SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 10, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, Sweeny, Acosta, Renwick, JJ.

7430 Adrienne McAllister, Index 300314/10
Plaintiff-Respondent,

-against-

New York City Transit Authority,
et al.,
Defendants-Appellants.

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

Norman A. Olch, New York, for respondent.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered February 23, 2011, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff pedestrian was struck by a bus driven by defendant Cornett while the bus was making a left turn at an intersection. In support of their motion for summary judgment, defendants submitted Cornett's testimony that he scanned the intersection before making the turn, observed no pedestrians before and while

making the turn, turned slowly, stayed in his lane of travel at all times, and had no problems with visibility.

In opposition to the motion, plaintiff's submissions raised triable issues of fact. Although the findings of negligence set forth in the internal investigatory report of defendant Transit Authority were inadmissible, as they were based upon internal standards that impose higher standards than common law (*see Karoon v New York City Tr. Auth.*, 286 AD2d 648, 649 [2001]), the otherwise admissible contents of the report raise triable issues of fact as to Cornett's manner of driving at the time plaintiff was struck.

Such contents show that the rear left tires of the bus protruded into the opposite lane of travel, and that the bus was about 50 feet from the crosswalk. Cornett's deposition testimony, that he was three-quarters of the way through his left turn when plaintiff impacted the left side of the bus, just behind the driver's window, could also support a reasonable inference that plaintiff was near the center of the street, raising issues of fact as to whether Cornett should have seen her. Moreover, plaintiff's expert's review of the admissible contents of the investigatory report, the deposition testimony,

and his personal examination of the intersection, provided a sufficient basis for him to opine that the accident was caused by driver inattentiveness (*see Joannis v Cahill*, 71 AD3d 1437, 1439 [2010]).

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

ENTERED: MAY 10, 2012

CLERK

Andrias, J.P., DeGrasse, Richter, Abdus-Salaam, JJ.

6735 Diane Del Terzo, et al., Index 111839/09
Plaintiffs-Respondents,

-against-

The Hospital for Special Surgery, et al.,
Defendants-Appellants.

_____

Peltz & Walker, New York (Bhalinder L. Rikhye of counsel), for appellants.

Kelner & Kelner, New York (Gerard K. Ryan, Jr., of counsel), for respondents.

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Order, Supreme Court, New York County (Joan B. Lobis, J.), entered November 5, 2010, which, insofar as appealed from as limited by the briefs, denied defendants' motion to preclude plaintiff from offering evidence of future damages at trial or, in the alternative, to compel plaintiff to authorize the release of confidential information, unanimously affirmed, without costs.

The underlying motion pursuant to CPLR 3124 and 3126 stems from plaintiff's refusal to authorize the release of HIV-related information, alcohol/drug treatment information and mental health information. Defendants argue that this information has a bearing on plaintiff's life expectancy and is therefore material

to plaintiff's claims for future damages. Defendants generally rely on CPLR 3101(a) insofar as it provides for "full disclosure of all matter material and necessary in the prosecution or defense of an action." Plaintiff opposes defendant's arguments, invoking the protections of confidentiality afforded by Public Health Law § 2785(2) and Mental Hygiene Law § 22.05 and § 33.13.

Where pertinent, Public Health Law § 2785(2)(a) gives a court discretion to grant an application for the disclosure of confidential HIV-related information upon a showing of "a compelling need for disclosure of the information for the adjudication of a criminal or civil proceeding." Citing CPLR 3101(a), defendants argue that plaintiff's medical records are material and necessary in the defense of this action because plaintiff has placed her life expectancy in controversy. Defendants therefore claim to have made a prima facie showing of a compelling need for disclosure. Defendants' argument appears to be based on the premise that a "compelling need" under Public Health Law § 2785(2) can be established by a showing that the information they seek is "material and necessary" within the purview of CPLR 3101(a). The argument is flawed for the following reasons.

Public Health Law § 2785(1) provides: "Notwithstanding any other provision of law, no court shall issue an order for the disclosure of confidential HIV related information, except . . . in accordance with the provisions of this section." Such a "notwithstanding" clause in a statute operates as an exception to the provisions of law referenced in the clause (*Engweiler v Board of Parole and Post-Prison Supervision,* 343 Or 536, 544, 175 P3d 408, 413 [Sup Ct Or 2007] [internal quotation marks omitted]). By operation of the "notwithstanding" clause in Public Health Law § 2785(1), all other provisions of law, including the "material and necessary" standard under CPLR 3101(a), are explicitly preempted by the "compelling need" standard under Public Health Law § 2785(2) (*see e.g. Matter of Melendez v Wing,* 8 NY3d 598, 609-610 [2007]; *Matter of State of New York v Zimmer*, 63 AD3d 1563, 1563-1564 [2009]). Therefore, as a matter of statutory construction, we reject defendants' attempt to equate the two. We further note that defendants have not otherwise made a showing of a compelling need for HIV-related information in this medical malpractice case which does not involve any claim relating to an HIV infection (*compare Matter of Plaza v Estate of Wisser,* 211 AD2d 111 [1995], *lv denied* 92 NY2d 805 [1998] [compelling need for disclosure found in an action against the estate of a

decedent who allegedly infected the plaintiff with the AIDS virus]). Nor have defendants even suggested, on the basis of the medical records provided, that there is any history of HIV or AIDS. Indeed, defendants seem to be engaged in a fishing expedition.

Mental Hygiene Law § 22.05 provides that the records of a person who receives chemical dependence services shall be released only in accordance with Mental Hygiene Law § 33.13 and another section that is not relevant to this appeal. The pertinent part of § 33.13(c)(1) provides that mental health information shall not be released except "upon a finding by the court that the interests of justice significantly outweigh the need for confidentiality." As a general matter, disclosure is warranted where records of a sensitive and confidential nature relate to the injury sued upon (*see Napoleoni v Union Hosp. of Bronx*, 207 AD2d 660, 662 [1994]). In *Napoleoni* we allowed discovery of treatment records pertaining to a mother's substance abuse during her pregnancy in a medical malpractice action brought on claims of negligence in prenatal care, labor and the delivery of a baby (*id.*). The interests of justice standard under Mental Hygiene Law § 33.13 has not been met in this case

where defendants seek the disclosure of confidential records on the basis of nothing more than a generalized assertion that substance abuse and mental illness can affect a person's level of stress, ability to work and life expectancy.

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

ENTERED: MAY 10, 2012

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

6940 In re Melind M.,
Petitioner-Appellant,

-against-

Joseph P.,
Respondent-Respondent.

Steven N. Feinman, White Plains, for appellant.

Randall S. Carmel, Syosset, for respondent.

Tennille M. Tatum-Evans, New York, attorney for the child.

Order, Family Court, New York County (Diane Costanzo, Referee), entered on or about April 14, 2010, which, after a fact-finding hearing, dismissed the petition for an order of protection, unanimously reversed, without costs, and the matter remanded to the Family Court, New York County, for further proceedings not inconsistent with this Court's decision.

Petitioner filed two petitions against respondent, with whom she has an infant child (Jade). Petitioner has a second infant child (Kaylene) from a different father. The first petition was filed on or about January 21, 2009, and alleged two incidents that occurred on November 4, 2008 and March 31, 2007. Hearing testimony established that on November 4, 2008, respondent showed up at Kaylene's babysitter's home and attempted

to initiate a physical altercation with a man who was with petitioner. He also tried to get his girlfriend to initiate a physical altercation with petitioner. Respondent testified that he could not remember what he said to petitioner, but that he challenged petitioner's friend to a fight. Respondent further testified that his conduct was the result of him being in a "rage that day" because the mother of his second child had just run away. Petitioner testified that respondent was in front of her face, causing her to feel "frightened" and "scared." Petitioner's friend testified that she was "frozen." Petitioner gave Kaylene to the babysitter and told her to go back into the apartment. Respondent fled when the babysitter called the police, but told petitioner that he would get her next time. Petitioner waited until the police arrived to leave the babysitter's house.

Hearing testimony also established that on March 31, 2007, while respondent was having visitation with Jade, he called petitioner to complain that the child was crying, and when petitioner told him to return the child to her, he repeatedly cursed at petitioner and threatened that he would never return the child. Respondent called petitioner a whore and said he would teach the child to hate her mother. When the conversation

ended, petitioner immediately called the police. Later that day, respondent's girlfriend returned the child. When petitioner walked respondent's girlfriend outside, respondent, who admitted to drinking alcohol prior to coming to petitioner's apartment, cursed them both and told them that something was going to happen to them. Petitioner testified that due to these events, an order of protection was issued but no charges were filed.

The second petition, filed on June 15, 2009, alleged that on June 12, 2009, respondent and his brother used foul and abusive language to threaten and harass petitioner while they were in the waiting area of the Family Court.

Based on these allegations, petitioner alleges that respondent committed several family offenses, including menacing in the third degree. Petitioner therefore sought an order of protection against respondent on behalf of her and her children.

To support a finding that a respondent has committed a family offense, a petitioner must prove the allegations by a fair preponderance of the evidence *(Matter of Everett C. v Oneida P.*, 61 AD3d 489,489 [2009]; *Matter of Melissa Marie G. v John Christopher W.*, 57 AD3d 314 [2008]; Family Ct Act § 832). A hearing court's determination is entitled to great deference because the hearing court has the best vantage point for

evaluating the credibility of the witnesses. Its determination should therefore not be set aside unless it lacks a sound and substantial evidentiary basis (*id.; Matter of Peter G. v Karleen K.*, 51 AD3d 541, 542 [2008]).

Here, although the Family Court credited petitioner's testimony concerning the acts committed by respondent and respondent admitted committing most of them, the court dismissed the petition. At the very least, respondent's words and actions on November 4, 2008 placed or attempted to place petitioner in fear of death, imminent serious physical injury or physical injury and thus established the family offense of menacing in the third degree (*see* PL 120.15 [a person is guilty of menacing in the third degree when, by physical menace, he or she intentionally places or attempts to place another person in fear of death, imminent serious physical injury or physical injury]).

Specifically, petitioner testified credibly, as noted above, that respondent arrived at the babysitter's apartment unexpectedly and in a rage. He directed his girlfriend to beat up petitioner and got "in her face," which caused petitioner to become "frozen" with fear (*Matter of Ramon M.* (109 AD2d 882, 883 [1985] [act of leaping towards the complainant without physical

contact in a karate kick position was sufficient to establish physical menace]). Respondent's threats and unexpected presence in combination with the March 31, 2007 occurrences, where respondent told petitioner that something was going to happen to her, support a finding that he intentionally placed petitioner in imminent fear of physical injury (*Yvette H. v Michael G.*, 270 AD2d 123, 123 [2000], *lv denied* 95 NY2d 762 [2000]). Indeed, petitioner's asking the babysitter to take the infant back inside the apartment and call the police supports her claim. Accordingly, given this evidence, the Family Court improperly dismissed the petition.

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

ENTERED: MAY 10, 2012

CLERK

Mazzarelli, J.P., Friedman, Acosta, Freedman, Abdus-Salaam, JJ.

6990 FC Bruckner Associates, L.P., et al., Index 600341/10
Plaintiffs-Appellants,

-against-

Fireman's Fund Insurance Co.,
Defendant-Respondent,

GAB Robins North America, Inc.,
Defendant.

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

Rivkin Radler LLP, Uniondale (Evan H. Krinick of counsel), for respondent.

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered May 26, 2011, which denied plaintiffs' motion for summary judgment seeking a declaration that defendant Fireman's Fund Insurance Company (FFIC) was obligated to defend and indemnify them under FFIC's excess policy in the underlying personal injury action, unanimously affirmed, with costs.

Plaintiffs, New York subsidiaries of Forest City Enterprises, Inc., an Ohio corporation, were insured under FFIC's excess policy issued to the parent corporation. They seek a declaration that FFIC was obligated to indemnify them in an underlying personal injury action that occurred in New York. At

issue is a conflict between the laws of New York and Ohio on the subject of timely notice -- the former providing (prior to the enactment of Insurance Law § 3420[a][5] [effective January 17, 2009]) that an insured's failure to provide timely notice of an occurrence is a material breach of the insurance contract vitiating coverage (*see Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436 [1972]), and the latter providing that when an insured gives late notice of a claim, there is a presumption of prejudice to the insurer and the claimant bears the burden of showing the absence of prejudice (*Champion Spark Plug Co. v Fid. & Cas. Co.*, 116 Ohio App 3d 258, 268 [1996], *lv denied* 77 Ohio St 3d 1501 [1996]). Additionally, plaintiffs maintain that FFIC's notice of disclaimer was late and that they are entitled to the statutory timely-notice-of-disclaimer protection of New York Insurance Law § 3420(d). Thus, a conflict of laws analysis is necessary to determine which law applies.

Applying New York's "center of gravity" or "grouping of contacts" approach to choice-of-law questions in contract cases, Ohio law has the "most significant relationship to the transaction and the parties" (*Matter of Midland Ins. Co.*, 16 NY3d 536, 543-44 [2011]). While the motion court incorrectly stated

that FFIC is an Ohio company (it is domiciled in California), the only other contracting party is Forest City, plaintiffs' Ohio parent corporation. The insurance broker and third-party administrator are also located in Ohio, and the FFIC excess policy contained an Ohio-specific endorsement. Additionally, plaintiffs, who were not expressly named in the policy, derive their insured status under the FFIC excess policy's "Broad Named Insured" endorsement that extended coverage to "any present or future affiliates, subsidiaries (or subsidiaries thereof) controlled or associated company, corporations, or other legal entities." The record shows that FFIC's underwriting file includes references to Forest City properties in Texas, West Virginia and Michigan, as well as Ohio, indicating that the parties to the contract considered the principal location of the insured risk to be either Ohio or other states. "The governmental interests implicated by an insured's claim against an insurer of risks located in multiple states . . . weigh in favor of applying the law of the insured's domicile" (*Certain Underwriters at Lloyd's, London v Foster Wheeler Corp.*, 36 AD3d 17, 22-23 [2006], *affd* 9 NY3d 928 [2007]).

