SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**NOVEMBER 13, 2014**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Renwick, Gische, JJ.

13441 The People of the State of New York, Respondent, Ind. 5573/11

-against-

Luis S. Alvarado,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered June 20, 2012, convicting defendant, upon his plea of guilty, of attempted robbery in the second degree, and sentencing him, as a second felony offender, to a term of 3 years, unanimously affirmed.

Defendant was properly adjudicated a second felony offender on the basis of a conviction under a Florida evidence-tampering statute. Based on a reasonable reading of the Florida statute (Fla Stat § 918.13), we find that it is equivalent to a New York felony (Penal Law § 215.40). The Florida statute does not apply

to intangible evidence, its prohibition of the removal of evidence corresponds to suppressing evidence by concealment, alteration or destruction under the New York analog, and, like the New York statute, the Florida statute requires specific intent for both its destruction and fabrication prongs.

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

ENTERED: NOVEMBER 13, 2014

CLERK

Gonzalez, P.J., Tom, Renwick, Gische, JJ.

13442 In re Jerald Miller, Index 251040/12
Petitioner-Appellant,

-against-

New York State Division
of Human Rights,
Respondent-Respondent.

_____

Jerald Miller, appellant pro se.

Eric T. Schneiderman, Attorney General, New York (Andrew Kent of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered December 6, 2012, denying the petition seeking to annul respondent's determination, dated June 21, 2012, which denied petitioner's request for disclosure of certain documents pursuant to the Freedom of Information Law (FOIL), and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The court properly denied the petition and dismissed the proceeding. Although the court reviewed respondent's determination under the "arbitrary and capricious" standard, instead of determining whether the denial "was affected by an error of law" (CPLR 7803[3]), the matter need not be remanded since respondent properly determined that FOIL does not require

disclosure of the requested materials (*see Mulgrew v Board of Educ. of the City School Dist. of the City of N.Y.*, 87 AD3d 506, 507 [1st Dept 2011], *lv denied* 18 NY3d 806 [2012]).

Respondent properly withheld the four legal opinions requested by petitioner pursuant to the "intra-agency materials" exemption (*see* Public Officers Law § 89[2][g]), since they are essentially "predecisional memoranda, prepared to assist the agency in its decision-making process and . . . are not final agency determinations or policy" (*Kheel v Ravitch*, 93 AD2d 422, 427 [1st Dept 1983], *affd* 62 NY2d 1 [1984]). Contrary to petitioner's argument, the opinions do not fall under the exceptions to this exemption for "statistical or factual tabulations or data" (Public Officers Law § 89[2][g][i]) or "instructions to staff that affect the public" (Public Officers Law § 89[2][g][ii]; *see Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 276 [1996]; *Matter of Tuck-It-Away Assoc., L.P. v Empire State Dev. Corp.*, 54 AD3d 154, 166 [1st Dept 2008]).

Moreover, three of the four opinions are "specifically exempted from disclosure by state . . . statute" (Public Officers Law § 87[2][a]; *see Matter of Short v Board of Mgrs. of Nassau County Med. Ctr.*, 57 NY2d 399 [1982]) pursuant to Executive Law § 297(8), which prohibits respondent from making public

information contained in reports obtained by it with respect to a particular person without his or her consent. Respondent cannot rely on the alternative ground raised on appeal that the legal opinions are privileged as attorney work-product pursuant to CPLR 3101(c), since it did not invoke this ground as a basis for denying petitioner's request (*see Matter of Natural Fuel Gas Distrib. Corp. v Public Serv. Commn. of the State of N.Y.*, 16 NY3d 360, 368 [2011]).

Respondent properly denied the request for its "Case Management System Legal Resources Notebook," which does not constitute a record within the meaning of FOIL, since it is not "information" (Public Officers Law § 86[4]) but rather a software application providing the means of accessing information in its electronic file system. It also properly withheld the user's manual for that application, since its disclosure "would jeopardize [respondent's] capacity . . . to guarantee the security of its . . . electronic information systems" (Public Officers Law § 87[2][i]).

Since petitioner has not substantially prevailed, he is not entitled to attorney's fees and costs pursuant to Public Officers Law § 89(4)(c).

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

ENTERED: NOVEMBER 13, 2014

CLERK

Gonzalez, P.J., Tom, Renwick, Gische, JJ.

13445 The People of the State of New York, Ind. 1141/12
Respondent,

-against-

Heriberto Rivera,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about November 26, 2012,

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: NOVEMBER 13, 2014

CLERK

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

Gonzalez, P.J., Tom, Renwick, Gische, JJ.

13446 In re Evangelina Santiago, Index 400014/13
Petitioner-Respondent,

-against-

New York City Housing Authority,
Respondent-Appellant.

_____

David I Farber, New York (Kimberly W. Wong of counsel), for appellant.

Goldberg, Scudieri and Lindenberg, P.C., New York (Samuel E. Goldberg of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered July 16, 2013, granting the petition to vacate respondent's determination, dated December 12, 2012, which found that petitioner violated a permanent exclusion stipulation and terminated her tenancy, to the extent of vacating the penalty of termination of tenancy and remanding the matter for imposition of a lesser penalty, unanimously reversed, on the law, without costs, the petition denied, the penalty of termination reinstated, and the proceeding brought pursuant to CPLR article 78 dismissed.

Petitioner was accorded procedural due process at the administrative hearing (*see e.g. Matter of Jackson v Hernandez*, 63 AD3d 64 [1st Dept 2009]), and the Hearing Officer's determination that she violated a stipulation permanently

excluding her adult son, as a result of his previous sale of drugs, from her apartment was rationally based in the record. Since "judicial review of administrative determinations is confined to the facts and record adduced before the agency" (*Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000] [internal quotation marks omitted]), Supreme Court erred in swearing in and questioning petitioner, at oral argument of the instant petition, for the purpose of eliciting testimony that her adult son had not been in her apartment since June 2012 and that she would not allow him to visit any more (*see Matter of Chandler v Rhea*, 103 AD3d 427 [1st Dept 2013]; *Matter of Evans v New York City*, 94 AD3d 885, 887 [2d Dept 2012]).

Petitioner's violation of the stipulation "provided a sufficient basis upon which to proceed to terminate" her tenancy (*Matter of Wooten v Finkle*, 285 AD2d 407, 408 [1st Dept 2001]),

and the penalty imposed does not shock one's sense of fairness (*see Matter of Harris v Hernandez*, 72 AD3d 450 [1st Dept 2010]; *Wooten* at 408-409).

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

ENTERED: NOVEMBER 13, 2014

CLERK

Gonzalez, P.J., Tom, Renwick, Gische, JJ.

13447 Honua Fifth Avenue LLC, Index 652237/10
Plaintiff-Respondent,

-against-

400 Fifth Realty LLC,
Defendant-Appellant,

Unicredit S.P.A., etc.,
Defendant.

_____

Greenberg Traurig, LLP, New York (Steven Sinatra of counsel), for appellant.

Brown Rudnick LLP, New York (Sigmund S. Wissner-Gross of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about May 24, 2013, which, to the extent appealed from, denied defendant seller's motion for partial summary judgment on its counterclaim alleging breach (wrongful termination) of a real estate purchase and sale agreement (the Residential PSA), unanimously affirmed, without costs.

Defendant's refusal to adjourn the closing to jointly and collaboratively investigate the alleged air infiltration defect raises questions of fact as to whether defendant, rather than plaintiff buyer, wrongfully terminated the Residential PSA (*see Roberts v New York Life Ins. Co.*, 195 App Div 97, 101 [1st Dept 1921], *affd* 233 NY 639 [1922]). Defendant argues that its

refusal to cure or adjourn the closing was justified by plaintiff's decision not to provide a copy of reports concerning the air infiltration defect. However, issues of fact exist as to whether it was unreasonable for defendant to demand that plaintiff produce written expert reports on an expedited basis, particularly since plaintiff repeatedly requested that the parties work "collaboratively" to complete the investigation.

Defendant's argument that plaintiff had no right to refuse to close, because an architect's certificate of substantial completion was attached to defendant's notice of closing, is unavailing. The Residential PSA obligated plaintiff to close upon defendant's satisfaction of *all* conditions set forth in section 9.3.1 of the contract, not just the requirement to attach an architect's certificate of substantial completion. Indeed, section 9.3.1(b) of the Residential PSA required that defendant perform its obligations under the agreement in all "material" respects, and section 9.3.1(c) stated that plaintiff would not be required to close if any representation by defendant was false and had a "material adverse effect on [the fair market] value" of the lower residential units at issue. Issues of fact exist as to whether defendant performed its obligations under the agreement in all "material" respects and whether the alleged air infiltration defect had a "material adverse effect" on the fair

market value of the lower residential units.

Plaintiff's expert's affidavit, which cited to specific sections of the New York City Building Code, was sufficient to raise issues of fact as to the existence of an air infiltration defect, whether defendant violated building code provisions related to the infiltration of air, and whether the alleged defects and violations constituted a material breach under the Residential PSA (*see Rodriguez v Leggett Holdings, LLC*, 96 AD3d 555, 556-557 [1st Dept 2012]; *cf. Cornwell v Otis El. Co.*, 275 AD2d 649, 649 [1st Dept 2000]).

Defendant, the party who moved for summary judgment, was required to show that plaintiff was not ready, willing and able to close (*see Revital Realty Group, LLC v Ulano Corp.*, 112 AD3d 902, 904 [2d Dept 2013], *lv denied* 22 NY3d 866 [2014]), and it failed to do so.

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

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

ENTERED: NOVEMBER 13, 2014

CLERK

Gonzalez, P.J., Tom, Renwick, Gische, JJ.

13448 The People of the State of New York, Respondent, Ind. 1729/10

-against-

Nicholas Crooks, Defendant-Appellant.

_____

Waters & Svetkey, LLP, New York (Jonathan Svetkey of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J. at motion to controvert search warrant; Lewis Bart Stone, J. at suppression hearing; Melissa C. Jackson, J. at plea and sentencing), rendered December 16, 2013, convicting defendant of criminal possession of marijuana in the first degree, and sentencing him to a term of five years' probation, unanimously affirmed.

The police action in this case was lawful at all stages. A detective saw defendant, a United Parcel Service employee, taking boxes from a UPS facility and placing them in his privately owned vehicle. Based on reliable information from knowledgeable UPS supervisors (*see Spinelli v United States*, 393 US 40 [1969]; *Aguilar v Texas*, 378 US 108 [1964]), including information about

UPS policies and defendant's past pattern of behavior, and based on the absence of any other logical explanations for defendant's conduct, the detective objectively (*see Devenpeck v Alford*, 543 US 146, 153 [2004]) had probable cause to believe either that defendant was stealing the boxes, or that he was picking up a shipment of illegal drugs. Moreover, the police acted reasonably in detaining defendant and moving the boxes to a location where they could be sniffed by a trained dog, resulting in the dog's detection of drugs (*see People v Devone*, 15 NY3d 106 [2010]; *People v Dunn*, 77 NY2d 19 [1990], *cert denied* 501 US 1219 [1991]). The ensuing search warrant was lawfully issued, and it was not tainted by illegal police activity. The discrepancy between the warrant application and the affiant's testimony at a hearing does not require suppression. We have considered and rejected defendant's remaining arguments.

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

ENTERED: NOVEMBER 13, 2014

CLERK

Gonzalez, P.J., Tom, Renwick, Gische, JJ.

13449 Shakina Fludd, Index 308399/10
Plaintiff-Appellant,

-against-

Anilfa Pena, et al.,
Defendants-Respondents.

_____

Decolator, Cohen & Diprisco, LLP, Garden City (Joseph L. Decolator of counsel), for appellant.

Russo, Apoznanski & Tambasco, Melville (Susan J. Mitola of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered April 24, 2013, which granted defendants' motion for summary judgment dismissing the complaint on the threshold issue of serious injury under Insurance Law § 5102(d), unanimously modified, on the law, to deny the motion as to the claims of "permanent consequential" and "significant" limitations in use of the lumbar spine, and otherwise affirmed, without costs.

Defendants established prima facie that plaintiff did not sustain serious injuries to her cervical or lumbar spine as a result of the subject motor vehicle accident by submitting the affirmed report of their medical expert, who found that plaintiff had full normal range of motion and exhibited no functional disability at the time of examination (*see Long v Taida Orchids, Inc.*, 117 AD3d 624 [1st Dept 2014]). Defendants were not

required to present medical evidence with respect to plaintiff's alleged injury to her left shoulder, since plaintiff failed to recall at her deposition which shoulder was injured (*see Thomas v City of New York*, 99 AD3d 580, 582 [1st Dept 2012], *lv denied* 22 NY3d 857 [2013]). Moreover, plaintiff made no complaints about any shoulder injury when she was examined by defendants' expert.

In opposition, plaintiff raised a material issue of fact as to injuries she claims were sustained to her lumbar spine. Her treating orthopedist confirmed that she exhibited limitations in range of motion in her lumbar spine when she was examined shortly after the accident and again when she was examined after defendants moved for summary judgment. The orthopedist also affirmed that he reviewed the MRI taken of plaintiff's lumbar spine less than two months after the accident, and it showed bulging disks, and he opined that the injuries were causally related to the accident (*see Santos v Perez*, 107 AD3d 572 [1st Dept 2013]). Although plaintiff inadvertently failed to attach the MRI report to the radiologist's affirmation she submitted, the affirmation by the orthopedist who reviewed the MRI constitutes admissible objective medical evidence of plaintiff's lumbar injury (*see Duran v Kabir*, 93 AD3d 566 [1st Dept 2012]). Further, defendants did not dispute the orthopedist's findings (*see Cruz v Rivera*, 94 AD3d 576 [1st Dept 2012]).

Plaintiff failed to submit any objective evidence of injury to her cervical spine, and the post-accident treatment records of her doctor do not refer to any such injury. She also failed to raise an issue of fact as to her left shoulder claim.

