SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**AUGUST 9, 2018**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Richter, J.P., Gesmer, Oing, Singh, Moulton, JJ.

6435 Craig B. Massey, Index 107935/10
Plaintiff-Respondent,

-against-

Christopher W. Byrne, et al.,
Defendants-Appellants.

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Law Offices of Tedd S. Levine, LLC, Garden City (Tedd S. Levine of counsel), for appellants.

The Kurland Group, New York (Erica T. Kagan of counsel), for respondent.

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Order, Supreme Court, New York County (Erika M. Edwards, J.), entered May 23, 2017, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the claims for a constructive trust and unjust enrichment, and granted plaintiff's motion for summary judgment dismissing the counterclaim for fraud in the inducement, unanimously affirmed, without costs.

We found on a prior appeal that there are triable issues of fact regarding plaintiff's constructive trust and unjust enrichment claims (112 AD3d 522 [1st Dept 2013]). Defendants have identified no new information unearthed in discovery that

would resolve these issues of fact. "An appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court as well as on the appellate court ... [and] operates to foreclose re-examination of the question absent a showing of subsequent evidence or change of law" (*Board of Mgrs. of the 25 Charles St. Condominium v Seligson*, 106 AD3d 130, 135 [1st Dept 2013] [internal quotation marks omitted]; *see Brodsky v New York City Campaign Fin. Bd.*, 107 AD3d 544 [1st Dept 2013].

Defendants' counterclaim for fraud in the inducement was correctly dismissed. Neither the allegations in the complaint, nor the surrounding circumstances, give rise to a "reasonable inference" that plaintiff possessed fraudulent intent when he made the alleged misrepresentations that he would become certified as an Apple Macintosh technician or that he would work diligently and competently for defendant Byrne Communications (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Rather, the allegations sound in breach of contract (*see Mañas v VMS Assoc., LLC*, 53 AD3d 451, 453-454 [1st Dept 2008]), a claim defendants did not assert. Moreover, defendants cannot claim that they continued to pay plaintiff a salary and to permit him to live rent-free in defendant Byrne's apartment in

justifiable reliance on his representations, since they admittedly had been aware for years that he was not performing his job adequately (*see Havell Capital Enhanced Mun. Income Fund, L.P. v Citibank, N.A.*, 84 AD3d 588, 589 [1st Dept 2011]).

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

ENTERED: AUGUST 9, 2018

CLERK

Friedman, J.P., Tom, Kapnick, Kahn, Kern, JJ.

6551N 21st Century Diamond, LLC, Index 650331/09
Plaintiff,

-against-

Allfield Trading, LLC, et al.,
Defendants.

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Allfield Trading, LLC, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Exelco North America, Inc., et al.,
Third-Party Defendants-Appellants.

- - - - -

Sterling Jewelers, Inc.,
Nonparty Appellant.

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Shelowitz Law Group PLLC, New York (Mitchell C. Shelowitz of counsel), for Exelco North America, Inc., FTK Worldwide Manufacturing, BVBA, Excelco International, Ltd., Jean Paul Tolkowsky, Fazal Chaudhri, Isidor, Inc. and Ori Levy, appellants.

LeClairRyan, New York (Joseph P. Paranac, Jr. of counsel), for Sterling Jewelers, Inc., appellant.

Judd Burstein, P.C., New York (Peter B. Schalk of counsel), for respondents.

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Order, Supreme Court, New York County (Lawrence K. Marks, J.), entered August 2, 2017, which, insofar as appealed from, granted third-party plaintiffs' motion to compel nonparty Sterling Jewelers, Inc. to produce allegedly privileged documents and make its witnesses available for further depositions following such production, unanimously modified, on the law and

the facts, to deny the motion except as to those documents as to which the claim of privilege has been withdrawn, as specified in Sterling's and third-party defendants' respective briefs, and otherwise affirmed, without costs.

The record supports the contention of third-party defendants and Sterling that they entered into a common-interest agreement "out of a reasonable concern that [third-party] plaintiffs might decide to add Sterling as a [third-party] defendant" (*21st Century Diamond, LLC v Allfield Trading, LLC*, 142 AD3d 913, 914 [1st Dept 2016]). Hence, the common-interest doctrine applies to protect otherwise privileged communications between these parties from disclosure (*see id.*).

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

ENTERED: AUGUST 9, 2018

CLERK

Richter, J.P., Andrias, Webber, Gesmer, Moulton, JJ.

6553 Delores Canteen, Index 300215/13
Plaintiff-Appellant,

-against-

The New York City Housing Authority,
Defendant-Respondent.

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Chirico Law PLLC, Brooklyn (Vincent Chirico of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Kenneth L. Thompson Jr., J.), entered November 30, 2016, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established its entitlement to judgment as a matter of law by establishing that it did not have actual or constructive notice of the urine on the staircase that allegedly caused plaintiff to fall. Defendant submitted, inter alia, the affidavit of its caretaker, who averred that it was his practice to inspect the staircase at issue twice each day, in the morning and at around 3:30 p.m., and to mop up any urine or other wet or slippery condition that he observed. He also stated that it was his practice to complete a checklist with regard to his morning inspection, and he attached and identified a copy of the

checklist that he had completed as to the morning inspection on July 2, 2012, the day before plaintiff's fall. In addition, he specifically stated that no one had complained to him about urine in a stairwell between his afternoon inspection on July 2 and the time his shift ended (*see Alamo v New York City Hous. Auth.*, 118 AD3d 484 [1st Dept 2014]; *Rodriguez v New York City Hous. Auth.*, 102 AD3d 407 [1st Dept 2013]).

Plaintiff's opposition failed to raise a triable issue of fact. The evidence she submitted failed to demonstrate a recurring dangerous condition routinely left unaddressed by defendant, as opposed to a mere general awareness of such a condition, for which defendant is not liable (*see Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]; *Love v New York City Hous. Auth.*, 82 AD3d 588 [1st Dept 2011]).

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: AUGUST 9, 2018

CLERK

Friedman, J.P., Sweeny, Kapnick, Kahn, Oing, JJ.

6580-
6581 Index 161735/14

Rafael Flores,
Plaintiff-Appellant-Respondent,

-against-

Metropolitan Transportation Authority,
et al.,
Defendants-Respondents-Appellants.

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Brian J. Isaac of counsel), for appellant-respondent.

Landsman Corsi Ballaine & Ford, P.C., New York (William G. Ballaine of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered July 14, 2016, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on the Labor Law § 240(1) claim and the Labor Law § 241(6) claim, which is based on alleged violations of Industrial Code (12 NYCRR) §§ 23-6.1(h) and 23-8.2(c)(3), denied defendants' cross motion for summary judgment dismissing the Labor Law § 240(1) claim and the Labor Law § 241(6) claim based on an alleged violation of 12 NYCRR 23-8.2(c)(3), granted the cross motion as to the Labor Law § 241(6) claim based on an alleged violation of 12 NYCRR 23-6.1(h), and made findings of fact pursuant to CPLR 3212(g), unanimously modified, on the law, to the extent of granting plaintiff's motion for partial summary

judgment on the Labor Law § 240(1) claim and § 241(6) claim based on 12 NYCRR 23-8.2(c)(3), and otherwise affirmed, without costs. Appeal from order, same court (Kathryn E. Freed, J.), entered November 27, 2017, which denied plaintiff's motion and defendants' cross motion for leave to renew and reargue, unanimously dismissed, without costs, as academic.

