SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 24, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Andrias, Saxe, DeGrasse, Román, JJ.

7743 The People of the State of New York, Docket 65925C/06
Respondent,

-against-

Carl D. Wells,
Defendant-Appellant.

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

Carl D. Wells, appellant pro se.

Robert T. Johnson, District Attorney, Bronx (Megan R. Roberts of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Seth L. Marvin, J.), rendered June 11, 2008, convicting defendant, upon his plea of guilty, of operating a motor vehicle while ability impaired by drugs, driving while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs, and sentencing him to a term of six months, unanimously affirmed.

The court erred in relying on the inventory search doctrine in denying suppression of physical evidence recovered from the

car defendant was driving, because the People did not introduce any evidence to establish a valid inventory search (*see People v Johnson*, 1 NY3d 252, 256 [2003]). However, there was overwhelming evidence of defendant's guilt, independent of the physical evidence at issue. Although the harmless error rule regarding suppression issues does not normally apply to cases where a defendant pleads guilty (*People v Grant*, 45 NY2d 366, 378-380 [1978]), the particular circumstances of this case warrant a finding of harmless error (*see People v Lloyd*, 66 NY2d 964 [1985]; *People v Beckwith*, 303 AD2d 594, 595 [2003]; *People v Strain*, 238 AD2d 452 [1997], *lv denied* 90 NY2d 864 [1997]).

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

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

ENTERED: MAY 24, 2012

CLERK

Gonzalez, P.J., Andrias, Saxe, DeGrasse, Román, JJ.

7744-
7745 Raymond Armstrong, Index 108277/08
Plaintiff-Appellant, 59044/09

-against-

B.R. Fries & Associates, Inc.,
Defendant-Respondent.

[And a Third-Party Action]

_____

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for appellant.

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Order, Supreme Court, New York County (Louis B. York, J.), entered October 26, 2011, which denied plaintiff's motion to vacate dismissal of the action and restore it to the calendar, unanimously reversed, on the law, without costs, the motion granted, the dismissal vacated, and the matter restored to the active calendar. Appeal from order, same court and Justice, entered October 15, 2010, which sua sponte directed dismissal of the complaint unless plaintiff filed a note of issue on October 20, 2010, unanimously dismissed, without costs, as taken from a nonappealable order.

Plaintiff's motion to vacate the order of dismissal should have been granted since, whether the dismissal was pursuant to CPLR 3216(b)(3) or CPLR 3126, it did not comply with statutory

requirements. The case was marked dismissed after plaintiff failed to comply with a status conference order directing him to serve and file a note of issue within seven days. That order did not comply with the requirements of CPLR 3216(b) in that plaintiff was not given 90 days to file a note of issue, and the order did not contain a statement that, inter alia, a "default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him for unreasonably neglecting to proceed" (CPLR 3216[b][3]; *see Cadichon v Facelle*, 18 NY3d 230, 235 [2011]). Since there was no motion pursuant to CPLR 3216(b)(3), or notice to plaintiff, the case could not be dismissed for failure to prosecute (*see Cadichon* at 235).

Nor was dismissal proper as a discovery sanction pursuant to CPLR 3126(3), since there was no finding of "willful and contumacious" conduct on plaintiff's part justifying dismissal of the complaint (*see Jones v Green*, 34 AD3d 260, 261 [2006]). Moreover, the extreme penalty of dismissal should not be imposed in the absence of any prior notice to plaintiff that such a sanction might be imminent (*see Postel v New York Univ. Hosp.*, 262 AD2d 40, 42 [1999]). We note that plaintiff's adversaries

did not move for such relief and did not oppose the motion to vacate or this appeal.

The status conference order itself is not appealable as of right because it is not an order which determined a motion made upon notice (*see Postel* at 41).

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

ENTERED: MAY 24, 2012

CLERK

Gonzalez, P.J., Andrias, Saxe, DeGrasse, Román, JJ.

7747 In re Jasmine L.,
Petitioner-Appellant,

-against-

Ely G.,
Respondent-Respondent.

_____

Dora M. Lassinger, East Rockaway, for appellant.

Leslie S. Lowenstein, Woodmere, attorney for the child.

_____

Order, Family Court, New York County (Fiordaliza A. Rodriguez, Referee), entered on or about June 3, 2011, which, insofar as appealed from as limited by the briefs, granted, after a hearing, the petition to modify the judgment of divorce to allow petitioner non-custodial parent expanded visitation with the subject child to the extent of granting alternate weekend visits, with petitioner responsible for pick up and drop off of the child at respondent father's home, and one week of summer vacation with the child, unanimously modified, on the law and the facts, to grant petitioner two weeks of summer visitation with the child, to direct petitioner's alternate weekend visitation to be held on weekends when respondent is not working, and to direct that all exchanges be conducted at the Woodlawn subway station in the Bronx, and otherwise affirmed, without costs.

In the totality of the circumstances, the Family Court's imposition upon the petitioner-mother of full responsibility for transporting the child to and from all exchanges at the home of respondent-father, the custodial parent, did not have a sound and substantial basis in the record (*see Matter of Tonisha J. v Paul P.*, 55 AD3d 386, 387 [2008]). The mother, who is of limited financial means and lives in lower Manhattan without access to a car, testified that transporting herself, her other minor child, and the subject child to and from the father's home in Yonkers for alternate weekend visitation subjected her to a significant financial expense that was several times her monthly child support obligation. In contrast, it is significantly less of a burden for the father, who works only one weekend per month and has access to two cars, to pick the child up at the Woodlawn subway station in the Bronx, which is only a few miles and a relatively short drive from his home, and which is where the exchanges had been conducted for several months without incident prior to the fact-finding hearing. Upon consideration of the "'economic realities' of the case" (*Ingarra v Ingarra*, 271 AD2d 573, 574 [2000]), the mother should not be made to bear the full burden for such transportation, and hence we direct that the exchanges resume at the Woodlawn subway station during the

weekends when respondent is not working.

We further direct that the mother be granted two weeks of summer visitation with the child, rather than the one week provided for in the order. All parties agreed that at least two weeks of summer visitation was appropriate, and the record reveals that the mother exercised two weeks of visitation during the summer preceding the hearing without incident. Since the child wishes to spend more time with her mother, and nothing in the record indicates any reason why the minimum agreed upon time would be in any way detrimental to the child, we conclude that the "development of the fullest possible healthy relationship" between the mother and child, which, in turn, best protects the child's interests (*see Nimkoff v Nimkoff*, 18 AD3d 344, 347 [2005]), would be furthered by the increase of the mother's summer visitation, on condition that it does not conflict with the child's academic commitments.

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

ENTERED: MAY 24, 2012

CLERK

Gonzalez, P.J., Andrias, Saxe, DeGrasse, Román, JJ.

7748-
7748A Rebecca Ayala, an Infant by her Mother and Natural Guardian Lydia Esther Quintana, et al.,
Plaintiffs-Appellants,

-against-

Daniel Cruz, et al.,
Defendants-Respondents,

Alejandro Reyes-Nunez,
Defendant.

Index 350736/08

_____

Greenstein & Milbauer, LLP, New York (Andrew W. Bokar of counsel), for appellants.

Richard T. Lau & Associates, Jericho (Kathleen E. Fioretti of counsel), for respondents.

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Judgment, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered on or about June 14, 2011, dismissing the complaint on the ground that plaintiffs did not suffer serious injuries within the meaning of Insurance Law § 5102(d), and bringing up for review an order, same court and Justice, entered on or about June 7, 2011, which granted defendants' motions for summary judgment, unanimously modified, on the law, to reinstate the claims of permanent consequential limitation and significant limitation of use of the lumbar spines against all defendants, and otherwise affirmed, without costs. Appeal from the aforesaid

order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Defendants established prima facie that plaintiffs did not suffer either significant limitation or permanent consequential limitation of use of their lumbar spines, by submitting the affirmations of two orthopedists who found full ranges of motion in all planes (*see Thompson v Abbasi*, 15 AD3d 95, 96 [2005]). However, defendants failed to make a prima facie showing that plaintiffs' injuries were not caused by the accident. One of their orthopedists conceded that the injuries were caused by the accident, and their neurologist's opinion was too equivocal to satisfy their burden with respect to causation (*see e.g. Biascochea v Boves*, 93 AD3d 548 [2012]; *Mitchell v Calle*, 90 AD3d 584, 585 [2011]).

Plaintiffs submitted the affirmations of a radiologist who reviewed MRI films of their lumbar spines taken about two months after the accident and found that plaintiff Quintana had bulging discs at numerous levels, and at least one disc herniation, and that plaintiff Ayala, then 18 years old, had bulging discs at three levels. In addition, plaintiffs' treating physician conducted EMG tests that showed that Quintana suffered from acute right L5-S1 radiculopathy and Ayala suffered from acute L4

radiculopathy. The physician also found upon testing on multiple occasions that plaintiffs had diminished ranges of motion in their spines (*see Antonio v Gear Trans Corp.*, 65 AD3d 869 [2009]), and causally related those injuries to the accident (*see Pommells v Perez*, 4 NY3d 566, 574-575 [2008]; *Yuen v Arka Memory Cab Corp.*, 80 AD3d 481 [2011]). With respect to the alleged gap in treatment, plaintiffs' treating physician opined that plaintiffs had reached maximum medical improvement when treatment stopped and that further treatment would only have been palliative. Either of these is a reasonable explanation sufficient to raise an issue of fact (*Pommells*, 4 NY3d at 577; *Mitchell*, 90 AD3d at 585).