Plaintiffs argue that New York law must apply because they have their places of business in New York and the accident

happened in New York. However, as we noted in *Foster Wheeler* with respect to a choice-of-law analysis for insurance policies covering multistate risks, "[t]he state of the insured's domicile is a fact known to the parties at the time of contracting, and (in the absence of a contractual choice-of-law provision) application of the law of that state is most likely to conform to their expectations" (*id*. at 23; *see also Steadfast Ins. Co. v Sentinel Real Estate Corp.*, 283 AD2d 44, 50 [2001] ["Given the nationwide scope of Sentinel's operations, the principal location of the insured risk should be deemed to be the state where Sentinel is incorporated and has its principal place of business"]). That any number of Forest City subsidiaries, located in different states, could be insureds under this policy weighs against plaintiffs' argument that, because they are New York companies and the accident occurred in this state, New York law should be applied in this instance.

> "If [plaintiffs'] position were accepted, the result would be a single policy governed by the laws of different states – precisely what *Foster Wheeler* sought to avoid. Moreover, applying multiple states' laws to the enforcement of a single insurance policy 'defies . . . the law . . . as well as the traditional concerns of judicial economy and

> uniformity.’” (*Wausau Bus. Ins. Co., v Horizon Admin. Servs., LLC*, 803 F Supp 2d 209, 216 [ED NY 2011] [citation omitted]).

Furthermore, it is unavailing for plaintiffs to argue that the policy was issued for delivery in this state pursuant to Insurance Law § 3420(d). While plaintiffs are insureds under the policy, they are not specified or expressly mentioned in the policy (*see TIG Ins. Co. v Martin*, 2003 WL 25796732 [ED NY 2003] [where policy issued by Texas insurer to Indiana insured, and occurrence was at New York baseball camp, policy not issued for delivery in New York where policy was not specific to New York camp or to other work in New York]; *compare Columbia Cas. Co. v National Emergency Servs.,* 282 AD2d 346 [2001] [policy deemed issued for delivery in New York where it expressly covered insureds and risks located in New York]; *American Ref-Fuel Co. of Hempstead v Employers Ins. Co. of Wausau*, 265 AD2d 49 [2000] [policies were issued for delivery in New York where policies

listed, as named insured, a New York corporation]). Thus, we conclude that Ohio law governs this dispute (*Matter of Midland Ins. Co.* at 544; *Matter of Allstate Ins. Co. [Stolarz-New Jersey Mfrs. Ins. Co.]*, 81 NY2d 219, 227 [1993]).

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

ENTERED: MAY 10, 2012

CLERK

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

7397 Erich Fuchs Enterprises, et al., Index 110140/10
Plaintiffs-Appellants,

-against-

American Civil Liberties Union Foundation, Inc., et al.,
Defendants-Respondents.

_____

Sandra D. Parker, New York, for appellants.

Litman & Jacobs, New York (Betty Jane Jacobs of counsel), for respondents.

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Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered March 24, 2011, which granted defendants' motion to dismiss the complaint pursuant to CPLR 3211, unanimously affirmed, without costs.

The court properly granted defendants' motion to dismiss the complaint. The documentary evidence submitted in support of the motion "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff[s'] claim" (*Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383 [2002] [internal quotation marks omitted]). "The court was not required to accept at face value every conclusory, patently unsupportable assertion of fact found in the complaint, but could consider documentary

evidence, proved or conceded to be authentic" (*West 64th St., LLC v Axis U.S. Ins.*, 63 AD3d 471 [2009] [internal quotation marks omitted]; *Robinson v Robinson*, 303 AD2d 234 [2003]).

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 10, 2012

CLERK

Tom, J.P., Andrias, Catterson, Acosta, Manzanet-Daniels, JJ.

7587 The People of the State of New York, Ind. 33017C/08
Respondent,

-against-

Sulaiman Barry,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Sara Gurwitch of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Clara H. Salzberg of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Eileen Koretz, J.H.O.), rendered January 12, 2010, convicting defendant, after a nonjury trial, of attempted aggravated harassment in the second degree, and sentencing him to a conditional discharge, unanimously affirmed.

The verdict 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 court's credibility determinations. The fact that the court acquitted defendant of other charges does not

warrant a different conclusion (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The absence of a translation of certain tape recordings was satisfactorily explained and does not warrant an adverse inference against the People.

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

ENTERED: MAY 10, 2012

CLERK

Tom, J.P., Andrias, Catterson, Acosta, Manzanet-Daniels, JJ.

7588 In re Evelyn Negron, Index 112419/10
Petitioner-Appellant,

-against-

New York City Housing Authority,
Respondent-Respondent.

_____

Anthony F. LeCrichia, New York, for appellant.

Sonya M. Kaloyanides, New York (Seth E. Kramer of counsel), for respondent.

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Determination of respondent New York City Housing Authority, dated May 26, 2010, terminating petitioner's public housing tenancy, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Emily Jane Goodman, J.], entered January 7, 2011), dismissed, without costs.

Substantial evidence supports the findings that petitioner filed false affidavits of income from 2006, by failing to report her ownership of a second home in New Windsor, and that she allowed her son and his family to occupy the subject apartment without permission (*see generally 300 Gramatan Ave. Assoc. v State Div. Of Human Rights*, 45 NY2d 176, 180 [1978]). It is uncontested that the affidavits of income did not include

petitioner's conceded ownership of the separate property, and that petitioner never sought permission for her son and his family to reside in the subject apartment. Moreover, petitioner's son and his wife admitted to an investigator that they were the only adults residing at the apartment. Although the son denied such admission at the hearing, he conceded that he and his wife and child stay at the apartment on days when his child is in school, which is five days per week. Documentary evidence also supported the finding that petitioner did not reside in the apartment, but in the New Windsor home.

The penalty of termination does not shock our sense of fairness (*see generally Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]; *see Matter of Waterside Redevelopment Co. v Department of Hous. Preserv. & Dev. of City of N.Y.*, 270 AD2d 87, 88 [2000], *lv denied* 95 NY2d 765 [2000]).

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

ENTERED: MAY 10, 2012

CLERK

Tom J.P., Andrias, Catterson, Acosta, Manzanet-Daniels, JJ.

7589 Kellee Marsh, Index 105211/10
Plaintiff-Respondent,

-against-

300 West 106th St. Corp., et al.,
Defendants-Appellants.

Schnader Harrison Segal & Lewis LLP, New York (Theodore L. Hecht of counsel), for appellants.

Sokolski & Zekaria, P.C., New York (Robert E. Sokolski of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered on March 3, 2011, which denied defendants' motion seeking dismissal of plaintiff's fourth cause of action, which sought attorneys' fees under Real Property Law § 234, unanimously affirmed, with costs.

Although the lease provision at issue here appears to be reciprocal in nature, its reciprocity is limited. To wit, it provides that "[t]he successful party in a legal action or proceeding between Landlord and Tenant for non-payment of rent or recovery of possession of the Apartment may recover reasonable legal fees and costs from the other party." Since the lease permits the landlord to collect attorneys' fees when suing for breach of the lease's covenants, whether nonpayment of rent or

any other breach couched in a suit for recovery of possession, but does not accord the tenant attorneys' fees if successful against a landlord when suing for breach of the lease's covenants, Real Property Law § 234 is triggered.

The overriding purpose of the legislation is to provide a level playing field between landlords and tenants, "creating a mutual obligation that provides an incentive to resolve disputes quickly and without undue expense" (*Matter of Duell v Condon*, 84 NY2d 773, 780 [1995]). "As a remedial statute, [Real Property Law] § 234 should be accorded its broadest protective meaning consistent with legislative intent" (*245 Realty Assoc. v Sussis*, 243 AD2d 29, 35 [1998]). In light of these guiding principals, artful drafting cannot be permitted to give an illusion of reciprocity, thus evading true equality.

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

ENTERED: MAY 10, 2012

CLERK

Tom, J.P., Andrias, Catterson, Acosta, Manzanet-Daniels, JJ.

7590 Cyrus Davila, etc., et al., Index 350514/08
Plaintiffs-Appellants,

-against-

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

Burns & Harris, New York (Blake G. Goldfarb of counsel), for appellants.

Lester Schwab Katz & Dwyer, LLP, New York (Steven B. Prystowsky of counsel), for respondents.

Judgment, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered April 29, 2011, dismissing the complaint, and bringing up for review an order, same court and Justice, entered February 9, 2011, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants satisfied their initial burden by establishing prima facie that they had received no complaints or other indication that the door at issue was defective and thus, had neither actual nor constructive notice of such defect. The only evidence that the door was defective was the testimony of plaintiff and his brother that the doors were heavy and the fact that they closed with enough force to injure plaintiff. Summary

judgment on the issue of dangerous condition therefore was properly granted to defendant (*Hunter v Riverview Towers*, 5 AD3d 249, 250 [2004] ["that the door was defective, or improperly maintained, cannot be inferred merely from the fact that it could be opened fast enough, or hard enough, to knock plaintiff down. Such inference, absent any other evidence of a defect, is too speculative to impose liability"]).

Further, plaintiff failed to raise an issue of fact as to actual notice. Plaintiff's only supporting testimony was his brother's statement that many years before he had mentioned to an unnamed teacher that the doors were hard for him to open. More importantly, there was no evidence that the doors were in the same condition, as the brother had not used them in years (*see DeCarlo v Village of Dobbs Ferry*, 36 AD3d 749, 750 [2007]).

The evidence of constructive notice was also insufficient. Plaintiff relied on the alleged slamming of the doors. However, he himself testified that the doors closed slowly for the first half of the time they closed, and then were unimpeded for the rest of the way. This would preclude the unusually loud slamming alleged. Further, it would present no notice of a defect, beyond

the fact that the doors were heavy and closed quickly.

Finally, plaintiff may not add a new theory of liability for the first time on appeal (*see Fleming v City of New York*, 89 AD3d 405 [2011]).

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

ENTERED: MAY 10, 2012

CLERK

Tom, J.P., Andrias, Catterson, Acosta, Manzanet-Daniels, JJ.

7592 Melissa Moreira, Index 302020/09
Plaintiff-Respondent,

-against-

Paulino Ramos,
Defendant-Appellant.

Cullen and Dykman, Brooklyn (Allyson D. Johnson Flash of counsel), for appellant.

The Law Office of Judah Z. Cohen, PLLC, Hewlett (Judah Z. Cohen of counsel), for respondent.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered July 20, 2011, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff was injured when she came in contact with defendant's vehicle. Defendant testified that plaintiff, while "messing with a radio," walked into the passenger side of his van as she attempted to cross the street in the middle of the block from between two parked cars. Defendant also stated that he was driving between 10 and 15 miles per hour at the time of impact. Plaintiff had a limited recollection of the accident, but she remembered reaching the corner of the intersection and that she was not listening to music. Viewing the evidence in the light

most favorable to plaintiff, triable issues of fact exist as to whether plaintiff was in an intersection crossing at the time of the accident and whether defendant failed to exercise due care to avoid the accident (*see Wein v Robinson*, 92 AD3d 578 [2012]; *Villaverde v Santiago-Aponte*, 84 AD3d 506 [2011]).

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

ENTERED: MAY 10, 2012

CLERK

Tom, J.P., Andrias, Catterson, Acosta, Manzanet-Daniels, JJ.

7593 In re Darryl Clayton T., III,

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

Adele L.,
Respondent-Appellant,

Catholic Guardian Society and Home Bureau,
Petitioner-Respondent.

Daniel R. Katz, New York, for appellant.

MaGovern & Sclafani, New York (Mary Jane Sclafani of counsel), for respondent.

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

Order of disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about March 7, 2011, which, after a fact-finding determination that respondent mother had permanently neglected the subject child, terminated her parental rights and transferred custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The mother failed to preserve her argument, raised for the first time on appeal, that the agency's petition was jurisdictionally defective for failing to specify the diligent

efforts the agency had made to encourage and strengthen the parental relationship (*see Matter of Toshea C.J.*, 62 AD3d 587 [2009]). Moreover, Family Court properly determined that the agency was excused from demonstrating diligent efforts as such efforts would be detrimental to the child's best interests (*see* Social Services Law § 384-b[7][a]; *Matter of Milan N.*, 45 AD3d 358, 359 [2007], *lv denied* 10 NY3d 703 [2008]). Indeed, an expert in child psychology and early childhood trauma testified that the child had been traumatized by witnessing the mother's alleged killing of the child's father, and that after supervised visits and telephone contact, the child had experienced intense flare-ups of his post-traumatic stress disorder, to the point where visits and calls had to be terminated.

In any event, the agency demonstrated, by clear and convincing evidence, that it had exercised diligent efforts by scheduling supervised visits and implementing a service plan that included therapy and classes in domestic violence, parenting skills, and anger management. Further, the finding of permanent neglect was supported by clear and convincing evidence that, despite the agency's diligent efforts, the mother had failed to obtain housing, complete anger management or therapy, and gain insight into the reasons for her child's placement (*see Matter of*

Alexander B. [Myra R.], 70 AD3d 524, 525 [2010], *lv denied* 14 NY3d 713 [2010]).

