to discuss the matter with him in his office. The notice states that plaintiff's conduct was both unprofessional and insubordinate. Quattracchi received no discipline for her part in the argument.

In response, plaintiff wrote a letter to Scimone in which she apologized for any acts deemed by Scimone to be insubordinate. However, she expressed frustration that Quattracchi was not disciplined, and that Scimone was not receptive to her view of the incident. In the letter, plaintiff also faulted Scimone for failing to address her concerns regarding HIPAA violations and medicine administration.

In response to plaintiff's letter, Scimone drafted another memo to her. With respect to "racial issues," Scimone promised

to "promptly address [plaintiff's complaints] in collaboration with the agency's personnel department and other members of senior management, as necessary." Jasper subsequently came to Beacon and interviewed a number of staff members, including plaintiff. At the conclusion of the hearing, Jasper reported that Vanessa Harmon, a senior counselor at Beacon, had made racist remarks to plaintiff, and that Allen Bradley, a Beacon supervisor, was aware of Harmon's remarks and failed to take any action to stop the misconduct. Both employees were slated to be discharged; Bradley resigned in lieu of being terminated. Quattracchi and Mascara received no negative reports, though many of plaintiff's complaints concerned their behavior.

In reviews dated April 6-7, 2005, the State Office of Mental Health cited Beacon for "not consistently providing staff with cultural sensitivity training." The report noted that one employee received this type of training in 2003 and that no one was trained in 2004. In mid-May 2005, plaintiff, Quattracchi, Scimone, and Morgan met to discuss the personality conflict between Quattracchi and plaintiff. Plaintiff also testified that she had frequent conversations with Scimone and Morgan alone regarding Quattracchi's behavior. After the mid-May 2005 meeting, plaintiff wrote to Jasper, begging for her help and

reiterating that the issue of Quattracchi's disdain for her had created an unbearable workplace in which she was not able to carry out her duties as an RN. No inquiry was conducted as a result of plaintiff's May 2005 letter.

Thereafter, on August 9, 2005, at about 2 p.m., a patient at the facility started hallucinating and called the police. Mascara called Kimberly Flory, Beacon's senior program supervisor, who advised her to call the patient's therapist. Plaintiff thought that she should be involved, because she was a nurse, but Mascara told her to leave the area. Plaintiff got angry, a fight began and it quickly escalated. At some point Quattracchi got involved. One or more doors were pushed into various individuals, and both plaintiff and Mascara suffered injuries. Flory had advised Mascara that plaintiff should be asked to leave the unit. Morgan eventually called plaintiff and asked her to leave the premises. Plaintiff followed his directive, but questioned the fairness of singling her out as the only one asked to leave. Plaintiff testified that she told Morgan that she was contacting counsel to address the racism at Beacon and the manner in which defendants condoned it.

On August 10, 2005, plaintiff, Quattracchi, and Mascara were suspended from work, pending an investigation of the incident.

On the same day, plaintiff wrote to Scimone, reiterating her intent to contact an attorney. Plaintiff, Quattracchi, and Mascara were all eventually terminated for engaging in the altercation.

Plaintiff commenced this action, asserting six causes of action: (1) against all defendants, under the New York State Human Rights Law (State HRL), for race- and nationality-based employment discrimination; (2) against the Archdiocese, Catholic Charities, and Beacon for vicarious liability for the individual defendants' alleged wrongs; (3) against all defendants for intentional infliction of emotional distress; (4) against the Archdiocese for breach of employment contract; (5) against all defendants for negligent supervision and hiring of Quattracchi and Morgan; and (6) against all defendants for wrongful termination (based on plaintiff's allegedly disabling shoulder injury) and retaliation (for plaintiff's statement that she would be seeking legal counsel).

Defendants moved to dismiss the complaint, and the court dismissed plaintiff's second through fifth causes of action. Defendants subsequently moved for summary judgment dismissing the remainder of plaintiff's complaint. The court granted defendants' motion to the extent of dismissing the sixth cause of

action (retaliation and disability discrimination) as to all defendants, and dismissing the entire complaint as to the individual defendants. Plaintiff appeals.

In reviewing defendants' motion for summary judgment, we must accept plaintiff's facts as true, and draw all reasonable inferences in the light most favorable to her (*Weiss v Garfield*, 21 AD2d 156 [3d Dept. 1964]). The standard for determining the motion is whether there are any genuine and material disputed issues of fact (*see Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is even arguable (*Glick*, 22 NY2d at 441). Moreover "[i]t is not the court's function on a motion for summary judgment to assess credibility" (*Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he [or she] is ruling on a motion for summary judgment or for a directed verdict" (*Anderson v Liberty Lobby, Inc.*, 477 US 242, 255 [1986]).

Retaliatory Discharge[1]

Under the State HRL, it is unlawful to retaliate against an employee for opposing discriminatory practices (*see* Executive Law § 296[7]). To prove unlawful retaliation, a plaintiff must show that (1) she has engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered an adverse employment action, and (4) there is a causal connection between the protected activity and the adverse action (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-313 [2004]). Here, plaintiff has established the first two prongs, and has raised issues of fact regarding the third and fourth prongs sufficient to require the denial of defendants' motion for summary judgment.

Regarding protected activity, plaintiff made numerous complaints that Beacon was infested by unlawful discrimination, of which she was a frequent target, and she indicated both orally, and in writing, her intent to call an attorney if those in supervisory positions at Beacon did not act to remedy the rampant and blatant racist conduct of Quattracchi and others that

[1]Plaintiff has abandoned her claim of retaliation based on her allegedly disabling shoulder injury, by failing to address it in her brief (*see Mehmet v Add2Net, Inc.*, 66 AD3d 437, 438 [1st Dept. 2009]).

she was required to endure in order to bring home a paycheck. The hostility at Beacon imploded on the afternoon of August 9, 2005, and as plaintiff was suspended for her role in the altercation, she reiterated her intention to call a lawyer.

With respect to her employers' awareness of the protected activity, it is plain that all of plaintiff's supervisors knew she was unhappy with the way she was treated. She indicated as early as the meeting in the fall of 2004 that she intended to seek an attorney if the racist behavior did not end. Jasper, one of plaintiff's supervisors, actually suggested she keep a log of unlawful acts and statements.

Defendants proffered a legitimate nondiscriminatory basis for terminating plaintiff -- the prohibition against workplace altercations. However, the fight was the direct result of 13 months of escalating hostility of which defendants were aware, and which the record reflects stemmed from racial animus. It is arguable that by firing all three participants in the fight -- plaintiff, Quattracchi and Mascara -- defendants were acting in a race neutral manner. An equally plausible inference, given the nature and degree of unaddressed racial animus at Beacon, is that defendants were motivated by a justified fear of liability stemming from an insufficient response to plaintiff's complaints

(*see Glick*, 22 NY2d at 441 [drastic remedy of summary judgment should not be granted where an issue is "arguable"][internal quotation marks omitted]).

As the Court of Appeals has recognized, discrimination is "[usually] accomplished . . . by devious and subtle means]" (*Ferrante*, 90 NY2d at 631 [internal quotation marks omitted]). Given that competing inferences are reasonably drawn from this record, summary judgment is not warranted. It is the province of a jury to weigh the evidence, assess credibility, and ultimately determine whether defendants' actions were retaliatory.

Individual Defendants

The record also raises an issue of fact as to whether the individual defendants were plaintiff's employers for purposes of the State HRL (Executive Law § 296[1][a]; *see Patrowich v Chemical Bank*, 63 NY2d 541 [1984]; *Pepler v Coyne*, 33 AD3d 434 [1st Dept 2006]; *Lapidus v New York City Ch. of N.Y. State Assn. for Retarded Children*, 118 AD2d 122, 131 [1st Dept 1986]). Tomasso, Jasper, Scimone and Morgan all had the authority to make and effectuate high-level managerial decisions. They did more than carry out personnel decisions made by others (*Patrowich*, 63 NY2d at 542). Jasper attested that she and Scimone interviewed plaintiff for her position. She also testified that after

conferring with Tomasso, she and Tomasso made the decision to hire plaintiff. Jasper encouraged plaintiff to keep track of racial incidents, and advised plaintiff to come to her with any problems. Morgan similarly advised plaintiff to come to him so that he could handle any problems she was having with Quattracchi. After plaintiff wrote to Jasper and Scimone, they, and Tomasso, held a meeting at the Archdiocese headquarters, and promised to stem the hostile work environment at Beacon. Plaintiff testified that she brought problems with Quattracchi to Scimone's attention, but he repeatedly shrugged them off.

Viewing the evidence in the light most favorable to plaintiff, we find that issues of fact exist as to whether defendants condoned racially discriminatory conduct, by approving or acquiescing to the actions of individuals such as Scimone's secretary, Quattracchi, and Gloria Mascara (*see Matter of State Div. of Human Rights v St. Elizabeth's Hosp.*, 66 NY2d 684, 687 [1985]; *Goering v NYNEX Info. Resources Co.*, 209 AD2d 834 [3rd Dept. 1994][calculated inaction to employee's harassing conduct may readily indicate condonation]). However, plaintiff failed to identify any evidence that any of the individual defendants "actually participate[d]" in the alleged discriminatory acts so as to support her alternative theory of individual liability on

the grounds of aiding and abetting the alleged acts (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 328 [2004, Smith, J., concurring] [internal quotation marks omitted]; Executive Law § 296[6]).

All concur except Friedman and Román, JJ. who dissent in part in a memorandum by Friedman, J. as follows:

FRIEDMAN, J. (dissenting in part)

Given our obligation to assume the truth of plaintiff's factual allegations (which defendants vigorously dispute) for purposes of deciding this appeal, I concur with the majority insofar as it reinstates the action as against the individual defendants. However, I must emphatically dissent from the majority's reinstatement of the cause of action for retaliatory discharge. Granted, plaintiff has satisfied her "de minimis burden of showing a prima facie case" (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 115 [1st Dept 2012] [internal quotation marks omitted]) that her discharge was retaliatory in nature, in that she threatened to sue her employer as she left the premises on the day she was suspended from her employment at defendant Beacon of Hope House, and was subsequently terminated. However, as the majority acknowledges, defendants have come forward with a legitimate nondiscriminatory basis for plaintiff's termination — namely, her involvement in a physically violent workplace altercation with two other employees on the day before she was suspended. Moreover, any reasonable inference that the true reason for the termination may have been the threat to sue is conclusively negated by the uncontroverted fact that the two other employees involved in the altercation with plaintiff were

also suspended and terminated based on that incident, even though they did not threaten to sue. It is undisputed that defendant Scimone, a manager at Beacon, prepared an investigative report on the incident, in which he concluded that plaintiff and the two other employees involved had violated Beacon's policy against fighting in the workplace and, based on that misconduct, recommended the termination of all three employees. Pursuant to that recommendation, plaintiff and the two employees with whom she had fought were terminated within three weeks of the incident.