The motion court erred in denying plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim. Plaintiff established that the accident was proximately caused by defendants' failure to provide safety devices necessary to ensure protection from the gravity-related risks posed by the work he was engaged in, in violation of Labor Law § 240(1) (*see Naughton v City of New York*, 94 AD3d 1, 6-8 [1st Dept 2012]). Here, plaintiff fell off a flatbed truck after a load of steel beams, without tag lines, was hoisted above him by a crane, and began to swing towards him (*compare Toefer v Long Is. R.R.*, 4 NY3d 399 [2005]). The risk of the hoisted load of beams with no tag lines triggered the protections set forth in Labor Law § 240(1) (*see McLean v Tishman Constr. Corp.*, 144 AD3d 534 [1st Dept 2016]). Based on the same evidence, plaintiff also established his Labor Law § 241(6) claim insofar as the swinging beams lacked tag lines, a violation of 12 NYCRR 23-8.2(c)(3), which requires tag lines or certain other restraints to be used to avoid hazards

posed by swinging loads hoisted by mobile cranes.

The motion court, however, correctly dismissed the Labor Law § 241(6) claim based on an alleged violation of 12 NYCRR 23-6.1(h) because that section does not apply to "cranes" (12 NYCRR 23-6.1[a]; *see e.g. Scott v Westmore Fuel Co., Inc.*, 96 AD3d 520, 521 [1st Dept 2012]).

There is no longer an issue as to whether the City or any of the other defendants are proper party defendants under the Labor Law in this case, given defendants' counsel's concession at oral argument (*see Dias v City of New York*, 110 AD3d 577 [1st Dept 2013]).

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

ENTERED: AUGUST 9, 2018

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, P.J.
Peter Tom
Angela M. Mazzarelli
Cynthia S. Kern
Anil C. Singh, JJ.

6608
Index 101608/15

_____x

In re 333 East 49th Partnership, LP, et al.,
Petitioners-Appellants,

-against-

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

Petitioners appeal from an order and judgment (one paper) of the Supreme Court, New York County (Margaret A. Chan, J.), entered July 19, 2017, denying the petition to reverse a determination of DHCR, concerning a rent overcharge complaint, and dismissing the proceeding brought pursuant to CPLR article 78.

Kucker & Bruh, LLP, New York (Nativ Winiarsky and Patrick K. Munson of counsel), for appellants.

Mark F. Palomino, New York (Martin B. Schneider of counsel), for respondent.

SINGH, J.

The primary issues on this appeal are whether DHCR had the authority to sua sponte vacate a nonfinal order under section 2529.9 of the Rent Stabilization Code (9 NYCRR) and whether DHCR's finding that petitioner 333 East 49th Partnership, LP (the owner) was responsible for refunding the overcharge collected by the prime tenant, on the grounds that the prime tenant created an illusory tenancy, is supported by a rational basis and not arbitrary and capricious.

The owner owns a residential building located at 333 East 49th Street, in Manhattan. The parties allege that the owner rented 23 apartments to Dennis Dziena Associates (Dziena Associates).[1] The apartment at issue, apartment 5T, is subject to regulation under the Rent Stabilization Law (Administrative Code of City of NY) (RSL).

By rent-stabilized lease, dated July 17, 1995, the owner leased the apartment to Dziena Associates, for a two-year term, for $1,242.57/month. The lease prohibited Dziena Associates from assigning the lease or subletting without the owner's prior written consent. The owner entered into rent-stabilized renewal leases with Dziena Associates, every two years, from 1999 through

[1] The owner's rent roll from 2007 reflects only 22 such rentals.

2007. The 2003 renewal lease set a stabilized rent of $1,524.32.

By lease, dated December 2, 2003, Dennis Dziena Associates LLC (Dziena LLC) as landlord leased the apartment, fully furnished, to Joseph Lombardo, as tenant, for a two-month term at $2,800/month. Lombardo paid his rent directly to Dziena LLC. A printout from the New York State Department of State, Division of Corporations confirmed that Dziena LLC was created on June 27, 1997.

On or about December 31, 2008, DHCR mailed Lombardo a form letter, addressed to "Tenant," enclosing the annual registration form for the apartment, which indicated that Dziena Associates was the tenant of record, and that the legal regulated rent was $1,741.10. DHCR advised that, as Dziena Associates was listed as the tenant of record for many apartments in the building, it was attempting to determine the actual tenants and rents paid by them. DHCR asked Lombardo to provide it with this and other information.

On February 24, 2009, Lombardo filed a rent overcharge complaint against Madeleine Dziena (Madeleine) c/o Dziena LLC, who was identified as the prime tenant. Lombardo alleged that Madeleine was "an illusory prime tenant" and had overcharged him.

The Rent Administrator (RA) granted the complaint on December 4, 2009, finding that the prime tenant, Dziena LLC

and/or Madeleine, had overcharged Lombardo, directing the tenant to refund the overcharge, and assessing treble damages, for total damages of $201,593.29. The RA found that the base date was February 27, 2005, and set a base date rent of $1,524.32. The claim of illusory tenancy was rejected based upon the owner's unrefuted contention that it had not received any amount in excess of the legal regulated rent. The RA noted that Dziena LLC's counsel had advised that Madeleine had a controlling interest in the LLC, and thus, he found that she and the LLC were jointly and severally liable.

On January 12, 2010, the RA informed Lombardo and Dziena LLC that, on the prime tenant's application, which sought Madeleine's removal as a party jointly responsible for the overcharge, he was reconsidering and reopening the December 2009 order.

Thereafter, on September 24, 2010, the RA modified his initial order, finding that Madeleine was not responsible for the overcharge, noting that the rent had been paid to the LLC. The RA again rejected Lombardo's claim of an illusory tenancy, "in the absence of any proof the owner or the manager received any amount of the excess rent collected by the prime tenant" and found Dziena LLC to be solely responsible.

On October 22, 2010, Lombardo filed a petition for administrative review (PAR), alleging that the owner and managing

agent should be jointly and severally liable, with the prime tenant, because they were complicit and involved in numerous illegal sublets by the prime tenant, and that Madeleine should also be liable.

The Deputy Commissioner partially granted the PAR by order dated April 19, 2012, to the extent of holding that "the finding below absolving Madeleine Dziena of responsibility for the overcharge is not supported by cognizable evidence in the record" and remanding the matter "for further fact finding, including referral . . . for an oral hearing if the [RA] deems doing so appropriate." The Commissioner further found that "neither the prime tenant nor the subtenant have shown that the owner . . . profited from the arrangement created by the prime tenant. It is clear that responsibility . . . lies with . . . the prime tenant alone".

Sixteen months later on August 8, 2013, DHCR sua sponte reconsidered the April 2012 PAR stating in relevant part:

> "On the Commissioner's own initiative, the Commissioner has determined to reopen the Commissioner's order . . . issued on April 19, 2012 ... Upon further review of said order . . ., the Commissioner finds the same must be revoked as its provisions are so internally inconsistent as to constitute an irregularity in vital matters."

The order reopened the matter to "replac[e] the order . . . of April 12, 2012 with an order . . . which will read the same

except that the fifth paragraph on the second page ... will be deleted in full from the new order and opinion." The paragraph to be replaced contained the finding that the owner had not profited from the arrangement and sole responsibility herein rested with the prime tenant. On August 20, 2013, DHCR remanded the matter to the RA for further proceedings.