Plaintiff failed to raise an issue of fact as to her 90/180-day claim, since her deposition testimony indicated that she returned to work as a police officer on limited duty eight weeks after the accident (*see Perl v Meher*, 18 NY3d 208, 220 [2011]; *Torain v Bah*, 78 AD3d 588, 589 [1st Dept 2010]).

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

ENTERED: NOVEMBER 13, 2014

CLERK

Gonzalez, P.J., Tom, Renwick, Gische, JJ.

13453 In re Natina F., And Another,

Dependent Children Under the
Age of Eighteen Years, etc.,

Zena F.,
Respondent-Appellant.

The Children's Aid Society,
Petitioner-Respondent.

_____

Tennille M. Tatum-Evans, New York, for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Patricia Colella of counsel), attorney for the children.

_____

Order, Family Court, New York County (Jody Adams, J.), entered January 18, 2013, which, upon a fact-finding determination that appellant mother permanently neglected the subject children, terminated her parental rights and transferred custody and guardianship of them to petitioner and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The court properly found that clear and convincing evidence demonstrated that despite the agency's diligent efforts to reunite the mother with the children, the mother permanently neglected the children based on the facts that although she had

completed a multitude of programs and engaged in mental health therapy, she never developed the ability to empathize with or understand the children, and that she had exposed her then three year old son to the home birth of a sibling, rather than comply with the Agency direction to return him to the foster home prior to the birth.

The court properly found that a preponderance of the evidence demonstrated that it was in the best interests of the children to terminate the mother's parental rights to free them for adoption by their foster mother. One of the children has lived in the foster home for almost seven years, since she was 19 months old, and was thriving. The other child was recently placed in the home, and his needs were being addressed by the foster mother, who wanted to adopt him. A suspended judgement was not warranted given the mother's failure to progress in the seven years since placement of the older child.

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

ENTERED: NOVEMBER 13, 2014

CLERK

Gonzalez, P.J., Tom, Renwick, Gische, JJ.

13456 Chellappa Shanmugam, etc., Index 600997/10
Plaintiff-Respondent,

-against-

SCI Engineering, P.C., et al.,
Defendants,

Shahid Iqbal,
Defendant-Appellant.

_____

Ralph A. Hummel, Woodbury, for appellant.

McLaughlin & Stern, LLP, New York (Jonathan R. Jeremias of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered October 23, 2013, after a jury trial, in favor of plaintiff, unanimously affirmed, with costs.

The court properly precluded defendant Shahid Iqbal (defendant) from presenting testimony concerning the value of defendant company's carry-forward contracts, accounts receivable, and monthly billings, since the best evidence rule requires production of those documents themselves, and since defendant did not proffer an adequate explanation for his failure to produce the documents (*see Schozer v William Penn Life Ins. Co. of N.Y.*, 84 NY2d 639, 643-644 [1994]). Because testimony on the value of the assets at issue would be based on the contents of the unproduced documents, any such testimony would also be

inadmissible hearsay (*see Soho Generation of N.Y. v Tri-City Ins. Brokers*, 256 AD2d 229, 232 [1st Dept 1998]). Similarly, the court properly precluded any testimony concerning client dissatisfaction with defendant company, as such testimony would be based on the client's out-of-court statements and would constitute inadmissible hearsay (*see People v Brensic*, 70 NY2d 9, 14 [1987]). The prelitigation letter by defendant to plaintiff explaining his refusal to pay on the notes at issue was also properly precluded as inadmissible hearsay (*see id.*). Defendant's alleged availability to testify at trial about the contents of the letter does not, alone, render the letter admissible (*see Nucci v Proper*, 95 NY2d 597, 602-603 [2001]). Lastly, the court properly precluded defendant's summary of customer revenues for 2012; even if relevant, the summary is inadmissible under the best evidence rule, as it is based on defendant company's books and records, which defendant, without

explanation, failed to produce during discovery (*Schozer*, 84 NY2d at 643-644; *see also National States Elec. Corp. v LFO Constr. Corp.*, 203 AD2d 49, 50 [1st Dept 1994]).

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

ENTERED: NOVEMBER 13, 2014

CLERK

Gonzalez, P.J., Tom, Renwick, Gische, JJ.

13457 The People of the State of New York, Ind. 3076/12
Respondent,

-against-

Julian Rosario,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about September 20, 2012,

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: NOVEMBER 13, 2014

CLERK

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

Gonzalez, P.J., Tom, Renwick, Gische, JJ.

13459-
13460 Index 102622/11

Robert Parkman,
Plaintiff-Respondent,

-against-

149-151 Essex Street Associates, LLC, et al.,
Defendants-Appellants.

_____

Kaufman Borgeest & Ryan LLP, Valhalla (Jacqueline Mandell of counsel), for 149-11 Essex Street Associates, LLC and Safeguard Realty Management Company, appellants.

Mead, Hecht, Conklin & Gallagher, LLP, White Plains (Elizabeth M. Hecht of counsel), for Milan Vatovec, appellant.

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

_____

Orders, Supreme Court, New York County (Joan M. Kenney, J.), entered October 28, 2013, which, to the extent appealed from as limited by the briefs, denied defendants 149-151 Essex Street Associates, LLC and Safeguard Realty Management Company's (the Safeguard defendants) motion for summary judgment dismissing the amended complaint as against them, and denied defendant Milan Vatovec's motion for summary judgment dismissing the amended complaint and the cross claims against him, unanimously reversed, on the law, without costs, and the motions granted. The Clerk is directed to enter judgment accordingly.

In this action, plaintiff, a firefighter, alleges that he

was injured when he fell over "something" while supervising the other firefighters, who were extinguishing a rooftop fire that erupted as a result of defendant Milan Vatovec's actions in discarding charcoal embers in a plastic trash can on the roof. When asked at his deposition what he fell over, plaintiff responded, "I don't know."

Defendant Vatovec is entitled to summary judgment dismissing the amended complaint as against him, since plaintiff failed to raise any opposition to Vatovec's motion, and we decline to review plaintiff's arguments presented for the first time on appeal (*see e.g. Callisto Pharm., Inc. v Picker*, 74 AD3d 545 [1st Dept 2010]). Similarly, Vatovec is entitled to summary judgment dismissing the Safeguard defendants' cross claims against him, since the Safeguard defendants have not opposed the dismissal of those claims on appeal (*see Razzano v Woodstock Owners Corp.*, 111 AD3d 522, 523 [1st Dept 2013]).

The Safeguard defendants, the owner and manager of the building at issue, were entitled to summary judgment dismissing plaintiff's common-law negligence claim. Plaintiff has not opposed the dismissal of this claim on appeal and, in any event, his failure to identify the condition that caused his fall is fatal to his claim (*see e.g. Bittar v New Growing, Inc.*, 94 AD3d 630 [1st Dept 2012]).

Plaintiff's General Municipal Law § 205-a claim should have been dismissed, since the Safeguard defendants established that they did not violate a fire safety statute or ordinance (*see Zvinys v Richfield Inv. Co.*, 25 AD3d 358, 359 [1st Dept 2006], *lv denied* 7 NY3d 706 [2006]). Section 307.5.1 of the New York City Fire Code (Administrative Code of City of NY tit 29), upon which plaintiff relies in support of his section 205-a claim, prohibits the installation or operation of a charcoal grill within 10 feet of any combustible waste or material, and there is no evidence that defendants violated this provision (*see Zvinys*, 25 AD3d at 359-360). Even if there were evidence of a violation, plaintiff failed to set forth relevant facts from which it may be inferred that the alleged violation directly or indirectly caused his injuries (*see id.*). Indeed, plaintiff alleges that he was injured when he fell over "something." Accordingly, it cannot be said that the alleged installation or operation of the charcoal grill near combustible material directly caused his injury. Nor can it be inferred that the alleged installation or operation of the grill indirectly caused his injury. Indeed, the evidence shows that the fire arose out of the activities of Vatovec, a tenant, more than 12 hours after his operation of the grill

(*id.*). Under the circumstances, the connection between plaintiff's claimed injury and the Safeguard defendants' alleged Code violation is too attenuated (*see id.*; *see also Downey v Beatrice Epstein Family Partnership, L.P.*, 48 AD3d 616, 619 [2d Dept 2008], *lv denied* 11 NY3d 702 [2008]).

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

ENTERED: NOVEMBER 13, 2014

CLERK

Gonzalez, P.J., Tom, Renwick, Gische, JJ.

13461 Bryant Cooper, etc., Index 260514/08
Plaintiff-Appellant,

-against-

Starrett City Inc., et al.,
Defendants-Respondents.

_____

Law Offices of Marius C. Wesser PC, New York (Marius C. Wesser of counsel), for appellant.

Brody & Branch, New York (Mary Ellen O'Brien of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered November 18, 2013, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

During a heat wave in early June of 2008, plaintiff's decedent, Ellis Cooper, who was disabled and wheelchair bound, suffered a heat stroke and died on June 10, 2008. At the time of his death, Cooper had been living with his mother and brother in an apartment located within the 46-building complex known as Spring Creek Towers in Brooklyn, which is owned by defendant Starrett City. The complex had a single central heating and air conditioning system, using a single pipe system located in Starrett's power plant. Under New York City law, the apartment complex is required to maintain the capacity to provide heat to

its tenants through May 31st of each year (Administrative Code of City of NY § 27-2029). After that date, Starrett undertakes a process of changing over from heat to air conditioning.

Plaintiff alleges that defendants voluntarily undertook a duty to provide central air conditioning, while at the same time preventing tenants from using individual air conditioning units, and were negligent in delaying the start of the changeover process, notwithstanding that a heat wave was forecast.

Although there is no contention that landlords are required to provide air conditioning, the general rule is that, when a person "voluntarily assumes the performance of a duty, he is required to perform it carefully, not omitting to do what an ordinarily prudent person would do in accomplishing the task" (*Wolf v City of New York*, 39 NY2d 568, 573 [1976]; *see also Parvi v City of Kingston*, 41 NY2d 553, 559 [1977]; *Marks v Nambil Realty Co.*, 245 NY 256, 258 [1927]).

Defendants demonstrated their prima facie entitlement to summary judgment by the deposition testimony of their employees that the seasonal changeover process begins every year at the earliest possible date, May 31st, and is complete no later than June 15th, and that the changeover in 2008 followed the usual process. They testified that the process involves shutting down the heating system, draining 250,000 gallons from the pipes, so

that the pumps can be inspected and cleaned, and then re-filling the pipes with 250,000 gallons of water that is pumped through refrigeration units until the water is cooled to about 40 degrees Fahrenheit. Although defendants did not provide admissible evidence for their assertion that the changeover process was actually completed by June 9th in 2008, the admissible evidence demonstrates that they undertook the seasonal changeover from heat to air conditioning in their usual manner, without undue delay (*see Peralta v Henriquez*, 100 NY2d 139, 144 [2003]). Defendants also demonstrated that they received no notice that plaintiff's decedent needed relief from the heat.

In opposition to defendants' summary judgment motion, plaintiff failed to raise a triable issue of fact as to whether defendants were negligent. The affidavit of plaintiff's engineering expert was insufficient to raise an issue of fact, since he simply asserted in a conclusory manner, without basis in the record, that defendants were reckless and late in providing air conditioning to the building complex (*see Belmer v HHM Assoc., Inc.*, 101 AD3d 526, 529 [1st Dept 2012]). There is no legal basis for the expert's assertion that defendants could have transported plaintiff's decedent to a cooling station or a hospital, on their own initiative. Landlords are not insurers of

tenant safety (*see Banner v New York City Hous. Auth.*, 94 AD3d 666 [1st Dept 2012]), and here it was undisputed that decedent's caregivers never alerted defendants that he needed any assistance.

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

ENTERED: NOVEMBER 13, 2014

CLERK

Gonzalez, P.J., Tom, Renwick, Gische, JJ.

13462 The People of the State of New York, Respondent, Ind. 5553/11

-against-

David Pagan, Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered on or about May 22, 2012, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

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

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

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

ENTERED: NOVEMBER 13, 2014

CLERK

Gonzalez, P.J., Tom, Renwick, Gische, JJ.

13463N Lourdes M. Rivera, Index 26234/04
Plaintiff,

-against-

Dr. Eric Walter, et al.,
Defendants.
- - - - -
Morelli Alters Ratner, PC,
Appellant,

-against-

Corpina, Piergrossi, Klar &
Peterman, LLP, et al.,
Respondents.

_____

Morelli Alters Ratner, LLP, New York (David S. Ratner of counsel), for appellant.

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Brian J. Isaac of counsel), for Corpina, Piergrossi, Klar & Peterman, LLP, respondent.

Mark Kressner, respondent pro se.

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered April 19, 2013, which apportioned 60% of plaintiff's attorneys' fees to her incoming attorneys, appellant Morelli Alters Ratner, P.C., 15% to her first outgoing attorney, respondent Mark Kressner, Esq., and 25% to her second outgoing attorneys, respondent Corpina, Piergrossi, Klar & Peterman, LLP, unanimously affirmed, without costs.

The motion court, which presided over this matter from its

inception, observed first-hand the amount of time spent by the attorneys on the case, the nature and quality of the work performed, and the relative contributions of counsel toward achieving the outcome, and properly analyzed these factors (*see Diakrousis v Maganga*, 61 AD3d 469 [1st Dept 2009]). The record shows that Kressner commenced the suit, served various discovery demands, attended court conferences, and filed a bill of particulars, but did the least work of all plaintiff's attorneys during his more than 3½ years representing plaintiff, warranting only 15% of the fees. The Corpina firm's contributions in, among other things, defending plaintiff's two depositions, warrant 25% of the award, and the remaining 60% is appropriately apportioned to Morelli (*see e.g. Castellanos v CBS Inc.*, 89 AD3d 499 [1st Dept 2011]).