Plaintiffs' 90/180-day claims are untenable in light of Quintana's testimony that she only missed two days of work because of the accident and Ayala's testimony that she did not

miss any time from school because of the accident (*see Gaddy v Eyler*, 79 NY2d 955, 958 [1992]; *Ramos v Rodriguez*, 93 AD3d 473 [2012]).

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

ENTERED: MAY 24, 2012

CLERK

Gonzalez, P.J., Andrias, Saxe, DeGrasse, Román, JJ.

7749 In re Theophilus Y. Ojuola, Index 260384/09
Petitioner-Appellant,

-against-

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

_____

Theophilus Y. Ojuola, appellant pro se.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered November 1, 2011, which, to the extent appealable, denied petitioner's motion to renew his article 78 petition challenging a determination by the New York State Division of Human Rights, unanimously affirmed, without costs.

The IAS court properly denied the motion to renew, as petitioner submitted no new facts in support of his petition (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1992], *lv denied in part, dismissed in part* 80 NY2d 1005 [1992]; *Foley v Roche*, 68 AD2d 558, 568 [1979]).

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

ENTERED: MAY 24, 2012

CLERK

Gonzalez, P.J., Andrias, Saxe, DeGrasse, Román, JJ.

7750 The People of the State of New York, Ind. 4200/08
Respondent,

-against-

Fayosi Ogunmekan, also known as
Larry Moore,
Defendant-Appellant.

- - - - -

7751 The People of the State of New York,
Respondent,

-against-

Dwaine Eric Coleman,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jody Ratner of counsel), for Fayosi Ogunmekan, appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Risa Gerson of counsel), for Dwaine Eric Coleman, appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered August 6, 2009, as amended September 24, 2009, convicting defendant Fayosi Ogunmekan, upon his plea of guilty, of grand larceny in the second degree (two counts), grand larceny in the third degree (seven counts), identity theft in the first degree (ten counts) and scheme to defraud in the first degree, and sentencing him, as a second felony offender, to an aggregate

term of 6 to 12 years, unanimously affirmed. Judgment, same court and Justice, rendered June 25, 2009, convicting defendant Dwaine Coleman, upon his plea of guilty, of attempted grand larceny in the third degree and identity theft in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 1½ to 3 years, unanimously affirmed.

The error in certain counts of the indictment with respect to the name of the identity theft victim, and the court's corrective action constituted, at most, nonjurisdictional defects (*see People v Iannone*, 45 NY2d 589, 594 [1978]). Accordingly, defendants' claims in this regard are forfeited by their guilty pleas, as well as their valid waivers of the right to appeal.

The counts at issue set forth every element of the crime of identity theft in the first degree (Penal Law § 190.79[1]). Therefore, they were not jurisdictionally defective (*see People v D'Angelo*, 98 NY2d 733, 735 [2002]; *People v Ray*, 71 NY2d 849, 850 [1988]).

However, each of these counts named, as the victim, an entity whose identity was not actually assumed by defendants under the underlying factual circumstances of the case; instead, a different entity should have been named. Thus, the defect was not in the language of the indictment, but in a contradiction

between its language and the underlying facts, creating an essentially latent defect. The substance of defendants' complaint about these counts is not that they facially fail to state a crime, but that the evidence that was presented to the grand jury, and would have been presented had defendants chosen to go to trial, did not sustain the allegations because the evidence did not match the named victim (*see People v Greeman*, 49 AD3d 463, 464 [2008], *lv denied* 10 NY3d 934 [2008]). However, issues concerning factual guilt are normally not reviewable on appeal when a defendant pleads guilty (*People v Taylor*, 65 NY2d 1 [1985]; *People v Thomas*, 53 NY2d 338 [1981]).

Coleman's challenge to the court's amendment of the indictment to substitute the name of one victim with that of another is similarly forfeited, as well as being affirmatively waived, since that claim raises no jurisdictional defect (*see People v Martinez*, 52 AD3d 68, 71 [2008], *lv denied* 11 NY3d 791 [2008]); in any event, the amendment was permissible (*see People v Gray*, 157 AD2d 596 [1990], *lv denied*, 75 NY2d 966 [1990]). Defendants' remaining arguments relating to the indictment are likewise forfeited. To the extent defendants are challenging their guilty pleas as involuntarily made, those claims are without merit.

The court properly adjudicated Ogunmekan a second felony offender. Ogunmekan did not establish that the prior conviction upon which the enhancement was based was obtained in violation of his federal constitutional rights (*see* CPL 400.21[7][b]). The court conducted an evidentiary hearing on Ogunmekan's claim that his 2003 guilty plea was the product of ineffective assistance of counsel, and there is no basis for disturbing the court's credibility determinations. In any event, aside from questions of credibility, and regardless of the retroactivity of *Padilla v Kentucky* (559 US__, 130 S Ct 1473 [2010]) both in general and in this procedural posture (*see People v Catalanotte*, 72 NY2d 641 [1988], *cert denied* 72 NY2d 641 [1988]), regardless of the applicability of *Padilla* to a plea that did not actually have any immigration consequences until the defendant's rearrest, and regardless of what immigration-related advice counsel provided or

failed to provide, we conclude that Ogunmekan did not establish the prejudice prong of a *Padilla* claim (*see Padilla*, __ US __, __, 130 S Ct at 1483).

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

ENTERED: MAY 24, 2012

CLERK

Gonzalez, P.J., Andrias, Saxe, DeGrasse, Román, JJ.

7752 John Whitehouse, Index 303918/07
Plaintiff-Appellant,

-against-

Priority Home Care, Inc., et al.,
Defendants-Respondents,

Lustre Properties, Inc.,
Defendant.

_____

Daniel J. Hansen, New York, for appellant.

Furey, Kerley, Walsh, Matera & Cinquemani, P.C., Seaford (Lauren B. Bristol of counsel), for Priority Home Care, Inc. and Premier Home Health Care Services, Inc., respondents.

Lester Schwab Katz & Dwyer, LLP, New York (Harry Steinberg of counsel), for Center for Urban Community Services, Inc., respondent.

_____

Judgment, Supreme Court, Bronx County (Norma Ruiz, J.), entered April 6, 2011, dismissing the complaint, unanimously affirmed, without costs.

In this action arising from plaintiff's fall on a stairway leading to his second-floor apartment, plaintiff alleges that defendants Priority Home Care, Inc., Premier Home Health Care Services, Inc., and Center for Urban Community Services, which are government approved and funded service facilitators for with people with traumatic brain injury, were negligent for, inter

alia, placing him in an apartment on the second floor of a non-elevator building. Defendants moved for summary judgment dismissing the complaint, arguing, inter alia, that they did not owe a duty to plaintiff and that there was no causal connection between plaintiff's fall on the steps and the injury complained of, amputation of his left leg. Defendants established their entitlement to judgment as a matter of law through the affidavit of their expert physician, a vascular surgeon, who opined that plaintiff's fall was not a substantial contributing factor to the amputation which was the result of severe underlying vascular disease in plaintiff's lower extremities. In opposition to the motion, plaintiff failed to raise an issue of fact as to defendants' alleged negligence in placing him in the subject apartment. Plaintiff agreed to the placement, signed the lease voluntarily and did not express any dissatisfaction with the apartment, nor did he appear to have any difficulty navigating the steps (*see e.g. Veloz v Refika Realty Co.*, 38 AD3d 299 [2007]).

Moreover, the court properly rejected the submission of plaintiff's second affirmation in opposition, dated June 14, 2010, which provided, for the first time, a medical expert's affirmation asserting that plaintiff's fall was the proximate

cause of the amputation of his left leg. The affirmation was served after the court ordered deadline for submissions, without leave of court and without any explanation for its untimeliness. Even assuming that the court should have considered the affirmation, it failed to address several medical records which attributed the amputation to plaintiff's pre-existing deep vein thrombosis, including a failed femoral-popliteral artery by-pass graft. Thus, plaintiff's expert's conclusion that plaintiff's fall proximately caused the amputation of his left leg was speculative and failed to raise an issue of fact sufficient to defeat summary judgment (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]).

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 24, 2012

CLERK

Gonzalez, P.J., Andrias, Saxe, DeGrasse, Román, JJ.

7759 Darka Genza, etc., et al., Index 119757/03
Plaintiffs-Appellants,

-against-

Stephen B. Richardson, M.D., et al.,
Defendants-Respondents.

_____

The Pagan Law Firm, P.C., New York (Tania Pagan of counsel), for appellants.

Russell T. McHugh, Melville, for respondents.

_____

Judgment, Supreme Court, New York County (Marilyn Shafer, J.), entered March 3, 2011, after a jury trial, in favor of defendants and against plaintiff, and bringing up for review an order, same court and Justice, entered July 10, 2008, which denied plaintiff's posttrial motion to set aside the verdict, unanimously affirmed, without costs.

