SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 3, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

6970 & M-224 — Index 106100/07

Phillip Fiorentino, et al.,
Plaintiffs-Respondents,

-against-

Atlas Park LLC, et al.,
Defendants-Respondents,

Sage Electrical Contracting, Inc.,
Defendant-Appellant.

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Plaza Construction, Inc.,
Third-Party Plaintiff-Respondent,

-against-

Donaldson Acoustics, Co.,
Third-Party Defendant-Appellant.

Camacho Mauro & Mulholland, LLP, New York (Andrea Sacco Camacho of counsel), for Sage Electrical Contracting, Inc., appellant.

McGaw, Alventosa & Zajac, Jericho (Dawn C. DeSimone of counsel), for Donaldson Acoustics, Co., appellant.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for Fiorentino respondents.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for Atlas Park LLC, Plaza Construction Corporation and Plaza Construction, Inc., respondents.

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered April 26, 2011, which, to the extent appealed from as limited by the briefs, granted defendants Atlas Park LLC (Atlas) and Plaza Construction Corporation's (Plaza) motion for summary judgment dismissing plaintiffs' Labor Law § 200 and common-law negligence claims as against them, granted Atlas and Plaza's motion for summary judgment on their claims for contractual and common-law indemnification against defendant Sage Electrical Contracting, Inc. (Sage) and third-party defendant Donaldson Acoustics, Co. (Donaldson), conditionally, and denied Donaldson's motion for summary judgment on its claim for common-law indemnification against Sage, unanimously modified, on the law, to the extent of granting Atlas and Plaza's motion as to their contractual indemnification claims against Sage and Donaldson, unconditionally, granting Donaldson's motion as to its common-law indemnification claim against Sage and denying Atlas and Plaza's motion as to their common-law indemnification claim against Donaldson, and otherwise affirmed, without costs.

In this personal injury action, plaintiff seeks damages for injuries he sustained while working on a construction project on April 6, 2006 in the basement of the premises located at 8000 Cooper Avenue in Queens. Defendant Atlas owned the premises and

contracted with defendant Plaza as general contractor. Plaza contracted with defendant Sage as an electrical subcontractor on the project and defendant Donaldson, plaintiff's employer, as a carpentry subcontractor. Donaldson's foreman supervised plaintiff's work. Plaintiff testified that, while he was working on the project, he never had any contact with anyone from Plaza and he never heard of a company named Atlas.

At the time of the accident, plaintiff was standing on a Baker scaffold, approximately 3 feet from the ground, installing acoustic ceiling tiles into a metal grid. As he was installing an exit sign tile, he noticed a BX cable, an armored electrical cable, dangling from the ceiling. While he had one hand holding the metal ceiling grid, plaintiff grabbed the cable with his other hand to push it back into the ceiling so that he could feed it through the slot that he created in the ceiling tile. As he grabbed the cable, he received an electric shock. He was unable to let go of the cable until his co-worker Richie Robbins pushed the scaffold out from under him.

In April 2007, plaintiff and his wife commenced this action against Atlas, Plaza and Sage, by filing a summons and complaint, alleging causes of action based on Labor Law §§ 240(1), 241(6), 200 and common-law negligence. Atlas and Plaza answered and

asserted cross claims against Sage for contractual indemnification and contribution. Atlas and Plaza also commenced a third-party action against Donaldson. Although the third-party complaint asserted two causes of action based on contractual indemnification, the final paragraph of the third-party complaint demanded judgment against Donaldson for contractual and common-law indemnification.

In July 2010, Atlas and Plaza moved for summary judgment dismissing plaintiffs' claims and all cross claims against them, on their cross claims against Sage for contractual and common-law indemnification, attorneys' fees and costs, and on their third-party claims against Donaldson for contractual indemnification, attorneys' fees and costs. In August 2010, Sage cross-moved for summary judgment dismissing plaintiffs' Labor Law §§ 240(1), 241(6), 200 and common-law negligence claims against it, and dismissing codefendants Atlas and Plaza's cross claims for indemnification, and third-party defendant Donaldson's cross claim for indemnification. In September 2010, Donaldson also cross-moved for summary judgment, dismissing the plaintiffs' Labor Law §§ 240(1) and 241(6) claims, as well as Sage's cross claims for common-law indemnification, and Atlas and Plaza's claims for contractual and common-law indemnification, attorneys'

fees and costs against Sage.

By order entered April 26, 2011, the motion court dismissed the Labor Law § 200 claims as against Atlas and Plaza, finding that they did not have the requisite supervision and control over plaintiff's work, and granted similar relief to Sage, determining that it was neither an owner nor a general contractor. The court denied that portion of Sage's motion seeking dismissal of the common-law claims against it. The court denied Atlas and Plaza's motion to dismiss plaintiffs' Labor Law § 241(6) claim based upon the violation of 12 NYCRR 23-1.13, but granted that portion of Sage's cross motion to dismiss the Labor Law § 241(6) claim.

As to the indemnification issues, the court conditionally granted Atlas and Plaza's motion as to contractual and common-law indemnification against Sage and Donaldson, pending a finding of negligence. Reasoning that factual issues remained, the court denied Sage's cross motion to dismiss Atlas, Plaza and Donaldson's cross claims for indemnification and Donaldson's cross motion for common-law indemnification against Sage.

We reject Atlas and Plaza's argument that Sage has no right to appeal from the part of the order that granted their motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims as against them. Sage is aggrieved by that

determination (*see* CPLR 5511) insofar as it precludes Sage from asserting claims for indemnification or contribution against Atlas and Plaza (*see Urbina v 26 Ct. St. Assoc., LLC*, 12 AD3d 225 [2004]).

In any event, an owner or general contractor will not be liable under Labor Law § 200 for injuries that arise out of the manner or method of work unless it had the authority to supervise or control that work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [2009]). Contrary to Sage's argument, that Plaza or its site safety inspector had the authority to stop the work if he observed a subcontractor engaging in an unsafe activity is insufficient to establish the requisite supervision or control (*see Hughes v Tishman Constr. Corp.*, 40 AD3d 305 [2007]). That Plaza expedited the work does not establish that it supervised and controlled the manner in which the work was performed (*see Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 [2011]).

Because the Labor Law § 200 and common-law negligence claims (as well as the Labor Law § 240[1] claim) were dismissed against them, Atlas and Plaza's only liability, if any, would be vicarious under Labor Law § 241(6). Accordingly, they are

entitled to enforce the indemnification provisions in their contracts with Sage and Donaldson (*see Macedo v J.D. Posillico, Inc.*, 68 AD3d 508, 510-511 [2009]).

These contracts provide that Sage and Donaldson will indemnify Atlas and Plaza for "[a]ny accident or occurrence which happens, or is alleged to have happened, in or about the place where such Work is being performed or in the vicinity thereof (a) while the Subcontractor is performing the Work, either directly or indirectly through a Subcontractor or material agreement, or (b) while any of the Subcontractor's property, equipment or personnel are in or about such place or the vicinity thereof by reason of or as a result of the performance of the Work." Because it is undisputed that plaintiff was performing work on behalf of Donaldson at the time of his accident and that Sage still had property, equipment or personnel in the place, Atlas and Plaza are entitled to unconditional summary judgment on their contractual indemnification claims.

To the extent Atlas, Plaza and Donaldson seek common-law indemnification from Sage, we affirm that part of the motion court's order that granted this relief to Atlas and Plaza, and we reverse that part of the order that denied the same relief to Donaldson. Indeed, the evidence in the record demonstrates that

Atlas, Plaza and Donaldson established their prima facie entitlement to summary judgment on the issue of common-law indemnification against Sage (*see Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483 [2010]). Contrary to the motion court's holding, Sage failed to raise an issue of fact in opposition.

The following facts are undisputed: Sage installed the BX cable that was involved in the accident, Sage was contractually responsible for "safing off"[1] any energized BX cables, and the BX cable involved in the accident was neither "safed off" with a wire nut nor marked with warning tape. Further, Sage was responsible for connecting and disconnecting the electricity in the area where plaintiff was injured, Sage was not required to obtain Plaza's permission before installing permanent power in the building where plaintiff was injured and Sage was not required to notify Plaza when it turned on a circuit breaker, like the one that powered the BX cable involved in the accident.

In opposition to Donaldson's cross motion, Sage asserted that an issue of fact existed as to whether the BX cable was

[1] "Safing off" a BX cable involves "skinning" the metal jacket of the wire back and then capping the wire with a rubber wire nut.

properly “safed off.” It argued that, based on its project manager Eric Gil’s testimony, Sage had “safed off” the BX cable. However, Gil merely testified that Jim Liotta, Sage’s foreman, understood that “the cable was somehow disrupted by somebody or somehow,” and that “it was safed off and tied up . . . and that somehow, it must have [come] loose.” Thus, Gil had no personal knowledge as to the condition of the BX cable prior to the accident. Accordingly, his testimony was insufficient to raise an issue of fact. The motion court reasoned that Gil’s testimony conflicted with the testimony of Donaldson’s foreman, Eric Anderson, who stated that he could tell from looking at the BX cable involved in the accident that “it was not safed off,” because “the wires were spliced and there were no wire nuts on them.” However, Anderson’s testimony was based on his personal knowledge.

Moreover, Sage and Donaldson understood that the project would be constructed on a fast track basis and that they would work overtime and even out of sequence. Sage and Donaldson were also contractually bound to use their best efforts to complete the work expeditiously. Thus, Sage’s argument in opposition to Atlas and Plaza’s motion that Plaza played a role in plaintiff’s accident, because of its failure to coordinate properly the

various subcontractors' work on the project, including requiring Sage and Donaldson to perform some of the work out of sequence, is unsupported by the record.

Finally, although the last paragraph of Atlas and Plaza's third-party complaint contained a reference to a common-law indemnification claim against Donaldson, their motion sought relief only as to their contractual indemnification claim. It appears that the motion court granted summary judgment on Atlas and Plaza's common-law claim for indemnification against Donaldson inadvertently as they did not request this relief, and this relief is not available here. Workers' Compensation Law § 11 bars common-law indemnity against Donaldson, plaintiff's employer, because the injuries claimed do not meet the statutory definition of "grave" injury (*see Acosta v Green Mgt. Corp.*, 267 AD2d 67, 68 [1999]). The statute does not, however, bar contractual indemnification where the employer has a contract

with the third party, prior to the accident, in which it agreed to indemnify for an employee's loss (*id.*).

M-224 - *Phillip Fiorentino, et al. v Atlas Park LLC, et al.*

Motion to adjourn appeal denied.

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

ENTERED: MAY 3, 2012

CLERK

Mazzarelli, J.P., Friedman, Catterson, Renwick, Richter, JJ.

5845 BPIII-548 West 164th Street LLC, Index 570479/09
Petitioner-Respondent,

-against-

Jose Garcia,
Respondent-Appellant.

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

Robert M. Olshever, P.C., New York (Erin R. Olshever of counsel), for respondent.

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Order of the Appellate Term of the Supreme Court, First Department, entered September 2, 2010, which reversed an order of the Civil Court, New York County (Marcia J. Sikowitz, J.), entered December 30, 2008, granting respondent's motion for summary judgment dismissing the proceeding, and denied the motion, unanimously reversed, on the law, without costs, and the motion granted.

Petitioner brought this nonpayment proceeding in 2007, after buying the building in which respondent is a tenant, and having no knowledge of the arrangement between respondent and the previous owner. The tenant resided in apartment 6C since moving into the building in 1958. At the time of tenant's application for the senior citizen rent increase exemption program in 2001,

the legal rent for apartment 6C was $388.29. Tenant's share of that rent was set at $358.00. The record reflects that the lease executed on March 11, 2003, between respondent and the previous owner contains a handwritten notation that respondent's share of the stated legal monthly rent of $603.92 is $358. The uncontroverted evidence, including the course of conduct of the parties to the lease, demonstrates that the intent of those parties was to cap the rent at tenant's previous legal rent share of $358 for the duration of respondent's tenancy (*see Waverly Corp. v City of New York*, 48 AD3d 261, 265 [2008]). The handwritten provision was added to the lease after respondent moved temporarily from apartment 6C to apartment 6D to permit renovations to be performed in apartment 6C. Rather than moving the tenant back to apartment 6C, the owner informed tenant that he could stay in apartment 6D for the same $358. Thereafter,

while the stated legal rent increased at the beginning of every new lease term, respondent continued to pay, and the owner continued to accept, $358 per month as if the tenant were still residing in apartment 6C.

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

ENTERED: MAY 3, 2012

CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Renwick, Abdus-Salaam, JJ.

6012 Noel M. Wiederhorn, MD, on behalf of Noel M. Wiederhorn, MD IRA Rollover Account, Petitioner-Respondent, Index 601265/10

-against-

J. Ezra Merkin, et al., Respondents-Appellants.

Dechert LLP, New York (Neil A. Steiner of counsel), for appellants.

Brickman & Bamberger, New York (David E. Bamberger of counsel), for respondent.

Judgment, Supreme Court, New York County (Richard B. Lowe, III, J.), entered February 9, 2011, awarding petitioner $1,758,744.01 as against respondent J. Ezra Merkin, and bringing up for review an order, same court and Justice, entered August 17, 2010, which, inter alia, granted the petition to confirm an arbitral award, denied respondents' cross petition to vacate the award as against Merkin and to confirm it as to respondent Gabriel Capital Corporation (Gabriel), and granted petitioner's motion to dismiss respondents' counterclaim, unanimously modified, on the law, to the extent of confirming the award as to Gabriel, and otherwise affirmed, without costs.

The following facts are undisputed: Petitioner invested in

nonparty Ascot Partners, L.P. (Ascot), a fund operated by respondent J. Ezra Merkin, who allegedly failed to disclose that the fund's monies were funneled to Bernard Madoff to invest. On March 18, 2003, petitioner Noel M. Wiederhorn subscribed for a $500,000 limited partnership interest in Ascot, on behalf of his individual retirement account (IRA). In the subscription agreement, petitioner represented that he was a "qualified purchaser." In order to reach the required $5 million in investments, petitioner included his house and office as real estate held for investment purposes. In 2004, petitioner invested an additional $962,040 in Ascot on behalf of his IRA. Merkin, Ascot's general partner, forwarded the funds to nonparty Bernard Madoff. In 2008, petitioner learned that the funds he had invested were misappropriated during Madoff's perpetration of a "Ponzi" scheme.

Pursuant to the Ascot limited partnership agreement's arbitration clause, petitioner commenced an arbitration action against Merkin, Gabriel, and Ascot[1] on December 19, 2008. Gabriel provided "accounting and back-office" services to Ascot, and Merkin is Gabriel's sole shareholder. The arbitration clause

[1] Petitioner subsequently withdrew his claims against Ascot.

requires that any dispute arising out of the agreement or breach of the agreement be submitted to arbitration in New York.

At arbitration, petitioner asserted claims for violation of the New Jersey Uniform Securities Law (NJSA §§ 49:3-51, 49:3-71), breach of fiduciary duty, common-law fraud and deceit, and gross negligence. Following seven days of evidentiary hearings before a three-person panel, a two-to-one majority found in petitioner's favor on his claims for breach of fiduciary duty and violation of the New Jersey Securities Act as against Merkin, and ordered him to pay petitioner restitution in the amount of $1,462,040, plus interest. The arbitral panel dismissed all claims against Gabriel.

Petitioner brought a special proceeding to confirm the arbitral award. Merkin and Gabriel answered jointly, cross-petitioned to vacate the award against Merkin and confirm the award to the extent it dismissed all claims against Gabriel, and counterclaimed for indemnification.

Respondents contended that the arbitral panel found that petitioner misrepresented his status as a qualified purchaser in the subscription agreement. They further argued that pursuant to the indemnification clause in the parties' subscription agreement, they are entitled to recover $1,010,542 in attorneys'

fees and $583,092 for expert witnesses, consultants, arbitrators, and transcripts. The indemnification clause of the subscription agreement states in pertinent part:

> "The Investor [petitioner and/or his IRA] agrees to indemnify and hold harmless ... [Ascot's] General Partner [respondent Merkin] ... [and his] affiliate[] ... against any and all loss, liability, claim, damage and expense whatsoever (including all expenses reasonably incurred in investigating, preparing or defending against any claim whatsoever) arising out of or based upon (i) any false representation or warranty made by the Investor ... in this Subscription Agreement ... or (ii) any action for securities law violations instituted by the Investor which is finally resolved by judgment against the Investor."

Respondents also contended that uncontradicted evidence established that petitioner was aware that Madoff had been delegated investment responsibility for substantially all of Ascot Partners' assets prior to petitioner's first investment in Ascot.