While Morelli contributed significantly to the settlement at mediation, deposed one of the defendant doctors, obtained and reviewed relevant medical records, and consulted with an expert, among other things, it nevertheless did not do as much work as the incoming attorneys in the cases it cites, such as preparing for and representing plaintiff at trial, making substantive

pretrial motions, and taking an appeal (*compare Han Soo Lee v Riverhead Bay Motors*, 110 AD3d 436 [1st Dept 2013]).

Morelli cites no evidence that the Corpina firm was discharged for cause, and insufficient evidence to demonstrate that Kressner was discharged for cause.

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

ENTERED: NOVEMBER 13, 2014

CLERK

Gonzalez, P.J., Tom, Acosta, Gische, JJ.

13464 Ind. 2342/13
[M-3658] In re Moises Martinez,
Petitioner,

-against-

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

_____

Moises Martinez, petitioner pro se.

Robert T. Johnson, District Attorney, Bronx (Melanie A. Sarver of counsel), for Robert T. Johnson, respondent.

Eric T. Schneiderman, Attorney General, New York (Michael A. Berg of counsel), for Hon. Judith Lieb, respondent.

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: NOVEMBER 13, 2014

CLERK

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

9254 The People of the State of New York, Appellant, Ind. 5388/97

-against-

Sandra Reyes, Defendant-Respondent.

_____

Robert T. Johnson, District Attorney, Bronx (Richard J. Ramsay of counsel), for appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Katherine Skolnick of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Caesar D. Cirigliano, J.), entered on or about October 25, 2011, which granted defendant's CPL 440.10 motion to vacate a judgment of the same court and Justice, rendered October 21, 1999, convicting defendant, on her plea of guilty, of attempted criminal sale of a controlled substance in the third degree, and sentencing her to a term of five years' probation, unanimously reversed, on the law, and the judgment reinstated.

The judgment of conviction was vacated pursuant to *Padilla v Kentucky* (559 US 356 [2010]), which was decided after defendant's

conviction had become final. In view of the Court of Appeals' determination that the *Padilla* rule will not be applied retroactively in the courts of this state (*People v Baret*, 23 NY3d 777 [2014]), we reverse the order granting defendant's CPL 440.10 motion and reinstate the judgment of conviction.

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

ENTERED: NOVEMBER 13, 2014

CLERK

Mazzarelli, J.P., Friedman, DeGrasse, Richter, Manzanet-Daniels, JJ.

11504- Ind. 470/06
11505 The People of the State of New York,
Respondent,

-against-

Mesias Pina,
Defendant-Appellant.

_____

Appeals having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Catherine Bartlett, J.), rendered June 4, 2008, and an order, same court (Doris M. Gonzalez, J.), entered May 1, 2012,

And said appeals having been argued by counsel for the respective parties; and due deliberation having been had thereon, and a decision and order of this Court having been entered on February 6, 2014, holding the appeals in abeyance, and upon the stipulation of the parties hereto dated June 9, 2014,

It is unanimously ordered that said appeals be and the same are hereby withdrawn in accordance with the terms of the aforesaid stipulation (see M-3112A decided simultaneously herewith).

ENTERED: NOVEMBER 13, 2014

CLERK

Tom, J.P., Friedman, Feinman, Gische, Kapnick, JJ.

13148 Sina Drug Corp., doing business as Oncomed Pharmaceutical Services, et al.,
Plaintiffs-Appellants,

-against-

Mohammad Ali Mohyuddin, et al.,
Defendants-Respondents.

Index 651710/13

Greenberg Traurig, LLP, New York (James W. Perkins and Roy Taub of counsel), for appellants.

Steven Cohn, P.C., Carle Place (Brian J. Isaac of counsel), for respondents.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about November 25, 2013, which denied plaintiffs' motion for summary judgment on their three causes of action, and granted defendants' cross motion for summary judgment dismissing the complaint, unanimously modified, on the law, to grant summary judgment to plaintiffs on their first and second causes of action, and to deny defendants' cross motion on those causes of action, remand for a determination of attorneys' fees to be awarded plaintiffs and a showing of the actual damages incurred in the instant action, and otherwise affirmed, without costs.

In 2011, the parties entered into a settlement that contained a mutual release of any and all claims arising from the

dispute that was the subject of the agreement. Thereafter, defendant Mohammad Ali Mohyuddin commenced an action against plaintiffs alleging that after the settlement agreement was executed, they improperly issued him scheduled K-1 statements for the years 2007 through 2010, imputing approximately $1.27 million in income in retaliation for the settlement, since he did not receive any of that income. This action was barred by the terms of the valid release which extinguished any claims regarding Moyhuddin's tax liability (*see Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 98 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]).

Notably, plaintiffs' actions in issuing the schedule K-1 statements were not improper. Prior to the settlement, Mohyuddin was judicially determined to be an 18% owner of plaintiff Sina Drug Corp. during the stated period, and as a subchapter S corporation, Sina Drug is required to issue schedule K-1 statements reflecting each shareholder's ownership (*Beacher v Estate of Beacher*, 756 F Supp 2d 254, 265 [EDNY 2010]), regardless of whether the income was actually distributed (*see U.S. v Pirro*, 212 F3d 86, 101 [2d Cir 2000]). Moreover, we find that nothing in the contractual language of the parties' release suggests that plaintiffs intended to relieve defendants of any

tax consequences (*see Maschler v Brenkler*, 85 AD3d 692 [1st Dept 2011]).

Plaintiffs are entitled to attorneys' fees they incurred in defending the action commenced by Mohyuddin since the indemnification provision in the parties' settlement agreement unambiguously reflects defendants' expressed intent to indemnify and hold plaintiffs harmless from and against all claims or expenses in connection with any claims brought by defendants.

However, the liquidated damages clause providing that defendants would pay $1 million if they refused to indemnify plaintiffs amounts to an unenforceable penalty (*see JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 380 [2005]; *Truck Rent-A-Ctr. v Puritan Farms 2nd*, 41 NY2d 420, 425 [1977]).

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

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

ENTERED: NOVEMBER 13, 2014

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Manzanet-Daniels, JJ.

13234 Jose De Jesus Miranda, Index 306801/10
Plaintiff-Respondent, 83751/11
83807/11

-against-

NYC Partnership Housing
Development Fund Company, Inc.,
Defendant,

Weiher Court, LLC, et al.,
Defendants-Appellants.

- - - - -

[And Third-Party Actions]

_____

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for Weiher Court, LLC., appellant.

Gallo, Vitucci & Klar, LLP, New York (Kimberly A. Ricciardi of counsel), for Great American Construction Company Corp., appellant.

Roth & Roth LLP, New York (David A. Roth of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered October 30, 2013, which granted the branch of plaintiff's motion that sought summary judgment on the issue of defendants-appellants' (hereinafter defendants) liability under Labor Law § 240(1), and denied, as academic, the branch of plaintiff's motion that sought summary judgment on the issue of defendants' liability under § 241(6), unanimously modified, on the law, to grant defendants, upon a search of the record, summary judgment dismissing the § 241(6) claim insofar as it is predicated on a

violation of 12 NYCRR 23-1.7(f), and otherwise affirmed, without costs.

Plaintiff was injured when he fell from a 6-foot-tall A-frame ladder that had been placed atop an approximately 8-foot-tall scaffold, reaching a combined height of nearly 14 feet. Despite defendants' argument that plaintiff could have extended the scaffold to a height of 12 feet using "piping and planks," the presence of which plaintiff disputes, the existing scaffold and unassembled components would not have constituted an adequate safety device (*see Conway v New York State Teachers' Retirement Sys.*, 141 AD2d 957, 958-959 [3d Dept 1988]; *Collins v West 13th St. Owners Corp.*, 63 AD3d 621, 622 [1st Dept 2009]). Even if the scaffold had been extended to its maximum 12 feet, it would have still provided an inadequate height from which to perform the work of attaching sheetrock to a metal frame at heights approaching the 20-foot ceiling. Moreover, the presence of taller ladders at the worksite is immaterial because it cannot be said that plaintiff "knew he was expected to use them" (*Gallagher v New York Post*, 14 NY3d 83, 88 [2010]); plaintiff testified that he could not use those ladders because they were designated for the plumbers' use, and the affidavit by defendant Jace Construction's foreman merely states that plaintiff was not warned against using them. As plaintiff was not provided with an

adequate safety device, defendants cannot avail themselves of the "sole proximate cause" or "recalcitrant worker" defense, and summary judgment in plaintiff's favor is appropriate on the issue of liability under Labor Law § 240(1) (*see e.g. Gallagher*, 14 NY3d at 88-89; *Hagins v State of New York*, 81 NY2d 921, 922-923 [1993]; *Stolt v General Foods Corp.*, 81 NY2d 918 [1993]; *DeRose v Bloomingdale's Inc.*, 120 AD3d 41 [1st Dept 2014]).

Although defendants did not move for summary judgment dismissing plaintiff's Labor Law § 241(6) claims, this Court finds, upon a search of the record, that the § 241(6) claim, insofar as it is predicated on a violation of 12 NYCRR 23-1.7(f), should be dismissed (*see* CPLR 3212[b]; *Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 111 [1984]). Plaintiff was not attempting to access another working level within the meaning of § 23-1.7(f) (*see Torkel v NYU Hosps. Ctr.*, 63 AD3d 587, 590 [1st Dept 2009]).

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

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

ENTERED: NOVEMBER 13, 2014

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Manzanet-Daniels, JJ.

13237 The People of the State of New York, Respondent, Ind. 1154/09 5599/10

-against-

George Smith, Defendant-Appellant.

_____

Stanley Neustadter, Cardozo Appeals Clinic, New York (Peter Lushing of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Patricia Nunez, J.), rendered April 21, 2011, convicting defendant, after a jury trial, of predatory assault against a child, sexual abuse in the first degree, and course of sexual conduct against a child in the second degree, and sentencing him to an aggregate term of 20 years to life, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the jury's credibility determinations. The child victim's testimony established all of the elements of the crimes, and medical evidence tended to corroborate that testimony.

Defendant sought to introduce foster care agency reports containing statements by two foster mothers regarding the victim's alleged untruthfulness regarding unrelated matters in

the past. These reports satisfied the business duty requirement of the business records exception to the hearsay rule (*see Johnson v Lutz*, 253 NY 124, 128 [1930]) because the foster mothers were expected to report on the child's relevant conduct. Foster parents are required to sign an agreement with the foster care agency, providing, inter alia, that they will "endeavor to cooperate with the agency staff in the implementation or review of each child's service or discharge plan and to inform the agency of any incident or event that affects or may affect the child's adjustment, health, safety or well-being and/or may have some bearing upon the current service plan" (18 NYCRR 443.3[b][10]).

Nonetheless, we find that the reports were properly excluded. The proffered evidence largely consisted of opinions, conclusions, second-hand accounts and anecdotal evidence. Such statements are inadmissible, even if contained within otherwise admissible business records. Further, one of the foster mothers testified that she had not made the comments the caseworkers had attributed to her, calling the reliability of the reports into question.

The information the defense sought to introduce through the foster care agency records was cumulative of other evidence at trial. The first-hand testimony of the complainant and the

foster mothers, all of whom were subject to cross-examination, was more reliable evidence than second- and third-hand statements contained in the records.

Any error in excluding the records would in any event be deemed harmless. The complainant gave detailed testimony regarding the alleged sexual abuse, and that testimony was strongly corroborated by evidence that she contracted HSV-2 from defendant, a disease that is nearly always sexually transmitted. The defense had ample opportunity to challenge the complainant's credibility, and some of its efforts to do so involved alleged incidents recounted in the disputed reports.

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

ENTERED: NOVEMBER 13, 2014

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Richter, Feinman, JJ.

13465 The People of the State of New York, Ind. 2681/07
Respondent,

-against-

David Hutchings,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Susan H. Salomon of counsel), for appellant.

David Hutchings, appellant pro se.

Robert T. Johnson, District Attorney, Bronx (Orrie A. Levy of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Caesar D. Cirigliano, J. at suppression hearing; Barbara F. Newman, J. at jury trial and sentencing), rendered March 10, 2010, convicting defendant of robbery in the first degree (two counts) and attempted robbery in the first degree, and sentencing him, as a second violent felony offender, to an aggregate term of 20 years, unanimously affirmed.

The court properly denied defendant's motion to suppress identification evidence. The court had the unique opportunity to see and hear the witnesses (*see People v Prochilo*, 41 NY2d 759, 761 [1977]), and there is no basis for disturbing its credibility

determinations, in which it rejected defendant's claim that he had requested the presence, at his lineup in this case, of one of the attorneys then representing him in pending cases.

We have considered and rejected defendant's pro se claims.

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

ENTERED: NOVEMBER 13, 2014

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Richter, Feinman, JJ.

13466 In re O'Kima Henry, Index 400524/13
Petitioner-Respondent,

-against-

New York City Housing Authority, etc.,
Respondent-Appellant.

_____

David I. Farber, New York (Seth E. Kramer of counsel), for appellant.

O'Kima Henry, respondent pro se.

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered on or about October 23, 2013, which, in an article 78 proceeding to annul respondent Housing Authority's termination of petitioner's public housing tenancy on the grounds of nondesirability, denied respondent's motion to dismiss the petition as barred by the statute of limitations, unanimously reversed, on the law, without costs, the cross motion granted, and the petition dismissed.

On March 23, 2013, petitioner pro se commenced this proceeding seeking to reverse respondent's June 11, 2012 denial of her application to vacate her default in appearing at a hearing on charges to terminate her tenancy. The denial constitutes a final and binding determination from which the four-month statute of limitations is measured (*see Matter of*

*Yarbough v Franco*, 95 NY2d 342, 347 [2000]). Thus, this proceeding is time-barred (*see* CPLR 217[1]), leaving the court without discretion to address the merits of petitioner's underlying claims (*see Matter of Thorton v New York City Hous. Auth.*, 100 AD3d 556, 557 [1st Dept 2012]).

