Corrected Order - October 31, 2013

Mazzarelli, J.P., Sweeny, Freedman, Feinman, Gische, JJ.

10122 In re Kelley S. Boyd, Index 110437/11
Petitioner-Appellant,

-against-

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

C-UPTOWN Realty, et al.,
Respondents.

Kelley S. Boyd, appellant pro se.

Gary R. Connor, New York (Jack Kuttner of counsel), for New York State Division of Housing and Community Renewal, respondent.

Rappaport, Hertz, Cherson & Rosenthal, P.C., Forest Hills (David I. Paul of counsel), for 232/242 Realty Co., LLC., respondent.

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered May 18, 2012, insofar as appealed from as limited by the briefs, denying the petition and dismissing the proceeding brought pursuant to CPLR article 78 to annul the determination of respondent New York State Division of Housing and Community Renewal (DHCR), issued July 19, 2011, which denied petitioner's petition for administrative review (PAR) of the denial of her rent overcharge complaint, reversed, on the law, without costs, the judgment vacated, and the matter remanded to DHCR for further proceedings consistent herewith.

Although petitioner filed her overcharge complaint more than

four years after the building owner registered the monthly rent, she contends that DHCR should not have accepted $1,750 as the registered monthly rent on the base date, April 7, 2005, because there are substantial indicia of fraud.

The owner increased the registered monthly rent from $572 in July 2004, when a long time tenant vacated the apartment, to $1750 in October 2004. More than 90% of the increase reflects an adjustment for "individual apartment improvements" (IAIs) under the Rent Stabilization Law and Code. To justify that adjustment, the owner would have had to spend about $39,000 to renovate the apartment in 2004. Petitioner, who moved into the apartment in 2007, is currently paying rent of over $2000 a month.

In a letter to DHCR, petitioner set forth a specific and detailed description of the apartment in 2007, alleging that based on its condition when she moved in, the owner could not have spent $39,000 for improvements to the building, which was constructed in 1932. Among other things, petitioner stated that the hardwood floors, bathtub, doors, and fixtures are original to the apartment, and that the kitchen had been updated with low-quality appliances which she estimated cost less than $1000. She described the kitchen as having "very inexpensive Home Depot cabinets," slat floors, and a used or recycled sink that did not fit in the cutout in the wall. The owner has never submitted any evidence rebutting petitioner's claim that the IAIs were minimal

and cost far less than claimed.

Under the standard set forth in *Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.* (15 NY3d 358 [2010]), petitioner made a sufficient showing of fraud to require DHCR to investigate the legality of the base date rent (*see also Bogatin v Windmere Owners LLC,* 98 AD3d 896 [1st Dept 2012]). Although the "look-back" for an apartment's rental history is ordinarily limited to the four-year period preceding the date that the petitioner files the complaint (*see Matter of Thornton v Baron*, 5 NY3d 175, 180 [2005]), where fraud is alleged and there is "substantial indicia of fraud on the record," DHCR is obliged to investigate whether the base date rate was legal and "act[s] arbitrarily and capriciously in failing to meet that obligation" (*Grimm*, 15 NY3d at 366).

Thus, we find that DHCR's disparate treatment of the parties' claims was arbitrary. While the agency made no attempt to evaluate the legitimacy of petitioner's claims despite their consistency and degree of detail, DHCR credited the owner's implicit claim that it spent $39,000 to renovate the apartment simply because "it would not be difficult for anyone with any experience in this industry to believe it could have taken $39,000 in IAIs to update the appearance and equipment in an apartment which had not changed hands for thirty-two years." This justification for the agency's determination is irrational. Finding that the owner "could have" spent $39,000 in IAIs, where the owner never submitted any evidence controverting petitioner's claims is not equivalent to finding that the owner actually made improvements costing that much. Accordingly, this matter should be remanded to DHCR to give the parties the opportunity to present evidence in connection with the legality of the base rate rent.

Under the circumstances presented, DHCR acted within its discretion by resolving the PAR on the merits even though petitioner filed it outside the 35-day statutory time frame (9 NYCRR 2529.2), and, contrary to the owner's contention, the record does provide a basis to amend the caption.

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

GISCHE, J. (dissenting)

I respectfully dissent. I do not agree with the majority, that petitioner presented sufficient evidence of a fraudulent increase in the legal registered rent for the subject apartment, justifying the examination of the apartment's rental history beyond the statutory four-year look-back period (*see* Rent Stabilization Law of 1969 [Administrative Code of City of NY] § 26-516[a][2].

Petitioner, who moved into the subject apartment in March 2007 pursuant to a one year lease at a monthly rent of $2,000, filed a rent overcharge claim with DHCR on April 7, 2009, alleging that the owner had obtained a fraudulent increase in the legal registered rent for the apartment from $571.70 per month in July 2004 to $1,750 per month in October 2004, when a new tenant took occupancy. This allegation of fraud was supported only by a letter containing petitioner's personal observations of the improvements to the subject apartment (IAIs) and her comparison to unidentified fixtures at a big box home improvement store. She estimated that, based upon her research and calculations, the most the improvements could have cost was $5,000. Thus, she maintains that allowing for permissible increases, the legal rent for the first vacancy tenant in October 2004 should have been

$974, not $1,750. Petitioner provides no real evidence for her conclusions on value, nor does she account for labor costs or assert that she has any relevant experience qualifying her to opine on the value of the work done. Thus, whether the letter adequately details her complaints about the nature or condition of the IAIs she admits were made to the subject apartment is of no moment in concluding their value.

While acknowledging that the "look back" period for her overcharge complaint was only four years from the filing date, petitioner argues that DHCR should nonetheless have investigated the basis for the IAI increase claimed by the owner before the four year period because of the poor quality of the improvements.

After initially issuing an erroneous order dated April 15, 2010, dismissing petitioner's rent overcharge complaint on the basis that the subject apartment was not rent stabilized, DHCR, on its own initiative, reopened the proceeding after the then recent Court of Appeals decision in *Roberts v Tishman-Speyer Props., L.P.* (13 NY3d 270 [2009]), and accepted further submissions by the parties.

In its superseding order dated October 4, 2010, DHCR determined that the subject apartment was, in fact, rent

stabilized because the building was receiving J-51 benefits (*see Roberts*, 13 NY3d at 279-286). However, using the base date of April 7, 2005, which was four years prior to the filing date of petitioner's rent overcharge complaint, at which time the lease rent was $1,750, DHCR determined that there had been no rent overcharge. Petitioner filed a PAR which was denied by DHCR on July 19, 2011 on the basis that there was no reason to deviate from the four-year look back rule, or put the owner to its proof as to the IAIs made over four years before the overcharge complaint was filed. The court below upheld the agency's determination and dismissed the petition.

In general, no determination of an overcharge and no calculation of an award of the amount of an overcharge may be based upon an overcharge having occurred more than four years preceding the filing of an overcharge complaint ([Rent Stabilization Law of 1969 Administrative Code of City of NY] § 26-516[a]). In order to effectuate the purpose of the four-year limitation period, the legal regulated rent is set at the base date, which is four years prior to the filing of the overcharge complaint, plus any subsequent lawful increases ([Rent Stabilization Code] 9 NYCRR 2520.6[e], [f][1]; 2526.1[a][3][i]). The Court of Appeals culled out a common-law exception to the

four-year look back period where the rent was set by the landlord as part of a fraudulent scheme. Only where there is a "colorable" claim of fraud may the rental history outside the four-year period be examined (*see Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.,* 15 NY3d 358, 364 [2010]; *Thornton v Baron,* 5 NY3d 175, 180 [2005]). A colorable claim of fraud requires that the tenant present something more than a mere allegation of fraud. It requires some evidence that the owner engaged in a fraudulent act or scheme more than four years prior to the tenant's filing of the rent overcharge claim, justifying the agency's examination of the entire rent history (*Matter of Grimm,* 15 NY3d at 367).

The fact that there has been a sizeable increase in the rent for the subject apartment prior to the look back period does not, alone, support or establish that the tenant has a colorable claim of fraud. This is true even where, as here, the bump up in rent was based upon the installation of improvements to an apartment which did not require prior DHCR approval (*id.*). Significantly, the owner complied with all of the rent registration requirements. Accordingly, the information on which petitioner's overcharge claim is based was known to her when she moved into the apartment in 2007, at which time she was within the four-year

period permitting a challenge to the rent without having to show a fraudulent predicate.

Petitioner's subjective belief that the IAIs could not have cost more than $5,000 does not satisfy her initial burden of showing that the fraud exception to the four-year statute of limitations should be applied, requiring DHCR to review a rent charged more than four years before her overcharge complaint (*Thornton v Baron*, 5 NY3d at 180). A conclusory claim, without more, is insufficient for the agency to disregard the four-year look back period established in the Rent Stabilization Law, as codified in the Rent Stabilization Code, requiring that an owner retain records relating to rents for housing accommodations for four years prior to the date of the most recent registration (CPLR §213-a; Rent Stabilization Law of 1969 [Administrative Code of City of NY] §26-516[a][2]; Rent Stabilization Code [9 NYCRR] §2526.1[2][ii]). Thus, DHCR's decision to employ the four-year look back rule rather than the fraud exception in determining the overcharge complaint filed by petitioner had a rational basis in the record and was not arbitrary and capricious or affected by an error of law (*see I.G. Second Generation Partner, L.P. v New York State Div. Of Housing and Community Renewal*, 284 AD2d 149 [1st Dept 2001] *lv denied* 98 NY2d 607 [2002]). The majority's

conclusions that petitioner's letter triggered an inquiry eviscerates the four year statutory rule whenever a tenant alleges fraud, even without any particularity. I do not believe that *Grimm* has such wide ranging implications.

Additionally, contrary to petitioner's argument, it was not arbitrary or capricious for DHCR to draw upon its own expertise and resources in concluding that $39,000 was not an inordinate expenditure to renovate an apartment that had became vacant for the first time in 32 years.

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

ENTERED: OCTOBER 29, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Freedman, Clark, JJ.

10740 In re Atlantic Outdoor Advertising, Inc., Petitioner-Appellant, Index 103078/12

-against-

Meenakshi Srinivasan, etc., et al., Respondents-Respondents.