A preponderance of the evidence supported the determination that it was in the child's best interest to terminate the mother's parental rights to free the child for adoption by his foster parents, who wished to adopt him and provided loving and appropriate care (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). Given that the child had not seen the mother since their final visit in November 2009, he no longer asked for her, and the medical expert opined that reunification would be harmful to the child, a suspended judgment would not have been appropriate (*see e.g. Matter of Jayden C. [Michelle R.]*, 82 AD3d 674, 675 [2011]).

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

ENTERED: MAY 10, 2012

CLERK

Tom, J.P., Andrias, Catterson, Acosta, Manzanet-Daniels, JJ.

7594 In re Joseph Dunne, Index 114656/10
Petitioner-Respondent,

–against–

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

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

Seelig Law Offices, LLC, New York (Philip H. Seelig of counsel), for respondent.

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered May 6, 2011, granting the petition to the extent of declaring that respondents' failure to apply the plain language of Administrative Code of City of NY § 13-249 to the calculation of petitioner's retirement allowance was arbitrary, capricious and contrary to law, and remanding the matter to respondent Board of Trustees for further action, unanimously reversed, on the law, without costs, the judgment vacated, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed.

This matter involves the interpretation of Administrative Code § 13-249, which provides that a retired Chief of Department is entitled to a retirement allowance, consisting of both an

annuity and a pension, which will effectively make the retirement allowance equal to two-thirds of the retiree's salary. Section 13-249 also provides instruction as to the computation of the "annuity portion" of the retirement allowance.

Here, petitioner, a retired Chief of Department of the New York City Police Department, challenges respondent Board of Trustees' interpretation of Administrative Code § 13-249. He claims that the plain language of the statute entitles him to receive a pension equal to two-thirds of his salary unreduced by any optional modification.

In an article 78 proceeding where the issue is one of pure statutory interpretation, deference to the agency is not required (*see e.g. Matter of KSLM-Columbus Apts., Inc. v New York State Div. of Hous. & Community Renewal*, 5 NY3d 303, 312 [2005]). Instead, courts "should attempt to effectuate the intent of the Legislature" and the best evidence of the Legislature's intent is the plain language of the statute (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998] [internal quotation marks omitted]).

We find that under the plain language of Administrative Code § 13-249, in computing only the "annuity portion" of the retirement allowance, a retiring Chief of Department's

"accumulated deductions," are not subject to "any decrease resulting from withdrawals, loans, optional modifications . . ." (*id.*). The statute, however, is silent with respect to computations of the "pension" portion of the retirement allowance. Thus, a retiring Chief's ability to receive the full two-thirds retirement allowance may be affected by his choice of options under Administrative Code § 13-261. Pursuant to that section, if any retiree exercises an option to designate a beneficiary to receive a portion of his retirement allowance, then his retirement allowance will be reduced accordingly. There is no discernible exception for those retiring from the position of Chief of Department. Accordingly, there is no fair reading of Administrative Code § 13-249 that leads to the conclusion that the "pension" portion of petitioner's retirement allowance would not be subject to a reduction based on the selection of an option in which a beneficiary is designated under Administrative Code § 13-261.

THIS CONSTITUTES THE DECISION AND ORDER
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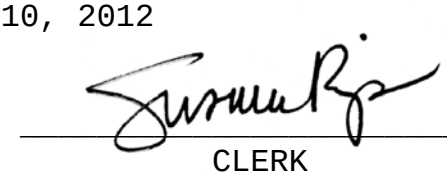
ENTERED: MAY 10, 2012



CLERK

Tom, J.P., Andrias, Catterson, Acosta, Manzanet-Daniels, JJ.

7595 The People of the State of New York, Ind. 5438/09
Respondent,

-against-

Phillippe Mejia,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Andrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Marc Weber 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 (Charles Solomon, J.), rendered on or about June 29, 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 10, 2012

CLERK

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

Tom, J.P., Andrias, Catterson, Acosta, Manzanet-Daniels, JJ.

7596-
7597-
7598-
7599 &
M-1721
M-1725

Elliott International L.P., et al.,
Plaintiffs-Respondents,

-against-

Vitro, S.A.B. de C.V., et al.,
Defendants,

Vimexico, S.A. de C.V., et al.,
Defendants-Appellants.

- - - - - - -

Aurelius Opportunities Fund IV, Ltd.,
Plaintiff-Respondent,

-against-

Vitro, S.A.B. de C.V., et al.,
Defendants,

Vimexico, S.A. de C.V., et al.,
Defendants-Appellants.

Index 652146/10
652223/10

_____

Milbank, Tweed, Hadley & McCloy LLP, New York (Alan J. Stone of counsel), for appellants.

Friedman Kaplan Seiler & Adelman LLP, New York (Edward A. Friedman of counsel), for respondents.

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Partial judgments, Supreme Court, New York County (Bernard J. Fried, J.), entered January 24, 2012 and January 25, 2012, awarding plaintiffs Aurelius Opportunities Fund IV, Ltd., Elliott International L.P. and The Liverpool Limited Partnership sums of money, and bringing up for review an order, same court and Justice, entered on or about December 19, 2011, which granted

plaintiffs' motions for partial summary judgment and referred the computation of the money judgments to a referee, and an order, same court (Louis Crespo Jr., Special Referee), entered on or about January 24, 2012, unanimously affirmed, with costs. Appeals from aforesaid orders unanimously dismissed, without costs, as subsumed in the appeals from the judgments.

Defendants waived the defense of limitation on liability, pursuant to the fraudulent conveyance savings clause provision in a series of indentures guaranteed by them. Defendants failed to raise the defense in their answer to the complaint (*see e.g. Art Masters Assoc. v United Parcel Serv.*, 77 NY2d 200, 204 [1990], *Maklihon Mfg. Corp. v Air-City, Inc.*, 224 AD2d 187 [1996]). In any event, the limitation provision at issue could be triggered only by an allegation of a fraudulent conveyance, and no such allegation was made here.

Defendants-appellants argue that principles of comity require deference to the Mexican District Court, which has been immersed for more than a year in a comprehensive reorganization of defendant Vitro, S.A.B. de C.V., defendants-appellants' parent company. Putting aside the fact that they abandoned this argument at oral argument before the motion court, defendants-appellants failed to show that circumstances exist that warrant

the extension of comity to a foreign court (*see In re Aerovias Nacionales de Colombia S.A. Avianca & Avianca, Inc.*, 345 BR 120, 125-126 [Bankr SD NY 2006]). Defendants executed a broad, unconditional guaranty, signed indentures that included the express agreement that their obligations would be governed by New York law, waived any rights under Mexican laws, and irrevocably submitted themselves to the jurisdiction of New York courts. It would prejudice plaintiffs for a New York court to ignore the express language of their bargained-for rights (*see id.*; *Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.V.*, 41 AD3d 25, 27, 37 [2007], *lv denied* 10 NY3d 705 [2008] [comity not extended to Indonesian court order purporting under Indonesian law to annul indenture containing New York choice of law and forum selection clauses); *Banco Nacional De Mexico, S.A., Integrante Del Grupo Financiero Banamex v Societe Generale*, 34 AD3d 124, 130 [2006] [comity not extended to Mexican decision on letter of credit containing New York choice of law and jurisdiction provisions; "State of New York has a strong interest . . . in protecting the justifiable expectation of the parties who choose New York law as the governing law of a letter of credit"]). Moreover, defendants-appellants' parent company (the debtor in the Mexican action) requested that the Mexican court attempt to stay the

instant action, and the Mexican court declined, finding it unnecessary to involve itself in an action against subsidiaries of the debtor.

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

M-1721 - ***Elliott International L.P., et al. v Vitro, S.A.B. de C.V., et al.***
M-1725 - ***Aurelius Opportunities Fund IV, Ltd. v Vitro, S.A.B. de C.V., et al.***

Motions to strike portions of reply brief denied.

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

ENTERED: MAY 10, 2012

CLERK

Tom, J.P., Andrias, Catterson, Acosta, Manzanet-Daniels, JJ.

7600 The People of the State of New York, Ind. 4803/09
Respondent,

-against-

Andy Cepeda,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered May 5, 2010, as amended May 27, 2010, convicting defendant, after a jury trial, of auto stripping in the second degree, and sentencing him, as a second felony offender, to a term of two to four years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence. The owner of a van testified that he did not give defendant permission to break the van's windows. This satisfied the element of lack of permission. The owner's acquaintance with defendant, his reluctance to assist in the prosecution, and his testimony that he "really didn't care" about the damage were irrelevant to whether, at the time of the crime, defendant had permission to break the windows.

Defendant failed to preserve, and expressly waived, his contention that he was entitled to an instruction on criminal mischief in the fourth degree as a lesser included offense. Defense counsel conceded that criminal mischief in the fourth degree is not a lesser included offense of auto stripping in the second degree. Instead, counsel asked the court to "add" it nonetheless, a remedy that the court properly declined (*see People v Ford*, 62 NY2d 275 [1984]). Thus, defendant now asserts that the court should have granted him a different remedy from the one he requested (*see e.g. People v Lombardo*, 61 NY2d 97, 104 [1984]). We decline to review this claim in the interest of justice.

As an alternative holding, we find that defendant was not entitled to submission of criminal mischief. Counsel's concession was correct. In the abstract, the crime of auto stripping can be committed under circumstances that would not also constitute criminal mischief (*see generally People v Glover*,

57 NY2d 61, 64 [1982]). Furthermore, in this case there was no reasonable view of the evidence that defendant committed the lesser crime but not the greater (*see id.* at 63).

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

ENTERED: MAY 10, 2012

CLERK

Tom, J.P., Andrias, Catterson, Acosta, Manzanet-Daniels, JJ.

7601 In re Clifford Aymes, Index 200026/10
Petitioner-Appellant,

-against-

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

Clifford Aymes, appellant pro se.

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

Order and judgment (one paper), Supreme Court, New York County (Martin Shulman, J.), entered April 28, 2011, which, to the extent appealed from as limited by the briefs, granted respondents' motion to dismiss the petition, and dismissed this proceeding brought pursuant to article 7 of the Real Property Tax Law, unanimously affirmed, without costs.

As a prerequisite to commencing a proceeding under article 7 of the Real Property Tax Law to review an assessment of real property, petitioner was required to "show that a complaint was made in due time to the proper officers to correct such assessment" (RPTL 706[2]). The court correctly held that the "proper officer" in this case was respondent Tax Commission, as section 153(b) of the New York City Charter states that the Tax

Commission "shall be charged with the duty of reviewing and correcting all assessments of real property" (*see also* NY City Charter § 163[f]; *Matter of G.A.D. Holding Co. v City of N.Y. Dept. of Fin., Real Prop. Assessment Bur.*, 192 AD2d 441, 442 [1993]). Given petitioner's failure to timely file a complaint with the Tax Commission, the petition was properly dismissed (*Matter of Sterling Estates v Board of Assessors of County of Nassau*, 66 NY2d 122, 126 [1985]). We note, however, that dismissal of this proceeding for failure to exhaust administrative remedies does not, in and of itself, bar petitioner from seeking corrections relating to the subject property's square footage, income, and expenses, which he properly sought in a Request for Review filed with the Department of Finance.

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

ENTERED: MAY 10, 2012

CLERK

Tom, J.P., Andrias, Catterson, Acosta, Manzanet-Daniels, JJ.

7602 In re Wilbert L.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for presentment agency.

Order, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about June 17, 2011, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of sexual abuse in the first degree, and placed him on enhanced supervision probation for a period of 18 months, unanimously affirmed, without costs.

Enhanced supervision probation, which was recommended by the Probation Department, was 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]). The underlying offense was a violent sexual attack. In addition, appellant had a poor disciplinary and attendance record at school, and admitted using marijuana and alcohol.

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

ENTERED: MAY 10, 2012

CLERK

Tom, J.P., Andrias, Catterson, Acosta, Manzanet-Daniels, JJ.

7604-
7604A-
7604B

Joanne Kase,
Plaintiff-Respondent,

Index 113045/09
591095/10

-against-

The H.E.E. Company, et al.,
Defendants,

Baron T. Ltd., et al.,
Defendants-Appellants.

[And a Third-Party Action]

The Shanker Law Firm, P.C., New York (Steven J. Shanker of counsel), for appellants.

Finkelstein & Partners, LLP, Newburgh (Andrew L. Spitz of counsel), for respondent.

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered August 26, 2011, which, in an action for personal injuries, denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs. Order, same court and Justice, entered on or about October 7, 2011, which denied defendants' motion for leave to file a late motion for summary judgment and for summary judgment dismissing the complaint, unanimously modified, on the law, the facts, and in the exercise of discretion, the motion deemed to seek renewal of the prior order, such renewal granted, and, upon renewal, the

motion for summary judgment granted to the extent of dismissing the complaint as against defendant Simpson Realty Corp. (Simpson), and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly. Appeal from order, same court and Justice, entered January 25, 2012, which denied defendants' motion for reargument, unanimously dismissed, without costs.

Plaintiff was injured when she slipped and fell on a patch of "black ice" on the street abutting the property owned by Simpson and leased to defendant Baron T. Ltd., Carmel Car & Limousine Service, Baron T, Ltd., d/b/a Carmel Car & Limousine Service (collectively Baron). Plaintiff alleges that the ice formed when water flowed from the subject property where Baron washed its cars.