The jury's verdict that defendant Stephen B. Richardson, M.D., departed from good and accepted medical practice by not providing plaintiff with appropriate medical supervision after prescribing insulin to her on May 30, 2001, but that such negligence was not a substantial factor in causing her injuries, was supported by sufficient evidence (*see Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). Indeed, given the evidence of

plaintiff's complicated medical history and concurrent conditions, the jury could have rationally concluded that Dr. Richardson's failure to supervise plaintiff's condition was not a substantial cause of her injuries (*see generally Mortensen v Memorial Hosp.*, 105 AD2d 151, 158 [1984]).

The trial court providently exercised its discretion in permitting testimony as to the existence of a preexisting brain injury, as defendants' expert exchange adequately informed plaintiff that their neurologist would provide such testimony (*see* CPLR 3101[d][1][i]). In any event, there was no evidence of a willful failure to disclose, and there was no showing of prejudice to plaintiff (*see St. Hilaire v White*, 305 AD2d 209, 210 [2003]). The trial court also properly admitted plaintiff's unredacted treatment records, as the portions plaintiff sought to preclude were "germane to her diagnosis and treatment" (*Niles v Patel*, 235 AD2d 275, 275 [1997], *lv denied* 89 NY2d 814 [1997]). Moreover, plaintiff's objections went to the weight of the evidence, not its admissibility (*see id.*; CPLR 4518[a]).

There is no evidence that defense counsel's references to plaintiff's burden on causation, which were addressed by the trial court and cured by the court's charges to the jury, and brief and limited remarks as to plaintiff's expert's credibility,

improperly affected the verdict (*see Pareja v City of New York*, 49 AD3d 470 [2008]; *cf. Nuccio v Chou*, 183 AD2d 511, 514-515 [1992], *lv dismissed* 81 NY2d 783 [1993]).

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

ENTERED: MAY 24, 2012

CLERK

Gonzalez, P.J., Andrias, Saxe, DeGrasse, Román, JJ.

7760 In re Gwendolyn Rossi, et al., Index 109625/10
Petitioners,

-against-

New York State Office of Children and Family Services,
Respondent.

_____

Bernard Mitchell Alter, Brooklyn, for petitioners.

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

_____

Determination of respondent, dated April 2, 2010, after an evidentiary hearing, which denied renewal of petitioner Wendy Eugene's license to operate a group family day care in the basement of her residence, and revoked petitioners' license to operate a group family day care on the first floor of the same premises, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Richard F. Braun, J.], entered January 18, 2011), dismissed, without costs.

The agency's determination was supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights,* 45 NY2d 176, 180-181 [1978]). The record

demonstrates that the ceiling height in the basement was less than seven feet in some areas, an undisputed violation of the applicable building code (*see* Administrative Code of City of NY § 28-1208.2). The record also supports the finding that the basement and first floor of the residence, which were connected by an internal staircase, constituted one dwelling unit, and that applicable regulations prohibited two group family day care programs from operating in one unit (18 NYCRR 416.15[a][20][i]).

Petitioners had no vested right to continue to operate the programs since they were required to remain in compliance with all applicable regulations (*see* 18 NYCRR 416.3[l]). Moreover, "estoppel is unavailable against a public agency" *(see Granada Bldgs. v City of Kingston*, 58 NY2d 705, 708 [1982]).

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

ENTERED: MAY 24, 2012

CLERK

Gonzalez, P.J., Andrias, Saxe, DeGrasse, JJ.

7764N LibertyPointe Bank, Index 116405/08
Plaintiff-Respondent,

-against-

75 East 125th Street, LLC, et al.,
Defendants-Appellants,

The City of New York, etc., et al.,
Defendants.

_____

Shapiro & Associates PLLC, Brooklyn (Robert J. Stone, Jr. of counsel), for appellants.

Cullen and Dykman LLP, Garden City (Ariel E. Ronneburger of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol Robinson Edmead, J.), entered February 16, 2011, which, insofar as appealed from as limited by the briefs, denied defendants-appellants' (defendants) motion to vacate their default, reinstate their answer, and restore the action to the calendar, unanimously reversed, on the law, without costs, and the motion granted.

As an affirmative defense and counterclaim, defendants contend that they were fraudulently induced into entering into the mortgage transaction by the misrepresentations of plaintiff's former president, including his alleged assertion that plaintiff

would not foreclose on the mortgage until the former president had paid a pre-existing debt which he owed to defendants' "silent partner." This alleged oral agreement would directly contradict the terms of the note and mortgage which plaintiff sues upon, and which vest plaintiff with an immediate right to foreclose upon occurrence of any default in payment. Nonetheless, the only merger clause here — that contained in the mortgage — is bare-bones, and certainly makes no reference to the "particular misrepresentations" allegedly made here by the former president (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273, 275 [2005]). Accordingly, neither the parol evidence rule, nor the agreements' merger clause, bars defendants' claim of fraudulent inducement.

Under these circumstances, we find that defendants' claim of fraudulent inducement is sufficiently substantial and meritorious

to support vacatur of their default, and the order appealed from should be reversed (*see Crespo v A.D.A. Mgt.*, 292 AD2d 5, 9 [2002]; *38 Holding Corp. v City of New York*, 179 AD2d 486, 487 [1992]).

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

ENTERED: MAY 24, 2012

CLERK

Gonzalez, P.J., Andrias, Saxe, DeGrasse, Román, JJ.

7765N Bernard H. Glatzer, Index 21663/04
Plaintiff-Appellant,

-against-

Bear, Stearns & Co., Inc., et al.,
Defendants-Respondents.

_____

Bernard H. Glatzer, appellant pro se.

Fulbright & Jaworski L.L.P., New York (Mark Allen Robertson of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (John A. Barone, J.), entered on or about May 1, 2008, which denied plaintiff's recusal motion, unanimously affirmed, with costs.

Plaintiff filed the instant recusal motion after the court dismissed the complaint. Thus, the trial court lacked the authority to grant the motion absent proof of actual prejudice or biased actions, rather than the mere appearance of impropriety (*see Rochester County Individual Practice Assn v Excellus Health Plan*, 305 AD2d 1007 [2003], *lv dismissed* 1 NY3d 546 [2003]), and there is no basis for mandatory disqualification or recusal (see Judiciary Law § 1; 22 NYCRR 100.3[E][1]; *People v Grasso*, 49 AD3d 303 [2008], *affd* 11 NY3d 64 [2008]). The trial court's generalized comments comparing judicial salaries to first year

attorney salaries as recently reported in the news, coupled with an attendant joke that he might have to seek employment with defendants' counsel's law firm, stand in stark contrast to the facts in *Caperton v A.T. Massey Coal Co., Inc.* (556 US 868 [2009]), relied upon by plaintiff, in which the president and chief executive officer of a corporation appearing as a defendant before the judge against whom recusal was sought had contributed some $3 million to his election campaign and at issue was a $50 million judgment against the defendant corporation. Here, there is no basis to conclude that actual bias or prejudice existed. No evidence was offered to show that the trial judge had any relationship with defendants' counsel outside of the courtroom, that the trial judge was seeking, or intended to seek employment with the law firm, or that the court was in anyway biased in favor of defendants.

Moreover, where, as here, a party inexplicably withholds an allegation of bias until after the court adversely rules against it, denial of the recusal motion is generally warranted and the courts' discretion in so ruling will not be disturbed (*see e.g.*, *Anonymous v Anonymous*, 222 AD2d 295 [1995]; *Leventritt v Eckstein*, 206 AD2d 313 [1994], *lv dismissed in part, denied in part*, 84 NY2d 987 [1994]). Plaintiff's claims of bias are

undermined by his continued participation in the court proceedings for nearly a year after the disputed comments were made, without complaint. Furthermore, the dismissal of plaintiff's "amended" action was soundly based upon a prior federal district Court decision which this Court previously found disposed of plaintiff's fundamental arguments (*see Glatzer v Enron Corp.*, 277 AD2d 161 [2000]).

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

ENTERED: MAY 24, 2012

CLERK

Gonzalez, P.J., Andrias, Saxe, DeGrasse, Román, JJ.

7766N-
7767N Aegis Holding Lipstick LLC, Index 651054/11
Plaintiff-Appellant,

-against-

Metropolitan 885 Third Avenue Leasehold LLC,
Defendant-Respondent,

CB Richard Ellis, Inc., etc., et al.,
Defendants.

_____

Rosenberg Feldman Smith, LLP, New York (Michael H. Smith of counsel), for appellant.

Stern & Zingman LLP, New York (Mitchell S. Zingman of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Bernard J. Fried, J.), entered October 26, 2011 and November 9, 2011, which, to the extent appealed from, dissolved a temporary restraining order that had tolled plaintiff's time to cure the alleged defaults and denied plaintiff's motions for a *Yellowstone* injunction, unanimously reversed, on the law, with costs, and the motions granted.