Rothkrug Rothkrug & Spector, LLP, Great Neck (Simon H. Rothkrug of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Peter H. Moulton, J.), entered December 7, 2012, denying the petition to annul the determination of respondent Board of Standards and Appeals of the City of New York (BSA), dated June 5, 2012, which denied petitioner's appeal of a determination of respondent Department of Buildings finding that the subject rooftop sign was not an "advertising sign," and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

BSA's determination that the rooftop sign at issue qualified as an accessory business sign rather than as an "advertising sign" under Zoning Resolution § 12-10 was not arbitrary and

capricious (*cf. Matter of Mazza & Avena v Chin*, 261 AD2d 546 [2d Dept 1999]). The court properly deferred to BSA's fact-based analysis as to whether the accessory use of the sign was clearly incidental to and customarily found in connection with the principal use of the property (*see Matter of New York Botanical Garden v Board of Stds. & Appeals of City of N.Y.*, 91 NY2d 413 [1998]; *see also Matter of Chelsea Bus. & Prop. Owners' Assn., LLC v City of New York*, 107 AD3d 414 [1st Dept 2013]).

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

ENTERED: OCTOBER 29, 2013

CLERK

Tom, J.P., Andrias, Saxe, Freedman, Richter, JJ.

10874 The People of the State of New York, Ind. 2372/08
Respondent,

-against-

Eulogio Ocasio,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Nancy D. Killian of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Nicholas J. Iacovetta, J.), rendered February 15, 2011, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to 18 years to life, and otherwise affirmed.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters outside the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Although there was a colloquy at which counsel conceded that the court's decision not to charge justification was correct, the unexpanded record does

not fully explain counsel's strategic decisions. Accordingly, since defendant has not made a CPL 440.10 motion, the merits of his claim may not be addressed on appeal.

In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Defendant faults his trial counsel for failing to request a justification charge, and for allegedly presenting no defense at all. However, as the court itself observed, defendant was not entitled to a justification charge. Defendant shot an unarmed man, and there was no evidence to support a claim that defendant reasonably believed that the victim was about to use deadly physical force (*see generally People v Goetz*, 68 NY2d 96 [1986]). A justification defense would have asked the jury to speculate as to an alternative set of facts not supported by the evidence. Accordingly, it was reasonable for counsel to refrain from asking for that charge, as an attorney cannot be deemed ineffective for failing to pursue a course of action with little or no chance of success (*see People v Stultz*, 2 NY3d 277, 287 [2004]).

Furthermore, the strategy that counsel did pursue was objectively reasonable under the circumstances of the case. Although "[c]ounsel may not be expected to create a defense when it does not exist" (*People v DeFreitas*, 213 AD2d 96, 101 [1995], *lv denied* 86 NY2d 872 [1995]), here defendant's attorney did present a defense, which contested the element of intent and also employed a jury nullification strategy (*see People v Zayas*, 89 AD3d 610, 611 [1st Dept 2011], *lv denied* 18 NY3d 964 [2012]; *see also Anderson v Calderon*, 232 F3d 1053, 1087, 1089 [9th Cir 2000], *cert denied* 534 US 1036 [2001]) that appealed to sympathy for defendant and prejudice against the victim, who had allegedly bullied defendant in the past. In effect, counsel was asking the jury to apply a theory of justification based on general considerations of fairness and morality. Counsel may have reasonably concluded that even if he could have persuaded the court to instruct the jury on justification despite its stated inclination to the contrary, the language of the charge might have undermined counsel's strategy by focusing the jury on the legal requirements for the use of deadly physical force (*see People v Pollard*, 78 AD3d 618 [1st Dept 2010], *lv denied* 17 NY3d 799 [2011]).

In any event, regardless of whether counsel should have requested a justification charge, defendant has not shown a reasonable probability that the request would have been granted or that, if granted, it would have affected the outcome.

In view of defendant's age and declining health, we find the sentence excessive to the extent indicated.

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

ENTERED: OCTOBER 29, 2013

CLERK

Tom, J.P., Andrias, Saxe, Freedman, Richter, JJ.

10875 Linda Stone, Index 150027/10
Plaintiff-Respondent,

-against-

Cabana East Associates, L.P., et al.,
Defendants-Appellants.

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White & McSpedon, P.C., New York (Joseph W. Sands of counsel), for appellant.

Thomas Torto, New York (Jason R. Levine of counsel), for respondent.

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Order, Supreme Court, New York County (Judith J. Gische, J.), entered on or about October 2, 2012, which denied defendant's motion for summary judgment, unanimously affirmed, without costs.

In finding that defendants failed to establish their entitlement to summary judgment, the court properly determined that the open facade area of defendants' restaurant, used as a means of entrance and exit, was a door within the meaning of New York City Administrative Code § 27-371(h), and that the step from the inside of the restaurant through the facade to the sidewalk, which exceeded 7½ inches, violated the Code and was some evidence of negligence (*see Sweeney v Bruckner Plaza Assoc.*, 57 AD3d 347, 348 [1st Dept 2008], *appeal dismissed* 12 NY3d 832 [2009]),

warranting denial of defendant's motion for summary judgment. Section 27-371(h) does not apply only to "required" exits, as defendant's expert opined, or to exits regularly used as exits, as defendants argue, but to "all" exits. It is uncontested that the facade area was used as an entrance/exit on the day of plaintiff's accident, and that the step exceeded the maximum height expressed in that section, 7½ inches. Nor is this conclusion altered by Administrative Code § 27-361, which requires that exits be clearly visible and "unobstructed at all times." Although the facade area of the restaurant was not always open, this does not mean that it was "obstructed," but simply closed. The intent of § 27-361 is clearly that an exit, when used as an exit, must be unobstructed. Moreover, even if an exit is found to be obstructed, § 27-361 does not mean that it is no longer an exit; it means only that the owner is in violation of the mandate to keep the exit unobstructed.

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

ENTERED: OCTOBER 29, 2013

CLERK

Tom, J.P., Andrias, Saxe, Freedman, Richter, JJ.

10876 In re Khadijah Destiny H.,

A Dependent Child Under The Age
of Eighteen Years, etc.,

Carmella Maria R.,
Respondent-Appellant,

New Alternatives for Children, Inc.,
Petitioner-Respondent.

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Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

Law Offices of James M. Abramson, PLLC, New York (Dawn M. Orsatti of counsel), for respondent.

Larry S. Bachner, Jamaica, attorney for the child.

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Order, Family Court, Bronx County (Monica Drinane, J.), entered on or about July 29, 2011, which, insofar as appealed from as limited by the briefs, found that respondent mother was presently and for the foreseeable future unable to care for the subject child by reason of mental retardation, unanimously affirmed, without costs.

Petitioner met its burden of proving by clear and convincing evidence that respondent suffers from mental retardation within the meaning of Social Services Law § 384-b(4)(c) and (6)(b)

(*Matter of Erica D. [Maria D.]*, 80 AD3d 423 [1st Dept 2011], *lv denied* 16 NY3d 708 [2011]). Such evidence included, inter alia, respondent's IQ scores and the reports and testimony of two court-appointed psychologists, who concluded that respondent's deficits in academic skills and self-direction rendered her unable to provide proper care for the child (*see Matter of Leomia Louise C.*, 41 AD3d 249 [1st Dept 2007]).

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

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

ENTERED: OCTOBER 29, 2013

CLERK

Tom, J.P., Andrias, Saxe, Freedman, Richter, JJ.

10877 Robert Gove, Index 101981/09
Plaintiff-Respondent,

-against-

Pavarini McGovern, LLC, et al.,
Defendants-Appellants.

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McGaw, Alventosa & Zajac, Jericho (Ross P. Masler of counsel), for appellants.

O'Dwyer & Bernstien, LLP, New York (Steven Aripotch of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered July 20, 2012, which granted plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim, unanimously affirmed, without costs.

Plaintiff testified that he was injured when a bundle of rebar that his coworker was lowering by rope fell and hit him. As plaintiff struggled to keep himself and the bundle from falling off his unguarded platform onto several workers on the level below him, his foot hit an unknown item on the platform, causing him to twist his back. This evidence establishes prima facie that plaintiff's injuries were proximately caused, at least in part, by defendants' failure to provide him with proper

protection as required by Labor Law § 240(1) (*see Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Defendants failed to raise an issue of fact by pointing to an alleged discrepancy between plaintiff's testimony and his handwritten statement on a form seeking medical treatment. The statement on the medical form does not conflict with the testimony establishing that "plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*id.*; *see McCay v J.A. Jones-GMO, LLC*, 74 AD3d 615 [1st Dept 2010]; *see also Susko v 337 Greenwich LLC*, 103 AD3d 434 [1st Dept 2013]). Even if plaintiff's injuries resulted in part from tripping or slipping on an object on the platform, the uncontroverted evidence demonstrates that these injuries resulted directly from the elevation-related risks that required plaintiff to struggle with the bundle of rebar (*see Skow v Jones, Lang & Wooton Corp.*, 240 AD2d 194, 195 [1st Dept 1997], *lv denied* 94 NY2d 758 [1999]).

Defendants also failed to raise an issue of fact whether plaintiff was the sole proximate cause of his accident. In response to plaintiff's testimony that he made extensive but fruitless efforts to obtain permission to use an on-site crane

that was in use by other laborers, defendants failed to show that a crane, pulley, or other appropriate safety device was readily available on the site, or that plaintiff had been instructed to use such a device while performing the kind of work that led to his injuries (*see Gallagher v New York Post*, 14 NY3d 83 [2010]; *Nacewicz v Roman Catholic Church of the Holy Cross*, 105 AD3d 402, 402-403 [1st Dept 2013]; *Peters v New Sch.*, 102 AD3d 548 [1st Dept 2013], *lv dismissed* 21 NY3d 922 [2013]; *Eustaquio v 860 Cortlandt Holdings, Inc.*, 95 AD3d 548 [1st Dept 2012]; *Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 10-11 [1st Dept 2011]). Moreover, plaintiff agreed to use the rope method only after expressing his concerns about the adequacy of the rope as the sole safety device to be used for the task, and being assured by his foreperson that it would be "okay." Since plaintiff did not unilaterally decide to use the rope method, he could not be the sole proximate cause of the accident (*see Boyd v Schiavone Constr. Co., Inc.*, 106 AD3d 546 [1st Dept 2013]; *Harris v City of New York*, 83 AD3d 104, 110-111 [1st Dept 2011]).

Defendants' argument that plaintiff was negligent in deciding to lower the bundle of rebar, rather than separating it into smaller bundles, is also unavailing. The record establishes

that a violation of the statute was a contributing cause of plaintiff's accident. Thus, any contributory negligence on plaintiff's part is no defense to his claim (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]).