Defendants' initial motion for summary judgment was properly denied. The exhibits in support of the motion, consisting of documentary evidence and deposition transcripts, were not before the motion court (*see* CPLR 2214[c]), and the attorney's affirmation alone was insufficient to warrant granting the motion (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Following the denial of their initial motion, defendants promptly moved for leave to make a late motion for summary

judgment. Defendants demonstrated "good cause" by submitting the affidavit of a paralegal describing how the motion papers had been prepared, served and personally filed with the clerk, but had not been delivered by the clerk to the motion court (*see* CPLR 3212[a]; *Brill v City of New York*, 2 NY3d 648, 652 [2004]. Under the circumstances, since the original motion was timely, and defendants were seeking to have that motion heard with evidence not previously submitted to the court through an apparent procedural error of the court system itself, the motion court should have exercised its discretion to deem the motion to be one seeking renewal of the summary judgment motion pursuant to CPLR 2221(e), and granted renewal (*see 219 E. 7th St. Hous. Dev. Fund Corp. v 324 E. 8th St. Hous. Dev. Fund Corp.*, 40 AD3d 293, 294 [2007]; *see also Tishman Constr. Corp. of N.Y. v City of New York*, 280 AD2d 374, 376-377 [2001]).

Moreover, the record shows that dismissal of the action as against defendant Simpson was warranted. Simpson demonstrated that, as an out-of-possession landlord, it was not liable to plaintiff. While it retained a right of reentry in its lease with Baron, plaintiff did not allege that there was a violation

of a specific structural safety provision (*see Pirraglia v CCC Realty NY Corp.*, 35 AD3d 234, 235 [2006]; *Gomez v 192 E. 151 St. Assoc., L.P.*, 26 AD3d 276, 277 [2006]). However, with respect to Baron, the record presents triable issues of fact as to whether car washing took place on the premises and whether Baron was responsible for the water run-off onto the street adjacent to its premises (*see Ford v Mizio*, 274 AD2d 329 [2000]).

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

ENTERED: MAY 10, 2012

CLERK

Tom, J.P., Andrias, Catterson, Acosta, Manzanet-Daniels, JJ.

7605 In re Alan MacPherson, Index 107988/10
Petitioner-Appellant,

-against-

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

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

Michael A. Cardozo, Corporation Counsel, New York (Inga Van Eysden of counsel), for respondents.

Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered February 15, 2011, denying the petition and dismissing the proceeding brought pursuant to CPLR article 78, which sought to annul respondents' determination denying petitioner's application for accident disability retirement benefits, unanimously affirmed, without costs.

Credible evidence supported the conclusion that petitioner's disability was not caused by a service-related injury (*see Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 145 [1997]; *Matter of Canfora v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II*, 60 NY2d 347, 351 [1983]). The Medical Board noted

that an MRI taken after the line-of-duty incident showed no change in petitioner's condition or new structural lesion as a result of that incident. A letter from petitioner's physician also noted that he suffered from complex seizures for several years before he was injured in the October 2007 incident. Moreover, the Medical Board's opinions referenced the evidence presented by petitioner's doctors, but disagreed with their conclusions. A dispute among medical experts is for the Medical Board to resolve *(see Matter of Borenstein v New York City Employees' Retirement Sys.,* 88 NY2d 756, 761 [1996]).

We have considered petitioner's remaining contentions, including that respondents ignored the difference in his condition before and after the subject incident, and find them unavailing.

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

ENTERED: MAY 10, 2012

CLERK

Tom, J.P., Andrias, Catterson, Acosta, Manzanet-Daniels, JJ.

7606 Ervido B. Mejia, Index 114179/04
Plaintiff-Appellant,

-against-

Roosevelt Island Medical Associates, etc., et al.,
Defendants-Respondents.

Wolin & Wolin, Jericho (Alan E. Wolin of counsel), for appellant.

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

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered March 31, 2011, which granted defendants' motion for summary judgment dismissing plaintiff physician's claims for age discrimination, retaliation, and hostile work environment under the New York State Human Rights Law (State HRL), unanimously affirmed, without costs.

The motion court correctly found that none of the employment actions pointed to by plaintiff entailed an adverse employment action (*see Messinger v Girl Scouts of U.S.A.*, 16 AD3d 314, 314-315 [2005]). Plaintiff contends that defendant Roosevelt Island Medical Associates involuntarily transferred him from a pulmonary unit to a regular ward. It is undisputed, however, that, apart from a change in the nature of his duties, plaintiff "retained

the terms and conditions of [his] employment, and [his] salary remained the same" (*Matter of Block v Gatling*, 84 AD3d 445, 445 [2011], *lv denied* 17 NY3d 709 [2011]). Hence, this transfer was "merely an alteration of [his] responsibilities," and, as such, not an adverse employment action (*Block*, 84 AD3d at 445).

Plaintiff also alleges that he was frequently assigned more difficult cases, often at inconvenient times, such as the end of a work shift, or while he was undertaking continuing medical education. Plaintiff does not identify any of these allegedly more difficult patients, or any time frame during which he received these more difficult assignments. These vague allegations, "devoid of evidentiary facts," lack probative value (*Castro v New York Univ.*, 5 AD3d 135, 136 [2004]). In any event, as plaintiff does not allege that these assignments were accompanied by any reduction in pay or rank, they would also constitute mere alterations of responsibilities, and not adverse employment actions (*see Block*, 84 AD3d at 445).

Plaintiff contends that his vacations were unfairly postponed in 1999, 2000, and 2006. Plaintiff filed the initial complaint in this action in October 2004. As employment discrimination claims under the State HRL are governed by a three-year statute of limitations, plaintiff's allegations

relating to delays of vacations in 1999 and 2000 are not actionable (*see* CPLR 214[2]; *Mascola v City Univ. of N.Y.*, 14 AD3d 409, 409 [2005]). As for the incident in 2006, when plaintiff was forced to delay his vacation for two weeks (with compensation for the additional expenses he incurred), the "particular timing of a vacation is not so disruptive that it crosses the line from 'mere inconvenience' to 'materially adverse' employment action" (*Figueroa v New York City Health & Hosps. Corp.*, 500 F Supp 2d 224, 230 [SD NY 2007]). Indeed, "standing alone," even "constant denials of [his] vacation would not rise to the level of an adverse employment" action (*id.* [internal punctuation omitted]).

Plaintiff complains that, in 2005 and 2006, he was subjected to several mortality and peer reviews, following the deaths of at least two of his patients. Plaintiff notes that, in a biannual evaluation covering the period 2003 to 2005, his supervisor rated plaintiff "unsatisfactory" in several categories, including mortality review and clinical skills. Plaintiff's supervisor recommended, however, that plaintiff keep his rank of Attending Physician, and accompanying salary and privileges. Finally, during a six-week period in January and February, 2006, plaintiff's supervisor directed that plaintiff's performance be

supervised by a physician who was junior to plaintiff in age and experience. After six weeks, however, upon the recommendation of the supervising physician, plaintiff's supervisor lifted the supervision.

As none of these negative evaluations resulted in any reduction in pay or privileges, they do not support plaintiff's claim of discrimination. "[R]eprimands and excessive scrutiny do not constitute adverse employment actions in the absence of other negative results such as a decrease in pay or being placed on probation" (*Hall v New York City Dept. of Transp.*, 701 F Supp 2d 318, 336 [ED NY 2010] [internal punctuation omitted]).

Finally, plaintiff contends that he was discriminated against in 2004, when two younger physicians were promoted to the position of Associate Director of the Department of Medicine. Plaintiff does not allege that he applied for the position, however, contending only that, in March 1999, he orally requested promotion to that position. This allegation does not support his claim, however, as it is too remote in time from the 2004 promotions. Under the circumstances, plaintiff's failure to specifically apply for the position is fatal to his claim of discriminatory failure to promote (*see Petrosino v Bell Atl.*, 385 F3d 210, 226-227 [2d Cir 2004]). Plaintiff's suggestion that he

did not apply for the position in 2004 because it was not advertised is unavailing, as it finds no support in the record other than his own assertion.

Accordingly, plaintiff has failed to make out a prima facie case of age-based employment discrimination, because he has failed to show that he suffered any adverse employment action. As such, defendant is entitled to summary judgment dismissing plaintiff's claim of age-based employment discrimination.

Plaintiff has failed to show that his "workplace was 'permeated with "discriminatory intimidation, ridicule and insult" that [was] 'sufficiently severe or pervasive to alter the terms or conditions of [his] employment,'" so as to make out a claim for hostile work environment (*Ferrer v New York State Div. of Human Rights*, 82 AD3d 431, 431 [2011], *quoting Harris v Forklift Sys., Inc.*, 510 US 17, 21 [1993]). As noted, defendants have offered legitimate business reasons for each of the allegedly adverse actions complained of by plaintiff. Nor has plaintiff alleged that any of defendants' agents ever uttered any offensive or derogatory remark relating to his age. Under these circumstances, we find that plaintiff has failed to show that the actions he complains of "were anything more than isolated, occasional or benign" (*Ferrer*, 82 AD3d at 431).

We likewise find that plaintiff cannot show that he suffered an adverse employment action sufficient to support his claim for retaliation. In any event, even assuming a prima facie case of retaliation, defendants have proffered legitimate, nonpretextual reasons for their actions (*see Bendeck v NYU Hosps. Ctr.*, 77 AD3d 552, 553-54 [2010]; *Pace v Ogden Servs. Corp.*, 257 AD2d 101, 104 [1999]).

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

ENTERED: MAY 10, 2012

CLERK

Tom, J.P., Andrias, Catterson, Acosta, Manzanet-Daniels, JJ.

7607 & M-1592 Angel Carchipulla, Plaintiff-Respondent, Index 302796/08

-against-

6661 Broadway Partners, LLC, Defendant-Appellant,

Gavino Construction Corp., Defendant.

_____

Kral Clerkin Redmond Ryan Perry & Van Etten LLP, Melville (James V. Derenze of counsel), for appellant.

Gorayeb & Associates, P.C., New York (John M. Shaw of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kibbie F. Payne, J.), entered October 20, 2011, which denied defendant's motion for summary judgment dismissing the complaint, and granted plaintiff's cross motion for partial summary judgment on the issue of liability under Labor Law § 240(1), unanimously affirmed, without costs.

Plaintiff established his prima facie entitlement to summary judgment by showing that defendant's failure to provide an adequate safety device enumerated in Labor Law § 240(1) proximately caused him to fall off a ladder, injuring him (*see*

Orellano v 29 E. 37th St. Realty Corp., 292 AD2d 289 [2002]). Plaintiff was not required to present evidence of a specific structural defect in the ladder (*see Lipari v AT Spring, LLC*, 92 AD3d 502, 503-504 [2012]; *Orellano*, 292 AD2d at 290-291). Contrary to defendant's unpreserved contention, there is no triable issue of fact about whether plaintiff's negligence was the sole proximate cause of the accident, given that there is no evidence that he fell because he simply lost his footing (*see Ervin v Consolidated Edison of N.Y.*, 93 AD3d 485 [2012]; *Lipari*, 92 AD3d at 504). Rather, plaintiff's uncontradicted testimony was that the ladder shook and fell while plaintiff was standing on it.

Defendant failed to preserve its arguments that the court should have dismissed plaintiff's common law negligence and Labor Law §§ 200 and 241(6) claims. In any event, defendant's contentions regarding those claims are academic in light of the grant of plaintiff's cross motion for partial summary judgment on

liability (*see Henningham v Highbridge Community Hous. Dev. Fund Corp.*, 91 AD3d 521, 522 [2012]; *Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 12 [2011]).

M-1592 - Carchipulla v Broadway Partners, LLC, et al.

Motion for a stay of trial pending appeal denied.

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

ENTERED: MAY 10, 2012

CLERK

Tom, J.P., Andrias, Catterson, Acosta, Manzanet-Daniels, JJ.

7608N In re State Farm Mutual Automobile Insurance Company,
Petitioner-Appellant,

-against-

Marie L. Hernandez,
Respondent-Respondent,

Qwetu, Inc., et al.,
Additional Respondents,

Lincoln General Insurance Company,
Additional Respondent-Respondent.

Index 260592/09

Richard T. Lau & Associates, Jericho (Joseph G. Gallo of counsel), for appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Howard R. Cohen of counsel), for respondent.

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered August 24, 2011, which, to the extent appealed from, denied the petition seeking a permanent stay of arbitration of an uninsured motorist claim, and dismissed the proceeding brought pursuant to CPLR article 75, unanimously modified, on the law, to reinstate the proceeding, grant petitioner's alternative request for a temporary stay of arbitration pending a determination regarding the insurance coverage of the alleged uninsured motorist, remand the matter to the Supreme Court for proceedings

consistent with this order, and otherwise affirmed, without costs.

Respondent Hernandez, a New York resident, was involved in an accident in New Jersey with a Freightliner tractor trailer driven by additional respondent Byron. Hernandez filed a demand with the American Arbitration Association against petitioner State Farm Mutual Automobile Insurance Company, her insurer, seeking to arbitrate her uninsured motorist claim. State Farm reported the claim to additional respondent Lincoln General Insurance Company, which had issued a policy to the Association of Independent Drivers of America. Byron is a certificate holder of the policy. Lincoln General disclaimed coverage on the ground that Byron was engaged in a business pursuit at the time of the accident. It invoked an exclusion in its "non-trucking" policy, which excluded from coverage an insured vehicle that was being used for a business purpose.

State Farm, relying on *Royal Indem. Co. v Providence Washington Ins. Co.* (92 NY2d 653 [1998]), argues that the exclusion is void as against public policy, as it violates New York law provisions requiring owners or operators of vehicles used or operated in this state to be financially liable for injuries or damages caused by an accident arising out of use of

the vehicle (*see* Vehicle and Traffic Law § 388[1]; Insurance Law § 3420[e]). Lincoln General counters with an argument raised for the first time on appeal, that New York law does not apply in interpreting the policy. Lincoln General contends the accident occurred in New Jersey, Lincoln General is located in Pennsylvania, the Association of Independent Drivers of America is located in Florida, the owner of the truck is located in Texas, Byron was hauling a trailer owned by a Texas corporation, and Byron resides in Texas.