Plaintiff does not dispute that the altercation in question occurred; that she was involved in it; that such conduct violated Beacon's policy against fighting in the workplace; and that all three employees involved in the altercation were suspended the next day and, ultimately, were terminated, with the reason given being the altercation. Notably, plaintiff offers no evidence that either of the other two terminated employees threatened Beacon with legal action before they were fired. In sum, the record offers no rational basis for concluding that plaintiff, like her two antagonists, was terminated for any reason other than violating her employer's rule against physical fighting in the workplace — a rule essential for any workplace, but

especially for a mental health facility like Beacon.

The majority appears to be unduly influenced by plaintiff's litany of complaints (all disputed by defendants) about her treatment at Beacon before the altercation that triggered her termination. Had plaintiff been the only employee fired, perhaps those allegations could support an inference that retaliation was the motive for the discharge. But, to reiterate, this was not the case. All three employees involved in the altercation were found to have violated the no-fighting policy and were dismissed, regardless of any threats of litigation. While I agree that, by alleging the bare facts that she threatened to sue her employer and was subsequently fired, plaintiff set forth a prima facie case of retaliation sufficient to shift to defendants the burden of "com[ing] forward with admissible evidence that it had 'legitimate, independent and nondiscriminatory reasons'" (*Melman*, 98 AD3d at 115, quoting *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]) for her termination, once defendants have proffered admissible evidence that they had such a legitimate and independent reason, plaintiff is no longer entitled to rely on "the minimal prima facie case" (*Melman*, 98 AD3d at 115 [internal quotation marks omitted]) to defeat a well-supported summary judgment motion (*see id.* at 122-123). She must come forward with

admissible evidence that, if credited, would refute the proffered reason for her termination.[1]

In this case, the majority reinstates plaintiff's retaliatory discharge claim notwithstanding unrefuted evidence that she was terminated for violating her employer's prohibition on conduct clearly intolerable in the workplace (fighting), a policy that the employer applied equally to the other employees involved in the same incident who did not threaten to sue (and who were not members of plaintiff's protected class). In so doing, the majority sends the message that an employee who commits workplace misconduct may deter the employer from taking disciplinary action by the simple expedient of threatening to sue before a penalty is imposed. I do not believe that the Human Rights Law was intended to afford such protection to employees who engage in misconduct in the workplace, as the record shows plaintiff did here. It is simply preposterous to suggest that the Human Rights Law was meant to call an employer to task for

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[1]As we recently noted, "in employment discrimination jurisprudence, the term 'prima facie case' is used to denote the establishment by plaintiff of facts sufficient to create a legally mandatory, rebuttable presumption, rather than the more traditional meaning of describing plaintiff's burden of setting forth sufficient evidence to go before the trier of fact" (*Melman*, 98 AD3d at 122 [internal quotation marks and ellipsis omitted]).

dismissing an employee at a mental health facility who involves herself in a physical altercation at work. Accordingly, I dissent from the portion of the majority's decision denying defendants' motion for summary judgment dismissing the cause of action for retaliatory discharge.

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

ENTERED: JANUARY 22, 2013

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Abdus-Salaam, Manzanet-Daniels, JJ.

7448 In re Subway Surface Supervisors Association, Petitioner-Respondent, Index 105285/09

-against-

New York City Transit Authority, Respondent-Appellant.

Martin B. Schnabel, Brooklyn (Richard Schoolman of counsel), for appellant.

Law Offices of Stuart Salles, New York (Gail M. Blasie of counsel), for respondent.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered April 23, 2010, which denied respondent New York City Transit Authority's cross motion to dismiss the petition brought pursuant to CPLR article 78, affirmed, without costs.

The New York City Transit Authority (TA) is a public benefit corporation organized and existing under Public Authorities Law (PAL) §§ 1201 *et seq.* to provide bus and subway services in New York City. In August 1984, as part of a reorganization of the TA, the New York City Department of Personnel created the title of Station Supervisor with two assignment levels, Station Supervisor Level I (SS-I) and Station Supervisor Level II (SS-II). Since Station Supervisor is a single title, the skills

requirements for SS-I and SS-II are the same, and applicants for jobs in this title need take a single competitive exam only; no additional exam is needed to move from SS-I to SS-II.

Petitioner Subway Surface Supervisors Association (SSSA) is the exclusive representative of SS-I workers, while SS-II workers are represented by the Transit Supervisors Organization (TSO). The initial salary range when the Station Supervisor title was created was $24,338-$36,047. Through the collective bargaining process, SSSA and the TA reached successive multi-year agreements including wage increases and other benefits for SS-Is. The TSO and the TA likewise reached successive multi-year agreements for SS-IIs.

When the two job categories were created, the functions and duties of SS-Is and SS-IIs differed, and SS-IIs received about $14,000 more in base salary. Currently, SS-IIs earn about $83,000, and SS-Is earn about $69,000. However, since 2003, the TA has been shifting work from SS-IIs to SS-Is, and, according to SSSA, there is currently no significant distinction between the work performed by SS-Is and that performed by SS-IIs. SSSA further contends that, as a result of attrition in the SS-II position, a greater portion of the work common to both positions is assigned to SS-Is.

SSSA alleges that, by assigning SS-Is to perform SS-IIs work, the TA has violated the Civil Service Law (CSL), which prohibits "out-of-title work" (CSL 61[2]). In lieu of an answer, the TA moved to dismiss the petition, on the grounds that it was barred by the applicable four-month statute of limitations and by laches. The TA further contended that Supreme Court lacked subject matter jurisdiction over the dispute and that the petition failed to state a cause of action. In opposition, SSSA argued, for the first time, that, since they performed the same work, SS-Is were entitled to be paid at the same rate as SS-IIs, under CSL 115 and the Equal Protection Clauses of the United States and New York Constitutions. In reply, the TA contended that SSSA had abandoned the petition, which sounded under CSL 61. The TA similarly argued that the court should not consider SSSA's CSL 115 claims, which it raised for the first time in opposition to the TA's motion to dismiss the petition. The TA also posited that, in any event, section 115 only applies to State employees, that the TA is a public authority, and that its employees are, therefore, not governed by section 115. The TA further argued that, by virtue of its repeated participation in negotiating salary agreements for SS-Is, SSSA should be estopped from challenging, or had waived or otherwise lost any standing to

challenge, the salary levels. Finally, the TA asserted that SSSA's section 115 claim implicated the Taylor Law and therefore fell within the exclusive jurisdiction of the Public Employment Relations Board (PERB), and not Supreme Court, in the first instance.

By leave of court, SSSA filed a supplemental affirmation in response to arguments raised by the TA in its reply. Among other things, SSSA contended that PAL 1210(2) expressly provided that TA employees are governed by the provisions of the Civil Service Law, including Section 115. The TA filed a sur-reply reiterating that SSSA had abandoned its claim under CSL 61, which was the sole theory identified in the petition. The TA also contended that it was not a division of the State and that its employees were not State employees or otherwise subject to CSL 115.

By order entered April 23, 2010, the court held that SSSA had abandoned its claim under CSL 61, and had advanced its claim under section 115 for the first time only in opposition to TA's motion to dismiss the petition. The court declined to dismiss the petition, however, noting that it had afforded the TA ample opportunity to respond to SSSA's new arguments. On the merits, noting that PAL 1210(2) expressly states that TA employees are governed by the provisions of the Civil Service Law, the court

found that CSL 115 did apply to those employees. The court also opined that, under section 115, SS-Is would be entitled to the same pay as SS-IIs if they performed the same work. The court found, however, that questions of fact existed whether SS-Is and SS-IIs performed the same duties. The court referred this factual issue to a Special Referee to report on. Nevertheless, the court granted the TA leave to appeal the court's determination of the four issues on which its decision rested.

Civil Service Law § 115 codifies a critical public policy, which is that, "to attract unusual merit and ability to the service of the state of New York, to stimulate higher efficiency among the personnel, to provide skilled leadership in administrative departments, to reward merit and to insure to the people and the taxpayers of the state of New York the highest return in services for the necessary costs of government," there should be "equal pay for equal work, and regular increases in pay in proper proportion to increase of ability, increase of output and increase of equality of work demonstrated in service." If the dissent's mistaken interpretation of the case law were applied, this would become a hollow promise that afforded no remedy for those it was designed to protect, such as the petitioners here. The dissent has further misconstrued the

nature of this dispute as involving a mere dissatisfaction with a collective bargaining agreement, when in reality it involves a violation of the important public policy codified in the Civil Service Law.

The dissent acknowledges that CSL 115 applies to TA workers, notwithstanding that they are, strictly speaking, employees of a public authority. Nevertheless, the dissent incorrectly opines that the workers are wrong to invoke that statute, because it "merely enunciates a *policy* and confers no jurisdiction on a court to enforce such policy" (quoting *Matter of Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL-CIO v State of N.Y. Unified Ct. Sys.*, 35 AD3d 1008, 1010 [3d Dept 2006] [internal quotation marks omitted]). A closer review of the cases reveals that no such "jurisdictional" prohibition exists. Indeed, *Gladstone v Board of Ed. of City of N.Y.* (49 Misc2d 344 [1966], *affd* 26 AD2d 838 [1966], *affd* 19 NY2d 1004 [1967], *cert denied* 389 US 976 [1967]), on which *Matter of Civil Serv. Empls. Assn.* relies, overstated the holdings of the cases it cited. For example, in one of those cases, *Matter of Goldberg v Beame* (22 AD2d 520 [1st Dept 1965], *revd on other grounds*, 18 NY2d 513 [1966]), this Court, in construing Civil Service Law § 37, the forerunner to section 115, observed that the statute "is a mere

statement of general policy applicable to all Civil Service employees. *It does not contain, however, a mandatory direction that such principle must be applied in all cases under any and all conditions*" (22 AD2d at 522 [quoting *Matter of Beer v Board of Educ. of City of N.Y.*, 83 NYS2d 485, 486-487 [Sup Ct Kings County 1948], *affd* 274 App Div 931 [1948], *appeal dismissed* 299 NY 565 [1949]] [emphasis added]). *Beer* was also cited by the *Gladstone* court.