Plaintiff established its entitlement to a *Yellowstone* injunction. Plaintiff demonstrated that it held a commercial lease, had received a notice to cure from defendant landlord, and had requested injunctive relief prior to the expiration of the

cure period. Plaintiff also showed that it was prepared and maintained the ability to cure the alleged defaults (*see Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.*, 93 NY2d 508, 514 [1999]). Although plaintiff initially did not, as required under the lease, remain open six days per week while it contested defendant's purportedly improper HVAC charges, plaintiff cured that default and there has yet to be a determination as to plaintiff's responsibility to cure the remaining alleged defaults, which the court did not address (*see e.g. Boi To Go, Inc. v Second 800 No. 2 LLC*, 58 AD3d 482 [2009]).

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

ENTERED: MAY 24, 2012

CLERK

Mazzarelli, J.P., Saxe, Catterson, Acosta, Román, JJ.

6626 Augusto Leyva, Index 310425/08
Plaintiff-Respondent,

-against-

Cora Realty Co., LLC,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (Patricia Anne Williams, J.), entered on or about January 25, 2011,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated May 3, 2012,

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

ENTERED: MAY 24, 2012

CLERK

Mazzarelli, J.P., Saxe, Catterson, Román, JJ.

6629 Wing Wong Realty Corp., Index 101323/05
Plaintiff, 590334/08

-against-

Flintlock Construction Services, LLC, et al.,
Defendants.

- - - - -

Versatile Consulting & Testing Services, Inc., et al.,
Third-Party Plaintiffs-Respondents,

-against-

R.A. Consultants, LLC, et al.,
Third-Party Defendants-Appellants,

Thornton Tomasetti, Inc.,
Third-Party Defendant.

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Edward M. Kay, Chicago, IL, of the bar of the State of Illinois, admitted pro hac vice, for appellants.

Babchik & Young LLP, White Plains (Jack Babchik of counsel), for respondents.

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Order, Supreme Court, New York County (Debra A. James, J.), entered February 10, 2011, which, insofar as appealed from as limited by the briefs, denied the motion of third-party defendants R.A. Consultants, LLC and Robert Alperstein, P.E. for summary judgment dismissing the third-party complaint as against them, affirmed, without costs.

Plaintiff alleges damage to its building as a result of excavation work at the adjacent construction site owned by defendant Well-Come Holdings. Third-party defendants, the project's engineering consulting firm and its principal (together, Alperstein), failed to establish prima facie that as a matter of law they could not be held responsible in part for the damage. Alperstein's responsibilities included reviewing the plans for the underpinning and recommending modifications to them; yet, their expert, while asserting that Alperstein had acted in accordance with good and accepted engineering practice, failed to indicate either that he had examined the excavation site or reviewed the drawings of the shoring and underpinning that were alleged to be faulty, let alone the particular elements of the design to which Alperstein proposed changes. Alperstein's expert therefore failed to establish that he possessed the necessary evidentiary basis for his conclusion (*see Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]). Accordingly, third-party plaintiffs were not obligated to submit expert opinion in opposition to the motion.

The claim for contribution was properly asserted, since the property damage claim was not merely cast in breach of contract, but was based on theories of negligence and statutory liability

(*see Structure Tone, Inc. v Universal Servs. Group., Ltd.*, 87 AD3d 909, 911 [2011]). It would be premature to dismiss the claims for common-law indemnification and contribution, since it has yet to be determined whether third-party plaintiffs were at fault and barred from indemnification. Whether Alperstein was at fault and liable for contribution or indemnification also has yet to be determined, since issues of fact exist as to Alperstein's role in the design of the shoring and underpinning and whether any act or omission on its part caused damage to plaintiff's building.

We have considered Alperstein's other contentions and find them unavailing.

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

CATTERSON, J. (dissenting)

In this action, the defendant/third-party plaintiff, Versatile Consulting and Testing Services acknowledged at oral argument that the record contains no facts to support its opposition to third-party defendants' summary judgment motion. Yet it raises a novel argument in the context of third-party summary judgment motion practice: It essentially urges us to adopt an exception as to nonmovant's burden to raise a triable issue of fact, asserting that to do so at this stage will undermine its position in the main action. Unfortunately, because the CPLR does not allow for any such exception, I must respectfully dissent.

The following facts are undisputed: third party plaintiff Versatile and its principal Roman Sorokko, a construction subcontractor, brought a third-party negligence claim against, inter alia, R.A. Consulting, an engineering firm, and its principal Robert Alperstein, stemming from damages to a building owned by Wing Wong Realty, the plaintiff in the main action.

Versatile was hired by codefendant Well-Come Holdings to prepare, among other things, plans for the shoring and underpinning of a lot at 106 Mott Street in Chinatown. The lot is adjacent to a building at 102-104 Mott Street owned by Wing

Wong. The excavation and underpinning of the lot was to be carried out by general contractor Flintlock Construction and subcontractor Diamond Point Excavating Corp., both codefendants in the principal action.

Well-Come contracted separately with R.A. Consulting, to act as the geotechnical consulting engineer for the project. R.A. Consulting's role included sampling soil at the site and making recommendations for the requirements of the underpinning design. Wing Wong alleges that its property was damaged during the excavation of the neighboring lot. As a result, the building was deemed unsafe and ordered vacated by the Department of Buildings (hereinafter referred to as "DOB"). Wing Wong filed a claim against, inter alia, Flintlock, Sorokko, and Versatile, for damages to the building and lost rents. Wing Wong's claims against Sorokko and Versatile were for strict liability pursuant to § 27-1031 of the Administrative Code of the City of New York, and for negligence related to its work and/or supervision at the premises.

Versatile subsequently initiated a third-party action against R.A. Consulting for contribution and common-law indemnification. R.A. Consulting moved for summary judgment, arguing that it served only as a consultant to the project and

made recommendations for the designs on request. Moreover, R.A. Consulting argued that Versatile was not entitled to indemnification because there was no privity of contract between the parties, and that contribution is not available where damages are based on contract. In addition, R.A. Consulting submitted an expert affidavit from Rudolph Frizzi, an engineer who opined that the recommendations made by R.A. Consulting were in accordance with good and accepted engineering practices and did not contribute to Wing Wong's damages.

In opposition, Versatile responded that, notwithstanding its contractual obligations, R.A. Consulting was "actively involved in shaping the final, filed underpinning and shoring designs."

The motion court denied summary judgment to R.A. Consulting, holding that its expert failed to establish "the propriety of each of the requested revisions," and that R.A. Consulting's role in the oversight of Versatile's work was unclear. The motion court reasoned that it would be premature to grant R.A. Consulting's motion in the absence of a determination as to its negligence.

In my opinion, this was error for the following reasons: It is well settled that in order to prevail on a motion for summary judgment a movant "must make a prima facie showing of entitlement

to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 925, 501 N.E.2d 572, 574 (1986), citing Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 317, 476 N.E.2d 642, 643 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 597, 404 N.E.2d 718, 720 (1980).

With the movant's burden satisfied, the burden shifts to the party opposing the motion for summary judgment "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez, 68 N.Y.2d at 324, 508 N.Y.S.2d at 925, 501 N.E.2d at 574.

Further, under CPLR 3212[i], when a summary judgment motion involves an allegation of malpractice against a licensed professional such as an engineer, a plaintiff must offer "'proof that there was a departure from accepted standards of practice and that the departure was a proximate cause of the [plaintiff's] injury.'" Talon Air Servs. LLC v. CMA Design Studio, P.C., 86 A.D.3d 511, 515, 927 N.Y.S.2d 643, 646 (1st Dept. 2011), quoting D.D. Hamilton Textilies v. Estate of Mate, 269 A.D.2d 214, 215, 703 N.Y.S.2d 451, 453 (1st Dept. 2000); see also Travelers Indem.

Co. v. Zeff Design, 60 A.D.3d 453, 875 N.Y.S.2d 456 (1st Dept. 2009)(affirming summary judgment for defendant where plaintiff failed to provide expert proof in support of negligence claim against defendant engineering firm for its alleged role in an underpinning failure).

In my opinion, the third-party defendant-movant in this case, R.A. Consulting, met its burden and established prima facie entitlement to summary judgment. On the basis of its contract with Well-Come, R.A. Consulting showed that it served as a consultant and that its responsibility was limited to reviewing plans for the underpinning, and providing memos identifying problems during excavation; but that it was Versatile that had filed the statement of responsibility with DOB.

Further, the deposition testimony of R.A. Consulting's principal indicated that Versatile was not obliged to accept his recommendations, and that, indeed, Versatile and Diamond Point failed to follow some of his recommendations in designing and carrying out the underpinning. More significantly, R.A. Consulting proffered the affidavit of an expert who had reviewed construction documents (but not shoring or underpinning drawings), memos issued by R.A. Consulting, and the deposition transcripts, and who opined that R.A. Consulting had acted in

accordance with good and accepted engineering practices and did not contribute to Wing Wong's damages.

The court's determination that the expert failed to establish the propriety of *each* of the requested revisions because he did not explain the purpose of each of the recommendations improperly shifted the burden on a summary judgment motion: In light of the expert affidavit of movant R.A. Consulting, it was Versatile's burden to raise a triable issue of fact, specifically by way of an expert affidavit. Travelers Indem. Co., 60 A.D.3d at 455, 875 N.Y.S.2d at 459, citing 530 E. 89 Corp. v. Unger, 43 N.Y.2d 776, 402 N.Y.S.2d 382, 373 N.E.2d 276 (1977); see also Talon Air Servs., 86 A.D.3d at 515, 927 N.Y.S.2d at 646; Sheehan v. Pantelidis, 6 A.D.3d 251, 251, 774 N.Y.S.2d 336, 336 (1st Dept. 2004) (third-party plaintiff's "failure to offer an expert affidavit was fatal to his malpractice claim against the architect").