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

ENTERED: OCTOBER 29, 2013

CLERK

Tom, J.P., Andrias, Freedman, Richter, JJ.

10878-
10878A-
10878B

Index 600609/06

Seth R. Rotter,
Plaintiff-Respondent-Appellant,

-against-

Alan S. Ripka, et al.,
Defendants-Appellants-Respondents,

Ripka Rotter & King LLP/Ripka Rotter King & Tacopina LLC., etc.,
Defendant.

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

Pavlounis & Sfouggatakis, LLP, Brooklyn (Andrew Sfouggatakis of counsel), for respondent-appellant.

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Supplemental judgment, Supreme Court, New York County (Debra A. James, J.), entered June 14, 2012, which granted plaintiff's motion to the extent of ordering supplemental judgment against defendants in the amounts set forth therein, and denied sanctions, unanimously affirmed, without costs. Appeals from orders, same court and Justice, entered April 10, 2012 and June 11, 2012, unanimously dismissed, without costs, as subsumed in the appeal from the supplemental judgment.

Alan Ripka and Seth Rotter were longtime partners in a law firm that is now in dissolution. Following commencement of

litigation, the parties entered into a court ordered stipulation of settlement, dated May 18, 2006, which described how cases from their former partnership were to be transferred and how fees were to be allocated. In the stipulation, the parties assigned certain designations to the client matters, depending on the status of the matters and who would handle them going forward. Rotter was entitled to 6%, 25% or 50% of the fees, depending on the designation.

Defendants' unjust enrichment claim, raised for the first time on appeal, is unavailing in light of the existence of the contract at issue (*see West 63 Empire Assoc., LLC v Walker & Zanger, Inc.*, 107 AD3d 586 [1st Dept 2013]). Defendants' assertion that the contract should be reformed due to an alleged mistake in assigning designations to certain specified client matters does not automatically render the contract unenforceable as ambiguous (*see Torres v Livorno Rest. Corp.*, 221 AD2d 197, 197 [1st Dept 1995]).

Although there is a "heavy presumption" in favor of the written contract, mutual mistake may justify reformation; proof may take the form of "parol or extrinsic evidence [] of the claimed agreement" (*Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]). Based on the clear language of paragraphs 28(c) and 29

of the stipulation of settlement, the case designations, upon which Rotter's net fee is based, cannot be reformed. Rotter, in his affidavit in opposition to defendants' cross motion for reformation, stated that the cases were correctly designated in the stipulation of settlement. Defendants cannot prove anything more than unilateral mistake, an insufficient basis for reformation. For the first time on appeal, Rotter argues that certain client consent forms were invalid because they were not properly filed in accordance with CPLR 321(b). In *Bevilacqua v Bloomberg, L.P.* (70 AD3d 411, 412 [1st Dept 2010]), this Court rejected an argument that a consent to change attorney form pursuant to CPLR 321(b) was invalid, stating that any mistake in such filing did not nullify the change of attorney form, absent prejudice. Rotter admitted that Ripka took possession of the files pending substitution by NBR or another firm; therefore, Rotter cannot establish that he was unaware of such transfer, or that he was prejudiced by defendants' actions in connection with the consent forms.

Rotter's claim that substitution was not proper in accordance with paragraph 1(a) of the stipulation of settlement is unavailing, as Rotter fails to refute the documentary evidence that consent forms that were signed by the clients were mailed to

him, and he acknowledged before the motion court that defendants paid all disbursements and expenses, two conditions necessary to effect substitution of counsel.

For the foregoing reasons, the motion court properly determined the percentage of fees Rotter is entitled to under the parties' agreement. The court correctly determined that sanctions were not warranted (*see Komolov v Segal*, 96 AD3d 513 [1st Dept 2012]).

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

ENTERED: OCTOBER 29, 2013

CLERK

Tom, J.P., Andrias, Saxe, Freedman, Richter, JJ.

10879 The People of the State of New York, Ind. 3025/11
Respondent,

-against-

Robert Williams,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered on or about September 7, 2011,

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: OCTOBER 29, 2013

CLERK

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

Tom, J.P., Andrias, Saxe, Freedman, Richter, JJ.

10880 In re 10th Street Associates, LLC, Index 108314/11
Petitioner-Appellant,

-against-

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

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Borah, Goldstein, Altschuler Nahins & Goidel, P.C., New York (Paul N. Gruber of counsel), for appellant.

Gary R. Connor, New York (Martin B. Schneider of counsel), for The New York State Division of Housing and Community Renewal, respondent.

John D. Gorman, New York, for Edward Coffina, respondent.

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Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered March 13, 2012, denying the petition to set aside the order of respondent New York State Division of Housing and Renewal (DHCR), dated May 24, 2011, insofar as it imposed the penalty of treble damages for a rent overcharge, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner failed to rebut the presumption arising from the finding of a rent overcharge that the overcharge was wilful (*see Matter of Graham Ct. Owners Corp. v Division of Hous. & Community Renewal*, 71 AD3d 515, 516 [1st Dept 2010]; Rent Stabilization

Code (9 NYCRR) § 2526.1). As this Court found in a prior appeal, there was no mention of a preferential rent in the initial lease, so petitioner could not rely on the 2003 rent law amendments authorizing an owner to increase a preferential rent to a legal regulated rent upon renewal of the lease (*see* 61 AD3d 404 [1st Dept 2009], citing Rent Stabilization Law of 1969 [Administrative Code of City of NY] § 26-511[c][14]; 9 NYCRR 2521.2], *lv denied* 13 NY3d 702 [2009]).

Nor, contrary to petitioner's contention, is its issuance of a rent credit permitted by the Rent Stabilization Code. While a tenant may recover an overcharge penalty by deducting it from the rent due, respondent Coffina made no such election (*see* 9 NYCRR 2526.1[e]).

Petitioner's argument based on the Filing Agent's Agreement was not raised in the administrative proceedings and may not be considered on appeal (*see Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000]). In any event, it is without merit.

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

ENTERED: OCTOBER 29, 2013

CLERK

Tom, J.P., Andrias, Saxe, Freedman, Richter, JJ.

10882 The People of the State of New York, Dkt. 54832/09
Respondent,

-against-

David Felix,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Robert Caliendo of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (John W. Carter, J.), rendered February 7, 2011, convicting defendant, after a nonjury trial, of attempted forcible touching, sexual abuse in the third degree, and harassment in the second degree, and sentencing him to an aggregate term of 90 days, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9NY3d 342, 348-349 [2007]). There is no basis for disturbing the

court's credibility determinations, in which it accepted the victim's account of the incident.

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

ENTERED: OCTOBER 29, 2013

CLERK

Tom, J.P., Andrias, Saxe, Freedman, Richter, JJ.

10883-
10884 In re Jonathan Kevin M.,

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

Anthony K.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Larry S. Bachner, Jamaica, for appellant.

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

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

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Order of disposition, Family Court, Bronx County (Kelly A. O'Neill Levy, J.), entered on or about September 25, 2012, which, upon a fact-finding determination that respondent abused the subject child, inter alia, directed respondent to comply with an order of protection enjoining him to stay away from the child until the child's eighteenth birthday and to submit to a mental health evaluation if he seeks to petition for any contact with the child, unanimously affirmed, without costs. Appeal from order of fact-finding (same court and Judge), entered on or about May 7, 2012, unanimously affirmed, without costs.

The record supports the Family Court's determination that, at the time of the abuse, respondent was a person legally responsible for the child's care, because he was married to the mother and was living with her and with the child who was then his stepson. Contrary to respondent's contention, the fact that he may have lived with the child for just eight days before the abuse was discovered does not preclude the finding that he was legally responsible for the child's well-being during the relevant period (*see Matter of Yolanda D.*, 88 NY2d 790 [1996]; *Matter of Christopher W.*, 299 AD2d 268 [1st Dept 2002]).

Furthermore, petitioner agency demonstrated that respondent abused the child by a preponderance of the evidence, which included respondent's guilty plea to a felony assault charge arising from the subject abuse. A police officer testified that respondent made statements admitting that he and the mother had bitten the child on his leg and arms, and that they had struck him, and those statements were admissible (*see Matter of Sasha B. [Erica B.]*, 73 AD3d 587 [1st Dept 2010], *appeal dismissed* 16 NY3d 755 [2011]; *Matter of Karen BB.*, 216 AD2d 754, 755-756 [3rd Dept 1995]). Moreover, the doctor who examined the then two-year-old child after the abuse was discovered testified that he presented with several contusions, bruises, lacerations, scratches,

thirteen bite marks, internal injuries and several rib fractures, and that the bruises were probably no more than two weeks old and could not have been self-inflicted. The burden thus shifted to respondent, who submitted no evidence and thus failed to rebut the showing of abuse (*see Matter of Philip M.*, 82 NY2d 238, 244 [1993]; *Matter of Vincent M.*, 193 AD2d 398, 402 [1993]). Although the mother admitted that she was responsible for some of the injuries, the burden remained with respondent to provide a satisfactory explanation as to how the child received the injuries that were not caused by the mother or to demonstrate that he had not inflicted them (*see Matter of Matthew O. [Kenneth O.]*, 103 AD3d 67, 75-76 [1st Dept 2012]).

The court properly drew a negative inference against respondent from his failure to testify at the fact-finding hearing, even if the criminal case against him had still been pending (*see Matter of Ashley M.V. [Victor V.]*, 106 AD3d 659, 660 [1st Dept 2013]; *Matter of Aria E. [Lisette B.]*, 82 AD3d 427, 428 [1st Dept 2011]; *Matter of Nicole H.*, 12 AD3d 182, 183 [1st Dept 2004]).

As for the dispositional order, the court had the authority under FCA § 1056(4) to issue an order of protection directing respondent to stay away from the child until his eighteenth

birthday, even thought respondent was not the child's biological father and, by that time, he and the mother had divorced. The order directing respondent to submit to a mental health evaluation should he petition for any contact with the child was proper because such requirement is in the child's best interests (*see Matter of Salvatore M. [Nicole M.]*, 104 AD3d 769, 770 [2d Dept 2013], *lv denied* 21 NY3d 858 [2013]; *Matter of Enrique T. v Annamarie M.*, 15 AD3d 310 [1st Dept 2005]).