On June 18, 2014, the RA issued his fourth order and, for the first time, found that the owner was jointly and severally responsible, with the prime tenant, for the overcharge in the amount of $263,942.29, including treble damages and interest. The RA found the tenancy was illusory as the arrangement deprived the tenants of their rights under the RSL. The RA further found that, as the arrangement was void as against public policy, the rental history could not be considered, and thus, set the rent using the default method set forth in *Thornton v Baron* (5 NY3d 175, 180 [2005]). Additionally, the RA found that treble damages were appropriate as willfulness was supported by the scope of the rental arrangements between the owner and prime tenant.

The owner filed a PAR contesting the RA's June 2014 order, asserting that it rented the apartment to Dziena Associates, a partnership, and not Dziena LLC, that any wrongdoing was committed by the prime tenant or Madeleine, who formed the LLC as a ruse to shield herself from liability, and so dominated the LLC

as to be its alter ego. The owner asserted that renting multiple apartments to one entity was not illegal and there was no evidence that it colluded in the scheme, was aware of the overcharge, or profited from it. The owner further asserted that its lease was valid that, therefore, the default formula should not have been used to set the base date rent and that treble damages were inappropriate as the owner did not collect excess rent.

DHCR denied the owner's PAR and the separate PAR filed by the prime tenant on July 1, 2015 finding that the record did not establish any distinction between Dziena Associates and Dziena LLC. DHCR also found the owner's argument that it had no relationship with the LLC to be unavailing and found insufficient evidence to show that Madeline dominated the LLC so as to become its alter ego. DHCR held that the RA's finding that the owner was jointly and severally responsible for the overcharge was proper, relying on *Matter of Avon Furniture Leasing v Popolizio* (116 AD2d 280 [1st Dept 1986], *lv denied* 68 NY2d 610 [1986]). In reaching this conclusion, DHCR noted that the prime tenant rented several apartments it did not intend to occupy and the owner had constructive knowledge of the illegal subleases. DHCR found that the RA correctly invalidated the owner's lease with the prime tenant and set the base date rent using the *Thornton* formula, as

the illusory tenancy invalidated the rent charged to the prime tenant, rendering the base date rent unreliable. DHCR found the owner to be subject to treble damages as it failed to rebut the presumption of willfulness using the same reasoning.

The owner then commenced this article 78 proceeding alleging, inter alia, that DHCR's July 1, 2015 determination was arbitrary and capricious. Supreme Court denied the petition seeking an order reversing the determination of DHCR and dismissed the proceeding. We now modify.

Discussion

The owner now argues, for the first time on appeal, that the Commissioner's August 8, 2013 order sua sponte reopening the matter was improper. On an article 78 proceeding, the reviewing court is limited to consideration of evidence and arguments raised before the agency when the administrative determination was rendered (*see Matter of Weill v New York City Dept of Educ.*, 61 AD3d 407, 408 [1st Dept 2009]; *Matter of HLV Assoc. v Aponte*, 223 AD2d 362, 363 [1st Dept 1996]). Accordingly, "[t]his Court has repeatedly rejected parties' attempts to raise issues on appeal [for the first time] where they neglected to raise those issues at an administrative hearing" (*Matter of Torres v New York City Hous. Auth.*, 40 AD3d 328, 330 [1st Dept 2007], citing *District Council 37, Am. Fedn. of State, County & Mun. Empls. v*

*City of New York*, 22 AD3d 279 [1st Dept 2005]). Accordingly, the owner's argument that the Commissioner may not sua sponte reopen is raised for the first time on appeal and need not be considered.

However, if we were to consider owner's argument, we would find that the Commissioner's sua sponte reopening of the matter was proper. Section 2529.9 of the Rent Stabilization Code provides:

> "The Commissioner, on application of either party or on his own initiative, and upon notice to all parties [], may, prior to the date that a proceeding for judicial review has been commenced . . . issue a superseding order modifying or revoking any order issued by him ... where he finds that such order was the result of illegality, irregularity in vital matters or fraud."

The foregoing provision authorizes DHCR to reopen, sua sponte, a proceeding at any time upon a finding of irregularity of vital matters, fraud or illegality, upon notice to the parties (*see Matter of Sherwood 34 Assoc. v New York State Div. of Hous. & Community Renewal*, 309 AD2d 529, 532 [1st Dept 2003]*; Matter of Dowling v New York State Div. of Hous. & Community Renewal*, 249 AD2d 181, 183 [1st Dept 1998] [on finding of conflict of interest], *lv denied* 93 NY2d 802 [1999]).

This is an exception to the "general rule of administrative finality" (*Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 203 [1st Dept 2011]), pursuant to which, "'[o]nce an administrative agency has

decided a matter, based upon a proper factual showing and the application of its own regulations and precedent, the parties ... are entitled to have the determination treated as final'" (*id.* at 204, quoting *Matter of Peckham v Calogero*, 54 AD3d 27, 28 [1st Dept 2008], *affd* 12 NY3d 424 [2009]). Thus, "a final administrative determination cannot be reopened to give a party an opportunity to make a new argument based on the existing administrative record" (*Gersten*, 88 AD3d at 204).

Therefore, "to challenge an administrative determination, the agency action must be final and binding upon the petitioner" (*Matter of East Ramapo Cent. Sch. Dist. v King*, 29 NY3d 938, 939 [2017] [internal citations and quotation marks omitted]; *see also* CPLR 7801[1]). "A 'final and binding' determination is one where the agency 'reached a definitive position on the issue that inflicts actual, concrete injury,' and the injury may not be 'significantly ameliorated by further administrative action or by steps available to the complaining party'" (*Matter of Center for Discovery, Inc. v New York City Dept. of Educ.*, -AD3d-, 2018 NY Slip Op 03494, *2 [1st Dept 2018] quoting *Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186, 194 [2007]).

Here, it is clear that DHCR's sua sponte determination, dated August 8, 2013, was not final. This determination did not impose any obligations or create any legal relationships as the

determination simply remanded the matter to the RA for a determination of the owner's liability. Moreover, the owner had a remedy - which it exercised - filing a PAR challenging the RA's subsequent determination of liability. In fact, it was not until this last order was decided that the owner instituted the article 78 proceeding.

Furthermore, an administrative agency's interpretation of the regulations which it administers is entitled to great deference, if not irrational or unreasonable (*see Samiento v World Yacht Inc.*, 10 NY3d 70, 79 [2008]; *Matter of Salvati v Eimicke*, 72 NY2d 784, 791 [1988]). DHCR defines "[i]rregularity in a vital matter" as the "[f]ailure by the agency to accurately calculate the rent or penalty, or to comply with established rules of practice and procedure" (DHCR Office of Rent Administration, Policy Statement 91-5). Based on the record before this Court, DHCR did not act irrationally or unreasonably in making its sua sponte determination that the order was internally inconsistent so as to constitute an irregularity in vital matters.

We now turn to whether the owner may be held responsible for creating an illusory tenancy by leasing multiple apartments to a business entity when only the business entity financially profited.

The rent stabilization laws are designed "to prevent exactions of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices (*Avon Furniture Leasing v Popolizio*, 116 AD2d at 283 [internal quotation marks omitted]). The Rent Stabilization Code expressly provides that the legal regulated rents and other requirements "shall not be evaded, either directly or indirectly, in connection with the renting or leasing or the transfer of a lease for housing accommodations" (9 NYCRR 2525.2[a]).

An illusory tenancy exists when the prime tenant rents an apartment for the sole purpose of re-leasing it, at a profit, or otherwise subverts the protections of the RSL (*see Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429-430 [1st Dept 2007], *affd* 11 NY2d 859 [2008]). "In such case, the subtenant will be accorded the full protection of the rent stabilization laws" (*Avon*, 116 AD2d at 284).

