SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 1, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Moskowitz, Richter, Abdus-Salaam, Román, JJ.

6256 The People of the State of New York, Respondent, Ind. 2809/01

-against-

Fernando Cristostomo, Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Jason S. Whitehead of counsel), for respondent.

Order, Supreme Court, Bronx County (Nicholas J. Iacovetta, J.), entered November 1, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously reversed, on the law, and the matter remitted to the Supreme Court for further proceedings.

While on work release from the drug conviction, defendant committed, and was convicted of, the crime of attempted kidnapping in the first degree, a violent felony. Supreme Court erred in finding that defendant is ineligible for resentencing due to his commission of a violent felony subsequent to the drug

offense (*see People v Allen*, 92 AD3d 980 [2012]; *People v Myles*, 90 AD3d 952 [2011]; *People v Devivo*, 87 AD3d 794 [2011], *lv denied* 18 NY3d 858 [2011]; *see also People v Suya*, 87 AD3d 921 [2011] [People conceded that defendant's conviction for a class C violent felony offense subsequent to the drug offense did not constitute an "exclusion offense" that rendered him ineligible for resentencing pursuant to CPL 440.46 (5)], *lv denied* 17 NY3d 956 [2011]).

The resentencing provisions do not apply to "any person who is serving a sentence on a conviction for or has a predicate felony conviction for an 'exclusion offense'"(CPL 440.46 [5]). Under the relevant portion of CPL 440.46(5)(a), an "exclusion offense" that disqualifies a defendant from resentencing is defined as a violent felony "for which the person was previously convicted within the preceding ten years, excluding any time during which the offender was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony."

The statutory language "predicate felony," "previous felony," and "present felony" indicates that this portion of CPL 440.46 was not written to anticipate the situation where the offense was committed after the drug conviction, such as while

the defendant was out on parole or work release (*see People v Devivo*, 87 AD3d at 795-796). "'[N]ew language cannot be imported into a statute to give it a meaning not otherwise found therein.' . . . Moreover, 'a court cannot amend a statute by inserting words that are not there, nor will a court read into a statute a provision which the Legislature did not see fit to enact'" (*Matter of Chemical Specialties Mfrs. Assn. v Jorling*, 85 NY2d 382, 394 [1995], quoting McKinney's Cons Laws of NY, Book 1, Statutes § 94 at 190, § 363 at 525; *see also People v Hill*, 82 AD3d 77, 80 [2011]).

The People argue here, as they did in *People v Paulin* (17 NY3d 238 [2011]), that a literal application of the statutory language would cause an absurd result, because the Legislature could not have intended for a defendant who commits a violent felony while on work release from a drug sentence to be eligible for resentencing on that drug conviction. *Paulin* involved prisoners who had been paroled and then reincarcerated for violating their parole, and there is no provision in CPLR 440.46 making reincarcerated parole violators ineligible for resentencing. The Court rejected the People's argument that permitting these defendants to apply for resentencing would have the absurd result of rewarding them for parole violations, and declined to read into the statute a nontextual exception for

parole violators, reasoning that if defendants did not deserve relief from their sentences, the court can deny their resentencing applications if "substantial justice dictates that the application should be denied" (*id*. at 244). That same reasoning applies here. We decline to graft onto the statute an exception not included by the Legislature, especially when defendant's resentencing application may be denied on the "substantial justice" ground included in the statute. Because Supreme Court found that defendant was ineligible for resentencing due to an exclusion offense, it did not reach the issue of whether the application should be denied based on considerations of substantial justice. We accordingly remit to the Supreme Court for further proceedings.

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

ENTERED: MAY 1, 2012

CLERK

Saxe, J.P., Sweeny, Acosta, DeGrasse, Abdus-Salaam, JJ.

6341 Luz Rosa, Index 308659/08
Plaintiff-Appellant,

-against-

Freddy A. Mejia,
Defendant-Respondent.

Harold Solomon, Rockville Center (Bernard G. Chambers of counsel), for appellant.

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

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered November 5, 2010, which granted defendant's motion for summary judgment dismissing the complaint based on the failure to establish a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendant made a prima facie showing that plaintiff did not sustain a "significant limitation of use" or "permanent consequential limitation of use" of her cervical and lumbar spines as a result of the subject accident (Insurance Law § 5102[d]). Defendant submitted, among other things, the affirmed report of his orthopedist, who found normal ranges of motion in plaintiff's cervical spine, and the affirmed report of his radiologist, who indicated that plaintiff's lumbar injury was caused by a preexisting degenerative condition and not the

accident (*see Torres v Triboro Servs., Inc.*, 83 AD3d 563 [2011]; *see also Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590 [2011]). Defendant's orthopedic and neurologic experts both concluded that plaintiff had normal ranges of motion in her cervical spine, "and the minor differences in what they regarded as normal ranges do not affect defendant's entitlement to summary judgment" (*Anderson v Zapata*, 88 AD3d 504, 504 [2011]).

In opposition, plaintiff failed to submit any evidence of contemporaneous, postaccident treatment. Notably absent were emergency room, physical therapy or chiropractic records, medical charts or other documents setting forth the treatment she claimed to have received relative to this accident. The affirmation of her treating physician, Dr. Perez, states that plaintiff was first seen by her on June 25, 2008, some 5½ months after the accident. Plaintiff's deposition testimony stated that she was treated at a hospital emergency room the day of the accident and then three days later. She also testified that she was treated by various medical providers, whom she could not identify by name except for Dr. Perez. Although plaintiff's bill of particulars references a number of medical providers plaintiff claims to have seen, and states there were attached bills and dates of treatment, none of these bills or treatment dates appear in the record before us. Indeed, other than uncertified copies of the

MRI reports from February 21 and 28, 2008, this record is devoid of any medical records, charts or bills to support plaintiff's claim of having received treatment prior to seeing Dr. Perez in June 2008.

In short, "the record is devoid of any competent evidence of plaintiff's treatment [or the] need for treatment" that would warrant the denial of defendant's motion (*Thompson v Abbasi*, 15 AD3d 95, 97 [2005]).

The recent Court of Appeals decision in *Perl v Meher* (18 NY3d 208 [2011]) does not require a different result. *Perl* did not abrogate the need for at least a qualitative assessment of injuries soon after an accident (*see Salman v Rosario*, 87 AD3d 482, 484 [2011]). In fact, the Court noted with approval the comment in a legal article[1] that "a contemporaneous doctor's report is important to proof of *causation*; an examination by a doctor years later cannot reliably connect the symptoms with the accident. But where causation is proved, it is not unreasonable to measure the *severity* of the injuries at a later time." (18 NY3d at 217-218).

In this case, plaintiff has presented no admissible proof that she saw any medical provider for any evaluation until 5½

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[1]Morrissey, '*Threshold Law': Is a Contemporaneous Exam by the Court of Appeals in Order?* NYLJ, January 18, 2011.

months after the accident. While the Court of Appeals in *Perl* "reject[ed] a rule that would make contemporaneous quantitative measurements a prerequisite to recovery" (18 NY3d at 218), it confirmed the necessity of some type of contemporaneous treatment to establish that a plaintiff's injuries were causally related to the incident in question.

Additionally, plaintiff's opposition fails **to** address defendant's evidence of preexisting degeneration in plaintiff's lumbar spine (*see Valentin v Pomilla*, 59 AD3d 184, 184-186 [2009]). Defendant's expert radiologist, in examining the MRI of plaintiff's lumbar spine taken on February 28, 2008, approximately 5½ weeks after the accident, stated that he observed "degenerative changes at the L5/S1 level." These findings were, in the expert's opinion, "consistent with a preexisting condition." The expert opined that "[t]here is no radiographic evidence of recent traumatic or causally related injury to the lumbar spine." Dr. Cooper, plaintiff's own radiologist, confirmed "degenerative narrowing at the L5-S1 intervertebral disc space" without further comment.

Significantly, *Perl* offers guidance with respect to this issue. As in this case, the defendant in *Perl* presented a sworn radiologist's report based on an MRI that her injuries were degenerative in nature and preexisted the accident. Unlike here,

the *Perl* plaintiff submitted a radiologist's report that, while conceding that the degeneration in question might be preexisting, also raised the issue that such degeneration may have been "a result of a specific trauma" (18 NY3d at 219), thus raising, as the Court of Appeals found, an issue of fact sufficient to warrant denial of the defendant's summary judgment motion (*id*. at 218-219). This is significantly different from the case before us. Plaintiff's expert merely noted the degeneration without contesting defendant's expert's opinion that it was a preexisting condition and not causally related to the accident. Thus, no issue of fact was raised.