In its last pronouncement on the subject in 2000, this Court stated that "[t]he principle of equal pay for equal work need not be applied in all cases under any and all circumstances" (*Bertoldi v State of New York*, 275 AD2d 227 [1st Dept 2000], *lv denied* 96 NY2d 706 [2001]). The clear implication of that statement is that there are circumstances in which the principle of equal pay for equal work must be applied and that this Court has the power to apply it. The mere fact that there are no reported cases in which a court has exercised such power does not mean that courts do not have that power. The dissent fails to reconcile the case law acknowledging that there may be circumstances in which the policy of equal pay for equal work must be applied, with its conclusion that no court has jurisdiction to apply it. The case law establishes that a court

need not presume that a disparity in pay is violative of section 115, but that, nevertheless, it may correct the disparity where "there is palpable discrimination or arbitrary action detrimental to the individual or class" (*Beer*, 83 NYS2d at 487). SSSA's petition sufficiently alleges "arbitrary action" by the TA in paying SS-Is less than SS-IIs who perform the same work.

Contrary to the TA's position, the issue here is not whether the union negotiated an unfavorable deal but whether the TA has violated public policy. Such disputes are amenable to review by the courts (*see e.g. Matter of Zuckerman v Board of Educ. of City School Dist. of City of N.Y.*, 44 NY2d 336 [1978]). The TA argues that SSSA's exclusive remedy resides in the Taylor Law with PERB alone having jurisdiction over the dispute, because the dispute goes to the terms and conditions of employment, which are required to be negotiated in good faith through collective bargaining. However, to characterize this dispute as one solely concerning terms that can be bargained for is to view it too narrowly.

This case is not merely about the collective bargaining agreement that SSSA negotiated, because SSSA has no ability to control pay disparity through collective bargaining. No matter what salary terms SSSA strikes with the TA through collective

bargaining, it is powerless to prevent the TA from shifting work away from SS-IIs, who are represented by a separate union, and onto SS-Is. Indeed, this case contrasts with *Matter of Trerotola v New York City Off-Track Betting Corp.* (86 AD2d 822 [1st Dept 1982], affd 58 NY2d 856 [1983]), the primary case upon which the TA relies. There, as here, a group of OTB branch managers complained that they were being paid less than another group of branch managers that was performing the same work. However, in *Trerotola*, the two worker groups with disparate salaries were represented by the same union in contract negotiations. The court held there that the very changes that led to the disparity, such as consolidation of job titles and elimination of duties attached to job titles, were part of the collective bargaining process. Here there is no reason to believe that SSSA, during that process, agreed to terms that created the very situation that led to their salaries being lower than that of brother and sister workers with the same responsibilities.

Contrary to the dissent's contention, SSSA could not prevent the TA from arbitrarily creating further inequalities in the nature of work assigned to the two different classes of workers, regardless of what salary SSSA negotiated with the TA. For this reason, and contrary to the dissent's position, the fact that SS-

Is bargained for their salary has no bearing on whether they have a viable equal protection claim, and we find that the petition sufficiently alleges the claim (*see Margolis v New York City Tr. Auth.*, 157 AD2d 238, 241-242 [1st Dept 1990]). Indeed, because of SSSA's inability to control SS-II pay levels, only a judicial declaration that the TA illegally differentiated between the two classes of workers, if that is indeed what occurred, could prevent a salary disparity from re-emerging.

All concur except Sweeny and Abdus-Salaam, JJ. who dissent in a memorandum by Abdus-Salaam, J. as follows:

ABDUS-SALAAM, J. (dissenting)

I respectfully dissent. I would dismiss the petition for failure to state a cause of action.

Respondent is correct that in the absence of an application by petitioner to replead, or for leave to serve an amended pleading accompanied by the proposed amended pleading (*see* CPLR 3025[b]), the proper procedure under these circumstances would have been for the court to dismiss the petition once petitioner abandoned its claim based on Civil Service Law § 61(2). By ordering a hearing on the issue of whether respondent violated Civil Service Law § 115, the court implicitly deemed the pleading amended and recognized that petitioner has a cognizable claim for violation of that statute. I disagree with the majority's view that petitioner states a cognizable claim under Civil Service Law § 115.

Civil Service Law § 115 "merely enunciates a *policy* and confers no jurisdiction on a court to enforce such policy" (*Matter of Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL-CIO v State of N.Y. Unified Ct. Sys.*, 35 AD3d 1008, 1010 [3d Dept 2006] [internal quotation marks omitted]; *see also MTA Bus Non-Union Employs. Rank & File Comm. v Metropolitan Transp. Auth.*, __ F Supp 2d __, 2012 WL 4782736, 2012 US Dist Lexis

143953, *12 [SD NY 2012]; *Matter of Trerotola v New York City Off-Track Betting Corp.*, 86 AD2d 822 [1st Dept 1982], *affd for reasons stated below* 58 NY2d 856 [1983]; *Gladstone v Board of Educ. of City of N.Y.*, 49 Misc 2d 344, 346 [1966], *affd* 26 AD2d 838 [2d Dept 1966], *affd* 19 NY2d 1004 [1967], *cert denied* 389 US 976 [1967]; *Matter of Goldberg v Beame*, 22 AD2d 520, 522 [1st Dept 1965], *revd on other grounds* 18 NY2d 513 [1966]). Contrary to the majority's analysis, all of the case law supports respondent's position that Civil Service Law § 115 "merely" enunciates a policy as opposed to providing an enforceable statutory right, and the majority has not pointed to any case where a court has recognized a cognizable cause of action based on a violation of Civil Service Law § 115. *Matter of Zuckerman v Board of Educ. of City School Dist. of City of N.Y.* (44 NY2d 336 [1978]), cited by the majority, did not involve an alleged violation of section 115, but instead concerned a claim that the Board of Education had circumvented the New York State Constitution and the statutory requirements of the Education Law.

While the majority asserts that in *Bertoldi v State of New York* (275 AD2d 227 [1st Dept 2000], *lv denied* 96 NY2d 706 [2001]) we implied that there are circumstances in which the principle of equal pay for equal work must be applied, significantly, we noted

that Civil Service Law § 115 "enunciates a *policy* and confers no jurisdiction on a court to enforce such policy" (275 AD2d at 228, quoting *Gladstone*, 49 Misc 2d at 346). That, as the majority points out, section 115 codifies an important public policy does not compel the conclusion that actions at odds with the policy are the basis for liability. Notably, Civil Service § 115, entitled "Policy of the state," not only declares it "to be the policy of the state to provide equal pay for equal work," but also declares the policy to encompass "regular increases in pay in proper proportion to increase of ability, increase of output and increase of equality of work demonstrated in service." By the majority's reasoning and reading of the statute, a cause of action for violation of section 115 could be stated upon allegations that an employee has not received regular increases in pay, a proposition that was clearly not intended by the Legislature in enunciating this policy. Accordingly, petitioner's claim under that statute should be dismissed.

I reject petitioner's claim that the amount of wages for SS-Is agreed to in the collective bargaining process violates the Equal Protection Clause. Petitioner has not cited any case law in which a union, after agreeing to a salary schedule through collective bargaining, has successfully prosecuted a claim that

the equal protection clause has been violated because the salary schedule it agreed to was lower than the salary schedule for similarly situated employees (*compare Margolis v New York City Tr. Auth.*, 157 AD2d 238, 241-242 [1st Dept 1990], and the cases cited therein, which did not involve claims that a contract reached through collective bargaining violated the Equal Protection Clause, but instead, involved disputes that had not been the subject of collective bargaining).[2] *Matter of Trerotola* (86 AD2d at 822), cited by respondent, is instructive. Although the court did not expressly address the Equal Protection Clause, it found that where petitioner union claimed equal pay for equal work, and Civil Service Law § 115 was inapplicable, there was no basis for granting relief, because "[t]he quarrel [was] a naked endeavor to impose upon [the respondent], through the courts, a

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[2]In *Litman v Board of Educ. of City of N.Y.* (170 AD2d 194 [1st Dept 1991]), not cited by either party, this Court ruled that an agreement between the teachers' union and the Board of Education that modified a collective bargaining agreement so as to provide for increased wage rates and benefits only to certain special education teachers did not violate constitutional guarantees of equal protection because the salary differential met valid state objectives. In so doing, we implicitly recognized that a cause of action had been stated. However, in *Litman*, in contrast to the situation here, the proceeding was commenced by individual teachers who were adversely affected by the agreement, not by the union that had reached the agreement through collective bargaining.

wage scale upon which there was no agreement during the collective bargaining process"(*id*. at 823).

That, as the majority points out, the two worker groups in *Trerotola* were represented by the same union is a distinction without a meaningful difference. The cornerstone of *Trerotola* was not that the workers were represented by the same union in contract negotiations -- the point was that the workers could have bargained for a higher salary, and could not, having failed to do so, obtain relief from the court with respect to the salary set by the collective bargaining agreement. The majority's position that petitioner has no ability to control pay disparity through collective bargaining is perplexing. Petitioner has been representing SS-Is since 1997, and has negotiated and agreed to multiple collective bargaining agreements and salary schedules, all with the knowledge of the salary schedules for the SS-IIs and

the nature of the work assigned to the different classes of workers. Petitioner need not represent both SS-Is and SS-IIs to be able to negotiate a salary for SS-Is that is comparable to that of their SS-II counterparts.

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

ENTERED: JANUARY 22, 2013

CLERK

Tom, J.P., Saxe, Richter, Abdus-Salaam, Feinman, JJ.