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

ENTERED: OCTOBER 29, 2013

CLERK

Tom, J.P., Andrias, Saxe, Freedman, Richter, JJ.

10885 In re Karen Matseoane, etc., File 2795/07
Deceased.

- - - - -

Karen Matseoane,
Petitioner-Respondent,

-against-

Subtle Engineering Company,
Objectant-Appellant.

_____

Joseph A. Altman, Bronx, for appellant.

Hubell & Associates, LLC, New York (Richard A. Hubell of counsel), for respondent.

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Order, Surrogate's Court, New York County (Kristin Booth Glen, S.), entered October 18, 2012, which granted petitioner's motion for summary judgment, dismissed the objections, and awarded sanctions against objectant, consisting of reimbursement of petitioner's attorneys' fees and costs, and $2,500 against appellant's attorney, payable to the Lawyer's Fund for Client Protection, unanimously affirmed, with costs.

Objectant was a judgment creditor of the decedent, whose judgment was discharged in bankruptcy prior to the decedent's death, based on objectant's failure to prosecute the adversary proceeding he had commenced in the Bankruptcy Court. Objectant then filed a petition in Surrogate's Court for the appointment of

an administrator of the estate of the decedent, and represented to the Surrogate that this was necessary in order for the Bankruptcy Court to accept its motion to vacate the dismissal of its adversary proceeding. However, after petitioner was appointed administrator of the decedent's estate, objectant and its counsel continued to litigate in Surrogate's Court for two years, without filing the motion in Bankruptcy Court. Moreover, in response to a question from the Surrogate, objectant's attorney denied that objectant's judgment had been discharged, although he had received a copy of the order dismissing the adversary proceeding brought in Bankruptcy Court.

The court properly granted summary judgment to petitioner and dismissed the objections. Objectant lacked standing to pursue its claim against the decedent's estate in Surrogate's Court, since it was neither a creditor nor a "person interested," pursuant to SCPA § 103(11) and (39), in that it had no entitlement to any share of the estate based on the discharged judgment, or as a beneficiary. Moreover, the discharge of objectant's judgment in the bankruptcy proceeding voided the judgment, and operated as an injunction against the commencement or continuation of an action, the employment of process, or an act to collect or offset such debt (*see* 11 USC § 524[a][1], [2]).

The record is bereft of evidence that objectant sought to return to Bankruptcy Court to vacate the dismissal of its adversary proceeding after the administrator was appointed, or that it advised the Surrogate that it had changed strategy and now wished to pursue the discharged claim in Surrogate's Court. Objectant and its counsel's conduct in relentlessly attempting to collect on the judgment they knew had been discharged, and their material misstatements to the Surrogate concerning the status of the judgment and their intention to move in the Bankruptcy Court, were frivolous, and merited the sanctions imposed (*see* 22 NYCRR 130-1.1[a]).

Objectant and its counsel fail to explain why they never returned to Bankruptcy Court to seek reinstatement of the claim, but, instead, pursued the aforementioned frivolous course of

conduct in Surrogate's Court (*see Hirschfeld v Daily News*, 269 AD2d 248, 250 [1st Dept 2000]; *Levy v Carol Mgt. Corp.*, 260 AD2d 27, 34-35 [1st Dept 1999]). Petitioner's request for sanctions in connection with the instant appeal is denied.

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

ENTERED: OCTOBER 29, 2013

CLERK

Tom, J.P., Andrias, Saxe, Freedman, Richter, JJ.

10886 Joseph Batista, Index 302226/08
Plaintiff-Respondent,

-against-

Francisco Rafae Porro, et al.,
Defendants-Appellants.

_____

Marjorie E. Bornes, Brooklyn, for appellants.

Sussman & Frankel, LLP, New York (Mitchell D. Frankel of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered October 14, 2011, which denied defendants' motion for summary judgment dismissing the complaint based on plaintiff's failure to establish a serious injury pursuant to Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint against all defendants.

Defendants made a prima facie showing that the 53-year-old plaintiff did not suffer a serious injury to his right knee as a result of an incident in which he was struck by a motor vehicle. Defendants submitted the affirmed report of an orthopedist who opined that plaintiff had no deficits in range of motion in his right knee, and that the findings made following arthroscopic

surgery were consistent with plaintiff's age and preexisting condition of the knee. Defendants also submitted the affirmed report of a radiologist who opined that x-rays of plaintiff's right knee showed conditions that were degenerative and due to a preexisting condition (*Vasquez v Almanzar*, 107 AD3d 538 [1st Dept 2013]; *Kamara v Ajlan*, 107 AD3d 575 [1st Dept 2013]).

In opposition, plaintiff failed to raise a triable issue of fact. He submitted, inter alia, affirmed medical reports from his treating orthopedic surgeon, which included findings of degenerative conditions in various compartments of plaintiff's right knee, yet his physicians failed to address those findings, thus supporting the conclusion that plaintiff had a preexisting degenerative condition (*Rosa v Mejia*, 95 AD3d 402, 404-405 [1st Dept 2012]; *Malupa v Oppong*, 106 AD3d 538 [1st Dept 2013]; *Kamara*, 107 AD3d at 575; *Vasquez*, 107 AD3d at 539).

Defendants established entitlement to dismissal of plaintiff's 90/180-day injury claim by submitting plaintiff's bill of particulars wherein he alleged that he was "incapacitated" for approximately 34 days as a result of the subject accident (*see Vasquez*, 107 AD3d at 540-541, citing *Mitrotti v Elia*, 91 AD3d 449, 450 [1st Dept 2012]). Plaintiff's assertion that his ability to do everyday activities had been

significantly limited was insufficient to raise a triable issue of fact without objective medical evidence to substantiate his claims (*id.*).

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

ENTERED: OCTOBER 29, 2013

CLERK

Tom, J.P., Andrias, Saxe, Freedman, Richter, JJ.

10887 Cecilia Basualdo, an Infant by Her Mother and Natural Guardian, Alejandra Espindola, et al., Plaintiffs-Appellants,

-against-

Eduvigis M. Guzman, et al., Defendants,

New York City Health and Hospitals Corp. (Lincoln Hospital), Defendant-Respondent. Index 17232/05

_____

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

Michael A. Cardozo, Corporation Counsel, New York (Susan P. Greenberg of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered January 11, 2012, which denied plaintiffs' motion to deem their previously served notice of claim timely, nunc pro tunc, and granted the cross motion of defendant New York City Health and Hospitals (HHC) for dismissal of the complaint, unanimously affirmed, without costs.

In this medical malpractice action in which the infant plaintiff seeks to recover for injuries allegedly caused by HHC's failure to properly monitor and screen her for exposure to lead, the court properly considered the pertinent statutory factors and

exercised its discretion in denying plaintiffs' motion (General Municipal Law § 50-e[5]).

While plaintiffs' expert interpreted the Lincoln Hospital Pediatric Clinic's records to support their theory of liability, the records do not, on their face, evince that the hospital deviated from good and accepted medical practice, and thus do not provide HHC with timely actual knowledge of the underlying claim (*see Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 537, [2006]; *Arauz v New York City Health & Hosps. Corp. [Lincoln Med. Ctr.]*, 101 AD3d 558, 559 [1st Dept 2012], *lv denied* __ NY3d __, 2013 NY Slip Op 85345 [2013]; *Plaza v New York Health & Hosps. Corp. [Jacobi Med. Ctr.]*, 97 AD3d 466 [1st Dept 2012], *affd* 21 NY3d 983 [2013]). There is no support for plaintiffs' argument that the infant's blood lead level of 7 ug/dL at nine-months old was "ominous," as that level is considered normal (*see* 10 NYCRR § 67-1.1[e]). Nor is the fact that plaintiff mother denies receiving any information concerning the dangers of lead relevant to the issue of whether the records provided HHC with notice.

Plaintiff mother's ignorance of the law is not a reasonable excuse (*see Plaza*, 97 AD3d at 468). Moreover, no excuse was offered for the additional delay of five years between the filing

of the notice of claim and the making of the instant motion (*id.*).

Since, in reaching his conclusions concerning Lincoln's treatment of the infant plaintiff, plaintiffs' expert relies upon the mother's testimony, which contradicts the actual records, this is not a case that will turn mainly on records rather than witnesses' memories (*cf. Leeds v Lenox Hill Hosp.*, 6 AD3d 232, 233 [1st Dept 2004]). Thus, plaintiffs' have failed to meet their burden on the motion of establishing a lack of substantial prejudice resulting from the delay (*see Williams*, 6 NY3d at 539; *Cartagena v New York City Health & Hosps. Corp.*, 93 AD3d 187, 190, 192 [1st Dept 2012]).

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

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

ENTERED: OCTOBER 29, 2013

CLERK

Tom, J.P., Andrias, Saxe, Freedman, Richter, JJ.

10891 Perlbinder Holdings, LLC, Index 103231/12
Petitioner-Appellant,

-against-

Meenakshi Srinivasan, etc., et al,
Respondents-Respondents.

_____

Kaufman Friedman Plotnicki & Grun, LLP, New York (Howard Grun of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Jane L. Gordon of counsel), for respondents.

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Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered March 27, 2013, denying the petition to annul a resolution of respondent Board of Standards and Appeals of the City of New York (BSA), dated June 19, 2012, which upheld a decision of the New York City Department of Buildings (DOB) that revoked petitioner's permits for an outdoor advertising sign, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law and the facts, without costs, the petition granted, and the DOB is directed to reinstate the subject permits and vacate the fines imposed in connection with the sign.

The revocation of the permits for a large advertising sign on petitioner's property was improper because petitioner

constructed the sign in good-faith reliance on a 2008 determination of the Manhattan Borough Building Commissioner that the sign was a permissible replacement for a similar sign that was removed when a building on the property was demolished.

In *Matter of Pantelidis v New York City Bd. of Stds. & Appeals* (43 AD3d 314 [1st Dept 2007], *affd* 10 NY3d 846 [2008]), we affirmed a decision of the Supreme Court (10 Misc 3d 1077A [Sup Ct, NY County 2005]), which held that the BSA was required to consider the petitioner's good-faith reliance on a later-rescinded permit when considering the petitioner's application for a variance. In so finding, Supreme Court relied on language in Zoning Resolution 72-21, governing variances, authorizing the BSA, "when . . . there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of [a] provision," to "vary or modify the provision so that the spirit of the law shall be observed, public safety secured, and substantial justice done."