Defendant also argues that there is a 1 1/2-year gap in plaintiff's treatment from June 2008 to December 2009. As defendant first raised this issue in his reply affirmation in support of the motion, it is not properly before us (*see Tadesse v Degnich*, 81 AD3d 570 [2011]). We note however, that, although Dr. Perez stated in her follow-up exam of December 9, 2009 that plaintiff had been receiving chiropractic and physical therapy treatment "on the dates set forth in the appendix to this affidavit," no such appendix appears in the record before us. As with her other allegations of treatment, plaintiff "inexplicably has provided no competent supporting documentation of this 'medical treatment'" (*Thompson*, 15 AD3d at 99).

Defendant made a prima facie showing of entitlement to judgment as a matter of law with respect to plaintiff's 90/180-day claim by submitting plaintiff's bill of particulars, which provided that, immediately after the accident, plaintiff was confined to bed and home for only two days and approximately one week respectively (*see Williams v Baldor Specialty Foods, Inc.*, 70 AD3d 522 [2010]). In opposition, plaintiff failed to raise an issue of fact.

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

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

ENTERED: MAY 1, 2012

CLERK

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

6500-
6501-
6502 Michael C. Weiss, etc., et al., Index 117716/09
Plaintiffs-Appellants,

-against-

Terrence Lowenberg, et al.,
Defendants,

Dennis Konner, etc., et al.,
Defendants-Respondents.

Law Offices of Michael A. Haskel, Mineola (Michael A. Haskel of counsel), for appellants.

Matalon Shweky Elman PLLC, New York (Howard I. Elman and Jeremy C. Bates of counsel), for Dennis Konner, respondent.

DLA Piper LLP (US), New York (Jodie E. Buchman of counsel), for First American Title Insurance Company of New York, respondent.

Judgment, Supreme Court, New York County (Richard B. Lowe, III., J.), entered October 28, 2010, dismissing the complaint as against defendant Dennis Konner pursuant to an order, same Court and Justice, entered August 26, 2010, which, inter alia, granted Konner's motion to dismiss the complaint as against him, unanimously modified, on the law, to the extent of reinstating the first and fifth causes of action against Konner alleging slander per se and the third cause of action against him alleging slander of title, and otherwise affirmed, without costs. Order, same court and Justice, entered August 26, 2010, which granted

the motion of defendant First American Title Insurance Company of New York (First American) to dismiss the second cause of action as against it alleging tortious interference with contract, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered August 26, 2010, which granted defendant Konner's motion to dismiss the complaint as against him, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiffs allege, inter alia, that defendants defamed them by accusing them, at a real estate closing at which third parties were present, of signing and filing a perjurious and fraudulent probate petition. The defamatory statements and allegations of malice set forth in the complaint were sufficient to state a claim for slander per se. Although allegations of malice may not rest on mere surmise and conjecture, on a motion to dismiss, plaintiffs are not obligated to show evidentiary facts to support their allegations of malice (*see Arts4All, Ltd. v Hancock*, 5 AD3d 106, 109 [2004]). Moreover, a defamation complaint should not be dismissed on a pre-answer motion to dismiss based on a qualified privilege claim where, as here, the content and context of the alleged defamatory statements in the complaint or supporting materials on the motion are "sufficient to potentially establish

malice" (*Pezhman v City of New York*, 29 AD3d 164, 168 [2006]), or are such that malice can be inferred (*see Hame v Lawson*, 70 AD3d 640, 641 [2010]). This comports with the principle that the allegations of a complaint facing a pre-answer motion to dismiss are to be deemed true and, the plaintiff is to be accorded the benefit of every reasonable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), and that an inference of malice flows from a defamatory statement (*see Toker v Pollak*, 44 NY2d 211, 219 [1978]). Thus, the allegations that Konner made false statements about plaintiffs in order to provide a pretext to abort the closing, satisfied the pleading requirements of malice (*see e.g. Kotowski v Hadley*, 38 AD3d 499, 500 [2007], and Supreme Court erred in dismissing the slander claims on the ground that the allegations of malice were conclusory.

The alleged defamatory statements Konner made about plaintiffs, which impugned their ability and intention to pay the appropriate estate taxes on the property to be sold, were sufficient to state a claim for slander of title and to satisfy the pleading requirements of CPLR 3016(a), as the statements cast doubt on the validity of title of the property to be sold. The court, however, properly dismissed the claim for injurious falsehood (fourth cause of action) based on its finding that alleged defamatory statements involved a single sale of property

and did not involve plaintiffs' business or trade or affect a business relationship (*see Waste Distillation Tech. v Blasland & Bouck Engrs.*, 136 AD2d 633, 634 [1988]).

The court properly dismissed the cause of action for tortious interference with contract asserted against First American. Although plaintiffs alleged that the transaction failed to close as a result of First American's failure to insure, the complaint does not allege that First American intentionally procured the buyer's breach of the contract for sale of the property, or even that the contract was breached *(see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424-425 [1996]; *Krinos Foods, Inc. v Vintage Food Corp.*, 30 AD3d 332, 333 [2006]). Moreover, plaintiffs' allegation that First American asserted a title exception in order to accommodate the buyer's desire to avoid closing on the contract contradicts the claim that the contract would have closed but for First American's purportedly malicious and reckless actions.

The court properly struck the demand for punitive damages. Such damages "require a demonstration that the wrong complained of rose to a level of such wanton dishonesty as to imply a

criminal indifference to civil obligations" (*164 Mulberry St. Corp. v Columbia Univ.*, 4 AD3d 49, 60 [2004], *lv dismissed* 2 NY3d 793 [2004] [internal quotation marks and citation omitted]). Here, the allegations of malice do not rise to such a level.

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

ENTERED: MAY 1, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Freedman, Manzanet-Daniels, JJ.

6793 Jose Roberto Correa, Index 300912/09
Plaintiff-Respondent,

-against-

Asm Saifuddin, et al.,
Defendants-Appellants.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Robert D. Grace of counsel), for appellants.

Ross Legan Rosenberg Zelen & Flaks, LLP, New York (Clifford F. Zelen of counsel), for respondent.

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered March 9, 2011, which, insofar as appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing plaintiff's claim of serious injury under the 90/180-day category of Insurance Law § 5102(d), affirmed, without costs.

Plaintiff was riding his bicycle on October 12, 2008, on his way to deliver food to a customer from the restaurant where he was employed, when his bicycle was struck from behind by a taxi. He was thrown to the ground, injuring his head, neck, back, right knee and right shoulder, and brought this negligence action against the owner and the driver of the taxi, claiming serious injury. Defendants' appeal concerns only the portion of plaintiff's action that was not dismissed, namely, the claim that

he suffered "serious injury" as defined in Insurance Law § 5102(d) in that the accident caused "a medically determined injury or impairment of a non-permanent nature which prevents [him] from performing substantially all of the material acts which constitute [his] usual and customary daily activities" for at least 90 of the first 180 days after the accident. Plaintiff does not challenge the dismissal of his claims of serious injury based on assertions that his injuries constituted either a significant limitation of the use of a body function or system, or a permanent consequential limitation of a body organ or member.

The issue is whether defendants satisfied their burden in moving for summary judgment dismissing such a 90/180 claim. A defendant seeking summary judgment dismissing a claim bears the initial burden of coming forward with evidence that, absent contrary evidence creating an issue of fact, establishes as a matter of law that plaintiff cannot sustain this cause of action (*see Wadford v Gruz*, 35 AD3d 258 [2006]). "[U]nless that burden is met, the opponent need not come forward with any evidence at all" (*Penava Mech. Corp. v Afgo Mech. Servs., Inc.*, 71 AD3d 493, 496 [2010]).

In seeking summary judgment dismissing the 90/180 portion of plaintiff's claim, defendants relied on plaintiff's testimony at

his deposition that he was confined to bed and home for one month immediately following the accident, and the absence of any further testimony regarding the remainder of the first 180-day period. They also asserted that plaintiff had failed to provide any certified medical directive that he refrain from work during that period. Finally, they pointed to their experts' opinions, which they characterized as concluding that plaintiff had suffered *no* trauma as a result of the accident, negating *any* type of serious injury claim.