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

ENTERED: NOVEMBER 13, 2014

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Richter, Feinman, JJ.

13467 Anthony Clement, Index 101148/06
Plaintiff-Appellant,

-against-

The New York City Transit Authority,
Defendant-Respondent.

_____

G. Wesley Simpson, P.C., Brooklyn (G. Wesley Simpson of counsel), for appellant.

Lawrence Heisler, Brooklyn (Anna J. Ervolina of counsel), for respondent.

_____

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered March 26, 2013, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The court properly granted defendant's motion based on the "storm in progress" defense (*see Powell v MLG Hillside Assoc.*, 290 AD2d 345 [1st Dept 2002]; *Pippo v City of New York,* 43 AD3d 303, 304 [1st Dept 2007]). Although defendant inadvertently omitted the relevant climatological data from its initial motion papers, the affirmation of its counsel stated that it was snowing from about 11 p.m. on the night before the accident until 5 a.m., more than three hours after the accident, and plaintiff testified that it had stopped snowing only two hours before his fall. The obligation to take reasonable measures to remedy a dangerous

condition caused by a storm does not commence until a reasonable time after the storm has ended (*see Weinberger v 52 Duane Assoc., LLC,* 102 AD3d 618, 619 [1st Dept 2013]). Based on plaintiff's testimony alone, a reasonable time had not yet elapsed.

Plaintiff failed to raise a triable issue of fact concerning whether defendant breached a duty to clean the subway stairs when trace amounts of precipitation were falling (*see Prince v New York City Hous. Auth.*, 302 AD2d 285 [1st Dept 2003]).

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

ENTERED: NOVEMBER 13, 2014

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Richter, Feinman, JJ.

13468-
13468A Sylvia Nasar,
Plaintiff-Appellant,

-against-

The Trustees of Columbia University
in the City of New York,
Defendant-Respondent.

Index 150132/13

_____

Mark J. Lawless, New York, for appellant.

Patterson Belknap Webb & Tyler LLP, New York (Catherine A. Williams of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Manuel J. Mendez, J.), entered December 20, 2013, dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered October 16, 2013, which granted defendant's motion to dismiss, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff has no standing to sue for money damages arising from a breach of the grant agreement since the funds belong entirely to defendant (*see* N-PCL 513). She does not fall within the "special interest" exception to the general rule (*see Alco Gravure, Inc. v Knapp Found.*, 64 NY2d 458, 465-466 [1985]). Her attempt to have the bulk of the corpus paid to her personally places her in conflict with future, undetermined beneficiaries of

the fund (*see id.*; *Citizens Defending Libraries v Marx*, 2014 NY Slip Op 31449[U] [Sup Ct, NY County May 30, 2014]). Nor is plaintiff a third-party beneficiary of the grant agreement (*see Oursler v Women's Interart Ctr.*, 170 AD2d 407 [1st Dept 1991]). The agreement vests full discretion to choose the holder of the endowed chair, and to spend monies from the fund, in defendant. By the express terms of the agreement, disputes or changes to the grant are to be decided by the donor and defendant. Thus, there is no indication in the grant agreement that plaintiff is an intended rather than an incidental beneficiary.

As plaintiff has no interest in the funds provided by the grant agreement, she cannot state a cause of action for conversion or unjust enrichment.

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

ENTERED: NOVEMBER 13, 2014

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Richter, Feinman, JJ.

13471 The People of the State of New York, Ind. 32153C/12
Respondent,

-against-

Irrae Davis,
Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Steven J. Miraglia of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Paul Hershan 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 (Caesar D. Cirigliano, J.), rendered on or about August 1, 2012,

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: NOVEMBER 13, 2014

CLERK

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

Mazzarelli, J.P., Sweeny, Moskowitz, Richter, Feinman, JJ.

13472 The People of the State of New York, Respondent, Ind. 62549C/12

-against-

Raymond Mata, Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Orrie A. Levy of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Richard Lee Price, J.), rendered December 17, 2012, convicting defendant, after a nonjury trial, of attempted assault in the third degree, attempted criminal obstruction of breathing or blood circulation, and harassment in the second degree, and sentencing him to an aggregate term of 30 days, unanimously affirmed.

Whether or not the court properly admitted the 911 call and the victim's statement to the responding police, the admission of this evidence was harmless (*see People v Crimmins*, 36 NY2d 230, 242 [1975]).

Defendant was properly convicted of attempted criminal obstruction of breathing or blood circulation. In an exercise of prosecutorial discretion (*see People v Urbaez*, 10 NY3d 773 [2008]), the class A misdemeanor charges were reduced to

attempts. Defendant argues that criminal obstruction of breathing or blood circulation (Penal Law § 121.11) is essentially an attempt to commit strangulation in the second degree (Penal Law § 121.12), rendering an attempt to commit the former crime nonexistent, as an "attempted attempt." However, criminal obstruction requires a specific intent, and it proscribes specific conduct committed with intent to achieve a certain result (*compare People v Campbell*, 72 NY2d 602, 605-607 [1988]). It is not an inchoate offense, and it may be committed by conduct that does not necessarily constitute an attempt to commit another crime.

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

ENTERED: NOVEMBER 13, 2014

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Richter, Feinman, JJ.

13473 6 Montague, LLC, Index 651133/10
Plaintiff-Appellant,

-against-

New Hampshire Insurance Company,
Defendant-Respondent.

_____

Profeta & Eisenstein, New York (Jethro M. Eisenstein of counsel), for appellant.

Lewis Brisbois Bisgaard & Smith LLP, New York (Peter T. Shapiro of counsel), for respondent.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered July 31, 2013, which granted defendant's cross motion for summary judgment dismissing the complaint, and denied plaintiff's motion for summary judgment, unanimously modified, on the law, solely to declare in defendant's favor, and otherwise affirmed, without costs.

Defendant insurer met its burden of establishing entitlement to judgment as a matter of law. The record establishes that the damage to the balcony was caused by deterioration and wet or dry rot, which defendant is not liable for pursuant to the plain language of the exclusion provisions of the policy (*see Seward Park Hous. Corp. v Greater New York Mut. Ins. Co.*, 43 AD3d 23, 28 [1st Dept 2007]). The photographs and affidavit submitted by defendant's engineer demonstrate that a rotting column

contributed to decay in the horizontal beam that ultimately fractured. Although the beam was not visible because it was encased in fascia, the decay in the area below it was visible and was a clear indication that the beam within was deteriorating. Thus, even if the loss was due to collapse, as contended by plaintiff, the exclusion for loss due to decay and deterioration is applicable (*see Catucci v Greenwich Ins. Co.*, 37 AD3d 513, 514-515 [2d Dept 2007]).

There is no ambiguity as to the meaning of the term "hidden decay," which is a loss covered by the policy. Here, as in *Catucci*, the defect was not hidden because the decay was evident via visual inspection (*see* 37 AD3d at 515). Nor is it enough for plaintiff to contend that it did not have actual knowledge of the decay within the fractured beam. The evidence of extensive damage, such as the rotting of the area right below the internal beam that eventually split, was graphically depicted in the photographs and was confirmed by plaintiff's own engineer and architect.

Although the motion court reached the correct result, we note that where, as here, a declaratory judgment action is resolved on the merits against the plaintiff, the proper course

is to declare in favor of the defendant, rather than dismiss the action (*see Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954 [1989]).

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

ENTERED: NOVEMBER 13, 2014

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Richter, Feinman, JJ.

13474 Fredys Ruiz, Index 302184/13
Plaintiff-Respondent,

-against-

Johanna Alcantara,
Defendant-Appellant.

_____

Cheven, Keely & Hatzis, New York (William B. Stock of counsel), for appellant.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered September 11, 2013, which, in this personal injury action arising out of an automobile accident, directed the parties to appear at a traverse hearing, and held defendant's motion to dismiss the complaint in abeyance pending the hearing, unanimously reversed, on the law, without costs, and defendant's motion granted. The Clerk is directed to enter judgment dismissing the complaint.

A traverse hearing was not required. The process server stated that, on April 15, 2013, he personally served a "Jane Smith" with the summons and complaint at an address at West 228th Street; the next day, he mailed the summons and complaint to defendant at that address. His affidavit did not indicate that he had searched the records of the Department of Motor Vehicles. Defendant submitted an affidavit saying that, in August 2010, she

had moved from the West 228th Street address to a different address; she also submitted a driver's license, issued on October 14, 2010, showing her new address. Plaintiff did not controvert this evidence; indeed, he did not oppose defendant's motion, nor did he respond to this appeal. Accordingly, under the circumstances, the court should have granted defendant's motion to dismiss the complaint due to plaintiff's failure to properly serve defendant (*see Cayo v Saggar*, 31 Misc 3d 1209[A], 2011 NY Slip Op 50545[U], *2 [Sup Ct, Queens County 2011]; *see also Patrick v 118 E. 60th Owners Inc.*, 20 Misc 3d 1131[A], 2008 NY Slip Op 51695[U], *2-3 [Sup Ct, Bronx County 2008]).

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

ENTERED: NOVEMBER 13, 2014

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Richter, Feinman, JJ.

13475 The People of the State of New York, Ind. 2468/08
Respondent,

-against-

Dennis Smith,
Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Steven J. Miraglia of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bruce Allen, J.), rendered on or about December 10, 2008,

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: NOVEMBER 13, 2014

CLERK

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

Mazzarelli, J.P., Sweeny, Moskowitz, Richter, Feinman, JJ.

13476 Kyle Sutliff, Index 107610/10
Plaintiff-Appellant,

-against-

Ghulam Qadar, et al.,
Defendants-Respondents.

_____

Frank J. Laine, P.C., Plainview (Frank Braunstein of counsel), for appellant.

Baker McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Robert D. Grace of counsel), for Ghulam Qadar, respondent.

Zachary W. Carter, Corporation Counsel, New York (Christina Chung of counsel), for municipal respondents.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered October 10, 2013, upon renewal, which, to the extent appealed from as limited by the briefs, adhered to the original determination granting defendants' motions for summary judgment dismissing the complaint for failure to meet the serious injury threshold of Insurance Law § 5102(d), unanimously modified, on the law, to deny the branches of the motions seeking dismissal of plaintiff's claims alleging a "significant" limitation of use of the left shoulder and a 90/180-day injury, and otherwise affirmed, without costs.

Defendants made a prima facie showing of a lack of a "permanent consequential" or "significant" limitation of use of

the left shoulder by submitting their orthopedist's report finding full range of motion in the shoulder and negative clinical test results, and their radiologist's MRI report finding a normal shoulder (*see Clementson v Price*, 107 AD3d 533, 533 [1st Dept 2013]). The orthopedist's report also showed a lack of causation, as it opined that any significant symptoms were due to a left shoulder injury that preexisted the subject accident (*see Williams v Horman*, 95 AD3d 650, 650 [1st Dept 2012]). To the extent plaintiff argues that the orthopedist found a causally related injury, the orthopedist opined that the causally related injury amounted to only a minor contusion and, based on his review of plaintiff's medical records, attributed the more serious symptoms to the preexisting injury (*see Bravo v Martinez*, 105 AD3d 458, 458 [1st Dept 2013]).

In opposition, plaintiff failed to raise a triable issue of fact as to the existence of a "permanent consequential" limitation of use of the left shoulder. The September 2011 report of his treating physician, which was submitted on renewal, failed to reconcile the physician's findings of only a minor limitation in June 2010 (*see Nicholas v Cablevision Sys. Corp.*, 116 AD3d 567, 568 [1st Dept 2014]). Moreover, plaintiff offered no explanation for his having ceased treatment from June 2010

until September 2011 (*see Pommells v Perez*, 4 NY3d 566, 574 [2005]).

However, plaintiff did submit sufficient evidence to raise an issue of fact as to whether the subject accident aggravated his prior left shoulder injury, resulting in "significant" limitations in use. The affirmed reports of plaintiff's treating physician found substantial limitations and positive clinical tests results in January 2010, a month after the accident, and plaintiff underwent shoulder surgery in February 2010 (*see Thomas v NYLL Mgt. Ltd.*, 110 AD3d 613, 614 [1st Dept 2013]; *cf. Vasquez v Almanzar*, 107 AD3d 538, 539-540 [1st Dept 2013]). The treating physician also noted that plaintiff's prior shoulder injury improved with therapy, and opined that the subject accident caused significant injuries to the left shoulder. This evidence, as well as evidence that plaintiff returned to work full time over a year prior to the subject accident, raises a triable issue of fact as to whether this accident caused an aggravation or exacerbation of the prior injury (*see Nelson v Tamara Taxi Inc.*, 112 AD3d 547, 548 [1st Dept 2013]). Further, plaintiff submitted an MRI report performed after the accident, and an operative report of his orthopedic surgeon, which provide objective proof of a preexisting partial tear that may have been aggravated by the subject accident, and of a new symptom following this

accident (*see Paulino v Rodriguez*, 91 AD3d 559, 559 [1st Dept 2012]). Though unaffirmed, these medical reports can be considered together with plaintiff's affirmed medical evidence, since they were presented by defendants' expert, and considered in reaching his conclusion (*see Boateng v Ye Yiyan*, 119 AD3d 424, 425 [1st Dept 2014]).

Defendants made a prima facie showing of their entitlement to judgment on plaintiff's 90/180-day claim, by submitting evidence that any shoulder injury was not causally related to the accident (*see Henchy v VAS Express Corp.*, 115 AD3d 478, 480 [1st Dept 2014]). As noted above, in opposition, plaintiff raised an issue of fact as to causation. In addition, plaintiff submitted sufficient evidence to raise an issue of fact as to the existence of a 90/180-day injury. In particular, plaintiff testified that he missed at least four months of work after the accident, and that he was unable to perform his other usual daily activities during that time, such as cooking, cleaning, shopping, and caring for his child. In addition, his affirmed medical reports reflect that plaintiff was not medically cleared to return to work until six months after the accident and four months after he underwent

surgery on the left shoulder (*see Swift v New York Tr. Auth.*, 115 AD3d 507, 508-509 [1st Dept 2014]; *Lopez v Abayev Tr. Corp.*, 104 AD3d 473, 473 [1st Dept 2013]).