8621 Port Parties, Ltd., Index 113117/10
Plaintiff-Appellant,

-against-

Merchandise Mart Properties, Inc.,
Defendant-Respondent,

The UnConvention Center, Inc.,
Defendant.

_____

Quinn McCabe LLP, New York (Jonathan H. Krukas of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered October 31, 2011, which, insofar as appealed from, granted the motion of defendant Merchandise Mart Properties, Inc. to dismiss plaintiff Port Parties Ltd.'s claim for contractual indemnification and its claim for a declaratory judgment that Merchandise Mart defend and indemnify it in an underlying personal injury action, and denied Port Parties' cross motion for summary judgment on said claims, unanimously modified, on the law, to deny Merchandise Mart's motion as to the declaratory judgment claim and declare that Merchandise Mart has no duty to defend and indemnify Port Parties in the underlying personal

injury action, and otherwise affirmed, without costs.

Merchandise Mart was granted a license by defendant UnConvention Center for the use of a portion of pier 94 in Manhattan to hold a trade show. Under the license agreement, Merchandise Mart was to provide for janitorial and cleaning services, and it retained Port Parties to supply bathroom matron services. The license agreement obligates Merchandise Mart to obtain insurance coverage for the event, which insurance "shall be considered primary and not contributory as respects other insurance," and to name Port Parties as an additional insured. Under a broad indemnification clause, Merchandise Mart is required to "indemnify, defend and hold harmless the Licensor and the Additional Insureds . . . from and against all claims, demands, liabilities, damages, costs, losses and expenses . . . arising from or related to any personal injury . . . caused by, arising from or in connection with (a) the use or occupancy of the Authorized Space by [Merchandise Mart] . . . or (c) any act or omission of [Merchandise Mart]."

The requisite insurance, however, was never obtained, and an attendee who allegedly sustained injuries when she slipped and fell on a puddle of water in the ladies' restroom commenced an action against Merchandise Mart, Port Parties, and UnConvention

Center. Port Parties failed to appear in the action and, upon its default, is deemed to have admitted "all traversable allegations in the complaint, including the basic allegation of liability" (*see Rokina Opt. Co. v Camera King*, 63 NY2d 728, 730 [1984]).

Supreme Court held that the indemnification provision of the license agreement offends General Obligations Law § 5-323, and dismissed Port Parties' indemnity claim against Merchandise Mart. While conceding that the agreement purports to indemnify it for its sole negligence in contravention of the statute (*Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786 [1997]), Port Parties argues that the insurance provision brings this matter within the ambit of *Great N. Ins. Co. v Interior Constr. Corp.* (7 NY3d 412 [2006]).

Under General Obligations Law § 5-323, a provision in an agreement affecting real property that purports to exempt a contractor from liability for its own negligence in connection with, inter alia, the maintenance of the property is deemed to be void as against public policy. However, construing a parallel statute rendering void provisions that purport to similarly exempt a lessor from liability for its own negligence, the Court of Appeals held that where a commercial lease is the product of

arm's-length negotiation between sophisticated parties who use insurance to allocate liability for injuries sustained by third persons, an indemnification provision holding the tenant liable for the landlord's negligence does not offend the statute (*Great N. Ins. Co.*, 7 NY3d at 419).

Central to this outcome is that the tenant's insurer, not the tenant, bore "ultimate responsibility for the indemnification payment" (*id.*). Indeed, the Court noted that the policy afforded $5 million in coverage for liability that amounted to only $86,650 (*id.* n 4). Thus, an indemnification provision is only exempt from the prohibition of the General Obligations Law where "the parties are allocating the risk of liability to third parties between themselves, essentially through the employment of insurance" (*Hogeland v Sibley, Lindsay & Curr Co.*, 42 NY2d 153, 161 [1977]).

Enforcement of the subject indemnification provision in the absence of the insurance coverage called for by the license agreement would permit Port Parties, the negligent contractor, to avoid responsibility for its own negligence, precisely the exemption from liability prohibited by the statute. As *Hogeland* suggests, the conceptual difference is that in cases where indemnification has been permitted, the negligent party was not

deemed to be *exempt* from liability to the injured third party; rather the parties merely agreed to *allocate financial responsibility* for the injury through the use of insurance, which afforded adequate compensation for the injury sustained. As the Court of Appeals put it, "[A]n agreement to procure insurance specifically anticipates the promisee's 'continued responsibility' for its own negligence for which the promisor is obligated to furnish insurance" (*Kinney v Lisk Co.*, 76 NY2d 215, 218 [1990]).

In the absence of the insurance policy Merchandise Mart was supposed to obtain, the subject indemnification provision does not have the favorable effect of allocating loss for the purpose of placing the risk on the party with insurance coverage. Relief from the bar against exemption from liability for a party's own negligent acts (General Obligations Law §§ 5-322, 5-322.1, 5-323, 5-325) is granted only where recovery against the negligent party is obviated by the availability of adequate insurance (*see Hogeland*, 42 NY2d at 161). Since the effect of enforcing the indemnification provision in the instant matter would be to exempt Port Parties from liability for an injury that was concededly caused by its own negligence without the commensurate protection afforded by insurance coverage, the indemnification

provision is void and unenforceable.

Finally, a complaint seeking a declaratory judgment should not be dismissed even though the court determines that the plaintiff is not entitled to the declaration sought (*Lanza v Wagner*, 11 NY2d 317, 334 [1962], appeal dismissed 371 US 374 [1962] *cert denied* 371 US 901 [1962]). Where, as here, a decision is rendered on the merits, the court should issue a declaration (*Hirsch v Lindor Realty Corp.*, 63 NY2d 878, 881 [1984]; *see also Daley v M/S Capital NY LLC*, 44 AD3d 313, 315 [1st Dept 2007]), and we modify accordingly.

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

ENTERED: JANUARY 22, 2013

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Román, Clark, JJ.

9033 The People of the State of New York, Respondent, Ind. 2862/06 3640/06

-against-

Charlie Jones, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (William Wetzel, J.), rendered December 19, 2007, convicting defendant, after a jury trial, of burglary in the first degree (four counts), robbery in the first degree (three counts) and attempted robbery in the second degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 50 years to life, unanimously affirmed.

There was no violation of defendant's right to be present at trial. After a thorough hearing, the court properly determined that defendant forfeited his right to be present by deliberately absenting himself from the proceedings (*see People v Brooks*, 75 NY2d 898, 899 [1990]; *People v Sanchez*, 65 NY2d 436, 443-444 [1985]). The record unequivocally establishes that defendant, a

chronic malingerer, deliberately caused his own absence (*see People v Cooks*, 28 AD3d 362 [2006], *lv denied* 7 NY3d 787 [2006]), and that regardless of whether defendant's alleged overdose of medication was feigned or actual, defendant intended to absent himself from the balance of his ongoing trial. Accordingly, the court was entitled to continue the trial in defendant's absence.

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

ENTERED: JANUARY 22, 2013

CLERK

Corrected Order - April 26, 2013

Friedman, J.P., Renwick, Manzanet-Daniels, Román, Clark, JJ.

9034 In re David C.,
Petitioner-Respondent,

-against-

Laniece J.,
Respondent-Appellant.

_____

The Reiniger Law Firm, New York (Douglas H. Reiniger of counsel), for appellant.

Daniel R. Katz, New York, **for** respondent.

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

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Order, Family Court, New York County (Christopher W. Coffey, Ref.), entered on or about December 2, 2011, which, in a proceeding brought pursuant to article 6 of the Family Court Act, granted the father's petition for a final order of custody of the subject child, awarded respondent-mother an order of visitation, and dismissed her cross petition for custody, unanimously affirmed, without costs.

The court's determination awarding custody of the subject child to the father has a sound and substantial basis in the record, and there is no reason to disturb the court's findings (*see Eschbach v Eschbach*, 56 NY2d 167, 173 [1982]; *Matter of Koegler v Woodard*, 96 AD3d 454, 455 [1st Dept 2012], *lv dismissed* 19 NY3d 1013 [2012]). The court considered all of the relevant

factors and properly concluded that, although the evidence demonstrated that both parents had a strong love for the child and either would be an adequate custodian, allowing the child to remain with the father would serve the child's best interests (*see Matter of Gregory L.B. v Magdalena G.*, 68 AD3d 478, 479 [1st Dept 2009]). The father was better able to provide a stable environment for the child, since he had lived in the same apartment for many years, and had been the child's primary caregiver, with whom she resided, for almost three years after her return from foster care (*see Obey v Degling*, 37 NY2d 768, 770 [1975] ["[c]ustody of children should be established on a long-term basis, wherever possible"]). In contrast, the mother had moved into her boyfriend's apartment in efforts to avoid homelessness, and the boyfriend had an extensive criminal history and indicated that the mother's residence in his apartment was only until she got on her feet.

The record indicates that the father would maintain, promote, and foster the relationship between the mother and the child (*see Bliss v Ach*, 56 NY2d 995, 998 [1982]; *Matter of Matthew W. v Meagan R.*, 68 AD3d 468 [1st Dept 2009]), since he wanted her in the child's life and was willing to abide by whatever visitation schedule the court imposed.

The referee did not err in failing to conduct an in camera interview of the child, since the attorney for the child

stipulated that the child's preference was to live with the mother. However, in a custody proceeding, "[a] child's preference for a particular parent, while a factor to be considered, cannot be determinative" (*Young v Young*, 212 AD2d 114, 123 [2d Dept 1995]). Contrary to the mother's contention, the court did not decrease her time with the child since it stated that she shall have parenting time with the child a "minimum" of alternate weekends and that the parties may mutually agree to increase her parenting time.

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

ENTERED: JANUARY 22, 2013

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Román, Clark, JJ.

9035 172 Van Duzer Realty Corp., Index 113137/09
Plaintiff-Respondent,

-against-

Globe Alumni Student Assistance Association, Inc., et al.,
Defendants-Appellants.

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Herzfeld & Rubin, P.C., New York (David B. Hamm of counsel), for appellants.

Cox Padmore Skolnik & Shakarchy, LLP, New York (Noah Potter of counsel), for respondent.