Where an illusory tenancy is created by the prime tenant's profiteering, "while there should be a showing of at least constructive knowledge on the part of the landlord of the subleasing arrangement, there is clearly *no requirement* that there be evidence of collusion ... before an illusory tenancy

will be found" (*Primrose Mgt. Co. v Donahoe*, 253 AD2d 404, 405 [1st Dept 1998] [emphasis added]; *see also Avon*, 116 AD2d at 285 ["While one who acts collusively with . . . the owner . . . in entering into a sublease as a means of permitting the landlord to subvert the rent laws, is clearly an 'illusory tenant,' a finding of such collusion is not an essential prerequisite to a determination that the tenancy is illusory"]). We have recognized that "while the landlord apparently did not benefit, it did know or should have known of the subterfuge, which was clearly within the knowledge of the former superintendent" (*Primrose*, 253 AD2d at 405-406).

DHCR's finding that the owner may be held accountable for the overcharge is not irrational or arbitrary and capricious. DHCR is not restricted, as the owner argues, to only take into account whether the owner overcharged the subtenant and actually collected rent in excess of the lawful stabilized rent. Rather, DHCR may consider that the owner "derived substantial benefits from the scheme and was aware of the nature of [the prime tenant's] activities" (*Avon*, 116 AS2d at 285). In making its finding, DHCR properly relied upon the fact that the prime tenant rented 22 or 23 apartments in the building as evidence of the owner's constructive knowledge of an illegal profiteering scheme.

The owner's reliance upon *Manocherian v Lenox Hill Hosp.*

(229 AD2d 197 [1st Dept 1997], *lv denied* 90 NY2d 835 [1997]) is misplaced. In *Manocherian* we held that a hospital's rental of 15 rent-stabilized apartments in a building for sublet as housing to its nurses or employees, did "not constitute an 'illusory prime tenancy,' such as where an alter ego of the owner rents an apartment as the 'tenant' and then 'sublets' to an innocent third party in an effort to stockpile vacancies or subscriptions for a conversion to cooperative or condominium ownership" (*id.* at 205). The apartments rented to the hospital in *Manocherian* were pursuant to the RSL, which provides "not-for-profit hospital[s] . . . the right to sublet any housing accommodation leased by it to its affiliated personnel without requiring the landlord's consent" (RSL 26-511[c][12][h]; *see also* Rent Stabilization Code § 2520.11[f]). Here, the owner does not dispute that the prime tenant was not subject to these exemptions within the RSL and Rent Stabilization Code. Therefore, the holding in *Manocherian* is inapposite.

The other cases relied upon by the owner on this issue involve similar scenarios, where the prime tenant was a charitable or other nonprofit organization leasing multiple apartments to house employees, clients, patients, or other affiliates (*see e.g. Avon Bard Co. v Aquarian Found.*, 260 AD2d 207 [1st Dept 1999], appeal dismissed 93 NY2d 998 [1999]

[religious corporation]; *Matter of Schwartz Landes Assoc. v New York City Conciliation & Appeals Bd.*, 117 AD2d 74 [1st Dept 1986] [nonprofit corporation aiding rehabilitating formerly institutionalized patients]). The issue in those cases involve the owner's right to refuse to renew prime leases, the analysis of which is irrelevant to the question of illusory tenancy.

Here, the prime tenant entered into the lease in order to earn a profit, in violation of the RSL. Further, the owner leased another 22 or 23 apartments to the same tenant, which was clearly not going to occupy them. DHCR considered this fact and the building staff's knowledge of the sublets, ascertained through the doorperson and superintendent in connection with deliveries and repairs, as well as evidence that the owner sought to profit by seeking luxury decontrol of several apartments leased to the prime tenant on default. Accordingly, DHCR did not act arbitrarily or capriciously in finding that the owner was "seeking to evade the Rent Stabilization Law and acquiesced in [the prime tenant's] activities towards that end" (*Avon*, 116 AD2d at 286).

The owner argues that DHCR improperly relied upon "agency records" to reach its luxury deregulation finding, a claim that was only first asserted in the PAR determination. However, "[t]he record adduced before the agency necessarily, and

rationally, includes the orders and records in the agency's own files" (*Matter of Schaefer v New York State Div. of Hous. & Community Renewal*, 19 Misc3d 1132[A], *6, 2008 NY Slip Op 50973{U], *6-7 [Sup Ct, NY County 2008] [internal quotation marks omitted]; *see also VR Equities v New York City Conciliation and Appeals Bd.*, 118 AD2d 459 [1st Dept 1986]). Furthermore, the administrative record does include evidence of attempted profiteering from luxury decontrol, in the form of a December 9, 2009 letter from the owner's counsel offering Lombardo a non rent-stabilized lease on the basis of luxury decontrol. Therefore, DHCR's findings regarding the owner's luxury deregulation attempts are proper.

We agree with Supreme Court that DHCR did not act arbitrarily, capriciously or in violation of the law in holding the owner liable for treble damages.

RSL 26-511(c)(12)(e), which entitles a subtenant to treble damages in the event of an overcharge, provides that, "where a tenant violates the provisions of subparagraph (a)" with regard to overcharging a subtenant, "the subtenant shall be entitled to damages of three times the overcharge" (RSL 26-511[c][12][e]). Additionally, RSC 2525.6(b) provides that, where a tenant charges a subtenant more than a 10% surcharge for housing accommodations that are sublet fully furnished, "the subtenant shall be entitled

to treble damages." Contrary to the owner's contention, these provisions do not expressly limit the landlord's responsibility for an overcharge to the amount it collected.

The Appellate Term in *Schreibman v Wiske* (NYLJ, July 24, 1990 at 17, col 2 [App Term, 1st Dept 1990]), held that a subtenant's exclusive remedy for an overcharge is in an action against the tenant. However, under the foregoing provisions, DHCR, which was not a party to the case, is not bound by the decision, which did not involve judicial review of an agency determination (*see Matter of Bambeck v State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 129 AD2d 51, 57 [1st Dept 1987], *lv denied* 70 NY2d 615 [1988]). Moreover, *Schreibman*'s holding is incorrect, as a subtenant is not limited to obtaining relief against the tenant *(Thornton*, 5 NY3d at 181; *Partnership 92*, 46 AD3d at 430).

As noted by the owner, in contrast to the above provision relating to subtenants, RSL 26-516(a) provides that,

> "any owner . . . who, upon complaint of a tenant, or of the [DHCR] is found ... to have collected an overcharge above the rent authorized for a housing accommodation subject to this chapter shall be liable to the tenant for a penalty equal to three times the amount of such overcharge. . . . If the owner establishes by a preponderance of the evidence that the overcharge was not willful [DHCR] shall establish the penalty as the amount of the overcharge plus interest."

Unlike in *Matter of Badem Bldgs. v Abrams* (70 NY2d 45, 56

[1987]), relied upon by the owner, here there is more than a "mere presence of a number of illusory tenancies," and the issue involves article 78 review and not civil liability under the Martin Act (General Business Law art 23-A). Collusion need not be found for a landlord to be held responsible for an illusory tenancy. Furthermore, DHCR's finding of constructive knowledge of the prime tenant's scheme was supported by the building staff's knowledge of the sublets and the staff keeping a separate registry for prime tenant's sublets for deliveries and repairs and the owner's attempts to profit from these sublets by seeking luxury decontrol of several apartments leased to the prime tenant on default (*see Primrose*, 253 AD2d at 405*; Avon*, 116 AD2d at 285). Accordingly, the owner has failed to meet its burden of establishing by a preponderance of the evidence that the overcharge is not willful (*see Matter of Century Tower Assoc. v State of N.Y. Div. of Hous. & Community Renewal*, 83 NY2d 819, 823 [1994]; *Matter of Bronx Boynton Ave. LLC v New York State Div. of Hous. & Community Renewal*, 158 AD3d 589, 590 [1st Dept 2018]).