Versatile failed to produce such an affidavit, or any specific factual allegations as to which, if any, recommendations were negligently made. Versatile argued only that, *insofar as Wing Wong could trace its damages to the designs*, R.A. Consulting should remain in the case since one of its revisions *may* have contributed to the design's hypothetical defects.

At oral argument, Versatile's counsel acknowledged that the record contains no facts to support opposition to the summary judgment motion. Instead, Versatile relied on the novel argument that, at this stage, pointing to defective designs recommended by R.A. Consulting -- and accepted by Versatile -- would be fatal to its defense strategy in the main action. Indeed, it maintains, as it did in the court below, that the designs it provided were in no way defective and were not the cause of Wing Wong's damages, and that fault in this case belongs to the contractors Flintlock and Diamond Point for negligently carrying out the work on the property.

Notwithstanding this position, Versatile argues that until liability is determined in the main action it should be allowed to preserve its claims against R.A. Consulting in case it needs to establish R.A. Consulting's negligence at a later point in the proceedings. Admittedly, at this stage of the main action, R.A. Consulting's motion for summary judgment leaves Versatile with a Hobson's choice. On the one hand, Versatile wants to leave the door open to bring in R.A. Consulting if it is found liable in the main action; on the other hand, Versatile is aware that raising a triable issue of fact as to R.A. Consulting's negligence would involve an acknowledgment of its own complicity

in that negligence.

Unfortunately, while Versatile's posture may elicit sympathy it cannot substitute for legal authority. Versatile would, in essence, have this Court adopt a rule that would impose a lesser standard on a third-party plaintiff where it is unable -- or chooses not -- to make out a prima facie case in opposition to a motion for summary judgment. Thus, third-party defendants could not prevail on summary judgment motions in indemnification cases where the primary defendant's negligence has not yet been determined. However, there is no CPLR exception to summary motion practice involving third parties. See CPLR 3212[b],[i]; see also Tungsupong v. Bronx-Lebanon Hosp. Ctr. 213 A.D.2d 236, 238, 623 N.Y.S.2d 866, 868 (1st Dept. 1995) ("[r]ank speculation is no substitute for evidentiary proof" in an attempt to defeat a motion for summary judgment).

For the foregoing reasons, I would reverse and grant summary judgment to R.A. Consulting.

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

ENTERED: MAY 24, 2012

CLERK

Mazzarelli, J.P., Friedman, Richter, Abdus-Salaam, JJ.

7113 In re Samuel Belzberg, Index 600977/10
Petitioner-Respondent,

Doris Lindbergh, et al.,
Petitioners,

-against-

Verus Investments Holdings Inc.,
Respondent-Appellant.

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Wolf Haldenstein Adler Freeman & Herz LLP, New York (Charles J. Hecht of counsel), for appellant.

Kaye Scholer LLP, New York (H. Peter Haveles, Jr., of counsel), for respondent.

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Judgment and supplemental order, Supreme Court, New York County (Shirley Werner Kornriech, J.), entered August 9, 2011, which, to the extent appealed from as limited by the briefs, granted the petition to permanently stay the arbitration as to petitioner Samuel Belzberg and denied the cross petition to compel Belzberg to arbitrate, unanimously reversed, on the facts and the law, without costs, the petition denied and the cross petition granted. The Clerk is directed to enter judgment accordingly.

In October 2008, petitioner-respondent Samuel Belzberg, an investor, and his friend Ajmal Khan, principal of respondent-

appellant Verus Investments Holdings Inc. (Verus), decided to purchase securities in Fording Canadian Coal. Because the investment would require an American brokerage account, Belzberg, a Canadian citizen, asked Khan to process the trade through Verus's account at Jefferies & Company, Inc. (Jefferies). The brokerage account customer agreement between Jefferies and Verus contained an arbitration clause.

Several weeks later, Belzberg directed that $5 million for the investment be wired to the Jefferies account from a company called Winton Capital Holding (Winton); Verus itself wired $1 million of its own money. Winton is a British Virgin Islands corporation owned by a trust of which Belzberg's children are the sole beneficiaries. Belzberg organized Winton for the benefit of his children and provided the initial capital. According to Belzberg, he acts as Winton's financial advisor, but has no ownership or beneficial interest in the corporation.

In November 2008, the Fording securities were liquidated and the proceeds were distributed to Verus's brokerage account. The profits from the Fording investment attributable to the $5 million put up by Winton amounted to $223,655. At Belzberg's direction, Verus returned the $5 million principal investment to Winton. But, instead of having the profits sent to Winton,

Belzberg directed Verus to wire those funds directly to petitioner Doris Lindbergh, Belzberg's good friend of 25 years. Verus complied with Belzberg's request and wired $223,655 to Lindbergh from its Jefferies account.

Soon thereafter, Canadian authorities notified Jefferies that a $928,053 withholding tax was owed on the distribution of the principal of the investment and the profit paid to Lindbergh. Khan asked Belzberg to pay, either personally or through one of his entities, the withholding tax attributable to the money put up by Winton, but Belzberg refused. In September 2009, Jefferies commenced an arbitration before the Financial Industry Regulatory Authority (FINRA) against Verus for the unpaid withholding taxes. Verus answered and asserted third-party arbitration claims against, inter alia, Belzberg, Lindbergh and Winton seeking payment for their share of the taxes.

In April 2010, Belzberg, Lindbergh and Winton filed an article 75 petition to permanently stay arbitration of the third-party claims. Petitioners asserted that since they were not customers of Jefferies, they were not subject to the arbitration agreement between Jefferies and Verus. Verus opposed the petition and moved to compel arbitration, arguing that petitioners should be estopped from avoiding arbitration because

they knowingly received direct benefits from the Verus-Jefferies customer agreement. The motion court granted the petition to the extent of compelling Winton to arbitrate since it had received a direct benefit under the agreement. With respect to Lindbergh and Belzberg, the court ordered a hearing to determine whether they knowingly exploited the customer agreement and directly benefitted from it.

Belzberg was unable to come to New York for the hearing and instead was deposed in California. At that deposition, he testified that he is a financial advisor for Winton and has the authority to make investment decisions on Winton's behalf. He testified that he derived no financial benefit from the Fording trade, but acknowledged that, at his direction, the profits from the trade were sent, purportedly "through Winton," to Lindbergh. Belzberg characterized the money as a loan so that Lindbergh, who could not get a mortgage, could purchase a country home. Belzberg testified that the loan would be repaid "one of these days," and the repayment would go to Winton. Belzberg acknowledged there was no documentation for the loan.

Lindbergh, a lawyer who formerly worked in the financial industry, testified at the hearing that she was unemployed at the time and could not get a mortgage to buy a summer house. In

November 2008, Belzberg called and said, "I'm sending you money" because he wanted to help her buy the home. Lindbergh was "surprise[d]" at Belzberg's generosity and told him that she was grateful, but that she did not know if and when she could repay him. Belzberg replied: "Don't worry, you'll pay me back. You will repay me." During the call, Belzberg requested Lindbergh's bank information, and several days later, she received a large sum of money. When asked how she was treating the $223,655 she received, she stated: "I'm treating it as money Sam Belzberg gave me . . . because that's what he said." Lindbergh conceded that she had never heard of Winton before being served in this litigation, and still did not know who Winton was at the time of her testimony. Lindbergh also confirmed that there was no documentation for the loan, there was no timetable or plan for her to repay the money, and no interest terms were discussed.

After the hearing, the motion court permanently stayed the arbitration as to both Belzberg and Lindbergh. On this appeal, Verus does not challenge the court's determination with respect to Lindbergh, but maintains that Belzberg should be equitably estopped from avoiding arbitration. Verus argues that Belzberg should be compelled to arbitrate because he knowingly exploited and directly benefitted from the Verus-Jefferies customer

agreement, which contained the arbitration clause.

The motion court should have compelled Belzberg to arbitrate. It is well settled that in certain circumstances, an intent to arbitrate may be imputed to a nonsignatory (*TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]). For example, "[a] nonsignatory to an agreement containing an arbitration clause that has knowingly received direct benefits under the agreement will be equitably estopped from avoiding the agreement's obligation to arbitrate" (*HRH Constr. LLC v Metropolitan Transp. Auth.*, 33 AD3d 568, 569 [2006]; *see Mark Ross & Co., Inc. v XE Capital Mgt., LLC*, 46 AD3d 296 [2007]; *Matter of SSL Intl., PLC v Zook*, 44 AD3d 429 [2007]).