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

ENTERED: NOVEMBER 13, 2014

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Richter, Feinman, JJ.

13477 Panasia Estate, Inc., Index 104355/09
Plaintiff-Respondent-Appellant,

-against-

Daniel R. Broche, etc.,
Defendant,

Property 51 LLC, et al.,
Defendants-Appellants-Respondents.

_____

Thomas F. Farley PC, White Plains (Thomas F. Farley of counsel), for appellants-respondents.

Robinson Brog Leinwand Greene Genovese & Gluck PC, New York (Jennifer S. Smith of counsel), for respondent-appellant.

_____

Judgment, Supreme Court, New York County (Joan M. Kenney, J.), entered July 1, 2013, to the extent appealed from as limited by the briefs, confirming the Special Referee's report, which awarded plaintiff damages for waste, plus prejudgment interest from August 26, 2010 to the date of entry of judgment, and which denied plaintiff damages for lost rent, unanimously modified, on the law and the facts, to the extent of rejecting so much of the Referee's report as denied plaintiff damages for lost rent actually received by defendants Property 51 LLC and Property 215 LLC, and awarding plaintiff $582,254.64 for rents actually received by those defendants, plus prejudgment interest, and otherwise affirmed, without costs.

Plaintiff contracted with defendant Broche to purchase two properties located in Manhattan for $5.5 million. Before closing, however, Broche contracted with defendant Property 215 LLC to convey the same properties to it, and subsequently conveyed them to defendant Property 51 LLC as Property 215 LLC's assignee. Supreme Court granted plaintiff partial summary judgment on liability on its causes of action against Broche for breach of the covenant of good faith and fair dealing and on its causes of action against Property 215 LLC and Property 51 LLC (collectively the Property defendants) for tortious interference with contract.

Thereafter, Supreme Court granted plaintiff summary judgment on its cause of action against Broche for specific performance and ordered a hearing on a purchase price abatement to determine the diminution of value between what Broche had contracted to convey and what he conveyed. Thereafter plaintiff settled its claims against Broche for a purchase price abatement of $1.75 million and plaintiff's damages claim against the Property defendants for tortious interference proceeded to a special referee.

The Referee's report, confirmed by Supreme Court, correctly concluded that the damages plaintiff sought from the Property defendants for waste of the subject properties during the time

that they wrongfully deprived plaintiff of possession were not duplicative of any recovery resulting from plaintiff's settlement with Broche. The Referee's report further correctly concluded that loss of the rent roll for tenants who vacated the premises was reflected in plaintiff's settlement with Broche, precluding plaintiff from also recovering for this item of damages against the Property defendants (*Singleton Mgt. v Compere*, 243 AD2d 213, 218 [1st Dept 1998]). However, three tenants remained at the premises, for which the Property defendants charged $17,644.08 monthly during the 33 months they were in possession of the properties (May 2009 through January 2012). Plaintiff was entitled to recover these rents with prejudgment interest accruing from the date each monthly installment was due. We note that defendants did not preserve for appeal any argument that they are entitled to an offset against these rents for improvements they may have made, and expenses they may have incurred, during their possession. The Referee specifically determined that they were not so entitled, and they did not seek to have that finding rejected.

Property 215 LLC is liable for damages for its tortious interference with plaintiff's contract with Broche, even if Broche's breach of the contract did not occur until it conveyed the subject properties to Property 51 LLC. Property 215 LLC

cannot avoid liability for damages by assigning its purchase contract with Broche to Property 51 LLC before closing.

The testimony of plaintiff's architect as to waste damages was not speculative, and the date from which Supreme Court set prejudgment interest to accrue was not arbitrary but was in accordance with CPLR 5002.

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

ENTERED: NOVEMBER 13, 2014

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Richter, Feinman, JJ.

13482- Ind. 2869/11
13482A The People of the State of New York,
Respondent,

-against-

Charles Smith,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Claudia B. Flores of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Cassandra M Mullen, J.), rendered December 7, 2011, convicting defendant, after a jury trial, of resisting arrest, and sentencing him to a term of three months, and judgment, same court (Daniel McCullough, J.), rendered August 14, 2012, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second drug felony offender, to a term of two years, unanimously affirmed.

At defendant's first trial, where he was convicted of resisting arrest but the jury failed to reach a verdict as to the remaining charges, the court properly exercised its discretion in limiting cross-examination of police witnesses. Although defendant was entitled, assuming good faith, to ask the officers

about acts of misconduct bearing on their credibility, the proposed line of questioning went into accusations, subsequent remedial changes in police procedures, and other irrelevant or collateral matters (*see People v Ducret* 95 AD3d 636 [1st Dept 2012], *lv denied* 19 NY3d 996 [2012]). In particular, to the extent defendant is arguing that he was entitled to elicit the fact that lawsuits involving these officers were settled by the City of New York, and the dollar amounts of those settlements, that argument is without merit (*see Bigelow-Sanford v Specialized Commercial Floors of Rochester*, 77 AD2d 464 [4th Dept 1980]). The record fails to support defendant's assertion that the court prevented him from making a full offer of proof.

At the second trial, the court properly declined to deliver either a circumstantial evidence or "two inference" charge. The People's case was not based entirely on circumstantial evidence, notwithstanding the fact that the jury was called upon to draw certain inferences from the evidence (*see People v Roldan*, 88 NY2d 826 [1996]; *People v Daddona*, 81 NY2d 990 [1993]). Defendant's claims relating to the timeliness of certain charges given by the court at the second trial are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find that defendant has not established that he was prejudiced by the timing of these charges.

Defendant's claim that his counsel rendered ineffective assistance at the second trial is unreviewable on direct appeal because it involves matters not reflected in, or fully explained by, the record concerning counsel's decisions as to the introduction of evidence (*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 the ineffectiveness 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 his counsel's failure to offer evidence relating to lawsuits against the officers, or evidence of the content of defendant's own statements, 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.

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

ENTERED: NOVEMBER 13, 2014

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Richter, Feinman, JJ.

13483 In re Rena M.,
Petitioner-Respondent,

-against-

Derrick A.,
Respondent-Appellant.

_____

Andrew J. Baer, New York, for appellant.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for respondent.

_____

Order, Family Court, New York County (Diane Costanzo, Referee), entered on or about April 15, 2013, which awarded petitioner sole legal and physical custody of the parties' child, unanimously affirmed, without costs.

The determination that the child's best interests require that petitioner be awarded sole legal and physical custody of him has a sound and substantial basis in the record (*see Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]). With the exception of the period between June 2011 and February 2012, during which petitioner worked and was the sole financial support of the family, she has maintained physical custody of the child since he was born. Moreover, since February 2012, petitioner has cared for the child without any support, financial, emotional or otherwise, from respondent, who has not even visited with the

child since that time, despite an order directing supervised visitation. The record establishes that the child has been well cared for by petitioner, who has a stable job and home environment and has provided for the child's needs (*see Matter of Battista v Fasano*, 41 AD3d 712, 713 [2d Dept 2007], *lv denied* 9 NY3d 818 [2008]).

The record does not support respondent's contention that leaving petitioner's home and moving to California to live with respondent – who the record shows is emotionally, physically and financially challenged – would be in the child's best interests (*see e.g. Matter of Oscarson v Maresca*, 232 AD2d 732 [3d Dept 1996]). Indeed, such a move would be detrimental to the child.

Nor does the record support respondent's contention that the court erred in crediting petitioner's testimony and discrediting his testimony (*see Eschbach*, 56 NY2d at 173; *Matter of Mildred S.G. v Mark G.*, 62 AD3d 460 [1st Dept 2009]). Petitioner's testimony included accounts of domestic violence by respondent against her, resulting in the issuance of two orders of protection, and the court properly considered this history of domestic violence in making its custody determination (*see* Domestic Relations Law § 240[1][a]; *Matter of Wissink v Wissink*, 301 AD2d 36, 40 [2d Dept 2002]).

Respondent's argument that the court abused its discretion

in failing to sua sponte appoint an attorney for the child is without merit (*see Matter of Keen v Stephens*, 114 AD3d 1029 [3d Dept 2014]).

The record does not support respondent's contention that he was denied a fair trial or the right to present his case by the trial court's intervention in the questioning of witnesses or by any alleged bias on the court's part (*see Messinger v Mount Sinai Med. Ctr.*, 15 AD3d 189 [1st Dept 2005], *lv dismissed* 5 NY3d 820 [2005]).

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

ENTERED: NOVEMBER 13, 2014

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Richter, Feinman, JJ.

13484 The People of the State of New York, Ind. 4656/07
Respondent,

-against-

Robert Fultz,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Lori Ann Farrington of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (John S. Moore, J.), entered on or about January 24, 2012, adjudicating defendant a level three sexually violent felony offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The record supports the court's discretionary upward departure, based on facts established by clear and convincing evidence. "[T]he level suggested by the [risk assessment instrument] is merely presumptive and a SORA court possesses the discretion to impose a lower or higher risk level if it concludes that the factors in the RAI do not result in an appropriate designation" (*People v Mingo*, 12 NY3d 563, 568 n 2 [2009], *see also People v Johnson*, 11 NY3d 416, 421 [2008]). Here, even though defendant was assessed points under the risk factors for

use of violence, sexual contact and the fact that the victim was a stranger, the RAI did not adequately account for the "extreme egregiousness" (*People v Ratcliff*, 107 AD3d 476 [1st Dept 2013], *lv denied* 22 NY3d 852 [2013]) of defendant's conduct, which involved a brutal home-invasion gang rape (*see e.g. People v Guasp*, 95 AD3d 608 [1st Dept 2012], *lv denied* 19 NY3d 812 [2012]).

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

ENTERED: NOVEMBER 13, 2014

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Richter, Feinman, JJ.

13485N- Index 650221/13
13485NA In re Joseph Cammarata, et al.,
Petitioners-Respondents,

-against-

InfoExchange, Inc.,
Respondent-Appellant.

_____

Karlinsky LLC, New York (Martin E. Karlinsky of counsel), for appellant.

Stuart J. Moskovitz, New York, for respondents.

_____

Amended order, Supreme Court, New York County (Eileen Bransten, J.), entered September 4, 2013, which granted the petition brought pursuant to CPLR article 75 to stay arbitration, and denied the cross petition to compel arbitration of an employment dispute, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered July 26, 2013, unanimously dismissed, without costs, as superseded by the appeal from the amended order.

Supreme Court properly found that there was no evidence establishing petitioner Cammarata's "clear, explicit and unequivocal" agreement to arbitrate any disputes with respondent, and hence, he could not be compelled to arbitrate (*see Matter of Waldron [Goddess]*, 61 NY2d 181, 183-184 [1984]). Cammarata did not sign the employment agreement proffered to him, and the

record is also devoid of any "clear indication" of his intent to be bound by the agreement so as to impute to him the intent to arbitrate as a nonsignatory (*see TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]). Nor is there evidence that Cammarata received a direct benefit under the employment agreement which might support a theory of estoppel. The record shows, at most, that he may have "exploit[ed] the contractual relation of the parties, but not the agreement itself" (*see Matter of Belzberg v Verus Invs. Holdings Inc.*, 21 NY3d 626, 631 [2013]).

In any event, the Supreme Court properly found that the terms of Cammarata's unsigned employment agreement, as well as the signed employment agreement of petitioner Erik Cohen, do not mandate arbitration of the dispute at issue. As articulated in its amended answer, respondent's claims against both petitioners are based on alleged violations of the covenants in the agreements relating to confidentiality, noncompetition, disclosure, and nondisparagement. However, the agreements' choice of law provisions provide that the "exclusive venue" for "any action, demand, claim, or counterclaim relating to the terms and provisions of" the covenants embodied in the respective sections of the agreements, including the breach of those covenants, shall be in "the state or federal courts located in the State and County of New York." The respective arbitration

provisions themselves reiterated the exclusion of claims arising from the covenants, and also exclude claims by respondent for equitable relief, while mandating that all other claims arising from the other provisions of the agreements be submitted to arbitration. Rather than a clear, explicit, and unequivocal intent to arbitrate the particular subject matter (*see Waldron*, 61 NY2d at 183-184), the evidence indicates that the parties agreed that the kind of claims at issue here would not be arbitrated. Hence, respondent, as the proponent of arbitration, did not satisfy its "burden of demonstrating that the parties agreed to arbitrate the dispute at issue" (*Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v Torino Jewelers, Ltd.*, 44 AD3d 581, 583 [1st Dept 2007]), and Supreme Court properly granted petitioners' motion to stay, and denied respondent's cross motion to compel, arbitration.

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: NOVEMBER 13, 2014

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Richter, Feinman, JJ.

13486 Index 301568/14

[M-4819] In re Anthony Zappin,
Petitioner,

-against-

Hon. Deborah A. Kaplan, etc.,
et al.,
Respondents.

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

And said proceeding having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto filed October 24, 2014,

It is unanimously ordered that the application be and the same hereby is deemed withdrawn in accordance with the terms of the aforesaid stipulation, without costs or disbursements.

ENTERED: NOVEMBER 13, 2014

CLERK

Tom, J.P., Sweeny, DeGrasse, Gische, Clark, JJ.

11572 In re Ming Tung, et al., Index 110149/11
Petitioners-Respondents,

-against-

China Buddhist Association,
et al.,
Respondents-Appellants.

_____

Capell Barnett Matalon & Schoenfeld, Jericho (Joseph Milano of counsel), for appellants.