Additionally, Rent Stabilization Code 2526.1(a)(1) imposes treble damages upon owners who "have collected any rent . . . in excess of the legal regulated rent" (9 NYCRR 2526.1[a][1]). However, as noted above, RSL 26-511(c)(12)(e) merely states that

"where a tenant violates the provisions of subparagraph (a)" with regard to overcharging a subtenant, "the subtenant shall be entitled to damages of three times the overcharge" (RSL 26-511[c][12][e]; *see also* 9 NYCRR 2525.6[b]). DHCR's interpretation of these statutes to impose treble damages upon the owner, under these circumstances, is rational and thus, entitled to deference (*see Salvati*, 72 NY2d at 791).

However, we find that DHCR erred to the extent that it used *Thornton*'s default method to set the stabilized rent. Rent overcharge complaints are subject to a four-year statute of limitations (RSL 26-516[a][2]; CPLR 213-a]). The New York Rent Regulation Reform Act (RRRA) of 1997 (L 1997, ch 116, § 33) amended RSL 26-516 to preclude examination of the rent history of the housing accommodation before the four-year period preceding the filing of a rent overcharge complaint (*see Thornton,* 5 NY3d at 180; *Silver v Lynch*, 283 AD2d 213, 214 [1st Dept 2001]).

9 NYCRR 2526.1(a)(3)(i) provides that "[t]he legal regulated rent for purposes of determining an overcharge shall be deemed to be the rent charged on the base date, plus . . . any subsequent lawful increases and adjustments" (*see also* 9 NYCRR 2520.6). The "base date" is "the date four years prior to the date of the filing of such ... complaint" (9 NYCRR 2520.6[f][1]). "[W]here there exist[s] substantial indicia of fraud on the record," DHCR

may consider the rental history prior to the four-year look-back period (*Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 366 [2010]; *see also Matter of Boyd v New York State Div. of Hous. & Community Renewal*, 23 NY3d 999 [2014]).

In *Thornton*, the Court of Appeals held that where a lease provision purporting to exempt an apartment from the RSL, in exchange for an agreement not to use the apartment as a primary residence, was void as against public policy, and the rent registration listing the illegal rent was a nullity, "the default formula used by DHCR to set the rent where no reliable rent records are available was the appropriate vehicle for fixing the base date rent" (*Thornton*, 5 NY3d at 181). The Court of Appeals reached this conclusion "so that no wrongdoer may benefit at the expense of the public" (*id.* at 182 [internal quotation marks omitted]). The default formula "uses the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building on the relevant base date" (*id.* at 180, n 1).

In *Grimm*, the Court of Appeals found that the rationale used in *Thornton* was not limited to illusory tenancies, and thus, where the overcharge complaint makes a colorable allegation of a fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization, DHCR must investigate the

legality of the base date rent (15 NY3d at 366).

Here, unlike in *Thornton*, the rent-stabilized lease that the owner entered into with the prime tenant was a legal one and it is not alleged to have included any improper provisions. While the lease served as a vehicle for the prime tenant's fraud, the rent-stabilized rent set forth therein, in the subsequent renewals, and in the rent registration records, are reliable in their own right. Unlike in *Thornton*, here the fraud was carried out via a separate vehicle, through the sublease. On this record, the base date rent was properly set by the RA in his December 4, 2009 order at $1,524.32, the rent in effect on the base date, February 27, 2005, pursuant to the 2003 lease renewal.

Finally, Supreme Court erred in holding that Madeleine Dziena is not personally liable. The lease, entered into in 1995, and renewal leases entered into between the owner and prime tenant were all with an entity identified as Dziena Associates. Dziena LLC did not exist until June 1997, almost two years after executing its lease with the owner for the subject apartment. There is no evidence that the owner was on notice that the prime tenant was operating or doing business as an LLC. This status would have shielded the LLC's members from personal liability and likely changed the course of the parties' relationship. Therefore, it was improper for DHCR to ignore the distinction

between the entity that entered into the original lease and had a relationship with the owner and the later created LLC that entered into a relationship with the subtenant, Joseph Lombardo.

Given that Dziena LLC did not exist at the time that the original lease was entered into and there was no evidence that it had any dealing with the owner in its purported capacity as an LLC, it could not have been the prime tenant. As such, it was improper to use Dziena LLC's status as an LLC to shield one of its members, Madeleine, from liability.

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Margaret A. Chan, J.), entered July 19, 2017, denying the petition to reverse a determination of DHCR concerning a rent overcharge complaint and dismissing the proceeding brought pursuant to CPLR article 78, should be modified, on the law and on the facts, to find Madeline Dziena personally liable and to vacate DHCR's improper use of *Thornton*'s default method to set the stabilized rent, set the base date rent at $1,524.32, and remand for a recalculation of damages, and otherwise affirmed, without costs.

All concur.

Order and judgment (one paper), Supreme Court, New York County (Margaret A. Chan, J.), entered July 19, 2017, modified, on the law and on the facts, to find Madeline Dziena personally liable and to vacate DHCR's improper use of *Thornton*'s default method to set the stabilized rent, set the base date rent at $1,524.32, and remand for a recalculation of damages, and otherwise affirmed, without costs.

Opinion by Singh, J. All concur.

Acosta, P.J., Tom, Mazzarelli, Kern, Singh, JJ.

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

ENTERED: AUGUST 9, 2018

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Dianne T. Renwick, J.P.
Rosalyn H. Richter
Sallie Manzanet-Daniels
Peter Tom
Ellen Gesmer, JJ.

7055

_____x

In re Barbara T.,
Petitioner-Respondent,

-against-

Acquinetta M.,
Respondent-Respondent,

The Children's Law Center,
on behalf of Ja-Quel M.,
Appellant.
- - - - -
Lawyers For Children and Covenant
House New York,
Amici Curiae.

_____x

The Children's Law Center appeals from the order of the Family Court, New York County (Adetokunbo O. Fasanya, J.), entered on or about April 20, 2017, which dismissed, for lack of standing, its objections to order, same court (Tionnei Clarke, Support Magistrate), entered on or about February 14, 2017 (Support Order), and affirmed the Support Order in its entirety.

Karen P. Simmons, The Children's Law Center, Brooklyn (Janet Neustaetter and Dawn Post of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jane L. Gordon and Devin Slack of counsel), for Commissioner of Social Services, respondent.

Boom Health Legal Services, Bronx (Sahar Shams of counsel), for Acquinetta M., respondent.

Karen Freedman, Lawyers For Children, Inc., New York (Betsy Kramer of counsel), for Lawyers For Children, amicus curiae.

Nancy Downing, New York, for Covenant House New York, amicus curiae.

GESMER, J.

The essential facts are not in dispute. Ja-Quel M. was born on December 21, 2000. In or about 2010, he was removed from his birth mother's home and placed in non-kinship foster care with respondent Acquinetta M. (mother or Ms. M), who thereafter adopted him.[1] When the adoption became final, in or about April 2014, she began to receive a monthly adoption subsidy for Ja-Quel, which was administered by the Administration for Children's Services (ACS). The amount of the subsidy indicates that Ja-Quel had been identified as a child requiring "exceptional" services (18 NYCRR 421.24[a][6]).