Here, Belzberg should be estopped from avoiding arbitration because he knowingly exploited and received direct benefits from the customer agreement between Verus and Jefferies. Although Belzberg claimed that he acted only as a financial advisor to Winton, and that he had no stake in the proceeds transferred to Lindbergh, the record demonstrates otherwise. Belzberg specifically asked Khan if he could use Verus's brokerage account at Jefferies to process the Fording trade, and when Khan agreed, Belzberg initiated and orchestrated the entire transaction. After the securities were liquidated, Belzberg appropriated the

$223,655 of trading profits by instructing Verus to transfer them to his good friend of 25 years so that she could buy a summer home, and then directed that she repay him.

Although the motion court characterized the transfer as a loan from Winton, the record shows that Belzberg, in his personal capacity, not Winton, gave the money to Lindbergh. There is no question that Lindbergh considered the money a loan from Belzberg, not Winton. During their phone conversation, Belzberg stated: "*I'm* going to send you some money," and "you'll pay *me* back. You will repay *me*" (emphasis added). It makes little sense that Winton would loan Lindbergh, an unemployed borrower who could not get a mortgage and who had no demonstrable connection to Winton, almost a quarter of a million dollars with no documentation, no repayment terms, no security and apparently no interest. Furthermore, Lindbergh's testimony that she had never heard of Winton undermines any claim that the loan came from Winton. And, contrary to Belzberg's testimony that he arranged for the $223,655 to be sent to Lindbergh "through Winton," the documentary evidence shows that the funds went directly from Verus's Jefferies account to Lindbergh, and that Winton never had possession of the money.

Additionally, the record reveals that Belzberg's hearing

testimony is inconsistent with an earlier affidavit he filed in the litigation. In the affidavit, Belzberg stated that he is "merely a financial advisor of Winton, and . . . [has] no authority to act on behalf of or bind Winton." But at the hearing, Belzberg admitted that he has the power to make investments for Winton. Likewise, his affidavit statement that he "had no involvement in Winton's transfer of funds to Verus'[s] account at Jefferies or the purchase of Fording securities" is flatly contradicted by his hearing testimony that he directed that $5 million be transferred from Winton to the Jefferies account for purchase of the securities. Belzberg's contradictory statements on these material issues cast doubt on his present claim that the loan came from Winton and not him, and warrant our rejection of his factual characterization of the money transfer.

Contrary to Belzberg's argument, the benefit to him flowed directly from the customer agreement. The profits Belzberg diverted to Lindbergh were generated in the Fording trade that Belzberg orchestrated using Verus's account at Jefferies. As the motion court recognized when it ordered Winton to arbitrate, absent the Verus-Jefferies customer agreement, Belzberg would not have been able to place the trade with Jefferies. And, as Lindbergh testified, she will repay the money directly to

Belzberg, which means that Belzberg will ultimately receive the profits from the trade. Because Belzberg knowingly exploited and directly benefitted from the Verus-Jefferies customer agreement, he should be estopped from avoiding the agreement's obligation to arbitrate (*see Matter of SSL Intl.*, 44 AD3d at 430 [nonsignatories to a license agreement were estopped from seeking to avoid an arbitration provision since they marketed products that utilized technology covered by the license agreement]).

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

ENTERED: MAY 24, 2012

CLERK

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

7524 The People of the State of New York, Ind. 3648/10
Appellant,

-against-

Calvin Green,
Defendant-Respondent.

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Robert T. Johnson, District Attorney, Bronx (Stanley R. Kaplan of counsel), for appellant.

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Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered on or about June 3, 2011, which granted defendant's motion to suppress physical evidence, unanimously reversed, on the law and the facts, the motion denied and the matter remitted for further proceedings.

The testimony credited by the hearing court established that defendant gave the police implicit consent to search his bag. In the presence of officers who were conducting an investigation, defendant's mother called defendant into the living room and asked him if it was true that he was keeping firearms in the apartment. Defendant admitted that this was true, and that the weapons were in his bedroom. Defendant took an officer into his bedroom, pulled out a bag and placed it on top of his bed. The officer then opened it and found the weapons.

The only reasonable interpretation of defendant's course of conduct was that he was voluntarily surrendering the bag to the police, or at least offering it up for inspection. This was an implied consent to look inside the bag and confirm the presence of the weapons that defendant had already admitted possessing (*see People v Smith*, 239 AD2d 219 [1997], *lv denied* 90 NY2d 911 [1997]; *United States v Reynolds*, 646 F3d 63, 73 [1st Cir 2011]).

In light of the foregoing, we do not reach the People's alternate contention.

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

ENTERED: MAY 24, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Freedman, JJ.

7579 Amy Kantor, etc., Index 600811/09
Plaintiff-Appellant,

-against-

75 Worth Street, LLC, et al.,
Defendants-Respondents.

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Eric W. Berry, PC, New York (Eric W. Berry of counsel), for appellant.

Brody, O'Connor & O'Connor, New York (Scott A. Brody of counsel), for respondents.

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Order, Supreme Court, New York County (Bernard J. Fried, J.), entered October 28, 2010, which, to the extent appealed from, granted defendants' motion pursuant to CPLR 3211 to dismiss the claims for lost profits, unanimously affirmed, without costs.

The allegations in the complaint and the supporting materials do not establish that plaintiff's lost profits "were within the contemplation of the parties at the time the contract was entered into and are capable of measurement with reasonable certainty" (*Ashland Mgt. v Janien*, 82 NY2d 395, 403 [1993]). Unlike the contract in *Ashland*, nothing in the record indicates that the parties' agreement contemplated, in the event of defendants' breach, that defendants would be liable for plaintiff's failure to realize profits from her new veterinary

practice. Moreover, plaintiff's claim for lost profits is too speculative to sustain a cause of action (*id.*). Plaintiff argues that a similarly-situated veterinary business quantifies her lost profits with reasonable certainty. However, aside from the other veterinary business occupying the same space that plaintiff intended to occupy, the record demonstrates no other similarities between the existing business and plaintiff's intended practice.

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

ENTERED: MAY 24, 2012

CLERK

Tom, J.P., Catterson, Renwick, Freedman, Manzanet-Daniels, JJ.

5597 In re Lite View, LLC, Index 108090/10
Petitioner-Appellant,

-against-

New York State Division of Housing
and Community Renewal,
Respondent-Respondent.

_____

Kucker & Bruh, LLP, New York (Robert H. Berman of counsel), for appellant.

Gary R. Connor, New York (Martin B. Schneider of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Joan B. Lobis, J.), entered January 14, 2011, affirmed, without cost.

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

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
James M. Catterson
Dianne T. Renwick
Helen E. Freedman
Sallie Manzanet-Daniels, JJ.

5597
Index 108090/10

_____x

In re Lite View, LLC,
Petitioner-Appellant,

-against-

New York State Division of Housing
and Community Renewal,
Respondent-Respondent.
_____x

Petitioner appeals from an order and judgment (one paper) of the Supreme Court, New York County (Joan B. Lobis, J.), entered January 14, 2011, denying its petition to annul the order and opinion of respondent New York State Division of Housing and Community Renewal, dated April 22, 2010, which granted the petition for administrative review and revoked a previously issued order of the Rent Administrator that had granted owner's application to, inter alia, install an elevator within the subject premises, and dismissing the proceeding brought pursuant to CPLR article 78.

Kucker & Bruh, LLP, New York (Robert H. Berman of counsel), for appellant.

Gary R. Connor, New York (Martin B. Schneider and Patrice Huss of counsel), for respondent.

TOM, J.P.

The issue raised on this appeal is whether petitioner owner's proposed installation of an elevator shaft within a tenant's apartment will change the shape and character of the dwelling space and materially affect the tenant's use and enjoyment of that space in contravention of the rent laws.

Owner acquired the premises known as 218 East 84th Street in Manhattan by an indenture dated April 14, 2009. The building is described as a five-story walk-up containing 20 residential units, four on each floor. Two weeks later, owner filed an application with respondent Division of Housing and Community Renewal (DHCR) to install an elevator.

Owner's application recites that five apartments in vertical line D of the building "will need to transfer space from their existing kitchens to the proposed [elevator] shaft." The ground-floor unit, which is rent-stabilized, is occupied by tenant John Burke. The other four apartments in line D are currently vacant and deregulated. Tenant's unit is a rectangular studio apartment with the bathroom and kitchen located in the front of the dwelling unit and the rear of the unit facing the courtyard. In order to accommodate the elevator shaft to be installed at the front of the unit, the existing bathroom would be relocated rearward in the space now occupied by the kitchen, which would,

in turn, be reconstructed in the living area. This being a small studio apartment, the living room also functions as tenant's bedroom.

In its application, owner proposed extending the rear of the building into the backyard to replace the floor space lost by the installation of the elevator shaft; renovating tenant's apartment and relocating tenant to a comparable apartment at owner's expense during the approximately two months required to complete the necessary alterations; and reducing tenant's rent by 10% to compensate for his loss of the use of that portion of the backyard taken up by the proposed extension. The Rent Administrator issued an order granting owner "permission to change or decrease dwelling space, essential services, etc." pursuant to Rent Stabilization Code (RSC) (9 NYCRR) § 2522.4.