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Judgment, Supreme Court, New York County (Carol Edmead, J.), entered June 20, 2011, awarding plaintiff landlord a total amount of $1,488,604.66, and bringing up for review an order, same court and Justice, entered December 6, 2010, which granted plaintiff summary judgment on the issue of liability, unanimously affirmed, with costs.

In this action for breach of a commercial lease and enforcement of a guarantee, plaintiff seeks damages in connection with a lease entered into in September 2006, for real property located in Staten Island, for a term, as extended, of 10 years. On January 30, 2008, plaintiff issued defendant-tenant Globe Alumni Student Assistance Association, Inc. a notice to cure

violations of the lease. Rather than curing the violations, in February 2008, the tenant vacated the premises. Plaintiff then terminated the lease effective as of March 24, 2008.

After obtaining a judgment of possession in the Civil Court, plaintiff brought the instant action seeking, among other things, the balance of rent due for the remainder of the term, which was recoverable as liquidated damages under an acceleration provision in the lease.

Plaintiff made a prima facie showing of its entitlement to accelerated rent, pursuant to the express terms of the lease, which also provided that the obligation to pay rent was to continue in the event of termination of the lease (*see Ring v Printmaking Workshop, Inc.*, 70 AD3d 480, 481 [1st Dept 2010]).

In opposition, defendants failed to raise a triable issue of fact as to whether the liquidated damages provision was an unenforceable penalty (*see Truck Rent-A-Ctr. v Puritan Farms 2nd*, 41 NY2d 420, 423-425 [1977]). The doctrine of res judicata does not bar plaintiff's recovery under the acceleration provision, as

such damages were not recoverable in the summary proceeding brought in the Civil Court (*see* NY City Civ Ct Act § 204; *Ross Realty v V & A Fabricators, Inc.*, 42 AD3d 246, 249-250 [2d Dept 2007]).

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

ENTERED: JANUARY 22, 2013

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Román, Clark, JJ.

9036 Chibcha Restaurant, Inc., doing business as Oxes Nightclub, et al., Plaintiffs-Appellants,

-against-

David A. Kaminsky & Associates, P.C., et al., Defendants-Respondents.

Index 112224/10

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The Law Firm of Ravi Batra, P.C., New York (Ravi Batra of counsel), for appellants.

Lewis Brisbois Bisgaard & Smith, LLP, New York (Peter J. Biging of counsel), for respondents.

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Order, Supreme Court, New York County (Judith J. Gische, J.), entered August 2, 2012, which granted defendants' motion to dismiss the claims of legal malpractice, violations of Judiciary Law § 487, and negligent hiring, unanimously affirmed, with costs.

In this action for legal malpractice, plaintiffs allege that defendants were negligent in their representation of plaintiffs in a dispute with their landlord. Defendants' failure to file an order to show cause for a temporary restraining order against the landlord, after notifying the landlord that they were going to seek such relief, as they were required to do pursuant to Uniform Rule 202.7(f), did not amount to malpractice. Rather, it was a

reasonable course of action not to seek such relief upon learning from the landlord that plaintiffs were in violation of the subject lease's insurance requirements (*Hand v Silberman*, 15 AD3d 167, 167-168 [1st Dept 2005], *lv denied* 5 NY3d 707 [2005]). Moreover, contrary to plaintiffs' argument, the motion court was entitled to determine that such conduct was reasonable and did not amount to malpractice as a matter of law (*see e.g. Sklover & Donath, LLC v Eber-Schmid*, 71 AD3d 497, 498 [1st Dept 2010]).

Plaintiffs' allegations that defendants made "no useful attempt" to argue against a TRO sought and obtained by the landlord, and that defendants were both unprepared and unskilled in defending them, do not suffice. As the motion court observed, plaintiffs do not allege, for example, that defendants missed any deadlines or otherwise failed to protect or preserve plaintiffs' rights (*see Mortenson v Shea*, 62 AD3d 414, 414-415 [1st Dept 2009]).

Contrary to plaintiffs' assertions, the record supports the motion court's conclusion that plaintiffs' damages, sustained from the closing of the subject premises after issuance of the TRO, were not caused by defendants' conduct, but rather by plaintiffs' failure to obtain the necessary insurance before the landlord brought its motion for a temporary restraining order.

Plaintiffs concede that the insurance coverage required by the lease initially was not in place, and that the TRO against them was lifted only after the requisite insurance was obtained. As the premises were closed due to the lack of insurance, it cannot be said that plaintiffs would not have incurred any damages, but for defendants' purported negligence (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]).

The motion court properly dismissed the cause of action alleging a violation of Judiciary Law § 487. Plaintiffs' allegations stem from defendants' alleged misconduct in connection with a fee dispute in Civil Court. Accordingly, "plaintiff's remedy lies exclusively in that lawsuit itself, i.e., by moving pursuant to CPLR 5015 to vacate the civil judgment due to its fraudulent procurement, not a second plenary action collaterally attacking the judgment in the original action" (*Yalkowsky v Century Apts. Assoc.*, 215 AD2d 214, 215 [1st Dept 1995]).

The claim of negligent hiring and retention was properly dismissed. The complaint does not sufficiently plead such a cause of action (*see e.g. White v Hampton Mgt. Co. L.L.C.*, 35 AD3d 243, 244 [1st Dept 2006]).

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

ENTERED: JANUARY 22, 2013

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Román, Clark, JJ.

9038 In re Cecil R.,
Petitioner-Appellant,

-against-

Rachel A.,
Respondent-Respondent.

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Michael S. Bromberg, Sag harbor, for appellant.

Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), attorney for the child.

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Order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about July 26, 2011, which, after a hearing, denied petitioner's motion to vacate an order dismissing his paternity petition on default, unanimously affirmed, without costs.

While petitioner demonstrated a reasonable excuse for his default in appearing, he failed to show a meritorious claim of paternity (*see Matter of Commissioner of Social Servs. v Philip De G.*, 59 NY2d 137, 141-142 [1983]; *Matter of Jason E. v Tania G.*, 69 AD3d 518, 519 [1st Dept 2010]). The court improperly relied on a purported DNA test that was not in the record, but its determination is otherwise supported by the record. Petitioner testified that, although he knew of the child's birth within the year after she was born, he did not believe he was the

father because of the mother's lifestyle. This testimony tends to undermine petitioner's claim, which he was required to prove by clear and convincing evidence (*see Jane PP. v Paul QQ.*, 65 NY2d 994, 996 [1985] ["Where there is proof in the record that a man other than the respondent has had intercourse with the petitioner during the critical time period, the evidence is insufficient as a matter of law"]).

The record also supports the application of the doctrine of equitable estoppel to preclude petitioner from pursuing his paternity claim (*see Matter of Shondel J. v Mark D.*, 7 NY3d 320, 326-327 [2006]). Petitioner waited almost four years after the child's birth before commencing the paternity proceeding, during which time he failed to communicate with her or provide any financial support. The child, who had been removed from her mother's care at the age of five months, lived with Jason A. and his extended family and an order of filiation was issued in 2007 declaring Jason A. her father. We agree with the court that it is not in the child's best interests to interfere with her relationship with the only father she has ever known (*see e.g. Matter of David G. v Maribel G.*, 93 AD3d 526 [1st Dept 2012];

Matter of Fidel A. v Sharon N., 71 AD3d 437 [1st Dept 2010]; *Matter of Enrique G. v Lisbet E.*, 2 AD3d 288 [1st Dept 2003]).

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: JANUARY 22, 2013

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Román, Clark, JJ.

9039 The People of the State of New York, Ind. 5546/09
Respondent,

-against-

Marc Castro, etc.,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (David E.A. Crowley of counsel), for respondent.

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Judgment, Supreme Court, New York County (Patricia M. Nunez, J.), rendered October 28, 2010, convicting defendant, upon his plea of guilty, of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

Since defendant did not move to withdraw his plea, and since this case does not come within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662 [1988]), his challenge to the plea is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. At the plea allocution, defendant expressly admitted every element of the crime to which he was pleading guilty, including the fact that

the stolen property was a credit card. The sentencing court was under no obligation to ask defendant about his postplea statement, reflected in the presentence report, that allegedly raised an issue about the nature of the stolen property (*see e.g. People v Espinal*, 99 AD3d 435 [1st Dept 2012]; *People v Pantoja*, 281 AD2d 245 [1st Dept 2001], *lv denied* 96 NY2d 905 [2001]). Moreover, defendant's statement to the probation officer did not contradict the plea allocution or negate any element of the crime.

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

ENTERED: JANUARY 22, 2013

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Román, Clark, JJ.

9040-
9041 Index 116338/10

Richard Ware Levitt doing
business as Levitt & Kaizer,
Attorneys at Law, etc.,
Plaintiff-Respondent,

-against-

Jeffrey Brooks,
Defendant-Appellant.

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Garvey Schubert Barer, New York (Andrew J. Goodman of counsel), for appellant.

Levitt & Kaizer, New York (Dean M. Solomon of counsel), for respondent.

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Judgment, Supreme Court, New York County (Donna M. Mills, J.), entered November 3, 2011, awarding plaintiff the principal amount of $224,956.16, and bringing up for review an order, same court and Justice, entered October 31, 2011, which granted plaintiff's motion for summary judgment on his breach of contract claim, unanimously affirmed, with costs. Appeal from the order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff made a prima facie showing of his entitlement to judgment as a matter of law with evidence that defendant, who signed an agreement to be jointly and severally liable for his

brother's legal fees, failed to pay the outstanding legal fees to plaintiff. In opposition, defendant failed to raise a triable issue of fact. The motion court properly rejected defendant's claim that the agreement was procured under duress. Plaintiff's "threat" to cease representing defendant's brother in federal criminal proceedings unless he was paid was not wrongful (*see Fred Ehrlich, P.C. v Tullo*, 274 AD2d 303, 304 [1st Dept 2000]). Further, defendant himself was never precluded from exercising his free will (*see id.*).

The order of the Federal District Court, granting plaintiff's motion to compel defendant's brother to pay the outstanding attorney's fees and directing the entry of judgment in plaintiff's favor in the amount of $224,956.16, was prima facie proof of plaintiff's damages in this case. Defendant's brother acknowledged the amount of legal fees owing to plaintiff

and never challenged the reasonableness of the fees before the District Court. In opposition to plaintiff's prima facie showing, defendant failed to raise a triable issue of fact.