Although Lincoln General asserts on appeal that the truck is not principally garaged or used in New York, there is no evidence in the record to support that claim. Moreover, Lincoln General has not indicated where the policy was issued or delivered or where the truck was principally operated or garaged. As such, the record is insufficient to determine whether New York law is inapplicable. Accordingly, we remand the matter to Supreme Court for a determination of Byron's insurance status (*see Matter of Aetna Cas. & Sur. Co. [Bruton]*, 45 NY2d 871 [1978], *revg on the dissenting opinion at* 58 AD2d 551, 553-554 [1977]; *Matter of American Intl. Adj. Co. [Walker]*, 111 AD2d 684 [1985]). In addition to issues it deems necessary to make such a determination, the court is to determine whether New York law

applies in interpreting Lincoln General's policy. If New York law governs, then Lincoln General's policy is to be interpreted in accordance with *Royal Indem. Co. v Providence Washington Ins. Co.* (92 NY2d 653 [1998], *supra*). If the court determines that the laws of a state other than New York apply, then it must also be determined whether the trucking exclusion bars coverage to Byron under that state's law.

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

ENTERED: MAY 10, 2012

CLERK

Friedman, J.P., Sweeny, DeGrasse, Abdus-Salaam, Román, JJ.

7609 The People of the State of New York, Case 99016/04
Respondent,

-against-

Myron Mungin,
Defendant-Appellant.

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

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

Order, Supreme Court, Bronx County (Megan Tallmer, J.), entered on or about June 24, 2009, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6–C), unanimously affirmed, without costs.

The court properly assessed 10 points under the risk factor for forcible compulsion. Even if the initial restraint of the victims was accomplished by deception, the subsequent circumstances of the crime satisfied the definition of forcible compulsion (*see* Penal Law 130.00[8][b]).

The court properly exercised its discretion in denying defendant's application for a downward departure (*see People v Mingo*, 12 NY3d 563, 568 n 2 [2009]).

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

ENTERED: MAY 10, 2012

CLERK

Friedman, J.P., Sweeny, DeGrasse, Abdus-Salaam, Román, JJ.

7610 Franca Ferrari, Index 117115/09
Plaintiff-Respondent,

-against-

Iona College, et al.,
Defendants-Appellants.

Tarter Krinsky & Drogin LLP, New York (Anthony D. Dougherty of counsel), for appellants.

Darrell N. Bridgers, New York, for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered April 4, 2011, which, to the extent appealed from as limited by the briefs, denied defendants' motion to dismiss the complaint for failure to state a claim and based upon documentary evidence, unanimously reversed, on the law, with costs, and defendants' motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiff's breach of contract claim should have been dismissed, as the documentary evidence conclusively establishes that plaintiff's termination from her employment as an assistant professor at defendant Iona College did not breach her contract with Iona or the provisions of Iona's Faculty Handbook, which were incorporated by reference into the contract (*see* CPLR

3211[a][1]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]). Indeed, the Faculty Handbook and the cover letter that accompanied the contract make clear that the "Assistant Professor" position was a probationary, tenure-track position. Further, section 5.1.2 of the Handbook plainly states that "non-tenured full-time faculty" are "ordinarily terminated by non-renewal of the contract in force," which is consistent with the contract's express provisions that it was entered into for a single academic year and could be terminated by written notice, either at the end of its term on June 30, 2009, or prior to December 15, 2008, which occurred here.

Contrary to plaintiff's contention, the phrase "appointment with tenure" in sections 5.3 and 5.4 of the Handbook does not encompass "tenure-track appointments." Rather, the plain meaning of "with tenure" encompasses only tenured faculty. Accordingly, the added protections for tenured faculty set forth in the Handbook do not apply to plaintiff. Additionally, the contract itself expressly provides for its own termination by written notice in the manner followed here by defendants, consistent with section 5.1.2 of the Handbook. To construe the Handbook phrase "appointment with tenure" as including tenure-track assistant professors would render the contract's termination provisions

meaningless — a result that should be avoided (*see Acme Supply Co., Ltd. v City of New York*, 39 AD3d 331, 332 [2007], *lv denied* 12 NY3d 701 [2009]; *HSBC Bank USA v National Equity Corp.*, 279 AD2d 251, 253 [2001]).

Plaintiff's fraud claim, based on an alleged oral agreement to extend plaintiff's employment for an additional year in the event Iona decided not to renew her appointment, should also have been dismissed. The alleged oral agreement conflicts with the terms of the parties' contract, which was signed after the alleged oral promise and, together with the Faculty Handbook, is a complete written instrument. Accordingly, the alleged oral agreement is unenforceable (*see Braten v Bankers Trust Co.*, 60 NY2d 155, 162 [1983]).

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

ENTERED: MAY 10, 2012

CLERK

Friedman, J.P., Sweeny, DeGrasse, Abdus-Salaam, Román, JJ.

7611 Demet Sabanci Cetindogan, Index 112418/09
Plaintiff-Respondent,

-against-

Harvey B. Schuyler,
Defendant-Appellant.

Starr Associates LLP, New York (Evan R. Schieber of counsel), for appellant.

Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel), for respondent.

Order, Supreme Court, New York County (Louis B. York, J.), entered April 11, 2011, which granted plaintiff's motion for summary judgment and denied defendant's cross motion for summary judgment, or, in the alternative, to compel disclosure, unanimously modified, on the law, plaintiff's motion denied, defendant's cross motion granted to the extent of directing plaintiff to respond to defendant's demand for production of documents and notice of plaintiff's deposition, and otherwise affirmed, without costs.

Plaintiff met her prima facie burden of establishing that she was entitled to the return of the contract deposit by submitting evidence, in admissible form, that she satisfied the conditions and fully performed her duties under the parties'

contract (*see Jangana v Cogan*, 76 AD3d 907, 908 [2010]; *Sapir v Hovas*, 71 AD3d 566 [2010]; *Rosenthal v Oakes*, 41 AD3d 305, 306 [2007]).

However, defendant raised an issue of fact in opposition. In support of his motion for summary judgment, defendant submitted the contract of sale, in which plaintiff represented that she and her husband would be the apartment's only occupants. Moreover, by executing the contract, at paragraph 5 plaintiff represented that she had examined and was satisfied with, or accepted and assumed the risk of not having examined, the cooperative's bylaws and house rules, which limit the occupancy of the apartment and prohibit pets. After the parties executed the contract, plaintiff sent an email to the broker, stating that her children "must stay in the apartment as long as they want without" her and her husband, and that this was "not negotiable." Defendant also submitted an affidavit stating that a member of the board, who was present at plaintiff's interview, told defendant that plaintiff stated her intent not to abide by the cooperative's rules.

Affording defendant, as the opponent of plaintiff's summary judgment motion, the benefit of all favorable inferences, we conclude that he has raised an issue of fact as to whether

plaintiff acted in bad faith by sabotaging the board interview (*see Alter v Levine*, 57 AD3d 923, 924 [2008]). Defendant is entitled to discovery to explore these material factual issues (*see* CPLR 3212[f]).

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

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

ENTERED: MAY 10, 2012

CLERK

Friedman, J.P., Sweeny, DeGrasse, Abdus-Salaam, Román, JJ.

7612 In re Maria A.M.,
Petitioner-Respondent,

-against-

Dextor N.,
Respondent-Appellant.

Michael S. Bromberg, Sag Harbor, for appellant.

Carol Kahn, New York, attorney for the child.

Order, Family Court, New York County (Elizabeth Barnett, Referee), entered on or about July 29, 2010, which, after a hearing, dismissed respondent father's petition alleging that petitioner mother violated a prior custody and visitation order, granted petitioner's cross petition to modify the order of custody and awarded petitioner sole legal and physical custody of the subject child while awarding respondent liberal visitation, unanimously affirmed, without costs.

The award of custody to the child's mother has a sound and substantial basis in the record (*see Matter of James Joseph M. v Rosana R.*, 32 AD3d 725, 726 [2006], *lv denied* 7 NY3d 717 [2007])). Respondent acknowledged that the child does not wish to live with him, there was testimony that, on at least one occasion, the police were called and arrested the child after she

had an altercation with respondent, and the child, who will soon turn 18, has requested to live with her mother and younger half sibling. Given this evidence, petitioner established that there has been a change in circumstances since the April 29, 2009 custody and visitation order and stipulation were entered, and that the change in custody from respondent to petitioner is in the child's best interests (*see Matter of O'Connor v Dyer*, 18 AD3d 757, 757-758 [2005]).

Respondent's hearing counsel called petitioner as a witness but did not request that she be declared a hostile witness and made no showing that she was either lying or unwilling to answer his questions. Thus, the referee properly sustained the objection to the leading questions counsel asked petitioner (*see Matter of Amanda L.*, 302 AD2d 1004 [2003]).

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

ENTERED: MAY 10, 2012

CLERK

Friedman, J.P., Sweeny, DeGrasse, Abdus-Salaam, Román, JJ.

7613 In re Stanley Moore, Index 100479/10
Petitioner-Appellant,

-against-

Andrea W. Evans, etc.,
Respondent-Respondent.

Stanley Moore, appellant pro se.

Eric T. Schneiderman, Attorney General, New York (David Lawrence III of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Carol R. Edmead, J.), entered August 2, 2010, which, to the extent appealed from, denied the petition seeking, among other things, to annul respondent's implied denial of petitioner's September 14, 2009 request to correct the consequential effects of a September 1983 parole revocation decision, and dismissed this proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner's challenge is time-barred because it was not brought within four months of receiving notice in 1983 of the Parole Board's determination to revoke his parole (CPLR 217[1]; *Matter of Carter v State of N.Y., Exec. Dept., Div. of Parole*, 95 NY2d 267, 270-272 [2000]). Even if, as petitioner

asserts, the Division of Parole had a continuous ministerial duty to expunge his 1983 parole revocation, this proceeding would still be untimely as it was not brought within four months of the Division of Parole's letter dated November 21, 2008 denying petitioner's request to vacate the 1983 parole revocation determination (CPLR 217[1]; *Matter of Bottom v Goord*, 96 NY2d 870, 872 [2001]).

This proceeding is also barred by the doctrines of res judicata and collateral estoppel, as petitioner has challenged the 1983 parole revocation in prior proceedings, including a CPLR article 78 proceeding in 2003 at which the statute of limitations issue was fully litigated and decided against petitioner (*see Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485 [1979]; *Matter of LaSonde v Seabrook*, 89 AD3d 132, 140 [2011], *lv denied* 18 NY3d 911 [2012]; *Barcov Holding Corp. v Bexin Realty Corp.*, 16 AD3d 282 [2005]).

In any event, petitioner's due process claim lacks merit. Petitioner was given notice of the charges against him at the time of the parole violation proceeding; therefore, he had an opportunity to be heard and to show, if possible, that he did not

violate the parole condition or that mitigating circumstances suggested that the violation did not warrant revocation (*see generally Morrissey v Brewer*, 408 US 471, 488 [1972]).

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

ENTERED: MAY 10, 2012

CLERK

Friedman, J.P., Sweeny, Freedman, Román, JJ.

7614 Caridad Cuevas, et al., Index 107857/06
Plaintiffs-Respondents,

-against-

St. Luke’s Roosevelt Hospital Center,
Defendant-Appellant.

_____

Edward J. Guardaro, Jr., Valhalla, for appellant.

Friedman Friedman Chiaravalloti & Giannini, New York (Mariangela Chiaravalloti of counsel), for respondents.

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Order, Supreme Court, New York County (Carol E. Huff, J.), entered October 12, 2010, which, to the extent appealed from as limited by the briefs, denied defendant hospital’s motion for judgment notwithstanding the verdict or a new trial on all issues, and granted the alternative relief of a new trial on damages only to the extent of ordering a new trial on damages for future pain and suffering and future loss of services unless the parties stipulated to reduce the award for future pain and suffering from $1 million to $500,000 over a period of 55 years, and for future loss of services from $200,000 to $100,000, unanimously affirmed, without costs.

The jury’s verdict was supported by sufficient evidence and

was not against the weight of the evidence (*see Cohen v Hallmark Cards*, 45 NY2d 493, 498-499 [1978]; *Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]). Indeed, there was sufficient evidence that defendant's anesthesiologist overstretched plaintiff's jaw during intubation, resulting in TMJ dysfunction. That the parties' experts disagreed on causation simply presented an issue for the jury, and the jury's resolution of the issue is entitled to deference (*see Feldman v Levine*, 90 AD3d 477, 478 [2011], *lv granted* 2012 NY Slip Op 68584 [2012]; *Warren v New York Presbyt. Hosp.*, 88 AD3d 591, 592 [2011]).

The trial court properly refused to charge the jury with a missing witness charge concerning one of plaintiff's doctors. The physician's notes and records had been entered into evidence by stipulation; thus, his testimony would have been cumulative (*see Jellema v 66 W. 84th St. Owners Corp.*, 248 AD2d 117 [1998]). Plaintiff's counsel's questioning of defendant's expert with respect to medical literature was not unduly prejudicial.

The reduced awards for future pain and suffering and future loss of services do not materially deviate from what is reasonable compensation (*see* CPLR 5501[c]). Plaintiff, 27 years old at the time of trial, could not open her mouth more than 15 millimeters without pain, eat without pain or cutting food into

very small pieces, or kiss her husband normally, and she had to wear a mouth guard at all times, which caused her to lisp (*compare Beauvais v City of New York*, 21 Misc 3d 127[A], 2008 NY Slip Op 51920[U], *2 [2008]; *Thomas-Vasciannie v State of New York*, 14 Misc 3d 1228[A], 2006 NY Slip Op 52563[U], *13 [2006]).