The motion court ruled in favor of plaintiff on this point, holding that defendants did not satisfy their initial burden on their motion for summary judgment as it concerned his 90/180 claim, in that reliance on plaintiff's testimony that he was confined to his home and bed for one month was insufficient. We agree.

Plaintiff's bill of particulars dated May 28, 2009, specified that he was "incapacitated from pursuing his usual duties, tasks and employment from the date of the accident, October 12, 2008 to present." As a matter of logic, testimony that plaintiff was sometimes able to leave his house simply does not demonstrate that plaintiff will be unable to establish that his non-permanent injuries prevented him from performing substantially all of the material acts which constituted his

usual and customary daily activities for at least 90 of the 180 days following the accident.

We recognize this Court has previously held that such a limited showing was sufficient as a defendant's prima facie showing on a summary judgment motion (*see Perez v Vasquez*, 71 AD3d 531 [2010]; *Guadalupe v Blondie Limo, Inc.*, 43 AD3d 669 [2007]). However, we are unable to discern from those decisions the reasoning justifying that aspect of those rulings.

As a point of comparison, where evidence shows, for example, that the plaintiff actually returned to work within the first 90 days after the accident, it is proper to dismiss 90/180 claims (*see e.g. Byong Yol Yi v Canela*, 70 AD3d 584 [2010]; *Brantley v New York City Tr. Auth.*, 48 AD3d 313 [2008]), since the ability to return to work may be said to support a legitimate inference that the plaintiff must have been able to perform at least most of his usual and customary daily activities. But the ability to leave the house, without more, does not similarly support any such inference.

On the other side of the issue, we have repeatedly held that proof that a plaintiff missed more than 90 days of work is not determinative of a 90/180 claim, since that proof alone is insufficient to established that the person was "prevented from performing *substantially all* of the material acts which

constitute [his] usual and customary daily activities" (*Blake v Portexit Corp.*, 69 AD3d 426, 426 [2010] [internal quotations marks omitted]). But conversely, proof that a plaintiff was able to get out of bed or exit the house cannot affirmatively prove that the individual was able to perform substantially all his or her usual and customary daily activities.

As to defendants' suggestion that their experts' opinions showed that plaintiff suffered no trauma at all as a result of the accident, it is an overstatement. The experts offered no opinion as to whether plaintiff had sustained a non-permanent injury that prevented him from performing his usual activities during 90 of the first 180 days.

Since defendants failed to satisfy their burden of making a prima facie showing of entitlement to judgment based on their evidentiary submissions, plaintiff had no obligation to present evidence on the issue at all. That aspect of defendants' motion was therefore properly denied.

All concur except Freedman, J. who dissents in a memorandum as follows:

FREEDMAN, J. (dissenting)

I respectfully dissent and would reverse because I disagree with the majority's opinion that defendants failed to meet their initial burden for their summary judgment motion on plaintiff's "90/180-day" claim (*see* CPLR 3212[b]). Plaintiff's own deposition testimony sufficed to make a prima facie showing that defendants were entitled to judgment, and by finding otherwise the majority departs from an established line of rulings by this Court.

At his deposition, plaintiff testified that, following his accident, he was confined to his bed and his home for about one month. According to plaintiff, his physician told him he could not work, and plaintiff added that he did not feel "ready to work," could not walk like before, and could not bend over.

The majority acknowledges that in the past this Court has found that, in connection with 90/180-day claims, the defendants meet their initial burden under CPLR 3212(b) by submitting the plaintiffs' testimony or bills of particulars indicating that their injuries did not significantly impair their activities for 90 days (*see Mitrotti v Elia*, 91 AD3d 449 [2012] [bill of particulars stated that plaintiff was confined to bed for two weeks and home for two months]; *Bonilla v Abdullah*, 90 AD3d 466, 468 [2011] [plaintiff stated in affidavit that she was only

confined to bed and home for a few weeks after accident]; *Wetzel v Santana*, 89 AD3d 554, 555 [2011] [confined to bed for two or three days]; *Perez v Vasquez*, 71 AD3d 531, 532 [2010] [confined to bed and home for three weeks after accident]; *Byong Yol Yi v Canela*, 70 AD3d 584 [2010] [plaintiff was not confined and returned to work within 90 days of the accident]; *Linton v Nawaz*, 62 AD3d 434, 443 [2009], *affd* 14 NY3d 821 [2010] [plaintiff returned to work part-time 79 days after his accident]; *Guadalupe v Blondie Limo, Inc.*, 43 AD3d 669 [2007] [plaintiff confined for a few weeks]). But the majority downplays how frequently and consistently we have ruled on this issue, and makes no attempt to distinguish this action from the earlier cases.

Once defendants met their initial burden on the motion, plaintiff was required to come forward with evidence raising a triable issue of fact. However, plaintiff's submissions do not suffice. His statement that he did not feel ready to work, could not walk as he did before the accident, and could not bend over do not demonstrate that he was unable to perform "substantially all" of his "usual and customary daily activities" for at least 90 of the 180 days following the accident (Insurance Law § 5102[d]; *see also Perl v Meher*, 18 NY3d 208, 220 [2011] [plaintiff's subjective description of her injuries insufficient

to defeat summary judgment]; *Blake v Portexit Corp.*, 69 AD3d 426, 426-427 [2010]). Moreover, plaintiff did not support his claim about his impairment with any medical proof (*see Lazu v Harlem Group, Inc.*, 89 AD3d 435, 436 [2011]; *Taylor v American Radio Dispatcher, Inc.*, 63 AD3d 407, 408 [2009]; *Brantley v New York City Tr. Auth.*, 48 AD3d 313 [2008]).

Accordingly, I would grant defendants summary judgment and dismiss the complaint.

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

ENTERED: MAY 1, 2012

CLERK

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

7306 Total Concept Carpentry, Inc., Index 400827/10
Plaintiff-Respondent,

-against-

Tower Insurance Company of New York,
Defendant-Appellant.

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Max W. Gershweir, New York, for appellant.

Kushnick Pallaci, PLLC, Melville (Vincent T. Pallaci of counsel), for respondent.

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Order, Supreme Court, New York County (Lucy Billings, J.), entered May 6, 2011, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment to the extent of declaring that defendant breached its contractual obligation to defend and indemnify additional insured Avalon Bay Communities, Inc. (Avalon) in an underlying personal injury action and that defendant is liable to plaintiff for damages for breach of that contract, and denied defendant's cross motion for summary judgment declaring that it was not obligated to defend or indemnify plaintiff in connection with the underlying action, unanimously reversed, on the law, without costs, plaintiff's motion denied, defendant's cross motion granted and it is so declared.

Based on the four corners of the insurance agreement (*see e.g. Stainless, Inc. v Employers Fire Ins. Co.*, 69 AD2d 27, 33 [1979], *affd* 49 NY2d 924 [1980]), defendant had no duty to defend or indemnify because it established that there was "no possible factual or legal basis on which it might eventually be obligated to indemnify its insured under any policy provision" (*Allstate Ins. Co. v Zuk*, 78 NY2d 41, 45 [1991]; *see Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 98 NY2d 435, 445 [2002]). The record shows that defendant properly disclaimed coverage to plaintiff contractor based on the Employer's Liability exclusion in the policy. This provision excludes coverage for bodily injury to an employee of the insured (plaintiff) arising out of and in the course of his or her employment or performance. Although this particular exclusion does not apply to liability the insured assumed under an "insured contract," the Contractual Liability Limitation endorsement deletes any reference in the definition of "insured contract" to a "contract or agreement pertaining to your business . . . under which you assume the tort liability of another party to pay for 'bodily injury' or 'property damage' to a third person or organization."

Moreover, Tower's disclaimer to Avalon relied on the Additional Insured endorsement that states: "[t]his insurance does not apply to acts or omissions of the Additional Insured nor

liability imposed on the additional insured by statute, ordinance or law." In the underlying lawsuit, the court dismissed all claims against Avalon except for those based on Labor Law §§ 240(1) and 241(6). Even though Avalon could be found actively negligent under Labor Law § 241(6), the endorsement excludes coverage for Avalon's acts or omissions.

In view of the foregoing and because of defendant's disclaimer of coverage to Avalon based on the Additional Insured endorsement, we decline to address defendant's contention that plaintiff had no standing to contest the propriety of its disclaimer to Avalon.