The court issued a decision and order dated August 6, 2010, granting petitioner's motion to confirm the award, and denying respondents' cross petition and counterclaim. The court then issued a judgment for petitioner dated January 28, 2011 ordering recovery of $1,758,744 from J. Ezra Merkin. The judgment, however, did not reflect the dismissal of petitioner's claims

against Gabriel.

On appeal, respondents Merkin and Gabriel argue that the court erred when it confirmed the award against Merkin but not in favor of Gabriel, and denied Gabriel's counterclaim for indemnification. Respondents argue, inter alia, that a confirmation of the award in favor of Gabriel constitutes a "judgment against the investor," entitling Gabriel to recover attorneys fees and other expenses under the terms of the indemnification clause.

For the reasons set forth below, we modify to confirm the entire award and amend the judgment accordingly, but affirm denial of respondents' counterclaim. Gabriel and Merkin, having charted their course in presenting and reaping the benefits of a joint defense, should not now be considered separately for the purposes of indemnification. Petitioner prevailed in the arbitration against the *joint representation of Merkin and Gabriel*. Thus, even though the judgment is modified in Gabriel's favor, neither respondent may recover the cost of their joint defense.

As a threshold matter, we note that an arbitration award will not be overturned unless it is violative of a strong public policy, is totally irrational, or exceeds a specifically

enumerated limitation on the arbitral panel's power (*Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 308 [1984]). Respondents have not established any of these bases for reversal.

Notably, the arbitration panel did not find that petitioner had misrepresented his status in the subscription agreement. To the contrary, the panel found that petitioner was unaware that he was not a qualified investor. We are bound by these factual findings made by the panel (*Silverman*, 61 NY2d at 308; *Matter of Brown & Williamson Tobacco Corp. v Chesley*, 7 AD3d 368, 372 [2004]).

Respondents have similarly provided no basis for overturning the panel's determinations that New Jersey Securities Law applies in this case (*see e.g. Silverman*, 61 NY2d at 308; *Brown & Williamson*, 7 AD3d at 372). Moreover, as to any conflicting testimony about petitioner's awareness of Madoff's involvement with Ascot, a court may not second-guess a determination made by the arbitration panel based on inconsistent evidence (*see e.g. Brown & Williamson*, 7 AD3d at 373).

Respondents correctly assert, however, that they are entitled to confirmation of the entire award, including that part of the award dismissing the claims against Gabriel. CPLR 7510 states that "[t]he court shall confirm an award upon application

of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511" (*see Matter of Bernstein Family Ltd. Partnership v Sovereign Partners, L.P.*, 66 AD3d 1, 7 [2009] [CPLR 7510 confers a broad right to confirmation of an arbitral award]). The record in this case indicates that respondents moved to confirm within one year of the award, and petitioner does not contend that any of the grounds specified in CPLR 7511 applies.

Nonetheless, confirmation of the award and modification of the judgment do not mandate granting Gabriel's counterclaim for indemnification. A dismissal of the claims against Gabriel and some of the claims against Merkin cannot be characterized as a "judgment against" petitioner. To trigger the second prong of the indemnification clause, Gabriel and Merkin would have to demonstrate that they "prevailed" in the action by obtaining a judgment in their favor (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989] ["Under the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule"]). The courts have generally held that the "prevailing" or "successful" party is the party in whose favor a "net judgment" was entered

(Stein Treatise § 17:56 [3d ed]; *see McGrath v Toys "R" Us, Inc.*, 3 NY3d 421, 431 [2004] [a plaintiff who obtains a damages judgment, which forces the defendant to pay a sum to the plaintiff that the defendant would not otherwise be required to pay, is considered the prevailing party]). The party who prevails with respect to "the central relief sought" is considered the prevailing party (*Matter of Metropolitan Transp. Auth. v HRH Constr. Interiors, Inc.*, 18 Misc 3d 1133[A], 2008 NY Slip Op 50303[U] *3 [Sup Ct NY County 2008]; *see LGS Realty Partners LLC v Kyle*, 29 Misc 3d 44 [App Term, 1st Dept 2010]).

Here, although the arbitration panel found that Gabriel had no duty to petitioner and dismissed the claims against it, and dismissed some of the claims against Merkin, petitioner prevailed in the arbitration proceeding because he was awarded the full value of his investments in Ascot with interest, in "full satisfaction of all claims and counterclaims." The fact that petitioner did not prevail on all of his claims, including the ones against Gabriel, is irrelevant. It is not necessary for a party to prevail on all of his claims in order to be considered "prevailing" (*see Duane Reade v 405 Lexington, L.L.C.*, 19 AD3d 179 [2005] [partial success did not negate the fact that the landlord prevailed, thus entitling it to counsel fees]).

Gabriel's argument that it should be considered separately for the purpose of determining whether it prevailed against petitioner is without merit. Respondents mounted a joint defense, maintaining absolute identity in the arbitration, in their cross petition and counterclaims to Supreme Court, and on appeal to this Court.

The record reflects that respondents' submissions, including Respondents' Answer to Statement of Claim, Pre-Hearing Memorandum, Post-Hearing Brief, and Respondents' Post-Hearing Reply Brief, present arguments throughout on behalf of "respondents" jointly. Even after the arbitration panel found that Merkin was liable and Gabriel was not, both "respondents" continued to represent their interests, claims, etc. jointly before Supreme Court and on appeal to this Court.

Furthermore, the record indicates that the cost of that defense accrued to both parties jointly, making it impossible to allocate expenses between Merkin and Gabriel. In their Verified Answer, Cross-Petition and Counterclaim, respondents assert that they are entitled to recoup $1,593,632 in fees for their attorneys, expert witnesses, consultants, arbitrators, and transcripts. The exhibits to the Verified Answer indicate that the invoices were for representation of both Merkin and Gabriel

jointly, and paid primarily by Gabriel. Thus, there is no way that a court could identify attorney fee expenses that accrued to representation of only Gabriel that were not already being spent on Merkin's defense.

Since respondents' motion to renew is still pending before the Supreme Court, we decline petitioner's request to decide whether newly discovered evidence constitutes grounds for vacating the arbitral award (*see Gribbin v Kearns*, 260 AD2d 601, 602 [1999]).

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

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

ENTERED: MAY 3, 2012

CLERK

Andrias, J.P., Friedman, DeGrasse, Freedman, Manzanet-Daniels, JJ.

6045-
6046 Index 601305E/07

Sabre International Security, Limited,
Plaintiff-Respondent,

-against-

Vulcan Capital Management., Inc., et al.,
Defendants,

Vulcan Power Services LLC, et al.,
Defendants-Appellants.

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Methfessel & Werbel, P.C., New York (Richard A. Nelke of counsel), for appellants.

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Judgment, Supreme Court, New York County (Richard B. Lowe III, J.), entered July 8, 2010, to the extent appealed from, awarding plaintiff $370,406.50, and bringing up for review an order, same court and Justice, entered on or about May 27, 2010, which granted plaintiff's motion for summary judgment on the second cause of action (account stated) as against defendants Vulcan Power Services LLC (Vulcan Power) and Vulcan Energy Solutions LLC (Vulcan Energy) (collectively defendants) and granted defendants' motion for summary judgment dismissing the second amended complaint, only to the extent of dismissing the complaint against defendants Vulcan Capital Management, Inc. and

Graham, and dismissing the claims for consequential and punitive damages and attorneys' fees against the remaining defendants, unanimously reversed, on the law, without costs, the judgment vacated, plaintiff's motion denied, and defendants' motion granted as to the causes of action for promissory estoppel, intentional or negligent representation, and fraud against defendants, and as to the cause of action for unjust enrichment as against defendant Vulcan Power.

In the fall of 2004, defendant Vulcan Energy and nonparty Vulcan Advanced Mobile Power Systems LLC (Vulcan Advanced) sought contracts with the Iraqi Ministry of Electricity (MOE) to install, repair and maintain power plants in Iraq. In connection with those efforts, their president, Ford F. Graham, negotiated an oral agreement with David Johnston, a former employee of plaintiff, under which plaintiff would provide security services for Vulcan Energy and Vulcan Advanced's personnel during travel to Iraq, both before and after Vulcan Energy or Vulcan Advanced entered into contracts with MOE. While Graham avers that the parties contemplated that a written agreement would be entered into once Vulcan Energy or Vulcan Advanced obtained a contract from MOE, no such agreement was ever drafted or signed, although Vulcan Energy entered into a contract with MOE on February 21,

2005 for the Mulla Abdulla project.

On December 2, 2004, Kev Gallagher, then plaintiff's Director of Finance, sent Graham two invoices addressed to Vulcan Power in the amounts of $129,350 and $41,289, respectively, for pre-contract security services allegedly provided by plaintiff to one or more Vulcan entity in October and November 2004. On February 22, 2005, Gallagher sent Graham a third invoice addressed to Vulcan Power in the amount of $76,304 for additional pre-contract security services for that month. While plaintiff did not render any security services to Vulcan Power, it claims that Graham directed that the invoices be addressed to that entity, which is a subsidiary of Vulcan Energy.

When the invoices remained unpaid, plaintiff commenced this action against Vulcan Energy, Vulcan Power, Vulcan Capital Management, Inc. (Vulcan Capital), and Graham, seeking payment under the theories of breach of an oral contract and an account stated, or, alternatively, promissory estoppel, unjust enrichment, intentional or negligent representation, and fraud. Plaintiff alleged that it had a "legally binding oral agreement" to "provide specific security services for Defendants' representatives in Iraq in exchange for compensation at agreed-upon rates and prices," that it provided such services to

defendants in February 2005 and November 2004, and that defendants received and retained the invoices for those services for more than three years without objection.

Defendants moved for summary judgment dismissing the second amended complaint, asserting that plaintiff could not support any of its claims with competent evidence because it had lost its records in Iraq and did not have any witnesses who participated in the original contract negotiations. Alternatively, defendants moved to dismiss the action as to defendants Vulcan Capital, Vulcan Power, and Graham, and to dismiss plaintiff's claims for punitive damages and attorneys' fees. Plaintiff moved for summary judgment on its breach of contract and account stated claims, now claiming that defendants had acquiesced and ratified express writings titled "Vulcan Capital Cost Proposal" and "Sabre Standard Terms and Conditions." Supreme Court granted plaintiff summary judgment on its account stated claim and granted defendants' motion for summary judgment to the extent of dismissing the action as to Vulcan Capital and Graham, and dismissing plaintiffs' claims for consequential and punitive damages and attorneys fees against all defendants. Defendants appeal.

Questions of fact and credibility exist with respect to the

existence of a binding oral agreement between plaintiff and defendants, and the terms thereof, rendering summary judgment in favor of either side on the first cause of action, for breach of an oral contract, inappropriate (*see Pryor & Mandelup, LLP v Sabbeth*, 82 AD3d 731, 732 [2011]; *Mirchel v RMJ Sec. Corp*., 205 AD2d 388, 389-390 [1994]).

Graham avers that the agreement to pay plaintiff was contingent on Vulcan Energy's or Vulcan Advanced's obtaining the contract and receiving payments from MOE, the latter of which never occurred, and that in any event there was no agreement as to the price for pre-contract services or for any entity other than Vulcan Energy or Vulcan Advanced to pay plaintiff. Graham asserts that, pursuant to the contingency agreement, he requested that plaintiff provide invoices to show the payments it would expect if, as and when Vulcan Energy and Vulcan Advanced received funds from MOE, for the sole purpose of enabling those entities to estimate costs as they negotiated power plant contracts. In support, defendants submitted e-mails from David Johnston, an employee of plaintiff, indicating his willingness to work within the "financial constraints" and "guidelines" outlined by Graham. Defendants also submitted Graham's May 10, 2005 e-mail stating, "I need to get full list of back bills so we can pay these next

week from LC payments"; his September 13, 2005 e-mail advising plaintiff that “it look[s] like we might actually be paid next week/week after” and “will take care of your bill”; and an e-mail in which Graham, in response to a June 2, 2005 demand for payment from plaintiff, states: "I believe your facts are not correct. We have a commercial agreement [pay when we are paid] with your firm dating from when your officers came to New York and had three days of meetings with us. We will honor that agreement."

While this evidence would appear to support Graham’s contentions as to the terms of the oral agreement, there are no e-mails that explicitly reference a contingency agreement, and Graham’s contentions are disputed by plaintiff’s employee, Mahesh Nambirajan. Although Nambirajan was not involved in the original negotiations with Graham, he communicated with Graham regarding the payment of the invoices. Further, Graham’s version of the oral agreement appears to conflict with certain documentary evidence and testimony.

On January 27, 2005, Gallagher sent Graham an e-mail asking when the first two invoices would be paid. This was before Vulcan Energy entered a contract with MOE, and is inconsistent with the alleged contingency agreement. Graham also testified that he asked two of his employees to make sure that plaintiff’s

invoices were reasonable in terms of cost and whether the work was actually performed, and was told that the services listed on the invoices had been provided. This is corroborated by a February 22, 2005 e-mail from Graham to one employee asking him to look over the February 22, 2005 invoice "before we pay," and the employee's reply that: "Yes[,] that invoice is correct. Bob and I had already reviewed it before it was issued via e-mail. We asked [Gallagher] to go ahead and send it out to us so when we issue payment to them it will be all inclusive of all money owed."

Other evidence includes Graham's testimony that he authorized an employee to offer plaintiff $100,000 as a payment toward the amounts that were outstanding, although defendants had not been paid by MOE; Graham's February 2006 e-mail advising plaintiff that "I had not forgotten you. Our bank refinancing had been delayed . . . Estimate end of Feb close"; and his July 19, 2006 e-mail advising plaintiff that he had closed on one of three interim financing deals and "hope[d] to have the second bank deal closed within two or three weeks and to begin to pay down your bill." This evidence is inconsistent with defendants' claims that pre-contract services were to be provided without charge based on the agreement that plaintiff would become the

"primary security firm" for Vulcan Energy and Vulcan Advance if one or both of them won a contract with MOE.

Graham also testified that while he said something about the invoices being addressed to Vulcan Power to his "guys in the field," he never said anything about it to Gallagher and did not know if his "guys" followed up. Insofar as Graham states that there was no agreement as to price for pre-contract services, he acknowledges that he requested the invoices for use in preparing cost estimates and never challenged the rates reflected therein. In light of the foregoing, Graham's testimony and the documentary evidence submitted by defendants do not conclusively establish that there was no oral agreement to compensate plaintiff for pre-contract security services. A review of the record as a whole demonstrates that questions of fact exist as to whether and to what extent plaintiff and defendants' pattern of conduct and performance would lead a reasonable and objective person to conclude that a binding agreement governing the pre-contract phase was reached by the parties under which plaintiff was entitled to payment for security services rendered (*see Coldwell Banker Hunt Kennedy v Wolfson*, 69 AD3d 492 [2010]; *Buhler v Maloney Consulting*, 299 AD2d 190, 191-192 [2002]). There is no merit to plaintiff's new claim that a written contract covering

pre-contract security services exists based on a document titled "Vulcan Capital Cost Proposal/Sabre Standard Terms & Conditions" that it forwarded to Graham in February 2005.

Plaintiff is not entitled to summary judgment on its second cause of action for an account stated. "[A] claim for an account stated may not be utilized simply as another means to attempt to collect under a disputed contract" (*Martin H. Bauman Assoc. Inc. v H&M Int'l. Transp., Inc.*, 171 AD2d 479, 485 [1991]; *see also Unclaimed Prop. Recovery Serv., Inc. v UBS PaineWebber Inc.*, 58 AD3d 526 [2009]). "[A]llegedly unfulfilled contractual conditions precedent to [a] defendant's payment obligation negate any inference of an implied agreement by [the] defendant that the amounts claimed in plaintiff's invoices were then due," and preclude the existence of an account stated (*see Enviroclean Servs., LLC v CEM, Inc.*, 12 AD3d 1042, 1043 [2004]). Here, issues of fact exist as to whether the parties had a binding oral contract and as to whether plaintiff agreed to a contingent fee arrangement (*see e.g. Ryan Graphics, Inc. v Bailin*, 39 AD3d 249, 251 [2007]; *Erdman Anthony & Assocs. v Barkstrom*, 298 AD2d 981, 982 [2002]).

Defendant Vulcan Energy is not entitled to summary judgment on plaintiff's fourth cause of action, for unjust enrichment.

Although “[t]he existence of a valid and enforceable contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter” (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]), “where there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract, and will not be required to elect his or her remedies" (*Goldman v Simon Prop. Group, Inc.*, 58 AD3d 208, 220 [2008]; *Schwartz v Pierce*, 57 AD3d 1348, 1353 [2008], *lv denied* 12 NY3d 707 [2009]; *Joseph Sternberg, Inc. v Walber 36th St. Assoc.*, 187 AD2d 225, 228 [1993]). Here, defendants allege, among other things, that there was no binding contract for pre-contract services because there was no agreement as to price. Accordingly, plaintiff does not have to elect its remedies with respect to its claims against Vulcan Energy. However, plaintiff cannot prove unjust enrichment as against Vulcan Power because plaintiff did not provide Vulcan Power with any services.