Tenant filed a petition for administrative review (PAR) supported by the affirmation of his attorney, asserting that tenant has resided in the apartment since 1978, that he is a "severely disabled senior citizen, who requires the assistance of a home attendant due to his poor health" and that requiring him to relocate, even temporarily, would be "extremely burdensome, due to his poor health and advanced age." It asserts that owner's attempt to compensate for the loss of the 66 square feet required for the elevator shaft by extending the rear of the apartment is inadequate and that the proposed alterations "would completely change the shape and character of the apartment."

By order of the Deputy Commissioner, DHCR granted tenant's PAR and revoked the Rent Administrator's order. The Deputy Commissioner's order summarizes owner's proposal to take about 63 square feet, or 18% of the dwelling space, from the front of the apartment to accommodate the elevator shaft and to add some 66 square feet at the rear of the apartment. The order further notes that the proposed elevator installation is not a necessary improvement or required by law. It makes no finding on whether the backyard was under the exclusive control of tenant, nor does it address either the effect of a temporary relocation on his health or the benefit conferred by receiving a newly renovated apartment with a 10% reduction in rent. It concludes that the proposed alterations to the apartment "would result in a significant reconfiguration of the apartment and the impact of such a significant change would materially reduce the use and enjoyment of the apartment by the tenant in contravention of the Rent Laws."

Owner brought this article 78 proceeding to annul DHCR's determination, culminating in the judgment under review. Supreme Court held that "DHCR's determination is based on its evaluation of the specific facts of this situation and its expertise in evaluating such facts[] is supported by the record, and is therefore entitled to deference and shall not be disturbed." Owner contends that the court committed error in deferring to the agency's expertise because DHCR's determination was issued

"without regard to the facts" and was, thus, arbitrary and capricious.

Applications to reduce or alter dwelling space pursuant to RSC § 2522.4 are fact-specific, warranting assessment on a case-by-case basis, and the courts appropriately defer to an administrative agency's determination based on an "evaluation of factual data and inferences to be drawn therefrom" (*Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 [1980]). Where an agency's factual findings have a rational basis and are not unreasonable, its determination will not be disturbed (*Matter of Salvati v Eimicke*, 72 NY2d 784, 791 [1988]).

DHCR's determination was not arbitrary and capricious within the meaning of *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County* (34 NY2d 222, 231 [1974]). The finding that owner's proposal would significantly reconfigure the apartment, thereby materially reducing tenant's use and enjoyment, has a rational basis in the record and therefore, was not made "without regard to the facts" so as to be deemed arbitrary (*Matter of West Vil. Assoc. v Division of Hous. & Community Renewal*, 277 AD2d 111, 112 [2000]). While owner contends, inter alia, that the foyer area (separated from the proposed new kitchen by a "dropped arch") should be included in the calculation of the new kitchen size, there is a rational basis for the Commissioner's decision not to include this space. Notwithstanding that the exact

dimensions and relative desirability of the existing and proposed kitchens are subject to debate, the existing kitchen certainly appears much more spacious, consisting of about 9½ feet of counter space and appliances against one side wall with about 6½ feet of open kitchen space in front. Owner's diagram shows that the proposed kitchen would consist of 6½ feet of counter space and appliances against the bathroom wall and, parallel to it, a row of counter tops extending 6½ feet from the side wall, with a two-foot-five-inch-wide aisle separating the two counters. The effect of the alteration would reduce the actual physical space available for food preparation to a significantly smaller area with only a two-foot-five-inch wide and six-foot-six-inch long, narrow aisle in which to move about to cook and wash. Further, a comparison of the respective floor plans shows that the existing kitchen includes a three-foot by five-foot closet or pantry, as well as a small clothes closet. In the proposed plan, the pantry and small closet are eliminated, in part to enlarge the bathroom from its original width of 5½ feet to approximately eight feet seven inches. The proposed alteration would leave the new kitchen without a pantry or closet space. Owner's proposed replacement closet, to be built in the living room/bedroom, would also diminish tenant's living space in that part of the apartment. Whatever else may be said, the record supports the Deputy Commissioner's finding that the proposed alterations to the kitchen represent "a significant reconfiguration of the

apartment." Owner's proposal would change the "shape and character" of tenant's existing apartment from the one he rented (*see Matter of Greenberg v Higgins*, 167 AD2d 216, 217 [1990]).

The dissent is incorrect that the majority misapprehends that "'adequate substitution' means replication." Rather, our ruling is based on the record, which amply supports the Deputy Commissioner's findings that owner's proposed alteration would result in a "significant reconfiguration" of tenant's dwelling space, specifically the kitchen and the substantial reduction of its size, and the adverse impact on tenant's use and enjoyment of the apartment. Contrary to owner's contention, the Deputy Commissioner clearly appreciated that the amount of living space to be removed from the kitchen area of the apartment was to be replaced with an equivalent amount of space added to the living-dining area by extending the apartment into the backyard. However, based on the foregoing findings, the Deputy Commissioner determined that owner's proposal to enlarge the apartment by 66 square feet, extending it into the backyard, would not be an adequate substitute for the lost dwelling space.

Here, the issue is whether owner's installation of an elevator shaft and necessary alterations to tenant's apartment would compromise services furnished on the base date of the lease that owner is required to maintain (RSC § 2520.6[r][1]). In *Greenberg*, we applied an "adequate substitute" test under which alterations that affect required services are evaluated with

respect to whether the alterations result in the provision of sufficiently equivalent services. DHCR, applying its administrative expertise, determined that the proposed alterations would not result in the maintenance of required services, essentially deciding that the renovated apartment, and its kitchen in particular, would not provide "[t]hat space and those services which owner was maintaining or was required to maintain on the applicable base dates . . . and any additional space or services provided or required to be provided thereafter by applicable law" (RSC § 2520.6[r][1]). Because the Deputy Commissioner's determination represents a rational interpretation of the RSC and is supported by the evidence, it must be judicially sustained (*Matter of Pell*, 34 NY2d 222 at 231; *Matter of Greenberg*, 167 AD2d at 217).

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Joan B. Lobis, J.), entered January 14, 2011, denying the petition which sought to annul and set aside the order and opinion of respondent New York State Division of Housing and Community Renewal dated April 22, 2010, which granted the petition for administrative review filed by the tenant of the subject premises and revoked a previously issued order of the Rent Administrator that had granted owner's application to, inter alia, install an elevator within the

premises, and dismissing the proceeding brought pursuant to CPLR article 78, should be affirmed, without costs.

All concur except Catterson, J. who dissents in an Opinion.

CATTERSON, J. (dissenting)

I must respectfully dissent because, in my opinion, the determination of DHCR's Deputy Commissioner was made "without regard to the facts." More importantly, the finding that the "alteration" of the subject apartment is inconsistent with the rent laws ignores well-established precedent. Rather than considering the impact on the tenant of reconfiguration, or "alteration to the shape and character" of an apartment, precedent requires the application of an "adequate substitute" test, which, in my opinion, is satisfied here. The majority's holding to the contrary is based primarily on the findings that (a) the foyer space should not be included in the new kitchen size because the alteration would reduce the actual physical space available for *food preparation*; and (b) the alteration would leave the new kitchen without a pantry and small closet even though a replacement closet would be constructed in the living space. The majority appears to be under the misapprehension that "adequate substitution" means replication.

This article 78 proceeding arises from the application by Lite View, LLC, the owner of an apartment building on East 84th Street, Manhattan, for modification of services in a ground-floor, rent-stabilized unit. Within weeks of purchasing the building, the owner filed the application with the New York State

Division of Housing and Community Renewal (hereinafter referred to as the "DHCR"), as required by the Rent Stabilization Laws and Rent Stabilization Code.

In the application, the owner stated that, in order to install an elevator in the five-story, 20-apartment building, he needed to use 63 square feet of the apartment on the ground floor. He stated that the tenant in the apartment would be compensated by an extension of the dwelling space into the backyard by an additional 66 square feet. At the time, the tenant had access to, but not exclusive use of the backyard. The owner proposed a 10% monthly rent reduction for the duration of the lease.

The owner further advised DHCR that it would completely renovate the tenant's apartment by installing new walls and ceiling, new flooring, new kitchen appliances and fixtures, a new bathroom and fixtures, and new windows. During the renovation, the tenant would be temporarily relocated to another building in the vicinity of the subject building. Both the renovation and the relocation would be at the owner's sole expense.

In September 2009, the Rent Administrator issued an order, granting the owner permission to install the elevator, provided that the owner relocated the tenant while construction was ongoing, and provided that the tenant's rent was reduced as offered. The tenant filed a petition for administrative review (hereinafter referred to as "PAR") asserting for the first time

that relocation would be an undue burden on his health, and that under the proposed plans he would be losing living space.

The DHCR Deputy Commissioner granted the PAR and revoked the Rent Administrator's order relying on two provisions of the Rent Stabilization Code. She found, inter alia, that the elevator was not required by law; that the renovation would result in the loss of 62 square feet, that is, 18% of the tenant's dwelling space; and that the "significant reconfiguration [...] would materially reduce the use and enjoyment of the apartment by the tenant in contravention of the rent laws." The Deputy Commissioner further cited to this Court's decision in Matter of Greenberg v. Higgins (167 A.D.2d 216, 561 N.Y.S.2d 722 (1990)) which she observed addressed "[a] similar situation" where an application was denied because the proposed modification plans "completely altered the shape and character of the apartment."