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

ENTERED: MAY 1, 2012

CLERK

Tom, J.P., Friedman, Catterson, Acosta, Freedman, JJ.

7475 Blanche Reid, Index 108332/10
Plaintiff-Respondent,

-against-

Phipps House Service, Inc., et al.,
Defendants-Appellants.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Joan A. Madden, J.), entered on or about October 25, 2011,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated April 12, 2012,

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

ENTERED: MAY 1, 2012

CLERK

Mazzarelli, J.P., Acosta, Renwick, Richter, JJ.

7506 Roberto Rodriguez, Index 105416/10
Plaintiff-Respondent-Appellant,

-against-

New York City Transit Authority,
Defendant-Appellant-Respondent,

Charles Johnson,
Defendant.

Office of the General Counsel, New York City Transit Authority, Brooklyn (Richard Schoolman of counsel), for appellant-respondent.

Edward Friedman, Brooklyn, for respondent-appellant.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered October 12, 2011, which granted in part and denied in part defendant New York City Transit Authority's (NYCTA) motion for summary judgment dismissing the complaint, unanimously modified, on the law, to grant the motion as to that portion of the complaint found to allege a claim sounding in respondeat superior, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint.

The claims arise from an incident on a Queens bound "E" subway train, when plaintiff Rodriguez, while intervening on behalf of a woman being menaced by another passenger, allegedly assaulted defendant Johnson, the train's conductor, now deceased.

Plaintiff was charged with assault in the second degree and obstruction of governmental administration in the second degree, but acquitted of all criminal charges.

Plaintiff brought this action, alleging false arrest and malicious prosecution against defendant Johnson, and negligent hiring, supervision and retention against his employer, defendant NYCTA. NYCTA moved for summary judgment dismissing the complaint, arguing that there was no basis for vicarious liability against it, and that plaintiff could not show that it negligently hired, supervised and retained Johnson.

The IAS court disagreed in part, finding that a cause of action for respondeat superior liability could be inferred from the notice of claim and complaint, and that issues of fact existed concerning whether Johnson was acting within the scope of his duties when reporting the alleged assault to police. The IAS court granted NYCTA's motion to the extent of dismissing the negligent hiring, supervision and retention claim.

The IAS court erred in sustaining a cause of action against the NYCTA predicated on respondeat superior liability. Plaintiff's theory is that Johnson made a false report to the police that plaintiff assaulted him in an effort to improperly receive leave and disability benefits to which he was not entitled. An employee's conduct in allegedly seeking to defraud

NYCTA of leave time and benefits cannot be reasonably viewed as actions within the scope of employment or in furtherance of NYCTA's interests (*Danner-Cantalino v City of New York*, 85 AD3d 709, 710 [2011].

We agree with the IAS court's grant of summary judgment dismissing plaintiff's negligent hiring, retention, and supervision claim. The motion court properly concluded that there was no actual evidence that the NYCTA knew or should have known of a propensity on the part of Johnson to engage in the conduct alleged to have caused injury here (*see e.g. Coffey v City of New York*, 49 AD3d 449 [2008]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: MAY 1, 2012

CLERK

Mazzarelli, J.P., Acosta, Renwick, Richter, JJ.

7507 Hector Luna, Index 308665/08
Plaintiff-Respondent,

-against-

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

Michael A. Cardozo, Corporation Counsel, New York (Mordecai Newman of counsel), for appellants.

Alexander J. Wulwick, New York, for respondent.

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered March 21, 2011, which denied defendants' motion to dismiss the complaint or, in the alternative, for summary judgment dismissing the action, unanimously reversed, on the law, without costs, and the complaint dismissed in its entirety. The Clerk is directed to enter judgment accordingly.

The City defendants established their entitlement to summary judgment dismissing the claims for false arrest, false imprisonment, and malicious prosecution. The testimony of the police officers that plaintiff was positively identified by three witnesses based on a photo array, as well as the police records memorializing the identifications, established that plaintiff's arrest was supported by probable cause, and plaintiff's

opposition failed to raise a triable issue of fact (*see Mendoza v City of New York*, 90 AD3d 453 [2011]; *Paredes v City of New York*, 73 AD3d 465 [2010]). Plaintiff's remaining tort claims and claims pursuant to 42 USC § 1983 should also have been dismissed (*see Leftenant v City of New York*, 70 AD3d 596, 597 [2010]).

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

ENTERED: MAY 1, 2012

CLERK

Mazzarelli, J.P., Acosta, Renwick, Richter, JJ.

7508 In re Erica D.,

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

Rebecca M.,
Respondent-Appellant,

New York Foundling Hospital,
Petitioner-Respondent.

_____

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

Law Offices of Quinlan and Fields, Hawthorne (Daniel Gartenstein of counsel), for respondent.

Law Offices of Ronald G. Fisher, Bronx (Ronald G. Fisher of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Anne-Marie Jolly, J.), entered on or about March 25, 2011, which, upon a fact-finding of permanent neglect, terminated respondent mother's parental rights and committed the custody and guardianship of the subject child to petitioner agency and the Administration for Children's Services, unanimously affirmed, without costs, with respect to the fact-finding, and the appeal therefrom otherwise dismissed, without costs, as taken from a nonappealable paper.

Although respondent failed to appear in person at the fact-finding hearing, her counsel appeared on her behalf and participated in the hearing. Thus, the fact-finding portion of

the order was not entered on default and is appealable (*see Matter of Amani Dominique H. [Andre H.]*, 67 AD3d 466, 466-467 [2009]). The testimony at the fact-finding hearing provided clear and convincing evidence that the agency made diligent efforts to encourage the parent-child relationship and that these efforts were frustrated by respondent's lack of cooperation with the service plan and frequent failure to appear at scheduled visits (*see* Social Services Law § 384-b[7][a]; *Matter of Lenny R.*, 22 AD3d 240 [2005], *lv denied* 6 NY3d 708 [2006]).

No appeal lies from the dispositional portion of the order, since it was entered on default (*see Matter of Aniya Evelyn R. [Yolanda R.]*, 77 AD3d 593 [2010]). Were we to review it, we would find that a preponderance of the evidence supported the finding that it was in the child's best interests to terminate respondent's parental rights and free her for adoption by her foster parents, who are the child's aunt and uncle, have provided a loving and stable home for her, and wish to adopt her (*see Matter of Sukwa Sincere G. [Shamiqua Latisha S.]*, 88 AD3d 592 [2011]; *Matter of Aisha C.*, 58 AD3d 471 [2009], *lv denied* 12 NY3d 706 [2009]).

Contrary to respondent's contention, a suspended judgment is not warranted under the circumstances (*see Matter of Michael B.*, 80 NY2d 299, 311 [1992]).

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

ENTERED: MAY 1, 2012

CLERK

Mazzarelli, J.P., Acosta, Renwick, Richter, JJ.

7509 The People of the State of New York, Ind. 419/10
Respondent,

-against-

Lenny J. Suazo,
Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Juan M. Merchan, J.), rendered on or about September 1, 2010,

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

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

ENTERED: MAY 1, 2012

CLERK

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

Mazzarelli, J.P., Acosta, Renwick, Richter, JJ.

7510 In re Michael Baudille, Index 116211/10
Petitioner-Appellant,

-against-

Raymond Kelly, etc., et al.,
Respondents-Respondents.

Chet Lukaszewski, P.C., Lake Success (Chet Lukaszewski of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Keith M. Snow of counsel), for respondents.

Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered May 25, 2011, denying the petition brought pursuant to CPLR article 78 seeking to annul the determination of respondents, dated September 8, 2010, which denied petitioner accidental disability retirement benefits, and dismissing the proceeding, unanimously affirmed, without costs.

There was a rational basis for respondents' determination (*see generally Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760 [1996]). The record shows that an MRI taken shortly after petitioner's line-of-duty accident found the glenoid labrum and capsular mechanism within normal limits, he resumed full duty after 20 days, and he had no documented treatment or complaints for over seven years, until he

sustained the new injury in 2008, which was admittedly not a line-of-duty accident. Petitioner failed to sustain his burden of demonstrating that there was no medical evidence which supported respondent Board of Trustees' rejection of the Medical Board's recommendation (*see Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 145 [1997]; *Matter of Deleston* v *Safir*, 294 AD2d 207 [2002]; *Matter of Calzerano v Board of Trustees of N.Y. City Police Pension Fund, Art.II*, 245 AD2d 84 [1997]).