Defendants are entitled to summary judgment dismissing plaintiff's fifth cause of action, for intentional and/or negligent misrepresentation. To the extent plaintiff alleges

intentional misrepresentation, the claim is duplicative of the sixth cause of action for fraud. To the extent plaintiff alleges negligent misrepresentation, defendants may not be held liable because they are not professionals, and had a commercial – not a special – relationship with plaintiff (*see Kimmell v Schaefer*, 89 NY2d 257, 263-264 [1996]; *Parisi v Metroflag Polo, LLC*, 51 AD3d 424 [2008]).

Defendants are also entitled to summary judgment dismissing plaintiff's sixth cause of action, for fraud. The fraud claim "is based on alleged misrepresentations of future intention" (*Parisi*, 51 AD3d at 424) and plaintiff's allegations are insufficiently specific (*see e.g. Friedman v Anderson*, 23 AD3d 163, 166-167 [2005]).

Defendants are entitled to summary judgment dismissing plaintiff's third cause of action, for promissory estoppel. To establish a claim for promissory estoppel, a plaintiff must allege "(1) a clear and unambiguous promise, (2)) reasonable and foreseeable reliance by the party to whom the promise is made, and (3) an injury sustained in reliance on the promise" (*Gurreri v Associates Ins. Co.*, 248 AD2d 356 [1998]; *Matter of Carr*, 99 AD2d 390, 394 [1984], *appeal dismissed* 62 NY2d 802 [1984]).

Here, the claim must be dismissed because Nambirajan could not say who made the promises, and therefore plaintiff cannot say it relied on defendants' promises to its detriment.

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

ENTERED: May 3, 2012

CLERK

Friedman, J.P., Sweeny, Renwick, DeGrasse, Román, JJ.

6837 In re Lenin Fermin-Perea, Petitioner, Index 104256/11

-against-

David J. Swarts, etc., et al., Respondents.

Michael F. Dailey, Bronx, for petitioner.

Eric T. Schneiderman, Attorney General, New York (Claude Platton of counsel), for respondents.

Determination of respondent Department of Motor Vehicles Appeals Board, dated November 30, 2010, affirming a determination of the Department of Motor Vehicles, which, after a hearing, revoked petitioner's driver's license for refusal to submit to a chemical test, annulled, without costs, and the petition in this proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Geoffrey D. Wright, J.], entered on or about May 19, 2011), granted.

In reviewing respondent's determination, made after a hearing, our review is "limited to whether [respondent's] determination is supported by substantial evidence upon the entire record" (*Matter of Purdy v Kreisberg*, 47 NY2d 354, 358 [1979]). Moreover, we may not substitute our own judgment of the

evidence for that of respondents, “but should review the whole record to determine whether there exists a rational basis to support the findings upon which the agency’s determination is predicated” (*id.*).

Here, petitioner’s refusal to submit to a chemical test could only result in revocation of his driver’s license if a chemical test was authorized by law in the first instance. To the extent relevant here, the Vehicle and Traffic Law authorizes a chemical test when reasonable grounds exist to believe that a person was operating a motor vehicle under the influence of alcohol or drugs, meaning while impaired or intoxicated (Vehicle and Traffic Law § 1192, § 1194[2][1]). The statute further states that reasonable grounds “shall be determined by viewing the totality of circumstances surrounding the incident which, when taken together, indicates that the operator was driving in violation of [Vehicle and Traffic Law § 1192 and § 1192-a]” (Vehicle and Traffic Law § 1194[2][3]).

The arresting officer’s refusal report, admitted in evidence at the hearing, indicates that upon stopping petitioner because he was speeding, following too closely, and changing lanes without signaling, the officer observed that petitioner was unsteady on his feet, had bloodshot eyes, slurred speech and “a

strong odor of alcoholic beverage on [his] breath." However, the field sobriety test, administered approximately 25 minutes later, a video of which was admitted in evidence at the hearing, establishes that petitioner was not impaired or intoxicated. Specifically, the video demonstrates that over the course of four minutes, petitioner was subjected to standardized field sobriety testing and at all times clearly communicated with the arresting officer, never slurred his speech, never demonstrated an inability to comprehend what he was being asked, and followed all of the officer's commands. Petitioner successfully completed the three tests he was asked to perform; thus never exhibiting any signs of impairment or intoxication.

Certainly, the contents of the arresting officer's refusal report, standing alone, establish reasonable grounds for the arrest under the Vehicle and Traffic Law (*Matter of Nolan v Adduci*, 166 AD2d 277, 278 [1990] [police officer's testimony that operator of motor vehicle was exceeding the speed limit, driving erratically, and his breath smelled of alcohol constituted reasonable grounds to arrest him for driving under the influence of alcohol], *appeal dismissed* 77 NY2d 988 [1991]). However, where, as here, a field sobriety test conducted less than 30 minutes after the officer's initial observations, convincingly

establishes that petitioner was not impaired or intoxicated, respondent's determination that there existed reasonable grounds to believe that petitioner was intoxicated has no rational basis and is not inferable from the record (*Matter of American Tel. & Tel. Co. v State Tax Commn.*, 61 NY2d 393, 400 [1984] ["If the agency's determination is not supported by substantial evidence or it constitutes a clearly erroneous interpretation of the law or the facts, it will be annulled"]). A field sobriety test is "accepted within the scientific community as a reliable indicator of intoxication" (*People v Hammond*, 35 AD3d 905, 907 [2006], *lv denied* 8 NY3d 946 [2007]). Here, the field sobriety test, conducted shortly after petitioner was operating his motor vehicle, which failed to establish that petitioner was intoxicated or otherwise impaired, leads us to conclude that respondent's determination is not supported by substantial evidence.

The dissent ignores the threshold issue here, namely, that refusal to submit to a chemical test only results in revocation of an operator's driver's license if there are reasonable grounds to believe that the operator was driving while under the influence of drugs or alcohol and more specifically, insofar as relevant here, while *intoxicated or impaired*. Here, while the

officer's initial observations are indeed indicative of intoxication or at the very least, impairment, the results of the field sobriety test administered thereafter - a more objective measure of intoxication - necessarily precludes any conclusion that petitioner was operating his vehicle while intoxicated or impaired. Any conclusion to the contrary simply disregards the applicable burden which, as the dissent points out, requires less than a preponderance of the evidence, demanding only that "a given inference is reasonable and plausible" (*Matter of Miller v DeBuono*, 90 NY2d 783, 793 [1997] [internal quotation marks omitted]). Even under this diminished standard of proof, it is simply unreasonable and uninferable that petitioner was intoxicated or impaired while operating his motor vehicle and yet, 25 minutes later he successfully and without any difficulty passed a field sobriety test. *Matter of Whelan v Adduci* (133 AD2d 273 (1987], *lv denied* 70 NY2d 616 [1988]) is inapposite. *Matter of Whelan* simply stands for the proposition that a police officer's observation of blood shot eyes and alcohol on an operator's breath constitute reasonable grounds to believe that the operator is intoxicated or impaired (*id*. at 273); a proposition with which we agree and is aptly supported by the case law (*see Matter of Nolan*, 166 AD2d at 278). However, as is

the case here, the court in *Matter of Whelan* was never confronted with evidence that shortly after the officer's observations of intoxication or impairment, the operator successfully completed a field sobriety test. Such evidence warrants a finding in favor of petitioner.

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

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

DEGRASSE, J. (dissenting)

In my view, respondents' determination was supported by substantial evidence and I respectfully dissent. The instant determination was made after a chemical test refusal hearing that was held pursuant to Vehicle and Traffic Law § 1194(2)(c). The issue before us is whether substantial evidence supported the administrative law judge's (ALJ's) determination that the police officer who arrested petitioner had reasonable grounds to believe that he was driving while intoxicated. The majority finds substantial evidence to be lacking on the basis of a video depicting petitioner's performance on three coordination tests that were administered at a precinct 25 minutes after his arrest. The real question, however, is whether reasonable cause existed when petitioner was stopped by the police officer, not 25 minutes later. For reasons that follow, I disagree with the majority's apparent conclusion that the video is dispositive under a substantial evidence analysis.

An administrative determination is regarded as being supported by substantial evidence when the proof is so substantial that from it an inference of the existence of the fact found may be drawn reasonably (*300 Gramatan Ave. Assoc. v State Div. of Human Rights,* 45 NY2d 176, 179-180 [1978] [internal

quotation marks and citations omitted]). The standard "is less than a preponderance of the evidence" and demands only that "a given inference is reasonable and plausible, not necessarily the most probable" (*Matter of Miller v DeBuono,* 90 NY2d 783, 793 [1997] [quotation marks omitted]). Measured against this standard, the evidence before the ALJ was sufficient to support respondent's determination.

The ALJ credited the police officer's report in which it was stated that petitioner was speeding, followed other vehicles too closely and changed lanes without signaling several times. The report also noted and the ALJ found that petitioner "displayed strong smell of alcohol on breath, bloodshot/watery eyes, slurred speech, swaying and unsteady gait [*sic*]." Although the video showed that petitioner was steady on his feet and did not slur his speech when he took the coordination tests, it did not refute the evidence of petitioner's erratic driving, the smell of alcohol on his breath and his bloodshot and watery eyes. Under a substantial evidence analysis, these factors alone can suffice as reasonable grounds to believe that a motorist was driving while intoxicated

(*see e.g. Matter of Whelan v Adducci*, 133 AD2d 273 [1987] *lv denied* 70 NY2d 616 [1988]; *cf. People v Donaldson*, 36 AD2d 37 [1971]). I would therefore confirm respondents' determination.

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

ENTERED: MAY 3, 2012

CLERK

Tom, J.P., DeGrasse, Freedman, Richter, Román, JJ.

7227 Martin Murphy, Index 108588/11
Plaintiff-Respondent,

-against-

317-319 Second Realty LLC,
Defendant-Appellant.

_____

Rose & Rose, New York (David P. Haberman of counsel), for appellant.

Grimble & LoGuidice, LLC, New York (Robert Grimble of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about November 21, 2011, which, in this action seeking, among other things, a declaration that plaintiff is a rent-stabilized tenant in the subject apartment, granted plaintiff's motion to remove a summary holdover proceeding between the parties pending in Civil Court and to consolidate it with this action, and denied defendant's cross motion to dismiss the complaint in this action, affirmed, without costs.

Plaintiff Martin Murphy, who resided with his brother in a rent-stabilized apartment, was asked to move into a basement apartment by defendant 317-319 Second Realty LLC's predecessor, Jelstone Realty Corp., and to become the building superintendent in 2003. Murphy avers that Jelstone agreed that the rent-

stabilized status of his former apartment would be transferred to the apartment at issue here. The rent-regulated lease of the former apartment contained a provision foreclosing assertion of counterclaims in proceedings to recover the premises.

When Murphy moved into the basement apartment, it had been severely damaged by fire. The then-parties agreed that Murphy would renovate and rehabilitate the apartment in exchange for a "substantial rent credit." Murphy claims that the cost of renovating the apartment (including his own labor) exceeded $100,000.

On December 10, 2010, 317-319 acquired the building from Jelstone, and Jelstone notified Murphy that at the new owner's request, it was terminating Murphy's employment. On December 22, 2010, 317-319 commenced a summary holdover proceeding in Civil Court alleging that Murphy's rights to occupy the apartment ended upon his termination as superintendent. Murphy moved to dismiss claiming that he was a long-term rent-regulated tenant, and countered that 317-319 was unjustly enriched by his expenditures to renovate the apartment. Civil Court denied Murphy's dismissal motion, concluding that there was a question of fact concerning his rent-regulated (or lease-controlled) status, but, curiously, dismissed his counterclaim for unjust enrichment, finding that

the lease (which 317-319 denied applied) barred Murphy from asserting counterclaims in a holdover proceeding. The court held that Murphy must assert such claims in a separate proceeding.

Murphy then commenced a separate proceeding in Supreme Court seeking a declaration that he is a rent-stabilized tenant, and claiming unjust enrichment, breach of the warranty of habitability, and "illegal construction"; he also moved to consolidate the Civil Court proceedings with the Supreme Court action. The illegal construction and breach of warranty claims relate to a ceiling collapse and a rupture of a sewer line adjacent to the apartment, which Murphy claims rendered the apartment uninhabitable in 2011. Upon motion, Supreme Court consolidated the Civil Court proceeding with this action since the issue of Murphy's rent-regulated status was being litigated in both courts.

While ordinarily there is a "strong preference" for resolving holdover proceedings in Civil Court (*44-46 W. 65th Apt. Corp. v Stvan*, 3 AD3d 440, 441 [2004]), particularly where complete relief is available in that court (*Post v 120 E. End Ave. Corp.*, 62 NY2d 19, 28 [1984]), where, as here, complete relief cannot be afforded by Civil Court because that court dismissed the counterclaim, and common questions of law and fact

exist, judicial economy is served by consolidation (*Phoenix Garden Rest., Inc. v Chu*, 202 AD2d 180 [1994]; *Kally v Mount Sinai Hosp.*, 44 AD3d 1010 [2007]). It is undisputed that in the lease that Murphy asserts was "transferred" to the subject apartment, he agreed not to interpose counterclaims in a summary proceeding. Based on that, Civil Court dismissed the counterclaim for unjust enrichment. If Civil Court were to determine that the apartment is not rent regulated and thus that the lease does not apply, it would have been error to dismiss the counterclaim. Thus, consolidation of the proceedings in Supreme Court would avoid such an occurrence.

Since a decision to consolidate is addressed to the sound discretion of the trial court, where, as here, there are common questions of law and fact, Supreme Court did not improvidently exercise that discretion (*Best Price Jewelers.Com, Inc. v Internet Data Stor. & and Sys., Inc.*, 51 AD3d 839 [2008]). Moreover, maintaining separate actions poses a risk of inconsistent verdicts concerning the status of the parties. Thus, Supreme Court did not abuse its discretion by removing the summary holdover proceeding and consolidating it with this action. Removal to Supreme Court to determine all issues, including the request for a declaratory judgment, renders moot

the motion to dismiss that claim pursuant to CPLR 3211(a)(4).

317-319 also avers that the unjust enrichment claim should be dismissed because it is based on events occurring under the prior owner. However, to establish unjust enrichment it is not necessary that the party enriched have been in complete privity with the plaintiff; rather, the relationship between the parties must not be too attenuated (*Georgia Malone & Co., Inc. v Rieder,* 86 AD3d 406, 408 [2011]) and the plaintiff must show that it is against equity and good conscience to permit the other party to retain what is sought to be recovered (*see Mandarin Trading Ltd. v Wildenstein,* 16 NY3d 173, 182 [2011]). Here, the relationship between the current owner and the prior owner, and the liabilities assumed during the transfer of ownership, should be explored before a determination as to the unjust enrichment claim can be made. Furthermore, if there is a valid claim for unjust

enrichment, it is the current owner who would benefit from the improvements. For that reason, the unjust enrichment claim should not be dismissed at this time.

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

ROMÁN, J. (dissenting in part)

In failing to dismiss plaintiff's first and second causes of action and in granting plaintiff's motion to consolidate this action with the special holdover proceeding, the motion court erred. Therefore, I dissent.

A motion to dismiss pursuant to CPLR 3211(a)(4), on the ground that "there is another action pending between the same parties for the same cause of action . . .," shall be granted if it is established that the action for which dismissal is sought was initiated subsequent to another already pending action and that both actions share sufficient identity of parties and the causes of action asserted (*White Light Prods. v On The Scene Prods.*, 231 AD2d 90, 93-94 [1997]; *National Union Fire Ins. Co. of Pittsburgh, Pa. v Jordache Enters.*, 205 AD2d 341, 343 [1994]). Here, inasmuch as the record establishes that plaintiff's first cause of action seeking to have the court declare that he is a rent-stabilized tenant within defendant's premises is identical to his first affirmative defense in the summary holdover proceeding previously commenced by defendant and pending in Civil Court, his first cause of action must be dismissed.