On December 2, 2015, the petitioner in this proceeding, Ja-Quel's godmother, Barbara T. (guardian or Ms. T), filed a petition for guardianship of Ja-Quel. In or about February 2016, Ja-Quel began living with her full-time. Ms. M did not contest the petition, and it was granted on March 28, 2016.

In March 2016, Ms. M advised ACS that Ja-Quel was no longer living with her and that she wished to stop receiving the subsidy. Based solely on her request, ACS issued a notice to the mother dated April 13, 2016 stating that the subsidy had been

[1]Under New York law, upon entry of the order of adoption, the birth parents are relieved of, and the adoptive parent obtains, all parental rights and duties (Domestic Relations Law [DRL] § 117).

"suspended" effective April 14, 2016 at her request. The last subsidy payment she received was in the amount of $1,944.01 on or about April 1, 2016.

On March 31, 2016, Ja-Quel's guardian filed a petition in Bronx Family Court seeking child support from Ms. M. On or about June 28, 2016, the Children's Law Center (CLC), which had represented Ja-Quel in the guardianship proceeding, was appointed, without any limitation, to represent him in the child support proceeding.[2]

[2]The order appealed from states that CLC was appointed on May 5, 2016 "to address the issues of Constructive Emancipation and Abandonment raised at that time." However, no order or transcript dated May 5, 2016 is included in the record. The June 28, 2016 transcript documents that it was CLC's first appearance in the support proceeding, the CLC attorney requested that CLC be assigned to represent Ja-Quel in that proceeding, and the Support Magistrate granted CLC's request without limitation. When the CLC attorney submitted subpoenas relating solely to the amount of the subsidy and not to the mother's defense, no one objected, and the Support Magistrate signed them. When the CLC attorney argued on the record that the adoption subsidy should be considered in determining child support, no one objected that CLC lacked standing to make that argument, and the Support Magistrate entertained it. As discussed further below, the February 14, 2017 order issued by New York County Family Court appointing CLC to continue to represent the child in the transferred proceeding was also made without limitation.

On August 22, 2016, the Support Magistrate took testimony on the mother's defense that she was relieved of her obligation to support Ja-Quel because he had been constructively emancipated.

At the continuation of the hearing on September 12, 2016, Ms. M testified that her only income was Supplemental Security Income (SSI) in the amount of $779 per month. She further testified that the reason she was unwilling to receive the adoption subsidy for Ja-Quel was that she was concerned that his guardian could claim that she had not turned the funds over to her.[3]

At the conclusion of testimony on September 12, 2016, the Support Magistrate was advised that Ja-Quel's guardian had applied for and obtained public assistance benefits for him of $91 per week. Consequently, the Support Magistrate determined that the Department of Social Services (DSS) was an interested party (Social Services Law [SSL] § 348[2]), and she issued an order transferring the proceeding to New York County Family Court. At the same time, she issued a temporary order of support

[3]Ms. M does not argue on appeal that this was a valid reason for terminating the adoption subsidy and for relieving her of any obligation for child support. If she had argued this, we would reject it, as any payor of child support could make this claim, and it is not a valid basis for declining to award child support.

directing the mother to pay the statutory minimum, $25 per month, thus rejecting CLC's arguments that the adoption subsidy should be considered in setting temporary child support.

On October 26, 2016, CLC filed a motion in Family Court, New York County, requesting leave to continue to appear on Ja-Quel's behalf in the transferred proceeding, and asking that child support be based on the amount of the adoption subsidy. The motion was supported by, inter alia, an email to CLC counsel from the Program Manager of ACS's Post-Adoption Support Services Unit, which stated, "If the adoptive parent(s) requests a suspend payment [and] th[e]n they later decide to resume receiving the subsidy payments, they must forward a notarized letter to ACS post adoption customer service, indicating that is their request. This request can be processed up until the adopted child's 21st birthday."

On November 30, 2016, DSS moved before New York County Family Court in support of CLC's motion seeking support in the amount of the adoption subsidy, and seeking permission to appear as an interested party. The latter request was granted.

On February 7, 2017, Support Magistrate Clarke issued an order granting CLC's motion only to the extent that CLC "may appear as attorney for the subject child." The order contains no limitation on the scope of CLC's representation.

On February 14, 2017, Support Magistrate Clarke issued written findings of fact. She found that Ms. M remained legally responsible for the child's support until he reached the age of 21, regardless of the award of guardianship to Ms. T. She determined that Ms. M's pro rata share of the basic child support obligation, based on her SSI income, was the statutory minimum of $25 per month.[4] She further determined that the adoption subsidy is properly treated as a resource of the child in determining whether the basic child support obligation is unjust or inappropriate, but found that she could not direct the mother to pay child support in an amount equal to the subsidy, since she was no longer receiving the subsidy. She further found that deviating from the basic child support obligation based on the subsidy would be "tantamount to . . . forcing the Respondent to seek to reinstate the adoption subsidy," and declined to do so. Consistent with her decision, on February 14, 2017, Magistrate Clarke issued a final child support order, which directs the mother to pay $25 per month to the child's guardian as child

[4]"Basic child support obligation" is defined in the Child Support Standards Act as the amount determined by applying the calculation set forth in the statute (Family Court Act [FCA] § 413[1][c]), before consideration of the statutory factors for determining whether deviation from the basic child support obligation is appropriate (FCA § 413[1][f]).

support.[5]

Both DSS and the child's attorney filed timely objections to the Support Magistrate's order. On April 20, 2017, Family Court (Fasanya, J.) denied the objections. With regard to the objections filed by CLC, the court found that CLC did not have standing to object to the child support order because it was only appointed to address the mother's defense of constructive emancipation, and because the Family Court Act does not specify that objections may be filed by a child's attorney (FCA § 439[e]). The court further found that, were it to entertain CLC's arguments, it would deny the objections because it is "inappropriate, if not illegal, for a person to apply for and receive adoption subsidies for a minor who is not in said person's care," and because an adoptive parent "may opt not to receive any subsidies and care for said child solely out of pocket." The court applied the same reasoning to deny DSS's objections. The court therefore confirmed the Support Magistrate's order.

CLC now appeals from the denial of its objections. DSS and amici curiae Lawyers for Children and Covenant House New York

[5]The appeal from the order denying objections in this matter brings up for review the Support Magistrate's orders (FCA § 1118; CPLR 5501[a]).

submit briefs in support of CLC's appeal, and the mother opposes it.

Standing

At the outset, Family Court erred in determining that CLC did not have standing to file objections in Family Court.[6] Family Court may appoint attorneys for children in cases in which such appointments are not mandatory, including in child support matters, where doing so "will serve the purposes" of the Family Court Act (FCA § 249). The preference for appointment of counsel for children in Family Court "is based on a finding that counsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition" (FCA § 241).

The record before us does not support Family Court's determination that CLC was appointed to represent the subject child solely in connection with issues of constructive emancipation and abandonment. Rather, the record shows that the Support Magistrates in both Bronx and New York County Family Courts appointed CLC as attorney for the child with no

[6]CLC also has standing to bring this appeal. The final order of a Support Magistrate is appealable after objections have been reviewed by a judge (FCA § 439[e]); *see also Reynolds v Reynolds*, 92 AD3d 1109, 1110 [3d Dept 2012]). In addition, this Court has discretion to entertain an appeal of any Family Court order other than an order of disposition (FCA § 1112).

limitations on the scope of its representation.

Although the mother argues that Family Court Act § 439(e) restricts the filing of objections to a "party or parties," we find that her reading is too narrow. That section does not prohibit children's attorneys, where appointed, from filing or rebutting objections to a Support Magistrate's order for three reasons. First, the statute is focused on the time frame for filing and not on the identity of the filers. It appears that the words "party" and "parties" are used in the general sense of persons or entities who have been served with a copy of the support order, rather than the strict sense of petitioner and respondent.