Subsequently, the owner commenced this article 78 proceeding, challenging the determination. Supreme Court found that the Deputy Commissioner had made "several misstatements of fact" based on a misreading of the floor plans for the apartment. These "misstatements of fact" included the finding that there would be a reduction in the size of the apartment, notably because the new kitchen would be smaller than the existing one. Nevertheless, Supreme Court upheld the determination, finding that the determination of a "significant reconfiguration of the [a]partment" had "at least *some* rational basis" because it was

"based on [an] evaluation of the specific facts ... and [the Deputy Commissioner's] *expertise in evaluating such facts*, is supported by the record" (emphasis supplied).

For the reasons set forth below, I would reverse Supreme Court, annul the Deputy Commissioner's ruling, and grant petitioner's application for modification of the subject premises. It is well established that the determination of an administrative agency "will not be disturbed if it has warrant in the record, a reasonable basis in law and is neither arbitrary or capricious." Greystone Mgt. Corp., v. Conciliation & Appeals Bd. of City of N.Y., 94 A.D.2d 614, 462 N.Y.S.2d 13 (1st Dept. 1983), aff'd, 62 N.Y.2d 763, 477 N.Y.S.2d 315, 465 N.E.2d 1251 (1984); see also West Vil. Assoc. v. Division of Hous. & Community Renewal, 277 A.D.2d 111, 112, 717 N.Y.S.2d 31, 33 (1st Dept. 2000) ("determination may be found arbitrary where it is without sound basis in reason and is generally taken without regard to the facts") (internal quotation marks omitted).

On appeal, the owner asserts that because the Deputy Commissioner's determination was made without regard to the facts, it should be annulled. I agree to the extent that Supreme Court's deference to the Deputy Commissioner's "expertise in evaluating the facts" appears illogical given the court's observation that the Deputy Commissioner was clearly mistaken about three determinative facts she purported to evaluate. Based on the floor plans in the record, Supreme Court correctly noted

that the apartment size would not be reduced by 18%, but that, in fact, the interior square footage would be "virtually unchanged." It also correctly found that "the kitchen area in the proposed design is arguably *larger* than the kitchen area in the current design" (emphasis added). Lastly, the court properly concluded that, because the Deputy Commissioner had failed to determine that the tenant had exclusive use of the rear yard, there was no reduction of a required service.

However, this does not end the analysis because it is also well established that judicial review of an administrative determination is limited to the grounds invoked by the agency. Matter of Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs., 77 N.Y.2d 753, 570 N.Y.S.2d 474, 573 N.E.2d 562 (1991). Here, the Deputy Commissioner did not deny the owner's application based strictly on a decrease in dwelling space. Rather, the Deputy Commissioner ruled that the owner's proposed changes "would result in a significant reconfiguration of the apartment and the impact of such a significant change would materially reduce the use and enjoyment of the apartment by the tenant in contravention of the [r]ent [l]aws."

The rent laws on which the Deputy Commissioner relied are provisions of the Rent Stabilization Code (9 NYCRR) § 2520.6(r)(1) and 9 NYCRR 2522.4(e). In relevant part, the first provision defines "required services" as the requirement of maintaining "[t]hat space and those services which the owner was

maintaining or was required to maintain" on certain applicable dates. The second provision permits an owner to file an application to

> "modify or substitute required services, at no change in the legal regulated rent [...] on the grounds that: 1) the owner and tenant by mutual voluntary written agreement, consent to a modification or substitution of the required services... or 2) such modification or substitution is required for the operation of the building in accordance with the specific requirements of law; or 3) such modification or substitution is not inconsistent with the [Rent Stabilization Law] or this Code." 9 NYCRR 2522.4(e).

The Deputy Commissioner purported to find legal authority for her determination that the "alteration to the [subject] apartment was not consistent with the rent laws" in this Court's decision, Matter of Greenberg v. Higgins, 167 A.D.2d 216, 561 N.Y.S.2d 722 (1990), supra. On appeal, the respondent DHCR also relies on Greenberg to argue that the Deputy Commissioner's determination has a rational basis because in Greenberg an owner's application to install an elevator shaft was denied when his proposed plan to extend a tenant's apartment "completely alter[ed] the shape and character of the apartment." 167 A.D.2d at 217, 561 N.Y.S.2d at 723. Hence, the respondent now asserts that a "[m]aterial alteration to the shape or character of a rent[-]stabilized apartment without the tenant's consent is prohibited by law."

Not only do the respondent - and the Deputy Commissioner –

totally misconstrue Greenberg as set forth more fully below, but as a threshold matter the respondent is simply incorrect about the requirement of a tenant's consent. Given the statutory procedure outlined above, where tenant consent is just one of three grounds, it is evident that a tenant's consent is *not* required in order for an owner to obtain DHCR approval for a modification. More importantly, there is no statutory authority for a finding that "significant reconfiguration" or rearrangement of a dwelling space or even a "material alteration to the *shape* or *character* of a rent[-]stabilized apartment" (emphasis added) is inconsistent with the rent laws. There is no language in the rent laws that, in and of itself, proscribes reconfiguration, rearrangement or alteration of rent-stabilized apartments.

The primary purpose of the rent laws as applied to rent-stabilized apartments is to "prevent the exaction of unjust, unreasonable and oppressive rents and rental agreements." See 9 NYCRR 2520.3. Legal regulated rents may be increased or decreased only as specified in the Rent Stabilization Code. 9 NYCRR 2522.1. Indeed, the modification provision relied on by the Deputy Commissioner falls within the section titled "[a]djustment of legal regulated rent." See 9 NYCRR 2522.4.

The provisions of this section allow an owner to make an application to increase rent (for example in a situation where an owner or landlord has increased services or made major capital improvements) (see 9 NYCRR 2522.4(a)(1)); or to reduce required

services or dwelling space for a corresponding rent reduction (see 9 NYCRR 2522.4(d)); or to modify or substitute required services or dwelling space at no change of rent (see 9 NYCRR 2522.4(e)). In other words, any reduction in dwelling space or required services without a corresponding reduction in rent will contravene the rent laws. See e.g. Matter of Car Barn Flats Residents' Assn. v. New York State Div. of Hous. & Community Renewal, 184 Misc.2d 826, 832, 708 N.Y.S.2d 556 (Sup. Ct., N.Y. County 2000) (DHCR is empowered to determine what constitutes required services and whether the curtailment of such services translates into an "evasion of stabilized rents"). To the extent there is a modification of dwelling space or required services, the rent laws require adequate substitution provided by the owner. Matter of Greenberg v. Higgins, 167 A.D.2d at 217, 561 N.Y.S.2d at 723, citing Matter of Vento v. Prince, 73 A.D.2d 884, 424 N.Y.S.2d 206 (1st Dept. 1980).

In Vento, this Court affirmed the determination of the Conciliation and Appeals Board (hereinafter referred to as "CAB"), the forerunner of DHCR, that rent-stabilized tenants were not denied any required services when the owner of the building converted from manual to automatic operation of elevators. This Court found that CAB "correctly used an 'adequate substitute' test" to determine that the owner had provided adequate substitute protective and security services. 73 A.D.2d at 885, 424 N.Y.S.2d at 207.

Hence, both the Deputy Commissioner and the respondent misconstrue the plain import of Greenberg and the well established precedent of this Department by zeroing in on the one phrase describing the proposed, and rejected, "sliver" extension of the apartment in Greenberg as per se prohibited because it "completely alter[s] the shape and character of the apartment." 167 A.D.2d at 217, 561 N.Y.S.2d at 723. Certainly, Greenberg does not support the respondent's argument that the proposed extension in this case is also per se prohibited because "as this Court has already ruled ... *such an extension* ... is not an adequate substitute" (emphasis added).

In my opinion, this is a flagrant mischaracterization of Greenberg. There are no facts in Greenberg that would allow the respondent to assume that the proposed extension of the tenant's apartment in that case is similar in square footage, shape or any other way to the extension proposed in this case. Thus, there is no basis whatsoever for the Deputy Commissioner viewing it as a "similar situation" or the respondent viewing it as "on all fours" with the instant case in order to deny the owner's modification application in this case unless one were to accept that Greenberg establishes a per se prohibition.

Rather, "adequate substitution" must be determined on a case by case basis. Here, as Supreme Court correctly noted, the proposed 66 square-foot extension of the apartment into the backyard results in the same square footage. The plans in the

record establish that the layout of the studio apartment is also virtually unchanged from the existing layout, and thus not a "drastic" or "significant" reconfiguration. Moreover, even if the reduction in the size of the backyard were seen as a reduction of a required service, the owner has offered the tenant a 10% monthly reduction in rent for the duration of the lease. Additionally, the owner has offered to renovate the entire apartment installing a new bathroom with new fixtures, a new kitchen with new appliances, new flooring, and new windows, all at the owner's sole cost. In my opinion, it would be the very essence of arbitrariness to find that such a proposal for modification is not an adequate substitute for taking 63 square feet from the entrance to the apartment and moving the total interior space 63 square feet to the rear of the existing studio.

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

ENTERED: MAY 24, 2012

CLERK