Plaintiff's second cause of action for unjust enrichment must also be dismissed pursuant to CPLR 3211(a)(7) since he fails

to state a cause of action. When deciding a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), all allegations in the complaint are deemed to be true (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]). All reasonable inferences that can be drawn from the complaint and the allegations therein stated shall be resolved in favor of the plaintiff (*id.*). While "[a] cause of action for unjust enrichment is stated where plaintiffs have properly asserted that a benefit was bestowed . . . by plaintiffs and that defendants will obtain such benefit without adequately compensating plaintiffs therefor" (*Wiener v Lazard Freres & Co.*, 241 AD2d 114, 119 [1998] [internal quotation marks omitted]), it must also be pleaded and proven that the benefit conferring services were performed for the defendant, thereby resulting in defendant's unjust enrichment (*Kagan v K-Tel Entertainment*, 172 AD2d 375, 376 [1991]). "It is not enough that the defendant received a benefit from the activities of the plaintiff; if services were performed at the behest of someone other than the defendant, the plaintiff must look to that person for recovery" (*id.* [internal citation omitted]). Here, plaintiff's complaint alleges that defendant became the owner of the premises where the subject apartment is located in 2011. Plaintiff further alleges

that defendant was unjustly enriched by virtue of renovations to the subject apartment, which plaintiff undertook based upon an agreement in 2003 between himself and *the prior owner* of defendant's premises. Accordingly, plaintiff's own allegations establish that the renovations he undertook, while arguably benefitting the defendant, were not undertaken at defendant's behest (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [plaintiff's unjust enrichment claim was dismissed when "the pleadings failed to indicate a relationship between the parties that could have caused reliance or inducement"]). Accordingly, plaintiff fails to state a cause of action for unjust enrichment.

Since consolidation pursuant to CPLR 602(a) is only warranted when there exist common questions of law and fact between two or more actions (*Matter of Progressive Ins. Co. [Vasquez—Countrywide Ins. Co.]*, 10 AD3d 518, 519 [2004]), here, having dismissed plaintiff's first two causes of action, this action and the special holdover proceeding in Civil Court no longer share common questions of law or fact; accordingly, plaintiff's motion for consolidation must be denied.

The majority's decision to decide plaintiff's motion for consolidation before deciding defendant's pre-answer motion to

dismiss defies logic. After all, the threshold on a motion for consolidation is commonality of facts and law. As such, any motion whose decision may result in dismissal of the claims forming the basis for consolidation should be resolved first. Here, it is clear that plaintiff's first cause of action seeking a declaratory judgment warrants dismissal pursuant to CPLR 3211(a)(4). Rather than addressing this issue on the merits, however, the majority concludes that defendant's motion to dismiss pursuant to CPLR 3211(a)(4) is rendered moot upon consolidation. Since consolidation cannot be had absent commonality of issues, the majority reaches the result it seeks in the only way it can, namely, the complete disregard of defendant's meritorious motion to dismiss plaintiff's first cause of action.

Further ignoring the merits of defendant's motion to dismiss plaintiff's second cause of action for unjust enrichment, the majority in essence adopts a wait-and-see approach. While the absence of discovery necessary to defeat a motion to dismiss warrants denial of such a motion (CPLR 3211[d]), here, that argument has not been raised by plaintiff on appeal (*Misicki v Caradonna*, 12 NY3d 511, 519 [2009] ["We are not in the business of blindsiding litigants, who expect us to decide their appeals

on rationales advanced by the parties, not arguments their adversaries never made"]). Moreover, even if, as the majority posits, plaintiff can prove that defendant has benefitted from plaintiff's improvements to the subject apartment, no claim of unjust enrichment would lie. As noted above, plaintiff pleads, and avers via affidavit, that the improvements here were not undertaken at defendant's behest (*Kagan*, 172 AD2d at 376). Thus, plaintiff may very well have an unjust enrichment claim, but not against this defendant (*id.*).

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

ENTERED: May 3, 2012

CLERK

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

7525 In re Severio L. Bruscino, Index 110244/09
Petitioner-Appellant,

-against-

Raymond W. Kelly, as Police Commissioner
of the City of New York, et al.,
Respondents-Respondents.

Robert G. Del Grosso, Mineola, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Lisa A. Giunta of counsel), for respondents.

Judgment, Supreme Court, New York County (Judith J. Gische, J.), entered June 30, 2010, dismissing an article 78 petition seeking to annul respondents' determination, dated March 23, 2009, which terminated petitioner's probationary employment as a police officer, unanimously affirmed, without costs.

Supreme Court properly determined that the petition failed to state a claim. Respondents are entitled to discharge a probationary police officer "for 'almost any reason, or for no reason at all' as long as it is not 'in bad faith or for an improper or impermissible reason'" (*Matter of Duncan v Kelly*, 9 NY3d 1024, 1025 [2008], quoting *Matter of Swinton v Safir*, 93 NY2d 758, 762-763 [1999]; *see Matter of Berenhaus v Ward*, 70 NY2d 436, 445 [1987]). At its essence, the petition alleges that

petitioner's failure to disclose the psychological treatment he underwent at the age of six was inadvertent. However, even if petitioner was "'ignorant' or 'unaware' of or 'oblivious'" to his personal history, respondents are entitled, given the broad discretion with which they are vested, to deem "such omissions a[s] material to his qualifications" (*Matter of Roman v Brown*, 202 AD2d 321, 321 [1994], *lv denied* 83 NY2d 760 [1994]). Even assuming the truth of the petition's allegations, the petition fails to allege any facts that would, if proven to be true, constitute a violation of "statute or policies established by decisional law" (*Matter of Talamo v Murphy*, 38 NY2d 637, 639 [1976]; *see Matter of York v McGuire*, 63 NY2d 760 [1984]). Petitioner has also failed to allege facts supporting a conclusion that his termination was in bad faith. Given this failure, a hearing to resolve the truth of the facts alleged is unnecessary (*see Matter of Bienz v Kelly*, 73 AD3d 489 [2010]).

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

ENTERED: MAY 3, 2012

CLERK

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

7526-
7526A Index 651123/10

Cedar & Washington Associates, LLC,
Plaintiff-Appellant,

-against-

Bovis Lend Lease LMB, Inc., et al.,
Defendants,

TRC Environmental Corporation, et al.,
Defendants-Respondents.

_____

Cohen Tauber Spievack & Wagner P.C., New York (Kara L. Gorycki of counsel), for appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, White Plains (Joanna M. Topping of counsel), for TRC Environmental Corporation, respondent.

Venable LLP, New York (Kostas D. Katsiris of counsel), for LVI Environmental Services, Inc., respondent.

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Orders, Supreme Court, New York County (Milton A. Tingling, J.), entered October 13, 2011, which, to the extent appealed from, dismissed plaintiff's claim for private nuisance against defendants LVI Environmental Services, Inc. and TRC Environmental Corporation, and dismissed plaintiff's claims for negligence, gross negligence, and strict liability against TRC, unanimously affirmed, without costs.

In the amended complaint, plaintiff, lessee of land and owner and operator of two hotels near the Deutsche Bank Building

(the building) at Ground Zero, seeks to recover damages arising out of a fire at the building, where defendant contractors were engaged in abatement and deconstruction work. Plaintiff alleges that defendants' disregard for public health and safety caused at least nine fires leading up to the subject fire. Plaintiff's allegations are insufficient to state a cause of action against TRC, which merely provided environmental consulting and health and safety services pursuant to a contract with the building's owner and owed no duty of care to plaintiff, a third party to the contract (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]).

Plaintiff's tort claims, including its private nuisance claim, also fail since plaintiff merely alleges economic loss, not personal injury or property damages (*see 532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, 96 NY2d 280, 291-292 [2001]; *Roundabout Theater Co. v Tishman Realty & Constr. Co.*, 302 AD2d 272, 272-273 [2003]). Although plaintiff alleges that it was damaged by glass, debris, smoke, dust and water that fell into and around its property, and that there was water damage to the property from the firefighting techniques, these allegations of property damage are too speculative or conclusory to have merit. Indeed, there is no indication of the extent of the damages, the

cost of repair or how its buildings were affected.

The cause of action for private nuisance also fails because, the alleged nuisance affects a wide area and adjacent properties (*see A & L Gift Shop v ASA Waterproofing Corp.*, 2005 NY Slip Op 30482[U], *8 [Sup Ct, NY County 2005]).

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

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

ENTERED: MAY 3, 2012

CLERK

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

7527 In re Messiah C., etc.,

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

Laverne C.,
Respondent-Appellant,

New York City Administration for
Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Alan G. Krams 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, Family Court, New York County (Clark V. Richardson, J.), entered on or about January 12, 2011, which, after a fact-finding hearing, determined that respondent had derivatively neglected the subject child, unanimously affirmed, without costs.

The finding of derivative neglect was supported by a preponderance of the evidence (*see* Family Court Act § 1046[b][i]; *In re Tammie Z.*, 66 NY2d 1, 3 [1985]). The record shows that respondent mother had a thirteen year history of abusing illegal narcotics, and that due to her addiction, her three older children had been removed from her care and her parental rights

to one of the children were terminated. The record also showed that the mother had continued to use drugs until at least May 2009, halfway through her pregnancy with the subject child, and that she had dropped out of a drug treatment program only two months before his birth.

That the mother subsequently enrolled herself in an in-patient program two weeks before the child's birth is commendable, but does not outweigh her significant history. The relevant time period for assessing the risk to the child is when the petition is filed (*see Matter of Brianna R. [Marisol G.]*, 78 AD3d 437, 438 [2010], *lv denied*, 16 NY3d 702 [2011]), and the petition was filed when the child was two weeks old. Thus, given the brief period between respondent's last drug use and the child's birth, the court properly found that the child was at risk of neglect based on the mother's extensive history of drug abuse (*see* FCA § 1046[a][i]; *Matter of Noah Jeremiah J. v Kimberly J.*, 81 AD3d 37, 42 [2010]).

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

ENTERED: MAY 3, 2012

CLERK

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

7528 Promatech, Inc., Index 600963/09
Plaintiff-Appellant,

–against–

AFG Group, Inc.,
Defendant-Respondent,

Amal Manassah, et al.,
Defendants.

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King & King, LLP, Long Island City (Peter M. Kutil of counsel), for appellant.

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

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Order, Supreme Court, New York County (Charles Edward Ramos, J.), entered December 3, 2010, which, to the extent appealed from as limited by the briefs, granted the motion by defendant AFG Group, Inc. ("AFG") to dismiss the causes of action alleging violations of New York's General Business Law § 349 and New Jersey's Consumer Fraud Act (N.J. Stat. Ann. § 56:8-2) as against it, unanimously affirmed, without costs.

In this action alleging violations of New York's General Business Law and New Jersey's Consumer Fraud Act, plaintiff Promatech and defendant AFG, construction management companies that conduct business within New York and the tri-state area, are

often in direct competition with each other. In 2007, plaintiff's former vice president went to work for defendant AFG. Plaintiff alleges that defendant thereafter wrongfully represented in advertising and in project proposals that construction management work done by plaintiff was defendant's work and that this misinformation harmed the governmental entities in New York and New Jersey that contracted for construction management services with defendant. Defendant maintains that it was within its rights to advertise the experience of its employee.

The motion court correctly dismissed the cause of action pursuant to General Business Law § 349 since plaintiff failed to plead that defendant's alleged misrepresentation had a broad impact on consumers at large (*see Natural Organics Inc. v Anderson Kill & Olick, PC.*, 67 AD3d 541, 542 [2009], *lv dismissed* 14 NY3d 881, [2010]). Moreover, plaintiff's alleged "good will" damages are derivative in nature and thus non-recoverable (*see City of New York v Smokes-Spirits Com, Inc.*, 12 NY3d 616, 621-624 [2009]).

The motion court also properly dismissed plaintiff's second and fourth causes of action, which allege that plaintiff violated the New Jersey Consumer Fraud Act (N.J. Stat. Ann. § 56:8 et.

seq.), since the complaint fails to plead an ascertainable loss by plaintiff caused by the alleged unlawful conduct (*see Bosland v Warnock Dodge, Inc.*, 197 NJ 543, 557, 964 A2d 741, 749 [2009]). Although the complaint alleges that defendant gained a financial benefit by misrepresenting plaintiff's work as its own, there is no claim that defendant suffered any loss such as a lost contract, or suffered some other direct loss.

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

ENTERED: MAY 3, 2012

CLERK

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

7529 David R. Kittay, etc., Index 23119/06
Plaintiff-Appellant-Respondent,

-against-

Herbert Moskowitz,
Defendant-Respondent,

Hudson River International LLC,
Defendant-Respondent-Appellant.

Brian M. Levy, New York, for appellant-respondent.

Weiner, Millo, Morgan & Bonanno, LLC, New York (Alissa A. Mendys of counsel), for respondent-appellant.

Gannon, Rosenfarb, Balletti & Drossman, New York (Lisa L. Gokhulsingh of counsel), for respondent.

Order, Supreme Court, Bronx County (Kenneth L. Thompson Jr., J.), entered July 5, 2011, which granted defendant Herbert Moskowitz's motion for summary judgment dismissing the complaint as against him, denied plaintiff's cross motions for leave to amend his bill of particulars, for spoliation sanctions, and to dismiss defendant Hudson River International LLC's (HRI) ninth affirmative defense, and denied HRI's motion for summary judgment dismissing the complaint as against it, unanimously modified, on the law, to grant HRI's motion, and otherwise affirmed, without costs.

The record demonstrates that defendant Moskowitz was an out-of-possession landlord, with no duty to maintain the premises. Notwithstanding that he had a limited right to re-enter the premises, at reasonable times, to make repairs not made by the tenant, Moskowitz cannot be held liable for plaintiff's decedent's injuries because the record does not establish that the basis of that liability is "a significant structural or design defect that is contrary to a specific statutory safety provision" (*see Johnson v Urena Serv. Ctr.*, 227 AD2d 325, 326 [1996], *lv denied* 88 NY2d 814 [1996]; *Devlin v Blaggards III Rest. Corp.*, 80 AD3d 497, 497-498 [2011], *lv denied* 16 NY3d 713 [2011]).

Former Administrative Code of City of NY §§ 27-127 and 27-128 were general safety provisions (*see Boateng v Four Plus Corp.*, 22 AD3d 323, [2005]). Administrative Code § 27-375(f), which requires, inter alia, handrails on "interior stairs," is not applicable, because the subject staircase was not an "interior stair[]," i.e., not one that "serve[d] as a required exit" (Administrative Code §§ 27-232; *see Cusumano v City of New York*, 15 NY3d 319, 324 [2010]; *Maksuti v Best Italian Pizza*, 27 AD3d 300 [2006], *lv denied* 7 NY3d 715 [2006]). Non-compliance with regulations that govern tread width and depth and lighting

does not constitute a significant structural or design defect (*see Babich v R.G.T. Rest. Corp.*, 75 AD3d 439, 440 [2010]; *Bethea v Weston House Hous. Dev. Fund Co., Inc.*, 70 AD3d 470 [2010]; *Peck v 2-J, LLC*, 56 AD3d 277 [2008]). The alleged violation of Multiple Dwelling Law § 190 cannot serve as a basis for liability since the accident is not alleged to have been caused by the presence of a combustible material.

In light of the foregoing, the court correctly denied plaintiff's motion for leave to amend the bill of particulars and for sanctions against Moskowitz for spoliation.

Defendant HRI demonstrated that it was the alter ego of plaintiff's decedent's employer, Antonio Thomas International Corp. (ATIC), HRI's parent company, which operated dental offices under the "Vital Dent" trademark and completely dominated and controlled HRI, and therefore that decedent's exclusive remedy against HRI is the Workers' Compensation Law (*see* Workers' Compensation Law § 11; *Carty v East 175th St. Hous. Dev. Fund Corp.* 83 AD3d 529 [2011]; *Morato-Rodriguez v Riva Const. Group, Inc.*, 88 AD3d 549 [2011]; *Hernandez v Sanchez*, 40 AD3d 446 [2007]). The fact that ATIC is organized into separate legal entities does not negate alter ego status since, inter alia, the record reflects that ATIC controlled and dominated HRI (*see*

Ramnarine v Memorial Ctr. for Cancer & Allied Diseases, 281 AD2d 218 [2001]; *Di Rie v Automotive Realty Corp.*, 199 AD2d 98 [1993]). HRI did not waive its Workers' Compensation Law defense (*see Murray v City of New York*, 43 NY2d 400, 407 [1977]; *Raptis v Juda Constr., Ltd.*, 26 AD3d 153, 155 [2006], *lv denied* 7 NY3d 716 [2006]).

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

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

ENTERED: MAY 3, 2012

CLERK

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

7530 Account of Roberta L., Koeppel, et al., as Executors of the Last Will and Testament of Robert A. Koeppel, Deceased.

- - - - -

William W. Koeppel, Petitioner-Appellant,

-against-

Roberta L. Koeppel, et al., etc., Respondents.

- - - - -

Richtenthal, Abrams & Moss, et al., Nonparty Respondents.