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

ENTERED: MAY 1, 2012

CLERK

Mazzarelli, J.P., Acosta, Renwick, Richter, JJ.

7512-
7513 Stuart F. Shaw, etc., Index 105845/06
Plaintiff-Respondent,

-against-

Joel J. Silver et al.,
Defendants-Appellants,

Heritage Partners, LLC, et al.,
Defendants.

_____

Schrader & Schoenberg, LLP, New York (David A. Schrader of counsel), for appellants.

Shaw & Blinder P.C., New York (Stuart F. Shaw of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered March 24, 2011, awarding plaintiff the amounts of $230,273.53 as against Joel J. Silver, Ethan Eldon, and other defendants who are not parties to this appeal, $115,743.85 as against Mr. Silver, and $370,038.58 as against Mr. Silver and Esther Silver, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered on or about March 22, 2011, which found in plaintiff's favor after a nonjury trial, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff's bills were sufficient to create an account stated (*see e.g. Zanani v Schvimmer*, 50 AD3d 445, 446 [2008]).

The account stated was not impeached by an error that was rectified at trial (*see O'Connell & Aronowitz v Gullo*, 229 AD2d 637, 639 [1996], *lv denied* 89 NY2d 803 [1996]; *see also Geron v DeSantis*, 89 AD3d 603, 604 [2011]).

"[W]here an account is rendered showing a balance, the party receiving it must, within a reasonable time, examine it and object, if he disputes its correctness. If he omits to do so, he will be deemed by his silence to have acquiesced, and will be bound by it as an account stated, unless fraud, mistake or other equitable considerations are shown" (*Peterson v Schroder Bank & Trust Co.*, 172 AD2d 165, 166 [1991] [internal quotation marks and citations omitted]; *see also Rosenman Colin Freund Lewis & Cohen v Neuman*, 93 AD2d 745, 746 [1983]). Defendants-appellants (hereinafter defendants) do not claim fraud or mistake. We find no equitable considerations that would prevent defendants' silence from being deemed acquiescence to plaintiff's bills. Furthermore, insofar as the bills for *Beta v Eldon* are concerned, there was not merely "retention of bills without objection" (*Morrison Cohen Singer & Weinstein, LLP v Waters*, 13 AD3d 51, 52 [2004]), there was also partial payment (*see id.*; *see also e.g. Parker Chapin Flattau & Klimpl v Daelen Corp.*, 59 AD2d 375, 378 [1977]).

Defendants' contention that plaintiff's fees were unreasonable is unavailing; "it is not necessary to establish the reasonableness of the fee since the client's act of holding the statement without objection will be construed as acquiescence as to its correctness" (*Cohen Tauber Spievak & Wagner, LLP v Alnwick*, 33 AD3d 562, 562-563 [2006] [internal quotation marks omitted], *lv dismissed* 8 NY3d 840 [2007]). Defendants' argument that plaintiff violated the Code of Professional Responsibility is "unpreserved and may not be raised for the first time on appeal" (*Morse, Zelnick, Rose & Lander, LLP v Ronnybrook Farm Dairy, Inc.*, 92 AD3d 579, 580 [2012]).

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

ENTERED: MAY 1, 2012

CLERK

Mazzarelli, J.P., Acosta, Renwick, Richter, JJ.

7514-
7514A The People of the State of New York, Ind. 4791/08
Respondent, 2161/09

-against-

James Crooks,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of Appellate Defender, New York (Lauren Stephens-Davidowitz of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Laura A. Ward, J. at colloquy; Ronald A. Zweibel, J. at nonjury trial and sentencing), rendered March 17, 2010, as amended April 7, 2010, convicting defendant of burglary in the second degree, and sentencing him to a term of eight years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to a term of five years, and otherwise affirmed. Judgment, same court (Ronald A. Zweibel, J.), rendered March 31, 2010, as amended April 7, 2010, convicting defendant, upon his plea of guilty, of burglary in the third degree, and sentencing him to a concurrent term of one year, unanimously affirmed.

Defendant's request to proceed pro se did not obligate the

court to make a sua sponte inquiry into whether defendant was instead entitled to new counsel. As in *People v Davis* (10 AD3d 583, 583 [2004], *lv denied* 4 NY3d 743 [2004]), "[a]lthough defendant had expressed dissatisfaction with his attorney, his sole request was for permission to proceed pro se, and not for substitution of counsel." In any event, even if defendant had specifically requested new counsel, his critical comments regarding his lawyer's performance did not constitute the "specific factual allegations" that are required to trigger a court's duty to make "minimal inquiry" (*People v Porto*, 16 NY3d 93, 100 [2010]).

Defendant argues that the evidence supporting his conviction of burglary in the second degree was legally insufficient because the housing project whose basement he entered unlawfully was allegedly not a dwelling. This argument is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

Burglary of the basement of an apartment building constitutes burglary of a "dwelling" (*see* Penal Law § 140.00[2], [3]; § 140.25; *People v Rohena*, 186 AD2d 509 [1992], *lv denied* 81 NY2d 794 [1993]). For purposes of the dwelling element of

second-degree burglary, a Housing Authority building is a dwelling because it meets the definition set forth in Penal Law § 140.00(3). Nothing in Penal Law § 140.10(e) is to the contrary.

We find the sentence excessive to the extent indicated.

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

ENTERED: MAY 1, 2012

CLERK

Mazzarelli, J.P., Acosta, Renwick, Richter, JJ.

7515 Farah A. Thompkins, Index 16188/06
Plaintiff-Appellant,

-against-

Belkis V. Ortiz,
Defendant-Respondent.

_____

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered April 25, 2011, which granted defendant's motion for summary judgment dismissing the complaint, unanimously modified, on the law, to the extent of reinstating plaintiff's claims that she sustained a "permanent consequential limitation of use of a body organ or member" and/or a "significant limitation of use of a body function or system," and otherwise affirmed, without costs.

Defendant established his entitlement to judgment as a matter of law in this action where plaintiff suffered injuries to her left foot, ankle and knee as she was exiting a livery cab driven by defendant. Plaintiff alleged that defendant started driving away before she was completely out of the cab, resulting in the car rolling over her foot and the door banging her knee.

Defendant submitted an affirmed report of a radiologist who reviewed an MRI of plaintiff's left knee and opined that her condition was degenerative and that there was no evidence of acute or recent injury. Defendant also submitted the affirmed report of an orthopedic surgeon who found that plaintiff's knee, ankle and foot demonstrated full ranges of motion (*see Grant v United Pavers Co., Inc.*, 91 AD3d 499 [2012]).

In opposition, plaintiff raised triable issues of fact. She submitted, inter alia, the report of a radiologist who found that the MRIs showed a partial intrasubstance meniscal tear of the left knee. Plaintiff also submitted reports of her orthopedic surgeon who conducted arthroscopy on her left knee and found meniscal tears, and of an orthopedist who, upon recent examination, found plaintiff had limited ranges of motion in her left ankle and knee and an antalgic gait to the left. The orthopedist also opined that the injuries were permanent and would require further treatment (*see Mitchell v Calle*, 90 AD3d 584 [2011]; *Torres v Villanueva*, 90 AD3d 523 [2011]). The orthopedist adequately addressed the causation issue by opining that the injuries were caused by the accident (*see Perl v Meher*, 18 NY3d 208, 219 [2011]; *Yuen v Arka Memory Cab Corp.*, 80 AD3d 481 [2011]).

Dismissal of plaintiff's 90/180-day claim was proper. Plaintiff testified that as a result of the accident, she missed only one day of school (*see e.g. Gaddy v Eyler*, 79 NY2d 955, 958 [1992]).

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

ENTERED: MAY 1, 2012

CLERK

Mazzarelli, J.P., Andrias, Renwick, Richter, JJ.

7516 In re Metropolitan New York Synod of the Evangelical Lutheran Church of America, Petitioner-Respondent, Index 107556/11

-against-

The Rev. Norman David, et al., Objectors-Appellants.

Niehaus LLP, New York (Paul R. Niehaus of counsel), for appellants.

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

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered on or about October 25, 2011, which granted the petition to transfer certain real property pursuant to Religious Corporations Law § 12 and Not-For-Profit Corporation Law § 511, unanimously affirmed, without costs.