Virtually identical language appears in section 666(7) of the New York City Charter, which addresses the BSA's appellate jurisdiction. Accordingly, as in *Pantelidis*, the BSA was required to consider evidence of good-faith reliance in adjudicating petitioner's appeal. Indeed, to the extent that

petitioner sought relief based on its good-faith reliance – as opposed to the replacement sign's compliance with the letter of provisions regarding continuing non-conforming use – petitioner's appeal was, in effect, an application for a variance.

In view of our finding that the permits should be reinstated, the fines that have been imposed in connection with the sign are vacated.

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

ENTERED: OCTOBER 29, 2013

CLERK

Tom, J.P., Andrias, Saxe, Freedman, Richter, JJ.

10892 Felix Moyano, et al., Index 109598/09
Plaintiffs,

-against-

Gertz Plaza Acquisition, LLC, et al.,
Defendants-Respondents.

- - - - -

Gertz Plaza Acquisition, LLC, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Electra Cleaning Contractors,
Third-Party Defendant-Appellant.

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Noorin Hamid of counsel), for appellant.

Law Offices of Charles J. Siegel, New York (Nikolaos Diamantis of counsel), for Gertz Plaza Acquisition, LLC and Wharton Realty Group, Inc., respondents.

London Fischer LLP, New York (Brian A. Kalman of counsel), for Ross & Associates, LLC, respondent.

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Order, Supreme Court, New York County (Richard F. Braun, J.), entered February 5, 2013, which, to the extent appealed from, denied third-party defendant's motion for summary judgment dismissing third-party plaintiffs' claims for contractual indemnification, unanimously affirmed, without costs.

Although third-party plaintiffs did not produce a written, executed contract covering their maintenance service arrangement

with third-party defendant at the time plaintiff Felix Moyano was injured, they submitted copies of unsigned contracts and evidence that raises issues of fact whether the parties intended to be bound by a maintenance agreement and whether the agreement contained indemnity and additional insured provisions (*see Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 368-369 [2005]; *Ruane v Allen-Stevenson School*, 82 AD3d 615, 616 [1st Dept 2011]; *John William Costello Assoc. v Standard Metals Corp.*, 99 AD2d 227, 231 [1st Dept 1984], *appeal dismissed* 62 NY2d 942 [1984]). It is undisputed that third-party defendant continued to provide maintenance services beyond the term of the parties' initial contract, executed in or about 1993, and there is evidence, apart from the continued performance, that the terms of the agreement were renewed. Written provisions for indemnity and additional insurance are set forth on a sheet of third-party defendant's letterhead that appears to have been appended to previous letter agreements between the parties. A liability insurance policy exists that covered the date of plaintiff's injury, and there is deposition testimony that also tends to substantiate third-party plaintiffs' allegation that the parties included provisions for contractual indemnity and additional insured coverage. Although third-party defendant's president testified that the full terms

of the parties' maintenance service arrangement were set forth in a two-page letter, he does not appear to have addressed any of the evidence that suggests that additional terms likely dictated the arrangement; thus, his testimony merely presents an issue of fact.

Contrary to third-party defendant's contention, the indemnity third-party plaintiffs seek is not barred by General Obligations Law § 5-322.1, since the indemnity provision in the submitted unsigned contract limits the obligation to indemnify "[t]o the fullest extent permitted by law" (*see Brooks v Judlau Contr., Inc.*, 11 NY3d 204 [2008]; *Dutton v Pankow Bldrs.*, 296 AD2d 321 [1st Dept 2002], *lv denied* 99 NY2d 511 [2003]).

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

ENTERED: OCTOBER 29, 2013

CLERK

Tom, J.P., Andrias, Saxe, Freedman, Richter, JJ.

10893-
10894 The People of the State of New York,
Respondent,

-against-

Bryan Andino,
Defendant-Appellant.

Ind. 2568/06

_____

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

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

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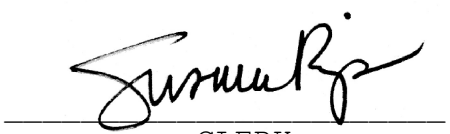
Appeals having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Martin Marcus, J.), rendered on or about March 18, 2008, and from an order, same Court and Justice, entered November 2, 2012, which denied defendant's motion to set aside the sentence,

Said appeals having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive, and having rejected defendant's remaining arguments,

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

ENTERED: OCTOBER 29, 2013



CLERK

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

Tom, J.P., Andrias, Saxe, Freedman, Richter, JJ.

10895 Rafael Thomas, Index 301866/10
Plaintiff-Respondent,

-against-

NYLL Management LTD., et al.,
Defendants-Appellants.

_____

Marjorie E. Bornes, Brooklyn, for appellants.

Spiegel & Barbato, LLP, Bronx (Brian C. Mardon of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered October 17, 2012, which denied defendants' motion for summary judgment dismissing the complaint alleging serious injuries under the "significant limitations" of use category of Insurance Law § 5102(d), unanimously affirmed, without costs.

Plaintiff was driving a livery cab when another cab owned and operated by defendants made a sudden U-turn from oncoming traffic, hitting the left fender of plaintiff's car. Plaintiff alleges that, as a result, he suffered a superior labral tear and other shoulder injuries for which he underwent arthroscopic surgery three months later, and was then out of work for over three months within the 180-day period following the accident. Plaintiff then commenced this action, alleging serious injuries

to the shoulder under the "permanent consequential" and "significant limitation of use," and 90/180-day injury categories of Insurance Law § 5102(d). The motion court found that the evidence submitted by the parties raised issues of fact as to whether plaintiff suffered a significant limitation of use injury, and defendants do not address the other categories in their appellate brief.

Defendants established prima facie absence of a "significant" limitation in the left shoulder as a result of the accident. Contrary to plaintiff's contention, the findings of minor limitations by defendants' orthopedist in forward elevation and abduction do not amount to "significant" limitations (*see Dufel v Green*, 84 NY2d 795, 798 [1995]; *Style v Joseph*, 32 AD3d 212, 214 n [1st Dept 2006]). Defendants also established prima facie absence of causation by submitting their radiologist's findings of preexisting degenerative changes and absence of evidence of recent traumatic or causally related injury (*see Kone v Rodriguez*, 107 AD3d 537 [1st Dept 2013]; *Malupa v Oppong*, 106 AD3d 538, 539 [1st Dept 2013]). The observation of defendants' orthopedist that the "mechanism of injury here [was] not one commonly associated with a SLAP lesion," viewed in conjunction with plaintiff's deposition testimony that no part of his body

hit the interior of his vehicle during the accident, establishes absence of causation as to the SLAP tear found during the surgery.

In opposition, plaintiff submitted his treating physicians' reports setting forth increasing limitations in quantified terms, and finding increasing positive test results for impingement, in the months preceding his shoulder surgery, which was sufficient to raise a triable issue of fact as to whether he sustained "significant" limitations in use of his shoulder following the accident (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Estrella v GEICO Ins. Co.*, 102 AD3d 730, 732 [2d Dept 2013]; *see also Vasquez v Almanzar*, 107 AD3d 538, 539-540 [1st Dept 2013]). The treatment reports were incorporated by reference into the surgeon's affirmation, and therefore can properly be considered. Plaintiff also raised a triable issue of fact as to causation by submitting his doctor's finding of a causal relationship based on his treatment, and conclusion that his surgical findings were consistent with a traumatic etiology, as well as the absence of any prior reported shoulder complaints (*see Lugo v Adom Rental*

Transp., Inc., 102 AD3d 444 [1st Dept 2013]; *James v Perez*, 95 AD3d 788, 789 [1st Dept 2012]).

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

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

ENTERED: OCTOBER 29, 2013

CLERK

Tom, J.P., Andrias, Saxe, Freedman, Richter, JJ.

10896N- Index 650331/09
10897N 21st Century Diamond, LLC,
Plaintiff,

-against-

Allfield Trading, LLC, et al.,
Defendants.

- - - - -

Allfield Trading, LLC, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Exelco North America, Inc., et al.,
Third-Party Defendants-Appellants,

Exelco, NV, etc., et al.,
Third-Party Defendants.

_____

Jones Day, New York (Stephen J. Pearson of counsel), for appellants.

Judd Burstein, P.C., New York (Peter B. Schalk of counsel), for respondents.

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Order, Supreme Court, New York County (Lawrence K. Marks, J.), entered on or about July 24, 2012, which, insofar as appealed from, granted third-party plaintiffs' motion for leave to amend their complaint, unanimously modified, on the law, to deny leave to add claims relating to the Robbins Brothers corporate opportunity, and otherwise affirmed, without costs. Order, same court and Justice, entered on or about April 9, 2013,

which, insofar as appealed from, granted third-party plaintiffs' motion for leave to file a second amended third-party complaint, unanimously modified, on the law, to deny leave to add the cause of action for an injunction, and otherwise affirmed, without costs.

The motion court properly granted the portion of third-party plaintiffs' first motion to amend the complaint seeking to add a breach of fiduciary duty claim against third-party defendants Jean-Paul Tolkowsky and Fazal Chaudhri. Liberally construed, the proposed amended third-party complaint alleges that Chaudhri, plaintiff's designated manager, owes a fiduciary duty to plaintiff (a Delaware limited liability corporation) and that Tolkowsky owes a duty to plaintiff because he became its de facto manager, having seized control of plaintiff (*see Feeley v NHAOCG, LLC*, 62 A3d 649, 660 [Del Ch 2012][and cases cited therein]; *see also Bay Ctr. Apts. Owner, LLC v Emery Bay PKI, LLC*, 2009 WL 1124451, *12, 2009 Del Ch LEXIS 54, *45 [Del Ch, Apr. 20, 2009, C.A. No. 3658-VCS]).

Third-party defendants Exelco North America, Inc., Tolkowsky, and Chaudhri lack standing to argue that Exelco NV, Exelco International, FTK, Doe Corporations 1-100, Doe L.L.C.s 1-100, Doe L.P.s 1-100, and Doe NVs 1-100 should not have been

added as third-party defendants (*see Zwiebel v Guttman*, 26 AD3d 429, 430 [2d Dept 2006]). We note that Exelco NV, Exelco International, and FTK have a pending motion to dismiss the claims against them.