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

ENTERED: MAY 10, 2012

CLERK

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

7615-
7616 George Bundy Smith, Sr., etc., Index 111455/10
Plaintiff-Appellant,

-against-

The United Church of Christ, et al.,
Defendants-Respondents.

_____

George Bundy Smith, Sr., appellant pro se.

Donald C. Clark, Jr., of the State of Illinois Bar, admitted pro hac vice, Bannockburn, IL, for The United Church of Christ, Dr. Geoffrey Black, Rev. Rita Root, Rev. Freeman Palmer, Rev. Michael Ward Caine, Rev. Noel D. Vanek, Rev. Dr. Ronald Wells and Gladys A. Philibert, respondents.

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Patrick J. Lawless of counsel), for Rev. Nigel Pearce, Cynthia James Rodriguez, Alethia West and Ivy Simons, respondents.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered February 25, 2011, which denied plaintiff's request for a preliminary injunction, dismissed all causes of action against the United Church of Christ defendants, and dismissed all causes of action except the thirteenth, fourteenth, and fifteenth against defendants Rev. Nigel Pearce, Cynthia James Rodriguez, Alethia West, and Ivy Simons brought in plaintiff's individual capacity, unanimously affirmed, without costs. Appeals from oral rulings, same court and Justice, rendered February 24, 2011,

August 10, 2011, and August 29, 2011, and a decision, same court and Justice, rendered January 19, 2011, unanimously dismissed, without costs.

The court properly denied pro se plaintiff's request for a preliminary injunction, and correctly dismissed all causes of action against the United Church of Christ defendants, and all causes of action except the thirteenth, fourteenth, and fifteenth against defendants Rev. Nigel Pearce, Cynthia James Rodriguez, Alethia West, and Ivy Simons, which it properly ruled may be maintained only in plaintiff's individual capacity.

Plaintiff's purported appeals from various oral rulings of the court must be dismissed. No appeal lies from the court's rulings in open court, as the transcripts were not "so-ordered" by the court (*see Sanchez de Hernandez v Bank of Nova Scotia*, 76 AD3d 929, 931 [2010], *lv denied* 16 NY3d 705 [2011]), and a number of findings on the record were superseded by a written order from

which plaintiff did not appeal. Similarly, "no appeal lies from a decision directing 'settle order'" (*Hutchinson v City of New York*, 18 AD3d 370 [2005]).

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

ENTERED: MAY 10, 2012

CLERK

Friedman, J.P., Sweeny, DeGrasse, Abdus-Salaam, Román, JJ.

7617 In re Administration for Children's Services,
Petitioner-Respondent,

-against-

Debra W.,
Respondent-Appellant.

_____

The Bronx Defenders, Bronx (Reid A. Aronson of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Julie Steiner of counsel), for respondent.

Keith Brown, New York, attorney for the children.

_____

Order, Family Court, Bronx County (Carol R. Sherman, J.), entered on or about August 13, 2010, which adjudicated respondent mother in civil contempt of court based on her violation of multiple court orders directing her to produce her children in court or at an office of petitioner agency or to provide the location of the children or the names and contact information for any and all persons who could give information as to their location, and ordered that she be incarcerated until the children were produced in court or at an agency office, or for six months, whichever was shorter, unanimously affirmed, without costs.

Contrary to respondent's contention, the application for civil contempt contained the requisite notice and warning that

failure to appear could result in immediate arrest and imprisonment (*see* Judiciary Law § 756). In any event, respondent waived any objection to the notice requirements by appearing and defending against the contempt application on the merits (*see Franklin v Leff*, 192 AD2d 328 [1993], *lv dismissed* 82 NY2d 749 [1993]; *see also Lapkin v Lapkin*, 224 AD2d 199, 200 [1996]).

The agency showed with reasonable certainty that respondent disobeyed lawful orders that clearly expressed an unequivocal mandate, thereby prejudicing a right or remedy of the agency (*see Matter of McCormick v Axelrod*, 59 NY2d 574, 583 [1983]; *McCain v Dinkins*, 84 NY2d 216, 227 [1994]; *see also* Judiciary Law § 753[A][3]). The July 26, 2010 arrest warrant, and the court's oral orders of August 2, 3, 4, 5, 6, 9, and 10, 2010 were lawful, and clearly and unequivocally mandated that respondent produce her children in court or at an agency field office or provide detailed information to assist in locating the children.

Respondent had actual knowledge of the arrest warrant (*see Matter of McCormick*, 59 NY2d at 583). One of the arresting officers showed it to her and explained to her why the officers were required to take her children. She also had knowledge of the court's seven oral orders, since they were issued in open

court in her presence (*see Matter of Lagano v Soule*, 86 AD3d 665, 667 [2011]).

The record shows that respondent disobeyed the July 26, 2010 arrest warrant on July 28, 2010, by preventing the police from gaining access to an apartment, which prevented them from fully executing the warrant. She also disobeyed the court's oral orders by repeatedly failing to produce the children or provide the names and addresses and other contact information for family and friends who might have had knowledge of the children's whereabouts. Respondent's disobedience prejudiced the agency in its ability to proceed with this child neglect proceeding, in interviewing the children, and in ensuring their general safety.

We reject respondent's claim that the contempt order was "purely punitive" in violation of Judiciary Law § 753(A)(3) (*see Matter of Department of Envtl. Protection of City of N.Y. v Department of Envtl. Conservation of State of N.Y.*, 70 NY2d 233, 239 [1987]; *State of New York v Unique Ideas*, 44 NY2d 345, 349 [1978]). The court's adjudication of civil contempt was based on

respondent's violation of an arrest warrant and numerous court orders, and respondent was released immediately after the children were produced in court.

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

ENTERED: MAY 10, 2012

CLERK

Friedman, J.P., Sweeny, Degrasse, Abdus-Salaam, Román, JJ.

7618 The People of the State of New York, Ind. 3667/09
Respondent,

-against-

Robert Stewart,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Andrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista 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 (Richard D. Carruthers, J.), rendered on or about June 16, 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 10, 2012

CLERK

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

Friedman, J.P., Sweeny, DeGrasse, Abdus-Salaam, Román, JJ.

7619-
7620 Sule Cabukyuksel, et al., Index 108356/08
Plaintiffs,

-against-

Ascot Properties, LLC,
Defendant.
- - - - -
Laskin Law PC,
Nonparty Petitioner-Respondent,

-against-

Marc E. Verzani,
Nonparty Respondent-Appellant.

_____

Glenn Backer, New York, for appellant.

Laskin Law PC, Mineola (Michael B. Grossman of counsel), for respondent.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered August 25, 2011, which granted nonparty Laskin Law P.C.'s petition to enforce an attorney's lien in the amount of $233,333.33, or one third of the settlement amount obtained by nonparty respondent Marc E. Verzani, and denied Verzani's cross motion to dismiss the petition, unanimously affirmed, with costs. Order, same court and Justice, entered December 13, 2011, which, denied Verzani's motion for renewal, and granted reargument, and upon reargument, adhered to the original determination,

unanimously affirmed, without costs.

Plaintiff Eleni Papaioannou signed a retainer agreement with Laskin that reserved to Laskin her personal injury claims resulting from the collapse of a crane onto her apartment building while she was in the apartment. Thereafter, Laskin filed a notice of claim with the City of New York and did extensive work on the matter.

Soon after Eleni executed the retainer agreement with Laskin, her husband, plaintiff Demetrios Papaioannou, without her or Laskin's knowledge, engaged Verzani to handle claims against the Papaioannous' landlord, who had refused to restore the building and was attempting to evict the tenants. Verzani acknowledged in his engagement letter that his case would not involve Eleni's personal injury claims and that Eleni was represented by other counsel with regard to those claims. Nevertheless, on the eve of his settlement with the landlord, Verzani amended the complaint he filed to include claims for negligent and intentional emotional distress, which included Eleni's personal injury claims.

Verzani argues that Laskin is not entitled to an attorney's lien against the settlement funds because it was not the attorney

of record on the matter commenced by him. We reject this argument.

It is true that Judiciary Law § 475 provides that a lien is had by "the attorney who appears for a party" (*see Rothman v Benedict P. Morelli & Assoc., P.C.*, 43 AD3d 769, 770 [2007]). However, as a remedial statute, it must be construed liberally to further the Legislature's intent, "which was to furnish security to attorneys by giving them a lien upon the subject of the action" (*Tunick v Shaw*, 45 AD3d 145, 148 [2007], *lv dismissed* 10 NY3d 930 [2008] [internal quotation marks omitted]). "The lien is imposed on the client's cause of action, in whatever form it may take during the course of litigation, and follows the proceeds, wherever they may be found" (*id.*).

Verzani admitted, in his counsel's affirmation on the motion to renew and reargue, that a portion of the Papaioannou settlement represents the proceeds of Eleni's personal injury

claims. Thus, Laskin is entitled to a charging lien in that amount.

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

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

ENTERED: MAY 10, 2012

CLERK

Friedman, J.P., Sweeny, DeGrasse, Abdus-Salaam, Román, JJ.

7621 Karen Lavy, Index 305093/09
Plaintiff-Respondent,

-against-

Mohammadulla Zaman,
Defendant-Appellant,

Medhi Hossain, et al.,
Defendants.

_____

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

Zalman Schnurman & Miner P.C., New York (Marc H. Miner of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered on or about October 19, 2011, which, inter alia, denied Mohammadulla Zaman's (defendant) motion for summary judgment dismissing the complaint alleging a "fracture" under Insurance Law § 5102(d), unanimously affirmed, without costs.

Plaintiff allegedly sustained a nasal fracture when a cab in which she was a passenger rear-ended another vehicle, causing her face to hit the partition between the front and rear seats of the cab.

Defendant failed to meet his prima facie burden of

establishing that plaintiff did not sustain a nasal fracture as a result of the accident. In any event defendant's expert acknowledged that his review of the emergency room records shows that the hospital had clinically diagnosed plaintiff with a nasal fracture, thereby raising issues of fact (*see Suazo v Brown*, 88 AD3d 602 [2011]; *Elias v Mahlah*, 58 AD3d 434 [2009]).

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

ENTERED: MAY 10, 2012

CLERK

Friedman, J.P., Sweeny, DeGrasse, Abdus-Salaam, Román, JJ.

7622 Cynthia Brown, Index 100215/09
Plaintiff-Appellant,

-against-

New York Marriot Marquis Hotel, et al.,
Defendants-Respondents.

_____

Diamond & Diamond LLC, New York (Stuart Diamond of counsel), for appellant.

Chesney & Nicholas, LLP, Baldwin (Gregory E. Brower of counsel), for respondents.

_____

Order, Supreme Court, New York County (Louis B. York, J.), entered April 19, 2011, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established their entitlement to judgment as a matter of law in this action where plaintiff alleges that she was injured when she slipped and fell on freshly mopped stairs in defendants' hotel. Defendants submitted, inter alia, the testimony of their employee who stated that after he completed mopping the subject stairs, he placed a yellow warning sign on the landing, and left the door to that floor open. Moreover, plaintiff acknowledged that prior to her fall, she observed the

open door, yellow cone and liquid, which led her to suspect that the steps were wet, but she proceeded to descend them in any event (*see Ramsay v Mt. Vernon Bd. of Educ.*, 32 AD3d 1007 [2006]).

In opposition, plaintiff failed to raise a triable issue of fact as to whether defendants failed to maintain the premises in a reasonably safe condition (*see generally Basso v Miller*, 40 NY2d 233, 241 [1976]).

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

ENTERED: MAY 10, 2012

CLERK

Friedman, J.P., Sweeny, DeGrasse, Abdus-Salaam, Román, JJ.

7623 Tradex Global Master Fund SPC LTD, etc., et al.,
Plaintiffs-Respondents,

-against-

Titan Capital Group III, LP, et al.,
Defendants-Appellants,

Marc Abrams, etc.,
Defendant.

Index 652127/10

Seward & Kissel LLP, New York (Mark J. Hyland of counsel), for appellants.

Drohan Lee LLP, New York (Vivian Rivera Drohan of counsel), for respondents.

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered August 11, 2011, which, to the extent appealed from, denied the motion of defendants Titan Capital Group III, LP, Titan Capital Group Global Return LLC (incorrectly sued as Titan Group Capital Global Return LLC), Titan Capital Group LLC, and Russell Abrams to dismiss plaintiffs' fraud claim pursuant to CPLR 3211(a)(1) and (7), unanimously reversed, on the law, with costs, and the motion granted.

Contrary to defendants' contention, not all of the misrepresentations alleged in the complaint are puffery, opinion, and expectation, and fraud is alleged with the particularity

required by CPLR 3016(b). Nevertheless, the fraud claim should have been dismissed.

First, insofar as plaintiffs claim they were fraudulently induced into making additional investments, Tradex Global Master Fund SPC LTD signed Additional Subscription Forms for Shares, each of which stated, "The undersigned restates all of the declarations, acknowledgments, warranties, agreements, and understandings made in the undersigned's original Application Form for Shares as if they were made on the date hereof . . ." In turn, the original Application Form for Shares states that "this Application is based solely on the [Private Placement] Memorandum." Thus, any reliance by plaintiffs on Abrams' alleged oral statements was "unjustifiable as a matter of law" (*see Matter of Dean Witter Managed Futures Ltd. Partnership Litig.*, 282 AD2d 271 [2001]).