[And Other Actions]

File No. 4098/96

McMillan, Constabile, Maker & Perone, LLP, Larchmont (William Maker, Jr. of counsel), and Law Offices of Walter Jennings, PC, New York (Walter Jennings of counsel), for appellant.

Law Offices of Craig Avedisian, P.C., New York (Craig Avedisian, of counsel), and Richardson & Patel, LLP, New York (Travis J. Meserve of counsel), for Richtenthal, Abrams & Moss and Law Offices of Craig Avedisian, P.C., respondents.

Order, Surrogate's Court, New York County (Kristin Booth Glen, S.), entered January 19, 2011, which, to the extent appealed from as limited by the briefs, granted, in part, a motion by attorneys Richenthal Abrams and Moss and the Law Offices of Craig Avedisian, P.C. (collectively, the firms) for partial summary judgment on their charging liens, and denied, in

part, client William W. Koeppel's motion for partial summary judgment dismissing such of the firms' claims as were predicated upon the parties' retainer agreement, unanimously affirmed, with costs.

The firms, in seeking enforcement of their charging liens, relied upon the parties' 2006 retainer agreement (2006 retainer) and an unsigned, undated memorandum as supplying an inadvertently omitted term in the 2006 retainer (i.e., the specific contingency rates to be applied). The information in the memorandum was buttressed by an affirmation, based on personal knowledge, submitted by William's primary attorney, Craig Avedisian, who attested to the negotiated contingency rates; indeed, William also acknowledged the validity of the claimed negotiated rates. However, William further relied upon a "termination" provision in the undated memorandum, and argued that it provided for automatic termination of the 2006 retainer on a date that preceded a 2008 global settlement (2008 settlement) reached as to all claims by Koeppel family members as to the contested estates and trusts.

Contrary to William's argument, there was no basis for the undated memorandum to be construed as a "rider" to the 2006 retainer, particularly as it is unsigned, undated, and the actual 2006 retainer did not incorporate the memorandum by reference.

Moreover, the executed 2006 retainer clearly stated that written notice of termination was required. To the extent that the undated memorandum's terms conflict on the termination issue, no affidavit was offered, based on personal knowledge, to indicate whether the termination terms in the memorandum were intended to control. William's attempt to import unintended terms into the finalized 2006 retainer to create ambiguity in a document where none otherwise exists is unavailing (*see generally Remekie v 740 Corp.*, 52 AD3d 393 [2008]; *U.S.B.M. Realty Co., Inc. v Studio MacBeth, Inc.*, 46 AD3d 317 [2007]).

Similarly, contrary to William's claims, there was no basis to find that the provisions within the 2006 retainer were ambiguous, inasmuch as they expressly applied in the event of a settlement reached by substantially all of the interested Koeppel family members, as undisputedly occurred here. To the extent William argues that uncertainty exists as to whether the firms were entitled to a "flat fee" and a "contingency fee" under the given provisions of the 2006 retainer, alleging said provisions to be unclear and/or ambiguous, such claim is refuted by a reading of the plain language of the 2006 retainer, in the context of the history of the Koeppel estates and trusts. Initially, the record demonstrates that the 2006 retainer was

intensely negotiated over the course of several weeks, and that William had independent counsel, as well as his accountant, who reviewed the terms of the 2006 retainer along with him. Prior to the 2008 settlement, William did not claim a misunderstanding, or unfamiliarity with the terms of the 2006 retainer. The fee terms, as found by the Surrogate, were premised on a cumulative value of the asset settlement achieved in the client's favor, as compared to a specified value previously proposed in an aborted 2004 settlement attempt. The nature of the assets received in the settlement was not a concern set forth in the 2006 retainer, and the record reflects that the Koeppel family members remained open to negotiation with regard to almost any asset so as to increase the cumulative value of their settlement share.

Pursuant to the plain terms of the 2006 retainer, a flat fee would be earned upon the offer of a settlement that equaled, or exceeded the value of William's specified interest in the 2004 proposed settlement. The evidence in this case indicates that such threshold was met, although the extent to which the 2008 settlement value (to William) exceeded the 2004 settlement value is an issue that the Surrogate submitted for a further hearing. Likewise, no ambiguity exists in memorandum language that set forth how the contingency rates were to be applied. The

contingency fee agreement provided for explicit percentages to be applied depending on the ultimate increase in value of William's 2008 settlement share as compared to the earlier proposed 2004 settlement share.

William's argument that his remainder interest in his father's marital trust should not have been factored into the cumulative value of the 2008 settlement achieved on his behalf, inasmuch as he already possessed such remainder interest before the 2008 settlement was entered into, is unavailing. The parties specifically negotiated that the firms' entitlement to a flat fee and performance fee would be determined by taking the gross value of the 2008 settlement achieved in William's favor and subtracting the 2004 settlement value ($43,640,000) to determine whether there was a positive net result as would trigger a right to payment of both a flat fee and a performance fee. The settlement negotiations left uncertain what assets each family member would receive upon a final agreement, and while William had a remainder interest, that interest was only contingent and subject to an exchange in the final settlement.

The record demonstrates that the legal fees earned under the 2006 retainer were fair and reasonable given the complexity of the matter, the firms' legal experience and long association with

William, the considerable time expended on the matter and the very favorable result obtained (*see* Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.5, formerly Code of Professional Responsibility DR 2-106 [22 NYCRR 1200.11(b)]). Moreover, the 2006 retainer was openly negotiated, addressed William's liquidity problems, and was independently reviewed by his outside counsel.

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

ENTERED: MAY 3, 2012

CLERK

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

7533 In re Richard G.,

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

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

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

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about April 7, 2011, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of robbery in the second degree and grand larceny in the fourth degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence. Appellant's conduct before, during, and after the robbery, including his demeanor and his positioning in relation to the victim and the

other participants, was inconsistent with that of a mere bystander; instead, this pattern of conduct established appellant's accessorial liability (*see Matter of Justice G.*, 22 AD3d 368 [2005]).

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

ENTERED: MAY 3, 2012

CLERK

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

7534- Index 260046/08
7535- 260044/08
7536

In re RCN New York Communications, LLC,
Petitioner-Respondent,

-against-

The Tax Commission of the City of New York, et al.,
Respondents-Appellants.

- - - - -

In re Level 3 Communications, LLC,
Petitioner-Respondent,

-against-

The Tax Commission of the City of New York, et al.,
Respondents-Appellants.

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Michael A. Cardozo, Corporation Counsel, New York (Robert J. Paparella and Paul T. Rephen of counsel), for appellants.

Law Offices of David M. Wise, P.A., Babylon (David M. Wise of counsel), for RCN New York Communications, LLC, respondent.

Ingram Yuzek Gainen Carroll & Bertolotti, LLP, New York (John G. Nicolich of counsel), for Level 3 Communications, LLC, respondent.

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Judgments, Supreme Court, New York County (Martin Shulman, J.), entered January 25, 2011, which, in these consolidated proceedings brought under RPTL Article 7, ordered and adjudged the 2008-09 tax assessments on the property at issue null and

void, and which bring up for review, an order, same court and Justice, entered November 22, 2010, which granted petitioners' motions for summary judgment, unanimously affirmed, without costs. Appeals from the aforementioned order unanimously dismissed, without costs, as subsumed in the appeals from the judgments.

Petitioners are companies that provide fiber optics telecommunications services and own the property at issue in these proceedings, which consist of fiber optics lines, poles, wires, supports and enclosures that are located in the buildings of their customers. It is undisputed that petitioners' fiber optics cables are electrical insulators which transmit light impulses and do not conduct electricity. Petitioners were assessed taxes on this property pursuant to RPTL 102(12)(I) and their challenges of the assessments were denied by the City Tax Commission.

RPTL 102(12) provides:

> "'Real property,' 'property' or 'land' mean and include: . . .
> (i) When owned by other than a telephone company as such term is defined in paragraph (d) hereof, all lines, wires, poles, supports and inclosures for electrical conductors upon, above and underground used in connection with the transmission or switching of electromagnetic voice, video and data

> signals between different entities separated by air, street or other public domain, except that such property shall not include: (A) station connections; (B) fire and surveillance alarm system property; (C) such property used in the transmission of news wire services; and (D) such property used in the transmission of news or entertainment radio, television or cable television signals for immediate, delayed or ultimate exhibition to the public, whether or not a fee is charged therefor."

The language of RPTL 102(12)(i) is clear and its interpretation does not require reference to external sources. In unambiguous language, the statute defines assessable real property in pertinent part as "all lines, wires, poles, supports and inclosures" which are "for electrical conductors." Since the cables at issue are not "for electrical conductors" they cannot be assessed under this statute. "When the language of a statute is clear . . . the court should look no further than unambiguous words and need not delve into legislative history" (*Matter of Lloyd v Grella*, 83 NY2d 537, 545-546 [1994]). Further, where the statute at issue is a tax statute, it must be narrowly construed and "any doubts concerning its scope and application are to be resolved in favor of the taxpayer" (*Debevoise & Plimpton v New York State Dept. of Taxation & Fin.*, 80 NY2d 657, 661 [1993]).

Appellants' argument that fiber optic cables transmit voice,

video and data signals and that light is part of the electromagnetic spectrum ignores the preceding language in subsection (i) which limits the assessable property to wires and related property which are "for electrical conductors."

Although petitioners' fiber optic cables which are located in the public streets and other public spaces are assessed taxes without objection from petitioners, such assessments are made pursuant to RPTL 102(17), which clearly includes wires for conducting light. That section provides:

> "'Special franchise' means the franchise, right, authority or permission to construct, maintain or operate in, under, above, upon or through any public street, highway, water or other public place mains, pipes, tanks, conduits, wires or transformers, with their appurtenances, for conducting water, steam, *light*, power, electricity, gas or other substance. For purposes of assessment and taxation a special franchise shall include the value of the tangible property situated in, under, above, upon or through any public street, highway, water or other public place in connection therewith" (emphasis added).

Even assuming that examination of the legislative history was necessary for this clear and unambiguous statute, the history does not support appellants' claim that the statute permits the disputed assessments. The legislative history, including the 1985 reports by the Tax Commission and the State Board of

Equalization and Assessment, reveals that the Legislature was aware of fiber optic technology and that fiber optic cables transmit light and do not conduct electricity. Yet, the Legislature chose to limit assessments under RPTL 102(12)(i) to wires and other related property "for electrical conductors."

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

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

ENTERED: MAY 3, 2012

CLERK

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

7537 In re Pedro A.,
Petitioner-Respondent,

-against-

Susan M.,
Respondent-Appellant.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Randall S. Carmel, Syosset, for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Janet Neustaetter of counsel), attorney for the child.

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Appeal from order, Family Court, Bronx County (Myrna Martinez-Perez, J.), entered on or about April 25, 2011, which granted petitioner father final custody of the subject child, and provided respondent mother with visitation, unanimously dismissed, without costs.

The challenged order was rendered academic when it was superseded by a subsequent order of the same court and Judge, entered on or about May 24, 2011 (*see Matter of Breeyanna S.*, 45 AD3d 498 [2007], *lv denied* 10 NY3d 706 [2008]; *Matter of Jabarry W.*, 24 AD3d 218, 219 [2005], *lv denied* 6 NY3d 711 [2006]), from which no appeal was taken. Moreover, the record is clear that the mother defaulted on the date set for the fact-finding

hearing. No appeal lies from an order entered on default (*see Matter of Anita L. v Damon N.*, 54 AD3d 630, 631 [2008]; *Matter of Miguel R. v Wilda C.*, 74 AD3d 631 [2010]).

Were we to consider the mother's appeal, we would find that the court had sufficient information to support its determination that it was in the best interests of the child for the child to remain in the custody of the father, with visitation by the mother (*see Matter of Reynaldo M. v Violet F.*, 88 AD3d 531 [2011]).

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

ENTERED: MAY 3, 2012

CLERK

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

7538-
7538A Index 24204/04

Jorge Nieves, et al.,
Plaintiffs-Respondents,

-against-

Riverbay Corporation,
Defendant-Appellant,

Aikler Asphalt Paving, Inc.,
Defendant.

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Vanessa M. Corchia of counsel), for appellant.

Finkelstein & Partners, LLP, Newburgh (Lawrence D. Lissauer of counsel), for respondents.

Judgment, Supreme Court, Bronx County (Norma Ruiz, J.), entered December 13, 2010, awarding plaintiffs the principal aggregate sum of $307,500 against defendant Riverbay Corporation, and bringing up for review an order, same court and Justice, entered December 3, 2010, which denied defendant's posttrial motion to set aside the jury's verdict, unanimously modified, on the law, to reduce the award of damages for past medical expenses from $10,000 to $5,000, and otherwise affirmed, without costs. Appeal from aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The jury's finding that defendant breached its duty to

exercise reasonable care to maintain its premises in a reasonably safe condition and proximately caused plaintiff's slip and fall in the icy parking lot is not against the weight of the evidence.

Defendant's claim that plaintiff's counsel made prejudicial comments in summation is unpreserved. In any event, the complained-of comments were isolated remarks that constituted either fair comment on the evidence or a fair response to defendant's arguments with respect to witness credibility, and were not the type of comments that could have deprived defendant of a fair trial (*see Bennett v Wolf*, 40 AD3d 274, 275 [2007], *lv denied* 9 NY3d 818 [2008]).

The court properly declined to charge the jury on comparative negligence since there was no valid line of reasoning based on the trial evidence that would support a finding of comparative negligence (*see Cuadrado v New York City Tr. Auth.*, 65 AD3d 434, 435 [2009], *lv dismissed* 14 NY3d 748 [2010]; *Perales v City of New York*, 274 AD2d 349, 350 [2000]).

The jury's award of $10,000 for past medical expenses is unsupported by competent evidence to the extent that it exceeds the sum of $5,000, the amount that plaintiff Rosa Nieves testified had been paid by plaintiffs in out-of-pocket medical expenses. There is no competent evidence in the record with

respect to unpaid past medical expenses (*see Lane v Smith*, 84 AD3d 746, 748-749 [2011]). There is no basis for vacating or reducing the other challenged damages awards.

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

ENTERED: MAY 3, 2012

CLERK

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

7539 The People of the State of New York, Ind. 2435/10
Respondent,

-against-

Vertnell Sarrazini,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (John B.F. Martin of counsel), for respondent.

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered March 1, 2011, convicting defendant, upon his guilty plea, of two counts of burglary in the second degree, and sentencing him, as a second violent felony offender, to concurrent terms of seven years, unanimously affirmed.

Although defendant moved to withdraw his plea, he did so on different grounds from those raised on appeal. Therefore, defendant did not preserve his present arguments that he misunderstood the terms of the plea and that he should have been granted more time to consider it (*see People v Lopez*, 71 NY2d 662, 665 [1988]), and we decline to review them in the interest of justice.

As an alternative holding, we also reject these claims on

the merits. The record establishes that the plea was knowing, intelligent and voluntary (*see generally People v Fiumefreddo*, 82 NY2d 536, 543 [1993]). During the allocution, the court clearly stated the promised sentence, and defendant acknowledged that he understood. Furthermore, the record demonstrates that defendant had a sufficient opportunity to consult with counsel and consider the offer.

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

ENTERED: MAY 3, 2012

CLERK

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

7541 Clifton Gibbon, Index 117309/08
Plaintiff-Respondent,

-against-

City of New York,
Defendant-Appellant.

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for appellant.

Advocates for Justice, Chartered Attorneys, New York (Arthur Z. Schwartz of counsel), for respondent.

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered January 27, 2011, which, to the extent appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing the complaint, and granted plaintiff's cross motion for summary judgment on the issue of liability, unanimously reversed, on the law, without costs, the motion granted, and the cross motion denied. The Clerk is directed to enter judgment dismissing the complaint.

Viewing the record in the light most favorable to plaintiff, we find that there is no competent evidence that he suffered from a disabling medical condition that prevented him from being able to produce a urine sample (*see Matter of Delta Air Lines v New York State Div. of Human Rights*, 91 NY2d 65, 72 [1997]). Even

assuming that issues of fact exist whether he suffered a medical impairment, plaintiff failed to make any showing that this impairment caused him to be unable to provide a 45-milliliter urine specimen within the required three-hour time period. None of the doctors' notes and letters upon which he relies is in admissible form, and he points to no competent evidence that may be considered in opposing defendant's motion (*see Tibbits v Verizon N.Y., Inc.*, 40 AD3d 1300, 1302 [2007]). In any event, the doctors' notes do not establish that plaintiff's alleged benign prostate hyperplasia (BPH) caused him to be unable to produce the required urine specimen. Indeed, plaintiff's treating urologist stated that his possible BPH did not explain his inability to produce an adequate urine sample. Plaintiff's internist's statement that plaintiff had BPH, "which causes problems with urination," does not contradict the urologist's flat assertion that any problems associated with BPH would not prevent the production of an adequate urine sample. The statement by another urologist (consulted nearly two years after the incident by plaintiff's attorney in connection with a prior lawsuit) that BPH "could prevent" plaintiff from producing an adequate sample is based solely on the urologist's review of plaintiff's internist's notes and therefore has no independent

probative value.