With respect to third-party plaintiffs' second motion to amend the complaint, we noted in a prior decision in this action that the third-party complaint, liberally construed, states a cognizable claim against Exelco, as majority member of 21st Century, for oppression of third-party plaintiff Allfield Trading, LLC, as minority member, "by freezing the latter out of the business and depriving it of the benefit of its interest" (*21st Century Diamond, LLC v Allfield Trading, LLC*, 88 AD3d 558, 559 [1st Dept 2011]), and we upheld third-party plaintiffs' claims for breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty on that basis (*id.*). Thus, the mere fact that Exelco North America, as the 82% owner of plaintiff, had the right under the operating agreement to call for an additional capital contribution does not mean that the proposed second amended third-party complaint fails to state a claim, given its allegation that Exelco North America called for the additional capital contribution in bad faith and for an improper purpose.

In addition, the part of the second amended third-party complaint alleging that Exelco North America did not comply with the operating agreement when it diluted Allfield Trading shares down to 4% because it failed to take into account all of Allfield Trading's capital contributions (i.e., those made via services as opposed to cash) states a cause of action.

However, third-party plaintiffs are not entitled to injunctive relief because they can be compensated by money damages (*see Louis Lasky Mem. Med. & Dental Ctr. LLC v 63 W. 38th LLC*, 84 AD3d 528 [1st Dept 2011]; *Bartley v Walentas*, 78 AD2d 310, 312 [1st Dept 1980]). A claim for the dilution of the cash value of one's shares "clearly states a claim for money damages" (*Rovner v Health-Chem Corp.*, 1996 WL 377027, *13, 1996 Del Ch LEXIS 83, *37 [Del Ch, July 3, 1996, Civil Action No. 15007], *appeal refused* 682 A2d 627 [Del 1996]). Under the circumstances

of this case, the dilution of Allfield Trading's voting interest from 18% to 4% did not constitute irreparable harm (*see Rovner*, 1996 WL 377027 at *13, 1996 Del Ch LEXIS 83 at *39).

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

ENTERED: OCTOBER 29, 2013

CLERK

Tom, J.P., Andrias, Saxe, Freedman, Richter, JJ.

10898N Jaiden Diaz, etc., et al., Index 23759/06
Plaintiffs-Respondents,

-against-

Lilly Alcira Reinersman, etc., et al.,
Defendants-Appellants.

_____

McAloon & Friedman, P.C., New York (Gina Bernardi Di Folco of counsel), for appellants.

Ephrem J. Wertenteil, New York , for respondents.

_____

Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered June 8, 2012, which, insofar as appealed from, denied defendants' cross motion for summary judgment and, upon reargument, denied defendants' earlier cross motion to compel disclosure, unanimously affirmed, without costs.

The motion court providently exercised its discretion in considering arguments addressed for the first time on reply, in support of reargument, to which defendants had an opportunity to respond (*see Rostant v Swersky*, 79 AD3d 456 [1st Dept 2010]). Upon reargument, defendants' failure to annex "an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion" (22 NYCRR 202.7[a]), was properly found to warrant denial of the

cross motion to compel (*see Molyneaux v City of New York*, 64 AD3d 406 [1st Dept 2009]).

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

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

ENTERED: OCTOBER 29, 2013

CLERK

Friedman, J.P., Sweeny, Acosta, Manzanet-Daniels, JJ.

10899-
10900 The People of the State of New York,
Respondent,

-against-

Claudius Hannah,
Defendant-Appellant.

Ind. 943/09

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Lewis Bart Stone, J.), rendered April 12, 2012, as amended April 16, 2012,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated October 8, 2013,

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

ENTERED: OCTOBER 29, 2013

CLERK

Friedman, J.P., Sweeny, Acosta, Manzanet-Daniels, J.

10902-
10902A In re Azmara N.G.,
Petitioner-Appellant,

-against-

Jessica Stephanie S., et al.,
Respondents,

Administration for Children's Services,
Respondent-Respondent.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

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

Karen Freedman, Lawyers for Children, Inc., New york (Betsy Kramer of counsel), attorney for the children.

_____

Order, Family Court, Bronx County (Fernando H. Silva, J.), entered on or about November 9, 2012, which denied petitioner's motion to vacate an order, same court and Judge, entered on or about September 19, 2012, on default, dismissing her petition for custody of the subject children, unanimously affirmed, without costs. Appeal from order entered on or about September 19, 2012, unanimously dismissed, without costs, as taken from a nonappealable paper.

Petitioner presented a reasonable excuse for her failure to appear at the September 19, 2012 hearing; she explained that she

had attempted to contact her attorney to inform him that she could not appear in court to testify because she had had oral surgery the day before, but she could not reach him. Indeed, the record shows that petitioner's counsel apprised the court on the morning of the court date of his own inability to appear due to a family emergency. Petitioner stated further that she went to the courthouse later, intending to show the court a letter from her dentist's office, but she arrived too late (*see Matter of Calvin S.*, 47 AD3d 491 [1st Dept 2008]). Petitioner did not, however, establish a meritorious claim; she failed to show that granting her custody would be in the children's best interests (*see Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]). The evidence shows that the children need special medical care and that the pre-adoptive foster family, with whom they have been living for most of their lives, has been providing that care and meeting all their needs (*see Matter of Julianna Victoria S. [Benny William W.]*, 89 AD3d 490 [1st Dept 2011], *lv denied* 18 NY3d 805 [2012]). In contrast, petitioner has not shown that she has a real plan for providing for the children's medical and other needs if granted custody. Moreover, she is living with the father of the children's half-siblings, whose parental rights to those children have been terminated and who has mental health and anger

management problems (*see Matter of Azmara N.G. v Jesse Stephanie S.*, 93 AD3d 404 [1st Dept 2012], *lv denied* 19 NY3d 803 [2012]).

No appeal lies from an order entered on default (*see Matter of Lisa Marie Ann L. [Melissa L.]*, 91 AD3d 524 [1st Dept 2012]).

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

ENTERED: OCTOBER 29, 2013

CLERK

Friedman, J.P., Sweeny, Richter, Manzanet-Daniels, JJ.

10904 In re Black Car Assistance Corporation, et al., Petitioners-Appellants, Index 100327/13

-against-

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

Metropolitan Taxicab Board of Trade, et al., Intervenor-Respondents-Respondents.

_____

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

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

Emery Celli Brinckerhoff & Abady LLP, New York (Richard D. Emery of counsel), for inervenor-respondents.

_____

Judgment, Supreme Court, New York County (Carol Huff, J.), entered April 26, 2013, which denied the petition to enjoin the implementation of respondent Taxi and Limousine Commission's (TLC) twelve-month pilot program to allow medallion cabs to arrange passenger pickups via smart phone applications (E-Hail Program), vacated the temporary restraining order, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioners, entities that represent or have financial interests in businesses that operate black or livery cars, filed the instant petition for an order declaring the E-hail Program null and void, arguing that respondent TLC exceeded its authority in adopting this program, that provisions of the program improperly depart from applicable provisions of the New York City Administrative Code, and that the program was adopted without complying with procedures required to change rules pursuant to the New York City Administrative Procedure Act (CAPA) and in violation of the State Environmental Quality Review Act (SEQRA). Contrary to petitioners' arguments, the E-Hail Program complies with the plain language of New York City Charter Section 2303(b)(9), as it was adopted for the "limited purpose" of studying the feasability of using smart phone application to hail medallion taxis and for the "limited time" of 12 months. Additionally, the program complies with Administrative Code § 19-511(a) requiring the licensing of communications systems upon such terms as TLC deems advisable by giving TLC the authority to issue temporary authorizations for the communications systems needed to accept passenger hails electronically, as those authorizations function as temporary, limited licenses appropriate for a pilot program.

Further, we find that to the extent the E-Hail Program allows drivers to ignore electronic hail requests or to cancel previously accepted requests in favor of street hails, this does not violate Administrative Code § 19-507(a)(2), which prohibits drivers from refusing, "without justifiable grounds, to take any passenger or prospective passenger to any destination within the city." We also find that the program was properly adopted, is not in violation of SEQRA and, as a temporary and voluntary pilot program, is not subject to CAPA procedural requirements.

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

ENTERED: OCTOBER 29, 2013

CLERK

Friedman, J.P., Sweeny, Acosta, Manzanet-Daniels, JJ.

10905 The People of the State of New York, SCI. 2005/03
Respondent,

-against-

Jorge Montes,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (David P. Johnson of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Laura Safer-Espinosa, J.), rendered on or about May 3, 2011,

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: OCTOBER 29, 2013

CLERK

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

Friedman, J.P., Sweeny, Acosta, Manzanet-Daniels, JJ.

10906-
10907 Maria Otto, etc., et al.,
Plaintiffs-Respondents,

-against-

Jonathan Otto, et al.,
Defendants-Appellants.

Index 108886/10

_____

Lynn, Gartner, Dunne & Covello, LLP, Mineola (Joseph Covello of counsel), for appellants.

Blank Rome LLP, New York (Harris N. Cogan and Andrew T. Hambelton of counsel), for respondents.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered April 2, 2012, which denied defendants' motion to dismiss plaintiff's second amended complaint, or in the alternative, for a stay of the action, unanimously modified, on the law, to dismiss the Delaware limited partnerships and limited liability company as derivative plaintiffs, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered December 26, 2012, which to the extent appealable, denied defendants' motion to renew, unanimously affirmed, without costs.

We disagree with the motion court's finding that plaintiff had legal capacity to bring her derivative claims on behalf of the dissolved Delaware limited partnerships and limited liability

company. Plaintiff was required to bring her derivative claims on behalf of the Delaware limited partnerships and limited liability company "after or in conjunction with" a successful action seeking the nullification of the certificate of cancellation (see Del. Code Ann. tit. 6, § 18-805; *Matthew v Laudamiel*, 2012 WL 605589, *21-22, 2012 Del. Ch. LEXIS 38, *76 [Del Ch, 2012]). However, plaintiff failed to file a petition in the Delaware Chancery Court in order to have the certificates of cancellation of the Delaware entities annulled (*see* Del. Code Ann. tit. 6, § 18-805), and instead, improperly filed a cross motion in this action seeking nullification of the certificates.

We agree with that portion of the motion court's order declining to dismiss the claims asserted against three dissolved Delaware corporations: defendants Baybroad, Inc., Elmont Realty, Inc. and Parkchester RB Corp. Under Delaware law, for the purpose of prosecuting suits, dissolved corporations exist for the term of three years from the expiration or dissolution (*see* Del. Code Ann. tit. 8, § 278; *see also Smith-Johnson S.S. Corp. v United States*, 231 F. Supp. 184, 186 [D Del 1964]). Although the three corporate defendants were served with plaintiff' second amended complaint more than three years after the filing of their respective certificates of dissolution, the relation-back

doctrine renders the claims timely (*see Buran v Coupal*, 87 NY2d 173, 178 [1995]; CPLR 203 [c][f]).