Second, insofar as plaintiffs claim that Abrams' misrepresentations caused them to hold onto their shares instead of redeeming them as of June 30, 2010, this holder claim, which is part of plaintiffs' fraud claim, is governed by Connecticut law since plaintiffs' principal place of business is in that

state (*see BT Triple Crown Merger Co., Inc. v Citigroup Global Mkts., Inc.*, 19 Misc 3d 1129[A], 2008 NY Slip Op 50941[U], *6 [2008]; *see also Ackerman v Price Waterhouse*, 252 AD2d 179, 192-193 [1998]). Connecticut law does not recognize holder claims (*see e.g. Calibre Fund, LLC v BDO Seidman, LLP*, 2010 WL 4517099, *5, 2010 Conn Super LEXIS 2619, *13-15). Moreover, even under New York law, such a "holder claim" would be precluded under the out-of-pocket rule by which the true measure of damages for fraud is indemnity for the actual pecuniary loss sustained as a direct result of the wrong (*Starr Found. v American Intl. Group, Inc.* 76 AD3d 25 [lst Dept. 2010]). Under the rule there can be no recovery of profits which would have been realized in the absence of fraud (*id.*).

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

ENTERED: MAY 10, 2012

CLERK

Friedman J.P., Sweeny, DeGrasse, Abdus-Salaam, Román, JJ.

7624 The People of the State of New York, Ind. 3970/08
Respondent,

-against-

Carlos Figueroa,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Robert R. Sandusky, III of counsel), for respondent.

Judgment, Supreme Court, Bronx County (William A. Kelly, J.), rendered May 25, 2010, as amended June 28, 2010, convicting defendant, after a jury trial, of criminal sale of a controlled substance in or near school grounds, 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 seven years, unanimously affirmed.

The verdict 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 credibility determinations, including its resolution of any alleged inconsistencies in

testimony.

There was no violation of defendant's right to be present at all material stages of the trial. The court spoke to the jury foreperson in the presence of counsel, but in defendant's absence, about matters concerning the functions of the foreperson. It is evident from the totality of the colloquy that it only involved ministerial matters (*see People v Ochoa*, 14 NY3d 180, 187-188 [2010]), and there is no indication that the foreperson wanted to raise any substantive concerns.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 10, 2012

CLERK

Friedman, J.P., Sweeny, DeGrasse, Abdus-Salaam, Román, JJ.

7625 Teodoro F. Marquez, Index 104744/09
Plaintiff-Respondent,

-against-

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

_____

Conway, Farrell, Curtin & Kelly P.C., New York (Jonathan T. Uejio of counsel), for appellant.

Gorayeb & Associates, P.C., New York (John M. Shaw of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered December 12, 2011, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for summary judgment on the issue of liability under Labor Law § 240(1), and denied defendant's cross motion for summary judgment dismissing the § 240(1) claim, unanimously affirmed, without costs.

Plaintiff established his entitlement to judgment as a matter of law. Plaintiff submitted, inter alia, his deposition testimony and his affidavit showing that he was working on an A-frame ladder plastering a ceiling when the ladder became unstable

and tipped, causing him to fall to the floor (*see Siegel v RRG Fort Greene, Inc.*, 68 AD3d 675 [2009]; *Orellano v 29 E. 37th Realty Corp.*, 292 AD2d 289 [2002]). In opposition, defendant failed to raise a triable issue of fact.

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

ENTERED: MAY 10, 2012

CLERK

Friedman, J.P., Sweeny, DeGrasse, Abdus-Salaam, Román, JJ.

7626 In re Hector Vargas, Index 103126/11
Petitioner-Appellant,

-against-

State of New York, et al.,
Respondents-Respondents.

Hector Vargas, appellant pro se.

Eric T. Schneiderman, Attorney General, New York (Ann P. Zybert of counsel), for respondents.

Proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Robert E. Torres, J.], entered September 26, 2011), seeking to annul a determination of respondent New York State Department of Motor Vehicles (DMV), dated January 28, 2011, which, after a hearing, affirmed petitioner's traffic conviction and imposed a fine of $130, unanimously dismissed, without costs.

Upon exercising our power to review Supreme Court's order denying respondents' cross motion to dismiss this proceeding on procedural grounds (*see* CPLR 7804[g]; *Matter of Wittie v State of N.Y. Off. of Children & Family Servs.*, 55 AD3d 842, 843 [2008]; *Matter of Desmone v Blum*, 99 AD2d 170, 177 [1984]), we find that respondent's cross motion should have been granted. It is

undisputed that petitioner never served the notice of petition and petition upon respondent DMV's chief executive officer or a person designated by the chief executive officer to receive service (CPLR 307[2]). DMV's receipt of the notice of petition and petition from the Attorney General's office did not provide personal jurisdiction over the DMV (*see Matter of Lowney v New York State Div. of Human Rights*, 68 AD3d 551, 551 [2009]). Further, respondent State of New York is not a proper party to this proceeding since it is not a "body or officer" within the meaning of CPLR 7802(a) (*see Kirk v Department of Motor Vehs.*, 22 AD3d 240, 241 [2005]). Were we to address the merits of the petition, we would find that substantial evidence supports the DMV's determination.

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

ENTERED: MAY 10, 2012

CLERK

Friedman, J.P., Sweeny, DeGrasse, Abdus-Salaam, Román, JJ.

7627 Jay Susman, Index 650654/11
Plaintiff-Appellant,

-against-

Commerzbank Capital Markets Corporation, et al.,
Defendants-Respondents.

_____

The Abramson Law Group, PLLC, New York (Robert Frederic Martin of counsel), for appellant.

Epstein Becker & Green, P.C., New York (Peter L. Altieri of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered December 5, 2011, which granted defendants' motion to dismiss the complaint pursuant to CPLR 3211, unanimously affirmed, without costs.

Supreme Court properly dismissed the first cause of action for breach of contract since the documentary evidence conclusively established that plaintiff was an at-will employee and thus defendants were authorized to terminate his employment at any time for any reason, or for no reason (*see Smalley v Dreyfus Corp.*, 10 NY3d 55 [2008]). Plaintiff argues that his agreement was modified by various oral assurances, which were confirmed in certain writings. However, to the extent plaintiff relies on oral promises of continued employment, he could not

reasonably rely on such promises as an at-will employee, and those promises do not modify the at-will doctrine (*Smalley*, 10 NY3d at 58-59; *Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1994]). Further, the writings plaintiff relies on consist of general company documents which did not conform to the requirements set forth in his employment agreement, i.e. they were not signed by plaintiff and a member of his employer, and did not clearly promise plaintiff employment for a certain period of time.

Plaintiff argues that his termination was in retaliation for refusing to partake in financial dealings with Iran's Central Bank, allegedly in violation of federal law, and thus his discharge was not subject to the at-will doctrine because it violated Labor Law § 740. However, defendants' alleged financial dealings did not create a substantial and specific danger to the public health or safety within the meaning of Labor Law § 740 (*see Peace v KRNH, Inc.*, 12 AD3d 914 [2004], *lv denied* 4 NY3d 705 [2005]; *Remba v Federation Empl. & Guidance Serv.*, 76 NY2d 801 [1990]).

As for the second and third causes of action, the court properly dismissed them as duplicative of the breach of contract claim (*see Celle v Barclays Bank P.L.C.*, 48 AD3d 301 [2008]). In

addition, to the extent the second cause of action was for promissory estoppel, such a claim cannot stand when there is a contract between the parties (*see SAA-A, Inc. v Morgan Stanley Dean Witter & Co.*, 281 AD2d 201, 203 [2001]). Further, to the extent the second cause of action was for tortious interference with prospective economic advantage, it was barred by the three year statute of limitations (*see Besicorp, Ltd. v Kahn*, 290 AD2d 147, 150 [2002], *lv denied* 98 NY2d 601 [2002]), as was the third cause of action for prima facie tort (*id.*). In any event, the prima facie tort claim fails because plaintiff did not allege that defendants engaged in tortious conduct separate and apart from their alleged failure to fulfill their contractual obligations (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308 [1995]).

Plaintiff's contention that the arbitration to recover his unreimbursed business expenses tolled the statute of limitations on his second and third causes of action is unavailing. "To toll the statute of limitations, the arbitration must have been 'instituted by the parties in order to resolve the present controversy'" (*Troeller v Klein*, 82 AD3d 513, 514 [2011] [citation omitted]), and the issues raised here are distinct from

the issue in the arbitration.

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 10, 2012

CLERK

Friedman, J.P., Sweeny, DeGrasse, Abdus-Salaam, Román, JJ.

7628 Marianne Kutza, etc., et al., Index 116427/04
Plaintiffs-Respondents,

-against-

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

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

Louis A. Badolato, Roslyn Harbor, for respondents.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered November 14, 2011, which denied defendants' motion for summary judgment dismissing plaintiffs' claims under Labor Law §§ 240(1), 241(6) and § 200 and for common-law negligence, unanimously modified, on the law, to grant the motion to the extent of dismissing the Labor Law § 240(1) claim, and otherwise affirmed, without costs.

The record evidence, including the deposition testimony of the decedent's coworker and supervisor, as well as the decedent's consistent statements at a Social Security Administration hearing, and on a Worker's Compensation Claim form, presents triable issues of fact as to the cause of the decedent's fall, and to the liability of defendants owner and construction

manager. The decedent's challenged out-of-court statements, to the effect that he tripped over garbage on the floor, were made to his coworker immediately after his injury, while he was bleeding heavily and in a panic. Such statements, under the circumstances, could be found by a trial court to be reliable, pursuant to exceptions to the hearsay rule (*see People v Johnson*, 1 NY3d 302, 305-308 [2003] [excited utterance]; *People v Brown*, 80 NY2d 729, 732-734 [1993] [present sense impression]), and thus supply competent proof as to causation.

In addition, the record shows that debris was observed all over the floor of the apartment where the decedent was working, both before and after his fall, and that the decedent's supervisor purportedly notified the construction manager promptly of the debris each time. Such evidence sufficiently raises triable issues as to whether the construction manager failed to fulfill its contractual obligation to clean debris allegedly left behind by other trades, and to keep the premises safe (*see Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 12-13 [2011]). Moreover, the evidence offered in opposition sufficiently raises issues as to whether defendants had notice of the alleged debris hazard.

Defendants argue that plaintiffs failed to raise a triable

issue as to whether defendants violated Labor Law § 241(6), inasmuch as the provision of the Industrial Code upon which plaintiffs rely (12 NYCRR 23-1.7[e][2]), does not apply where a worker trips over materials that are being used by tradesmen at the time of the accident. This argument is unavailing. There is no evidence that the decedent had tripped over his own materials, or those of other tradesman in the area. Rather, the evidence indicates that the debris on the floor of the job site consisted of materials used by other tradesman who had allegedly departed the area. At a minimum, this raises triable issues as to the nature of the materials the decedent tripped over.

Dismissal of the Labor Law § 240(1) claim is warranted since the decedent's injuries were not related to an elevation-related hazard.

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

ENTERED: MAY 10, 2012

CLERK

Friedman, J.P., Sweeny, DeGrasse, Abdus-Salaam, Román, JJ.

7629 Oasis Sportswear, Inc., Index 115500/07
Plaintiff-Respondent, 591092/07
591157/07

-against-

Patricia Rego, et al.,
Defendants-Appellants.
- - - - -
Patricia Rego, et al.,
Third-Party Plaintiffs-Appellants,

-against-

Joseph Trachtman,
Third-Party Defendant-Respondent.

[And Another Action]

Kevin T. Mulhearn, P.C., Orangeburg (Kevin T. Mulhearn of counsel), for appellants.

Cole, Schotz, Meisel, Forman & Leonard, P.A., New York (Jed M. Weiss of counsel), for respondents.

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered November 16, 2011, which, inter alia, granted plaintiff's motion to strike defendants' answer and counterclaims and ordered the case to inquest, unanimously affirmed, without costs.

Given that defendants had been ordered on three prior occasions to produce certain documents, and had been expressly warned that failure to do so again would result in the striking of their pleadings, the IAS court did not abuse its discretion in

striking the pleadings, under CPLR 3126, when defendants again failed to produce the requested records (*De Socio v 136 E. 56th St. Owners, Inc.*, 74 AD3d 606 [2010]). We note that the repeated failure of defendants to produce, despite express orders to do so, amply demonstrates wilfulness and the lack of any reasonable excuse for such failure. Moreover, that the documents were relevant to plaintiff's defense to certain counterclaims constitutes prejudice sufficient to warrant the particular sanction imposed. To the extent defendants failed to comply with a conditional order of preclusion, they failed to demonstrate a reasonable excuse or a meritorious defense (*see Gibbs v St. Barnabas Hosp.*, 16 NY3d 74 [2010]).

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

ENTERED: MAY 10, 2012

CLERK

Friedman, J.P., Sweeny, DeGrasse, Abdus-Salaam, Román, JJ.

7630N-
7630NA G.M. Data Corp., etc., Index 601004/08
Plaintiff-Respondent,

-against-

Potato Farms, LLC,
Defendant-Appellant,

Hyde Park Gourmet, LLC, etc., et al.,
Defendants.

_____

Michael Resko, New York, for appellant.

Brown & Whalen, P.C., New York (Rodney A. Brown of counsel), for respondent.

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Second amended order and judgment (one paper), Supreme Court, New York County (Louis Crespo, Special Referee), entered October 20, 2011, insofar as appealed from, awarding plaintiff G.M. Data Corp. d/b/a GMDC Business Consultants the total sum of $1,955,283.08 against defendant Potato Farms, LLC d/b/a Amish Market d/b/a Zeytuna (defendant), unanimously affirmed, without costs. Appeal from the underlying order, New York County (Richard B. Lowe, III, J.), entered October 18, 2010, which, insofar as appealed from, granted plaintiff's motion to strike defendant's amended answer and affirmative defenses, unanimously dismissed, without costs, as subsumed in the appeal from the second amended order and judgment.