Moreover, in determining that plaintiff failed to comply with its drug test procedures, defendant was "implementing federal regulations" governing his eligibility for the Assistant City Highway Repairer position (*see* 49 CFR Part 40), and "cannot have violated state or local discrimination laws by [doing so]" (*Kinneary v City of New York*, 601 F3d 151, 158 [2010]; *see also Medard v Doherty*, 16 Misc 3d 1127[A], 2007 NY Slip Op 51593U, *3 [2007]).

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

ENTERED: MAY 3, 2012

CLERK

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

7542 The People of the State of New York, Ind. 524/10
Respondent,

-against-

Twana Smith,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes 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 (Patricia Nunez, J.), rendered on or about September 9, 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 3, 2012

CLERK

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

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

7543 Katherine T. Christomanos, Index 302878/10
Plaintiff-Appellant,

-against-

Danwatie Vick,
Defendant-Respondent.

Scarcella Law Offices, White Plains (M. Sean Duffy of counsel) for appellant.

Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis & Fishlinger, Uniondale (Kathleen D. Foley of counsel), for respondent.

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered February 17, 2011, which, in an action for personal injuries arising out of a motor vehicle accident, granted defendant's motion to change venue from Bronx County to Westchester County, unanimously affirmed, without costs.

Defendant showed that the venue chosen by plaintiff was improper since none of the parties resided in Bronx County when the action was commenced (*see Hernandez v Seminatore*, 48 AD3d 260 [2008]; CPLR 503[a], 510[1]). Defendant submitted, inter alia, the records of the Department of Motor Vehicles showing that she resided in Westchester County when the action was commenced and her affidavit stating that she exclusively lived in Westchester

County at that time (*see Weiss v Wal-Mart Stores E., L.P.*, 83 AD3d 461 [2011]).

In opposition, plaintiff failed to raise an issue of fact as to whether defendant resided in Bronx County when the action was commenced. Plaintiff submitted the police accident report, listing defendant's address before she moved; an affidavit identifying defendant's former husband as the person on whom process was served; and records of defendant's voter registration in 2000, none of which is probative of defendant's residence when the action was commenced (*see e.g. Hernandez* at 260).

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 3, 2012

CLERK

Tom, J.P., Andrias, DeGrasse, Richter, Román, JJ.

7544 The People of the State of New York, Ind. 4624/08
Respondent,

-against-

Ernesto Martinez,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Frances A. Gallagher of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

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Judgment, Supreme Court, New York County (John Cataldo, J., at hearing; Bruce Allen, J., at trial, plea, and sentencing), rendered September 9, 2009, convicting defendant, after a jury trial, of robbery in the first and second degrees, and, upon his plea of guilty, of attempted robbery in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 10 years, unanimously affirmed.

The trial court properly exercised its discretion in admitting testimony that the police apprehended defendant on a subway train after recognizing him from a wanted poster bearing his photograph. The testimony was admitted not for its truth, but to provide background information explaining why the police approached and arrested defendant at the particular time and

place in question (*see People v Tosca*, 98 NY2d 660 [2002]). Under the circumstances, to leave the officers' actions unexplained "would have placed a mystery before the jury and invited speculation" (*People v Barnes*, 57 AD3d 289, 290 [2008], *lv denied* 12 NY3d 781 [2009]). Furthermore, the court provided a suitable limiting instruction, which the jury is presumed to have followed. In particular, we find there was no danger that the jury would draw an inference that anyone other than testifying witness gave any information to the police (*compare United States v Reyes*, 18 F3d 65, 70-71 [1994]).

The challenged portion of the prosecutor's summation did not deprive defendant of a fair trial. The prosecutor did not act as an unsworn expert witness on the issue of eyewitness identification. Instead, in response to counsel's summation, the prosecutor essentially asked the jurors to apply ordinary life

experiences and common sense.

We have considered and rejected defendant's remaining claims.

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

ENTERED: MAY 3, 2012

CLERK

Tom, J.P., Andrias, DeGrasse, Richter, Román, JJ.

7545 Nayely Herrera, Index 301734/08
Plaintiff-Appellant,

-against-

E. 103rd ST. & Lexington Ave. Realty Corp., et al.,
Defendants-Respondents.

Trolman, Glaser & Lichtman, P.C., New York (Michael T. Altman of counsel), for appellant.

Gannon, Rosenfarb, Balletti & Drossman, New York (Lisa L. Gokhulsingh of counsel), for respondents.

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered April 1, 2011, which, in an action for personal injuries sustained when plaintiff slipped and fell on ice on the sidewalk abutting defendants' building, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established their entitlement to judgment as a matter of law by showing that they neither created nor had actual or constructive notice of the alleged hazardous condition (*see generally Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518, 519 [2010]). Defendants submitted plaintiff's deposition testimony that she passed the location less than three

hours before her fall and had not noticed any snow or ice on the sidewalk. Plaintiff also testified that when she returned to the location, she was looking straight ahead and did not notice ice on the sidewalk until after she fell. Defendants also submitted climatological data showing that there was no precipitation on the day of the accident and the testimony of the building superintendent that he was not aware of any complaints about the condition of the sidewalk prior to plaintiff's fall.

In opposition, plaintiff failed to raise a triable issue of fact. Indeed, the evidence shows that the alleged icy condition was not present for a sufficient period of time before the accident for defendants to have had time to discover and remedy it (*see Rivera v 2160 Realty Co., L.L.C.*, 4 NY3d 837 [2005]; *Lenti v Initial Cleaning Servs., Inc.*, 52 AD3d 288, 289 [2008]). Moreover, the record is devoid of evidence that previous snow removal efforts made the subject sidewalk more dangerous (*see Joseph v Pitkin Carpet, Inc.*, 44 AD3d 462, 463-464 [2007]).

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

ENTERED: MAY 3, 2012

CLERK

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

7546 Barbara Sehnert, et al., Index 117950/06
Plaintiffs-Respondents-Appellants,

-against-

The New York City Transit Authority, et al.,
Defendants,

City of New York,
Defendant-Respondent,

Broadway Tenth Property LLC, et al.,
Defendants-Appellants.

[And a Third Party Action]

_____

Hodgson Russ, LLP, New York (Margaret M. Cmielewski of counsel), for appellants.

The Jacob D. Fuchsberg Law Firm, LLP, New York (Leslie D. Kelmachter of counsel), for respondents-appellants.

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

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered January 24, 2011, which, insofar as appealed from as limited by the briefs, denied plaintiffs' motion for summary judgment on the issue of liability as against defendant City of New York, denied defendants Broadway Tenth Property LLC and Ernest Realty Associates, LLC's motion for summary judgment dismissing the complaint as against them, and granted the City's

motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff Barbara Sehnert allegedly sustained injuries after exiting a bus and tripping and falling over a piece of metal protruding from the sidewalk. Plaintiffs contend that the piece of metal was a broken signpost that the City installed and removed. However, as they concede, they submitted no evidence that established that the piece of metal was a sign or signpost installed or removed by the City and thus failed to show that the City caused or created the alleged sidewalk defect. Nor did they show that the City had prior written notice of the alleged defect (*see* Administrative Code of City of NY § 7-201[c][2]).

Defendants Broadway Tenth and Ernest Realty, as the owners of property abutting the public sidewalk, may be held liable in negligence for injuries resulting from sidewalk defects (*see* Administrative Code § 7-210[a]; § 19-101[d]; *Early v Hilton Hotels Corp.*, 73 AD3d 559 [2010]; *Lockard v Sopolsky*, 82 AD3d 657 [2011]). The cases on which defendants rely in support of their

argument to the contrary involve accidents that occurred before September 2003, the effective date of Administrative Code § 7-210(a) (*see Early*, 73 AD3d at 560).

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

ENTERED: MAY 3, 2012

CLERK

Tom, J.P., Andrias, DeGrasse, Richter, Román, JJ.

7548 Aramarine Brokerage, Inc., Index 650631/11
Plaintiff-Respondent,

-against-

Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C.,
Defendant-Respondent,

Epstein Becker & Green, P.C.,
Defendant-Appellant.

Hinshaw & Culbertson LLP, New York (Richard Supple of counsel), for appellant.

Weg and Myers, P.C., New York (Joshua Lee Mallin of counsel), for Aramarine Brokerage, Inc., respondent.

Furman Kornfeld & Brennan LLP, New York (R. Evon Idahosa of counsel), for Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., respondent.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered on or about January 11, 2012, which denied defendant Epstein Becker & Green, P.C.'s (EB&G) motion to dismiss the legal malpractice cause of action against it, unanimously affirmed, with costs.

Plaintiff, an insurance broker, seeks to recover for legal malpractice arising out of defendant law firms' successive representation of it in connection with an underlying federal action against a group of insurers (the CGU insurers). In the

federal action, the CGU insurers moved for, inter alia, summary judgment on their counterclaims for a return of insurance brokerage commissions paid in connection with premiums subsequently returned, on the ground that plaintiff's claim of an oral agreement between the parties was controlled by New York law and was unenforceable pursuant to the statute of frauds. The CGU insurers argued for the first time in reply that the oral agreement also failed for lack of consideration. Plaintiff, then represented by Hall Estill, neither objected to the CGU insurers' raising this issue in reply nor sought to submit a sur-reply. The district court (Casey, J.) granted the CGU insurers' motion, finding that the oral modification was subject to New York law and was unenforceable under New York's statute of frauds. The court found, alternatively, that plaintiff "failed to establish that any consideration was given in exchange for the alleged agreement" (*American Hotel Intl. Group Inc. v CGU Ins. Co.*, 2004 WL 626187 *7 n 7, 2004 US Dist LEXIS 5154, *25 n 7 [SD NY 2004], *vacated in part* 307 Fed Appx 562 [2d Cir 2009]). On appeal by EB&G, the Second Circuit vacated the finding that New York law and the statute of frauds applied to the oral modification. Neither EB&G's appellate brief nor the Second Circuit's decision addressed the district court's alternative holding of "no

consideration."

On remand, the district court (McMahon, J.) held that, although Judge Casey could have disregarded the argument first raised in reply, his "no consideration" ruling was "law of the case," because it had not been reversed on appeal (*American Hotel Intl. Group Inc. v OneBeacon Ins. Co.*, 611 F Supp 2d 373, 379 [SD NY 2009], *affd* 374 Fed Appx 71 [2d Cir 2010]). Judge McMahon noted that plaintiff had not, inter alia, objected to Judge Casey's consideration of this argument on reply, or sought leave to file a sur-reply, or raised the issue on the prior appeal and reconsideration motions (*id*. at 376). She observed that, while the Second Circuit could have responded favorably to an abuse of discretion argument, it was "equally likely" to have "viewed with disfavor" plaintiff's failure to raise the issue before the district court, and concluded that, "[h]aving passed up every conceivable opportunity to raise this issue . . . [plaintiff] has waived any right to argue . . . that Judge Casey erred by considering the belatedly-raised 'no consideration' argument" (*id*. at 376, 377).

The district court ultimately awarded the CGU insurers more than $1.3 million on their counterclaims against plaintiff. EB&G appealed this award on plaintiff's behalf. In affirming the

judgment, the Second Circuit held that, by failing to object to the "no consideration" claim or raise the issue on the first appeal, plaintiff waived the right to challenge the claim, and, thus, Judge Casey's "no consideration" ruling became law of the case (*American Hotel Intern. Group, Inc. v OneBeacon Ins. Co.*, 374 Fed Appx 71 [2d Cir 2010]).

The complaint alleges that EB&G's failure to address the "no consideration" ruling in its appellate brief in the first federal appeal resulted in plaintiff's inability to defend against the CGU insurers' counterclaims. By thus alleging "facts from which it could reasonably be inferred that defendant's negligence caused [plaintiff's] loss," the complaint states a cause of action for malpractice (*see Garnett v Fox, Horan & Camerini, LLP*, 82 AD3d 435 [2011], citing *InKine Pharm. Co. v Coleman*, 305 AD2d 151 [2003]). In opposition to EB&G's motion, plaintiff was not required to show a "likelihood of success" (*id.* at 436).

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

ENTERED: MAY 3, 2012

CLERK

Tom, J.P., Andrias, DeGrasse, Richter, Román, JJ.

7549 John Cahn, Index 106110/04
Plaintiff-Respondent, 590947/05
590446/07
-against- 590385/08
590189/09

Ward Trucking, Inc., et al.,
Defendants-Respondents,

J.T. Falk & Company, LLC, sued herein
as J.T. Falk & Company, Inc.,
Defendant-Respondent-Appellant,

460 Park Avenue South Associates, LLC,
Defendant.

- - - - -

J.T. Falk & Company, LLC,
Third-Party Plaintiff-Respondent-
Appellant,

-against-

Chemtreat, Inc.,
Third-Party Defendant-Appellant-
Respondent.

- - - - -

J.T. Falk & Company, LLC,
Second Third-Party Plaintiff-
Respondent-Appellant,

-against-

Atlantic Coastal Trucking, Inc., et al.,
Second Third-Party Defendants-
Respondents.

[And Other Actions]

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

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for respondent-appellant.

Pollack, Pollack, Isaac & De Cicco, New York (Michael H. Zhu of counsel), for John Cahn, respondent.

Downing & Peck, P.C., New York (John M. Downing, Jr. of counsel), for Ward Trucking, Inc., respondent.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, White Plains (Debra A. Adler of counsel), for R.C. Dolner, LLC, respondent.

Law Office of James J. Toomey, New York (Evy L. Kazanzky of counsel), for Taconic Management Company, LLC and 450 Park Avenue South Associates LLC., respondents.

Quirk and Bakalor, P.C., New York (Debra E. Seidman of counsel), for Atlantic Coastal Trucking, Inc. and Triangle Trucking, respondents.

Order, Supreme Court, New York County (Paul Wooten, J.), entered February 16, 2011, which, to the extent appealed from, denied third-party defendant Chemtreat's motion for summary judgment dismissing the third-party complaint and all cross claims against it, and denied defendant/third-party plaintiff/second third-party plaintiff J.T. Falk's motion for summary judgment dismissing the complaint against it and for summary judgment on its claims for contractual and common-law indemnification against Chemtreat, and for common-law indemnification against Ward Trucking, Atlantic, Triangle and Bermudez, unanimously modified, on the law, to grant Chemtreat's

motion, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the third-party complaint and all cross claims against Chemtreat.

This is an action to recover damages for personal injuries sustained by plaintiff when he was struck by a barrel (or drum) of cleaning chemicals that fell off of a hand truck in the lobby of a building owned by defendant 450 Park, where plaintiff worked. Third-party Chemtreat, the vendor of the chemicals who allegedly failed to pack the barrels properly for delivery, was entitled to summary judgment. The claims for common-law indemnification against Chemtreat should have been dismissed, as the record shows that Chemtreat was not actively at fault in bringing about plaintiff's injury (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 375 [2011]). Indeed, it is undisputed that the barrels were unpacked by the independent trucking contractors who delivered them, and that the barrel that hit plaintiff fell after the trucking contractors rocked the hand truck during delivery. Chemtreat also owed no duty of care to plaintiff, who was a third party to the vending contract between Chemtreat and Falk (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140-141 [2002]).

The claims for contractual indemnification against Chemtreat

also should have been dismissed. The indemnity provision in Chemtreat's contract with Falk was limited on its face to losses arising from the use of Chemtreat's patented devices, processes, materials and equipment. Because the chemicals were not in use at the time of the accident, a properly strict reading of the indemnity clause bars a finding that Chemtreat owes Falk contractual indemnity (*Baginski v Queen Grand Realty, LLC*, 68 AD3d 905 [2009]). Nor did Chemtreat owe Ward Trucking, which subcontracted the delivery of the barrels to Atlantic/Triangle, contractual indemnity; the contract between Chemtreat and Ward Trucking contains an indemnification clause only in favor of Chemtreat. There is no basis in the record for finding that Chemtreat is subject to the indemnification provisions in the building manager Taconic's construction contract with Dolner, the general contractor.

The court properly denied Falk's motion for summary judgment dismissing the complaint against it. Although Falk did not actually supervise the unloading and delivery of the barrels, issues of fact remain as to whether it had the authority to actually supervise that activity, given the very specific duty in its contract with Dolner to oversee deliveries of materials used

in the work (*cf. Reilly v Newireen Assoc.*, 303 AD2d 214, 221 [2003], *lv denied* 100 NY2d 508 [2003]). Because fact issues exist as to Falk's liability to plaintiff, Falk was properly denied summary judgment on its claims for common-law indemnity.