Second, children's attorneys are expected to participate fully in proceedings in which they are appointed. We base this conclusion on the broad language of section 249 authorizing appointment of attorneys for children in any type of proceeding, the legislative finding that children's attorneys can be "indispensable to a practical realization of due process of law" (FCA § 241), and the obligation of attorneys for children to zealously advocate for their clients and generally adhere to the ethical requirements applicable to all attorneys (22 NYCRR 7.2). It would make little sense for Family Court to be permitted to appoint attorneys for children in child support cases to assist

it in carrying out the purposes of the Family Court Act and then not permit those attorneys to file or respond to objections. Indeed, published opinions in other cases acknowledge that they have been permitted to do so (*see Matter of K.A. v M.S.*, 56 Misc 3d 1221[A], 2017 NY Slip Op 51113[U] [Fam Ct, Bronx County 2017] [child's attorney submitted response to father's objections to child support order]; *Matter of D.S.S. v Timothy C.*, 114 AD3d 860 [2d Dept 2014] [child, by his attorney, appealed from Family Court order denying his objections to order of filiation]).

Finally, this case requires us to determine whether and how courts should consider adoption subsidies when setting child support. As discussed further below, adoption subsidies are a resource of the child. To prohibit the child's attorney from participating in the litigation of this issue would be absurd and would not aid the court in carrying out the purposes of the Family Court Act, which, in a child support matter, requires consideration of the child's resources, needs and aptitudes, inter alia (FCA § 413[f]). Accordingly, we find that the child's attorney had standing to file objections to the Support Magistrate's order.

The Adoption Subsidy and Child Support

For the reasons discussed below, we find that Family Court properly determined that an adoption subsidy should be considered

as a resource of the child when determining child support, but that the court erred in failing to consider the mother's eligibility for the subsidy in determining whether the mother's basic child support obligation was unjust or inappropriate. We further find that child support should have been set at no less than the amount of the adoption subsidy for so long as Ms. M is eligible to receive the subsidy on Ja-Quel's behalf. We also find that further proceedings are necessary to determine whether the subsidy may be made available to Ms. M retroactive to the date of its suspension, and remand for these further proceedings.

New York has offered an adoption subsidy in some form since 1977 in order to "eliminate, or at the very least substantially reduce, unnecessary and inappropriate long-term foster care situations," which are both costly to the state and contrary to the best interests of children who are difficult to place due to physical or mental disabilities, age, or for other reasons (SSL § 450).

In 1980, Congress passed the Adoption Assistance and Child Welfare Act (42 USC §§ 670-676) "to encourage greater efforts to find permanent homes for children" by, inter alia, subsidizing the adoption of special needs children (*Glanowski v New York State Dept. of Family Assistance*, 225 F Supp 2d 292, 305 n 8 [WD NY 2002] [quoting US Code Cong Admin News 1980 vol 3 at 1450-

1451]; 42 USC § 673[a][1][A]). New York's adoption subsidy program comports with the federal requirements (*Glanowski*, 225 F Supp at 302), and is administered in New York City by ACS.

Foster parents apply for the subsidy prior to adoption (18 NYCRR 421.24[b], [c][1]), and sign a contract with ACS (18 NYCRR 421.24[c][3]). Although the contract signed by Ms. M is not in the record, the minimum provisions of such contracts are set by regulation (18 NYCRR 421.24[c][3]; *see also* New York State Office of Children and Family Services Adoption Subsidy and Non-Recurring Adoption Expenses Agreement [available at https://ocfs.ny.gov/adopt/subsidy.asp]). The applicable regulations further provide that the written agreement

> "will remain in effect until the child's 21st birthday. No payments may be made if [ACS] determines that the adoptive parents are no longer legally responsible for the support of the child or the child is no longer receiving any support from such parents. Such written agreement must state that it will be the responsibility of the adoptive parent(s) to inform the appropriate State or local official when they are no longer legally responsible for the child or no longer providing any support to the child" (18 NYCRR 421.24[c][5]).

Similarly, the Social Services Law provides that, once approved, subsidy payments "shall be made until the child's twenty first birthday" (SSL § 453[1][a]) and that payment of the subsidy may only be suspended if ACS "determines that the

adoptive parents are no longer legally responsible for the support of the child or the child is no longer receiving any support from such parents" (SSL § 453[1][c]; *see also* 42 USC § 673[a][4][A][ii], [iii]).[7] Accordingly, Family Court erred in determining that receipt of the subsidy, once the contract is entered into, is at the adoptive parent's election or that the subsidy terminates when the adoptive parent "opts" not to receive it. The mother's similar claim, apparently made for the first time on appeal and without citation to any legal authority, is also contrary to the plain language of the applicable state and

[7]The April 13, 2016 ACS notice to the mother confirming suspension of the adoption subsidy is a form letter listing various possible reasons for a suspension. The only one checked is "Adoptive parent's request." However, according to a statement added on February 14, 2018 to the U.S. Department of Health and Human Services (HHS) Children's Bureau's Child Welfare Policy Manual, an agency may only suspend subsidy payments if it is unable to establish contact with the parent and therefore cannot establish that the parent is supporting the child and/or remains legally responsible to support the child. It notes that the adoptive parent only ceases to be legally responsible to support the child following termination of parental rights or the child's emancipation, marriage, or enlistment in the military. It further notes that the agency cannot reduce or suspend the assistance "solely because the adoptive parents fail to reply to the agency's request for information, renewal, or recertification of the adoption assistance agreement" (U.S. Department of Health and Human Services, Administration for Children & Families, Children's Bureau, Child Welfare Policy Manual [available at https://www.acf.hhs.gov/cwpm/public_html/programs/cb/lawspolicies/laws/cwpm/policy_dsp.jsp?citID=12]). Accordingly, it does not appear that ACS's justification for the suspension in 2016 comports with HHS's interpretation of applicable statutes and regulations.

federal statutes and regulations. Furthermore, the mother's claim that she was no longer eligible to receive the subsidy once Ja-Quel no longer resided with her, also made apparently for the first time on appeal and without citation to supporting legal authority, is contrary to the applicable statutes and regulations and the required language of the adoption subsidy agreement.

Although the statute does not presently permit anyone other than an adoptive parent to receive the subsidy on the child's behalf,[8] there is no statutory or regulatory requirement that the child continue to reside with the adoptive parent in order for the subsidy to continue. Accordingly, Family Court erred when it determined that it is "inappropriate, if not illegal, for a person to apply for and receive adoption subsidies for a minor who is not in said person's care." The mother's similar argument that it would be "illegal" for her to turn over the subsidy to the child's guardian, apparently made for the first time on

[8]Proposed legislation in New York State would permit payment of the adoption subsidy to the child's legal guardian or custodian where the administering agency determines that the adoptive parent is no longer legally responsible to support the child or is no longer supporting the child (2017 NY Senate-Assembly Bill A8313, S6518). Nothing in the proposed legislation would require termination of payments to the adoptive parent and institution of payments to a custodian or guardian so long as the adoptive parent remained legally responsible for the child's support and transferred the subsidy funds to the custodian or guardian.

appeal and without citation to legal authority, is also incorrect.