Alexander P. Kelly, Brooklyn, for respondents.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered May 31, 2012, reversed, on the law, without costs, the order vacated, and the petition dismissed.

Opinion by Gische, J. All concur except Tom, J.P. who dissents in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
John W. Sweeny, Jr.
Leland G. DeGrasse
Judith J. Gische
Darcel D. Clark, JJ.

11572
Index 110149/11

_____x

In re Ming Tung, et al.,
Petitioners-Respondents,

-against-

China Buddhist Association,
et al.,
Respondents-Appellants.

_____x

Respondents appeal from the order of the Supreme Court, New York County (Geoffrey D. Wright, J.), entered May 31, 2012, which granted the petition to the extent of invalidating the China Buddhist Association's May 2011 meeting and directed that another general meeting be held with petitioners included.

Capell Barnett Matalon & Schoenfeld, Jericho (Joseph Milano of counsel); Todd L. Platek, Flushing; and Benjamin L. Herzweig, Patchogue, for appellants.

Alexander P. Kelly, Brooklyn, for respondents.

GISCHE, J.

This is an Article 78 proceeding brought by a monk (Master Tung), a nun (Wai Ching Chen), and a lay person (Shun Yi Mon), who were members of the China Buddhist Association (CBA) until they were excommunicated [from the CBA.] Respondents are the CBA, Master Mew Fung Chen (Master Chen), the original founder and spiritual leader of the CBA, who performed the excommunication, and two trustees (Ming Yee and Chih Chen Ma) he recently appointed in 2011. The petition seeks a judgment directing the CBA to hold an annual membership meeting, as required by CBA's bylaws, the appointment of a receiver to determine the names and addresses of all CBA members eligible to vote, and a vote regarding the CBA's future. Supreme Court (Geoffrey Wright, J.) granted the petition to the extent of invalidating a May 2011[1] meeting and election held by the CBA and ordering that a duly convened meeting be held in the future. The order specifically requires that petitioners be notified of that meeting so they can participate. Petitioners' ultimate goal is to vote for the division of the CBA into two separate religious corporations, each with legal ownership of its own, completely independent,

[1]Though referring to the "May 2011" meeting, this is apparently a shorthand reference by the court below, and even in the briefs, to a number of actions taken by the CBA around that time, including a meeting.

temple.

Respondents have appealed, arguing that the petition should be dismissed because the relief sought by petitioners cannot be decided through the application of neutral principles of law, and that by invalidating May 2011 meeting and election, and directing that petitioners be permitted to participate in a future CBA meeting, the court interfered with religious matters which are constitutionally protected. In particular, respondents argue that because only CBA members can attend and vote at meetings, the court cannot provide the relief sought without necessarily determining the validity of the excommunications, which is a purely ecclesiastical matter. We reverse the Supreme Court's grant of the petition because the issues raised are not secular in nature, but religious, and cannot be resolved by the application of neutral principles of law.

The CBA was incorporated in October 1963 by Master Chen. Before its incorporation, the CBA existed as an unincorporated Buddhist society. Thereafter, in 1970, the CBA applied for, and was granted, an exemption from Federal income tax as a religious organization (Internal Revenue Code 501 [c][3]). Eventually, the CBA acquired real property, including property at 245 Canal Street, New York, New York (Manhattan temple), and in Flushing, New York (Queens temple), where it established temples. The

Queens temple is the corporate headquarters of the CBA. The deeds to these and other real properties are titled in the name of the CBA. Petitioners worshiped at the Manhattan temple until they were excommunicated and it was closed.

The first meeting of the CBA was held in January 1964. At that meeting, the incorporators selected officers and adopted bylaws. Master Chen was made the CBA's president and Chairman of the Board of Trustees, consisting of three trustees, Master Chen included. Article Two of the bylaws provides that the CBA was organized for the following purposes:

> "1. To foster and promote the teaching of Buddhism. 2. To maintain a house of worship for all those who wish to learn and practice the Buddhist religion. 3. To conduct Buddhist religious services. 4. To foster fellowship among its members and with members of other Buddhist and religious groups."

Although the bylaws provide for officers to serve fixed terms of three years, and annual elections to be held each January, this was the first and only meeting and election ever held by the CBA until the meeting in May 2011. Now age 86, Master Chen is the sole surviving original corporate officer.

Article Three of the bylaws provides that "[membership in this organization shall be open to all who are of the Buddhist faith and have been admitted as disciples." None of the corporate governance documents, including the bylaws, otherwise

specifies any procedure by which someone becomes a member, clergy person, or disciple of the CBA, nor do any of these documents specify how a member, clergy person, or disciple of the CBA is excommunicated, stripped of his or her membership, or denied privileges in the CBA, including the right to worship at any CBA-owned temple. Article Four of the bylaws pertains to meetings and who may attend, stating that notice of the annual meeting will be mailed to "every member in good standing." The bylaws also permit the president to call a special meeting, if he deems it "in the best interest of the organization." Article Five provides that "any question may be voted upon in the manner and style provided for election of officers and directors." The election of officers and directors requires a marked ballot. Article Seven addresses votes by the trustees, vacancies and removal of officers and Article Eight broadly provides that the CBA's president has "such powers as may be reasonably construed as belonging to the chief executive of any organization." Article Eleven provides for the payment of dues in the annual sum of $10.00.

In 1996, Master Chen, on behalf of the CBA, offered Master Tung employment as a monk and sponsored his application for an immigration visa. Among Master Tung's duties were teaching new members the manners of worship, praying, chanting, worshiping,

preaching and conducting Buddhist ceremonies. In 1998, Master Chen presented Master Tung with a Letter of Appointment, appointing him a resident monk of the CBA, exhorting Master Tung to "spread the trust of Buddhism . . ."

The relationship among the congregants of the CBA was harmonious until sometime in 2009 when a power struggle developed. The Manhattan temple contingent views Master Tung as their spiritual leader and believes that the Manhattan temple should be autonomous. Master Chen, however, regards Master Tung as a rogue monk who has shown a lapse in faith, promoted disharmony within the CBA, disobeyed his (Master Chen's) authority, strayed from the path of righteousness and engaged in wayward behavior contrary to Buddhist tenets. This struggle has, at times, escalated into violence, necessitating police intervention, and there have been protests at the Manhattan temple, which have attracted media attention.

By letter dated September 23, 2010, Master Chen severed his "master-apprentice relationship" with Master Tung and notified him that he was to leave the Manhattan temple immediately, never to return to that, or any other, temple associated with the CBA. According to Master Chen, he took such actions to prevent this "spiritual pollution" from spreading to the CBA's other temples. After designating two trustees to fill vacancies on the board,

the board met in April 2011 to address the September 2010 events. They resolved that it was in CBA's best interest to excommunicate petitioners and close the Manhattan temple. Subsequently, by notice dated May 16, 2011, in which he refers to his "ultimate and ecclesiastical authority over all activities in these three temples," Master Chen stripped the Manhattan disciples (petitioners) "of their blessing," effectively excommunicating them. The excommunication and petitioners' termination from employment was later ratified by the board of trustees in June 2011. Although petitioners are forbidden from worshiping at any CBA-owned temple, they may worship at any non-CBA temple available to them.

In invalidating the May 2011 meeting, the Supreme Court found that the bylaws make no reference to excommunication and stated that "I note further, that no particular lapse of faith to justify the excommunication was given." The court below also stated that "[r]espondents have no real active interest in the [Manhattan temple and] it is my hope that the two sides will, with the guidance of their faith, find a way to co-exist, at least until the membership meeting is held."

The Establishment Clause of the First Amendment of the United States Constitution, which is binding on the states by the Fourteenth Amendment, guarantees religious bodies "independence

from secular control or manipulation — in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine" (*Kedroff v St. Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 US 94, 116 [1952]). Consequently, courts are forbidden from "interfering in or determining religious disputes, because there is substantial danger that the state will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrines or beliefs" (*Matter of Congregation Yetev Lev D'Satmar, Inc. v Kahana*, 9 NY3d 282, 286 [2007] [internal citations omitted]). Only when disputes can be resolved by neutral principles of law may the courts step in (*see First Presbyt. Church of Schenectady v United Presbyt. Church in U.S. of Am.*, 62 NY2d 110, 116-117 [1984], *cert denied* 469 US 1037 [1984]). The issues before us, however, cannot be resolved through the application of "neutral principles of law" but entail an inquiry into the validity of petitioners' excommunications. Because this is an entirely ecclesiastical matter, we are forbidden from such an inquiry (*Congregation Yetev Lev D'Satmar,* 9 NY3d at 286).

The neutral principles of law approach allows the court to apply principles of law to disputes, even if a religious body is involved. In doing so, the court can examine internal

organizational documents, like the bylaws, which may apply to or shed light on the dispute, as well as the Religious Corporation Law. Where disputes concern real property, the court can also look to the deeds to resolve the issues before it (*First Presbyt. Church of Schenectady*, 62 NY2d at 121-123). The deeds for these temples provide no support for petitioners' claims, however, because title to the real property, including the temples involved, is held by the CBA. Petitioners can only achieve their ultimate objective by legally separating the two factions via a successful membership vote approving such measure. However, neither the bylaws, nor the Religious Corporation Law, provide petitioners with any right to vote at a CBA meeting. CBA's bylaws permit CBA members to vote and membership in the CBA is conditioned on being of the Buddhist faith and admission as a disciple. It is undisputed that Master Chen acted within his spiritual authority when he originally accepted petitioners as his disciples and unilaterally named Master Tung the resident monk of the Manhattan temple. The bylaws place no express or implied restrictions on whom Master Chen can choose to make a member of the CBA, or whom he can expel from membership. It is unrefuted that membership is a prerequisite to becoming a member of the clergy.

At first blush the petition appears to present a

straightforward issue of corporate governance, specifically whether various corporate actions, including a meeting held in May 2011, were improperly taken, thereby depriving petitioners of their right to participate in those events. We take no issue with petitioners' claim and the dissent's conclusion that the CBA has not followed corporate formalities which may impact on whether the parliamentary acts undertaken by it are valid. We hold, however, that because petitioners are not members of the CBA based upon Master Chen's excommunication of them, they cannot challenge these corporate actions. Article Four of the bylaws limits attendance at annual and special meetings by providing that notices of the annual meeting must be sent to "every member in good standing" and special meetings are open to "members." Since petitioners were excommunicated from the CBA in September 2010, and they were no longer members when these various parliamentary actions were taken, they had no right to be notified of, or participate in, the meetings held or votes taken.

Petitioners contend that their excommunication was completely motivated by Master Chen's desire to squelch the simmering underlying dispute over ownership of real property in Manhattan and Queens where the CBA owns temples. Even where the parties' dispute concerns control of church property, the court will not intervene in matters that are predominantly religious

disagreements (*Serbian E. Orthodox Diocese v Milivojevich*, 426 US 696 [1976]).

It is impermissible for a court to look behind an ecclesiastical determination or act to examine the subjective reasons for which it was undertaken (*Congregation Yetev Lev D'Satmar,* 9 NY3d at 286; *Upstate N.Y. Synod of Evangelical Lutheran Church in Am. v Christ Evangelical Lutheran Church of Buffalo*, 185 AD2d 693, 694 [4th Dept 1992], *citing Serbian E. Orthodox Diocese v Milivojevich*, 426 US at 721-722).

Although a court may determine whether a religious organization has adhered to its membership requirements by examining corporate documents, such as the bylaws, here the bylaws are unhelpful because they are silent on that issue. Membership is solely conditioned on discipleship and it is unrefuted that Master Chen has always made that determination, even in the case of petitioners. Whether petitioners' excommunication and expulsion from the CBA was justified calls into question religious dogma, practices and issues well beyond any membership criteria found in CBA's bylaws which do not provide any procedure for or limitation on how a member is expelled or excommunicated from the CBA.

We find that the reasoning and holding of the Court of Appeals in the strikingly similar recent case of *Congregation*

*Yetev Lev D'Satmar* compels our conclusion. As in the proceeding before us, *Congregation Yetev Lev D'Satmar*a involved an election controversy between two rival factions of a religious congregation. Central to that controversy was whether a particular member had been properly expelled from the congregation by the Grand Rabbi, making him unqualified to vote on matters of the congregation's corporate governance. In concluding that the dispute could not be decided through application of neutral principles of law, the court observed that "[a] decision as to whether or not a member is in good standing is binding on the courts when examining the standards of membership requires intrusion into constitutionally protected ecclesiastical matters" (*Congregation Yetev Lev D'Satmar,* 9 NY3d at 288). Noting that the congregation's bylaws "condition membership on religious criteria, including whether a congregant follows the 'ways of the Torah'. . .," the court found that whether the member was properly expelled "calls into question religious issues beyond any membership criteria found in the Congregation's bylaws" (*id*).

In this proceeding, petitioners' claims are likewise nonjusticiable, as they cannot be resolved based on neutral principles of law, but involve an impermissible inquiry into religious doctrine or practice (*id.* at 286-287; *see Sieger v*

*Union of Orthodox Rabbis of U.S. & Can.*, 1 AD3d 180, 182 [1st Dept 2003]). Here, membership in the CBA requires being of the Buddhist faith and admission as a disciple. There are no governance provisions for becoming a disciple or for reversal of that process, clearly making this an entirely discretionary matter vested in its leader and premised on religious, not secular, principles (*Congregation Yetev Lev D'Satmar*, 9 NY3d at 288).

Respondents' subsequent decision to elect officers and hold a meeting ratifying Master Chen's excommunication of petitioners does not mean that secular rules and legal principles apply to resolve the parties' disputes. Nor does it mean that the respondents, by having engaged in various parliamentary acts, have opted for a secular basis by which to excommunicate members. Consequently, the motion court erred in directing a new meeting on the basis that the meeting held by the CBA in May 2011 was improperly called.