The dismissal of the prior action in Supreme Court, Kings County, challenging the validity of the application of synodic administration to the church in question bars the objections to the instant petition, pursuant to the doctrine of judicata *(see Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485 [1979]). Moreover, petitioner's determination that the congregation had become so diminished and scattered that it could no longer

function is a nonjusticiable religious determination *(see Episcopal Diocese of Rochester v Harnish*, 11 NY3d 340 [2008]).

Were we to consider their argument on its merits, we would find that objectors failed to demonstrate the unconstitutionality of Religious Corporations Law § 17-c ("Property of Lutheran congregations") beyond a reasonable doubt (*see Matter of Schultz Mgt. v Board of Stds. & Appeals of City of N.Y.*, 103 AD2d 687, 689 [1984], *affd* 64 NY2d 1057 [1985]). The statute's reference to a congregation's inability to fulfill its purpose, which permits the synod having jurisdiction over it to take control of the congregation's property (*see* Religious corporations Law § 17-c[2][a][iii]), is not impermissibly vague. The constitution of the congregation in question amplifies the purpose, tying it to the conduct of worship services and the provision of pastoral care. These areas are both governed by petitioner in its discretion; it is for petitioner to determine whether the order

of service is “evangelical Lutheran” and to appoint pastors to an approved list. Thus, the congregation is not subject to any rules other than those to which it subscribed.

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

ENTERED: MAY 1, 2012

CLERK

Mazzarelli, J.P., Acosta, Renwick, Richter, JJ.

7517 The People of the State of New York, Respondent, Ind. 3239/08

-against-

Ricardo Colon, Defendant-Appellant.

Myers, Singer & Galiardo, New York (Matthew D. Myers of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Patricia M. Nunez, J. at hearing; A. Kirke Bartley, Jr., J. at jury trial and sentencing), rendered June 7, 2010, convicting defendant of two counts of criminal possession of a weapon in the second degree, and sentencing him to concurrent terms of six years, unanimously affirmed.

The court properly denied defendant's suppression motion. The police acted on information that was far more reliable than an anonymous tip (*compare Florida v J.L.*, 529 US 266 [2000]).

A visibly frightened witness told the police that a man had just threatened him with a firearm, and the witness pointed to the location where this happened. As instructed by the police, the witness followed the police car in his own vehicle. At the location, the witness pointed at defendant and exclaimed,

excitedly, that defendant was the man who had threatened him.

This provided, at least, reasonable suspicion for a stop and frisk. Although the witness ultimately drove away without giving his name, the reliability of his statement was enhanced by many factors. This was a face-to-face encounter, permitting the officers to observe the witness's demeanor (*see e.g. People v Appice*, 1 AD3d 244 [2003], *lv denied* 1 NY3d 594 [2004]). The witness expressly stated the basis of his knowledge, which was that he had personally been threatened. Finally, the witness's statements were excited utterances, another factor enhancing their reliability (*see People v Govantes*, 297 AD2d 551, 552 [2002], *lv denied* 99 NY2d 558 [2002]).

Moreover, at the time the police stopped defendant, it was reasonable for them to expect that the witness would remain at the scene and ultimately become a complainant. They did not find out until later that the witness had departed. It was only the urgency of the situation that prevented the police from obtaining the witness's name and contact information (*see People v Harris*, 175 AD2d 713, 715 [1991], *lv denied* 79 NY2d 827 [1991]).

Even assuming the police had only reasonable suspicion to justify a forcible detention, but not probable cause to arrest, they did not arrest defendant until after he resisted a frisk and

a pistol fell to the ground in the course of the struggle. We have considered and rejected defendant's remaining arguments.

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

ENTERED: MAY 1, 2012

CLERK

Mazzarelli, J.P., Acosta, Renwick, Richter, JJ.

7518-
7519 In re Kaila A.,

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

Reginald A.,
Respondent-Appellant,

Lovely A.,
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

_____

Susan Jacobs, New York (Christopher Buerger of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Kathy H. Chang of counsel), for respondent.

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

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Order of fact-finding, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about November 5, 2010, which, to the extent appealed from, after a hearing, found that respondent father had neglected the subject child, unanimously affirmed, without costs. Appeal from order of disposition, same court and Judge, entered on or about January 26, 2011, which placed the child in the custody of the Commissioner of Social Services until the completion of the next permanency hearing, to the extent not abandoned, unanimously dismissed, without costs, as moot.

A preponderance of the evidence supports the court's finding that respondent had neglected the child by committing acts of domestic violence against the child's mother in the child's presence (*see* Family Ct Act § 1012[f][i][B]; § 1046[b][I]; *Matter of Niyah [Edwin E.]*, 71 AD3d 532, 533 [2010]). Respondent failed to preserve his hearsay objections, and we decline to review them (*see Matter of Isaiah R.*, 35 AD3d 249, 249 [2006]). In any event, the child's out-of-court statements to the caseworker that she had seen respondent "choking, kicking and slapping" her mother on one occasion and hitting her on another were admissible since they were corroborated by other evidence — namely, the caseworker's testimony and the records admitted without objection (Family Ct Act § 1046[a][vi]; *Matter of Aliyah B. [Denise J.]*, 87 AD3d 943, 943 [2011]). Under the circumstances, Family Court properly found that the child's physical, mental or emotional condition was in imminent danger of becoming impaired (*see* Family Ct Act § 1012[f][i]; *Matter of Niyah*, 71 AD3d at 533).

A preponderance of the evidence also supports the court's finding of educational neglect, as the record shows that the child had missed 59 days of school in a two-year period (*see Matter of Aliyah*, 87 AD3d at 943). The court rejected respondent's testimony that he was unaware of the child's excessive absences, and there is no basis for disturbing the

court's credibility determinations (*id*. at 943-944).

On appeal, respondent does not raise any arguments with respect to the dispositional order. In any event, to the extent the appeal from that order is not abandoned, it is moot since the placement terms of the order have expired (*see Matter of Adena I. [Claude I.]*, 91 AD3d 484 [2012]).

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

ENTERED: MAY 1, 2012

CLERK

Mazzarelli, J.P., Acosta, Renwick, Richter, JJ.

7520 Ludwign H. Zambrana, Index 306426/09
Plaintiff-Appellant,

-against-

Robert J. Timothy, et al.,
Defendants-Respondents.

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Jillian Rosen of counsel), and Law Offices of Alexander Bespechny, Bronx (Alexander Bespechny of counsel), for appellant.

Adams, Hanson, Finder, Hughes, Rego, Kaplan & Fishbein, Yonkers (Jeffrey A. Domoto of counsel), for respondents.

Order, Supreme Court, Bronx County (Julia Rodriguez, J.), entered September 21, 2011, which granted defendants' motion for summary judgment dismissing the complaint alleging serious injuries under the "permanent consequential limitation of use," "significant limitation of use" and 90/180-day categories of Insurance Law § 5102(d), unanimously affirmed, without costs.

On January 9, 2008, then 26-year-old plaintiff was driving on the Van Wyck Expressway when a vehicle owned by defendant Clifford C. Hay, Inc. and driven by defendant Timothy J. Robert collided with his car. Plaintiff commenced this action alleging that he sustained serious injuries to his right knee.

Defendants established prima facie absence of a serious injury by submitting the report of an orthopedist who examined

plaintiff on November 18, 2010, and found full range of motion, and absence of disability, permanency, or residuals (*see De la Cruz v Hernandez*, 84 AD3d 652, 652 [2011]).

Notwithstanding plaintiff's arguments that his medical records contain objective evidence of injuries, that he had adequately explained his cessation of treatment, and that he need not submit contemporaneous quantitative evidence of limitations to sustain his claims, he failed to raise a triable issue of fact as to existence of a permanent serious injury since he did not submit any objective evidence of limitations based on a recent examination of his knee (*see Perl v Meher*, 18 NY3d 208, 219-220 [2011]; *Harrigan v Kemmaj*, 85 AD3d 559 [2011]; *Thompson v Abbasi*, 15 AD3d 95, 97-98 [2005]). The most current medical evidence upon which plaintiff relies is the operative report dated October 18, 2008, which was prepared more than two years before defendants' expert's findings of full range of motion and resolved symptoms.

Defendants met their burden of proof as to plaintiffs' 90/180-day claim by relying on plaintiff's medical records, and his deposition testimony, which are insufficient to establish that he was unable to perform substantially all of the material acts which constitute his usual and customary daily activities

during the requisite period (*see Uddin v Cooper*, 32 AD3d 270, 271 [2006], *lv denied* 8 NY3d 808 [2007]).