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

ENTERED: MAY 3, 2012

CLERK

Tom, J.P., Andrias, DeGrasse, Richter, Román, JJ.

7551 In re Alicia C.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Nancy M. Bannon, J.), entered on or about October 25, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed acts that, if committed by an adult, would constitute the crimes of robbery in the third degree, grand larceny in the fourth degree and criminal possession of stolen property in the fifth degree, and placed her with the Office of Children and Family Services for a period of 12 months, unanimously affirmed, without costs.

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

identification, voluntariness and credibility. Appellant made a voluntary and reliable statement that corroborated the identification testimony given by the victim.

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

ENTERED: MAY 3, 2012

CLERK

Tom, J.P., Andrias, DeGrasse, Richter, Román, JJ.

7552 In re Tayshawn S.,

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

Tyon S.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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Dora M. Lassinger, East Rockaway, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon 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 disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about May 4, 2011, which, upon a fact-finding determination that respondent mother neglected the subject child, placed the child in the custody and guardianship of the Commissioner of Social Services until completion of the next scheduled permanency hearing, unanimously affirmed, without costs.

The finding of neglect was supported by a preponderance of the evidence (*see* Family Court Act § 1012[f]; § 1046[b][i]. The evidence showed that respondent left her six year-old son alone

in their apartment after midnight for two to three hours, lied to police by telling them that the child was staying with her mother, hit the child with a brush on another occasion, and burned him with a hot cigarette lighter (*see e.g. Matter of Shayna R.*, 57 AD3d 262 [2008]). There exists no basis upon which to disturb the court's credibility determinations (*see Matter of Jared S. [Monet S.]*, 78 AD3d 536 [2010], *lv denied* 16 NY3d 705 [2011]).

We have considered respondent's remaining contentions, including that her due process rights were violated, and find them unavailing.

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

ENTERED: MAY 3, 2012

CLERK

Tom, J.P., Andrias, DeGrasse, Richter, Román, JJ.

7555 Lawrence Bizjak, Index 105492/08
Plaintiff-Appellant, 590815/09

-against-

Gramercy Capital Corp., et al.,
Defendants-Respondents.

- - - - -

Lawrence Bizjak,
Third-Party Plaintiff-Appellant,

-against-

GKK Capital, L.P., et al.,
Third-Party Defendants-Respondents.

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Fugazy & Rooney LLP, New York (Paul P. Rooney of counsel), for appellant.

The Law Offices of Mark Sherman, LLC, New York (Ryan A. O'Neill of counsel), for respondents.

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Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered April 29, 2011, which, insofar as appealed from, granted defendants' motions for summary judgment dismissing the Labor Law article 6 claim, accounted stated claim, breach of contract claims as against defendants GKK Manager LLC (GKK) and SL Green Realty Corp. (SLG), and indemnification claims against defendant Gramercy Capital Corp. (Gramercy), and granted third-party defendants' motion for summary judgment dismissing the third-party complaint, unanimously affirmed, with costs.

Gramercy, a real estate investment trust, and plaintiff entered into an oral agreement in March 2005, pursuant to which Gramercy retained plaintiff to originate, underwrite, and close loan investments at an hourly rate of $250. In June 2005, plaintiff formed Solaris Group Ltd., a Nevada-based company, and began submitting invoices on Solaris' name and directed Gramercy to wire his compensation to Solaris' bank account. Gramercy paid plaintiff pursuant to the invoices submitted, but did not withhold any taxes or social security. Gramercy also never issued plaintiff a W-2 form during the 2½ years he provided services to Gramercy. Moreover, plaintiff testified that he would withdraw money from the Solaris account as loans; that he did not report the compensation as income on his personal income tax returns, which reflect his occupation as a consultant; and that he did not file tax returns on Solaris' behalf. Although he claims that he has since amended his personal tax returns to reflect the income received, the amended returns submitted are neither dated nor signed. On his last day with Gramercy in September 2007, plaintiff submitted unpaid invoices and a reconciliation statement. In April 2008, when Gramercy had not yet paid him, he commenced this action seeking to recover unpaid wages in excess of $900,000.

The court properly dismissed plaintiff's Labor Law article 6 wage claim, as the evidence established that plaintiff was an independent consultant and not an employee of Gramercy. Plaintiff argues that, aside from the non-traditional payment structure, the oral agreement contemplated that he was to be treated as an employee. In showing that Gramercy exercised control over his manner of work, he states that Gramercy required him to be in the office by a set time; required his attendance at weekly meetings; required prior approval before he could take vacation; closely supervised, edited, and revised his written work product; prohibited him from engaging in other employment; applied the offices' policies to him; and provided him with a trading desk, office support, supplies, computer equipment, and business cards with Gramercy's name on it. Plaintiff's claim fails inasmuch as some of the requirements imposed on him are conditions "just as readily required of an independent contractor as of an employee and not conclusive as to either" (*Matter of Empire State Towing & Recovery Assn., Inc. [Commissioner of Labor]*, 15 NY3d 433, 438 [2010] [internal quotation marks omitted]), and his remaining contentions of control are unsupported by the record, which shows that Gramercy exerted only general supervisory control over plaintiff, which is insufficient

to establish an employment relationship (*see Meyer v Kumi*, 82 AD3d 514 [2011]; *Lazo v Mak's Trading Co., Inc.*, 199 AD2d 165 [1993], *affd* 84 NY2d 896 [1994]).

Moreover, it is undisputed that plaintiff did not receive fringe benefits, was not on any of defendants' payrolls, and was paid only after submitting invoices (*see Bynog v Cipriani Group*, 1 NY3d 193 [2003]; *Goodwin v Comcast Corp.*, 42 AD3d 322, 323 [2007]). The way plaintiff was paid and the parties' tax treatment of the relationship, in addition to the foregoing considerations, establish that plaintiff was an independent contractor of Gramercy (*see Meyer*, 82 AD3d at 515; *Gagen v Kipany Prods., Ltd.*, 27 AD3d 1042 [2006]).

The court also properly dismissed the account stated claim on the ground that Solaris, not plaintiff in his individual capacity, billed Gramercy (*see Brown Rudnick Berlack Israels LLP v Zelmanovitch*, 11 Misc 3d 1090[A], 2006 NY Slip Op 50800[U] [2006]). Nor may plaintiff assert a claim in his individual capacity to recover funds on behalf of an injured corporation (*see Matter of Spear, Leeds & Kellogg v Bullseye Sec.*, 291 AD2d 255 [2002].

Plaintiff's breach of contract claims against GKK and SLG were properly dismissed. Plaintiff entered into the oral

agreement with Gramercy, and GKK and SLG were formed as separate entities for legal and legitimate business purposes. Gramercy has not submitted any evidence showing that Gramercy used GKK or SLG to commit fraud or other inequity so as to permit piercing the corporate veil (*see Credit Suisse First Boston v Utrecht-America Fin. Co.*, 80 AD3d 485, 488 [2011]).

Plaintiff's claims seeking indemnification against Gramercy and the third-party defendants for his defense of Gramercy's counterclaims also fail. He claims indemnification under Gramercy's bylaws, the New York Business Corporation Law, and an Amended and Restated Management Agreement, which all permit indemnification of directors and officers of Gramercy under certain circumstances. However, plaintiff has not submitted any evidence demonstrating that he was a director or officer of Gramercy. To the extent he argues indemnification as an agent of GKK under the Amended and Restated Management Agreement, even if he could be deemed an agent, the agreement does not contain clear

language permitting indemnification against Gramercy where Gramercy brought counterclaims to recover against plaintiff (*see Tonking v Port Auth. of N.Y. & N.J.*, 2 AD3d 213, 214 [2003], *affd* 3 NY3d 486 [2004]).

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

ENTERED: MAY 3, 2012

CLERK

Tom, J.P., Andrias, DeGrasse, Richter, Román, JJ.

7557 Lasana Kamara, Index 303574/09
Plaintiff-Appellant,

-against-

Revite One Company, LLC,
Defendant-Respondent.

_____

Budin, Reisman, Kupferberg & Bernstein, LLP, New York (Gregory C. McMahon of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered March 29, 2011, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleges that he was injured when, while walking on the sidewalk adjacent to defendant's building, he slipped and fell on ice. Plaintiff's opposition to defendant's prima facie showing that it lacked notice of the alleged icy condition failed to raise a triable issue of fact as to whether the condition was present for a sufficient period of time before the accident that defendant would have had time to discover and remedy it (*see Simmons v Metropolitan Life Ins. Co.*, 84 NY2d 972 [1994]). The record shows that it was snowing less than two hours before the

accident occurred, and that defendant had performed snow removal less than four hours after the snowfall had stopped (*see* Administrative Code of City of NY § 16-123[a]). Plaintiff's contention that the ice upon which he slipped resulted from a snow accumulation that occurred several days earlier is speculative (*see Bernstein v City of New York*, 69 NY2d 1020 [1987]; *Disla v City of New York*, 65 AD3d 949 [2009]).

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

ENTERED: MAY 3, 2012

CLERK

Tom, J.P., Andrias, DeGrasse, Richter, Román, JJ.

7558- Index 20932/06
7559 Lari Konfidan,
Plaintiff-Appellant,

-against-

FF Taxi, Inc., et al.,
Defendants-Respondents.

Hogan & Cassell, LLP, Jericho (Michael D. Cassell of counsel), for appellant.

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

Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered on or about August 10, 2010, which, insofar as appealed from as limited by the briefs, granted defendants' motion to set aside the jury verdict awarding plaintiff $400,000 in future pain and suffering to the extent of setting the matter down for a new trial on damages "unless the parties stipulate" to an award of $250,000 for future pain and suffering, unanimously modified, on the law, to the extent of substituting "unless plaintiff stipulates" to the reduced award for "unless the parties stipulate," and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered on or about October 21, 2010, which, upon reargument, adhered to the prior determination,

unanimously dismissed, without costs, as academic.

Plaintiff sustained injuries in a motor vehicle accident, which included two labral tears in his right shoulder, which required surgery, and months of physical therapy, both before and after the surgery. At the time of trial, the 33-year-old plaintiff suffered from pain on a daily basis, which varied in degree, and still needed treatment for his shoulder. Under the circumstances presented, we find that trial court appropriately found that the jury's award of $400,000 for future pain and suffering was excessive and that the amount of $250,000 constituted reasonable compensation for the injuries sustained (*see e.g. DeSimone v Royal GM, Inc.*, 49 AD3d 490 [2008], *lv dismissed in part and denied in part*, 11 NY3d 862 [2008]; *Elescano v Eighth-19th Co., LLC*, 17 AD3d 250 [2005];).

However, we modify to the extent indicated because the only

party required to stipulate to the reduced award was plaintiff, as the nonmovant (*see O'Connor v Papertsian*, 309 NY 465, 471 [1956]).

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

ENTERED: MAY 3, 2012

CLERK

Tom, J.P., Andrias, DeGrasse, Richter, Román, JJ.

7560 The People of the State of New York, Ind. 738/08
Respondent,

-against-

John Dawson,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered May 5, 2009, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to concurrent terms of eight years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9

NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's decision to credit the police account of the incident.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 3, 2012

CLERK

Tom, J.P., Andrias, DeGrasse, Richter, Román, JJ.

7561 In re Malik C.,

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

Neal D. Futerfas, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for presentment agency.

Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about January 6, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he had committed acts that, if committed by an adult, would constitute the crimes of attempted gang assault in the first degree, assault in the second and third degrees, reckless endangerment in the second degree, menacing in the third degree, and endangering the welfare of a child, and placed him on enhanced supervision probation for a period of 20 months, unanimously affirmed, without costs.

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

disturbing the credibility determinations. The credible evidence supported each element of the offenses at issue, as well as establishing appellant's accessorial liability under Penal Law § 20.00, where applicable.

The disposition was a proper exercise of the court's discretion that constituted the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]).

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

ENTERED: MAY 3, 2012

CLERK

Tom, J.P., Andrias, DeGrasse, Richter, Román, JJ.

7562 The People of the State of New York, Ind. 1380/10
Respondent,

-against-

James Simms,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Philip Morrow 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 (Carol Berkman, J.), rendered on or about July 28, 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 3, 2012

CLERK

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

Tom, J.P., Andrias, DeGrasse, Richter, Román, JJ.

7563N Nikiyah S. Blackman, Index 101743/02
Plaintiff-Respondent,

-against-

The Hit Factory, et al.,
Defendants-Appellants,

James Porte,
Defendant.

_____

Podvey, Meanor, Catenacci, Hildner, Cocoziello & Chattman, P.C., New York (Damian P. Conforti of counsel), for appellants.

Nikiyah S. Blackman, respondent pro se.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered August 19, 2010, which, insofar as appealed from, granted defendants' cross motion for enforcement of a settlement agreement to the extent of authorizing them to serve plaintiff with certain settlement documents with a request that they be executed, and denied their request for attorneys' fees, unanimously affirmed, without costs.

At the evidentiary hearing ordered by the motion court, plaintiff did not establish that she lacked the capacity to enter into the stipulation of settlement that she initialed on October 13, 2004. Even assuming that she lacked capacity to enter into the stipulation, under the facts presented here, she would still

be bound by its terms, given that the document was signed, in her presence, by her counsel, who had apparent authority to enter into the agreement (*see Hallock v State of New York*, 64 NY2d 224, 230-232 [1984]). Nor is there any evidence, other than her own testimony, which the motion court implicitly discounted, that plaintiff made any contemporaneous objection to the stipulation, or engaged in any behavior manifesting a lack of capacity (*see id.* at 231; *Privin v Landolfi*, 191 AD2d 485 [1993]).

We perceive no basis for disturbing the equitable remedy which the motion court fashioned here in its discretion (*see Matter of Gerges v Koch*, 62 NY2d 84, 94-95 [1984]; *Town of Caroga v Herms*, 62 AD3d 1121, 1125 [2009], *lv denied* 13 NY3d 708 [2009]). Nor do we find any abuse of discretion in the motion court's determination that no award of attorneys' fees is warranted at this time (*see 542 Holding Corp. v Prince Fashions, Inc.*, 57 AD3d 414, 416 [2008]).

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

ENTERED: MAY 3, 2012

CLERK

Tom, J.P., Andrias, DeGrasse, Richter, Román, JJ.

7564 In re Rodney Skinner, Ind. 4378/96
[M-1202] Petitioner, 8190/96

-against-

Hon. Edward J. McLaughlin,
Respondent.

Rodney Skinner, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Anthony J. Tomari of counsel), for 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: MAY 3, 2012

CLERK

Gonzalez, P.J., Saxe, Moskowitz, Acosta, Freedman, JJ.

6707 Cornelia Sharpe Bregman, Index 601637/06
Plaintiff-Appellant,

-against-

111 Tenants Corp.,
Defendant-Respondent.

_____

Stiefel & Cohen, New York (Herbert L. Cohen of counsel), for appellant.

Hoey, King, Epstein, Prezioso & Marquez, New York (David S. Kasdan of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered January 31, 2011, affirmed, without costs.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
David B. Saxe
Karla Moskowitz
Rolando T. Acosta
Helen E. Freedman, JJ.

6707
Index 601637/06

_____x

Cornelia Sharpe Bregman,
Plaintiff-Appellant,

-against-

111 Tenants Corp.,
Defendant-Respondent.

_____x

Plaintiff appeals from an order of the Supreme Court, New York County (Joan A. Madden, J.), entered January 31, 2011, which granted defendant-owner's cross motion for summary judgment dismissing the complaint, and denied, as moot, plaintiff-shareholder's motion for leave to amend the complaint.

Stiefel & Cohen, New York (Herbert L. Cohen and Philip P. Foote of counsel), for appellant.

Hoey, King, Epstein, Prezioso & Marquez, New York (David S. Kasdan of counsel), for respondent.

SAXE, J.

This appeal challenges the enactment and enforcement of a resolution adopted by the board of directors of defendant, a residential cooperative corporation. The resolution prohibits the subleasing, without board approval, of a shareholder's apartment for more than two years in any four-year period, and institutes sublet fees. Plaintiff, who has owned the shares to two apartments in the building since its conversion to cooperative ownership in 1972, and who has subleased both apartments for virtually the entire time, contends that although the language of the resolution appears to apply to all shareholders, in fact she is its sole target. She also claims that in the course of purportedly enforcing the terms of this resolution, defendant and its managing agent have taken steps not justified either by the terms of that resolution or by any other authority, abusing their discretion and breaching their fiduciary duty toward her as a shareholder.