The motion court properly applied a six-year statute of limitations to the breach of fiduciary duty claim since the derivative action is "equitable in nature" (*see Horizon Asset Mgt., LLC v Duffy*, 106 AD3d 594, 595 [1st Dept 2013]). Plaintiff continued to be in a continuing fiduciary relationship with defendant Jonathan Otto and the other limited partners or members. Accordingly, the statute of limitations did not begin to run until the relationship terminated (*see 196 Owners Corp. v Hampton Mgmt. Co.*, 227 AD2d 296 [1st Dept 1996]).

Both New York and Delaware law require a plaintiff bringing a derivative action on behalf of a limited liability company or limited partnership to plead that demand was made or that demand was futile (*see* Del. Code Ann. tit. 6, §§ 17-1003, 18-1003; NY Partnership Law § 115-a). The motion court's finding that demand was futile with respect to four of the limited partnerships is supported by the complaint's specific allegations that defendant Jonathan Otto, the controlling owner in the defendant entities, was interested in the sale transaction (*see Wandel v Eisenberg*, 60 AD3d 77, 79-80 [1st Dept 2009]).

There is no basis for a stay of the action pursuant to CPLR

2201 since the decision in the Surrogate Court proceeding will not determine all of the questions in this action (*see Somoza v Pechnik*, 3 AD3d 394 [1st Dept 2004]). Indeed, the record establishes that the Executors Statement of Issues indicates that the contested issues to be tried by the Surrogate Court are limited to issues of professional fees. Claims relating to the Real Estate Entities, and alleged breaches of fiduciary duty were not included as matters before the Surrogate Court.

The motion court properly denied the motion to renew as defendants failed to present any new facts warranting renewal (CPLR 2221[e][2]).

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

ENTERED: OCTOBER 29, 2013

CLERK

Friedman, J.P., Sweeny, Acosta, Manzanet-Daniels, JJ.

10908 Michelle Askin, Index 111987/11
Plaintiff-Appellant,

-against-

Department of Education of the
City of New York,
Defendant-Respondent,

City of New York,
Defendant.

_____

Law Offices of Stewart Lee Karlin, P.C., New York (Daniel Dugan of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered June 15, 2012, which, insofar as appealed from as limited by the briefs, granted defendants-respondents' motion to dismiss the complaint as against them, unanimously affirmed, without costs.

Plaintiff alleges that during the relevant period of the 2010-2011 school year, she was 54 years old, and serving as the principal of a school she had founded. She received satisfactory performance reviews for two years, but claims to have been subjected to unfair and excessive scrutiny and reprimands during 2010 to 2011, including an investigation into allegations of

misconduct. Plaintiff was terminated in June 2011. It is undisputed that, by these allegations, plaintiff has established the first three elements of her claims for age discrimination under the New York State and City Human Rights Laws (HRL), since she was a member of a protected class, was qualified for her position, and was subjected to an adverse employment action (*see Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 113 [1st Dept 2012]; *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 35 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]).

Construing the complaint liberally, presuming its factual allegations to be true, and according the complaint the benefit of every possible favorable inference (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]), plaintiff has not, however, adequately pled the fourth element of a prima facie claim of employment discrimination under the State and City HRL, namely, that she was either terminated or treated differently under circumstances giving rise to an inference of discrimination (*see Melman*, 98 AD3d at 113; *Bennett*, 92 AD3d at 35). Although plaintiff asserts that defendants' actions were motivated by age-related bias, she does not make any concrete factual allegation in support of that claim, other than that she was 54 years old and was treated adversely under the State law or

less well under the City HRL. Plaintiff's allegations in this respect amount to mere legal conclusions, and do not suffice to make out this element of her claim (*see Ortiz v City of New York*, 105 AD3d 674 [1st Dept 2013]; *McKenzie v Meridian Capital Group, LLC*, 35 AD3d 676 [2d Dept 2006]; *see also Clyburn v Shields*, 33 Fed Appx 552, 555-556 [2d Cir 2002]).

Plaintiff's failure to adequately plead discriminatory animus is similarly fatal to her claims of hostile work environment (*see Chin v New York City Hous. Auth.*, 106 AD3d 443, 445 [1st Dept 2013]) and violation of the New York State Constitution's equal protection and antidiscrimination provisions (*see* NY Const art I, § 11; *Bower Assoc. v Town of Pleasant Val.*, 2 NY3d 617, 631 [2004]).

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

ENTERED: OCTOBER 29, 2013

CLERK

Friedman, J.P., Sweeny, Acosta, Manzanet-Daniels, JJ.

10909 Jumax Associates, Index 650555/10
Plaintiff-Appellant,

-against-

350 Cabrini Owners Corp.,
Defendant-Respondent.

_____

Marcus Rosenberg & Diamond LLP, New York (David Rosenberg of counsel), for appellant.

Kane Kessler, P.C., New York (S. Reid Kahn of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered July 19, 2012, which, inter alia, granted defendant's cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff previously commenced an action in 2002 seeking to recover fees that had been paid to defendant co-op pursuant to a license agreement defendant had entered into in or about 1995 with a third-party cellular telephone company, as well as fees that would be paid through the time of judgment. At the time the action was commenced, the license agreement had been amended and extended three times. During the pendency of the prior action, the license agreement was amended and extended two more times.

This Court affirmed the motion court's dismissal of Jumax's claims for "past and future income from the . . . license agreement" based on waiver and estoppel *(Jumax Assoc. v 350 Cabrini Owners Corp.*, 46 AD3d 407, 408 [1st Dept 2007]), and, ultimately, on a subsequeal appeal, held that "plaintiff is the owner of the roof rights, including any transferable development rights, subject to the existing license agreement" (71 AD3d 584, 584 [1st Dept 2010]). Plaintiff's current claims seeking to recover amounts paid pursuant to the amendments entered into during the pendency of the prior action are barred by the doctrine of res judicata, which bars "future actions between the same parties on the same cause of action" (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999]). The rule bars "all other claims arising out of the same transaction or series of transactions . . . even if based upon different theories or if seeking a different remedy" (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]), and applies "not only to claims actually litigated but also to claims that could have been raised in the prior litigation" (*Matter of Hunter*, 4 NY3d 260, 269 [2005]). Plaintiff's current claims to recover fees paid to the co-op under the fourth and fifth amendments either were raised and dismissed in the prior action, or could have been raised therein.

If the merits were to be reached, plaintiff points to no authority or provision in the license agreement and amendments thereto in support of its argument that the fourth and fifth amendments constitute "new agreements," rather than "mere amendments" of the existing license agreement (*see Ernie Otto Corp. v Inland Southeast Thompson Monticello, LLC*, 91 AD3d 1155, 1157 [3d Dept 2012], *lv denied* 19 NY3d 802 [2012]; *L'Art de Jewel Ltd. v Hudson Sheraton Corp., LLC*, 46 AD3d 418, 420 [1st Dept 2007]).

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

ENTERED: OCTOBER 29, 2013

CLERK

Friedman, J.P., Sweeny, Acosta, Manzanet-Daniels, JJ.

10910 David R. Keneally, Index 112031/09
Plaintiff-Respondent,

-against-

400 Fifth Realty LLC, et al.,
Defendants-Appellants.

_____

Malapero & Prisco LLP, New York (Frank J. Lombardo of counsel), for appellants.

Erlanger Law Firm PLLC, New York (Robert K. Erlanger of counsel), for respondent.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered December 10, 2012, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing plaintiff's claim under Labor Law § 241(6), unanimously affirmed, without costs.

Industrial Code (12 NYCRR) 23-1.12(c)(1) is applicable because plaintiff was using a "power-driven saw" at the time of his accident within the meaning of that provision. Nonetheless, triable issues of fact exist as to whether the regulation was violated because the saw provided to plaintiff had a defective or inadequate "movable self-adjusting guard below the base plate," which failed to "completely cover the saw blade to the depth of the teeth when such saw blade [was] removed from the cut" (12

NYCRR 23-1.12[c][1]; *see Ortega v Everest Realty LLC*, 84 AD3d 542, 544 [1st Dept 2011]). Plaintiff's co-worker testified that he used the saw shortly before plaintiff's accident and observed that the movable self-adjusting guard had been "sticking" and, therefore, it did not completely cover the saw blade when removed from the cut.

The court properly considered plaintiff's expert's affidavit on the question of whether a certain condition or omission was in violation of a regulation and the meaning of the terms used within the relevant Industrial Code provision (*see Boruch v Morawiec*, 51 AD3d 429 [1st Dept 2008], citing *Franco v Jay Cee of N.Y. Corp.*, 36 AD3d 445, 448 [1st Dept 2007]).

The court did not abuse its discretion in declining to consider the affidavit of defendants' expert, which was submitted for the first time in reply. The affidavit was not addressed to the arguments made in plaintiff's opposition, and instead sought

to assert new grounds for the motion (*see AMBAC Assur. Corp. v DLJ Mtge. Capital, Inc.*, 92 AD3d 451, 452 [1st Dept 2012], citing *Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 [1st Dept 1992]).

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

ENTERED: OCTOBER 29, 2013

CLERK

Friedman, J.P., Sweeny, Acosta, Manzanet-Daniels, JJ.

10912 The People of the State of New York, Ind. 5225/01
Respondent,

-against-

Michael Johnson,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered June 1, 2012, resentencing defendant, as a second violent felony offender, to an aggregate term of 15 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: OCTOBER 29, 2013

CLERK

Friedman, J.P., Sweeny, Acosta, Manzanet-Daniels, JJ.

10915 Bobby Simmons, Index 17846/04
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant.

_____

Gruvman Giordano & Glaws LLP, New York (Charles T. Glaws of counsel), for appellant.

Antin, Ehrlich & Epstein, LLP, New York (Richard K. Hershman of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Wilma Guzman, J.), entered June 18, 2012, upon a jury verdict, awarding plaintiff damages in the amount of $300,000 for past pain and suffering and $200,000 for future pain and suffering, unanimously affirmed, without costs.