Plaintiff failed to raise an issue of fact. The medical records upon which he relies indicate that, as of February 7, 2008, he was only "temporarily partially disabled" and, if he were working, would have been able to return to work with light duty restrictions (*see Perl*, 18 NY3d at 220; *Williams v Perez*, 92 AD3d 528 [2012]). Without any corroborating objective medical evidence, his affidavit, which simply repeats that he was curtailed from job hunting and confined to home during the requisite period, is insufficient to sustain a 90/180-day claim (*see Rosa-Diaz v Maria Auto Corp.*, 79 AD3d 463 [2010]; *Blake v Portexit Corp.*, 69 AD3d 426 [2010]).

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

ENTERED: MAY 1, 2012

CLERK

Mazzarelli, J.P., Acosta, Renwick, Richter, JJ.

7521 In re Mar De Luz R., and Another,

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

Luz R.,
Respondent-Appellant,

Mercyfirst, et al.,
Petitioners-Respondents.

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

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for respondents.

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

Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about February 22, 2011, which, upon a finding of mental illness, terminated respondent mother's parental rights and committed the custody and guardianship of the subject children to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The court's determination that respondent's untreated mental illness renders her unable, at present and for the foreseeable future, to provide proper and adequate care for the subject children, one of whom has special needs, was supported by clear

and convincing evidence (Social Services Law § 384-b[3][g][i]). The court properly permitted the court-appointed psychologist to testify as to respondent's mental illness, pursuant to the statute (*see* Social Services Law § 384-b[4][c], [6][c]; *see e.g. Matter of Isaiah J. [Janice J.]*, 82 AD3d 651 [2011]; *Matter of Robert K.*, 56 AD3d 353 [2008], *lv denied* 12 NY3d 704 [2009]; *Matter of Nadaniel Jackie P.*, 35 AD3d 305 [2006]). Moreover, respondent's testimony demonstrated that she was unable to acknowledge the existence of her mental illness and that she did not believe her prescribed medication was needed to manage her condition.

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

ENTERED: MAY 1, 2012

CLERK

Saxe, J.P., Catterson, Moskowitz, Degrasse, Abdus-Salaam, JJ.

1964 Cobalt Partners, L.P., et al., Index 602964/07
Plaintiffs-Appellants,

-against-

GSC Capital Corp.,
Defendant,

GSCP (NJ), L.P., et al.,
Defendants-Respondents.

Seward & Kissel LLP, New York (M. William Munno of counsel), for appellants.

Davis Polk & Wardwell LLP, New York (Robert F. Wise, Jr. of counsel), for respondents.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered February 2, 2009, modified, on the law, to deny the motion as to the second cause of action alleging breach of written contract against Group, and otherwise affirmed, without costs.

Opinion by Moskowitz, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
James M. Catterson
Karla Moskowitz
Leland G. DeGrasse
Sheila Abdus-Salaam, JJ.

1964
Index 602964/07

_____x

Cobalt Partners, L.P., et al.,
Plaintiffs-Appellants,

-against-

GSC Capital Corp.,
Defendant,

GSCP (NJ), L.P., et al.,
Defendants-Respondents.

_____x

Plaintiffs appeal from an order of the Supreme Court, New York County (Charles E. Ramos, J.), entered February 2, 2009, which granted the motion of defendants GSC Group, Inc. and GSCP (NJ), L.P. to dismiss the second amended complaint as against them.

Seward & Kissel LLP, New York (M. William Munno and Walter A. Naeder of counsel), for appellants.

Davis Polk & Wardwell LLP, New York (Robert F. Wise, Jr., Jonathan D. Martin and Sarah M. Egan of counsel), for respondents.

MOSKOWITZ J.

On August 31, 2010, subsequent to oral argument, but while the case was sub judice, defendants filed for bankruptcy and therefore this case became subject to the automatic stay of litigation pursuant to section 362 of the Bankruptcy Code. On March 28, 2012, the parties notified this court that the United States Bankruptcy Court for the Southern District of New York had lifted the stay. Thus, we may now release our decision.

Because this is an appeal from the grant of a motion to dismiss and plaintiffs have alleged facts sufficient to meet the strict standard for piercing the corporate veil under New York law, we reverse so much of the order below as dismissed the cause of action for breach of written contract against GSC Group, Inc. (Group). We affirm in all other respects.

We derive the facts from the allegations in the second amended complaint and other documents in the record. Plaintiffs bring this action to rescind the private placement purchase of $4 million of restricted shares of defendant GSC Capital Corp. (the Fund), a real estate investment trust (REIT). Defendant GSCP (NJ), L.P. owns a minority of the Fund's stock and is its investment adviser. GSCP is an affiliate or subsidiary of defendant Group, that also has a minority investment in the Fund.

Around June 6, 2005, Wayne Cooperman on behalf of plaintiffs met with nonparties Fred Horton, Thomas Inglesby, Daniel Castro

and Joe Wender at plaintiffs' office in New York City. At the time of the meeting, Group employed Horton, Inglesby and Castro. Wender was a member of Group's advisory board.

At the meeting, Group's employees solicited Cooperman to purchase restricted shares of the Fund in a private placement. Horton, Inglesby, Castro and Wender allegedly represented that they would “cause a registration statement to be filed” for the Fund within six months of the private placement and would use commercially reasonable efforts to cause the registration statement to become effective. This representation was material because, once effective, registration would enable purchasers to sell their shares on a national securities exchange. Allegedly in reliance on this promise, plaintiffs agreed to purchase $4 million of the Fund’s restricted shares.

In connection with the meeting, Cooperman received a copy of a preliminary offering memorandum dated May 31, 2005. In the preliminary offering memorandum, only the Fund agreed to file a registration statement within 181 days of the closing of the offering and to use commercially reasonable efforts to cause the registration statement to become effective.

Subsequently, Cooperman received an offering memorandum dated June 23, 2005. This second offering memorandum contained the same promise as the preliminary offering memorandum concerning the registration statement. Notably, the offering

memorandum describes GSCP, GSC Partners (the predecessor to Group) and the Fund as closely related entities, and, at one point, describes "GSC Partners" as the "'doing business as' name of several related entities, including GSCP." The offering memorandum also states that initially the Fund would have no employees, but would operate through its manager (GSCP), and that "each of our executive officers is also an officer of our Manager or one of its affiliates."

Allegedly in reliance on Group's and the Fund's promises to register or cause to register the Fund's shares, plaintiffs purchased $4 million in restricted shares (160,000 shares at $25 per share) on or about June 24, 2005.

As purchasers in the private placement, plaintiffs were required to sign a subscription agreement. The subscription agreement states:

> "In making the decision to purchase the Common Stock, the undersigned relied solely on the information set forth in the Offering Memorandum [defined to include both the May 31, 2005 preliminary offering memorandum and the final offering memorandum] and any other information obtained by the undersigned directly from the Company [i.e., the Fund] as a result of any inquiries by the undersigned or the undersigned's advisor(s)."

The subscription agreement also incorporates the terms of the registration rights agreement:

> "The undersigned acknowledges having received a copy of the form of registration rights agreement attached as Annex IV to the Offering Memorandum . . .

> and agrees to be bound by and acknowledges being entitled to the benefits of the terms and provisions thereof as if the same has been duly executed by the undersigned . . .”

The registration rights agreement contains a merger clause.

The private placement of the Fund's restricted stock closed on July 11, 2005. On or about January 27, 2006, the Fund filed a registration statement with the SEC. On December 6, 2007, The Fund withdrew the registration statement. On January 23, 2008, the Fund announced that it was in financial difficulty.

Meanwhile, on September 4, 2007, plaintiffs commenced this action. The thrust of their second amended complaint, filed on April 22, 2008, is that Group purposefully failed to cause the registration statement to become effective. Plaintiffs ascribe an alleged motive for this failure. In January 2006, the Fund’s shares were worth less than $25 per share, a value that would have required repurchase with proceeds from the public offering. Because the management fee was based on a percentage of the total equity under management, this repurchase would have reduced the assets under management by allegedly $680 million with the concomitant reduction in the management fees of Group’s subsidiary, GSCP. Plaintiff’s allege because Group did not want to lose these management fees, it stalled the filing of the registration statement so there would be no repurchase. In the second amended complaint, plaintiffs sued: (1) Group for breach of oral contract, (2) all defendants for breach of a written

contract, namely, the Offering Memorandum and the Registration Rights Agreement and (3) Group for fraudulent omission.