In this action for breach of contract and unjust enrichment, the gravamen of plaintiff's complaint is that defendants breached the terms of three written and executed "Open Listing Agreements" by failing to pay brokerage commissions to plaintiff after selling certain membership interests or assets in defendants' companies to ready, willing and able buyers allegedly presented by plaintiff. The grounds for plaintiff's motion to strike defendants' answer are alleged violations by defendants of the IAS court's February 25, 2010 order directing defendants' production of various discovery. Because of the extent of violations which precipitated the order, it contained self-executing language where non-compliance would result in a striking of defendants' answer. Notwithstanding, the IAS court directed an additional motion to be made in order to allow for an additional opportunity to review the record.

Upon further review, the court properly determined that, in violation of the order, defendant, inter alia, had failed to produce Jody B. Vitale (Vitale), the alleged purchaser of the subject transactions, for continued deposition, as well as certain bank account authorizations, communications, and documents. The record supports the court's determination that, since the instant action was initiated, numerous hours have been

spent by the court addressing defendant's repeated failure to produce court-ordered discovery. In addition, defendant had been put on notice that no further violations of the orders of the court would be tolerated.

Thus, under these circumstances, the court did not improvidently exercise its discretion in determining that defendant had willfully and contumaciously failed to comply with discovery obligations (*see Fish & Richardson, P.C. v Schindler*, 75 AD3d 219, 220 [2010]). Defendant failed to demonstrate a reasonable excuse for failure to comply with the conditional order of preclusion (*see Gibbs v St. Barnabas Hosp.*, 16 NY3d 74 [2010]). Moreover, the court's imposition of joint and several liability as to plaintiff's third and fourth causes of action was properly based on plaintiff's allegations, which defendant is now precluded from challenging.

The court properly deemed as true all traversable allegations set forth by plaintiff, and acted within its discretion in calculating damages (*see Hussein v Ratcher*, 272 AD2d 446 [2000]; *Reynolds Sec. v Underwriters Bank & Trust Co.*, 44 NY2d 568, 572 [1978]; *compare Amusement Bus. Underwriters v American Intl. Group*, 66 NY2d 878, 880 [1985]). The court's calculation of damages properly included an award of reasonable

attorneys' fees and costs, as provided for in the parties' agreements (*see Matter of A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 [1986]; *Juste v New York City Tr. Auth.*, 5 AD3d 736 [2004]).

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

ENTERED: MAY 10, 2012

CLERK

Saxe, J.P., Sweeny, Renwick, DeGrasse, Richter, JJ.

7004 Robert Weinreb, et al., Index 650868/11
Plaintiffs-Respondents,

-against-

37 Apartments Corp.,
Defendant,

Nellie Caruso, et al.,
Defendants-Appellants.

Wolf Haldenstein Adler Freeman & Herz LLP, New York (Steven David Sladkus of counsel), for appellants.

Gallet Dryer & Berkey, LLP, New York (David L. Berkey of counsel), for respondents.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered August 10, 2011, reversed, on the law, the motion granted and the action dismissed as against defendants Nellie Caruso, Claudia Green, Philip Milldrum and Jonathan Morris. The Clerk is directed to enter judgment accordingly.

Opinion by Saxe, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
John W. Sweeny, Jr.
Dianne T. Renwick
Leland G. DeGrasse
Rosalyn H. Richter, JJ.

7004
Index 650868/11

_____x

Robert Weinreb, et al.,
Plaintiffs-Respondents,

-against-

37 Apartments Corp.,
Defendant,

Nellie Caruso, et al.,
Defendants-Appellants.

_____x

Defendants appeal from an order of the Supreme Court, New York County (Carol R. Edmead, J.), entered August 10, 2011, which, insofar as appealed from, denied defendants Nellie Caruso, Claudia Green, Philip Milldrum and Jonathan Morris's motion to dismiss, as against them, the fourth cause of action, for a permanent injunction.

Wolf Haldenstein Adler Freeman & Herz LLP, New York (Steven David Sladkus, Eric B. Levine and Jared E. Paioff of counsel), for appellants.

Gallet Dryer & Berkey, LLP, New York (David L. Berkey and Adam M. Felsenstein of counsel), for respondents.

SAXE, J.P.

This appeal concerns the parameters for allowing a shareholder of a cooperative corporation to name as defendants, in an action against the corporation, individual members of the corporation's board of directors.

On September 27, 2005, plaintiffs Robert and Champa Weinreb purchased the penthouse apartment in the residential cooperative at 37 Riverside Drive, in Manhattan. They claim that although defendants were aware that the apartment required major renovations to make it habitable, and had assured plaintiffs before the purchase that their renovation plans would be given prompt consideration, defendants have unreasonably withheld their approval for plaintiffs' planned renovations of the apartment, in violation of the provision of the proprietary lease stating that the consent of the lessor "shall not be unreasonably withheld."

According to plaintiffs, in October 2005, they and the board agreed that plaintiffs would first submit a general alteration plan to the board, then seek approval from the Landmarks Preservation Commission (LPC), and thereafter submit a detailed plan to the board for its approval. In preparation for the submission to the LPC, plaintiffs retained an architect, a structural engineer, and a mechanical engineer. In July 2006, the Community Board 7 Preservation Committee approved the plan,

and in September 2006, the full board of Community Board 7 approved it.

According to plaintiffs, defendant Nellie Caruso, the board's president, refused to sign their application to the LPC for nearly seven months, without providing any reason. In February 2007, the LPC approved the plan.

In April 2007, plaintiffs submitted the detailed plans for the renovations to the board. In June 2007, according to plaintiffs, the cooperative advised them that it would not approve the plan because it needed to retain its own experts to assess the plan's structural integrity, at plaintiffs' expense. Although the board retained such experts, plaintiffs allege that it "substantially delayed" the review process by withholding information from those experts, and then requiring, on three separate occasions, that additional experts be retained. Plaintiffs also claim that the experts required multiple additional submissions of information from plaintiffs such that the board did not vote on the alteration plans until June 6, 2008. Apparently, because of that delay, the LPC had to reapprove the plans and assign a new examiner, and according to plaintiffs, the board refused to sign the reapplication.

In August 2008, the board rejected plaintiffs' plans, asserting safety reasons. By January 15, 2009, the board's

experts approved the safety and mechanical plans, but one week later, the board allegedly "raised four completely new issues with the mechanical plans." In February 2009, the board "listed 14 new issues with [the] renovation plans," and plaintiffs claim that, by April 2009, the board's architect was satisfied with the manner in which those problems were addressed, but the board required plaintiffs to pay a construction consultant to assess the issues. In September 2009, this consultant furnished the board with a report of his assessment, and by letter dated September 25, 2009, notified plaintiffs of the risks that needed to be addressed, and asked plaintiffs for the pertinent plans.

By e-mail dated February 25, 2010, the board notified plaintiffs that it would not approve the plans, and cited multiple reasons for not doing so; plaintiffs responded, asking for the reports upon which the board's decision was based. The board also notified plaintiffs that if any building occupant "experience[s] undue inconvenience as a result of [the] renovation," plaintiffs would be responsible for temporary housing costs "not to exceed $1,000 per night."

In July 2010, plaintiffs submitted revised plans to the board, followed by submission of revised plans in September 2010, followed by a letter in support from plaintiff's structural engineer. On November 8, 2010, the board, again, rejected the

plans.

In March 2011, plaintiffs commenced this action alleging four causes of action: (1) breach of proprietary lease as against the cooperative; (2) attorneys' fees under Real Property Law § 234; (3) breach of fiduciary duty by the cooperative as well as four of the nine board members: Nellie Caruso, Claudia Green, Philip Milldrum, and Jonathan Morris (individual defendants); and (4) a permanent injunction requiring the cooperative and the board to approve the alterations and sign such documents as required to effectuate the same, and prohibiting all defendants from interfering with the alterations. Plaintiffs allege that the cooperative, the board and its members have unreasonably withheld consent to alterations of the subject cooperative apartment.

There is no challenge to the propriety of the claim against the cooperative corporation based on its allegedly unreasonable withholding of consent. The only challenge was by the individual defendants, who moved, pre-answer, to dismiss the only claims seeking relief against them, the third and fourth causes of action, pursuant to CPLR 3211(a)(1) and (7), and 3016(b). Supreme Court granted the motion to the extent of dismissing the breach of fiduciary duty claim as against them, but denied the motion insofar as it pertained to the fourth cause of action, for

an injunction. The individual defendants now appeal from the denial of their motion to dismiss, as against them, the fourth cause of action for a permanent injunction.

We reverse and dismiss the claim for injunctive relief as against the individual defendants.

As a general matter, courts are prohibited from inquiring into the propriety of actions taken by a director on behalf of the corporation (*see Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537-538 [1990]); "[t]he business judgment rule protects individual board members from being held liable for decisions . . . that were within the scope of their authority" (*Berenger v 261 W. LLC*, __ AD3d __, 2012 NY Slip Op 00738 *6 [2012]). Of course, individual board members may be validly sued for breach of fiduciary duty if the complaint pleads independent tortious acts on the part of those individual directors (*see id.*; *Kleinerman v 245 E. 87 Tenants Corp.*, 74 AD3d 448, 449 [2010]). But, here, the breach of fiduciary duty claim against the individual board members has been dismissed, and that ruling is not challenged on appeal. Therefore, the *Levandusky* rule precludes claims against the individual directors.

In allowing the claim for injunctive relief to proceed against individual members of the board, the motion court relied on *King v 870 Riverside Dr. Hous. Dev. Fund Corp.* (74 AD3d 494,

495 [2010]). In *King*, a shareholder sued the cooperative corporation, its board of directors and named individual directors, for their failure to consent to the transfer of her father's cooperative shares after his death. The proprietary lease there provided that a transfer of shares could not take effect until authorized by the directors, but specified that in the event of the death of a lessee shareholder, such consent could not be unreasonably withheld (*id.*). This Court allowed the plaintiff's claim for injunctive relief to proceed against all the defendants, including the individual directors, with a brief reference to the allegations that "the board and its members, acting inexplicably and without any stated reason, withheld their consent and refused to execute the documents necessary to complete the transfer and assignment," and the conclusion that the "cause of action, which seeks to compel the board and its individual members to execute the necessary documents, thus states a valid cause of action" (*id.*).

We conclude that reliance on *King* was unwarranted, for the following reasons.

One important distinction between the present case and the facts of *King* is that the language of the proprietary lease at issue in *King* required authorization by "the directors" (74 AD3d at 495); therefore, permitting a claim for a mandatory injunction

to proceed against the directors there at least arguably allowed the court to issue the sought directive against the appropriate responsible parties. In contrast, here, the written consent required by the proprietary lease is that of "the Lessor," namely, the cooperative corporation. There is no logic in keeping individual *directors* in the case, where only the *cooperative corporation* may be directed to sign the consent.

In any event, including individual board members as defendants, where they are not accused of tortious conduct, cannot be justified based merely on the assumption that they may be required to sign a consent on behalf of the corporation. An injunction against a corporation "is enforceable against not only th[at] corporation ... but also the persons who act for it in the transaction of its business, that is, corporate officers and agents with knowledge of the injunction" (67A NY Jur 2d, Injunctions § 212). Indeed, the individuals named as defendants may not even remain in their positions by the time the sought relief is awarded.

Moreover, injunctive relief is simply not available when the plaintiff does not have any remaining substantive cause of action against those defendants. An injunction is a remedy, a form of relief that may be granted against a defendant when its proponent establishes the merits of its substantive cause of action against

that defendant. "Although it is permissible to plead a cause of action for a permanent injunction, ... permanent injunctive relief is, at its core, a remedy that is dependent on the merits of the substantive claims asserted" (*Corsello v Verizon N.Y., Inc.*, 77 AD3d 344, 368 [2010], *mod on other grounds* __ NY3d __, 2012 NY Slip Op 02343 [2012]). Here, there is no remaining substantive claim interposed against the individual defendants, since the breach of fiduciary duty claim against them has been dismissed, and that ruling is not challenged on appeal. Consequently, nothing in the complaint as it now stands entitles plaintiffs to *any* injunctive relief -- neither a direction that these defendants sign off on the proposed renovation work, nor a prohibition against interference with the contemplated work after consent is obtained, which form of injunction in any event finds no support in the complaint.

Unlike the present case, in *King*, although the motion court dismissed the plaintiff's claim of tortious conduct against the individual board members, that dismissal was subject to a grant of leave to seek to replead it (2009 NY Slip Op 32049[U], *8-9 [2009]), and that portion of the ruling was not challenged on appeal. In view of the possibility in *King* that a claim against the individual directors could successfully be pleaded, which in turn could warrant the issuance of injunctive relief against

them, dismissal of the claim for injunctive relief against the individual defendants arguably would have been premature. Here, no such possibility exists. Therefore, the ruling in *King* permitting the plaintiff to proceed with a claim for injunctive relief against individual board members is inapplicable here, and the settled law that applies in the absence of any pleaded tortious conduct on the part of the individual directors precludes their inclusion as named defendants in this case.

Accordingly, the order of the Supreme Court, New York County (Carol R. Edmead, J.), entered August 10, 2011, which, insofar as appealed from, denied the individual defendants' motion to dismiss, as against them, the fourth cause of action, for a permanent injunction, should be reversed, on the law, the motion granted, and the action dismissed as against the individual defendants. The Clerk is directed to enter judgment accordingly.

All concur.

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

ENTERED: MAY 10, 2012

CLERK