The dissent maintains that petitioners have standing as members to challenge the actions taken in May 2011, because they meet the alternative definition of "members" in Religious Corporation Law § 195, which is based upon attendance and financial contribution. Petitioners, however, did not assert that claim in their petition, or raise it in the underlying

motion, or make that argument in their responsive briefs before this court. We believe that we cannot decide whether Religious Corporation Law § 195 has any application to this proceeding when the parties were not given a full and fair opportunity to argue the issue. Moreover, the affidavits of some CBA members other than petitioners who state that they regularly worship at the Manhattan temple and contribute to the CBA do not, on their face, establish a predicate for the application of Religious Corporation Law § 195; it is the petitioners who must qualify as members to have standing. In any event, the statements are conclusory, tracking the statutory language, but without any factual support.

We also disagree with the dissent that this matter is distinguishable from the issues considered by the Court of Appeals in *Congregation Yetev Lev D'Satmar* because the CBA is not part of a larger hierarchical body with a well organized and centralized governing body, or there is no established tradition for the dismissal of a Buddhist monk, much less, the closure of a Buddhist temple. Constitutional protections to practice one's religion are not limited by the manner of its organization or structure (*see Matter of Holy Spirit Assn. for Unification of World Christianity v Tax Commn. of the City of New York,* 55 NY2d 512, 521-523 [1982]). We also disagree with the dissent's

conclusion that we should adjudicate the issue of whether a lone monk can exercise authoritarian control over the property of a religious corporation. To consider whether a spiritual leader wields too much power or authority over his congregants, in the absence of corporate restrictions on such power, places the court in the position of evaluating ecclesiastical doctrine, law, practices, procedures and rulings (*see Presbyterian Church in U.S. v Mary Elizabeth Blue Hull Mem. Presbyt. Church*, 393 US 440, 447 [1969]; *see also Park Slope Jewish Ctr. v Congregation B'nai Jacob*, 90 NY2d 517, 521 [1997]). We cannot consider whether one master or faction is better suited or more correct for the CBA than another (*First Presbyt. Church of Schenectady*, 62 NY2d at 117). To do so would be to enter a "forbidden domain" (*id.* at 116). Although we recognize that there may be ongoing turmoil within the CBA, regardless of the parties' underlying motivations, those disputes cannot be resolved through the application of neutral legal principles and petitioners have no right to the relief demanded.

Accordingly, the order of the Supreme Court, New York County (Geoffrey D. Wright, J.), entered May 31, 2012, which granted the petition to the extent of invalidating the China Buddhist Association's May 2011 meeting and directed that another

general meeting be held with petitioners included should be reversed, on the law, without costs, the order vacated, and the petition dismissed.

All concur except Tom, J.P. who dissents in an Opinion.

TOM, J.P. (dissenting)

This case presents the straightforward issue of whether a religious corporation can be required to observe prescribed corporate procedures, including complying with its own bylaws, holding membership meetings and electing a board of trustees.

Because a special meeting was called by unauthorized trustees in violation of the corporate bylaws and notice was not given to all congregants qualified to vote, the actions taken at that meeting and asserted to have been ratified by the purported trustees are null and void. Therefore, a new meeting is required. Under Religious Corporation Law § 195, membership in the particular religious organization is immaterial to the issue of whether someone who is a congregant or attendant at worship and a regular financial contributor, has the right to vote at a corporate meeting. Thus, whether individual congregants are "members" of the religious community and whether its spiritual leader has the authority to expel or "excommunicate" them do not affect their right to vote in a corporate meeting under § 195.

The majority gives the impression that the instant litigation involves merely three disgruntled petitioners who are a monk, a nun and a congregant (who may be a member) of the China Buddhist Association (CBA or association). While only three individuals are listed as petitioners, it should be noted that

the instant petition seeks, inter alia, to enforce the right of all members or congregants expelled to establish their qualification to vote at a new membership meeting at which trustees of the association can be legally elected. Respondent Mew Fung Chen (Master Chen) excommunicated not only the three petitioners but a total of 517 members, representing all the congregants of the Manhattan chapter of the CBA and a majority of the CBA's members, 10 days before the special meeting called by the two unauthorized trustees appointed by Master Chen. Thus, he deprived the Manhattan congregants of their right to vote on the agenda of the meeting which, in effect, resulted in the transfer of control of all properties and assets of the CBA to Master Chen. Only 110 members of the Queens faction of the CBA, all supporters of Master Chen, were given notice of the special meeting. Attached to the petition are affidavits of various Manhattan congregants who set forth their entitlement to cast a vote but were not given notice of the May, 2011 meeting.

Irrespective of the expulsion of the majority of the association's membership or the propriety of that action – whether examined against the tenets of Buddhist religious tradition or the teachings of the organization's spiritual leader – the corporation remains the secular owner of the association's properties. Any disagreement concerning the control and

disposition of corporate assets must be resolved in the manner required by the Religious Corporations Law and the association's bylaws. Since the contested expulsions have no effect on either the organization's statutory obligation to hold a valid meeting to elect officers and directors and conduct church business or on those persons entitled to vote at that meeting, Supreme Court properly granted the petition to the extent of vacating the actions taken at the special meeting called in violation of the association's bylaws and directing that a new general meeting be scheduled.

The CBA filed a certificate of incorporation under the Religious Corporations Law on October 3, 1963. It was approved as a tax exempt organization under § 501(c)(3) of the Internal Revenue Code, and was issued an exempt organization certificate by the New York State Department of Taxation and Finance in July 1971. The petition states that the CBA owns and maintains two temples within New York City, a retreat house in Hyde Park, New York and, upon information and belief, at least two other commercial properties in Manhattan.

This controversy arises out of a dispute between petitioners, two of whom identify themselves as resident clergy and one as a long-term member of the congregation of the Fa Wang temple located at 245 Canal Street (the Manhattan temple), which

opened in 1964, and the leadership of the Ci Hang temple located at 136-12 39th Avenue in Flushing (the Queens temple), where religious services have been conducted since 1994. The Queens temple is controlled by respondent Master Chen, the CBA's founder, who is described by respondents as its "Grand Master" and "highest religious authority." The congregation of the Manhattan temple, which is effectively controlled and operated by petitioners and their followers, is the significantly larger of the two and is presided over by petitioner Ming Tung (Master Tung), who was hired by the CBA in 1996 and appointed by Master Chen to serve as "resident monk."

Since the months following its inception, the CBA has failed to conduct its operations as required by law and its own bylaws. At the CBA's initial membership meeting on January 2, 1964 – the only membership meeting ever held – corporate officers and a Board of Trustees were elected, including Master Chen as president of the association and chairman of the board of trustees. Among the bylaws adopted at the meeting, article four provides for an annual membership meeting to be held on January 2 of each year, with regular membership meetings in April, July, and October, and for such "special meetings" as might be called for by the president "when he deems it for the best interest of the organization." Alternatively, a special meeting may be

called upon the written request of two members of the board of trustees or 20 members of the organization.

Article seven of the bylaws provides for the board of trustees to consist of three people, who are to be elected by the membership for three-year terms and "shall have the control and management of the affairs and business of this organization." Mid-term vacancies are to be filled by a vote of the remaining trustees, but only for the balance of the year. Of the three original trustees, Master Chen is the only survivor. Article eight provides for three corporate officers – the president, treasurer, and secretary – of whom the president "shall by virtue of his office be Chairman of the Board of Trustees." A secretary is to be selected by the trustees "from one of their number." The term of the officers is not prescribed. As to the membership, article three of the by-laws provides: "Membership in this organization shall be open to all who are of the Buddhist faith and have been admitted as disciples."

From the end of 2009 to late 2010, the relationship between the Manhattan and Queens factions of the CBA deteriorated rapidly. While the exact reasons are undisclosed in the record, the growing schism between the two groups is attributed to increasing animosity between the presiding monks of the respective temples. According to petitioners, in 2009, Master

Chen arranged for a lay volunteer and worshiper at the Queens temple by the name of Cheuk-Yiu Man to take over certain unspecified administrative duties at the Manhattan temple that formerly had been performed by Master Tung and the resident nuns. In October 2010, a monk unknown to the Manhattan clergy by the name of Xiao Dan Wu was moved into the residence and began a campaign of harassment and intimidation against the other resident clergy and the temple's worshipers. According to the affidavit of Ming Xin Shi, a resident nun, Xiao Dan Wu was escorted from the Manhattan temple by police after assaulting Master Tung, and fled the temple shortly thereafter. It is further alleged that Cheuk-Yiu Man physically attacked members of the Manhattan temple's congregation and its clergy. In November 2010, Master Chen caused a holdover proceeding to be commenced against Master Tung in an attempt to regain possession of his quarters at the Manhattan temple.

After these concerted efforts failed to drive out the resident clergy, Master Chen issued a flier, which was posted at the entrance to the Manhattan temple on May 16, 2011, purporting to direct its closure because it had "become contaminated and unclean" as the result of "iniquitous behavior of monks and nuns." In addition, the locks to the prayer hall located on the second floor were changed to prevent access. The flier further

proclaimed: "I declare that all disciples of [the Manhattan] Temple are hereby stripped of their blessing. They are no longer disciples of mine or members of the China Buddhist Association."

In October 2011, petitioners obtained a temporary restraining order enjoining Master Chen and his agents from interfering with the regular payment of salary to the resident clergy and otherwise interfering with their ability to conduct religious activities at the Manhattan temple. Contemporaneously, petitioners obtained a second temporary restraining order enjoining respondents from vandalizing or removing any property from the temple, including books and records, occupying the premises or entering them outside normal business hours. The summary holdover proceeding was ultimately dismissed because the supporting verification was signed by Cheuk-Yiu Man in his alleged capacity as "executive officer" of the CBA. Supreme Court found that the association's bylaws do not provide for any such position and that the verification was fatally defective.

The petition at issue was filed on September 2, 2011. It seeks, by way of order to show cause, an order (1) directing the CBA to hold an annual membership meeting pursuant to its bylaws and (2) appointing a receiver for the CBA to determine who in the association is eligible to vote at such meeting. The petition further states that the CBA is an independent religious

association that is not part of any larger ecclesiastic body or organization. It further states that Master Chen lacks authority to fire clergy or expel members of the CBA, that the bylaws contain no provisions for hiring and firing clergy and are likewise silent with respect to dismissing members of the CBA. The stated purpose of the annual membership meeting to be held is to take a vote on the dissolution of the CBA; alternatively, to vote on its division into two separate religious corporations to hold title to the two temples where religious services are regularly conducted; and to elect a board of trustees.

Respondents, in opposition, assert that the effect of Master Chen's pronouncement stripping all of the members of the Manhattan temple of his blessing was to "excommunicate any and all members of the CBA" who worshiped at that temple. They further assert that his decisions and actions in regard to closing the temple and expelling its membership and clergy "were duly adopted and ratified by the Board of Trustees of the CBA." In a supporting document denominated "Action of the Board of Trustees" that was "adopted as of January 1, 2011," Master Chen, purporting to act as the "sole surviving and remaining member of the Board of Trustees," designates Ming Yee and Yung Feng Yang to fill two vacancies on the board for the balance of the year. In a similar document dated April 22, 2011 – several weeks before

the posting of the notice on the Manhattan temple on May 16 – the trustees resolved that "the Board of Directors is in agreement that it is in the best interests of China Buddhist Association to close [the Manhattan] Temple and to excommunicate any and all alleged members of China Buddhist Association who pray at [the Manhattan] Temple." The submitted documents include a request for a special membership meeting to elect a Board of Trustees signed by the two interim trustees and dated May 12, 2011, written notice of a special membership meeting scheduled for May 26, 2011, an affidavit stating that the notice of election was served and a "certification of results of voting for Board of Trustees" indicating that the special meeting was held on May 26, 2011 and that the individual respondents were duly elected.[2]

Respondents argue that the decisions of Master Chen to excommunicate the members of the Manhattan Temple and to close the temple are "ecclesiastical and religious functions beyond review of the Court, and not subject to this Court's subject matter jurisdiction." Thus, they maintain, an article 78

---

[2] Respondents also maintain that relief pursuant to CPLR article 78 is unavailable due to petitioners' failure to first make a demand upon the association for such relief. Even assuming that such a demand would be anything but futile (*see Miller v Schreyer*, 257 AD2d 358 [1st Dept 1999]), there remains the obvious question of who would have been authorized to receive or act upon such request (*see id.* at 360).

proceeding is an inappropriate vehicle for resolving the parties' dispute, and this proceeding must be dismissed (citing *Matter of Congregation Yetev Lev D'Satmar, Inc. v Kahana*, 9 NY3d 282 [2007]).

Supreme Court found that the May, 2011 meeting was held in violation of the articles of incorporation and bylaws and granted the petition to the extent of vacating actions taken at the meeting of the board of trustees, ostensibly ratifying the expulsion of the 517 congregants and the closing of their temple. The court directed that another general meeting of the membership be scheduled for the purpose of electing trustees.

It is beyond question that while a court may not interfere in ecclesiastical matters, it has the power to decide whether applicable statutory requirements and the bylaws of the organization have been complied with in deciding whether an election was validly conducted (*Matter of Kaminsky*, 251 AD 132 [4th Dept 1937], *affd* 277 NY 524 [1938]).

It should be noted that the CBA is devoid of any corporate agents who possess authority to act on the organization's behalf. Whatever Master Chen's ecclesiastical rank – Master, Grand Master or Supreme Spiritual Leader – he is not an officer or trustee of the organization, his tenure having expired some 43 years prior to the acts complained of by petitioners. Thus, he was without

authority to appoint interim trustees, who were themselves without authority. Devoid of trustees, the only available means of calling a special meeting under the CBA's bylaws is by written request of 20 members of the association. Thus, it is clear that the May 2011 meetings called by the two purported interim trustees were not authorized by the association's bylaws and that the business conducted, particularly the decision to close the Manhattan temple, was without force and effect.[3] The particular defect in respondents' position, adopted by the majority, is that the expulsion of the congregants of the Manhattan temple as members of the CBA does not have the supposed effect of eliminating them as persons qualified to vote in a corporate election.