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

ENTERED: JANUARY 22, 2013

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Román, Clark, JJ.

9042 John Peters, Index 106570/08
Plaintiff-Appellant,

-against-

The New School,
Defendant-Respondent.

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Law Offices of Edmond C. Chakmakian, P.C., Hauppauge (Anne Marie Caradonna of counsel), for appellant.

Westermann, Sheehy, Keenan, Samaan & Aydelott, LLP, Uniondale (Peter S. Samaan of counsel), for respondent.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered June 27, 2011, which denied plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) cause of action, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff was injured when, while removing plywood sheets that were temporarily covering a hole in the floor, a wood beam that was used to support the plywood and upon which plaintiff was standing, cracked and caused him to fall through the hole. Plaintiff established, through his deposition testimony and the affidavit of his coworker, that defendant failed to provide any safety devices that would have prevented his fall, thereby entitling him to summary judgment (*see Bland v Manocherian*, 66

NY2d 452, 459 [1985]).

In opposition, defendant failed to raise a triable issue of fact as to whether plaintiff was a recalcitrant worker or the sole proximate cause of the accident (*see Eustaquio v 860 Cortlandt Holdings, Inc.*, 95 AD3d 548 [1st Dept 2012]). The project superintendent's affidavit was conclusory and nonspecific as to what safety devices were available, where they were kept, and whether plaintiff knew where they were kept. A general standing order to use safety devices does not raise a question of fact that a plaintiff knew that safety devices were available and unreasonably chose not to use them *(see Gallagher v New York Post*, 14 NY3d 83, 88-89 [2010]).

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

ENTERED: JANUARY 22, 2013

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Román, Clark, JJ.

9043 The Board of Managers of the 85 8th Avenue Condominium, Plaintiff-Respondent, Index 111902/00

-against-

Manhattan Realty LLC, et al., Defendants-Appellants,

Weiner-Mega LLC, et al., Defendants.

_____

Morrison Cohen LLP, New York (Y. David Scharf of counsel), for appellants.

Starr Associates LLP, New York (Andrea L. Roschelle of counsel), for respondent.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered July 21, 2011, which denied defendants Manhattan Realty LLC and Joel Weiner's motion for summary judgment and granted plaintiff's motion for summary judgment, unanimously modified, on the law, to deny plaintiff's motion and grant defendants' motion to the extent of dismissing plaintiff's claims for common charges allegedly owed by defendants (1) from 2004 onward, except for the amounts that defendants acknowledge are due, (2) for repair and maintenance of the lobby of the residential unit, (3) for repair of plumbing servicing the residential unit, and (4) for the costs and legal fees incurred in the instant action (without prejudice

to recovering them from defendants if plaintiff is ultimately the prevailing party), and otherwise affirmed, without costs.

The bylaws of the subject condominium, which consists of a residential unit (a cooperative), a garage unit, and a commercial unit, require a five-member board of managers. The garage and commercial units each have the right to designate one member and the residential unit has the right to designate three members. The bylaws also require annual elections and contain specific provisions for amendments.

At a meeting of the residential *cooperative* (not *condominium*) board held on January 28, 1992, a motion was successfully made to elect the same condominium board as the cooperative board. There is a dispute between the parties as to whether the boards were to be the same indefinitely or for a specified period of time. In either case, defendants argue that the election of the condominium board was in violation of the bylaws. Plaintiff has presented no evidence that the condominium's bylaws were amended to provide that its board of managers and the cooperative board would be the same in perpetuity nor has it presented any evidence that the condominium's board election was in accordance with the bylaws.

According to defendants, the garage and commercial units

have had no representation on the condominium board since approximately 1997. By contrast, the board president testified that through 2003, defendants' representative attended board meetings. It is undisputed that, as of January 21, 2010, all six of the members of the alleged condominium board were from the cooperative, and that at various points before May 28, 2010, defendants demanded that a condominium board be created pursuant to the bylaws, to no avail.

Defendants raised issues of fact as to whether the condominium board was properly constituted and thus, whether it had the authority to impose the charges at issue in this case (*see Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 540 [1990]). Accordingly, plaintiff is not entitled to summary judgment.

Defendants are entitled to summary judgment dismissing the complaint for the period 2004 onward, except for the amounts they concede are owed for charges prior to 2004, since it is undisputed that at that time defendants were no longer represented on the board and thus, the board did not have the authority to impose the charges (*see Levandusky*, 75 NY2d at 540). For the period prior to 2004, defendants are entitled to summary judgment dismissing plaintiff's claims for the categories of

common charges that are inconsistent with the governing documents. Specifically, the Declaration of Condominium states that the residential unit includes the lobby area; therefore, to the extent the condominium has been charged for repairs and maintenance of the cooperative's lobby, this is improper. Similarly, the Declaration states that plumbing servicing the residential unit is part of the residential unit; thus, the cost of repairing such plumbing is not a condominium common charge. Defendants are not entitled to summary judgment with respect to charges relating to the hallways and elevator since the Declaration contains conflicting provisions regarding which parts of the hallways and elevator are common elements.

Similarly, to the extent plaintiff has allocated the fees for the instant action to the condominium, this is not permitted by either the Declaration or the bylaws.

Defendants may be correct that plaintiff is not entitled to allocate 40% (as opposed to some lesser amount) of the managing agent's fee and 29% of the payroll to the condominium. However, they are not entitled to summary judgment dismissing the payroll and managing agent fee claims since there is evidence that the managing agent was responsible for managing all of the building, including the commercial unit and the garage unit, and that the

superintendent (part of the payroll fee) performed work in the condominium's common elements. Thus, there is an issue of fact as to what percentage of the fees is chargeable to defendants.

Defendants are not entitled to summary judgment limiting the garage's responsibility for heating costs to 4%. Although an amendment to the offering plan, which defendants concede must be read together with the bylaws, allocates 4% of the heating costs to the garage, the bylaws state that common expenses should be allocated according to the condominium units' proportionate interest in the common elements, which is 9.6% for the garage unit. Additionally, the bylaws require each condominium unit to pay its fair share of heating expenses.

Defendants are not entitled to summary judgment voiding plaintiff's decision to spend more than $10,000 to repair the cooperative's courtyard, which is also the garage's roof. Although the bylaws provide that "[n]o ... vote shall be binding without the consent of ... ninety ... percent of the Unit Owners if such vote purports to ... decide to expend more than $10,000," the next sentence states that "*Notwithstanding the foregoing*, the Board of Managers is authorized to operate the building as a first-class multiple dwelling ... Toward that end, the Board may expend any sums it deems necessary in connection with the

operation and maintenance of the Common Elements" (emphasis added). The courtyard is undisputedly a common element.

To be sure, the bylaws also prohibit the condominium board from making any determinations which adversely affect the garage and the commercial unit. If – as defendants contend – the courtyard renovation was unnecessarily lavish, to the sole benefit of the cooperative, this might be contrary to the bylaws. Again, however, this merely creates an issue of fact for trial; it does not entitle defendants to summary judgment.

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

ENTERED: JANUARY 22, 2013

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Román, Clark, JJ.

9044 The People of the State of New York, Ind. 5567/09
Respondent,

-against-

Hafeez Odofin,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Svetlana M. Kornfeind 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 (Renee A. White, J.), rendered on or about September 7, 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: JANUARY 22, 2013

CLERK

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

Friedman, J.P., Renwick, Manzanet-Daniels, Román, Clark, JJ.

9045 In re Wilfredo Arias, etc., Index 114111/10
Petitioner-Appellant,

-against-

Woody Pascal, etc., et al.,
Respondents-Respondents.

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Breier Deutschmeister Urban Popper Law Group PLLC, New York (Jason S. Deutschmeister of counsel), for appellant.

Gary R. Connor, New York (Christina S. Ossi of counsel), for respondents.

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Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered June 24, 2011, denying the petition to vacate respondents' decision dated September 7, 2010, which determined that petitioner landlord was not entitled to collect a washing machine surcharge from the tenant, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The court properly deferred to respondents' interpretation of Rent Stabilization Code (9 NYCRR) § 2522.9 and Operational Bulletin 2005-1, as their interpretation is rational (*see Matter of Marzec v DeBuono*, 95 NY2d 262, 266 [2000]). Both § 2522.9(b)(1) and the Bulletin, setting the permissible amount of the surcharge, contain language permitting only a prospective

surcharge where a previously installed washing machine "comes to the attention" of the landlord, and the landlord "consents" to its continued use. Respondents rationally interpreted this present-tense language to mean that § 2522.9(b)(1) does not apply where landlords had acquiesced to a tenant's use of a washing machine before the effective date of the regulation on December 20, 2000. Here, it is undisputed that petitioner had acquiesced to the use of a washing machine, without imposing a surcharge or taking any other action, before the effective date of the regulation, and continued to do so until after the issuance of the Bulletin in 2005. Accordingly, petitioner is not entitled to impose even a prospective surcharge.

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: JANUARY 22, 2013

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Román, Clark, JJ.

9047 Dragon Head LLC, Index 650192/12
Plaintiff-Appellant,

-against-

Steven Munro Elkman, et al.,
Defendants,

Deutsche Bank, Alex Brown, etc.,
Defendant-Respondent.

_____

Russ & Russ, P.C., Massapequa (Jay Edmond Russ of counsel), for appellant.

Murphy & McGonigle, P.C., New York (Theodore R. Snyder of counsel), for respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 14, 2012, which granted defendant Deutsche Bank, Alex Brown, a Division of Deutsche Bank Securities, Inc.'s motion to dismiss the complaint as against it, and denied plaintiff's cross motion to amend the complaint, unanimously affirmed, without costs.