The jury could rationally conclude that defendant had constructive notice of the defect in the subway station stairway from plaintiff's testimony that the photographs entered into evidence were taken approximately five weeks after his accident occurred and that they fairly and accurately depicted the location as it appeared on the day he fell (*see Gonzalez v New York City Tr. Auth.*, 87 AD3d 675, 677 [2d Dept 2011]).

The jury's determination that plaintiff was not comparatively negligent is not against the weight of the evidence. In addition to his testimony that he was looking forward while descending the stairs, plaintiff testified that he was holding the handrail and then, to avoid other people on the stairs, let go of it and moved to the center of the stairway. Thus, the jury could reasonably conclude that the stairs were so crowded that plaintiff would not have been able to see the defective condition even if he had been paying the utmost attention.

We find that the damages award is not excessive (*see Thomas v 14 Rollins St. Realty Corp.*, 25 AD3d 317 [1st Dept 2006]; *Hoerner v Chrysler Fin. Co., L.L.C.*, 21 AD3d 1254 [4th Dept 2005]; *Gainey v City of New York*, 278 AD2d 102, 102-103 [1st Dept 2000]). It is undisputed that as a result of his fall on the subway station stairs, plaintiff, who was then 62 years old, sustained a ruptured patellar tendon in his left knee that required surgery to repair and and which left a 10 inch scar. Plaintiff testified that he remained in the hospital for four days and required crutches for approximately two months and many months of therapy. He testified that he was no longer able to jog, which he had been used to doing about four times a week, and

that his knee continued to cause him pain and "lock up," for which he required prescription medication. Plaintiff's expert testified that when he examined plaintiff approximately eight years after the accident, he determined that plaintiff had developed crepitus, that he lacked about 5 degrees of range of motion upon full extension of the knee, 25 degrees upon flexion of the leg, and 7 degrees upon overextension, that he had lost 2 centimeters of muscle mass in his left thigh and 1 centimeter in his lower leg, that his movement limitations and muscle loss were related to the accident, and that his prognosis was poor.

Defendant's argument that the defect in the stairway was trivial and hence not actionable was not raised at trial and thus is unpreserved for appellate review, and we decline to review it in the interest of justice (*see Revis v City of New York*, 18 AD3d 290 [1st Dept 2005]).

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

ENTERED: OCTOBER 29, 2013

CLERK

Friedman, J.P., Sweeny, Acosta, Manzanet-Daniels, JJ.

10916 & M-4975 The People of the State of New York, Respondent,

Ind. 5931/93

-against-

Rene Whitecloud,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered January 13, 1995, convicting defendant, after a jury trial, of murder in the second degree, attempted murder in the second degree (two counts) and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 41⅔ years, unanimously affirmed.

Defendant did not preserve his argument that the court's jury instruction on the theory of transferred intent (*see People v Fernandez*, 88 NY2d 777, 781-782 [1996]) constructively amended an indictment only charging direct intent to kill three named persons. This is a claim requiring preservation (*People v Duncan*, 46 NY2d 74, 80 [1978], *cert denied* 442 US 910 [1979]; *People v Hernandez*, 273 AD2d 176 [1st Dept 2000], *lv denied* 95

NY2d 890 [2000]; *People v Udzinski*, 146 AD2d 245 [2d Dept 1989], *lv denied* 74 NY2d 853 [1989]; *see also People v Ford*, 62 NY2d 275 [1984]), and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal. There is no reasonable possibility that the jury convicted defendant, on any count, on a transferred intent theory (*see People v Grega*, 72 NY2d 489, 496 [1988]). The proof and arguments presented by the People at trial did not vary from the allegations of the indictment, and there was no evidence to support a transferred intent theory. Furthermore, defendant only contested the element of identity and raised no issues regarding intent. Contrary to defendant's argument, the nature of the defense is highly relevant to the issue of prejudice here, because it tends to minimize the possibility that the jury convicted defendant on an improper theory (*see e.g. People v Buanno*, 296 AD2d 600, 601 [3d Dept 2002], *lv denied* 98 NY2d 695 [2002]).

Defendant did not preserve his argument that the court improperly participated in the examination of witnesses (*see People v Charleston*, 56 NY2d 886, 887-888 [1982]), and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal. The court did not take on either the function or appearance of an advocate or suggest to

the jury that it had any opinion. To the extent that any of the court's interventions were inappropriate, they were not so egregious as to affect the verdict or deprive defendant of a fair trial (*see People v Arnold*, 98 NY2d 63, 67 [2002]; *People v Moulton*, 43 NY2d 944 [1978]), particularly in light of the court's jury charge. Furthermore, there was overwhelming evidence of guilt.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not fully explained by the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of his claim may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case.

We perceive no basis for reducing the sentence.

M-4975 - *People v Whitecloud*

Motion to enlarge record granted.

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

ENTERED: OCTOBER 29, 2013

CLERK

Friedman, J.P., Sweeny, Acosta, Manzanet-Daniels, JJ.

10917 Theodore Chapman, Index 17822/04
Plaintiff-Respondent,

-against-

Schindler Elevator Corporation,
Defendant-Respondent,

1345 Fee, LLC, et al.,
Defendants-Appellants.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (Mark Friedlander, J.), entered on or about October 22, 2012,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated October 9, 2013,

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

ENTERED: OCTOBER 29, 2013

CLERK

Friedman, J.P., Sweeny, Acosta, Manzanet-Daniels, JJ.

10918 CRP/Capstone 14W Property Owner, LLC, Index 114140/11
Plaintiff-Respondent,

-against-

Behman Hambleton LLP,
Defendant-Appellant,

Gibson & Behman P.C.,
Defendant.

_____

Behman Hambleton, LLP, New York (Phillip Lagana of counsel), for appellant.

Heiberger & Associates, P.C., New York (Ricardo Vasquez of counsel), for respondent.

_____

Order, Supreme Court, New York County (Donna M. Mills, J.), entered on or about May 2, 2012, which denied defendant Behman Hambleton LLP's (Behman) motion to dismiss the complaint, unanimously affirmed, without costs.

Because the complaint clearly alleged that Behman was in privity of estate with the leased premises (*Howard Stores Corp. v Robison Rayon Co.*, 64 Misc 2d 913, 915 [App Term, 1st Dept 1970], *affd* 36 AD2d 911 [1st Dept 1971]) and because the complaint, read generously, alleged that the entire business of the signatory to the lease, defendant Gibson & Behman P.C., was now carried on by

Behman, the IAS court correctly held that the motion to dismiss should be denied (*cf. Wells v Ronning*, 269 AD2d 690, 692-693 [3d Dept 2000]).

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

ENTERED: OCTOBER 29, 2013

CLERK

Friedman, J.P., Sweeny, Acosta, Manzanet-Daniels, JJ.

10919N Robert J.A. Zito, Index 602308/04
Plaintiff-Respondent-Appellant,

-against-

Fischbein Badillo Wagner Harding, et al.,
Defendants.

- - - - -

Nimkoff Rosenfeld & Schechter, LLP,
Nonparty Appellant-Respondent.

_____

Nimkoff Rosenfeld & Schechter, LLP, Syosset (Ronald A. Nimkoff of counsel), for appellant-respondent.

Carter Ledyard & Milburn LLP, New York (Gary D. Sesser of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered March 8, 2012, which denied nonparty Nimkoff Rosenfeld & Schechter, LLP's motion to modify and confirm a special referee's report, and granted so much of plaintiff's motion as sought to reject the report, unanimously affirmed, with costs.

The motion court correctly rejected the special referee's report and recommendation on the ground that the referee failed to hear evidence as to whether Nimkoff received a settlement offer in the underlying action and failed to communicate it to plaintiff. Plaintiff submitted an affirmation by counsel for

defendant Fischbein Badillo Wagner Harding stating that he personally had conveyed an offer of $225,000 to $250,000 to Nimkoff in January 2007. Plaintiff testified that he first learned of the offer in late 2010. However, the referee declined to take the testimony of the attorney. If proven, the failure to communicate a settlement offer would constitute a violation of Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.4(a)(3) ("A lawyer shall ... keep the client reasonably informed about the status of the matter)," and could bar Nimkoff's claim to fees, at least from February 2007 onward (*see Doviak v Finkelstein & Partners, LLP*, 90 AD3d 696, 699 [2d Dept 2011]; *see also Yannitelli v Yannitelli & Sons Constr. Corp.*, 247 AD2d 271 [1st Dept 1998], *lv denied* 92 NY2d 875 [1998]). Moreover, there is evidence that plaintiff ultimately accepted an offer of $265,000 (*see Boglia v Greenberg*, 63 AD3d 973, 975 [2d Dept 2009]).

Contrary to Nimkoff's argument, prior orders dismissing plaintiff's claims alleging malpractice and ethical violations against it are not barred by the doctrine of law of the case, collateral estoppel or res judicata. Since evidence was offered to show that plaintiff first learned of the alleged January 2007 settlement offer in late 2010, at least a year after the motion

to dismiss had been fully submitted, there is no identity of issues, as required by law of the case (*see Martin v City of Cohoes*, 37 NY2d 162 [1975]) and collateral estoppel (*see Buechel v Bain*, 97 NY2d 295 [2001], *cert denied* 535 US 1096 [2002]). And, since the record suggests that the aforesaid prior orders did not arise from the same "factual grouping" as plaintiff's current settlement claim, res judicata does not bar the claim (*see UBS Sec. LLC v Highland Capital Mgt, L.P.*, 86 AD3d 469, 474 [1st Dept 2011]).

Plaintiff argues that the terms of the parties' retainer agreement should dictate the fees, if any, to which Nimkoff is entitled for representing him in the underlying action. However, plaintiff breached the retainer agreement by not reimbursing Nimkoff for its billed disbursements; Nimkoff's subsequent motion for leave to withdraw as plaintiff's counsel was granted on that ground. Subsequent orders referring the issue of fees for a hearing and determination of the amount to be awarded on a quantum meruit basis became law of the case. Moreover, since Nimkoff withdrew from representation (i.e., was not discharged for cause), it is entitled to recover the fair and reasonable value of the services it rendered to plaintiff (*see Nabi v Sells*, 70 AD3d 252 [1st Dept 2009]). We also note that a fair reading

of the parties' retainer agreement reveals that the parties intended Nimkoff to be compensated pursuant to a contingency arrangement, but plaintiff's breach of the agreement undermined the goals and purpose of the agreement, rendering it unenforceable.

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

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

ENTERED: OCTOBER 29, 2013

CLERK