The qualification of voters at corporate meetings is specified by Religious Corporations Law § 195, which extends the right to vote to persons who meet either of two criteria. First, it extends to "persons who are then members in good and regular standing of such church by admission into full communion or membership in accordance with the rules and regulations thereof,

---

[3] As this Court observed in another context, a person who has incorporated a religious organization must assume the burdens imposed by the Religious Corporations Law along with its advantages (*see Avon Bard Co. v Aquarian Found.*, 260 AD2d 207, 212 [1st Dept 1999], *appeal dismissed* 93 NY2d 998 [1999]).

and of the governing ecclesiastical body, if any, of the denomination or order to which the church belongs." Additionally, it is conferred on those persons "who have been stated attendants on divine worship in such church and have regularly contributed to the financial support thereof during the year next preceding such meeting." Thus, a person is qualified to vote *either* as a member of the church or as an attendant at worship and contributor of financial support. An expelled member remains qualified to vote if he or she falls within the second category of qualified voters under § 195.

To restrict the right to vote only to those persons who qualify under the membership criterion requires further corporate action. The statute provides that a church may, at a duly noticed meeting, "determine that thereafter only members of such church shall be qualified voters at corporate meetings thereof" (*id.*). The CBA never adopted a provision requiring that only "members of such church" are qualified voters. Notably, the CBA never held a duly noticed meeting. Thus, under the statute, the qualified voters include not just members, but also those "persons . . . who have been stated attendants on divine worship . . . and have regularly contributed . . . financial support" to

the CBA during the year preceding the meeting (*id.; see Sillah v Tanvir*, 18 AD3d 223, 224 [1st Dept 2005], *lv denied* 5 NY3d 711 [2005]; *Islamic Ctr. of Harrison v Islamic Science Found.*, 262 AD2d 362, 363 [2d Dept 1999], *lv denied* 94 NY2d 752 [1999]). Since the disputed action of shutting down the Manhattan temple and expelling all of its 517 members was purportedly adopted at a meeting on May 26, 2011, the pertinent year for the purpose of determining whether an attendant on divine worship contributed financial support is the year preceding that meeting date.

The majority states, without citation to authority, that because the association's bylaws provide for notice to be sent only to members in good standing and petitioners were not members, "they had no right to be notified of, or participate in, the meetings held or votes taken." It should be apparent that if the meeting was called in violation of the association's bylaws, it simply does not matter whether proper notice was given. Furthermore, Religious Corporations Law § 194 specifies how notice of a meeting must be given, and failing to comply with the statute affords an additional basis for vacating any business conducted at the meeting. In *Trustees of Gallilee Pentecostal Church, Inc. v Williams* (65 AD3d 1221, 1223 [2d Dept 2009]), involving the parallel notice provision of Religious Corporations Law § 164, the court voided the election of trustees at a

membership meeting called without the requisite statutory notice (*see also Horodeckyi v Horodniak*, 16 Misc 2d 865 [Sup Ct, NY County 1958]; *Holcombe v Leavitt*, 124 NYS 980 [Sup Ct, Erie County 1910]; *cf. Feldbin v Temple Beth-El of Msnhattan Beach*, 210 AD2d 374 [2d Dept 1994] [meeting to consider renewal of rabbi's contract exempted from statutory notice requirements by Religious Corporations Law § 25]).

The closing of a place of worship implicates the need to dispose of its property, over which church trustees are assigned custody and control (Religious Corporations Law § 5). In the absence of duly elected trustees, no action can be taken. It is apparent that the manner in which the unauthorized May 2011 meeting was called was calculated to preclude the participation of the 517 expelled congregants in the voting process, thereby resulting in the election of trustees amenable to promoting the interests of Master Chen and his adherents in the disposition of the Manhattan temple.

The use to which church property should be applied involves temporal matters that can be decided by application of neutral principles of law and governing statutes. As to the prohibition against interference in religious matters, even assuming that the Manhattan temple has been dissolved by a superior ecclesiastical authority whose decision must be accorded deference (*see Watson v*

*Jones*, 80 US 679, 727 [1871]), "there still remains the legal entity – that is to say, the trustees of the corporation are left in charge of its property, but without any spiritual body to maintain services or carry on religious work therein" (*Westminster Presbyt. Church of W. Twenty-Third St. v Trustees of Presbytery of N.Y.*, 211 NY 214, 223 [1914]). Since there are no trustees of the CBA to take charge of the affairs of the Manhattan temple, it is clear that the first requirement for resolving any dispute over the property held by and on behalf of the temple is the election of a board of trustees with the authority to determine its proper disposition.

The majority's reliance on *Congregation Yetev Lev D'Satmar* (9 NY3d 282) in support of respondent's contention that this Court is without jurisdiction to entertain this dispute is misplaced. While membership in a religious order is a spiritual determination to which we are required to accord deference, the courts possess jurisdiction to decide whether the religious organization "adhered to its own bylaws in making determinations as to the membership status of individual congregants," and judicial review is only precluded where the "bylaws condition membership on religious criteria" (*id.* at 288). Since the CBA's bylaws do not condition the right to vote at corporate meetings on membership in the religious order, the issue of whether

religious criteria for membership have been satisfied will not be encountered and does not, unlike the Satmar dispute, involve this court in matters of faith.

The distinction that respondents, and the majority, fail to recognize is that membership in the religious community, the dispositive issue in the Satmar dispute, is immaterial to the resolution of this appeal. This aspect is overlooked because it involves a matter that is not discussed by the Court of Appeals, that is, whether the right to hold elected office *requires* membership in the religious organization. Rather, analysis in *Satmar* proceeds, without comment, on the presupposition that Berl Friedman, the respondent purportedly expelled from the Satmar Congregation, could not hold the office of president unless he was a member of the religious community. Thus, the Court found it dispositive that "the Congregation's bylaws condition membership on religious criteria, including whether a congregant follows the 'ways of the Torah,'" concluding that the propriety of Friedman's expulsion "inevitably calls into question religious issues beyond any membership criteria found in the Congregation's bylaws" (*id.*).

Disregarded by the majority is that the question of membership in the CBA is not germain to the statutory right to vote in an election of trustees to preside over the affairs of

the association. Unlike the matter before the Court of Appeals, we are not confronted with the question of whether the expulsion of a member of the congregation was proper because the CBA never adopted the requisite provision to restrict qualified voters to members of the association. Thus, a qualified voter includes any person who regularly attended worship and contributed to the financial support of the CBA, irrespective of whether the association has been dissolved or such person has been expelled from membership in the congregation. Since membership is not material, a determination of who has the right to vote does not involve this Court in consideration of "membership criteria found in the Congregation's bylaws" (*id.*). And if we need not examine the association's internal documents, we need not consider whether they "require interpretation of ecclesiastical doctrine" (*id.* at 286). In sum, because membership is not dispositive, we are not required, as the majority mistakenly asserts, to inquire into "religious dogma, practices and issues well beyond any membership criteria found in CBA's bylaws" by examining the decisions taken by Master Chen in expelling all the members of the Manhattan temple and directing its closure.

Further, while our courts are precluded by virtue of the Establishment Clause of the First Amendment from interfering in any action taken in Master Chen's role as a spiritual leader, it

should not require emphasis that the protection afforded by the Establishment Clause is a shield to prevent state promotion of one religion over another; it is not a sword to permit a religious leader to exercise totalitarian control over denominational assets in contravention of the system of corporate democracy mandated by the Religious Corporations Law. The purportedly ecclesiastical decision by the CBA's spiritual leader to expel the entire Manhattan congregation which represents the majority of CBA's worshipers – announced shortly before the meeting at which persons purporting to act as CBA trustees voted to close the Manhattan temple and ratify the expulsion of its congregants - appears to be no more than a mere pretext intended to subvert the corporate process without any regard to religious doctrine. This is borne out by the fact that only supporters of Master Chen were given notice of the May 26, 2011 special meeting, while all 510 Manhattan congregants were expelled 10 days before the special meeting was held and were not given notice merely because they were not Chen supporters.

Reduced to its essentials, respondents' argument confronts us with the question of whether a single Zen monk, acting without legal corporate authority, can exercise authoritarian control over the property of a religious corporation through the expedient of expelling any and all of his opponents, thereby

ruling as a majority of one. Thus, to the sound of one hand clapping, respondents would have this Court add the conundrum of the singular plurality. To accept their position that Master Chen's ostensibly ecclesiastical decision subjects corporate property to his exclusive personal control would relegate the Religious Corporations Law to the status of an easily obviated artifact (*see Westminster Presbyt. Church of W. Twenty-Third St.*, 211 NY at 224 ["A deed of land to a religious corporation is not worth much if it can thus readily be nullified."]), a result that hardly promotes legislative intent (*see Thoreson v Penthouse Intl.*, 179 AD2d 29, 33 [1st Dept 1992], *affd* 80 NY2d 490 [1992]; McKinney's Cons Laws of NY, Book 1, Statutes § 92[a]).

To adopt respondents' view would reward Master Chen for ignoring provisions of the Religious Corporations Law and the association's bylaws for 43 years and treating the CBA as his alter ego. It would also discard the distinction drawn between the spiritual and temporal aspects of a religious corporation. *Westminster Presbyt. Church* (211 NY 214) indicates that while a superior religious authority may expel the congregants of a church, it may not disenfranchise them or their elected representatives. There, the Court of Appeals held that a decree of dissolution issued by the church's governing body extends "no further than the ecclesiastical or spiritual side of the

plaintiff's organization; for the Religious Corporations Law confers no power upon such a governing body, or anybody else, to dissolve a religious corporation" (*Westminster Presbyt. Church*, 211 NY at 223). It is the duty of the elected trustees of the church to "hold the property subject to denominational uses, notwithstanding the dissolution of the spiritual church" (*id.*). Where, as here, there is no duly constituted board of trustees with authority to take possession and control of church property, the congregants must be afforded the opportunity to elect a board with the authority to protect the association's interests, provide for the orderly administration of the CBA's properties and "preserve them from exploitation by those who might divert them from true beneficiaries of the corporate trust" (*Morris v Scribner*, 69 NY2d 418, 423 [1988]).

Further, it appears that respondents' own practices indicate that the "agreement" of the board of trustees is necessary to effectuate Master Chen's pronouncements on matters such as excommunication and the closure of a temple. The trustees' agreement that the temple closure and excommunications were in the CBA's best interest, and the resolution that the excommunication ceremony should go forward and be binding, reasonably show that such ratification was required to effectuate the pronouncements of Master Chen. Notably, a similar deliberate

approval is reflected in the June 9, 2011 ratification of the dismissal of the two Manhattan temple nuns. Once again, the elected trustees were without authority to act on behalf of the CBA, thus, invalidating such approval.

As set forth above, petitioners have standing to commence this proceeding. Respondents raised a number of pro forma challenges to petitioners' right to maintain this special proceeding by way of affirmative defense, none of which has been pursued on appeal. While the answering papers state that petitioners lack sufficiently cognizable stakes in the outcome, no such argument is advanced in appellants' brief. In any event, it is difficult to imagine persons more suited to bring the proceeding on behalf of the Manhattan disenfranchised members or congregants than the presiding monk in charge of the Manhattan temple, a resident nun and a worshiper at the Manhattan temple for over 40 years, all of whom occupied a position of importance in the religious community. The presiding monk Master Tung was in charge of the Manhattan temple and had been conducting the affairs and business of the temple for many years. Significantly, the unauthorized actions of the purported trustees in closing the Manhattan temple and expelling its congregants deprived the resident clergy of both their ministry and their residence, and the long-term congregant of her place of worship.

Furthermore, Shun Yi Mon stands to lose her statutory right to participate in the election of trustees at a duly scheduled meeting, an interest representative of all the expelled members. These consequences entail actual or threatened concrete injury affording petitioners with a sufficiently cognizable interest in the resolution of the dispute to ensure that it will be presented "in a form traditionally capable of judicial resolution" (*Schlesinger v Reservists Comm. to Stop War*, 418 US 208, 220-221 [1974] [internal quotation marks and citation omitted]; *see Community Bd. 7 of Borough of Manhattan v Shaffer*, 84 NY2d 148, 154-155 [1994]). Despite the obvious concrete injury demonstrated, the majority remarkably holds that petitioners are unable to challenge the concededly unauthorized acts taken by respondents, including the misappropriation of association property, or seek redress for the 517 excommunicated members who have a right to vote in an election to select association trustees.

As to the majority's position that petitioners have no right to relief under Religious Corporations Law § 195 because they have not specifically cited to that provision, it need only be noted that the courts of this state are required to "take judicial notice without request of the common law, constitutions and public statutes of the United States and of every state"

(CPLR 4511). Nine affidavits submitted by expelled lay members of the association in support of the petition recite, in haec verba, "I have contributed regularly, and I regularly attend religious services to this day," tracking the language of § 195. While short of a specific statutory citation, this is undoubtedly a reference to the statute's particular provisions, specifically, "the alternative definition of members . . . based upon attendance and worship" (*Islamic Ctr. of Harrison*, 262 AD2d at 363). Thus, the right of petitioners and worshipers at the Manhattan temple to relief under Religious Corporations Law § 195 has been asserted from the outset, and its relevance to this dispute cannot be so readily cast aside. In declining to enforce a clearly applicable statutory provision to resolve this controversy, the majority permits Master Chen to profit from his utter disregard of law and the association's bylaws and abrogates the legal maxim that "there is no wrong without a remedy" (*People v Volunteer Rescue Army, Inc.*, 262 AD 237, 239 (2d Dept 1941]).

Accordingly, the order should be affirmed.

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

ENTERED: NOVEMBER 13, 2014

CLERK