The mother also complains that her receipt of the subsidy makes her subject to periodic certification, which may require her to provide information to which she claims she no longer has access.[9] The mother has made this claim for the first time on appeal. Even if we could properly consider her claim, we would reject it. She cites no legal authority to support it. Moreover, it appears that ACS may only seek from the mother information about her own income (18 NYCRR 421.24[c][9]) and certification that the child is a full-time student or has completed secondary education (18 NYCRR 421.24[c][19]).[10] However, the mother has not claimed that the guardianship order prohibits her from obtaining such information about the child,

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[9]The mother also claims that a home study would be part of such review. However, the applicable regulation requires a home study of the adoptive parent's home only as part of the initial application process (18 NYCRR 421.24[c][2][iv][a]).

[10]The mother also claims that she would have to produce information about whether the child is covered by health insurance or whether other reimbursement for medical expenses is available. However, the regulatory provisions to which she cites apply only to medical subsidies for "handicapped" children that are not federally reimbursable (18 NYCRR 421.24[e][2][v], [ix]). There is no evidence that Ja-Quel is in receipt of this type of medical subsidy. Furthermore, even if the mother were required to produce such information, she does not claim that the guardianship order prohibits her from acquiring healthcare information about her son.

either from his school or from the guardian. Moreover, the mother remains legally responsible for the child's support, and consented to participate in periodic certification as permitted by law when she entered into the contract for the adoption subsidy.

It appears that only two published opinions in New York address the treatment of adoption subsidies in determining child support (*A.E. v J.I.E.* (179 Misc 2d 663 [Sup Ct Bronx County 1999]; *Matter of Commissioner of Social Servs. v Smith* (75 AD3d 802 [3d Dept 2010]). In *A.E. v J.I.E.*, Supreme Court (Gische, J.) determined that an adoption subsidy cannot be considered as income to a parent for the purposes of crediting it against, and thus decreasing, the non-custodial parent's child support obligation, citing *Graby v Graby* (87 NY2d 605 [1996] [Social Security payments received by the child of a disabled non-custodial parent cannot be included as income to that parent and credited against her support obligation]) and *Matter of Commissioner of Social Services (Wandel) v Segarra* (78 NY2d 220 [1991] [parent's duty to support child is not abrogated by child's receipt of public assistance]). The court reasoned, inter alia, that, if the parents had not divorced, the child would have received the benefit of both parents' income, in addition to the adoption subsidy. The court found that the

subsidy may, however, be considered in determining whether the non-custodial parent's statutory child support obligation is "unjust or inappropriate" (FCA § 413[1][f]). That is precisely our holding in this case.

Courts around the country that have dealt with this issue have reached the same conclusion, noting that the adoption subsidy is intended both to encourage adoption of children who are hard to place and to provide supplemental funds to address the needs of these children[11] (*see In re Marriage of Bolding-Roberts*, 113 P3d 1265, 1268 [Colo App 2005]; *In re Marriage of Newberry*, 805 NE2d 640, 643 [Ill App 2004]; *In re Strandberg v Strandberg*, 664 NW2d 887, 890 [Minn Ct 2003]; *Hamblen v Hamblen*, 54 P3d 371, 375 [Ariz Ct 2002]; *see also County of Ramsey v Wilson*, 526 NW2d 384 [Minn Ct 1995] [adoptive parent required to pay adoption subsidy to county to reimburse it for child's care

[11]As the amici point out, adopted children, and, in particular, children adopted from foster care, have been found to be significantly more likely than other children to suffer from physical, mental and behavioral issues requiring special services, as appears to be the case for Ja-Quel (*see* Karin Malm et al., Office of the Asst. Secretary for Planning and Evaluation, U.S. Dept. of Health and Human Svcs., Children Adopted from Foster Care: Child and Family Characteristics, Adoption Motivation, and Well-Being, available at https://aspe.hhs.gov/basic-report/children-adopted-foster-care-child-and-family-characteristics-adoption-motivation-and-well-being [May 30, 2001, p 15]; Matthew D. Bramlett et al., "The Health and Well-Being of Adopted Children," Pediatrics vol. 119/issue supplement 1 [2007]).

in court-ordered out-of-home placement]). Many of the cases from other states emphasize the "supplementary" nature of the subsidy, and, like the court in *A.E. v J.I.E.*, have determined that the child should receive the benefit of both parental income and the subsidy (*see W.R. v C.R.*, 75 So3d 159, 169 [Ala Civ App 2011]; *in re Marriage of Dunkle*, 194 P3d 462, 466 [Colo App 2008]; *Gambill v Gambill*, 137 P3d 685, 691 [Okla Civ App 2006]).

As the Support Magistrate in this case correctly noted, adoptive parents, just like biological parents, remain legally responsible for the support of their children until they are 21 (FCA § 413[1][a]). The Support Magistrate also correctly determined that the adoption subsidy (*see* 18 NYCRR 421.24) is not income that can be imputed to the adoptive parent (*see A.E. v J.I.E.*, 179 Mis 2d 663).

However, Family Court erred in determining that a deviation based on the subsidy would be improper because it would "force" the mother to take steps to undo the subsidy's suspension. Awarding child support in the amount of the subsidy is not unlike awarding support based on a parent's historic earning potential, which similarly requires the parent to do what the court has determined he or she is capable of doing based on past performance.

Family Court further erred in failing to properly consider

the 10 factors set forth in FCA § 413(1)(f) to determine whether the mother's basic child support obligation is unjust or inappropriate. In particular, Family Court should have considered the first three statutory factors -- the financial resources of the child, the physical and emotional health of the child and his special needs and aptitudes, and the standard of living the child would have enjoyed had he continued to reside with his mother -- and the 10th factor: "[a]ny other factors the court determines are relevant in each case." Considering these factors, we find that awarding child support in at least the amount of the subsidy for so long as the mother is eligible to receive it on the child's behalf is an appropriate deviation from the basic child support obligation (*see Smith*, 75 AD3d 802).[12]

However, it is not clear from this record whether the mother may obtain the subsidy retroactive to the date on which it was suspended.

Accordingly, the order of the Family Court, New York County

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[12]The mother claims, for the first time on appeal, and without citing to any legal authority, that she would be "liable" if Ja-Quel's guardian failed to use the subsidy for his support. Even if this argument were properly before us, we would reject it. This might be a basis for future suspension of the subsidy, or even termination of the guardianship. Since the child support order will provide that child support is to be paid in the amount of the subsidy only for so long as the mother is eligible to receive it, her concern is unfounded.

(Adetokunbo O. Fasanya, J.), entered on or about April 20, 2017, which dismissed, for lack of standing, appellant's objections to order, same court (Tionnei Clarke, Support Magistrate), entered on or about February 14, 2017 (Support Order), and affirmed the Support Order in its entirety, should be reversed, on the law, without costs, and the matter remanded to Family Court to issue a new child support order directing the mother to pay to Ja-Quel's guardian no less than the amount of the adoption subsidy for so

long as the mother remains eligible to receive the subsidy on her son's behalf, and for further proceedings to address the issue of whether the mother is entitled to receive the subsidy retroactive to the date of its suspension.

All concur.

Order, Family Court, New York County (Adetokunbo O. Fasanya, J.), entered on or about April 20, 2017, reversed, on the law, without costs, and the matter remanded to Family Court to issue a new child support order directing the mother to pay to Ja-Quel's guardian no less than the amount of the adoption subsidy for so long as the mother remains eligible to receive the subsidy on her son's behalf, and for further proceedings to address the issue of whether the mother is entitled to receive the subsidy retroactive to the date of its suspension.

Opinion by Gesmer, J. All concur.

Renwick, J.P., Richter, Manzanet-Daniels, Tom, Gesmer, JJ.

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

ENTERED: AUGUST 9, 2018

CLERK