Plaintiff's allegations against Deutsche Bank are not entitled to be deemed true, since they consist of bare legal conclusions and factual assertions that are flatly contradicted by the documentary evidence showing that Deutsche Bank was not a party to the written agreements at issue (*see Biondi v Beekman*

Hill House Apt. Corp., 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]). In support of its noncontractual causes of action, plaintiff does not sufficiently allege, nor do the evidentiary submissions show, that any relationship, contractual, fiduciary, or otherwise, existed between it and Deutsche Bank, or that Deutsche Bank possessed or exercised control over any of the property at issue (*see e.g. Roslyn Union Free School Dist. v Barkan*, 16 NY3d 643, 653 [2011]; *Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006]; *Bradkin v Leverton*, 26 NY2d 192, 199 n 4 [1970]; *Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd* 19 NY3d 511 [2012]; *Kopelowitz & Co., Inc. v Mann*, 83 AD3d 793, 798 [2nd Dept 2011]).

Plaintiff failed to submit a proposed amended pleading with his motion for leave to amend the complaint (*see* CPLR 3025[b]).

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

ENTERED: JANUARY 22, 2013

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Román, Clark, JJ.

9048-
9048A &
M-5946

Index 105494/06

National Casualty Company, etc.,
Plaintiff-Respondent,

-against-

American Home Assurance Company,
Defendant,

Chubb Indemnity Insurance Company,
Defendant-Appellant.

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

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Dawn M. Warren of counsel), for respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered on or about March 30, 2012, which, to the extent appealed from, denied, in part, defendant Chubb Indemnity Insurance Company's motion for summary judgment dismissing the complaint, granted, in part, plaintiff's cross motion for summary judgment, and declared that Chubb is required, pursuant to the terms of a 1993-1994 insurance policy, to indemnify plaintiff National Casualty Company for its losses sustained in an underlying lead paint action, unanimously affirmed, without costs. Order, same court and Justice, entered on or about June 1, 2011, which, to the extent appealed from as limited by the briefs, granted so

much of plaintiff's motion as sought to preclude Chubb from presenting any evidence at trial, unanimously reversed, on the law, without costs and the motion denied.

The motion court correctly held Chubb's disclaimer to be untimely (*First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 66 [2003]; *George Campbell Painting v National Union Fire Ins. Co. of Pittsburgh, PA*, 92 AD3d 104, 106 [1st Dept 2012]). The record indicates that Chubb had all the information it needed to deny coverage based on late notice shortly after it received the claim. Chubb has presented no satisfactory explanation for the 43-day delay from the receipt of the claim to the issuance of the letter declining coverage (*id.*).

The motion court's preclusion order was an improvident exercise of its discretion (*Castor Petroleum, Ltd. v Petroterminal de Panama, S.A.*, 90 AD3d 424, 424 [1st Dept 2011]). The court failed to address the merits of the motion, and there was no finding of willful, contumacious, or bad faith conduct on Chubb's part (*see Armstrong v B.R. Fries & Assoc., Inc.*, 95 AD3d 697, 698 [1st Dept 2012]). In any event, the record reveals no

basis for sanctioning defendant.

M-5946 - National Casualty Company v American Home Assurance Company, et al.,

Motion seeking stay denied.

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

ENTERED: JANUARY 22, 2013

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Román, Clark, JJ.

9049 Lorene Richardson, Index 308880/09
Plaintiff-Appellant,

-against-

S.I.K. Associates, L.P., et al.,
Defendants-Respondents.

_____

Michael Gunzburg, New York, for appellant.

Thomas D. Hughes, New York (Richard C. Rubinstein of counsel), for respondents.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered November 28, 2011, which denied plaintiff's motion for partial summary judgment on the issue of liability, and granted the cross motion of defendant for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff slipped and fell on a strip of water in the service lobby, near the back exit of the building where she worked, during an ongoing snowstorm. Defendants demonstrated that the snowstorm started prior to, and continued during plaintiff's accident. Thus, defendants were not required to provide a constant, ongoing remedy when an alleged slippery condition is said to be caused by moisture tracked indoors during a storm (*see Hussein v New York City Tr. Auth.*, 266 AD2d 146 [1st

Dept 1999]; *Kovelsky v City Univ. of N.Y.*, 221 AD2d 234 [1st Dept 1995]).

Defendants demonstrated that they had no notice of the alleged water accumulation in the service lobby, as this accumulation could have been tracked in by pedestrian traffic, or deliveries made through this service entrance (*see Thomas v Boston Props.*, 76 AD3d 460 [1st Dept 2010]). Nor did defendants have constructive notice due to any ongoing and recurring condition which was routinely left unaddressed by the landlord, since plaintiff saw no water prior to her fall (*see Rodriguez v 520 Audubon Assoc.*, 71 AD3d 417 [1st Dept 2010]). Moreover, neither the eyewitness nor the superintendent testified that there was any ice coming into the service area (*see Roman v Met-Paca II Assoc., L.P.*, 85 AD3d 509 [1st Dept 2011]).

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

ENTERED: JANUARY 22, 2013

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Román, Clark, JJ.

9050 The People of the State of New York, Ind. 1702/11
Respondent,

-against-

David Boutron,
Defendant-Appellant.

_____

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

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Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered on or about May 25, 2011, 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: JANUARY 22, 2013

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Román, Clark, JJ.

9051 Gregory Berry, Index 652274/11
Plaintiff-Appellant,

-against-

Kasowitz, Benson, Torres
& Friedman, LLP, et al.,
Defendants-Respondents.

_____

Gregory Berry, New York, for appellant.

Kasowitz, Benson, Torres & Friedman, LLP, New York (Joseph A. Piesco, Jr. of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about January 13, 2012, which granted defendants' motion to dismiss the complaint pursuant to CPLR 3211, unanimously affirmed, without costs.

Plaintiff's claims are barred by the release and were properly dismissed.

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

ENTERED: JANUARY 22, 2013

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Román, Clark, JJ.

9052N- Index 306122/09
9053N Zoraida Martinez,
Plaintiff-Appellant,

-against-

Charles Nguyen, D.P.M., et al.,
Defendants,

Union Community Health
Center, Inc., et al.,
Defendants-Respondents.

_____

Levine & Grossman, Mineola (Steven Sachs of counsel), for appellant.

Gabarini & Scher, P.C., New York (Santosh N. Chitalia of counsel), for respondents.

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Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered September 29, 2011, which, in this medical malpractice action, granted defendants-respondents' motion to vacate the default judgment entered against defendant Charles Nguyen, and granted their motion to dismiss the claims and cross claims against Nguyen for lack of personal jurisdiction, unanimously affirmed, without costs. Order, same court (Stanley Green, J.), entered on or about March 23, 2012, which denied plaintiff's motion for a default judgment against Nguyen, unanimously affirmed, without costs.

The court (Aarons, J.) properly vacated the default judgment against Nguyen for lack of personal jurisdiction (*see* CPLR 5015 [a] [4]). The law of the case doctrine does not preclude vacatur in this case, as a court never found that service upon Nguyen was properly effectuated (*cf. Morrison Cohen, LLP v Fink*, 92 AD3d 514, 515 [1st Dept 2012], *lv denied* 19 NY3d 1017 [2012]).

Defendants have standing to seek vacatur, as they are "interested persons" within the meaning of CPLR 5015 (a). Indeed, defendants, as Nguyen's former employers, could be held vicariously liable for Nguyen's alleged medical malpractice. Accordingly, a "legitimate interest" of defendants will be served by obtaining vacatur (*Oppenheimer v Westcott*, 47 NY2d 595, 602 [1979] [internal quotation marks omitted]; *see also Nachman v Nachman*, 274 AD2d 313, 315 [1st Dept 2000]).

Defendants are not required to establish a reasonable excuse or a meritorious defense in order to obtain vacatur on the ground of lack of personal jurisdiction (*see Deutsche Bank Natl. Trust Co. v Pestano*, 71 AD3d 1074, 1075 [2d Dept 2010]).

The court (Green, J.) properly denied plaintiff's motion for a default judgment against Nguyen, as plaintiff served Nguyen well beyond the 120-day period set forth in CPLR 306-b. Moreover, plaintiff never moved for an extension of time to serve

Nguyen. Rather, plaintiff improperly asked for that relief for the first time in her reply papers (*see Singh v Empire Intl., Ltd.*, 95 AD3d 793 [1st Dept 2012]).

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: JANUARY 22, 2013

CLERK

Gonzalez, P.J., Friedman, Renwick, Manzanet-Daniels, Román, JJ.

7860 The People of the State of New York, Ind. 4295/05
Respondent,

-against-

David Green,
Defendant-Appellant.

_____

Fischetti & Malgieri, New York (Eric Franz of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered February 10, 2011, affirmed.

Opinion by Friedman, J. All concur except Renwick and Manzanet-Daniels, JJ. who dissent in part in an Opinion by Manzanet-Daniels, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
David Friedman
Dianne T. Renwick
Sallie Manzanet-Daniels
Nelson S. Román, JJ.

7860
Ind. 4295/05

_____x

The People of the State of New York,
Respondent,

-against-

David Green,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of the Supreme Court, New York County (Lewis Bart Stone, J.), rendered February 10, 2011, convicting him, after a jury trial, of reckless endangerment in the first degree, and sentencing him.

Fischetti & Malgieri, New York (Eric Franz and Ronald P. Fischetti of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (David C. Bornstein and Eleanor J. Ostrow of counsel), for respondent.

FRIEDMAN, J.

This appeal from a conviction for reckless endangerment in the first degree presents the recurring issue of what constitutes "circumstances evincing a depraved indifference to human life." We find that the jury's determination that this element of the offense was proven comports with the weight of the evidence.

Defendant admits that, during the morning rush hour of August 15, 2005, he threw bottles and plates from a 26th-floor hotel balcony overlooking Seventh Avenue, in the vicinity of Penn Station. Admittedly, defendant — who was then 24 years old — engaged in this callous and self-evidently dangerous behavior for no purpose other than to amuse himself and his friends. Although defendant claims that he was intoxicated at the time, videotapes of the incident show no evidence of significant impairment of his physical coordination; he successfully executed two cartwheels while holding a beer bottle, and sprinted toward the balcony's ledge, with no hint of staggering, while steadily holding a glass in his hand. As to his mental faculties, defendant admits that, in spite of his drinking, he had enough of his wits about him to suspend his antics when he saw police on the street below and on the roof of the building across Seventh Avenue, only to resume tossing objects off the balcony when he saw that the police had left the area. Moreover, at trial, defendant testified that he

could still "remember everything [he] did" that morning.