The Fund answered the second amended complaint. Group and GSCP moved to dismiss it pursuant to CPLR 3211(a)(1), (5) and (7). The motion court granted the motion to dismiss.

Law of the case did not require the court to deny the motion to dismiss the second amended complaint, even though it had previously denied the motion to dismiss the amended complaint (*see generally People v Evans*, 94 NY2d 499, 502 [2000]). Law of the case is a discretionary doctrine (*id*. at 503), and the second amended complaint differed from the amended complaint.

The court should have allowed the second cause of action for breach of written contract to proceed against Group because plaintiffs have alleged just enough facts that, if true, are sufficient to satisfy New York's strict standard for veil piercing in breach of contract cases.[1]

New York law disfavors disregard of the corporate form. Accordingly, "piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that

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[1]The Fund is a Maryland corporation, and therefore, Maryland law arguably applies to the issue of whether to pierce its veil to hold Group liable on The Fund's written contract (*see e.g. Klein v CAVI Acquisition, Inc.*, 57 AD3d 376, 377 [2008]). However, because the parties have cited only New York law, we apply that law (*see e.g. M&A Oasis v MTM Assoc.*, 307 AD2d 872, 874 [2003]).

such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). Plaintiffs have alleged as the first prong that Group "exercise[d] complete domination and control over" the Fund, which was "entirely dependent upon GSC Group for its business operations." There is ample evidence in the record to support Group's domination and control. For instance, the offering memorandum describes the Fund as having no employees and operating through GSCP, while GSCP in turn is described as a "doing business as" name for Group. However, in *TNS Holdings v MKI Sec. Corp.* (92 NY2d 335, 339 [1998]), the Court of Appeals rejected the notion that control alone is sufficient to tie a nonsignatory to contractual obligations:

> "Those seeking to pierce a corporate veil of course bear a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences. *Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance* [emphasis added; citations ommited]."

Accordingly, cases following *TNS Holdings* have dismissed complaints seeking to hold a parent liable for the contractual obligations of its subsidiary or affiliate "unaccompanied by allegations of consequent wrongs" *(UMG Recs., Inc. v FUBU Records*, LLC, 34 AD3d 293, 294 [2006]; *see also Sound Communications Inc., v Rack and Roll, Inc., 88 AD3d 523, 524*

[2011]; *Prichard v 164 Ludlow Corp.*, 49 AD3d 408, 409 [2008]; *Brainstorms Internet Mktg. v USA Networks,* 6 AD3d 318 [2004]; *Hartej Corp. v Pepsico World Trading Co.,* 255 AD2d 233 [1998]).

Citing several federal cases, plaintiffs argue merely that Group dominated and controlled the Fund. As the above cases from this Court demonstrate, domination and control alone are insufficient to pierce the corporate veil. Fortunately for plaintiffs, their complaint contains allegations sufficient to allege the second prong, i.e., that Group misused the corporate form to commit a wrong. In particular, paragraph 104 of the second amended complaint states: "Through its domination and control, [Group] caused [the Fund] to breach the Offering Memorandum and Registration Rights Agreement with respect to the Registration Obligation." Under a liberal reading, the complaint also alleges that Group, as the alter ego of the Fund, failed to cause the registration statement to become effective because the notes were worth less than $25 dollars per share, and once registered, the Fund would have to repurchase them, thereby causing Group to lose money. To use domination and control to cause another entity to breach a contractual obligation for personal gain is certainly misuse of the corporate form to commit a wrong. Accordingly, the court should not have dismissed the second cause of action for breach of written contract against Group (*see ABN Amro N.V. v MBIA Inc.*, 17 NY3d 208, 229 [2011]

["plaintiffs' allegations that MBIA Inc. abused its control of its wholly-owned subsidiary, MBIA Insurance, by causing it to engage in harmful transactions that now shield billions of dollars in assets from plaintiffs and expose them to significant liability meet this test"]). As plaintiffs directed their veil-piercing allegations against Group only, we affirm so much of the order as dismissed this claim against GSCP.[2]

Because the allegations against Group, as the alter ego of the Fund, are sufficient to state a cause of action for breach of the written contract, the first cause of action, for breach of oral contract, is duplicative. However, it was also proper to dismiss the claim alleging breach of oral contract because the alleged oral agreement contradicts terms in the written documents. Breach of oral contract, asserted against Group alone, claims Group's breach of the alleged oral agreement at the June 6, 2005 meeting to cause the Fund to file a registration statement with the SEC and cause that statement to become effective. Although there is a standard merger clause in the registration rights agreement accompanying this transaction,

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[2]We note that plaintiffs had originally asserted the second cause of action against GSCP as well as Group, and that plaintiffs' notice of appeal purports to be from the motion court's order in its entirety. However, in their briefs, plaintiffs do not mention GSCP separate from Group, and thus plaintiffs have waived any separate argument they may have had with respect to GSCP (*see Davis v School Dist of City of Niagra Falls*, 4 AD3d 866, 867 [2004]).

defendants stated at oral argument before the motion court that "We are not arguing today that the merger agreement bars the first cause of action." Therefore, we do not consider the merger clause in the registration rights agreement as a basis for dismissing plaintiffs' claim for breach of oral contract.

However, we can consider the subscription agreement. The subscription agreement states that "[i]n making the decision to purchase the Common Stock, [plaintiffs] relied solely on the information set forth in the Offering Memorandum and any other information obtained by [plaintiffs] directly from" the Fund. Accordingly, plaintiffs expressly disclaimed reliance on any representations other than those they received from the Fund alone and cannot now complain that Group made them some sort of independent promise. Plaintiffs' signature does not appear on the copy of the subscription agreement in the record on appeal, and counsel for plaintiffs denied at oral argument that plaintiffs had signed it. However, plaintiffs do not dispute that they could not have become investors without signing the subscription agreement. Nor have plaintiffs come forward with a different copy of the subscription agreement that lacks this language, while the very copy they attach to their complaint contains it.

Because the terms of the subscription agreement preclude plaintiffs' reliance on anything Group may have allegedly

represented, we need not address Group's remaining arguments as to why the breach of oral contract claim must fail.

It was also proper to dismiss the third cause of action alleging fraud. This claim, asserted against Group only, does not rely on the theory that Group made a promise with no intent to perform, but rather is based on allegedly fraudulent omissions. Plaintiffs allege that Group "failed to disclose that they could decide to delay indefinitely efforts to cause the registration statement to become effective if the Fund's Restricted Shares could not be offered for a price of at least $25 per share or if they judged market conditions not to be favorable."

"[A]n omission does not constitute fraud unless there is a fiduciary relationship between the parties" (*SNS Bank v Citibank*, 7 AD3d 352, 356 [2004]). Here, there are no allegations that this transaction was anything more than at arm's length, between sophisticated commercial parties who had their own advisors. Moreover, in the Offering Memorandum, the Fund specifically warns that "[t]here are conflicts of interest in our relationship with our Manager and/or GSC Partners, which could result in decisions that are not in the best interests of our stockholders and our noteholders." Given this language, plaintiffs had clear notice

that they needed to protect their own interests (*see Arfa v Zamir*, 17 NY3d 737, 739 [2011]).

Finally, *Bullmore v Ernst & Young Cayman Is.* (45 AD3d 461 [2007]), upon which plaintiff relies heavily, is inapposite. There, where the defendant was the investment manager of certain hedge funds, the liquidators for the funds sued for violation of fiduciary duties owed to those funds. The case does not stand for the proposition that a manager for an entity like a hedge fund or, as here, a REIT, has any duties to the individual investors in the funds it manages. Moreover, even if an investment advisor to an entity like the Fund could ever be held liable for breach of fiduciary duty or fraud to the *investors* of that entity, Group was *not* the Fund's investment advisor; GSCP was. Plaintiffs do not assert the third cause of action against GSCP.

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

Accordingly, the order of the Supreme Court, New York County (Charles E. Ramos, J.), entered February 2, 2009, which granted the motion of defendants GSC Group, Inc. and GSCP (NJ), L.P. to

dismiss the second amended complaint as against them, should be modified, on the law, to deny the motion as to the second cause of action alleging breach of written contract against GSC Group, Inc., and otherwise affirmed, without costs.

All concur.

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

ENTERED: MAY 1, 2012

CLERK