Plaintiff asserts that in 1972, when she was a tenant residing in apartment 6C at 111 East 75th Street, then a rent-controlled residential apartment building, the owners of the building sought to convert it to cooperative ownership. She states that because they had received an insufficient number of subscriptions to qualify for the conversion, a man named Paul

Green, a principal of the group of investors that owned the building, approached her and asked her to purchase not only the apartment in which she then resided, but also another unit, penthouse apartment 10A. Recognizing that she would need to sublease at least one and possibly both of those apartments, she claims that she obtained an agreement giving her "full, unconditional and perpetual sublet rights to both Apartments" before agreeing to purchase them. With that assurance, she says, she purchased both cooperative apartments.

However, plaintiff's professed understanding that she would have "full, unconditional and perpetual sublet rights" is not reflected in any of the formal documents that she signed. The proprietary leases executed by plaintiff contain an explicit provision requiring board authorization for subletting:

> "[T]he Lessee shall not sublet the whole or any part of the apartment or renew or extend any previously authorized sublease, unless consent thereto shall have been duly authorized by a resolution of the Directors . . . Any consent to subletting may be subject to such conditions as the Directors . . . may impose. There shall be no limitation on the right of Directors . . . to grant or withhold consent, for any reason or for no reason, to a subletting."

Indeed, a document signed by plaintiff, by Paul Green for the owners and by Stanley Weller for the sponsor, in connection with plaintiff's purchase of the two apartments, specifically

addressed plaintiff's circumstances, and fails to support plaintiff's claim of unfettered sublet rights. That document, bearing the date of April 14, 1972, acknowledges that plaintiff "shall be permitted to sublet her apartments *provided the consent of the Board . . . is obtained*" (emphasis added), and further provides that "[t]he owners will use their best efforts to have the Board . . . not unreasonably withhold their consent to subletting by [plaintiff]." But it does *not* contain a provision altering or diminishing in any way the board's right to grant *or withhold* its consent.

An exchange of correspondence from that time indicates that the terms of the foregoing document were negotiated, and that the owners explicitly *rejected* proposed language that would have required that the board of directors not unreasonably withhold its consent to plaintiff's subletting her apartments. First, a letter from the owners to the sponsor's cooperative coordinator, dated May 1, 1972, recited that it was returning plaintiff's checks and her attorney's letter, and explained that since the proprietary leases did *not* provide that board consent may not be unreasonably withheld, and since the owners could not bind the future board of directors, the owners would not agree to the inclusion of language providing that the Board's consent "shall not unreasonably be withheld." The letter added that "[t]he only

thing we can do is to have the owners agree that if they are members of the Board they will not unreasonably withhold their consent." A second letter, dated June 1, 1972, from the sponsor's cooperative coordinator to plaintiff's attorney, confirmed plaintiff's purchase of the apartments, and documented that plaintiff's lawyer had agreed to the final form of the agreement in which the phrase "which consent shall not unreasonably be withheld" was deleted, and added instead was the language, "the owners will use their best efforts to have the Board of Directors not unreasonably withhold their consent to subletting by [plaintiff]."

As a result of this negotiation, the final signed document, purportedly dated April 14, 1972, did not contain any language promising that the board would not unreasonably withhold its consent to sublets, let alone any language that plaintiff would have an unfettered right to sublease the apartments she was purchasing. It merely recited that the owners would "use their best efforts to have the Board of Directors not unreasonably withhold their consent to subletting by [plaintiff]."

After the 1972 purchases, plaintiff lived in apartment 6C for two years while renovating apartment 10A, but thereafter, during the 30 years that followed, she sublet both apartments. She states that while she "occasionally" submitted the

credentials of her subtenants to the board "[a]s a courtesy," she did not include in her subleases any provision making the landlord's consent to the sublease a condition to the sublease, because she believed that her arrangement with the board rendered such consent unnecessary.

On September 16, 2003, allegedly prompted by a board member's learning the amount of rent plaintiff charged her sublessees, the board adopted the resolution at issue, stating that "no [l]essee shall be permitted to sublet the whole or any part of an apartment or renew or extend any previously authorized sublease for more than two years during any four consecutive year period unless consent thereto has first been duly authorized by a resolution of the Directors or . . . by [l]essees owning at least 66⅔% of the then issued and outstanding shares of the Corporation."

A sublease for penthouse apartment 10A that plaintiff had submitted to the board for approval in August 2003 was then conditionally approved by the board, the condition being that plaintiff provide the board with an executed document titled "Shareholder Acceptance of Corporation's Sublet Policies." The document specifically referenced plaintiff's penthouse unit: "The undersigned understands that the right to sublet Penthouse A at 111 East 75th Street is governed exclusively by the Corporation's

by-laws including but not limited to the following resolutions adopted by the Board of Directors," followed by the language of the resolution. It then stated, "Furthermore, the undersigned agrees that the Board's decision to waive the production of certain documents normally required during the sublet application in no way creates precedent or requirements for any future waivers or exceptions with respect to the Corporations [*sic*] then current sublet policy and application process."

But plaintiff encountered difficulty two years later, when she submitted an application for another sublease on the same apartment. On November 21, 2005, the managing agent's office rejected the new sublet application for penthouse apartment A, with the message "As per . . . Managing Agent of 111 East 75th Street, I am not to accept any sublet packages for Apt. PH A." A subsequent explanatory letter from the board president, dated February 10, 2006, stated that under the new sublet policy, that apartment would not be eligible for sublet again until September 2007. It added, "While the policy does allow the Board to make exceptions to the frequency rule, a shareholder must demonstrate that there are extenuating circumstances surrounding the sublet. If you feel that this would apply, the Board asks that you provide to us additional information so that we may make a fully informed decision at our next meeting." Finally, with regard to

plaintiff's previous assertions that she had special rights to sublet her apartments in perpetuity, the board requested that she provide documentation specifically stating the existence and scope of those rights, as the board had no record of such an agreement.

The response by plaintiff's counsel questioned the board's reliance on the resolution for its outright rejection of the application, pointing out that the resolution merely requires board consent to sublets for more than two years of any four-year period, and nowhere mentions proof of extenuating circumstances.

When no further action was taken on her application, plaintiff commenced this litigation. The complaint alleged that the board's denial of plaintiff's sublease application was arbitrary and capricious, was not a proper exercise of any legitimate business judgment, and that it had the effect of improperly creating a class of shareholders who could sublet and a class of shareholders who could not. Plaintiff alleged economic harm in lost rental income and sought an injunction preventing further denial of her sublease applications. Defendant counterclaimed for attorneys' fees and expenses pursuant to the terms of the proprietary lease.

In July 2010, plaintiff, represented by substituted counsel, moved to amend her complaint. Plaintiff explained that in her

original complaint she was merely attempting to recoup lost rental income, but that the conduct of the managing agent after the action was commenced made it clear that defendant and its managing agent were attempting to divest her of her rights as a shareholder. Specifically, plaintiff claimed that the cooperative had absolutely refused to permit her to sublet either of the two apartments, and that the managing agent had continually and systematically interfered with her ownership rights by preventing or unreasonably delaying access to her apartments by her contractors. Plaintiff's proposed amended complaint added the contention that the original board assumed the contractual obligations of the sponsor and confirmed her perpetual subletting rights at its first meeting. Plaintiff offered in support of that contention a letter dated February 2, 1983, from an attorney who then represented the board, stating:

> "In view of the arrangements made at the time the building went cooperative and you purchased two apartments on condition that you . . . be permitted to sublet same, we have investigated your proposed sub tenant . . . and finding him suitable, I am pleased to advise you that on behalf of the Board of Directors of 111 Tenants Corp. the proposed sublet is hereby approved."

Plaintiff also submitted an affidavit dated May 8, 2007 by that same former representative of the board, now deceased, stating that he was a principal of the sponsor at the time of the

building's conversion, and specifically stating,

> "As I recall, at one of the early Board meetings, the arrangements which we had made with Mrs. Bregman at the time of the purchase were acknowledged by the co-op's Board, the intention being that it would not simply be an agreement with the sponsor but also an agreement which would be understood to be followed by the co-op, and the minutes should reflect the foregoing."

Accordingly, plaintiff sought to add causes of action for breach of contract and breach of fiduciary duty against defendant and specified and unspecified members of the Board, and to add a claim of tortious interference with plaintiff's proprietary lease as against the managing agent. She also sought to add as defendants the management company, the managing agent, and the individual board members. Defendant cross-moved for summary judgment dismissing the complaint.

The motion court granted defendant's cross motion for summary judgment dismissing the complaint, and denied, as moot, plaintiff's motion to amend.

We agree with the motion court. Nothing in the documents plaintiff has submitted supports her claimed contractual right to unfettered subletting rights. As provided by the proprietary leases, the right to sublet that she acquired when she purchased the shares to her apartments always required board consent, and there was no protection against consent being unreasonably

withheld. None of plaintiff's submitted documents provides otherwise.

Even assuming that it is proper for this Court to rely on the 1983 letter and 2007 affidavit by the now-deceased former principal of the sponsor, these documents do not sufficiently support plaintiff's claim. The 1983 acknowledgment of "the arrangements made at the time the building went cooperative and you purchased two apartments on condition that you . . . be permitted to sublet same," actually proceeded to announce that consent to a proposed sublet had been granted, which shows that those "arrangements" incorporated the requirement of Board consent. Similarly, the 2007 affidavit, asserting that "[t]he sponsor . . . agreed that it would use its best efforts to have the Board consent to all sublease applications, it being our intent that the right to sublease would be denied only if the proposed subtenant was found to be objectionable," does not assert that the sponsor had the ability to bind the board, and explicitly acknowledges the requirement of board consent for all subleases.

Moreover, even if plaintiff had been granted such preferential unfettered sublet rights, Business Corporations Law § 501(c), which provides that "each share [issued by a corporation] shall be equal to every other share of the same

class," precludes any such special subletting rights (*see Wapnick v Seven Park Ave. Corp.*, 240 AD2d 245 [1997]; *see also Krakauer v Stuyvesant Owners*, 301 AD2d 450 [2003]).

As the motion court observed, *Spiegel v 1065 Park Ave. Corp.* (305 AD2d 204 [2003]) is directly applicable here. In that case, where a shareholder challenged a managing agent's denial of consent to a proposed sublease, this Court invalidated cooperative bylaws and proprietary leases that gave original purchasers such as the plaintiff greater subletting privileges than were allowed to subsequent purchasers. We remarked that

> "it does not avail plaintiff that she relied on the sponsor's offer of special subletting privileges in buying the apartment, that the cooperative learned of her intent to sublet the apartment when she purchased a second larger apartment in the building with her husband, that the cooperative is continuing to permit subletting by other original shareholders and that the cooperative is itself subletting an apartment" (*id.* at 205).

Plaintiff's attempt to distinguish *Spiegel* based on "the sponsor's offer of special subletting privileges" is unavailing. The two cases merely involve two different situations in which shareholders of common shares could claim to have rights beyond those of other holders of common shares, whether based on bylaws, proprietary lease provisions, or agreements "assumed by" the cooperative corporation. We view the directive of Business

Corporations Law § 501(c) as not limited to unequal treatment in proprietary leases or bylaws. It precludes the proposition, advanced by plaintiff, that a shareholder purchasing common shares may, by contract with the cooperative, obtain special rights that could not be granted in the corporate documents themselves.

Plaintiff argues that the September 2003 resolution was enacted in bad faith, since its sole intent is to discriminate against her. She points out that the notice her attorney was sent regarding the board meeting on September 16, 2003 said it was to "discuss the sublet issue for [plaintiff]." She asserts that adoption of the resolution at that particular meeting shows that it was all about her, and that such "targeted" action establishes defendant's bad faith. However, the record fails to support her claimed right to relief. As explained in *Matter of Levandusky v One Fifth Ave. Apt. Corp.* (75 NY2d 530, 538 [1990]),

> "[A cooperative] board owes its duty of loyalty to the cooperative -- that is, it must act for the benefit of the residents collectively. So long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith, courts will not substitute their judgment for the board's. Stated somewhat differently, unless a resident challenging the board's action is able to demonstrate a breach of this duty, judicial review is not available."
>
> "The business judgment rule protects the

> board's business decisions and managerial authority from indiscriminate attack. At the same time, it permits review of improper decisions, as when the challenger demonstrates that the board's action has no legitimate relationship to the welfare of the cooperative, deliberately singles out individuals for harmful treatment, is taken without notice or consideration of the relevant facts, or is beyond the scope of the board's authority" (*id.* at 540).

The board here was prompted by a legitimate interest in the welfare of the cooperative: maximizing owner residency and therefore the value of the shares. It is therefore authorized to adopt a resolution in furtherance of that interest.

Moreover, while a board may not deliberately single out individuals for harmful treatment (*Levandusky*, 75 NY2d at 538), if a board of directors becomes aware of a situation or conduct of a particular shareholder that it considers contrary to the interests of the cooperative generally, there is no prohibition against the board's adoption of a policy protective of those broader interests, even if the policy is responsive to a single shareholder's situation or conduct.

Notably, the proprietary lease limits the shareholders' subletting rights by requiring the board's consent and specifying that the board may grant or withhold consent for any reason or for no reason. So, even if the language of the 2003 resolution does not appear to authorize a refusal to even consider a sublet

application, the board has always retained the right to withhold consent to a sublet without providing any reason.

Although the board's new policy, adopted in the 2003 resolution, may prevent plaintiff from subletting her apartments in the same manner as she had done for the first 30 years, adoption of the resolution does not qualify as the type of deliberately abusive treatment that would justify allowing a legal challenge to the board's decision. Assuming that plaintiff's situation was the impetus for the board's decision to restrict subletting, and that plaintiff is, as she claims, currently the only shareholder affected by the resolution, nevertheless the board's adoption of a restrictive resolution applies to all shareholders. The fact that plaintiff will be more immediately affected by the resolution does not render defendant's act discriminatory or applicable solely to her.

The case of *Louis & Anne Abrons Found. v 29 E. 64th St. Corp.* (297 AD2d 258 [2002]) is distinguishable. In that case, an issue of fact was presented as to whether a new sublet fee was imposed in bad faith, solely for its impact on the plaintiff. Evidence submitted on the summary judgment motions established that the plaintiff owned and subleased all the commercial units and that the board had previously banned all residential subleases, so the newly adopted fee could *only* have had an impact

on the plaintiff. Here, in contrast, plaintiff's assertions are insufficient to establish that she is the only shareholder whom the newly adopted rule affects.

Plaintiff's citation to *Tsimis v Rudnick, Brett, Wyckoff* (59 AD2d 871 [1977], *affd* 45 NY2d 976 [1978]) is understandable, because in that case, under circumstances similar to those present here, this Court declared that the plaintiffs had the absolute right to sublet the second apartment they purchased in the building when it converted to cooperative ownership, notwithstanding the board's newly adopted policy disapproving of subleasing. Importantly, however, *Tsimis* predated both *Levandusky*, which gave cooperative boards of directors the authority to freely adopt a new policy in the legitimate interest of the cooperative, and *Spiegel v 1065 Park Ave. Corp.*, 305 AD2d 204 [2003], *supra*). Nor did the *Tsimis* decision consider the possible impact of Business Corporations Law § 501(c). In view of these intervening cases, we decline to treat *Tsimis* as controlling.

Finally, plaintiff's argument that a triable issue of fact exists as to whether she is a holder of unsold shares for apartment 10A -- presumably premised on the broader subletting rights for the holders of unsold shares provided by paragraph 38 of the proprietary lease -- was never raised in the motion court.

Indeed, the word "unsold" does not appear in any of the papers contained in the record before us. Therefore, the issue is unpreserved for our review. Notably, it is *not* purely a question of law that clearly appears on the face of the record, unavoidable by respondent if raised; rather, had it been timely raised, defendant could have submitted evidence seeking to disprove the claimed entitlement (*see First Intl. Bank of Israel v Blankstein & Son*, 59 NY2d 436, 447 [1983]; *DiFigola v Horatio Arms*, 189 AD2d 724, 726 [1993]).

Leave to amend was properly denied because plaintiff's proposed amended complaint, based on the assertion that she is entitled to preferential subletting rights, "suffers from the same fatal deficiency as the original" (*"J. Doe No. 1" v CBS Broadcasting Inc.*, 24 AD3d 215, 216 [2005]).

We have considered plaintiff's remaining arguments and find them to be without merit.

Accordingly, the order of the Supreme Court, New York County (Joan A. Madden, J.), entered January 31, 2011, which granted defendant-owner's cross motion for summary judgment dismissing

the complaint, and denied, as moot, plaintiff-shareholder's motion for leave to amend the complaint, should be affirmed, without costs.

All concur.

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

ENTERED: MAY 3, 2012

CLERK