Based on uncontroverted evidence of the conduct described above, a jury convicted defendant of reckless endangerment in the first degree, a crime of which a person is guilty "when, under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person" (Penal Law § 120.25). On appeal, defendant raises no objection to the instructions that the jury received, nor does he claim that any of the evidence presented against him was irrelevant or unfairly prejudicial. Further, he admits (as he did at trial) that, by throwing bottles and plates from a height of 26 stories above a public boulevard, he "recklessly engage[d] in conduct which create[d] a grave risk of death to another person," thereby satisfying two of the three elements of first-degree reckless endangerment. Defendant argues, however, that the jury's verdict was against the weight of the evidence to the extent he was found to have acted with "a depraved indifference to human life." Therefore, contends defendant, his conviction should be reduced to reckless endangerment in the second degree (Penal Law § 120.20), a misdemeanor having no depraved indifference element.[1] The dissent would accede to this

[1]Because defendant made only a pro forma, unelaborated motion for a trial order of dismissal, he failed to preserve any

request, opining that defendant's conduct, while it was reckless and created a grave risk of death to others, "reflected [only] stupidity and drunken thoughtlessness," not depraved indifference to human life. We disagree.

At the outset, in conducting a weight-of-the-evidence review, while we must determine whether the jury "'failed to give the evidence the weight it should be accorded'" (*People v Romero*, 7 NY3d 633, 643 [2006], quoting *People v Bleakley*, 69 NY2d 490, 495 [1987]), still we should not "'substitute [our]selves for the jury,'" whose determinations are entitled to "'[g]reat deference'" based on its "'opportunity to view the witnesses, hear the testimony and observe demeanor'" (*Romero*, 7 NY3d at 644, quoting *Bleakley*, 69 NY2d at 495). Here, given the great deference owed to the jury's determinations, it cannot be said that the jury failed to give the evidence the weight it should be accorded in finding that defendant acted with depraved indifference to human life.

What sets depraved indifference apart from mere recklessness is that the former involves "an utter disregard for the value of human life — a willingness to act *not because one intends harm*,

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challenge to the legal sufficiency of the evidence. Accordingly, on appeal, he invokes only this Court's power of weight-of-the-evidence review (CPL 470.15[5]).

but because *one simply doesn't care* whether grievous harm results or not" (*People v Suarez*, 6 NY3d 202, 214 [2005] [emphasis added]). "In other words, a person who is depravedly indifferent is not just willing to take a grossly unreasonable risk to human life — that person does not care how the risk turns out" (*People v Lewie*, 17 NY3d 348, 359 [2011]). It is in this abject indifference to the possible consequences of the conduct at issue that the "wickedness, evil or inhumanity" (*Suarez*, 6 NY3d at 214) of the depravedly indifferent actor lies. Moreover, "[t]he mens rea of depraved indifference to human life can, like any other mens rea, be proved by circumstantial evidence" (*People v Feingold*, 7 NY3d 288, 296 [2006]). Thus, in this case, the jury's finding that defendant acted with depraved indifference is not negated in any way by his apparent lack of a specific intention to harm anyone when he threw objects from the 26th-floor balcony. Rather, it is precisely because the jury could reasonably determine that defendant was aware of the risk he was creating, and did not care whether or not that risk came to fruition, that the finding that he acted with depraved indifference should be upheld.

The grave risk of death created by defendant's heinous conduct was glaringly obvious. Plainly, defendant could not have failed to appreciate what was likely to happen if a bottle or

plate thrown from the height of 26 stories hit a pedestrian or the windshield of a motor vehicle that someone was driving. Nevertheless, defendant asks us to overturn the jury's depraved indifference finding based on his alleged intoxication at the time of the incident and on his self-serving testimony that it simply "[d]idn't cross [his] mind" that he was endangering the lives of the people below. The jury, however, had every right to discredit any implication by defendant that he did not contemplate that people on Seventh Avenue could be harmed by his conduct, even if he was somewhat under the influence of alcohol at the time. After all, by his own admission, defendant was sufficiently rational and self-aware to stop throwing things from the balcony when he saw police in the area, apparently looking for the source of the objects that were crashing onto the street below. And, given the physical coordination with which he performed cartwheels and other movements (as shown on the videotapes of the incident), and his professed clear recollection of the events of that morning, the notion that defendant was so profoundly inebriated as to be unaware of the grave danger obviously created by his actions can only be described as risible (*see People v Wells*, 53 AD3d 181, 191 [1st Dept 2008], *lv denied* 11 NY3d 858 [2008] [in affirming convictions for depraved-indifference murder and depraved-indifference assault, this Court

noted that, although the defendant was "extremely intoxicated," he "was not so impaired that he was unaware of what he had done"]; *cf. People v Valencia*, 14 NY3d 927, 928 [2010] [Graffeo, J., concurring] [the evidence was insufficient to support a conviction for depraved indifference assault where the factfinder determined that the defendant, who caused an accident while driving with a blood alcohol level about three times the legal limit, "was so drunk that he was 'oblivious' to the danger he created"]).

At oral argument, defendant placed considerable reliance on *People v Bussey* (19 NY3d 231 [2012]), a case decided by the Court of Appeals after the briefs for this appeal were filed. In *Bussey*, the Court of Appeals reduced a conviction for depraved-indifference murder to second-degree manslaughter (which has no depraved indifference element) where the victim was brutally beaten by the defendant and two other men for at least 10 minutes, after which the perpetrators rolled up the severely injured victim in a blanket, drove him to another city 18 miles away, and left him in a creek bed, where he was later found dead (*see* 19 NY3d at 234-235). Defendant argues that, because the conduct of the *Bussey* defendant was even more reprehensible than his own behavior in this case, the determination that depraved indifference was absent in *Bussey* necessarily means that depraved

indifference was also absent here. Defendant is mistaken.

In *Bussey*, the Court of Appeals determined that the finding of depraved indifference could not stand, not because the defendant's conduct was insufficiently "depraved," but because that conduct did not evince "indifference" toward the victim — that is, "the evidence tend[ed] to support the conclusion that [the defendant] intended to harm the victim" (19 NY3d at 236). The intent to harm the victim (even if it did not rise to an actual intent to kill) was inconsistent with a finding of depraved indifference because, as the Court of Appeals explained in an earlier case:

> "Depraved indifference murder is not a lesser degree of intentional murder. Moreover, someone who intends to cause serious physical injury does not commit depraved indifference murder because the intended victim dies. . . . [A] defendant who intends to injure or kill a particular person cannot generally be said to be 'indifferent' — depravedly or otherwise — to the fate of that person" (*Suarez*, 6 NY3d at 211]).

In the present case, although defendant was plainly aware of the danger to which he was exposing people on the street below, there is no evidence that he specifically intended to harm anyone. Indeed, throughout this prosecution, defendant has understandably taken pains to emphasize that he never intended to harm anyone. Accordingly, here, unlike in *Bussey*, the jury's finding that defendant acted with depraved indifference to the

risk of death he was creating was fully supported by the evidence.

Finally, we reject defendant's argument that his suppression motion should have been granted. The warrantless entry into his hotel room was justified by exigent circumstances (*see People v McBride*, 14 NY3d 440, 445-446 [2010], *cert denied* __ US __, 131 S Ct 327 [2010]). A visibly upset woman informed the police that she had just been raped and that the foreign visitor who had raped her, and whom she knew only by his first name, was staying in the hotel room. The police had probable cause to arrest defendant for a very serious charge, and they had reason to believe that he was still in the hotel room.[2] Regardless of whether defendant was aware that he was about to be arrested, there was a danger that he might choose to flee (*see People v Williams*, 181 AD2d 474, 476 [1992], *lv denied* 79 NY2d 1055 [1992]), or might simply check out of the hotel and return to his native country, rendering him nearly impossible to locate given the lack of pedigree information. Similarly, there was reason to believe that a drug used in commission of the alleged rape was in the room, and that defendant might dispose of it either to destroy evidence or for some other reason.

[2]At trial, defendant was acquitted of the rape charge.

Additionally, the officers entered the hotel room peaceably, using the manager's key, and the record does not establish that it would have been practical for the police to proceed by way of a warrant, by telephone or otherwise (*see United States v Malik*, 642 F Supp 1009, 1012 [SD NY 1986]). After the police entered, defendant gave his written consent to a search of the room, which yielded evidence relating to the reckless endangerment charge of which defendant was ultimately convicted. The People established the voluntariness of that consent by clear and convincing evidence (*see generally People v Gonzalez*, 39 NY2d 122, 128-131 [1976]), including evidence that the police informed defendant that he had the right to refuse to consent to a search. The record also supports the hearing court's finding that the consensual search was attenuated from any illegality in the police entry.

Accordingly, the judgment of the Supreme Court, New York County (Lewis Bart Stone, J.), rendered February 10, 2011, convicting defendant, after a jury trial, of reckless endangerment in the first degree, and sentencing him to a term of one year, should be affirmed.

All concur except Renwick and Manzanet-Daniels, JJ. who dissent in part in an Opinion by Manzanet-Daniels, J.

MANZANET-DANIELS, J. (dissenting in part)

I dissent, in part, because I believe defendant's conviction of first degree, rather than second-degree reckless endangerment was against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). While defendant's acts of throwing beer bottles and a plate off the balcony of his 26th-floor hotel room were reckless, insofar as they created a grave risk of death to pedestrians and occupants of the vehicles in the street below, the state of mind required for depraved indifference requires "utter depravity, uncommon brutality and inhuman cruelty" (*People v Suarez*, 6 NY3d 202, 216 [2005]). As the Court of Appeals explained: "Reflecting wickedness, evil or inhumanity, as manifested by brutal, heinous and despicable acts, depraved indifference is embodied in conduct that is so wanton, so deficient in a moral sense of concern, so devoid of regard of the life or lives of others, and so blameworthy as to render the actor as culpable as one whose conscious objective is to kill" (*id.* at 214 [internal quotation marks omitted]). Defendant's

conduct reflected stupidity and drunken thoughtlessness, rather than "wickedness, evil or inhumanity," and the throwing of bottles and plates falls short of the "brutal, heinous and despicable acts" required to establish depraved indifference.

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

ENTERED: JANUARY 22, 2013

CLERK